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Davis Wright Tremaine LLP

AGENDA

8:00 – 9:00 am	BREAKFAST AND REGISTRATION
9:00 – 9:15 am	**Welcome: Initiate DOWNLOAD**
9:15 – 10:15 am	**Beyond Fair Use** AI AND COPYRIGHT'S NEXT ACT
10:15 – 11:15 am	**What Are the Odds?** PREDICTION MARKETS AT THE CROSSROADS OF GAMING, FINANCE, AND REGULATION
11:15 – 11:30 am	BREAK
11:30 am – 12:30 pm	**Can You Handle the Truth?** BRANDS, CREATORS & THE BATTLE FOR CREDIBILITY
12:30 – 1:30 pm	LUNCH
1:30 – 2:30 pm	**Can We Launch?** MAKING GLOBAL TM DECISIONS IN THE REAL WORLD
2:30 – 3:30 pm	**The New Culture Wars** ARTS INSTITUTIONS AND EXECUTIVE POWER IN THE TRUMP ERA
3:30 – 4:00 pm	BREAK
4:00 – 5:00 pm	**In Conversation** AN INTERVIEW WITH DAVID MCCRAW, THE NEW YORK TIMES
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5:10 – 7:00 pm	COCKTAIL RECEPTION

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BRANDS, CREATORS & THE BATTLE FOR CREDIBILITY

SECTION 4 — **Can We Launch?**
MAKING GLOBAL TM DECISIONS IN THE REAL WORLD

SECTION 5 — **The New Culture Wars**
ARTS INSTITUTIONS AND EXECUTIVE POWER IN THE TRUMP ERA

SECTION 6 — **In Conversation**
AN INTERVIEW WITH DAVID MCCRAW, THE NEW YORK TIMES

9:15 – 10:15 am

Beyond Fair Use

AI AND COPYRIGHT'S NEXT ACT

After the "is training fair use?" fight, what comes next? This opening DOWNLOAD NY panel brings together leading media and technology lawyers to explore the emerging fault lines of AI and copyright—from copyright ownership and infringing outputs to licensing markets, agentic AI, and the future rules of engagement between AI companies and creators. Designed as a candid, off-the-record-style discussion among peers, the session will be practical and forward-looking assessment of where the market may be heading next.

Panelists:

Demetri Blaisdell, Senior Litigation Counsel, The New York Times Company
Lauren Chamblee, Assistant General Counsel, Intellectual Property Group, Microsoft
Kathleen Farley, Vice President of Litigation, Chamber of Progress
Min Lee, Partner, Executive Vice President and General Counsel, Hachette Book Group, Inc.

Moderator:

Jim Rosenfeld, Partner, Davis Wright Tremaine LLP

United States Copyright Office
Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 • www.copyright.gov

January 30, 2025

VIA E-MAIL

Cooley LLP
Attn: Judd Lauter
3 Embarcadero Center 20th Floor
San Francisco, CA 94111
United States

Correspondence ID: 1-6RDE4VB
Original Corresp. ID: 1-6JBF2G7

Re: A Single Piece of American Cheese (1-14119617821)

Dear Mr. Lauter:

This is in response to your December 5, 2024, correspondence requesting reconsideration of the U.S. Copyright Office's refusal to register a copyright claim in the above-referenced work. You made this request on behalf of the copyright claimant, Invoke AI, Inc.

We have carefully reviewed *A Single Piece of American Cheese* in light of the points raised in your correspondence. We also reviewed the prior correspondence between you and the Office, the 9:58 video you uploaded[1] at our request showing how this work was created, and we conducted a further examination of the work. Upon reconsideration, we have decided to register a copyright claim in this work because we find that it contains a sufficient amount of human original authorship in the selection, arrangement, and coordination of the AI-generated material that may be regarded as copyrightable and, therefore, supports a copyright registration.

In your December 5, 2024, request for reconsideration, you argued that Mr. Keirsey[2] "selected, coordinated, and arranged numerous AI generated image fragments into a single, unified image," *Request* at 5, and likened *A Single Piece of American Cheese* to a collage: "the Work can and should be thought of as a kind of collage of separate elements that together form something new." *Id*. at 4. You conclude that the selection, coordination, and arrangement of the AI-generated material exhibits sufficient creative authorship to warrant registration. We agree.

---

[1] Due to size constraints, you submitted this video in three separate uploads. *E-mail from Judd Lauter* (Aug. 7, 2024).
[2] The application lists Invoke AI, Inc. as the author and claimant and states that this work was created as a work made for hire. In your request for reconsideration, you describe "Mr. Keirsey of Invoke" as creating the work. *Request* at 2. In the cover letter submitted with the application, you explain that "Mr. Keirsey" is "Kent Keirsey, the CEO of Invoke AI, Inc." *Letter from Judd Lauter*, at 2 (Aug. 5, 2024). Based on these statements, we presume Mr. Keirsey is an employee of Invoke and prepared this work while acting within the scope of his employment.

As the Copyright Office explained in its March 16, 2023, policy statement concerning works that contain material generated by artificial intelligence, "a human may select or arrange AI-generated material in a sufficiently creative way that 'the resulting work as a whole constitutes an original work of authorship.'" *Copyright Registration Guidance: Works Containing Materials Generated by Artificial Intelligence*, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023); *See also, U.S. Copyright Office, Copyright and Artificial Intelligence, Part 2: Copyrightability*, at 24 (Jan. 2025). We further explained that for any selection, coordination, or arrangement that includes AI-generated material, the computer-generated material will not be protected outside of the selection, coordination, or arrangement authorship. *Id.*; 17 U.S.C. § 101 (definition of "compilation"). The application adheres to this guidance, as the AI-generated material has been excluded from the claim from the outset.

In your request for reconsideration, you state that "Mr. Keirsey selected, coordinated, and arranged numerous AI generated image fragments into a single, unified image," resulting in a work that "satisfy[ies] the constitutional minimum for copyright protectability." *Request* at 5. Accordingly, in the request for reconsideration, you limit the claim for registration to the selection, coordination, or arrangement of the AI-generated material and do not seek protection for the individual inpainted and outpainted segments mentioned in your August 5, 2024, cover letter accompanying the application. We will, therefore, amend the application to identify Invoke AI, Inc. as the author of "selection, coordination, and arrangement of material generated by artificial intelligence." In addition, we will amend the application to replace "2-D artwork" in the "material included field" with "selection, coordination, and arrangement of material generated by artificial intelligence."

The effective date of registration for this work is August 5, 2024, the date that we originally received the application, deposit material, and filing fee. The certificate of registration is being mailed separately and should arrive soon.

Sincerely,

Gina Giuffreda

Gina Giuffreda
Attorney Advisor
Office of Registration Policy & Practice
U.S. Copyright Office



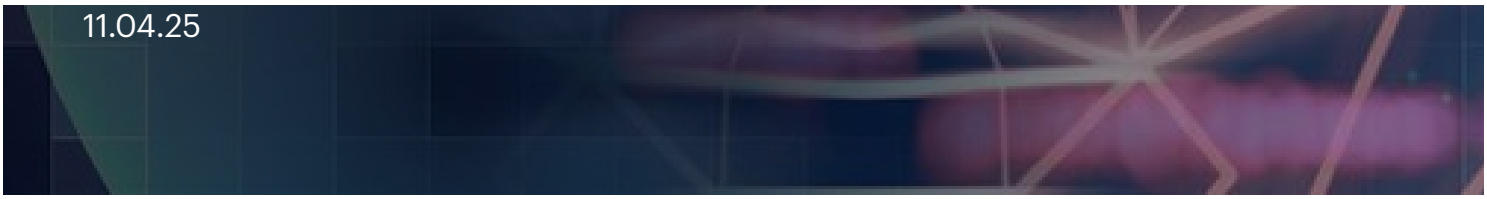
INSIGHTS

Artificial Intelligence

AI's Passport Problem: How Can Media and Content Creators Navigate Fragmented Copyright Laws in a Global World?

Creating and distributing AI-generated content internationally implicates diverse—and often conflicting—laws. Part of a series: The Generative Slate

By Adrian F. Vallens



The rapid proliferation of artificial intelligence across creative industries has sparked a cascade of legislative and judicial activity worldwide, reshaping how intellectual property is defined, created, and protected. For media and entertainment companies, content creators, and IP rightsholders, these evolving—and often conflicting—international approaches to AI and copyright present new challenges and can raise more questions than answers. How should IP holders navigate this changing legal landscape? And what strategies can artists and companies deploy to protect their content in an increasingly complex global environment?

Take Denmark's proposed move to tackle AI-generated digital replicas. The country recently saw highly publicized legislation aimed at curbing AI-generated deepfakes. The proposed law would give individuals copyright-like digital identity protection for their faces, voices, and likenesses. Meanwhile, countries like Japan and Singapore have embraced a more permissive approach to AI, amending their copyright laws to adopt AI-friendly exceptions that allow for data training without prior consent. Yet, in other jurisdictions, courts are stepping in to impose strict boundaries. Mexico's Supreme Court, for instance, recently issued a decision finding that works generated exclusively by AI are not eligible for copyright protection—but leaving unresolved questions about hybrid works with some human input. And a recent court decision in China denying copyright protection for certain AI-generated images led legal commentators to question whether China's copyright laws might be slowly aligning with U.S. standards.

These wide-ranging, and sometimes contrasting, approaches underscore the legal uncertainty over how courts and policymakers will reconcile the growing tension between innovation and IP protection worldwide. A television production team relying on AI-generated assets might find materials acceptable for use in Japan but not in Mexico or the EU. Filmmakers may encounter inconsistent likeness rights when working with Danish, Chinese, and American cast members on a single project. And with the copyright status of AI-generated contributions varied across jurisdictions, rights may become fragmented, opening the door to thorny ownership disputes. These challenges are only going to become more complex and more commonplace in today's interconnected media environment—where content is often developed, licensed, and distributed across the globe. For companies with cross-border interests, these issues pose major legal and policy challenges in areas ranging from creating content to securing distribution rights to ensuring ownership across jurisdictions. How these divergences will resolve (or clash) remains to be seen.

For media and entertainment stakeholders, the message is clear: monitoring international legal standards for AI in content creation is as critical as keeping up with domestic developments. Should AI generated content be restricted in certain jurisdictions but not others? Are new strategies needed to manage rights globally, not just domestically? The splintered legal landscape demands proactive strategies to secure creative works and adapt to changing laws. As AI continues to reshape how content is created, shared, and protected, vigilance in navigating these international trends will be critical.

DWT's AI Team has been at the forefront of addressing these issues for its clients, including work on cross-border projects. If you have any questions about AI and copyright issues, please contact Adrian Vallens.

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This article is part of DWT's The Generative Slate series, which explores the use of generative AI in the production and distribution of content. Read our previous installments:

Two Courts Find Fair Use in GenAI Training

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Media & Entertainment

As Digital Replicas Improve, Legal Issues Grow

Part 3 of The Generative Slate Series: Can the law and the entertainment industry keep up?

By James Rosenfeld and Bianca G. Chamusco

03.19.26

This article is part of DWT's The Generative Slate Series. It explores the use of generative AI in the production and distribution of content.

Life may imitate art, but AI does a pretty good job of imitating both. We have reached an inflection point in the capacity of generative AI to create convincing audiovisual (and audio, and visual) content. Many of these AI-created works don't (yet) look or sound completely real, but they look and sound *real enough* to threaten the premise that movies or

concerts require actual human performance. Two examples from the entertainment world:

- In a development that both tantalized and unnerved the entertainment industry, Irish filmmaker Ruairi Robinson typed a two-line prompt into ByteDance's Seedance 2.0 AI video generator and produced a 15-second clip of Tom Cruise and Brad Pitt in a hyper-realistic rooftop fistfight.

- In the music industry, an AI company called Codible Ventures "voice-cloned" Arijit Singh—the most followed artist on Spotify (yes, more than Taylor Swift)—without his permission. It also used Singh's likeness in its advertising, misrepresenting his endorsement of or performance at a virtual event. Singh had to petition the Bombay High Court to obtain an injunction protecting his personality rights.

The Pitt/Cruise video triggered awe and unease among actors, studios, and others in the filmmaking world. Deepfakes seem to have crossed the line from a theoretical risk to a lived, professional anxiety for entertainment creators. While some denounced the clip as "slop," screenwriter Rhett Reese reposted the video on X and said he was "shook" by its quality and warned that careers across the industry are at risk. SAG-AFTRA issued a statement condemning the technology as a threat to performers' rights. Motion Picture Association chairman Charles Rivkin was equally critical.

AI-generated music mimicking real artists has sent similar ripples through the music industry. In June 2024, the Recording Industry Association of America sued AI music generators Suno and Udio for alleged mass infringement of copyrighted sound recordings. And just last month, a coalition of artist groups launched a "Say No to Suno"

campaign, accusing the platform of flooding streaming services with AI-generated tracks that dilute royalty pools for the human artists whose work trained the models.[1]

Deepfakes are causing anxiety on other fronts too, outside of the entertainment world—particularly in sexually and politically exploitative contexts:

- In January 2024, sexually explicit AI-generated images of Taylor Swift spread virally across social media, reaching tens of millions of viewers before being removed. The deepfakes sparked outrage and calls for new laws criminalizing deepfake porn.

- That same month, an AI-generated robocall mimicking President Biden's voice urged New Hampshire Democrats not to vote in the state's primary, telling them to "save your vote for the November election." "Republicans have been trying to push nonpartisan and Democratic voters to participate in their primary. What a bunch of malarkey," the fake message said. The FCC ultimately assessed a $6 million fine against the political consultant responsible.

While the Pitt/Cruise and Singh examples raise concerns about labor substitution, economic harm, and intellectual property violations, these other use cases raise graver threats. Sexual deepfakes implicate personal dignity and bodily autonomy. Political deepfakes threaten the integrity of elections themselves.

Can the law permit creative uses but keep up with these risks? While courts are already wrestling with how to apply legacy legal frameworks to AI (particularly in the copyright sphere), it is becoming apparent that the old frameworks are not always a perfect fit. No matter which side one is on, it is indisputable that copyright law was not designed to

adjudicate the legality of statistical learning from massive corpora, or to address outputs that are "new" in a formal sense but derivative in an economic one. Likewise, the right of publicity traditionally assumes a relatively discrete act of appropriation—using a person's name or likeness in a commercial context—not the synthesis of identity traits by a generative AI model. These legal doctrines can and will be stretched to cover some of these harms, but they certainly weren't developed with AI in mind, and courts are understandably cautious about extending them too far.

That imperfect fit has led to a wave of new statutes targeting deepfakes. [2] Legislatures are filling what they perceive as remedial gaps in current legal regimes. Rather than waiting for copyright or publicity law to evolve incrementally through litigation, they're creating bespoke causes of action and, in some cases, criminal. These statutes have, so far, primarily addressed use cases involving sexual content, election manipulation, and exploitation of celebrity performances. These developments reflect legislative judgments that generative AI presents qualitatively different risks justifying tailored regulation in these areas, although they may sometimes be in tension with First Amendment protections for creative uses of this type of content, as well as intermediary liability protections for platforms that provide user-generated content.

To complicate things further, deepfakes create problems within the legal system itself. Our legal system relies on the assumption that audiovisual evidence has some baseline level of reliability. As synthetic media become indistinguishable from real recordings, that assumption erodes. The law will adapt—it always does—but it will likely require new authentication norms, technical watermarking regimes or other technical solutions, and perhaps rebuttable presumptions about synthetic content—though any mandatory watermarking or disclosure regime will have to stand up to First Amendment scrutiny.

Advances in generative AI video and audio challenge the foundational evidentiary and substantive assumptions that underlie large swaths of the law. As courts apply old laws to new technologies, legislatures draft new laws for new risks. It will be a challenge, as always, for the law and courts to keep up with the rapidly changing technology, but more so here given the lightning speed of the advances and the ways in which new tech may affect the judicial process itself. People and companies involved in creating entertainment should:

- **Track and sample these technological developments.** Be aware of the changes in technology and explore ways you might use generative AI to supplement and improve human-made creative works while respecting others' rights.

- **Protect IP.** Register copyrights and trademarks. Be vigilant about identifying and preventing infringers. Whether using old or new laws, it may be necessary to pursue bad actors. Realize that enforcement may now constitute a larger portion of the legal budget.

- **Address AI rights in contracts.** Studios, labels, and creators should review contracts to determine who controls the use of voices, likenesses, and performances in generative AI systems. New agreements may need explicit provisions governing voice cloning, digital replicas, and AI-assisted performances to avoid disputes over consent, compensation, and ownership.

- **Follow changes in the law.** Be aware of how existing disputes, in copyright and other realms, are playing out. Keep up to date on the growing body of deepfake-specific legislation. Large players may want to engage with legislatures over their ongoing efforts to permit creative uses while deterring infringing ones.

None of us can predict how the technology or law will develop in this area with any certainty, but we can try to stay on top of both—new technologies and new laws—to protect our interests while the landscape changes.

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Jim Rosenfeld is a partner and Bianca Chamusco is an associate in the media and entertainment group in the New York and Seattle offices of DWT. For more insights, reach out to Jim, Bianca, or another member of our media & entertainment team and sign up for our alerts.

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[1] Udio has since settled disputes and signed with UMG, Warner, and Merlin, and Suno has reached a licensing deal with Warner Music.
[2] *See, e.g.*, TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55 (2025) (criminalizing distribution of nonconsensual intimate images, including AI-generated deepfakes, and requiring platforms to remove such content); see also NO FAKES Act, S. 1367, 119th Cong. (2025) (proposed federal right of publicity protecting individuals from unauthorized AI-generated replicas of their voice or likeness). At the state level, 47 states have enacted deepfake-related legislation since 2019, with 82% of those laws adopted in 2024 and 2025 alone. *See* Ballotpedia, Deepfake Legislation Tracker (2025). Representative examples include Tennessee's ELVIS Act, Tenn. Code Ann. § 47-25-1125 (2024) (protecting voice and likeness against AI replication); California's Defending Democracy from Deepfake Deception Act of 2024, Cal. Elec. Code § 20010 *et seq.* (regulating deepfakes in election communications); and Texas's True Source Statute, Tex. Elec. Code § 255.004 (criminalizing political deepfakes within 30 days of an election). DWT attorneys have written about some of these legislative developments here.

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UNITED STATES COPYRIGHT OFFICE

Copyright and Artificial Intelligence

Part 1: Digital Replicas

A REPORT OF THE REGISTER OF COPYRIGHTS

JULY 2024

UNITED STATES COPYRIGHT OFFICE

Copyright and Artificial Intelligence

Part 1: Digital Replicas

A REPORT OF THE REGISTER OF COPYRIGHTS

JULY 2024

ABOUT THIS REPORT

This Report by the U.S. Copyright Office addresses the legal and policy issues related to artificial intelligence ("AI") and copyright, as outlined in the Office's August 2023 Notice of Inquiry ("NOI").

The Report will be published in several Parts, each one addressing a different topic. The first Part addresses the topic of digital replicas—the use of digital technology to realistically replicate an individual's voice or appearance. Subsequent Parts will turn to other issues raised in the NOI, including the copyrightability of works created using generative AI, training of AI models on copyrighted works, licensing considerations, and allocation of any potential liability. To learn more, visit www.copyright.gov/AI.

ABOUT THE U.S. COPYRIGHT OFFICE

The U.S. Copyright Office is the federal agency charged by statute with the administration of U.S. copyright law. The Register of Copyrights advises Congress, provides information and assistance to courts and executive branch agencies, and conducts studies on national and international issues relating to copyright, other matters arising under Title 17, and related matters. The Copyright Office is housed in the Library of Congress. Its mission is "to promotes creativity and free expression by administering the nation's copyright laws and by providing impartial, expert advice on copyright law and policy for the benefit of all." For more information, visit www.copyright.gov.

FOREWORD FROM THE REGISTER OF COPYRIGHTS

The recent emergence of sophisticated generative artificial intelligence ("AI") models available for use by consumers constitutes a major leap forward in technology. It presents both exciting opportunities and complex challenges for society as a whole, which have captured the attention of policymakers around the world, as well as the press and the public.

One of the areas affected is intellectual property. Copyright issues in particular have risen to the forefront, due to their visibility, immediacy, and relevance to the average person. By the fall of 2022, millions of Americans were utilizing generative AI systems and services to produce an astonishing array of expressive material, including visual art, text, and music. Almost weekly, tremendous strides have been announced in the technology's capabilities. Artists have harnessed the power of AI to find new ways to express themselves and new ways of connecting with audiences. At the same time, AI-generated deepfakes have proliferated online, from celebrities' images endorsing products to politicians' likenesses seeking to affect voter behavior. Over the past year or so, the resulting debates have intensified, with enthusiasm about the promise of extraordinary technical potential tempered by concern about the impact on individuals' livelihoods and reputations.

AI raises fundamental questions for copyright law and policy, which many see as existential. To what extent will AI-generated content replace human authorship? How does human creativity differ in nature from what AI systems can generate, now or in the future? What does this mean for the incentive-based foundation of the U.S. copyright system? In what ways can the technology serve as a valuable tool to amplify human creativity and ultimately promote science and the arts? How do we respect and reward human creators without impeding technological progress?

For copyright, this is the latest chapter in a symbiotic relationship with technology. Throughout history, technological innovation has shaped the evolution of copyright law and policy, with new forms of expression, such as photography, motion pictures, and computer programs; new methods of copying, such as photocopiers and video-cassette recorders; and new means of distribution, such as radio, television, and the internet. In recent decades, the pace of change has sharply accelerated, and today's generative AI tools have picked it up even further. The late 20th century saw the Copyright Act amended to respond to the challenge of digital networked technology. History has shown that the copyright system is resilient and continues to evolve as needed.

In response to the importance and urgency of the copyright issues, in early 2023 the Copyright Office initiated the study that led to this Report. Our work is just one part of a broader national and global conversation. In the United States, the Biden Administration's

October 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence addresses how AI technologies can be deployed safely and responsibly while taking into account concerns about fraud, bias, and transparency, as well as the impact on intellectual property rights. Other agencies are examining issues within their own areas of jurisdiction, and Congress is debating the need for legislation. Governments of other countries are similarly grappling with the potential impact of AI in all of its forms.

As with all of the Copyright Office's studies, our analysis is guided by the Constitutional goal of promoting creativity in order ultimately to benefit the public. This requires an appropriate balance, enabling technology to move forward while ensuring that human creativity continues to thrive. It is our hope that this Report will further productive discussions in Congress, the courts, and the executive branch, to help achieve that balance.



Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office

PREFACE

In early 2023, the U.S. Copyright Office announced a broad initiative to explore the intersection of copyright and artificial intelligence.

In March of that year, the Office released a policy statement with registration guidance for works incorporating AI-generated content. Over the spring and summer, we hosted a series of online listening sessions, presented educational webinars, and engaged with numerous stakeholders to enhance our understanding of the technology and how it is used, the copyright implications, and the potential impact on businesses and individuals.

These activities culminated in an August 2023 Notice of Inquiry, formally seeking public input on the full range of copyright issues that had been raised. In response, we received more than 10,000 comments representing a broad range of perspectives, including from authors and composers, performers and artists, publishers and producers, lawyers and academics, technology companies, libraries, sports leagues, trade groups and public interest organizations, and even a class of middle school students. Comments came from all 50 states and from 67 countries. That valuable and extensive input, supplemented by additional Office research and information received from other agencies, forms the basis for the discussion and recommendations in this Report.

UNITED STATES COPYRIGHT OFFICE

Copyright and Artificial Intelligence
Part 1: Digital Replicas

A REPORT OF THE REGISTER OF COPYRIGHTS

JULY 2024



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EXECUTIVE SUMMARY

This first Part of the Copyright Office's Report on copyright and artificial intelligence ("AI")[1] addresses the topic of digital replicas. From AI-generated musical performances to robocall impersonations of political candidates to images in pornographic videos, an era of sophisticated digital replicas has arrived. Although technologies have long been available to produce fake images or recordings, generative AI[2] technology's ability to do so easily, quickly, and with uncanny verisimilitude has drawn the attention and concern of creators, legislators, and the general public.

As part of a broad AI Initiative, the Copyright Office sought comments on these developments. We asked whether existing laws provide sufficient protection against unauthorized digital replicas or if new protection is needed at the federal level. In response, numerous commenters called for a new federal law to protect individuals from the appropriation of their persona. They provided extensive input into the justifications for and the appropriate parameters of such a law.

In the months since the Office's inquiry was launched, unauthorized digital replicas have continued to make headlines, and have triggered Congressional activity. During this time, we analyzed the comments received, performed additional research, and consulted with other agencies on their relevant areas of expertise. Based on all of this input, we have concluded that a new law is needed. The speed, precision, and scale of AI-created digital replicas calls for prompt federal action. Without a robust nationwide remedy, their unauthorized publication and distribution threaten substantial harm not only in the entertainment and political arenas, but also for private individuals.

Section I summarizes the context and history of the Office's study of the digital replicas issue. Section II.A outlines the main existing legal frameworks: state rights of privacy and publicity, including recent legislation specifically targeting digital replicas, and at the federal level, the Copyright Act, the Federal Trade Commission Act, the Communications Act, and the Lanham Act.

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[1] For purposes of the Copyright Office's Report on Copyright and Artificial Intelligence, "AI" or "Artificial Intelligence" is a general classification of automated systems designed to perform tasks typically associated with human intelligence or cognitive functions. Artificial Intelligence Study: Notice of Inquiry, 88 Fed. Reg. 59942, 59948 (Aug. 30, 2023) ("NOI"). *See also* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232, § 238(g)(2), 132 Stat. 1636, 1697–98 (2018) (defining "artificial intelligence" to include systems "developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action").

[2] "Generative AI" refers to applications of AI used to generate outputs in the form of expressive material such as text, images, audio, or video. NOI at 59948–49.

In Section II.B, we explain why existing laws do not provide sufficient legal redress for those harmed by unauthorized digital replicas and propose the adoption of a new federal law. We make the following recommendations regarding its contours:

- Subject Matter. The statute should target those digital replicas, whether generated by AI or otherwise, that are so realistic that they are difficult to distinguish from authentic depictions. Protection should be narrower than, and distinct from, the broader "name, image, and likeness" protections offered by many states.
- Persons Protected. The statute should cover all individuals, not just celebrities, public figures, or those whose identities have commercial value. Everyone is vulnerable to the harms that unauthorized digital replicas can cause, regardless of their level of fame or prior commercial exposure.
- Term of Protection. Protection should endure at least for the individual's lifetime. Any postmortem protection should be limited in duration, potentially with the option to extend the term if the individual's persona continues to be exploited.
- Infringing Acts. Liability should arise from the distribution or making available of an unauthorized digital replica, but not the act of creation alone. It should not be limited to commercial uses, as the harms caused are often personal in nature. It should require actual knowledge both that the representation was a digital replica of a particular individual and that it was unauthorized.
- Secondary Liability. Traditional tort principles of secondary liability should apply. The statute should include a safe harbor mechanism that incentivizes online service providers to remove unauthorized digital replicas after receiving effective notice or otherwise obtaining knowledge that they are unauthorized.
- Licensing and Assignment. Individuals should be able to license and monetize their digital replica rights, subject to guardrails, but not to assign them outright. Licenses of the rights of minors should require additional safeguards.
- First Amendment Concerns. Free speech concerns should expressly be addressed in the statute. The use of a balancing framework, rather than categorical exemptions, would avoid overbreadth and allow greater flexibility.
- Remedies. Effective remedies should be provided, both injunctive relief and monetary damages. The inclusion of statutory damages and/or prevailing party attorney's fees provisions would ensure that protection is available to individuals regardless of their financial resources. In some circumstances, criminal liability would be appropriate.
- Relationship to State Laws. Given well-established state rights of publicity and privacy, the Office does not recommend full federal preemption. Federal law should provide a floor of consistent protection nationwide, with states continuing to be able

to provide additional protections. It should be clarified that section 114(b) of the Copyright Act does not preempt or conflict with laws restricting unauthorized voice digital replicas.

Section III discusses protection against AI outputs that deliberately imitate an artist's style. We acknowledge the seriousness of creators' concerns and identify legal remedies available to address this type of harm. We do not, however, recommend including style in the coverage of new legislation at this time.

The Office appreciates and has benefitted from the extensive and thoughtful comments we received on this important topic. We remain available to assist as Congress continues to consider legislative solutions.

I. INTRODUCTION

In April of 2023, a new song featuring the voices of Drake and The Weeknd drew over fifteen million views on social media and six hundred thousand listens on Spotify.[3] Yet neither artist was aware of the song before its release, because the vocals were unauthorized, AI-generated replicas.[4]

The viral hit "Heart on My Sleeve," commonly referred to as the "Fake Drake" song, is a high-profile example of a burgeoning subgenre of sound recordings using generative AI systems[5] to create vocals that can pass for those of a favorite artist.[6] Vocal tracks are merely one form of increasingly realistic replicas of individuals' voices, images, and artistic styles.[7] In a short period of time, generative AI technology has become so sophisticated, and so accessible, that minimal expertise is required to rapidly produce such replicas.[8] On social media and other internet platforms, their volume has skyrocketed.[9]

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[3] Bill Donahue, *Fake Drake & The Weeknd Song — Made With AI — Pulled From Streaming After Going Viral*, BILLBOARD (Apr. 17, 2023), https://www.billboard.com/pro/fake-ai-drake-the-weeknd-song-pulled-streaming/.

[4] Colin Stutz, *The Fake Drake AI Song Earned Millions of Streams — But Will Anyone Get Paid?*, BILLBOARD (Apr. 19, 2023), https://www.billboard.com/pro/fake-drake-ai-song-earned-millions-streams-get-paid/.

[5] An "AI System" is a software product or service that substantially incorporates one or more AI models and is designed for use by an end-user. NOI at 59948; *see also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117–263, § 7223(4)(A), 136 Stat. 2395, 3669 (2022) (defining "artificial intelligence system" as "any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence").

[6] Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html.

[7] *See, e.g.*, Melissa Heikkilä, *This Artist Is Dominating AI-Generated Art. And He's Not Happy About It*, MIT TECH. REV. (Sept. 16, 2022), https://www.technologyreview.com/2022/09/16/1059598/this-artist-is-dominating-ai-generated-art-and-hes-not-happy-about-it/; Jane Friedman, *I Would Rather See My Books Get Pirated Than This (Or: Why Goodreads and Amazon Are Becoming Dumpster Fires)*, JANEFRIEDMAN BLOG (Aug. 20, 2023), https://janefriedman.com/i-would-rather-see-my-books-pirated/.

[8] *See* Federal Trade Commission ("FTC") Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 30, 2023) ("FTC Initial Comments") ("Although policymakers have debated the disruptive potential of AI for decades, the pace of the technology's development and rollout has accelerated in recent years . . . ."); *Fast, Relax, & Turbo Modes*, MIDJOURNEY, https://docs.midjourney.com/docs/fast-relax ("Wait times for Relax are dynamic but generally range between 0–10 minutes per job. . . . Turbo Mode is available for subscribers who want extremely quick image generation. . . . Jobs run in Turbo mode generate up to four times faster. . . .") (last visited July 21, 2024); Karen X. Cheng (@karenxcheng), INSTAGRAM (Apr. 11, 2022), https://www.instagram.com/p/CcN5nBSpO9W/ (demonstrating how to generate an image in seconds using DALL·E).

[9] *E.g.*, Don Philmlee, *Practice Innovations: Seeing is no longer believing — the rise of deepfakes*, THOMSON REUTERS (July 18, 2023), https://www.thomsonreuters.com/en-us/posts/technology/practice-innovations-deepfakes/.

A. AI and Digital Replicas

This Report uses the term "digital replica" to refer to a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual. A "digital replica" may be authorized or unauthorized and can be produced by any type of digital technology, not just AI. The terms "digital replicas" and "deepfakes" are used here interchangeably.[10]

Digital replicas may have both beneficial and harmful uses. On the positive side, they can serve as accessibility tools for people with disabilities,[11] enable "performances" by deceased or non-touring artists,[12] support creative work,[13] or allow individuals to license, and be compensated for, the use of their voice, image, and likeness.[14] In one noted example, musician

[10] Although the term "deepfake" is often associated with unauthorized or deceptive uses, especially in explicit imagery, *see infra* notes 22–23, some dictionary definitions are broader. *See deepfake*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deepfake ("an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said") (last updated July 20, 2024); *deepfake*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/deepfake ("a video or sound recording that replaces someone's face or voice with that of someone else, in a way that appears real"). In popular media too, the term has been used to describe authorized uses as well as malicious ones. *See* Nilesh Christopher & Varsha Bansal, *Indian Voters Are Being Bombarded With Millions of Deepfakes. Political Candidates Approve*, WIRED (May 20, 2024), https://www.wired.com/story/indian-elections-ai-deepfakes/ ("Politicians are using audio and video deepfakes of themselves to reach voters—who may have no idea they've been talking to a clone.").

[11] *E.g.*, Press Release, Office of Congresswoman Jennifer Wexton, Wexton Shares Video Debuting New AI Voice Model (July 10, 2024), https://wexton.house.gov/news/documentsingle.aspx?DocumentID=952 ("Today, Congresswoman Jennifer Wexton (D-VA) shared a video debuting a new Artificial Intelligence-generated model of her voice as it was before being impacted by her Progressive Supranuclear Palsy (PSP) condition.").

[12] Universal Music Group ("UMG"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5–6 (Oct. 30, 2023) ("UMG Initial Comments"); *see also* Elias Leight, *Will AI Be Used to Raise Musicians From the Dead*?, BILLBOARD (Nov. 29, 2023), https://www.billboard.com/pro/ai-bring-back-dead-artists-musicians-estate-managers/.

[13] *See, e.g.*, Letter from Motion Picture Association ("MPA"), Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 20, 2024) ("MPA highlighted the importance of this issue to our members, given the ubiquity of depiction of individuals in docudramas, biopics, and similar works. And we argued that use of digital-replica technology is simply an evolution of the type of technology our members have long used to make actors more closely resemble the people they portray, including make-up and prosthetics.").

[14] *See, e.g.*, American Association of Independent Music ("A2IM") et al., Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1–2 (Dec. 6, 2023) ("A2IM-Recording Academy-RIAA Joint Reply Comments"); William Morris Endeavor Entertainment, LLC ("WME"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 30, 2023) ("WME Initial Comments").

Randy Travis, who has limited speech function since suffering a stroke, was able to use generative AI to release his first song in over a decade.[15]

At the same time, a broad range of actual or potential harms arising from unauthorized digital replicas has emerged. Across the creative sector, the surge of voice clones and image generators has stoked fears that performers and other artists will lose work or income.[16] There have already been film projects that use digital replica extras in lieu of background actors,[17] and situations where voice actors have been replaced by AI replicas.[18] Within the music industry, concerns have been raised that the use of AI in sound recordings could lead to the "loss of authenticity and creativity" and displacement of human labor.[19] Numerous commenters,

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[15] Dylan Smith, *Randy Travis Harnesses AI to Release His 'First New Music in More Than a Decade' – Another Song Is Already Being Created*, DIGIT. MUSIC NEWS (May 6, 2024), https://www.digitalmusicnews.com/2024/05/06/randy-travis-new-song.

[16] *See, e.g.*, Screen Actors Guild-American Federation of Television Artists ("SAG-AFTRA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 4 (Oct. 30, 2023) ("SAG-AFTRA Initial Comments"); Writers Guild of America ("WGA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023) ("WGA Initial Comments"); Christi Carras, *Which Entertainment Jobs Are Most Likely to Be Disrupted by AI? New Study Has Answers*, L.A. TIMES (Jan. 30, 2024), https://www.latimes.com/entertainment-arts/business/story/2024-01-30/ai-artificial-intelligence-impact-report-entertainment-industry; Sam O'brien, *AiArt: Why Some Artists Are Furious About AI-Produced Art*, IEEE COMPUT. SOC'Y (Nov. 29, 2023), https://www.computer.org/publications/tech-news/trends/artists-mad-at-ai; Ari's Take, *Is AI Music Taking Royalties From Musicians and Composers? — The New Music Business Podcast*, YOUTUBE, at 20:57 (Jan. 17, 2024), https://www.youtube.com/watch?v=3I9dnxzjEzg.

[17] Jeremy Dick, *Disney Gets Roasted for 'Creepy' AI Extras in Disney+ Movie Prom Pact*, CBR (Oct. 12, 2023), https://www.cbr.com/disney-prom-pact-ai-actors/; *see also* Bobby Allyn, *Movie Extras Worry They'll be Replaced by AI. Hollywood Is Already Doing Body Scans*, NPR (Aug. 2, 2023), https://www.npr.org/2023/08/02/1190605685/. As we discuss below, there have been steps taken to address these concerns through private and collective bargaining agreements. *See infra* Section II.A.3.

[18] *See, e.g.*, FTC Initial Comments, Attach. at 37 (statement of Tim Friedlander, Nat'l Ass'n of Voice Actors); Cade Metz, *What Do You Do When A.I. Takes Your Voice?*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/technology/ai-voice-clone-lawsuit.html; Ed Nightingale, *Baldur's Gate 3 Actors Reveal the Darker Side of Success Fuelled by AI Voice Cloning*, EUROGAMER (Apr. 12, 2024), https://www.eurogamer.net/baldurs-gate-3-actors-reveal-the-darker-side-of-success-fuelled-by-ai-voice-cloning (addressing concerns by video game voice actors).

[19] *See, e.g.*, CVL ECONOMICS, FUTURE UNSCRIPTED: THE IMPACT OF GENERATIVE AI ON ENTERTAINMENT INDUSTRY JOBS 39–40 (Jan. 2024), https://animationguild.org/wp-content/uploads/2024/01/Future-Unscripted-The-Impact-of-Generative-Artificial-Intelligence-on-Entertainment-Industry-Jobs-pages-1.pdf ("With the capability to recreate melodies and replicate musicians' voices convincingly and quickly, it is becoming easier than ever to generate a music track without any direct human involvement."); Jem Aswad, *Billie Eilish, Nicki Minaj, Stevie Wonder, Dozens More Call on AI Developers to Respect Artists' Rights*, VARIETY (Apr. 2, 2024), https://variety.com/2024/music/news/billie-eilish-nicki-minaj-ai-respect-artists-rights-1235957451/.

among them many SAG-AFTRA members, stressed the importance of performers being able to prevent such displacement as well as the resulting impacts on their careers and livelihoods.[20]

While digital replicas depicting well-known individuals often attract the most attention, anyone can be vulnerable.[21] Beyond the creative sector, the harms from unauthorized digital replicas largely fall into three categories. First, there have been many reports of generative AI systems being used to produce sexually explicit deepfake imagery.[22] In 2023, researchers concluded that explicit images make up 98% of all deepfake videos online, with 99% of the individuals represented being women.[23] Instances of students creating and posting deepfake explicit images of classmates appear to be multiplying.[24]

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[20] *See, e.g.*, Morgan Keaton, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 30, 2023); Allie Radice, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 29, 2023); Gregory Schott, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 23, 2023).

[21] *E.g.*, Arian Garshi, *Deepfakes in 2022: How individual non-celebrities are targeted,* MEDIUM (Oct. 17, 2022), https://ariangarshi.medium.com/deepfakes-in-2022-how-individual-non-celebrities-are-targeted-a7dab59cac3a.

[22] *See, e.g.*, Caroline Haskins, A *Deepfake Nude Generator Reveals a Chilling Look at Its Victims*, WIRED (Mar. 25, 2024), https://www.wired.com/story/deepfake-nude-generator-chilling-look-at-its-victims/; Katherine Noel, *Journalist Emanuel Maiberg Addresses AI and the Rise of Deepfake Pornography*, INST. OF GLOBAL POL. (Apr. 22, 2024), https://igp.sipa.columbia.edu/news/rise-deepfake-pornography. On social media platform X alone, one sexually explicit deepfake image of Taylor Swift was "viewed 47 million times before the account [where the image was posted] was suspended." Kate Conger & John Yoon, *Explicit Deepfake Images of Taylor Swift Elude Safeguards and Swamp Social Media*, N.Y. TIMES (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/arts/music/taylor-swift-ai-fake-images.html; Ashley King, *Megan Thee Stallion the Latest Victim of Deepfake Porn — X/Twitter 'Proactively Removing' Clips*, DIGI. MUSIC NEWS (June 14, 2024), https://www.digitalmusicnews.com/2024/06/14/megan-thee-stallion-deepfake-porn-x-twitter-removing.

[23] HOME SECURITY HEROES, 2023 STATE OF DEEPFAKES at Key Findings 2–3 (2023), https://www.homesecurityheroes.com/state-of-deepfakes/#key-findings. *See also* Katherine Noel, *Journalist Emanuel Maiberg Addresses AI and the Rise of Deepfake Pornography*, INST. OF GLOBAL POL. (Apr. 22, 2024), https://igp.sipa.columbia.edu/news/rise-deepfake-pornography ("It is almost exclusively young women who are nonconsensually being undressed and put into AI-generated porn.") (internal quotation marks omitted).

[24] *E.g.*, Natasha Singer, *Teen Girls Confront an Epidemic of Deepfake Nudes in Schools*, N.Y. TIMES (Apr. 8, 2024), https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html; Caroline Haskins, *Florida Middle Schoolers Arrested for Allegedly Creating Deepfake Nudes of Classmates*, WIRED (Mar. 8, 2024), https://www.wired.com/story/florida-teens-arrested-deepfake-nudes-classmates/; Cameron Sires, *Schools Navigate The New World of Explicit AI-Generated Images*, ISSAQUAH REPORTER (Apr. 16, 2024), https://www.issaquahreporter.com/news/schools-navigate-the-new-world-of-explicit-ai-generated-images/; Miranda Ceja, *AI-Generated Nude Photos Of High Schoolers Investigated In South OC*, MSN NEWS (Apr. 2, 2024), https://www.msn.com/en-us/news/us/ai-generated-nude-photos-of-high-schoolers-investigated-in-south-oc/ar-BB1kXrkt.

Second, the ability to create deepfakes offers a "potent means to perpetrate fraudulent activities with alarming ease and sophistication."[25] The media has reported on scams in which defrauders replicated the images and voices of a multinational financial firm's CEO and its employees to steal $25.6 million;[26] replicated loved ones' voices to demand a ransom;[27] and replicated the voice of an attorney's son asking him to wire $9,000 to post a bond.[28] Digital replicas of celebrities have been used to falsely portray them as endorsing products.[29]

Finally, there is a danger that digital replicas will undermine our political system and news reporting by making misinformation impossible to discern. Recent examples involving politicians include a voice replica of a Chicago mayoral candidate appearing to condone police brutality;[30] a robocall with a replica of President Biden's voice discouraging voters from participating in a primary election;[31] and a campaign ad that used AI-generated images to depict former President Trump appearing with former Director of the National Institute of Allergy and Infectious Diseases, Anthony Fauci.[32] Deepfake videos were even used to influence a high

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[25] Giuseppe Ciccomascolo, *Deepfakes Make Up 66% of AI Fraud While Crypto Scams Halved*, CCN (Apr. 25, 2024), https://www.ccn.com/news/technology/deepfakes-ai-fraud-crypto-scams/.

[26] Heather Chen & Kathleen Magramo, *Finance worker pays out $25 million after video call with deepfake 'chief financial officer'*, CNN (Feb. 4, 2024), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html ("The elaborate scam saw the [finance] worker duped into attending a video call with what he thought were several other members of staff, but all of whom were in fact deepfake recreations . . . . [T]he worker put aside his early doubts after the video call because other people in attendance had looked and sounded just like colleagues he recognized . . . .").

[27] Charles Bethea, *The Terrifying A.I. Scam That Uses Your Loved One's Voice*, NEW YORKER (Mar. 7, 2024), https://www.newyorker.com/science/annals-of-artificial-intelligence/the-terrifying-ai-scam-that-uses-your-loved-ones-voice.

[28] Samantha Manning, *Father Warns Congress About AI scammer Who Sounded Just Like His Son*, KIRO7 (Nov. 16, 2023), https://www.kiro7.com/news/local/father-warns-congress-about-ai-scammer-who-sounded-just-like-his-son/KA7BXJJ2OJB3NHDDM4EGB5L24M/.

[29] *See, e.g.*, Megan Cerullo, *AI-generated Ads Using Taylor Swift's Likeness Dupe Fans With Fake Le Creuset Giveaway*, CBS NEWS (Jan. 16, 2024), https://www.cbsnews.com/news/taylor-swift-le-creuset-ai-generated-ads/; *Tom Hanks Says AI Version of Him Used In Dental Plan Ad Without His Consent*, THE GUARDIAN (Oct. 1, 2023), https://www.theguardian.com/film/2023/oct/02/tom-hanks-dental-ad-ai-version-fake; Jamey Tucker, *Fake Ads Made With Artificial Intelligence Exploit Celebrities on Social Media*, WPSD LOCAL 6 (Mar. 11, 2024), https://www.wpsdlocal6.com/news/fake-ads-made-with-artificial-intelligence-exploit-celebrities-on-social-media/article_7a94d8a6-dfba-11ee-bb47-7f2861477d8e.html.

[30] Tiffany Hsu & Steven Lee Myers, *A.I.'s Use in Elections Sets Off a Scramble for Guardrails*, N.Y. TIMES (June 25, 2023), https://www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html.

[31] Shannon Bond, *AI Fakes Raise Election Risks As Lawmakers and Tech Companies Scramble to Catch Up*, NPR (Feb. 8, 2024), https://www.npr.org/2024/02/08/1229641751.

[32] Nicholas Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/politics/desantis-deepfakes-trump-fauci.html.

profile union vote by falsely showing a union leader urging members to oppose the contract that he had "negotiated and . . . strongly supported."[33]

Summarizing the challenges to the information ecosystem, one digital forensics scholar cautioned, "[i]f we enter a world where any story, any audio recording, any image, any video can be fake . . . then nothing has to be real."[34] As AI technology continues to improve, researchers predict that it will become increasingly difficult to distinguish between digital replicas and authentic content.[35]

B. Background of This Study

In early 2023, the Copyright Office announced an initiative to examine the copyright issues raised by AI. Over the following months, we hosted public listening sessions and engaged in extensive outreach to better understand the issues, including those related to generative AI's ability to produce digital replicas.[36]

The topic of digital replicas does not fall neatly under any one area of existing law. While some characterize it as a form of intellectual property, protection against the use of unauthorized digital replicas raises overlapping issues including privacy, unfair competition, consumer protection, and fraud. It relates to copyright in a number of ways: creators such as artists and performers are particularly affected; copyrighted works are often used to produce digital replicas; and the replicas are often disseminated as part of larger copyrighted works. Moreover, the noncommercial harms that may be caused are similar to violations of moral rights protected in part through the copyright system.[37]

In August 2023, the Office published a Notice of Inquiry on AI and Copyright that sought input on "the treatment of generative AI outputs that imitate the identity or style of human artists," among other topics.[38] The NOI asked what existing laws apply to AI-generated material that features the voice or likeness of a particular person; whether Congress should enact a new federal law that would protect against unauthorized digital replicas; and, if so,

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[33] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA).

[34] Weekend Edition Sunday, *As Tech Evolves, Deepfakes Will Become Even Harder to Spot*, NPR (July 3, 2022), https://www.npr.org/2022/07/03/1109607618 (Interview with Professor Hany Farid of U.C. Berkeley).

[35] *E.g.*, Weekend Edition Sunday, *As Tech Evolves, Deepfakes Will Become Even Harder to Spot*, NPR (July 3, 2022), https://www.npr.org/2022/07/03/1109607618 (Interview with Professor Hany Farid of U.C. Berkeley).

[36] *See, e.g.*, Music and Sound Recordings Listening Session Tr. at 11:11–12; 16:19–17:4; 73:11–77:20 (May 31, 2023) (statements by Nathaniel Bach, Music Artists Coalition ("MAC"); Kenneth Doroshow, Recording Industry Association of America ("RIAA"); Rohan Paul, Controlla; Garrett Levin, Digital Media Association ("DiMA")).

[37] *See infra* note 41.

[38] NOI at 59945.

what its contours should be. We also inquired whether there are or should be protections against AI systems generating outputs that imitate artistic style.[39] Finally, we sought views on how, for sound recordings, section 114(b) of the Copyright Act relates to state laws protecting against the imitation of an individual's voice.[40]

The Office received approximately one thousand comments responding to this group of questions, over 90% of them from individuals. The majority advocated for the enactment of new federal legislation. The scope, duration, and assignability of the right to be provided, as well as its relationship to existing state laws, were the subject of greater disagreement.

The copying of an individual's identity is not an entirely new topic for the Copyright Office. In 2019, we published a report on the moral rights of attribution and integrity[41] in the United States, in which we recommended that Congress consider adopting a federal right of publicity.[42] The current study has a narrower focus—assessing the need for federal protection specifically with respect to unauthorized digital replicas.

The Office concludes that the time has come to adopt such a law at the federal level. Based on our analysis of the comments received, independent research, and a review of work being done at other agencies, we believe there is an urgent need for a robust nationwide remedy beyond those that already exist. In the sections below, we review the protections available under current laws and the gaps in their capacity to respond to today's threats, explain the reasons for new federal protection, and provide recommendations regarding its contours.

We then address requests for protection against AI outputs that mimic or appropriate an artist's style. While the Office acknowledges the seriousness of this concern, we believe that existing laws may provide sufficient protection at this time.

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[39] *Id.* at 59945, 59948.

[40] *Id.* at 59948.

[41] Moral rights are non-economic rights in copyrighted works that are considered personal to the authors. The two most commonly recognized are the right of attribution (being credited as the author) and the right of integrity (preventing distortions of the work). U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 6 (2019) ("MORAL RIGHTS REPORT"), https://copyright.gov/policy/moralrights/full-report.pdf. The United States provides these moral rights through a combination of federal and state laws, most of which are described below, including the Lanham Act, certain provisions of the Copyright Act, and state laws relating to privacy and publicity, contracts, fraud and misrepresentation, unfair competition, and defamation. *See id.* at 7.

[42] *Id.* at 110–19.

II. PROTECTION AGAINST UNAUTHORIZED DIGITAL REPLICAS

A. Existing Legal Frameworks

A variety of legal frameworks provide protection against the unauthorized use of aspects of an individual's persona. Some exist at the state level, including statutory and common law rights of privacy and publicity. Others are based on federal law, including the Copyright Act, the Federal Trade Commission Act, the Lanham Act, and the Communications Act.

1. State Common and Statutory Law

The most directly relevant state laws are the long-standing rights of publicity and privacy. In response to the accelerating pace of replicas created by generative AI systems, many states are also considering or have enacted new legislation specifically directed at unauthorized digital replicas.

a) Right of Privacy

The common law right of privacy emerged in the late 19th century and has been described as protecting against unreasonable intrusions into individuals' private lives, safeguarding their autonomy, dignity, and personal integrity.[43] Privacy rights are considered personal to the individual and typically apply only to the living.[44] Most states recognize some form of the right of privacy, either through statutory or common law.[45]

The common law right of privacy has been described as a complex of torts,[46] with the torts of false light and of appropriation of name and likeness most relevant here.[47] False light invasion of privacy protects the reputation of individuals, "with the same overtones of mental

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[43] Samuel Warren and Louis Brandeis first argued for a law to protect the right of privacy in their 1890 article, *The Right to Privacy*, describing "the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'" Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[44] RESTATEMENT (SECOND) OF TORTS § 652I (AM. L. INST. 1977).

[45] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 6:1, 6:7 (2d ed. 2024).

[46] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) ("It is not one tort, but a complex of four."). The four-tort complex includes: (1) intrusion upon seclusion or solitude, (2) disclosure of embarrassing private facts, (3) false light, and (4) appropriation of a person's name or likeness for the defendant's advantage. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 578 (2d ed. 2024).

[47] *See* Nicholas Schmidt, *Privacy Law and Resolving 'Deepfakes' Online*, IAPP (Jan. 30, 2019), https://iapp.org/news/a/privacy-law-and-resolving-deepfakes-online/; *see also* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1794–95 (2019).

distress as in defamation."[48] Liability arises when someone "gives publicity to a matter concerning another that places [them] before the public in a false light," if the false light is "highly offensive to a reasonable person," and if "the actor had knowledge of or acted in reckless disregard as to the falsity."[49] For example, courts have found liability where a defendant spread false statements that "attribut[ed] a lewd fantasy" to a woman and claimed she agreed to appear nude in an adult magazine,[50] as well as where a defendant used individuals' names and likenesses in promotions for strip clubs without their consent.[51] The majority of jurisdictions have recognized this tort,[52] with a few incorporating it by statute.[53]

False light invasion of privacy may provide some legal protection against unauthorized digital replicas when they are used to depict an individual participating in offensive conduct.[54] It would appear particularly appropriate to address deepfake pornography. However, the objective "highly offensive" standard will limit its applicability to other uses of unauthorized digital replicas, such as depictions that are merely untruthful.[55]

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[48] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 400 (1960). *See also* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:112 (2d ed. 2024) ("The difference between false light invasion of privacy and defamation is still unclear. While the false light tort primarily focuses upon indignity and defamation focuses upon reputation, the distinction is a subtle one."). Although some courts view defamation as duplicative of false light invasion of privacy, *see, e.g.*, *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002), defamatory statements are not necessary for an individual to be placed in a false light. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

[49] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977). "The courts uniformly adopt the Restatement of Torts list of elements." 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:114 n.1 (2d ed. 2024).

[50] *Wood v. Hustler Mag., Inc.*, 736 F.2d 1084, 1089, 1093 (5th Cir. 1984).

[51] *Longoria v. Kodiak Concepts LLC*, 527 F. Supp. 3d 1085, 1102 (D. Ariz. 2021); *Johnson v. J.P. Parking, Inc.*, No. 4:22-cv-00146, 2024 WL 676770, at *18 (S.D. Iowa Feb. 20, 2024).

[52] *Welling v. Weinfeld*, 866 N.E.2d 1051, 1055 (Ohio 2007) ("A majority of jurisdictions in the United States have recognized false-light invasion of privacy as a distinct, actionable tort."). However, some states, such as Colorado, Florida, Minnesota, New York, North Carolina, and Texas, have rejected or do not recognize the false light tort. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:115 (2d ed. 2024).

[53] *E.g.*, 9 R.I. GEN. LAWS § 9-1-28.1(a)(4) (2024) (providing for a "right to be secure from publicity that reasonably places another in a false light before the public," and allowing recovery if "[t]here has been some publication of a false or fictitious fact which implies an association which does not exist" and "[t]he association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances"); NEB. REV. STAT. § 20-204 (2024) (following the *Restatement (Second) of Torts*' formulation).

[54] *See* Douglas Harris, *Deepfakes: False Pornography Is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99, 115–16 (2019).

[55] *See, e.g.*, *De Havilland v. FX Networks, LLC*, 230 Cal.Rptr.3d 625, 630, 644 (Cal. Ct. App. 2018) (rejecting a false light claim for a docudrama's fictionalized interview because it would not "subject a person to hatred, contempt, ridicule, or obloquy").

The related tort of invasion of privacy by appropriation involves "appropriation of the plaintiff's identity or reputation, or some substantial aspect of it, for the defendant's own use or benefit."[56] On its face, this tort appears well suited to protect against unauthorized digital replicas,[57] although not every state recognizes it.[58] Courts, however, have not interpreted the tort consistently. Several states require that the appropriative act be for commercial purposes or purposes of trade,[59] excluding claimants harmed by noncommercial uses. Although in most jurisdictions the tort is available to any member of the public, some require a showing that the name or likeness has "intrinsic value," limiting protection to individuals who are well-known.[60]

b) Right of Publicity

The right of publicity addresses the use of individuals' personas[61] in commercial contexts, aiming to prevent others from profiting from unauthorized uses. The right evolved from the tort of invasion of privacy by appropriation to protect celebrities and well-known figures.[62] In 1953, the Second Circuit coined the term "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, where it held that "in addition to and independent of that right

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[56] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 579 (2d ed. 2024). Common law elements of invasion of privacy include (1) use, without permission, of "some aspect of the plaintiff's identity or persona in such a way that plaintiff is identifiable from defendant's use," and (2) that the use "causes some damage to plaintiff's peace of mind and dignity, with resulting injury measured by plaintiff's mental or physical distress and related damage." 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:62 (2d ed. 2024) (footnote omitted).

[57] Shannon Reid, *The Deepfake Dilemma: Reconciling Privacy and First Amendment Protections*, 23 U. PA. J. CONST. L. 209, 215 (2021).

[58] *See, e.g.*, *Hougum v. Valley Mem'l Homes*, 1998 ND 24, ¶ 12, 574 N.W.2d 812, 816 ("This Court has not decided whether a tort action exists in North Dakota for invasion of privacy."); *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 347 (8th Cir. 1996).

[59] *See, e.g.*, *Barbieri v. News-J. Co.*, 56 Del. 67, 70, 189 A.2d 773, 774 (1963); *Fergerstrom v. Hawaiian Ocean View Ests.*, 441 P.2d 141, 144 (1968).

[60] *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:62 (2d ed. 2024). Right of privacy laws generally do not address other issues, such as secondary liability or First Amendment exceptions, at the level of detail that right of publicity laws do, as discussed below. We also received fewer comments focused on these issues from a right of privacy perspective.

[61] The term "persona" in right of publicity law "is increasingly used as a label to signify the cluster of commercial values embodied in personal identity as well as to signify that human identity 'identifiable' from defendant's usage. There are many ways in which a 'persona' is identifiable: from name, nickname and voice, to picture or performing style and other indicia which identify the 'persona' of a person." *Id.* § 4:46.

[62] *Id.* § 1:25; Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203–04 (1954) ("[T]he [privacy] doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries. Well known personalities connected with these industries do not seek the 'solitude and privacy' which Brandeis and Warren sought to protect.").

of privacy . . . , a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . ."[63]

A majority of states now recognize the right of publicity by statute, common law, or both.[64] Because the harms that the right of publicity and the tort of invasion of privacy address are similar, some jurisdictions use the terms interchangeably,[65] while others treat them as distinct.[66]

Intended to protect aspects of an individual's identity, the right of publicity may be the most apt state law remedy for unauthorized digital replicas.[67] Numerous commenters noted, however, that the contours of the right differ considerably from state to state.[68] As to the subject matter, in some states the law sweeps more broadly than digital replicas, capturing aspects of

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[63] 202 F.2d 866, 868 (2d Cir. 1953).

[64] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:2 (2d ed. 2024). Some states, such as Alaska, Kansas, Maryland, and North Carolina, have neither statutory nor common law rights of publicity. *See* Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, https://rightofpublicityroadmap.com/law/ (last visited July 21, 2024). There are also a few states, such as Colorado, Delaware, and Oregon, that have no statutory right of publicity but where the existence of a common-law right is unclear. *Id. See generally* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2024).

[65] *E.g.*, *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 830 (11th Cir. 2016) ("The last category of invasion of privacy—misappropriation of a person's name or likeness—is commonly referred to as a violation of the 'right of publicity.'"); *In re Jackson*, 972 F.3d 25, 34 (2d Cir. 2020) (using the *Restatement (Second) of Torts*' description of liability for invasion of privacy by appropriation to describe right of publicity liability).

[66] *See, e.g.*, *Minnifield v. Ashcraft*, 903 So. 2d 818, 826 (Ala. Civ. App. 2004) ("[W]e cannot say that the commercial-appropriation invasion-of-privacy tort in Alabama bases its liability solely on commercial rather than psychological interests. To do so would, in effect, substitute the commercial-appropriation invasion-of-privacy tort with the tort of violating the right to publicity.").

[67] A number of commenters agreed that existing rights of publicity would apply to certain uses of digital replicas. *See, e.g.*, Jennifer Rothman, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 25, 2023) ("Jennifer Rothman Initial Comments") (noting that, in the context of an AI-generated Tom Hanks appearing in an advertisement and the AI-generated voices of Drake and The Weeknd appearing in a song, "[a]bsent jurisdictional hurdles, . . . each have straightforward lawsuits under state right of publicity laws for the uses described"); SAG-AFTRA Initial Comments at 6–7; *see also* Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 383–85 (2019); Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 164, 166–67 (2023). Indeed, courts have applied standard right of publicity laws to other forms of digital likenesses. *See, e.g.*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (digital avatars of football players); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011) (digital avatars of the musical group No Doubt).

[68] *See, e.g.*, The Honorable Marsha Blackburn, U.S. Senator, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023) ("Senator Marsha Blackburn Initial Comments"); Computer & Communications Industry Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 24 (Oct. 30, 2023); Daniel Gervais, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Oct. 30, 2023).

identity that merely evoke or call to mind the protected individual. In one well-known example, the Ninth Circuit found that a robotic depiction of a blonde woman in a long gown turning large block letters on a game-show set sufficiently "evoked" Vanna White, even without using her name or image, to state a claim under California's common law right of publicity.[69] Further, some states protect additional aspects of identity, such as gestures and mannerisms in Indiana[70] or "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener" in Illinois.[71]

In other cases, the laws are written too narrowly to cover all types of digital replica uses. Some states restrict the right to limited groups of individuals, from professional performers,[72] to soldiers[73] or the deceased.[74]

Protection for Postmortem Rights. The treatment of postmortem rights of publicity is one of the areas of greatest variation.[75] Twenty-seven states currently provide postmortem rights of publicity, 19 by statute and 8 by common law.[76] The durations vary from as short as 20 years in Virginia, to 100 years in Indiana, and indefinitely in Tennessee, as long as the right is continuously exploited.[77] The postmortem term can differ depending on the ongoing

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[69] *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *as amended* (Aug. 19, 1992) ("The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."). *See also* Stacy L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 292 (2003) (citing cases where "non-proprietary symbols" were held to call to mind, and thus violate the right of publicity of, various celebrities).

[70] IND. CODE § 32-36-1-6 (2024).

[71] 765 ILL. COMP. STAT. 1075/5 (West 2024).

[72] *See infra* Section II.A.1.c.

[73] ARIZ. REV. STAT. ANN. § 12-761 (2024).

[74] TEX. PROP. CODE ANN. § 26.002 (West 2023). As mentioned above, New York's digital-replicas-specific amendment applies only to deceased performers. N.Y. CIV. RIGHTS LAW § 50-f(1)(a)–(b), (2)(b) (McKinney 2024).

[75] *See, e.g.*, CAL. CIV. CODE §§ 3344, 3344.1 (West 2024) (protecting against the unconsented commercial use of a person's name, voice, signature, photograph, or likeness, affording a 70-year postmortem term, and requiring registration by the successor in interest); KY. REV. STAT. ANN. § 391.170 (West 2024) (recognizing a right in name and likeness, and protecting against the commercial use of the name or likeness of a "public figure" for 50 years after death); *see also* Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 CARDOZO ARTS & ENT. L.J. 1, 2 (2019).

[76] 2 J. THOMAS MCCARTHY AND ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (2d ed.).

[77] *See* VA. CODE ANN. § 8.01-40 (2024); IND. CODE § 32-36-1-8(a) (2024); TENN. CODE ANN. § 47-25-1104 (2024).

commercial exploitation of the individual's identity, its commercial value at the time of death, and whether the estate complied with statutory registration requirements.[78]

Commercial Use Requirement. Many right of publicity laws only protect against unauthorized commercial uses. These uses may include advertising campaigns, product endorsements, merchandising, and sponsored content,[79] and may extend to newer forms of commercial exploitation facilitated by digital platforms, such as influencer marketing and brand partnerships on social media.[80]

Secondary and Intermediary Liability. Most state statutes do not specify rules for potential secondary liability.[81] However, courts have interpreted these laws as incorporating ordinary tort law principles of aiding and abetting liability, so that a party may be secondarily liable for infringing the right where it has knowledge of the illegal acts and provides substantial assistance.[82]

Several states explicitly limit liability for certain types of intermediaries, where they lack knowledge of the unauthorized acts. California, Pennsylvania, Ohio, and New York exempt advertising media from liability so long as they do not have knowledge that the use of the name, image, or likeness is unauthorized.[83] Arkansas, borrowing concepts from federal copyright law,[84] exempts the "service provider of a system or network" if the service provider does not have actual knowledge that the use is unlawful and is not aware of facts and

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[78] *See, e.g.*, CAL. CIV. CODE § 3344.1(h) (West 2024) (applying to deceased personalities "whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death").

[79] *See, e.g.*, *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (1984), *judgment aff'd*, 488 N.Y.S.2d 943 (1985) (finding that the use of a look-alike in an advertisement infringed Jacqueline Onassis's right of publicity); *Beverley v. Choices Women's Med. Ctr., Inc.*, 532 N.Y.S.2d 400 (1991) (holding that the use of a female physician's photo on a calendar distributed by and advertising the defendant's business infringed the physician's right of publicity).

[80] Grace Greene, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right of Publicity in the Social Media Age*, 168 U. PA. L. REV. ONLINE 153, 189–92 (2020) (citing several (settled) right of publicity suits by online influencers seeking to protect their exact images as well as their influencer personas).

[81] *See* Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 164, 166–67 (2023).

[82] *See, e.g.*, *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1183–84 (C.D. Cal. 2002); *Keller v. Elecs. Arts, Inc.*, No. 09-cv-1967, 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010) (allowing civil conspiracy claims for violation of California right of publicity to proceed based on defendant's alleged direction of users to infringing websites).

[83] *See* CAL. CIV. CODE §§ 3344(f), 3344.1(a)(l) (West 2024); 42 PA. STAT. AND CONS. STAT. § 8316(d) (2024) (described as those "in the business of producing, manufacturing, publishing or disseminating material for commercial or advertising purposes by any communications medium"); OHIO REV. CODE ANN. § 2741.02(E) (West 2024); N.Y. CIV. RIGHTS LAW § 50-f(9) (McKinney 2024) (adding a "by prior notification" element to knowledge).

[84] *See infra* Section II.B.3.d.

circumstances that make a violation apparent.[85] A number of courts have found intermediaries not liable for state right of publicity violations where they served as "mere conduits" for the unlawful activity.[86]

First Amendment Protections. States have adopted varied approaches to accommodating First Amendment concerns, either by statute or judicial interpretation.[87] A number of statutes provide carveouts for categories of conduct likely to implicate protected speech, such as news reporting, sports broadcasts, political campaigns, commentary, and satire.[88] California's law, for example, permits unauthorized uses of an individual's voice or likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."[89] Some carveouts also cover broader categories of expressive works, such as in Ohio, which exempts a "literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted."[90]

Others, however, are silent on this issue.[91] When interpreting the common law, or a statute without an express exemption, courts analyze the extent to which the claim at hand implicates First Amendment rights.[92]

Jurisdiction and Remedies. State right of publicity statutes apply varying jurisdictional requirements. Some restrict the law's protections to those domiciled in the state; others are

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[85] ARK. CODE ANN. § 4-75-1110(a)(1)(F) (2024).

[86] *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 27–28 (1st Cir. 2016) (upholding dismissal of statutory misappropriation claims against a classifieds website for images appearing in an advertisement, as it is a "mere[] conduit" and does not benefit from the appropriation); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (highlighting that Amazon did not make "editorial choices" when displaying a book cover that included an unauthorized image on the book's sales page, and that the display was incidental to its role as an internet bookseller).

[87] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 145, 147 (2018) ("At least five balancing approaches have been applied to evaluate First Amendment defenses in right of publicity cases. . . . This panoply of tests used to determine whether the First Amendment allows and protects uses of a person's identity has led to bizarre and conflicting outcomes in cases with similar facts.").

[88] *See, e.g.*, CAL. CIV. CODE § 3344 (West 2024); ARK. CODE ANN. § 4-75-1110 (2024); N.Y. CIV. RIGHTS LAW § 50-f(2)(d) (McKinney 2024); LA. STAT. ANN. § 51:470.5 (2024); NEV. REV. STAT. § 597.790 (2023).

[89] CAL. CIV. CODE § 3344(d) (West 2024).

[90] OHIO REV. CODE ANN. § 2741.09(A)(1)(a) (West 2024).

[91] *See, e.g.*, KY. REV. STAT. ANN. § 391.170 (West 2024); UTAH CODE ANN. § 45-3-3 (West 2024); VA. CODE ANN. § 8.01-40 (2024).

[92] *See, e.g.*, *Daly v. Viacom*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (the First Amendment protected the use of the plaintiff's likeness in advertisements for a television show in which the plaintiff appeared; the advertisement was found to be an expressive work); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186–87 (9th Cir. 2001) (right of publicity claims targeting noncommercial uses of an individual's name or likeness may receive heightened First Amendment scrutiny).

more generous.[93] Remedies available to a successful plaintiff also vary across states, although all provide for some form of both injunctive and monetary relief.[94]

c) New State Regulation of Digital Replicas

In response to the emergence of AI-created digital replicas, a number of states have taken steps to either amend existing right of publicity statutes or adopt new laws.[95] Tennessee, for example, recently extended its right of publicity statute to encompass voice simulations.[96] It also expanded the law's scope beyond solely commercial conduct (*i.e.*, "purposes of advertising") to include all acts of unauthorized publishing, performing, distributing, transmitting, or making available to the public.[97]

Two other states, Louisiana and New York, recently passed laws targeting the use of digital replicas.[98] The Louisiana statute applies only to living, professional performers, and prohibits the use of their digital replicas "in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work, if the use is intended to create, and creates, the clear impression that the professional performer is actually performing in the role of a fictional character."[99] New York's amendment of its existing right of publicity prohibits unauthorized digital replicas of deceased professional performers "in a scripted audiovisual

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[93] *Compare* WASH. REV. CODE § 63.60.010 (2024) (applying to "all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death"), *with* OHIO REV. CODE ANN. § 2741.03 (West 2024) (limiting to individuals whose domicile or residence is or was in the state).

[94] *See, e.g.*, ARK. CODE ANN. § 4-75-1109 (2024) (providing for injunctive relief and recovery of monetary damages and profits); OHIO REV. CODE ANN. § 2741.07 (West 2024) (providing for injunctive relief and recovery of actual damages including profits, statutory damages, punitive damages, attorney's fees, and treble damages).

[95] In 2023, state legislators introduced 191 AI-related bills, 37 of them addressing deepfakes. *2023 State AI Legislation Summary*, BSA|THE SOFTWARE ALLIANCE (2023), https://www.bsa.org/files/policy-filings/09222023statelegai.pdf. Six deepfake bills were passed targeting nonconsensual deepfake porn and use of deepfakes in politics. *Id. See, e.g.*, S.D. CODIFIED LAWS § 22-24A-2 (2024); 2024 Utah Laws Chs. 127 (H.B. 148), 146 (S.B. 66), 142 (H.B. 238); UTAH CODE ANN. § 20A-11-1104 (West 2024). New Mexico updated its elections laws in 2024 to require a disclaimer of any "materially deceptive media" generated by AI in the context of certain campaign advertisements, and claims may be brought by the Attorney General, a district attorney, falsely represented individual, candidate, or any organization that represents the interests of potentially deceived voters. 2024 N.M. Laws Ch. 57 (H.B. 182).

[96] Ensuring Likeness, Voice, and Image Security Act of 2024, Tenn. Pub. Acts ch. 588.

[97] *Id.*

[98] Other states seem likely to follow suit. In California, for example, a pending bill would amend the postmortem right of publicity statute to establish liability for the production, distribution, or making available of a deceased personality's digital replica. Assemb. B. 1836, Reg. Sess. (Cal. 2024).

[99] LA. STAT. ANN. § 51:470.4(C) (2024).

work as a fictional character or for the live performance of a musical work" if the use is likely to deceive the public.[100]

Both laws incorporate categorical exemptions to accommodate free speech concerns. New York specifies a list of uses excluded from protection:

> [I]f the work is of parody, satire, commentary, or criticism; works of political or newsworthy value, or similar works, such as documentaries, docudramas, or historical or biographical works, regardless of the degree of fictionalization; a representation of a deceased performer as himself or herself, regardless of the degree of fictionalization, except in a live performance of a musical work; de minimis or incidental; or an advertisement or commercial announcement for any of the foregoing works.[101]

Louisiana's law similarly exempts several categories of uses: those made in connection with "a news, public affairs, sports transmission or account, or political campaign," in works of "political, public interest, educational, or newsworthy value," and in "a play, book, magazine, newspaper, literary work, musical composition, single and original work of art or photograph, or visual work."[102] The law also exempts "a sound recording, audiovisual work, motion picture, or radio or television program," but not if they include unauthorized digital replicas that substitute for a professional performer who did not actually appear in the work.[103]

2. Federal Law

While no federal statute focuses solely on the use of an individual's image, likeness, or voice, several serve to limit the creation or use of digital replicas in particular circumstances. We outline below the most relevant laws and regulatory schemes: the Copyright Act, the Federal Trade Commission Act, the Lanham Act, and the Communications Act. In those areas where the Copyright Office does not have special expertise, we summarize the descriptions by the expert agency or commenters of the statutes and their application to digital replicas.[104]

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[100] N.Y. CIV. RIGHTS LAW § 50-f(1)(a)–(b), (2)(b) (McKinney 2024).

[101] N.Y. CIV. RIGHTS LAW § 50-f(2)(d)(ii) (McKinney 2024).

[102] LA. STAT. ANN. § 51:470.5(B) (2024).

[103] *Id.*; *id.* § 51:470.2(11) (defining "performance" as "the use of a digital replica to substitute for a performance by a professional performer in a work in which the professional performer did not actually appear"). The statute also provides that it "does not affect rights and privileges recognized under other state or federal laws, including those privileges afforded under the 'fair use' factors in the United States Copyright Act of 1976." *Id.* § 51:470.5(A).

[104] Other agencies are also working on aspects of digital replica issues. For example, the Federal Elections Commission ("FEC") has sought public comments on amending 11 C.F.R. section 110.16 to clarify that candidates

a) Copyright Act

Copyright protects original works of authorship, including the material—photographs or audio or video recordings—from which a digital replica might be constructed.[105] The Copyright Act provides copyright owners with a bundle of exclusive rights, including the rights to reproduce a work and to prepare derivative works.[106]

Digital replicas that are produced by ingesting copies of preexisting copyrighted works, or by altering them—such as superimposing someone's face onto an audiovisual work or simulating their voice singing the lyrics of a musical work—may implicate those exclusive rights.[107] If the depicted individual is an owner of the copyrighted work, he or she could have a copyright claim for infringement of the work as a whole. Copyright does not, however, protect an individual's identity in itself, even when incorporated into a work of authorship.[108] A replica of their image or voice alone would not constitute copyright infringement.

b) Federal Trade Commission Act

The Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[109] FTC

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and their agents may not use deliberately deceptive AI in campaign ads. *Comments sought on amending regulation to include deliberately deceptive Artificial Intelligence in campaign ads*, FEC (Aug. 16, 2023), https://www.fec.gov/updates/comments-sought-on-amending-regulation-to-include-deliberately-deceptive-artificial-intelligence-in-campaign-ads/.

[105] *See* 17 U.S.C. § 102.

[106] *Id.* § 106. Under the Copyright Act, a "derivative work" is a work "based upon one or more preexisting works" in which the original is "recast, transformed, or adapted." *Id.* § 101. Examples of derivative works in the Act's definition include, but are not limited to, "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation." *Id.*

[107] The Office will address the legal issues involved in use of copyrighted works in AI systems in a subsequent Part of this Report.

[108] *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001) ("A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102."); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship."); *see also* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:41 (2d ed. 2024) ("While a recorded aspect of these features, such as a facial photograph or a video, is subject to protection under federal copyright law, the human identity that they identify is not protected by copyright.").

[109] 15 U.S.C. § 45(a)(1). Many states have unfair competition laws that target similar business practices and prohibit deceptive or misleading conduct in commercial activities. *See, e.g.*, CAL. BUS. & PROF. CODE § 17200 (West 2024) (providing that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"); MASS. GEN. LAWS ch. 93A, § 11 (2024) (providing a

rules against deceptive advertising and unfair trade practices encompass the misleading use of individuals' identities.

The FTC submitted comments in response to the Office's NOI. It explained that it is empowered to protect the public against deceptive and unfair uses of AI technologies that harm competition, and "there is no AI exemption from the laws on the books."[110] According to the FTC, the use of a digital replica that mimics an individual's voice and likeness might qualify as an unfair method of competition or an unfair or deceptive practice, particularly if it "deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers."[111]

The FTC is also exploring issues related to digital replicas in its ongoing rulemaking to amend its Rule on Impersonation of Government and Businesses.[112] Concurrent with the promulgation of the Impersonation Rule,[113] it issued a supplemental notice requesting comments on the Rule's expansion to prohibit the impersonation of individuals and to extend liability to parties who provide goods and services with knowledge or reason to know that they will be used in impersonations that are unlawful under the Impersonation Rule.[114] The proposed prohibition is meant to address misrepresentations that the person is, or is affiliated with, the impersonated individual, including those that use "identifying information, or insignia or likeness of an individual."[115] Digital replicas, including voice cloning, would be covered.[116]

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cause of action for those who engage in trade or commerce who suffer loss "as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice"). Because these laws largely parallel the protections provided by the FTC Act and the Lanham Act, we do not discuss them separately.

[110] FTC Initial Comments at 3–4, 6, 8 ("The FTC is empowered under Section 5 of the FTC Act to protect the public against unfair methods of competition, including when powerful firms unfairly use AI technologies in a manner that tends to harm competitive conditions.").

[111] *Id.* at 4–6.

[112] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072 (Mar. 1, 2024) ("Impersonation Rule"), https://www.govinfo.gov/content/pkg/FR-2024-03-01/pdf/2024-03793.pdf.

[113] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15017 (Mar. 1, 2024) (to be codified at 16 C.F.R. pt. 461), https://www.govinfo.gov/content/pkg/FR-2024-03-01/pdf/2024-04335.pdf.

[114] Impersonation Rule at 15072. The supplemental notice proposes defining "Individual" in 16 C.F.R. section 461.4 to mean "a person, entity, or party, whether real or fictitious, other than those that constitute a business or government under this Part." This definition may include deceased persons.

[115] *Id.* at 15077.

[116] *Id.* at 15082 n.98 ("[T]he use of voice cloning for purposes of impersonation is covered where its use satisfies the Rule's prohibitions. Audio deepfakes, including voice cloning, are generated, edited, or synthesized by artificial intelligence, or 'AI,' to create fake audio that seems real.").

In a statement accompanying the final rule on government and business impersonation and describing the supplemental notice, FTC Chair Lina Khan, joined by Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, highlighted the proliferation of AI-enabled fraud, such as voice cloning used to impersonate individuals regardless of whether they are celebrities.[117] This statement noted that the extension of "means and instrumentalities" liability could apply to persons or entities, including AI developers, "who knew or should have known that their AI software tool designed to generate deepfakes of IRS officials would be used by scammers to deceive people about whether they paid their taxes."[118]

c) Lanham Act

The Lanham Act is the federal trademark law and addresses certain acts of unfair competition. It prohibits deceptive and misleading uses of marks and unfair competition, and fraud and deception in commerce, among other things.[119] Several commenters noted that third-party uses of a digital replica without authorization could constitute false endorsement under the Lanham Act.[120] They cited cases where Lanham Act claims were successful based on unauthorized uses of aspects of plaintiffs' identities, such as soundalikes and lookalikes in advertising.[121] In some circumstances a celebrity or performer may be able to demonstrate that

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[117] 89 Fed. Reg. 15017, 15030–31 (to be codified at 16 C.F.R. pt. 461) (statement of Chair Lina M. Khan joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya).

[118] *Id.* at 15031 (to be codified at 16 C.F.R. pt. 461) (statement of Chair Lina M. Khan joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya).

[119] 15 U.S.C. § 1127. In March 2024, the U.S. Patent and Trademark Office held a public symposium on intellectual property and AI, which included a panel discussion titled "AI, NIL, and the Lanham Act," which addressed the legal and policy considerations related to name, image, and likeness, and the intersection with generative AI. *See Public Symposium on AI and IP*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/about-us/events/public-symposium-ai-and-ip (last visited July 21, 2024).

[120] Section 43(a) of the Lanham Act establishes liability for using in commerce "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which[] is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person," or which "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1). For comments related to the Lanham Act, see, *e.g.*, International Trademark Association ("INTA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("INTA Initial Comments"); Jennifer Rothman Initial Comments at 3; American Intellectual Property Law Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15 (Oct. 30, 2023); SAG-AFTRA Initial Comments at 5; Kernochan Center for Law, Media and the Arts, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023).

[121] *E.g.*, UMG Initial Comments at 93 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992)).

their voice or a particular pose has achieved trademark status as the basis for a successful claim.[122]

Both false endorsement and trademark infringement claims require proof of commercial use and a likelihood of consumer confusion, mistake, or deceit. The Lanham Act specifies that the defendant's use must be "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[123] It may be difficult for many individuals, including artists and performers, to prove that the challenged conduct is likely to confuse consumers regarding the plaintiff's association with, or approval of, the defendant's commercial activities. And as INTA noted, AI-generated "revenge porn" would likely fall beyond its reach.[124]

d) Communications Act

The Federal Communications Commission ("FCC") has taken action to regulate digital replicas and to authorize state Attorneys General to do the same. In 2023, it published a Notice of Inquiry on the use of AI-generated voice clones in robocall scams targeting consumers.[125] Following this inquiry, pursuant to the Telephone Consumer Protection Act, the FCC unanimously adopted a declaratory ruling "mak[ing] voice cloning technology used in common robocall scams targeting consumers illegal,"[126] and giving state Attorneys General authority to enforce the rule. FCC Chair Jessica Rosenworcel explained, "Bad actors are using AI-generated

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[122] *See, e.g.*, INTA Initial Comments at 7 (quoting *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 922 (6th Cir. 2003), for the "general rule" that "a person's image or likeness cannot function as a trademark," unless "a particular photograph was consistently used on specific goods"); Law Office of Seth Polansky LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 37 (Oct. 12, 2023) ("Seth Polansky Initial Comments"); *Presley's Est. v. Russen*, 513 F. Supp. 1339, 1364–65 (D.N.J. 1981) (noting that while the assertion that Elvis's likeness and image serve as a service mark is too broad, that "a picture or illustration of Elvis Presley dressed in one of his characteristic jumpsuits and holding a microphone in a singing pose is likely to be found to function as a service mark," and ultimately finding a likelihood of success on the merits of an infringement claim as to that mark).

[123] 15 U.S.C. § 1125(a).

[124] INTA Initial Comments at 8.

[125] FCC, Notice of Inquiry on Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, CG Docket No. 23-362 (Nov. 16, 2023), https://docs.fcc.gov/public/attachments/FCC-23-101A1.pdf.

[126] *FCC Makes AI-Generated Voices in Robocalls Illegal*, FCC (Feb. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-400393A1.pdf; *see* FCC, Declaratory Ruling on Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, CG Docket No. 23-362 (Feb. 2, 2024), https://docs.fcc.gov/public/attachments/FCC-24-17A1.pdf.

voices in unsolicited robocalls to extort vulnerable family members, imitate celebrities, and misinform voters. We're putting the fraudsters behind these robocalls on notice."[127]

3. Private Agreements

Beyond these statutory and common law protections, private contracts can be negotiated to govern the use of individuals' names or likenesses. Performer service agreements, for example, often include terms proscribing whether and how the other contracting party can use the performer's identity. These usually cover use of the performer's name, image, voice, or likeness for the purpose of promoting the works in which the performer appeared.[128] They may be structured to allow only limited uses, for instance through time-limited grants and restrictions to a particular performance or context, or they may grant broad control, such as an assignment in perpetuity on an exclusive basis.[129] With the advent of AI, some agreements now include specific terms for the use of digital replicas. Talent agency WME, for example, described deals for the use of its clients' likenesses and personalities in connection with AI experiences and products.[130]

In the entertainment field, collective bargaining agreements that establish baseline employment terms have begun to include provisions on the treatment of AI-generated replicas. In December 2023, SAG-AFTRA ratified a multi-year agreement with the Alliance of Motion Picture and Television Producers ("AMPTP") that incorporates new provisions related to the

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[127] *FCC Makes AI-Generated Voices in Robocalls Illegal*, FCC (Feb. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-400393A1.pdf.

[128] 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 10:48 (2d ed. 2024) ("When an actor or performer contracts with a producer to perform in a motion picture or record a phonorecord, the actor or performer commonly signs a contract which includes a 'grant of rights' clause. A 'grant of rights' clause typically assigns copyright in the work to the producer and exclusively licenses the producer to use the actor or performer's identity in advertising and promotion of the work.").

[129] *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 120 (2018); *see also id.* at 122 ("Although many of these voluntary assignments are limited in various ways, to particular time periods, or to the context of telecasts, or to a particular photograph, they are often broader—and can be perpetual and cover all uses of a person's identity in any context."). Contract terms made public through litigation provide some examples of the range and breadth of such agreements. *See, e.g.*, *In re Jackson*, 972 F.3d at 31 (recording agreement granting a label term-limited exclusive rights, and non-exclusive rights thereafter, to use the artist's name and likeness for advertising and marketing covered sound recordings and videos); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 816 n.2 (Cal. 1979) (grant of rights clause for a film included, in part, the right to use and publicize "the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical and other sound effects produced by the artist hereunder, in connection with the advertising and exploitation of said photoplay" (emphasis omitted)).

[130] WME Initial Comments at 2 ("WME has already worked with its clients to negotiate AI-specific deals . . . [such as] a deal to lend Snoop Dogg's voice to the AI app Artifact, and deals between Meta and WME's clients to lend their likenesses and personalities to a series of AI-powered chatbots.").

creation and use of digital replicas produced by AI.[131] The ratification was the culmination of a months-long strike, in which this was among the issues "at the forefront."[132] The agreement's final terms establish guidelines related to consent, compensation, and exceptions for replicas created outside the scope of employment if the intended use is protected by the First Amendment.[133] First Amendment-protected uses are specified to include those "for purposes of comment, criticism, scholarship, satire or parody, or . . . use in a docudrama, or historical or biographical work."[134] Similar protections have been negotiated for voice actors and recording artists with respect to voice replicas.[135]

As AI technology continues to evolve, tailored private agreements are likely to become more common.[136] It may be unrealistic, however, to expect such agreements to extend to many other industries, particularly outside of the collective bargaining context.

B. The Need for Federal Legislation

The Copyright Office concludes that new federal legislation is urgently needed. As numerous commenters noted, generative AI technology enables the production and dissemination of digital replicas at a speed and scale that calls for a national response.[137]

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[131] Memorandum of Agreement Between the SAG-AFTRA and the AMPTP 60–76 (2023) ("SAG-AFTRA 2023 Agreement"), https://www.sagaftra.org/files/2023_Theatrical_Television_MOA.pdf.

[132] SAG-AFTRA Initial Comments at 1 ("[M]any of our members have identified AI as their number one issue, more important to them than increases in wages or improvements in other working conditions, because it poses an existential threat to their very livelihoods.").

[133] SAG-AFTRA 2023 Agreement at 60–76.

[134] *Id.* at 67.

[135] In January 2024, SAG-AFTRA entered into an agreement with Replica Studios covering the use of digital voice replicas by video game studios, and in April 2024, its members ratified an agreement with several major record labels regarding the use of voice replicas in sound recordings. Both agreements include provisions regarding consent and compensation. *SAG-AFTRA and Replica Studios Introduce Groundbreaking AI Voice Agreement at CES*, SAG-AFTRA (Jan. 9, 2024), https://www.sagaftra.org/sag-aftra-and-replica-studios-introduce-groundbreaking-ai-voice-agreement-ces; *SAG-AFTRA Members Ratify 2024 Sound Recordings Code Contract*, SAG-AFTRA (Apr. 30, 2024), https://www.sagaftra.org/sag-aftra-members-ratify-2024-sound-recordings-code-contract.

[136] More recently, in June 2024, the International Alliance of Theatrical Stage Employees ("IATSE") and AMPTP reached a tentative agreement covering requests and consent to "scan" employees. *Tentative 2024–2027 Basic Agreement Summary* at 5, IATSE (2024), https://iatse.net/wp-content/uploads/2024/06/2024-SUMMARY-OF-BASIC-AGREEMENT-NEGOTIATIONS_6.28.24-FINAL.pdf.

[137] *See*, *e.g.*, American Society of Composers, Authors and Publishers, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 13 (Oct. 30, 2023) ("[T]he ubiquity and scale of this new technology requires a robust federal law ensuring that creators' rights are adequately protected."); Songwriters of North America ("SONA") et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of

The impact is not limited to a select group of individuals, a particular industry, or a geographic location. And as described below, existing laws fail to provide fully adequate protection.

1. Shortcomings of Existing Laws

State laws are both inconsistent and insufficient in various respects. As described above, some states currently do not provide rights of publicity and privacy,[138] while others only protect certain categories of individuals.[139] Multiple states require a showing that the individual's identity has commercial value.[140] Not all states' laws protect an individual's voice; those that do may limit protection to distinct and well-known voices, to voices with commercial value,[141] or to use of actual voices without consent (rather than a digital replica).[142]

State right of publicity laws typically apply only where the infringement occurs in advertising, on merchandise, or for other commercial purposes.[143] They do not address the harms that can be inflicted by non-commercial uses, including deepfake pornography, which are particularly prevalent in the internet environment.[144] Different jurisdictional requirements create discrepancies as to who may seek relief.[145] Finally, some of these laws incorporate broad exceptions that may go beyond First Amendment requirements and place many unauthorized uses outside their scope.[146] As numerous commenters noted, the result is a patchwork of protections, with the availability of a remedy dependent on where the affected individual lives or where the unauthorized use occurred.

Inquiry at 10–11 (Oct. 30, 2023) ("SONA-MAC-BMAC Joint Initial Comments") ("We feel strongly that new federal legislation is needed for the protection of a person's identification – their image, voice, characterization, and other likenesses."); WME Initial Comments at 5–6; *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Jennifer Rothman, Professor of Law, University of Pennsylvania, in response to Questions for the Record ("QFRs") from Rep. Darrell Issa) ("Recent advancements in AI . . . highlight some preexisting challenges because the scale of the problem of unauthorized uses of a person's identity has grown.").

[138] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:2 (2d ed. 2024).

[139] *See supra* notes 72–74 and accompanying text.

[140] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (2024); OHIO REV. CODE ANN. §§ 2741.01, 2741.02 (West 2024).

[141] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (2024); OHIO REV. CODE ANN. §§ 2741.01(A), 2741.02 (West 2024).

[142] *See, e.g., Midler*, 849 F.2d at 463 (concluding that the California right of publicity statute does not encompass voice imitations but holding that, under California common law, "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.").

[143] *See, e.g.*, 765 ILL. COMP. STAT. ANN. 1075/30 (2024); VA. CODE ANN. § 8.01-40 (2024); FLA. STAT. § 540.08 (2024).

[144] *See supra* Section II.A.1.b.

[145] *See id.*

[146] *See, e.g.*, OHIO REV. CODE ANN. § 2741.09(A)(1)(a) (West 2024); *see also infra* Section II.B.3.f.

Existing federal laws are too narrowly drawn to fully address the harm from today's sophisticated digital replicas. As explained above, the Copyright Act protects original works of authorship but does not prevent the unauthorized duplication of an individual's image or voice alone,[147] and the targeted individual may not be an owner of copyright in the work as a whole.[148]

The Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce.[149] While it can be applied to cases where digital replicas are used in commercially misleading ways, it does not provide comprehensive protection in other circumstances. Similarly, under the Lanham Act, claims such as false endorsement involving a digital replica are limited to unauthorized *commercial* uses, and most federal courts also require a showing of consumer awareness of the depicted individual in order to establish a likelihood of confusion, limiting the Lanham Act's protection to well-known figures and commercial circumstances. It may be difficult for many individuals, including less famous artists and performers, to prove that the challenged conduct is likely to confuse consumers regarding the plaintiff's association with, or approval of, the defendant's commercial activities. And issues like AI-generated "revenge porn" would likely fall beyond its reach.[150]

Nor can federal communications law address all of the issues raised by unauthorized digital replicas. It only provides the FCC with enforcement powers related to its authority over common carrier services, transmissions, and cable services.[151] The agency's efforts to combat robocall scams stem from its authority related to telephony issues and can help with that particular context. It does not offer a comprehensive solution that could extend more broadly to situations where the use and dissemination of digital replicas may be common, but are not under the FCC's enforcement purview, such as websites featuring user-generated content.

2. Congressional Activity

The Office's recommendations here are presented against the backdrop of ongoing congressional activity.[152] Members of Congress have warned that AI-generated digital replicas have the potential to exacerbate problems of copyright infringement, as well as labor

[147] *See* 17 U.S.C. § 102; *see also supra* Section II.A.2.a.

[148] *See* 17 U.S.C. § 102(a); *id.* § 201(a).

[149] *See* 15 U.S.C. § 45(a)(1).

[150] INTA Initial Comments at 8.

[151] *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

[152] This discussion reflects relevant Congressional activity that has occurred before July 22, 2024.

displacement and election misinformation.[153] At a hearing last year on AI and copyright, Senator Chris Coons inquired "whether changes to our copyright laws or whole new protections like a federal right of publicity may be necessary to strike the right balance between creators' rights and AI's ability to enhance innovation and creativity."[154]

Legislation has been introduced to address unauthorized digital replicas in various contexts, including political advertisements and communications[155] and sexually explicit images.[156] These bills include the Preventing Deepfakes of Intimate Images Act,[157] which would make it a crime to intentionally disclose or threaten to disclose AI-generated intimate digital depictions; the REAL Political Advertisements Act,[158] which would require political advertisements to disclaim the use of AI-generated sounds or images; and the Protect Elections from Deceptive AI Act,[159] which would make it a crime to distribute deceptive AI-generated media relating to federal elections.

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[153] The Office is aware that name, image, and likeness issues related to college athletes have also received recent congressional attention. These issues differ from those examined in various aspects here and are beyond the scope of this Report. They arise out of the 2021 Supreme Court decision, *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021), which held in part that NCAA limits on college athlete compensation violated antitrust laws. While the *Alston* case was pending, many states enacted laws to recognize and regulate publicity rights for college athletes. *See generally* Maureen A. Weston, *Off the Guardrails: Opportunities and Caveats for Name Image Likeness and the [Student] Athlete Influencer*, 11 TEXAS A&M L. REV. 911 (2024), https://ssrn.com/abstract=4734794.

[154] *Artificial Intelligence and Intellectual Property—Part II: Copyright: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Sen. Chris Coons, Chair, S. Subcomm. on Intell. Prop.). The House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet and the Senate Judiciary Subcommittee on Intellectual Property both held hearings focused on the misuse of AI technology with respect to the likeness, voice, and other identifying characteristics of individuals. *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary,* 118th Cong. (2024); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024); *Oversight of AI: Election Deepfakes: Hearing Before the Subcomm. on Priv., Tech., & the Law of the S. Comm. on the Judiciary*, 118th Cong. (2024); *see also At Senate Judiciary Subcommittee Hearing, Klobuchar Urges Action to Address Deepfakes in Elections*, AMY KLOBUCHAR, SENATOR (Apr. 16, 2024), https://www.klobuchar.senate.gov/public/index.cfm/2024/4/at-senate-judiciary-subcommittee-hearing-klobuchar-urges-action-to-address-deepfakes-in-elections.

[155] REAL Political Advertisements Act, H.R. 3044, 118th Cong. (2023); Candidate Voice Fraud Prohibition Act, H.R. 4611, 118th Cong. (2023); REAL Political Advertisements Act, S. 1596, 118th Cong. (2023); Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023).

[156] Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023); Protect Victims of Digital Exploitation and Manipulation Act of 2024, H.R. 7567, 118th Cong. (2024); DEFIANCE Act of 2024, S.3696, 118th Cong. (2024); TAKE IT DOWN Act of 2024, S.4569, 118th Cong. (2024).

[157] Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023).

[158] REAL Political Advertisements Act, S. 1596, 118th Cong. (2023); REAL Political Advertisements Act, H.R. 3044, 118th Cong. (2023)

[159] Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023).

To date, two congressional proposals would address the unauthorized use of digital replicas more broadly: the No Artificial Intelligence Fake Replicas And Unauthorized Duplications ("No AI FRAUD") Act,[160] and the discussion draft of the Nurture Originals, Foster Art, and Keep Entertainment Safe ("NO FAKES") Act of 2023.[161] A number of commenters specifically referenced these two proposals and were generally supportive.[162]

a) No AI FRAUD Act

Introduced in early 2024, the No AI FRAUD Act would establish intellectual property rights in voice and likeness[163] and protect against the use of unauthorized digital voice replicas and digital depictions that readily identify an individual.[164] The bill would allow these rights to be transferred during the individual's lifetime and would make them descendible.[165] Rights would endure at least ten years after the death of the individual, even if they had not been used commercially during their lifetime, and would continue until either (a) proof that they had not been used commercially in a two-year period by an executor, transferee, heir, or devisee; or (b) the death of all executors, transferees, heirs, or devisees.[166]

The legislation would require any authorization to use a digital depiction or digital voice replica to be in writing and valid only if the individual is represented by counsel. If the individual is a minor, the agreement must be approved by a court in accordance with state

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[160] No AI FRAUD Act, H.R. 6943, 118th Cong. (2024).

[161] Sen. Chris Coons et al., NO FAKES Act Discussion Draft (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf. The COPIED Act, introduced in July 2024, establishes rules regarding the attachment of content provenance information for synthetic content, such as digital replicas, but does not provide new rights to individuals. *See* The COPIED Act, S. 4674, 118th Cong. (2024).

[162] *See, e.g.*, SAG-AFTRA Initial Comments at 7–8; Sandra Aistars, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20 (Oct. 30, 2023); Independent Music Publishers International Forum, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023); Dina LaPolt, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9–10 (Oct. 30, 2023) ("Dina LaPolt Initial Comments").

[163] No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(b)(1)–(2) (2024).

[164] A "digital depiction" is a "replica, imitation, or approximation" of an individual's "likeness," which is defined as an actual or simulated image or likeness that is "readily identifiable as the individual." *Id.* § 3(a)(2), (6) (2024). The bill defines "voice" as an actual or simulated voice that is "readily identifiable" as the depicted individual, while a "digital voice replica" is an audio rendering that includes "replications, imitations, or approximations of an individual that the individual did not actually perform." *Id.* § 3(a)(4)–(5).

[165] *Id.* § 3(b)(2)–(3).

[166] *Id.* § 3(b)(2)–(3).

law.[167] Authorization would also be valid if governed by the terms of a collective bargaining agreement.[168]

The bill would impose direct liability for disseminating a digital voice replica or digital depiction with knowledge that it is not authorized,[169] and for trafficking in a "personalized cloning service" designed to produce digital voice replicas or digital depictions of particular individuals.[170] It would establish secondary liability for any person or entity who "materially contributes to, directs, or otherwise facilitates" directly infringing activity with knowledge that the rightsholder has not consented.[171]

To accommodate the First Amendment, the bill provides a list of factors for a court to consider in balancing the public interest against the private digital replica right.[172] This balancing framework is not required, however, if the digital depiction "includes child sexual abuse material, is sexually explicit, or includes intimate images."[173]

Potential remedies include statutory or actual damages, whichever is greater, lost profits, punitive damages, and attorney's fees.[174] The bill categorizes the law as intellectual property for the purposes of Section 230 of the Communications Decency Act.[175] It expressly does not preempt any state or federal laws.[176]

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[167] *Id.* § 3(b)(4)(A).

[168] *Id.* § 3(b)(4)(B).

[169] Specifically, any person or entity who "publishes, performs, distributes, transmits, or otherwise makes [it] available to the public." *Id.* § 3(c)(1)(B).

[170] *Id.* § 3(a)(3), (c)(1)(A). The bill does not incorporate a knowledge requirement for this violation.

[171] *Id.* § 3(c)(1)(C). The bill does not provide safe harbors, and a disclaimer is not a defense for any infringing activity. *Id.* § 3(c)(2)(D).

[172] *Id.* § 3(d). These factors include whether "(1) the use is commercial; (2) the individual whose voice or likeness is at issue is necessary for and relevant to the primary expressive purpose of the work in which the use appears; and (3) the use competes with or otherwise adversely affects the value of the work of the owner or licensee of the voice or likeness rights at issue." *Id.*

[173] *Id.* § 3(e)(3).

[174] *Id.* § 3(c)(2)(A)–(C).

[175] *Id.* § 3(j); *see infra* Section II.B.3.d.iii.

[176] No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(g) (2024).

b) NO FAKES Act Discussion Draft

The NO FAKES Act discussion draft provides for a right "to authorize the use of the image, voice, or visual likeness of the individual in a digital replica."[177] The right is a descendible and licensable property right that continues for 70 years after the individual's death, even if it is not exploited during their lifetime.[178] Licensing of the right is valid only if the individual is represented by counsel; the agreement is in writing; or the license is governed by a collective bargaining agreement.[179]

The draft bill imposes liability for producing and disseminating a digital replica without consent.[180] It conditions liability on "knowledge that the digital replica was not authorized by the applicable individual or rights holder."[181] The draft includes a list of categorical exclusions from liability, including the use of digital replicas in news, public affairs, or sports broadcasts; in documentary, historical, or biographical works; for comment, criticism, scholarship, satire, or parody; and where the use is *de minimis* or incidental.[182]

Potential remedies include statutory or actual damages, whichever is greater; punitive damages; and attorney's fees.[183] The bill categorizes the law as an intellectual property law for the purposes of Section 230 of the Communications Decency Act.[184] It expressly does not preempt other state or federal laws.[185]

3. The Contours of a New Right

In response to our NOI, the Office received extensive input on the contours of a new digital replica right. After reviewing the comments, existing law, and the current legislative proposals, we have identified the following critical elements: (1) the definition of "digital

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[177] Sen. Coons et al., NO FAKES Act Discussion Draft § 2(b)(1) (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf. The draft bill defines a "digital replica" as a representation that "is [nearly indistinguishable]" from an individual's actual image, voice, or visual likeness, and is fixed in a sound recording or audiovisual work. *Id.* § 2(a)(1).

[178] *Id.* § 2(b)(2)(A).

[179] *Id.* § 2(b)(2)(B).

[180] *Id.* § 2(c)(2).

[181] *Id.* § 2(c)(2)(B). The draft bill does not provide safe harbors for any activity. Displaying a disclaimer or not having participated in the "creation, development, distribution, or dissemination" of the digital replica is not a defense. *Id.* § 2(d)(3).

[182] *Id.* § 2(c)(3).

[183] *Id.* § 2(d)(4).

[184] *Id.* § 2(f); *see infra* Section II.B.3.d.iii.

[185] Sen. Chris Coons et al., NO FAKES Act Discussion Draft § 2(e) (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf.

replica;" (2) the persons protected; (3) the term of protection; (4) prohibited acts; (5) secondary liability; (6) licenses and assignments; (7) accommodation of First Amendment concerns; (8) remedies; and (9) interaction with state laws.[186]

a) Subject Matter

In this Report, we have defined "digital replica" as "a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual."[187] A new bill will have to include text that precisely prescribes the subject matter it seeks to protect. Although the Office did not receive comments proposing definitions, in our view the new right should not sweep too broadly. As discussed above, state rights of publicity have been interpreted to cover a broad range of imitations or evocations, including catch phrases or caricatures.[188] But the conduct that now demands federal attention—such as voice cloning in music and the creation of a video or image that appears to depict a real person—involves replicas that do not merely evoke an individual but are difficult to distinguish from reality. We recommend that federal law target replicas that convincingly appear to be the actual individual being replicated.

b) Persons Protected

As discussed above, state rights of publicity and related laws vary significantly in the persons that are protected. Some protect only those who can demonstrate that they are famous or that their identities have commercial value.[189]

Multiple commenters advocated for a federal right that extends protection to all individuals regardless of their level of fame or the commercial value of their identities.[190] They

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[186] There are other issues on which the NOI did not seek comment and which this Report does not discuss in detail. These include the statute of limitations, retroactivity, and whether federal courts should have exclusive jurisdiction.

[187] *See supra* Section I.A.

[188] *See supra* Section II.A.1.

[189] *See, e.g.*, IND. CODE ANN. § 32-36-1-6 (2024) (defining subject of right of publicity protections as a natural person who possesses an attribute (such as name, voice, image, or likeness) that has commercial value); OHIO REV. CODE §§ 2741.01(A), 2741.02 (2024) (protecting "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value").

[190] *See, e.g.*, David Newhoff, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 7, 2023) ("David Newhoff Initial Comments") ("If ROP law is expanded, it should . . . apply to all persons, not just celebrities . . . ."); Walker Wambsganss et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 26, 2023) ("Walker Wambsganss et al. Initial Comments") ("[M]inimum standards should be set again including but not limited to, . . . obtain[ing] consent of an individual's likeness of AI-generated content regardless of their public or private status . . . ."); Internet Archive, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11–12 (Oct. 30, 2023) ("Internet

pointed out that everyone has a legitimate interest in controlling the use of their likenesses, and harms such as blackmail, bullying, defamation, and use in pornography are not suffered only by celebrities.[191] While a famous performer might be more susceptible to an AI-generated sound recording topping the music charts, any member of the public could be on the receiving end of a robocall imitating a close family member, or the subject of an explicit image used to humiliate them.[192] Protecting all individuals is consistent with the common law right of privacy, which typically requires neither fame nor commercial value.[193]

The Office believes that the goal of enacting a federal digital replica law is to ensure that everyone has adequate protection and recommends that the law cover all individuals.

c) Term of Protection

The appropriate term of protection is the subject of some debate. Should protection continue after death, allowing heirs or assigns to control exploitation of the deceased's voice and image? As discussed above, a number of states provide postmortem protection for rights of publicity, with protections varying in duration and conditions such as continuing commercial exploitation.

The Office received several comments on this issue. Talent agency WME argued in favor of postmortem rights, stating that "[u]nauthorized deepfakes threaten to usurp estates' valid interests in preserving and strengthening artists' legacies through the *legitimate* use of AI" and may detract from the authenticity, credibility, and commercial value of an artist's body of work.[194] Some courts and commentators have reasoned that postmortem rights promote

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Archive Initial Comments") ("The public deserves the right to exist in online spaces without being constantly surveilled, and the right to not have our likeness used in ways that humiliate, harass, or abuse us."); INTA Initial Comments at 10–11 (Basic standards for a federal right of publicity should include that "[a]n individual claimant need not make commercial use of his or her persona to have a right of publicity.").

[191] *See, e.g.*, Jennifer Rothman Initial Comments at 5 ("Many ordinary people have their names, likenesses, and voices used without their permission in ways that cause significant harm, including reputational and commercial injuries. There should be no requirement to have a commercially valuable identity to bring a claim."); Internet Archive Initial Comments at 12 ("It would be unfair to hand out rights to celebrities that would allow them to control how their image is collected, processed and used, but not have any protections for the general public.").

[192] *See supra* Section I.A.

[193] *See supra* Section II.A.1.a.

[194] WME Initial Comments at 4. A number of other groups and individuals also supported postmortem protection. *See, e.g.*, INTA Initial Comments at 11; Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office (Apr. 29, 2024); *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis) ("[T]he NO FAKES Act[] should also provide for protection of the artist's rights and image after their death in perpetuity.").

investment in the deceased's legacy,[195] protect the value of assignments made before death,[196] prevent exploitation that heirs and assigns find objectionable or offensive,[197] and conform to the treatment of other types of property.[198]

Support for a postmortem right, however, was not unanimous. Others asserted that there is a less compelling government interest in such protection, making its application to expressive content more vulnerable to First Amendment challenge.[199] It has also been argued that postmortem rights offer little value as a motivating force for creative endeavors.[200] Moreover, to the extent that rights in one's image, voice, and likeness are personal in nature and rooted in privacy, the interests protected do not survive death and generally are not descendible

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[195] *See Martin Luther King Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 694 F.2d 674, 682 (11th Cir. 1983) ("If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use."); *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 99 n.11 (Tenn. Ct. App. 1987) (holding that the law should recognize a celebrity's expectation that he or she is creating a valuable capital asset for the benefit of heirs after death). *Cf.* Peter Felcher & Edward Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L.J. 1125, 1128–29 (1980).

[196] *See Martin Luther King Jr., Ctr. for Soc. Change*, 694 F.2d at 705.

[197] Marc A. Lieberstein, *Why a Reasonable Right of Publicity Should Survive Death: A Rebuttal* at 9, 10, NYSBA BRIGHT IDEAS (2008) ("Without a post-mortem right of publicity, [Marilyn] Monroe's name or likeness could show up on portable toilets. Such offensive, unauthorized uses of Monroe's persona are a real possibility absent reasonable legislation that would permit the heirs and/or other authorized entities to regulate use of the publicity right after death.").

[198] *See, e.g.*, *State ex rel. Elvis Presley Int'l Mem'l Found.*, 733 S.W.2d at 97–98 ("If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death.").

[199] *E.g.*, Letter from MPA, Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 5 (May 20, 2024).

[200] As the Sixth Circuit put it in *Memphis Development Foundation v. Factors Etc., Inc.*, before Tennessee adopted postmortem rights legislation, "[t]he desire to exploit fame for the commercial advantage of one's heirs is . . . a weak principle of motivation." 616. F.2d 956, 959 (6th Cir. 1980).

to one's heirs.[201] One commenter warned that postmortem rights could reduce investment in living artists by shifting it to "digitally-resurrected" celebrities.[202]

In addition to these policy arguments, postmortem rights can pose practical challenges. For example, identifying the individual or entity that controls these rights may be difficult, depending on how the rights were bequeathed. INTA suggested addressing the uncertainty around the holder of postmortem rights though a non-mandatory registration system that would provide "public notice that such rights are being claimed, and provide contact information for the use of such rights."[203]

Taking into account all of these points, the Office makes the following recommendation: A federal digital replica right should prioritize the protection of the livelihoods of working artists, the dignity of living persons, and the security of the public from fraud and misinformation regarding current events. For these purposes, a postmortem term is not necessary.

At the same time, we recognize that there is a reasonable argument for allowing heirs to control the use of and benefit from a deceased individual's persona that had commercial value at the time of death. If postmortem rights are provided in a new federal law, we would recommend an initial term shorter than twenty years, perhaps with the option of extending it if

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[201] This point is consistent with the approach taken in the Visual Artists Rights Act, which protects the moral rights of artists to control their work and reputation via copyright law only during the life of the author. 17 U.S.C. § 106A(d)(1). *See Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) ("We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."); *see also The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA) ("Any interest in a performer's reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue. But recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in centuries of American law, under which 'there can be no defamation of the dead.'" (quoting RESTATEMENT (SECOND) OF TORTS § 560 (AM. L. INST. 1977))).

[202] Jennifer Rothman Initial Comments at 6 ("A federal postmortem right may shore up the replacement of up-and-coming performers with long-dead celebrities."). *Cf.* Mark Bartholomew, *A Right to Be Left Dead*, CALIF. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4610679 ("Because dead celebrities no longer have the capacity to make unpredictable choices in their personal lives that can jeopardize their corporate sponsor's relationship with the public, they represent a more stable investment than their living counterparts. . . . Dead stars also come cheaper as company spokespersons than live ones—an obvious point in their favor when constructing a marketing campaign on a limited budget.").

[203] INTA Initial Comments at 10–11 ("Where practicable, a non-mandatory post-mortem registration system would assist . . . in proving public notice that such rights are being claimed, and provide contact information for the use of such rights. . . . There could be incentives to register the claim of rights, such as reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.").

the persona continues to be commercially exploited.[204] This approach would not pose the same burden to free expression interests or raise as many practical challenges as a long-term or perpetual right.[205] We note that to the extent the federal law is not fully preemptive, as discussed below, states could still offer a longer term.

d) Infringing Acts

The Office received relatively few comments addressing the scope of the conduct to be prohibited and the allocation of liability.

Regarding the baseline acts that a law should cover, we recommend proscribing activities that involve dissemination to the public—in copyright terms, the acts of distribution, publication, public performance, display, or making available. In our view, this is the type of conduct likely to cause harm to the individual whose image or voice is being replicated.

In contrast, the creation of a digital replica in itself could be part of an artist's experimental process or for a consumer's personal entertainment. Such purely personal use would ordinarily be innocuous and can foster further creativity.[206] If Congress were to impose liability for the mere act of creation, it would be advisable to include a defense for legitimate and reasonable private uses. This does not mean, however, that the act of creation could not be the basis for liability where it is a knowing part of a broader distribution scheme[207] or violates other laws.[208]

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[204] *Cf.* 15 U.S.C. §§ 1058–59 (providing for successive renewals of trademark registrations so long as there is continued use in commerce). The longer term of copyright protection, in contrast, is intended to incentivize the creation of original works in order to promote progress.

[205] Even a short postmortem term could benefit from something like the voluntary registry INTA proposes in order to clarify the status of postmortem rights and facilitate licensing. Among states with right of publicity laws, California, Oklahoma, and Texas all have registration regimes through which descendants of rightsholders may publicly register their rights with the government. CAL. CIV. CODE § 3344.1 (West 2024) (registration is required in order to recover damages); OKLA. STAT. ANN. tit. 12, § 1448(F)(2) (2024) (same); TEX. PROP. CODE ANN. § 26.006 (West 2023) (registration is prima facie evidence of a valid claim to a property right).

[206] In the copyright context, see, *e.g.*, *Chapman v. Maraj*, No. 2:18-cv-9088, 2020 WL 6260021, at *10 (C.D. Cal. Sep. 16, 2020) (holding that Nicki Minaj's unauthorized creation of a derivative work based on a Tracy Chapman song for experimentation was a fair use).

[207] In these circumstances, principles of secondary liability could apply. *See infra* Section II.B.3.d.iii.

[208] For example, digital replicas used to create child sexual abuse material ("CSAM") or nonconsensual pornography would still be subject to criminal law penalties. *See, e.g.*, 18 U.S.C. § 2251(a) (criminalizing, among other acts, using a minor to produce CSAM with materials transported interstate, such as a computer); *United States v. Tatum*, No. 3:22-cr-157, 2023 WL 3185795, at *2 (W.D.N.C. May 1, 2023) (involving an indictment alleging, in part, production of sexually explicit content under 18 U.S.C. § 2251(a) for using a website to produce deepfake nude images); TEX. PENAL CODE ANN. § 21.165(b) (West 2023) ("A person commits an offense if, without the effective consent of the person appearing to be depicted, the person knowingly produces or distributes by electronic means a deep fake video that appears to depict the person with the person's intimate parts exposed or engaged in sexual conduct.").

(i) Commercial Nature of Use

As discussed above, state rights of publicity typically cover only commercial uses.[209] While some commenters suggested that any federal right be similarly limited,[210] others urged that it should cover both commercial and non-commercial uses,[211] noting the range of harms that can arise from unauthorized replicas.[212] As the Brooklyn Law Incubator & Policy Clinic ("BLIP") and National Public Radio ("NPR") pointed out, the creators of deepfakes do not always act for financial gain,[213] and deception can be harmful regardless of commercialization.[214] Moreover, distinguishing between commercial and non-commercial contexts can be challenging, especially in today's online environment. For example, social media posts that appear to be an individual's personal expression may be part of a paid influencer campaign in support of a commercial interest.[215]

The Office agrees that harmful uses of digital replicas are not limited to those that are commercial in nature. In fact, the commercial use requirement in many state laws is frequently cited as a major reason why these laws are unable to provide adequate protection.[216] We recommend that a federal digital replica law should encompass both non-commercial and

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[209] *See supra* Section II.A.1.

[210] *See, e.g.*, INTA Initial Comments at 10 ("To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist."); Law Office of Seth Polansky Initial Comment at 37.

[211] *See, e.g.*, BLIP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 32 (Oct. 30, 2023) ("BLIP Initial Comments") ("[C]onsidering the breadth of content on which AI systems can be trained, when it comes to infringement of the right of publicity through the use of AI systems, commercial use should not be a required element."); David Newhoff Initial Comments at 5.

[212] *E.g.*, Artist Rights Alliance & Future of Music Coalition Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Dec. 6, 2023) ("[T]he harms go deeper still. Just last week, reports surfaced of a generative AI engine used to create non-consensual pornographic images, including those depicting 'several multiplatinum Grammy Award-winning singer-songwriters and Academy Award-winning actresses' among others. And reports of other forms of deepfake harms such as cyber bullying, impersonation scams, and revenge porn are well-known.").

[213] *E.g.*, BLIP Initial Comments at 32 ("[S]ometimes the end-users do not produce [deepfakes] for commercial purposes, but for creativity or maliciousness.").

[214] *E.g.*, NPR, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Oct. 30, 2023) ("NPR Initial Comments").

[215] *See* Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 416–17 (2018) ("[C]ommercial use on the internet—especially on social media—can be a complicated question. . . . In fact, everything on social media is advertising at some level—a level that has become increasingly difficult to determine." (footnotes omitted)).

[216] *See, e.g.*, WME Initial Comments at 5 ("Here too, there is often limited recourse. Right-of-publicity laws are generally limited to commercial uses, leaving it unclear whether they apply to fan-generated deepfakes that were not created for profit or for commercial distribution.").

commercial uses. In this respect, the law would incorporate aspects of the right of privacy, which typically guards against non-economic damage.[217]

(ii) Knowledge Standard

Although the Office did not receive many comments on this issue, we recommend adoption of an actual knowledge standard for direct liability.

Under the actual knowledge standard, liability would attach only where the distributor, publisher, or displayer acted with actual knowledge both that the representation in question was a digital replica of a real person, and that it was unauthorized. An objective or "should have known" standard might ensnare unsuspecting or technologically unsophisticated defendants. Given the volume of potential outputs produced by current technologies, and the number of individuals who could be targeted, there are likely to be cases where a user passes along an image or audio recording without realizing that it is a replica of someone's voice or likeness.[218] And even where the user recognizes the subject of a digital replica, they may not be aware that the replica is inauthentic or unauthorized.

Some commenters proposed the stricter standard of intent to deceive. NPR, for instance, argued that "Congress should adopt a narrow law that creates liability in instances where someone's name, image, likeness, or voice is used with intent to deceive the audience to believe that false, faked, or AI-generated content is true or represents actual facts or event[s]. . . . Liability would turn on intentional deceptiveness—that something is fake but is trying to persuade someone otherwise."[219] The Office notes, however, that there may be no intent to deceive in some situations where liability should attach, such as where an unauthorized digital replica is used to harass or ridicule an individual, or to profit from the replica of a popular

[217] *See supra* Section II.A.1.a.

[218] *E.g.*, Public Knowledge, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20 (Oct. 30, 2023) ("[A]ny universally-available right needs to adequately address the 'digital doppelganger' problem—namely, ways of dealing with situations in which an AI-generated work, by pure mathematical chance, looks or sounds like an otherwise unknown individual. Such instances should not give rise to liability, or trigger a rabbit hole of provenance questions about the training data of the GAI system that generated the accidental lookalike.").

[219] NPR Initial Comments at 9–10.

performer's voice or image.[220] Proof of subjective intent is also a high barrier to meet when seeking to prevent damaging distributions of unauthorized replicas.[221]

(iii) Secondary Liability

Since digital replicas are generally distributed and displayed online through the services of various intermediaries, the treatment of secondary liability will be an important element of a new federal law.

Traditional secondary liability principles from copyright law may be drawn on here. Pursuant to these principles, a defendant may be contributorily liable if it "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[222] Vicarious liability may be found if the defendant "profits directly from the infringement and has a right and ability to supervise the direct infringer."[223] And a defendant may be liable for inducing infringement where it "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement."[224]

While these principles could apply in a variety of cases,[225] most of the comments on this topic related to online service providers ("OSPs") that transmit, cache, host, or link to user content. In several areas, Congress has provided OSPs with special safe harbors against liability for unlawful conduct by their subscribers. The most far-reaching example is Section 230 of the Communications Decency Act of 1996, which immunizes online platforms from civil liability for

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[220] In some recent instances where popular artists' voices (both living and deceased) have been cloned without authorization, the rights owners' objections do not appear to depend on whether the unauthorized use was intended to deceive. *See, e.g.*, Vicky Wong & Bonnie McLaren, *Drake: AI Tupac track gone from rapper's Instagram after legal row*, BBC News (Apr. 26, 2024), https://www.bbc.com/news/newsbeat-68904385.

[221] *See* David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1071–72 (2010) ("[I]ntent, of course, cannot be seen directly by witnesses. It eludes all five senses. It is known only to the actor, and even here, only sometimes, because some definitions of intent allow the actor to readily believe that there is no intent, even when there is. . . . [T]he law evaluates intent by what the actor does, which means that the law evaluates intent by circumstantial evidence. At the same time, intent is easily denied or rebutted, even when it exists, and sometimes the denial is accompanied by convincing belief on the part of the actor."); *cf.* Thomas O. Depperschmidt, *Bankruptcy for Gamblers: The Questions of Fraudulent Intent, Dischargeability, and Remedial Policy in Credit Card Cash Advance Cases*, 13 BANKR. DEV. J. 389, 403–04 (1997) (concerning the difficulty of establishing intent in fraud cases).

[222] *Co-Star Grp. Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

[223] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005).

[224] *Id.* at 919, 936–37.

[225] For example, the trafficking in devices tailored to create digital replicas might be addressed through secondary liability. *Cf.* No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(c)(1)(A), (C) (2024) (establishing liability for distributing, and for facilitating the distribution of, services for creating digital replicas).

many types of illegal third-party content.[226] It provides that an OSP shall not be treated as the "publisher or speaker" of content provided by others, and that neither OSPs nor their users shall be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[227]

Section 230 includes a significant carve-out; it does not "limit or expand any law pertaining to intellectual property."[228] Commenters had differing views on whether a federal digital replica law would constitute a "law pertaining to intellectual property" carved out from section 230.[229] Some favored including the law within the scope of immunity in order to support online platforms' ability to make moderation decisions and avoid chilling protected speech.[230] Electronic Frontier Foundation ("EFF"), for example, argued that "Congress should clarify that the right of publicity sounds in privacy and is not 'intellectual property' for purposes of Section 230" because "when platforms must fend off expensive lawsuits to protect user speech, they are likely to cave to censorious demands."[231]

Others asserted that including digital replica protection in the intellectual property carve-out is necessary to incentivize platforms to remove infringing material.[232] Several pointed to experiences under current law with OSPs refusing requests to remove AI-generated content violating state rights of publicity, citing section 230.[233]

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[226] 47 U.S.C. § 230; *see Hepp v. Facebook*, 14 F.4th 204, 209 (3d Cir. 2021) (Section 230 "encourages [internet] companies to host and moderate third-party content by immunizing them from certain moderation decisions.").

[227] 47 U.S.C. § 230.

[228] 47 U.S.C. § 230(e)(2).

[229] *See, e.g.*, DiMA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("DiMA Initial Comments"); A2IM-Recording Academy-RIAA Joint Reply Comments at 18; Jennifer Rothman Initial Comments at 4–5.

[230] *See, e.g.*, EFF, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023) ("EFF Initial Comments"); *see also* DiMA Initial Comments at 6.

[231] *See, e.g.*, EFF Initial Comments at 7; *see also* DiMA Initial Comments at 6 (DiMA "strongly believes that any such right should not be deemed a form of 'intellectual property . . . .").

[232] *See, e.g.*, UMG Initial Comments at 94; SAG-AFTRA Initial Comments at 7; A2IM-Recording Academy-RIAA Joint Reply Comments at 18.

[233] *See, e.g.*, UMG Initial Comments at 94; *see also* SAG-AFTRA Initial Comments at 7; *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis) ("Some platforms have responded to our requests for removal and some have resisted. . . . Some have argued that under Section 230 . . . they are not required to remove them.").

The Copyright Office believes that exclusion from section 230 is advisable to encourage prompt removal of unauthorized digital replicas from online platforms. In many circumstances, OSPs are best positioned to prevent the continuing harm from the availability of such replicas.[234] For example, the disseminators may be anonymous or unreachable,[235] making it impossible to take direct action against them, either informally or through court action. OSPs should be incentivized to assist in removing the replicas once they know they are unauthorized and protected from liability when they do so.

Open AI advocated for "a form of safe harbor . . . for technology providers that do not induce users to create non-consensual digital replicas and take proactive steps to monitor and mitigate harmful uses."[236] Some commenters proposed a notice-and-takedown framework similar in concept to section 512 of the Digital Millennium Copyright Act.[237] This provision encourages copyright owners and OSPs to cooperate "to detect and deal with copyright infringement"[238] by providing qualifying OSPs with immunity from monetary liability for copyright infringement committed by their users.[239] The safe harbors for hosting or linking to infringing content are conditioned upon (among other things) a requirement that the OSP act expeditiously to remove allegedly infringing content upon receiving a valid notification or otherwise becoming aware of the infringing activity.[240]

A number of commenters suggested a safe harbor that differs from section 512 in various respects. DiMA, for instance, argued that if a digital replica law allows for secondary liability, then a safe harbor ought to provide "complete immunity when a service removes

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[234] Recently, YouTube announced a program allowing individuals to demand a takedown of image and voice deepfakes. Dylan Smith, *YouTube Unveils New AI Likeness Protections—Covering Soundalike Audio and More—for 'Uniquely Identifiable' First Parties*, DIGI. MUSIC NEWS (July 2, 2024), https://www.digitalmusicnews.com/2024/07/02/youtube-ai-protections/.

[235] The hurdles rightsholders face to identify infringers was the subject of a number of comments in the Office's Section 512 Study. *See* U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 164 (2020) ("SECTION 512 REPORT"), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[236] *See* Letter from OpenAI, Summary of *Ex Parte* Meeting on May 28, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 4 (June 4, 2024).

[237] *See, e.g.*, *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law, in response to QFRs from Sen. Tillis).

[238] H.R. REP. NO. 105-551, pt. 2, at 49 (1998).

[239] U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 13–21 (2020) ("SECTION 512 REPORT"), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[240] *See* 17 U.S.C. § 512(c)–(d).

specifically identified content upon notice."[241] Warner Music Group, by contrast, requested a framework that conditions safe harbor on platforms' not only taking content down, but ensuring that it stays down.[242]

The Office agrees that a notice and takedown system, combined with an appropriate safe harbor, could be an effective approach. Such a system need not duplicate every element of section 512. In our 2020 report on section 512, we observed that some of its provisions were not working as Congress had intended;[243] the experience gained in that context could inform the design of a safe harbor here. The Office recommends conditioning its availability on the OSP expeditiously removing the digital replicas when it has actual knowledge or has received a sufficiently reliable notification that the replica is infringing. We would not, however, import the DMCA's "red flag" knowledge standard, given its interpretive problems in the copyright context.[244]

e) Licensing and Assignment

A digital replica law should address whether rights can be transferred either by assignment or licensing.[245] While the Office did not receive many comments on these issues, they were discussed in congressional hearings, and we have considered that testimony as part of our analysis.[246]

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[241] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Graham Davies, President & Chief Executive Officer, DiMA, in response to QFRs from Sen. Thom Tillis).

[242] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis); *see also id.* (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, in response to QFRs from Sen. Thom Tillis).

[243] *See* SECTION 512 REPORT at 2–6.

[244] *See id.* at 113–20.

[245] The Office uses the terms assignment and licensing here in the same sense as in the copyright context. An assignment is an outright sale or transfer of all rights to another party, who then controls the use and distribution of those rights going forward. A license is a contractual permission, either exclusive or nonexclusive, for the use of a digital replica, which may include limitations such as the duration of the license and the uses licensed.

[246] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop.*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group); *id.* (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Dana Rao, Executive Vice President, General Counsel, & Chief Trust Officer, Adobe, Inc.); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Jeff Harleston, General Counsel & Executive Vice President, UMG).

Commenters in favor of assignability asserted that a digital replica right should be treated no differently than other intellectual property rights, such as copyrights, trademarks, and patents. UMG, for instance, stated that "it is important that . . . as with all forms of intellectual property, [a digital replica] right should be eligible for assignment or licensing either in whole or in part, so that enforcement may be delegated."[247] INTA likewise argued that digital replica "rights should be freely transferable, licensable and descendible property rights."[248]

Others raised concerns about the abuses that could occur if individuals were permitted to fully assign their rights, thereby permanently losing control over how their image is used. Professor Jennifer Rothman stated that "[a]llowing another person or entity to own a living human being's name, likeness, voice, or other indicia of a person's identity in perpetuity poses a significant threat to a person's fundamental rights and liberty, and should be prohibited."[249]

Most commenters favored the ability to license digital replica rights, but with different views on whether there should be any limitations and what the limitations should be. The MPA supported broad freedom to contract, including through licensing.[250] Professor Lisa Ramsey warned, however, that "[i]f digital replica right licenses are not limited in significant ways, this will undermine the objectives of [a digital replica law], which include preventing public deception and protecting the ability of people to control uses of their identity."[251] Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, argued that licensing guardrails are needed and described those negotiated by the guilds in 2023 as "model provisions for protection against abuse."[252]

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[247] UMG Initial Comments at 95.

[248] INTA Initial Comments at 11.

[249] Jennifer Rothman Initial Comments at 5; *see also The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law); *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary,* 118th Cong. (2024) (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis) ("[T] he importance of limiting licensing agreements in time subject to reasonable renewable contractual terms and conditions must be made clear and provided for. There should be no suggestion of or opportunity for licensed rights being given in perpetuity.").

[250] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA, in response to QFRs from Sen. Thom Tillis).

[251] *Id.* (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law, in response to QFRs from Sen. Thom Tillis); *id.* (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis).

[252] *See id.* (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, in response to QFRs from Sen. Thom Tillis).

Having considered these views, the Office recommends that individuals be able to license their images and voices for use in digital replicas but not to fully assign all rights. Licensing can facilitate the creation, distribution, and use of creative works, products, and services. It enables individuals who choose to do so to monetize and profit from their own personas.

At the same time, the Office acknowledges the potential for abuse. Given unequal contracting power or knowledge, particularly in the context of employment or talent contracts, individuals may lose control over their own personas for long periods of time or under broad terms, based on a decision made early in their career. Although assignments are common in other areas of intellectual property, digital replica rights are most appropriately viewed as a hybrid of privacy interests and a form of property. Unlike publicity rights, privacy rights, almost without exception, are waivable or licensable, but cannot be assigned outright.[253] Accordingly, we recommend a ban on outright assignments, and the inclusion of appropriate guardrails for licensing, such as limitations in duration and protection for minors.

(i) Duration

To avoid the effective result of an outright assignment, the Office suggests limiting licenses (other than those collectively bargained) to a relatively short term, such as five or ten years.[254] Parties that wish to continue the licensing arrangement could subsequently renegotiate it—allowing for consideration of changed circumstances, including bargaining power.

In adopting a time limitation, care should be taken not to block the ongoing use of content produced lawfully during the period of the license. In creative industries, an owner of digital replica rights is often not the owner of the copyrighted works that incorporate that replica. Similarly, the licensed digital replica may be incorporated into a product that the licensee has invested in with a reasonable expectation of continued distribution, such as packaging or labeling of consumer goods.[255]

Accordingly, we believe that the lapse of a digital replica license should bar only new uses after the expiration of the license period. In other words, if a singer consents to a record label using a digital replica of her voice for a period of years, when that period ends, the label would be prohibited from making new recordings using a digital replica (absent a subsequent

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[253] *See* 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 10:1, 10:2 (2d ed. 2024).

[254] Jennifer Rothman Initial Comments at 6; *see, e.g.*, CAL. LAB. CODE § 2855(a) (West 2024) ("a contract to render personal service, other than a contract of apprenticeship . . . may not be enforced against the employee beyond seven years from the commencement of service under it").

[255] For example, a company's trademark or product packaging may include the image of an individual, such as Gerber's use of an image of a baby on its baby food packaging, or General Mills' use of images of athletes on its Wheaties cereal boxes.

agreement). It could, however, continue distribution of recordings that were prepared during the contractual period.[256]

(ii) Informed Consent

Reflecting the personal aspects of a digital replica right and the risks of public confusion, the Office believes that a federal statute should ensure that individuals licensing their rights are doing so with adequate knowledge and full disclosure of the intended uses. SAG-AFTRA's collective bargaining agreement provides an example: it requires contract terms regarding digital replica rights to be "clear and conspicuous" and agreed to in a separate contract or rider, or in some other form that stands out prominently.[257] We also note that other federal and state laws offer examples of similar terms required in contracts where personal rights are at issue.[258]

(iii) Contracts with Minors

A number of commenters emphasized the unequal bargaining power of minors.[259] They proposed restrictions on such contracts, including requiring that licenses involving minors would automatically expire when they reach the age of 18, and be subject to procedural safeguards such as court review and holding income in a trust.[260] The Office agrees that such safeguards are advisable.

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[256] This approach is similar to how copyright law treats derivative works after termination of a grant, allowing those already prepared to continue to be utilized. *See* 17 U.S.C. §§ 203, 304(c), 304(d) (2022). As the Office has explained, a "derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." *See id.* § 203; *Notices of Termination*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/recordation/termination.html (last visited July 21, 2024).

[257] In its FAQs on digital replica rights, SAG-AFTRA explains that "this could mean [a digital replica provision] is in a separate rider or it could be in your contract as long as it clearly stands out, such as in a larger font, ALL CAPS or **bold**. . . . A bolded paragraph granting consent, alone, is not sufficient." *FAQs on AI*, SAG-AFTRA, https://www.sagaftra.org/files/sa_documents/AIFAQs.pdf (last visited July 21, 2024).

[258] For instance, the Age Discrimination in Employment Act requires a range of contractual safeguards for employees entering into certain severance and settlement agreements. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C.A.). Under this statute, agreements must explicitly advise the contracting party to consult an attorney before signing and must be written in plain, clear language that the contracting party can understand and not exaggerate any benefits.

[259] *See, e.g.*, Jennifer Rothman Initial Comments at 6 (stating that "[t]he most egregious licenses are likely to involve those with the least bargaining power," and highlighting children as a particularly vulnerable group currently lacking control over these rights).

[260] *E.g.*, *id.* For example, California requires that a court confirm entertainment or sports personal services contracts involving minors. CAL. FAM. CODE §§ 6750, 6751 (West 2024) ("A contract, otherwise valid, of a type described in

f) First Amendment Concerns

Digital replicas may be used in the context of constitutionally protected speech, including news reporting, artistic works, parody, and political opinion, in ways that may be unauthorized and objectionable. Federal legislation in this area will need to take into account the speech interests protected by the First Amendment.[261]

The First Amendment, however, does not protect all speech equally. While the Supreme Court has acknowledged that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee,"[262] it has permitted restrictions in cases of defamation,[263] fraud,[264] and commercially misleading speech[265]—each of which could be implicated by certain uses of unauthorized digital replicas.

In applying state rights of publicity, courts have acknowledged the tension between an individual's right to control their persona and a third party's free speech rights.[266] However, the outcomes in these cases are not consistent, leading to a lack of predictability. The application of First Amendment principles in right of publicity cases has been described by scholars as "a confusing morass of inconsistent, incomplete, or mutually exclusive approaches, tests, and

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Section 6750, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, *if the contract has been approved by the superior court* in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this state for the transaction of business." (emphasis added)).

[261] *See, e.g.*, *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA) ("[C]reation of a new right that would apply in expressive works raises serious First Amendment concerns and risks interfering with core creative freedoms.").

[262] *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

[263] *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). Defamation claims involving public officials and public figures must meet a higher standard, however. *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (defamatory statements about public officials are protected by the First Amendment unless they are made with actual malice); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (applying *Sullivan* to public figures).

[264] *Stevens*, 559 U.S. at 468 (citations omitted).

[265] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (false or misleading commercial speech falls outside of the First Amendment).

[266] *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (acknowledging the tension between a news broadcaster's First Amendment rights and a performer's right of publicity, holding that First and Fourteenth Amendments "do not immunize the media when they broadcast a performer's entire act without his consent . . . "); *see also Comedy II Productions, Inc. v. Gary Saderup*, 25 Cal.4th 387, 397 (Cal. 2001) ("The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.") (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring)).

standards"[267] or, more succinctly, a "dumpster fire."[268] At least five different balancing tests are in use by courts in different states across the country,[269] producing "conflicting outcomes in cases with similar facts."[270]

Our NOI questions on this issue elicited strong reactions from commenters. Many recognized that a federal law prohibiting unauthorized digital replicas must leave room for First Amendment-protected activity.[271] Commenters, however, disagreed on exactly how a statute should accommodate free speech rights. Some supported specific exceptions similar to those in some state right of publicity statutes, primarily for news reporting, various types of expressive works, and sports broadcasting, as well as parody, comment, and criticism.[272]

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[267] Gloria Franke, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 946 (2006).

[268] William McGeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 362 (2018).

[269] Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1346 (2009); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86, 127 n.167 (2020).

[270] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 145, 147 (2018).

[271] *See, e.g.*, Senator Marsha Blackburn Initial Comments at 3 ("This liability must be balanced, of course, by significant protections for any applicable First Amendment rights."); International Center for Law & Economics, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 26 (Oct. 30, 2023) ("If Congress chose to enact a federal 'right of privacy' statute, several key issues would need to be addressed regarding . . . First Amendment limitations."); Digital Media Licensing Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20–21 (Oct. 30, 2023) ("The right to create content for newsworthy and expressive purposes that are guaranteed under the First Amendment must be considered and balanced with the concerns of the public including actors and other public figures."); Internet Archive Initial Comments at 11–12 ("[G]ranting a new right of publicity along the lines of existing state laws . . . come with serious First Amendment concerns."); Pamela Samuelson et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 37 (Oct. 30, 2023) ("Pamela Samuelson Initial Comments") (advocating for "thoughtful self-regulation in [addressing the issue of deepfakes]," but expressing skepticism about the feasibility of imposing rules due to potential conflicts with the First Amendment).

[272] *See, e.g.*, Getty Images, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 28 (Oct. 30, 2023) ("Getty Images Initial Comments") ("[A]ny new federal right of publicity should be carefully considered so that constitutionally protected expression is not unduly limited. Accordingly, legislation should include explicit exemptions for First Amendment-protected expression."); MPA, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 33 (Dec. 6, 2023) ("MPA Reply Comments") ("At minimum, a bill establishing a federal digital-replica right must include exemptions where the use is in a work of political, public interest, educational, or newsworthy value, including comment, criticism, or parody, or similar works, such as documentaries, docudramas, or historical or biographical works, or a representation of an individual as himself or herself, regardless of the degree of fictionalization, and for uses that are de minimis or incidental."); INTA Initial Comments at 11 (proposing exceptions for "a. News, public affairs and sports reporting or commentary; b. Dramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual; c. Works that parody, criticize, satirize or comment upon the individual; d. Advertising and promotion for (a)-(c); and (e). Any other noncommercial use, including, but not limited to, education and research").

Protection for expressive works was a principal area of focus.[273] The MPA offered several examples of expressive uses as deserving of protection, including documentaries using digital replicas "to re-create scenes from history where no actual footage exists" and late-night comedians "using digital replicas to poke fun at celebrities, politicians, athletes."[274] It asserted that categorical exceptions "are crucial to giving filmmakers clarity so they know what uses are allowed, or not allowed" before they undertake expensive projects, and proposed a list of exceptions, some subject to the caveat that the use was not intended to and did not create a false impression of authenticity.[275] Donaldson Callif Perez LLP stated that "the implementation of a right that does not explicitly exempt expressive works would have immediate negative consequences."[276]

Other commenters argued that categorical exceptions are unnecessary and could undermine effective protection. RIAA asserted that "categorical exclusions for certain speech-oriented uses are not constitutionally required and, in fact, risk overprotection of speech interests at the expense of important publicity interests."[277] Instead, "the First Amendment calls for a case-specific balancing of the right of publicity against whatever First Amendment

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[273] *See* MPA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 71 (Oct. 30, 2023) ("MPA Initial Comments") ("The right of publicity does not—and, to be consistent with the First Amendment, may not—regulate uses of or references to individuals' [name, image and likeness] in 'expressive works,' such as books, plays, news articles and broadcasts, songs, and movies and television programs. Such expressive works are non-commercial speech fully protected by the First Amendment, regardless of whether those works are sold for a profit."); David Newhoff Initial Comments at 5 ("If ROP law is expanded, it should . . . not restrict expressive uses of AI-generated likeness for purposes (e.g., biographical films) that fall within the scope of protected speech.").

[274] MPA Reply Comments at 32.

[275] Letter from MPA, Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 4 (May 20, 2024) ("Use of a digital replica would not constitute a violation where: 1. the digital replica is used to depict the individual in a documentary, docudrama, or historical or biographical work, or any other representation of the individual as such individual, regardless of the degree of fictionalization, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated; 2. the digital replica is used for purposes of a news, public affairs, or sports broadcast or report, or for a purpose that has political, public interest, educational, or newsworthy value, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated; 3. the use of the digital replica is for purposes of comment, criticism, scholarship, satire, or parody; 4. the use of the digital replica is de minimis, incidental, or fleeting; 5. the use of the digital replica is addressed by a collective bargaining agreement; or 6. the digital replica is used in an advertisement or commercial announcement for a work that includes the use of the digital replica as described in [1 through 5].").

[276] Donaldson Callif Perez, LLP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10 (Oct. 30, 2023).

[277] *E.g.*, Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (Apr. 29, 2024).

interests may be presented in the given case."[278] Professor Jennifer Rothman suggested that a new law be specific regarding uses that would not be Constitutionally privileged: "Current common areas of agreement are that unauthorized uses of a person's identity are not protected by the First Amendment if a person's 'entire act' or performance is used, or the uses are in commercial products or advertising not related to an authorized underlying work."[279]

Each of these approaches has advantages and disadvantages. Enumerated exceptions provide greater certainty: users can more easily determine from the face of the statute whether the use they are considering is lawful. In addition, the existing bodies of state precedent are available to be drawn upon for purposes of interpretation. But such exceptions may be both over- and under-inclusive depending on the facts.[280] For example, an exception for expressive works, if not appropriately cabined, could render the law toothless against common uses of digital replicas—such as voice clones in music or deepfake pornography. Indeed, many of the problematic uses reported have been in expressive or political contexts, such as the "Fake Drake" song and the President Biden robocalls described above.[281]

The Office stresses the importance of explicitly addressing First Amendment concerns. While acknowledging the benefits of predictability, we believe that in light of the unique and evolving nature of the threat to an individual's identity and reputation, a balancing framework is preferable. Although the potential overbreadth of categorical exceptions can be cabined by conditions like those proposed by MPA, this introduces a high level of complexity. In addition, we note that in today's online environment, traditional categories such as "news" or "public affairs" are often difficult to define.[282] The result may be to exempt conduct that legislators intended to prohibit.

In our view, a balancing framework permits greater flexibility to assess whether a particular unauthorized use is protected by the First Amendment. Rather than checking a box marked "news" or "musical work," courts can assess the full range of factors relevant to the First Amendment analysis. These could include the purpose of the use, including whether it is

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[278] A2IM-Recording Academy-RIAA Joint Reply Comments at 16–17; *see also id.* at 17 ("[W]e disagree with those commenters who argue that any federal right of an individual to control uses of their voice or likeness must contain express, categorical exclusions for all uses of a certain type, such as unauthorized uses of an individual's voice or likeness in any 'expressive works,' regardless of the particular facts and circumstances of the use.").

[279] Jennifer Rothman Initial Comments at 6.

[280] *See* Joshua Matz, RIGHT OF PUBLICITY AND THE FIRST AMENDMENT (2024), humanartistrycampaign.com/rop-first-amendment; Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office (Apr. 29, 2024) (endorsing Matz's view).

[281] *See supra* Section I.

[282] Indeed, the meanings of categories like "news" or "public affairs" are themselves contested. *See* Richard L. Hansen, *From Bloggers in Pajamas to The Gateway Pundit: How Government Entities Do and Should Identify Professional Journalists for Access and Protection* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4776774; Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91 (2018).

commercial; its expressive or political nature; the relevance of the digital replica to the purpose of the use; whether the use is intentionally deceptive; whether the replica was labeled; the extent of the harm caused; and the good faith of the user.[283] We believe that this approach would leave room for the types of expressive works that many commenters identified as a priority.[284]

g) Remedies

A federal right must offer effective remedies through which individuals can seek redress. Several commenters proposed a range of appropriate remedies, including monetary and injunctive relief.[285]

The Office agrees that a digital replica law should provide both monetary and injunctive relief. Damages should include compensation for loss of income, damage to reputation, or emotional distress. As INTA commented, "[t]he commercial value of a persona may have an impact on any damage amount claimed in a dispute."[286] Injunctive relief is essential to prevent ongoing unauthorized use of an individual's likeness or to prevent future violations.

We note that some individuals may have difficulty proving actual damages, particularly market-based injuries, in court. To ensure that protection is both accessible and effective for all, the Office recommends inclusion of special damages enabling recovery by those who may not be able to show economic harm or afford the cost of an attorney.[287] As in the copyright system,

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[283] *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 8:23, 8:71–3 (2d ed. 2024); A2IM-Recording Academy-RIAA Joint Reply Comments at 16–17 ("[T]he First Amendment calls for a case-specific balancing of the right of publicity against whatever First Amendment interests may be presented in the given case.").

[284] Importantly, application of these factors should permit a movie to use unauthorized digital replicas of deceased individuals where those individuals are portrayed in objectively unrealistic, fictionalized contexts. As an example, a remake of the movie *Bill & Ted's Excellent Adventure*, in which the protagonists use a time machine to interact with and transport historical figures (portrayed by digital replicas) into modern times, should not require authorization. *See Synopsis, Bill & Ted's Excellent Adventure*, IMDB, https://www.imdb.com/title/tt0096928/plotsummary/#synopsis (last visited July 21, 2024).

[285] *See, e.g.*, Law Office of Seth Polansky Initial Comments at 37 ("Enforcement mechanisms would also need to be specified, through both civil remedies and criminal penalties. Given the rapid speed at which AI-generated material can be created and distributed, it is crucial for enforcement measures to be timely and effective."); SAG-AFTRA Initial Comments at 7–8 ("Monetary relief . . . might include lost wages and reputational damage. Injunctive relief must also be available, particularly in the context of AI-generated content that might impact one's reputation (such as AI-generated voice or likeness used to sell shoddy merchandise or questionable services).").

[286] INTA Initial Comments at 11.

[287] Jennifer Rothman Initial Comments at 5 ("Any legislation should include statutory damages to protect people who may not otherwise be able to establish market-based injuries. A number of states have included statutory damages in publicity legislation with the express purpose of protecting ordinary people.").

without the potential for statutory damages or attorney's fee awards to the prevailing party, litigation costs may be a barrier to the filing of meritorious claims.

Several commenters urged the inclusion of criminal penalties,[288] particularly in connection with nonconsensual intimate material.[289] Criminal liability would recognize the seriousness of the harm caused by such actions and the need for accountability; appropriate penalties could deter bad actors and provide justice for victims. The Office agrees that there are specific unauthorized uses that should incur criminal liability, including sexual deepfakes and other particularly harmful or abusive imagery. We do not take a position, however, on whether criminal penalties should be included in a federal digital replica right as opposed to stand-alone criminal legislation, such as the bills pending in this Congress.[290]

h) Preemption

An overarching question is whether, and to what extent, a federal digital replica law should preempt state laws.[291] Commenters were divided on this issue, with some urging preemption and others seeking to preserve state flexibility.

The benefit of preempting state laws as they pertain to digital replicas would be to establish a uniform nationwide standard, entirely replacing the patchwork of existing coverage. Commenters who supported this approach asserted that it would provide clarity for creators, businesses, and consumers alike.[292] DiMA, for example, stated that "Congress should ensure that content related matters have consistent standards by preempting state and common laws where doing so would ensure consistency in application and reduce operational challenges and improve the customer experience."[293] MPA also urged preemption to "provide national uniformity."[294]

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[288] *See, e.g.*, NPR Initial Comments at 10 ("Criminal penalties may be necessary."); Walker Wambsganss et al. Initial Comments at 5.

[289] *E.g.*, Anonymous AI Technical Writer, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 17 (Dec. 6, 2023) ("At minimum the right to not have one's face used in generative AI, with criminal penalties for nonconsensual pornography and child pornography generated with AI.").

[290] For example, the TAKE IT DOWN Act, introduced in the Senate in June of 2024, would criminalize publishing or threatening to publish non-consensual intimate imagery. TAKE IT DOWN Act of 2024, S.4569, 118th Cong. (2024).

[291] *See generally* CONG. RSCH. SERV., ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11052.

[292] *See, e.g.*, DiMA Initial Comments at 5; INTA Initial Comments at 9; MPA Reply Comments at 34; BLIP Initial Comments at 32.

[293] DiMA Initial Comments at 5.

[294] MPA Reply Comments at 34.

Commenters opposing preemption stressed the desirability of preserving the extensive body of state law precedent developed over many decades.[295] SONA, Black Music Artists Coalition, and MAC stated that "there is nothing that should warrant preemption of laws that have been thoroughly considered and vetted in our state."[296]

Many proposed that federal law should set a "floor," permitting states to offer broader protection than federal law and displacing only those state laws that fell beneath the federal standard.[297] In testimony before Congress, Warner Music Group advocated for this approach.[298] ImageRights International also urged that the federal right "should set a baseline (floor) for protections, allowing states to provide additional protections if they choose."[299] Dina LaPolt, an entertainment lawyer, stated, "It is important that any potential federal right protecting voice and likeness set a 'floor' of fundamental rights such that states can be individualized in their approach to cater to the potentially more stringent wishes of their residents."[300]

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[295] *See, e.g.*, SAG-AFTRA Initial Comments at 8 (A "federal right should not preempt state right of publicity laws unless it provides individuals greater protections over their name, image, voice, or likeness than existing state law. Further, it is critical that any federal law relating to AI-generated image and/or voice not supersede, whether intentional or inadvertent, existing state law relating to sexually explicit digital replicas."); A2IM-Recording Academy-RIAA Joint Reply Comments at 18 ("[A] federal right should not preempt state law to deprive individuals of rights that have been carefully developed over decades of legislation and litigation."); SONA-MAC-BMAC Joint Initial Comments at 10–11.

[296] SONA-MAC-BMAC Joint Initial Comments at 10–11.

[297] *See, e.g.*, SAG-AFTRA Initial Comments at 8 ("[A]ny federal law should set a floor for state law protections, allowing states to provide greater protection to individuals residing in their state."); Dina LaPolt Initial Comments at 10. Commenters did not use a uniform term for this form of preemption. Some cases and scholars use the term "partial preemption" to describe statutes that create a regulatory floor that state laws can exceed.

[298] *See The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis) ("[L]imited preemption would be appropriate to the extent of the scope of a new federal right. But state laws that provide enhanced protections and that are supported by decades of helpful jurisprudence regrading protection of voice and likeness should be allowed to stand to the extent they do not conflict with federal law.").

[299] ImageRights International, Inc., Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Dec. 6, 2023).

[300] Dina LaPolt Initial Comments at 10. To the extent that states have developed diverse approaches, this may reflect differences in state industries and interests. For example, California, the domicile of many celebrities, has a retroactive postmortem right that arose in large part due to a ruling denying the descendability of Marilyn Monroe's right of publicity. *See* Laurie Henderson, *Protecting A Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor*, 3 J. BUS. ENTREPRENEURSHIP & L. 165, 171, 177–83 (2009). Similarly, some have observed that Tennessee's potentially perpetual right of publicity may be traceable to the influence of native Tennessean Elvis Presley. Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 699 (2011). This is not to say that state variations in right of publicity laws always neatly track local or regional interests. JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR NEW YORK?, 592–93 (2018) (noting variation in postmortem rights in the tri-state area).

Alternatively, a non-preemptive law would leave existing state protections in place, regardless of whether those state protections exceeded or fell short of the federal protection. This approach would be similar to the Lanham Act, which leaves state trademark and unfair competition laws coexisting with federal protections.[301]

Although there are reasonable arguments for each approach, the Office recommends against preempting state laws for several reasons. Most importantly, as commenters pointed out, extensive state law in this area has developed over many decades, creating settled expectations.[302] Full preemption would reduce existing protections for individuals in states that currently provide broader rights, causing discrepancies between protection for digital replicas and other imitations of their personas. For example, in a state that provides for postmortem rights of publicity, a preemptive federal law without postmortem rights would result in a deceased individual's beneficiaries having longer-lasting rights in the non-digital context. And there may be advantages in preserving policy flexibility at the state level to respond to rapidly changing conditions, without the need to achieve consensus at the federal level.

Moreover, a non-preemptive federal right can achieve some of the benefits of uniformity, but without imposing a one-size-fits-all solution on all states. Although it would not fully harmonize the varied state approaches, it would fill in the gaps by ensuring the availability of effective national protection against unauthorized uses of digital replicas. Everyone, whatever the status of their own state's law, would have recourse to the same federal claim.

Finally, a non-preemptive law has the advantage of greater clarity. Either full or partial preemption raises the specter of extensive litigation over its scope and the question of which state-level protections remain available. This uncertainty could be minimized by specifying that the federal digital replica law supplements rather than preempts a state's protections.

4. Relationship to Section 114(b) of the Copyright Act

The Office's NOI inquired about the relationship between section 114(b) of the Copyright Act and state law protections against unauthorized digital replicas of voices in sound recordings.[303] Section 114(b) states that the copyright owner's reproduction and derivative work rights in a sound recording are limited to uses that appropriate "the actual sounds fixed in the recording," and "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or

[301] *See* J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 1:18, 22:1 (5th ed. 2024).

[302] *See supra* notes 295–96.

[303] NOI at 59948.

simulate those in the copyrighted sound recording."[304] The provision was intended to clarify that "mere imitation" of a copyrighted sound recording does not constitute infringement.[305]

Because section 114(b) permits imitation or simulation of sounds (including an individual's voice) in the context of a sound recording copyright, some have questioned whether it might preempt state laws that prohibit an unauthorized replica of someone's voice used in a sound recording. Several commenters noted this issue, with one stating that "legislative attention might be necessary to address potential conflicts and gaps in the law" to clarify these relationships.[306]

Only a few courts have analyzed whether section 114(b) preempts a state right of publicity claim based on the imitation of an individual's voice, with varying results. While the Ninth Circuit has twice rejected preemption in cases involving claims for voice misappropriation under California law,[307] a federal court in Michigan concluded a state right of publicity claim was preempted.[308] The uncertainty regarding section 114(b)'s impact appears to be having real-world consequences as state legislatures debate and enact laws with provisions on digital replicas. Presumably to avoid possible inconsistencies with the Copyright Act, both New York and Louisiana included in their recent laws language which mirrors section 114(b) and limits the scope of conduct prohibited by these state laws. These are right of publicity laws that encompass digital replicas in certain instances and not specifically "digital replica laws." Louisiana's statute, for example, exempts from liability "the making or duplication of another recording that consists entirely of an independent fixation of other sounds, even though the

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[304] 17 U.S.C. § 114(b).

[305] H.R. REP. NO. 94-1476, at 106 (1976).

[306] *See, e.g.*, Rightsify Group LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 13 (Oct. 30, 2023); *see also* UMG Initial Comments at 98 ("[W]hile UMG maintains that rights of publicity as applied to AI-generated soundalikes are not preempted, the potential for disagreement further counsels in favor of a federal right of publicity that will eliminate debate on this issue."); A2IM and RIAA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 43–44 (Oct. 30, 2023) ("A2IM-RIAA Joint Initial Comments") ("Case law concerning copyright preemption of rights of publicity is still developing, and we are not aware of any cases addressing that issue in the specific context of AI. Whether courts properly recognize the distinction between Section 114(b) and rights of publicity . . . with respect to generative AI is an issue that warrants attention. Legislative clarification is not clearly necessary but may prove to be helpful.").

[307] *Midler*, 849 F.2d at 462 ("Midler does not seek damages for Ford's use of [a licensed song], and thus her claim is not preempted by federal copyright law. Copyright protects 'original works of authorship fixed in any tangible medium of expression.' A voice is not copyrightable. The sounds are not 'fixed.'"); *Waits*, 978 F.2d at 1100, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (finding that the elements of Tom Waits's voice misappropriation claim "are 'different in kind' from those in a copyright infringement case challenging the unauthorized use of a song or recording," and that the claim is not preempted by copyright).

[308] *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 764 (E.D. Mich. 2008) (finding that the Copyright Act preempted a right of publicity claim based on use of a band's "distinctive sound" in a videogame, where the "distinctive sound" at issue was that of a copyrighted song rather than the band more generally).

sounds imitate or simulate the voice of the professional performer," and New York's law uses similar language.[309]

In the Office's view, these concerns are misplaced, and section 114(b) does not preempt state laws prohibiting unauthorized voice replicas. The Copyright Act does not preempt state laws with respect to "subject matter that does not come within the subject matter of copyright" or "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright."[310] The legislative history of the Act's preemption provision explains that "[t]he evolving common law rights of 'privacy,' 'publicity,' and trade secrets . . . remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement."[311]

The Office believes that digital replica rights in an individual's voice satisfy this test. An individual's voice, unlike a particular sound recording that may capture it, "does not come within the subject matter of copyright."[312] It is the product of biology, nature, environment, and, in the case of performers, training, skill, and talent. It is not an "original work[] of authorship,"[313] or "fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated."[314]

Copyright and digital replica rights serve different policy goals; they should not be conflated. Section 114(b) shields vocal imitations and other soundalike recordings against claims of copyright infringement. But nothing indicates that Congress intended for this limitation on copyright to deprive individuals of rights in their unique voices, whether under state right of publicity laws or a new federal statute.[315] To avoid unnecessary confusion or carve outs like the limitations in the New York and Louisiana laws discussed above, the Office recommends that Congress clarify in express terms that section 114(b) does not preempt state laws or affect a new federal right protecting an individual's voice.

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[309] *See* LA. STAT. ANN. § 51:470.2(4) (2024); N.Y. CIV. RIGHTS LAW § 50-f(1)(c) (McKinney 2024) ("A digital replica does not include . . . the making or duplication of another recording that consists entirely of the independent fixation of other sounds, even if such sounds imitate or simulate the voice of the individual.").

[310] 17 U.S.C. § 301(b)(1), (3).

[311] H.R. REP. NO. 94-1476, at 132 (1976).

[312] *See* 17 U.S.C. § 301(b)(1).

[313] *See id.* § 102(a). *Cf.* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.7 (3d Ed. 2021) ("Because human authorship is required for copyright protection, the U.S. Copyright Office will not register naturally occurring objects or materials that are discovered in nature.").

[314] 17 U.S.C. § 102(a).

[315] *See* H.R. REP. NO. 94-1476, at 132 (1976).

III. PROTECTION OF ARTISTIC STYLE

The Office received many comments seeking protection against AI "outputs that imitate the artistic style of a human creator."[316] Commenters voiced concern over the ability of an AI system, in response to a text prompt asking for an output "in the style of artist X," to quickly produce a virtually unlimited supply of material evoking the work of a particular author, visual artist, or musician.[317] They asserted that these outputs can harm, and in some cases have already harmed, the market for that creator's works.[318]

For example, the Center for AI and Digital Policy warned that "if AI can replicate [artists'] signature style en masse, it might undermine the market value of their creations, unjustly depriving them of economic benefits."[319] The Authors Guild described "authors, who, after years of developing their unique voice and style, are finding AI appropriating a part of their personality and mimicries of their work being sold in the market."[320] In addition, commenters argued that, while in the past the impact of human imitators was limited by the demands of time and labor, AI systems present a challenge exponentially greater given their speed and scale.[321] An anonymous artist offered the following example:

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[316] *See, e.g.*, The Authors Guild, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10–12 (Oct. 30, 2023) ("The Authors Guild Initial Comments") ("[W]e will need to find a way to prevent authors' body of work or recognizable style from being exploited by others without permission.").

[317] Some commenters described similar results where an image prompt uses copies of the artist's work. *E.g.*, Katherine Lee et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 44–46 n.229 (Oct. 29, 2023) (providing as a hypothetical text-to-image prompt, "a big dog facing left wearing a spacesuit in a bleak lunar landscape with the earth rising in the background as an oil painting in the style of Paul Cezanne high-resolution aesthetic trending on artstation"); *see also id.* at 20 n.66, 46 (describing image-to-image prompts).

[318] *See, e.g.*, *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Karla Ortiz, Concept Artist, Illustrator, and Fine Artist) ("Artists and creators who have spent a lifetime honing and refining a skill can now have facsimiles of their hard work reproduced in an instant by a Generative AI model that has been trained on their work . . . .").

[319] Center for AI and Digital Policy, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15–16 (Oct. 30, 2023).

[320] The Authors Guild, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) ("The Authors Guild Initial Comments") ("Suddenly, we see people using generative AI to generate texts in the style of authors. . . . [W]e have already seen someone write the last two novels in George R.R. Martin's *A Song of Ice and Fire (Game of Thrones)* series.").

[321] *See, e.g.*, Letter from The Authors Guild, Summary of *Ex Parte* Meeting on May 6, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 10, 2024) (noting "that the need for [style] protection has increased in light of the ease with which materials lacking proper attribution can be created and disseminated by AI, as well as the recent explosion of false attribution for AI generated works").

> [A]s of November 29th, 2023, the top result when googling American artist Kelly McKernan is an AI-generated imitation of her style. Not only does this demonstrate the ability of AI forgeries to quickly propagate and pollute search engines and the wider internet but this digital impersonation has a chilling effect on artists' agency and ability to control their online identity. Artists are essentially competing with a distorted version of themselves.[322]

The Office acknowledges the seriousness of these concerns and believes that appropriate remedies should be available for this type of harm.

Copyright law's application in this area is limited, as it does not protect artistic style as a separate element of a work.[323] As noted by several commenters, copyright protection for style would be inconsistent with section 102(b)'s idea/expression dichotomy.[324] Moreover, in most cases the elements of an artist's style cannot easily be delineated and defined separately from a particular underlying work.[325] Google and EFF both stressed that, as a policy matter, stylistic

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[322] Anonymous Artist, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Dec. 5, 2023).

[323] 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery."); *see also Douglas v. Osteen*, 317 F. App'x. 97, 99 (3d Cir. 2009) ("[T]he use of a particular writing style or literary method is not protected by the Copyright Act."); *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 11 (D.D.C. 2004) ("While similar writing styles may contribute to similarity between works' total concept and feel, a particular writing style or method of expression standing alone is not protected by the Copyright Act."); *Tangle Inc. v. Aritzia, Inc.*, No. 23-cv-1196, 2023 U.S. Dist. LEXIS 187348, at *7 (N.D. Cal.) ("Style, no matter how creative, is an idea, and is not protectible by copyright."). *But see* Benjamin L.W. Sobel, *Elements of Style: Copyright, Similarity, and Generative AI*, 38.1 HARV. J.L. & TECH. (forthcoming 2024), https://www.bensobel.org/files/articles/Sobel_Elements-of-Style_Public-Draft-May-18-2024.pdf ("[A]n honest application of copyright law requires us to acknowledge that some of what we call style is copyrightable some of the time, and that in some legal contexts courts regularly protect emergent copyright interests that span multiple works.").

[324] *See, e.g.*, Pamela Samuelson Initial Comments at 36–37 ("[A]ny concept of style that can only be identified by considering several works collectively is far too abstract to merit copyright protection consistent with the idea/expression distinction and Section 102(b). Even if proposed copyright protection for 'style' were focused on stylistic features of individual works, it is difficult to see how copyright protection for style or artistic technique could be reconciled with the idea/expression distinction and Section 102(b)."); MPA Initial Comments at 74 ("However, the law does not grant individuals exclusive rights over artistic style. . . . This conclusion flows ineluctably from one of copyright's most fundamental precepts: that it protects expression, not ideas."). *Cf.* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[325] *See* 2 PATRY ON COPYRIGHT § 4:14 (2024) ("If an . . . artist claimed broad protection for a style not associated with a particular work . . . it would be difficult, if not impossible, to determine the scope of protection.").

aspects of expressive content should remain freely available for later creators to develop and build on.[326]

The Copyright Act may, however, provide a remedy where the output of an "in the style of" request ends up replicating not just the artist's style but protectible elements of a particular work. Additionally, as future Parts of this Report will discuss, there may be situations where the use of an artist's own works to train AI systems to produce material imitating their style can support an infringement claim.

Numerous commenters pointed out that meaningful protections against imitations of style may be found in other legal frameworks,[327] including the Lanham Act's prohibitions on passing off and unfair competition.[328] In its comments, the FTC stated:

> [M]imicking the creator's writing style . . . may also constitute an unfair method of competition or an unfair or deceptive practice, especially when the copyright violation deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers.[329]

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[326] *See* EFF Initial Comments at 7 ("A greater degree of restriction on the public's permissible range of speech, particularly one as elusive as a 'style,' would undermine the cultural advancement at the core of copyright's goals."); Google LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023) ("[A] law protective of artistic style would inevitably inhibit creativity and impoverish the public domain, which is the cultural commons from which all artists can freely take inspiration.").

[327] *See, e.g.*, A2IM-RIAA Joint Initial Comments at 41 ("To the extent that AI systems are based on, or derive their value from, a particular artist's identity, that artist should be protected by laws governing the use of an individual's brand or identity (such as the individual's voice or likeness), including the Lanham Act and laws regarding rights of publicity and unfair competition."); SAG-AFTRA Initial Comments at 8 ("To the extent an AI system is based on, or derives value from, the artist's brand or identity, that artist should have legal recourse. Laws such as the right of publicity or Lanham Act that protect an individual's persona may be implicated, including when an AI program generates output by using the name of a specific artist as a prompt."); Pamela Samuelson Initial Comments at 37 ("The tendency of users of text-to-image generators to invoke the names of living artists in prompts has caused considerable consternation . . . it can occasionally result in the names of particular artists being publicly associated with works they did not author, to an extent that dwarfs their own substantial artistic contributions . . . . This seems like harm that trademark law and right of publicity could address more easily than copyright law.").

[328] *See* Andrew J. Noreuil, *Nice Tie: Trade Dress Protection for Visual Artistic Style When Competitors Offer Artist-Inspired Products*, 67 FORDHAM L. REV. 3403, 3427 (1999) (discussing *Walt Disney Co. v. Goodtimes Home Video Corp.*, 830 F. Supp. 762 (S.D.N.Y. 1993)).

[329] FTC Initial Comments at 5–6. Adobe has proposed that Congress enact legislation, titled the Federal Anti-Impersonation Right (FAIR) Act, which would provide a right of action to artists whose unique personal style or likeness is intentionally imitated using AI tools for commercial gain. Adobe Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8 (Oct. 30, 2023).

Although state right of publicity statutes do not explicitly refer to style, where a particular style is closely identified with an individual performer, it may be protected.[330] Protection may also be available under the common law.[331] Although the law in this area is not fully developed, that may be because the means of easy and near-perfect stylistic impersonation have not been widely available until recently,[332] and the advent of generative AI may result in an increase in such claims. Meanwhile, some AI developers have reportedly placed guardrails in their systems blocking requests to generate images in the style of living artists.[333]

In sum, there are several sources of protection under existing laws that may be effective against unfair or deceptive copying of artistic style. Given these resources, as well as the policy reasons not to extend property-like rights to style in itself, the Office does not recommend including style as protected subject matter under a federal digital replica law at this time.[334] If existing protections prove inadequate, this conclusion may be revisited.

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[330] *See* 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 8:110, 4:75 (2d. ed. 2024); *see also Muzikowski v. Paramount Pictures Corp.*, No. 01-cv-6721, 2003 U.S. Dist. LEXIS 21766, at *17–18 (N.D. Ill. Dec. 2, 2003) (holding that the "Illinois Right of Publicity Act defines a person's 'identity' broadly . . . . While the term 'persona' is not contained in the [statute's] list of examples [of attributes that serve to identify an individual], the breadth of the . . . statute supports the conclusion that Illinois courts would use an expansive approach in determining what kinds of attributes are protected under the statute."). *But see Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 452 (S.D.N.Y. 2008) (holding that the New York right of publicity statute should be "strictly construed and is not to be applied so as to prohibit the portrayal of an individual's personality or style of performance").

[331] The Ninth Circuit has recognized athletic play style as an element of "likeness" under California common law, *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1272 (9th Cir. 2013), and the Northern District of Texas has recognized "performing style" as a protectible aspect of an individual's persona under Texas common law, *Henley v. Dillard Dep't Stores*, 46 F.Supp. 2d 587, 591 (N.D. Tex. 1999) (citing *Elvis Presley Enters. V. Capece*, 950 F.Supp. 783, 801 (S.D. Tex. 1996)).

[332] *See, e.g.*, Authors Guild Initial Comments at 10.

[333] *See Index: Creative Control*, OPENAI, https://openai.com/index/dall-e-3/ ("DALL·E 3 is designed to decline requests that ask for an image in the style of a living artist.") (last visited July 21, 2024); *Frequently Asked Questions*, COPILOT, https://www.bing.com/images/create/help ("We allow living artists, celebrities, and organizations to make requests to limit the creation of images associated with their names and brands.") (last visited July 21, 2024).

[334] In addition to artistic style, some commenters identified other subject matter—specifically name or attribution—they would like to have covered by a digital replica law. They seek to bar the unauthorized use of an individual's name on or in connection with AI-generated material or creative works in general—a different type of harm from the use of realistic image or voice replicas produced by AI, addressed in this Report. The Authors Guild would prohibit unauthorized use of an author's name in connection with AI-generated material. Letter from Authors Guild, Summary of *Ex Parte* Meeting on May 6, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 10, 2024). This would prevent unauthorized users from labeling such material with the name of the author the AI system was prompted to imitate. The Directors Guild of America would add moral rights of attribution and integrity, *see supra* note 41, in order to prevent the "harm to a Director's reputation when his/her creative work is altered without their involvement and when their name is falsely attributed to, or deleted from, a creative work." Letter from

IV. CONCLUSION

The Copyright Office agrees with the numerous commenters that have asserted an urgent need for new protection at the federal level. The widespread availability of generative AI tools that make it easy to create digital replicas of individuals' images and voices has highlighted gaps in existing laws and raised concerns about the harms that can be inflicted by unauthorized uses.

We recommend that Congress establish a federal right that protects all individuals during their lifetimes from the knowing distribution of unauthorized digital replicas. The right should be licensable, subject to guardrails, but not assignable, with effective remedies including monetary damages and injunctive relief. Traditional rules of secondary liability should apply, but with an appropriately conditioned safe harbor for OSPs. The law should contain explicit First Amendment accommodations. Finally, in recognition of well-developed state rights of publicity, we recommend against full preemption of state laws.

The Office remains available as a resource to Congress, the courts, and the executive branch in considering the recommendations in this Report and future developments.

Directors Guild, Summary of *Ex Parte* Meetings on May 22 and May 29, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 1–2 (June 4, 2024). In this area, too, it is important to note that several bodies of existing law protect against the unauthorized and confusing use of an individual's name. *See, e.g.*, CAL. CIV. CODE § 3344 (West 2024) (protecting "name, voice, signature, photograph, or likeness"); FLA. STAT. § 540.08 (2024) (protecting "name, portrait, photograph, or other likeness"); VA. CODE ANN. § 8.01-40 (2024) (protecting "name, portrait, or picture"); 15 U.S.C. § 1125 (providing a cause of action for using, among other things, a name in connection with goods and services that is likely to cause confusion).

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Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
July 31, 2024

To Follow

Further Parts of the U.S. Copyright Office's Copyright and Artificial Intelligence Report will be published in 2024. Visit www.copyright.gov/AI for more information and to sign up for updates.

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ABOUT THIS REPORT

This Report by the U.S. Copyright Office addresses the legal and policy issues related to artificial intelligence ("AI") and copyright, as outlined in the Office's August 2023 Notice of Inquiry ("NOI").

The Report will be published in several Parts, each one addressing a different topic. This Part addresses the copyrightability of works created using generative AI. The first Part, published in 2024, addresses the topic of digital replicas—the use of digital technology to realistically replicate an individual's voice or appearance. A subsequent part will turn to the training of AI models on copyrighted works, licensing considerations, and allocation of any liability. To learn more, visit www.copyright.gov/ai.

ABOUT THE U.S. COPYRIGHT OFFICE

The U.S. Copyright Office is the federal agency charged by statute with the administration of U.S. copyright law. The Register of Copyrights advises Congress, provides information and assistance to courts and executive branch agencies, and conducts studies on national and international issues relating to copyright, other matters arising under Title 17, and related matters. The Copyright Office is housed in the Library of Congress. Its mission is to promote "creativity and free expression by administering the nation's copyright laws and by providing impartial, expert advice on copyright law and policy for the benefit of all." For more information, visit www.copyright.gov.

PREFACE

In early 2023, the U.S. Copyright Office announced a broad initiative to explore the intersection of copyright and artificial intelligence.

In March of that year, the Office released a policy statement with registration guidance for works incorporating AI-generated content. Over the spring and summer, we hosted a series of online listening sessions, presented educational webinars, and engaged with numerous stakeholders to enhance our understanding of the technology and how it is used, the copyright implications, and the potential impact on businesses and individuals.

These activities culminated in an August 2023 Notice of Inquiry, formally seeking public input on the full range of copyright issues that had been raised. In response, we received more than 10,000 comments representing a broad range of perspectives, including from authors and composers, performers and artists, publishers and producers, lawyers and academics, technology companies, libraries, sports leagues, trade groups and public interest organizations, and even a class of middle school students. Comments came from all 50 states and from 67 countries. That valuable and extensive input, supplemented by additional Office research and information received from other agencies, forms the basis for the discussion and recommendations in this Report.

UNITED STATES COPYRIGHT OFFICE

Copyright and Artificial Intelligence
Part 2: Copyrightability

A REPORT OF THE REGISTER OF COPYRIGHTS

JANUARY 2025



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EXECUTIVE SUMMARY

This second Part of the Copyright Office's Report on Copyright and Artificial Intelligence ("AI") addresses the copyrightability of outputs generated by AI systems. It analyzes the type and level of human contribution sufficient to bring these outputs within the scope of copyright protection in the United States.

Of the more than 10,000 comments the Office received in response to its Notice of Inquiry ("NOI"), approximately half addressed copyrightability. The vast majority of commenters agreed that existing law is adequate in this area and that material generated wholly by AI is not copyrightable.

Commenters differed, however, as to protection for generative AI outputs that involve some form of human contribution. They expressed divergent views on what types and amounts of contribution could constitute authorship under existing law. Many also stressed the desirability of greater clarity in this area, including with respect to the use of AI as a tool in the creative process.

As a matter of policy, some argued that extending protection to materials created by generative AI would encourage the creation of more works of authorship, furthering progress in culture and knowledge to the benefit of the public. The Office also heard concerns that an increased proliferation of AI-generated outputs would undermine incentives for humans to create.

While recognizing that copyrightability is determined on a case-by-case basis, in this Part the Office sets out the legal principles that govern the analysis and assesses their application to AI-generated content.

Section I identifies the copyrightability issues raised by AI technologies. It outlines the history of adapting copyright law to new technological developments and describes the Office's ongoing AI initiative.

Section II provides a brief background on the technologies involved. It then summarizes the existing legal framework, particularly the human authorship requirement, the idea/expression dichotomy, and the originality standard for copyright protection. After discussing the use of AI to assist authors in the process of creating works of authorship, it analyzes how the law may apply to various types of human contributions to AI-generated outputs: prompting, the inclusion of human-authored expressive inputs, and the modification or arrangement of AI-generated outputs.

Section III reports on the international landscape. It describes how other countries are approaching questions of copyrightability within their own legal systems.

Section IV addresses the policy implications of providing additional legal protection to AI-generated material and evaluates the arguments for and against legislative change.

Based on an analysis of copyright law and policy, informed by the many thoughtful comments in response to our NOI, the Office makes the following conclusions and recommendations:

- Questions of copyrightability and AI can be resolved pursuant to existing law, without the need for legislative change.
- The use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output.
- Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.
- Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.
- Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
- Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.
- Human authors are entitled to copyright in their works of authorship that are perceptible in AI-generated outputs, as well as the creative selection, coordination, or arrangement of material in the outputs, or creative modifications of the outputs.
- The case has not been made for additional copyright or *sui generis* protection for AI-generated content.

The Office will continue to monitor technological and legal developments to determine whether any of these conclusions should be revisited. It will also provide ongoing assistance to the public, including through additional registration guidance and an update to the *Compendium of U.S. Copyright Office Practices*.[1]

[1] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021) ("COMPENDIUM (THIRD)").

I. INTRODUCTION

This Part of the Copyright Office's Report on Copyright and Artificial Intelligence addresses the use of AI systems to produce outputs that would be copyrightable if created by a human author.

The use of technology in the production of works of authorship is not new. Authors have used computer-assisted technology for decades to enhance, modify, and add to their creations—expanding their range of expression and advancing the goals of the copyright system. And today they are leveraging advancements in technology to push the boundaries of creativity in exciting ways. Neither the use of AI as an assistive tool nor the incorporation of AI-generated content into a larger copyrightable work affects the availability of copyright protection for the work as a whole. But the capabilities of the latest generative AI technologies[2] raise challenging questions about the nature and scope of human authorship.

These technologies now permit the creation of textual, visual, and sound outputs that resemble the creative works traditionally protected by copyright. Should these outputs also enjoy copyright protection? The answer will turn on the nature and extent of a human's contribution, and whether it qualifies as authorship of expressive elements contained in the output. Finally, to the extent that protection is not available under existing copyright principles, should the law be changed? If so, how?

A. Technology and Copyright

As stated in the legislative history of the 1976 Copyright Act, "[t]he history of copyright law has been one of gradual expansion in the types of works accorded protection."[3]

Over the years, copyright has proven flexible enough to respond to new technologies and mediums as they emerge. Protection has been extended to photographs, motion pictures, video games, and computer programs—to name just a few.[4] At the same time, courts have been called on to explore and analyze the nature of authorship. As authors have increasingly used

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[2] "Generative AI" refers to "application[s] of AI used to generate outputs in the form of expressive material such as text, images, audio, or video." Artificial Intelligence Study: Notice of Inquiry, 88 Fed. Reg. 59942, 59948–49 (Aug. 30, 2023) ("NOI").

[3] H.R. REP. NO. 94-1496, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

[4] When Congress extended copyright protection to architecture, it explained that these types of works would be governed by "the general standards of originality applicable for all other copyrightable subject matter." H.R. REP. NO. 101-735, at 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6952. Courts have also applied those standards to claims involving new technology in numerous cases. *See, e.g.*, *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*, 528 F.3d 1258, 1264–65 (10th Cir. 2008) (then-judge Neil Gorsuch stating "we do not doubt for an instant that the digital medium before us, like photography before it, can be employed to create vivid new expressions fully protectable in copyright"); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856–67 (2d Cir. 1982) (audiovisual work); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 436 (4th Cir. 1986) (video games); *Tandy Corp. v. Personal Micro Computs., Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981) (computer program and silicon chip).

technology in the process of creation, the relative roles of human and machine can be central to the analysis of copyrightability.

Given its role in registering claims to copyright,[5] the Copyright Office has considerable experience addressing technological developments related to the creation of works of authorship. As early as 1965, developments in computer technology began to raise "difficult questions of authorship," including whether material created using technology is "'written' by computers" or authored by human creators.[6] As then-Register of Copyrights Abraham Kaminstein observed, there is no one-size-fits-all answer:

> The crucial question appears to be whether the "work" is basically one of human authorship, with the computer merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.[7]

Because the answer depends on the circumstances of a work's creation, Barbara Ringer (then-Chief of the Examining Division and future Register of Copyrights) noted that the Office could not "take the categorical position that registration will be denied merely because a computer may have been used in some manner in creating the work."[8]

The same analysis applies in the context of AI technology. For a work created using AI, like those created without it, a determination of copyrightability requires fact-specific consideration of the work and the circumstances of its creation. Where AI merely assists an author in the creative process, its use does not change the copyrightability of the output. At the other extreme, if content is entirely generated by AI, it cannot be protected by copyright.[9] Between these boundaries, various forms and combinations of human contributions can be involved in producing AI outputs.

While few bright-line rules are possible in assessing copyrightability, this Part of the Report seeks to shed more light on the relevant considerations.

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[5] The Register of Copyrights is responsible for administering the copyright system, including examining claims for copyright registration. 17 U.S.C. §§ 410(a), 701(a). Although copyright vests automatically in an original work of authorship when fixed in a tangible medium, registration (or its refusal) provides a number of practical and legal benefits, including enabling U.S. copyright owners to enforce their exclusive rights in court. *See generally id.* §§ 106, 408(a), 410(c), 412, 411(a); U.S. Copyright Office, Circular 1: Copyright Basics (Sept. 2021), https://copyright.gov/circs/circ01.pdf.

[6] U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966), https://www.copyright.gov/reports/annual/archive/ar-1965.pdf.

[7] *Id.*

[8] U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE Examining Division, Copyright Office, for the Fiscal Year 1965, at 4 (1965), https://copyright.gov/reports/annual/archive/ar-examining1965.pdf.

[9] *See Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 149–50 (D.D.C. 2023).

B. The Copyright Office's AI Initiative

In February 2022, the Copyright Office's Review Board issued a final decision affirming the refusal to register a work claimed to be generated with no human involvement.[10] A year later, the Office issued a registration for a comic book incorporating AI-generated material.[11]

In early 2023, the Office announced the launch of a broad AI Initiative and issued a statement of policy providing guidance on the registration of works incorporating AI-generated material (the "Guidance" or "AI Registration Guidance").[12] The Guidance reiterated the Office's longstanding position that human authorship is an essential requirement for copyright protection in the United States.[13] It explained that if a work contains more than a *de minimis* amount of AI-generated material, the applicant should disclose that information and provide a brief statement describing the human author's contribution.[14]

Since the Guidance was issued, the Office has registered hundreds of works that incorporate AI-generated material, with the registration covering the human author's contribution to the work.[15]

In August 2023, the Office issued a Notice of Inquiry seeking comments on a wide range of copyright law and policy issues arising from the development and use of generative AI.[16] The NOI asked five questions related to the copyrightability of material generated using AI systems:

(1) Does the Copyright Clause in the U.S. Constitution permit copyright protection for AI-generated material?

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[10] U.S. Copyright Office Review Board, *Decision Affirming Refusal of Registration of A Recent Entrance to Paradise* (Feb. 14, 2022), https://copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf.

[11] U.S. Copyright Office, *Cancellation Decision re: Zarya of the Dawn* (VAu001480196) at 5 (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf (explaining that registration covered the work's human-authored text as well as the human-authored selection, coordination, and arrangement of the work's written and visual elements, but not images generated by Midjourney that were not the product of human authorship).

[12] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023) ("AI Registration Guidance"). A copy of the guidance is available on the Office's website. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION GUIDANCE: WORKS CONTAINING MATERIAL GENERATED BY ARTIFICIAL INTELLIGENCE (2023), https://copyright.gov/ai/ai_policy_guidance.pdf.

[13] AI Registration Guidance at 16191–92; *see also Thaler*, 687 F. Supp. 3d at 149–50.

[14] AI Registration Guidance at 16193; *see also* Registration Guidance for Works Containing AI-Generated Content Tr. (June 28, 2023), https://www.copyright.gov/events/ai-application-process/Registration-of-Works-with-AI-Transcript.pdf (webinar on registration of works incorporating AI-generated material).

[15] Registration records are searchable in the Office's public record, including by using keywords and filters to search the Copyright Public Record System. *Copyright Public Records System - Pilot*, U.S. COPYRIGHT OFFICE, https://publicrecords.copyright.gov/ (last visited Jan. 17, 2025).

[16] NOI.

(2) Under copyright law, are there circumstances when a human using a generative AI system should be considered the "author" of the material produced by the system?

(3) Is legal protection for AI-generated material desirable as a policy matter?

(4) If so, should it be a form of copyright or a separate *sui generis* right?

(5) Are any revisions to the Copyright Act necessary to clarify the human authorship requirement?[17]

Approximately fifty percent of the more than 10,000 comments received in response to the NOI addressed one or more of these questions. The Office refers to these comments throughout the discussion below.

[17] *Id.* at 59947–48.

II. AUTHORSHIP AND ARTIFICIAL INTELLIGENCE

A. Technological Background

In the NOI, the Office defined an AI system as a "software product or service that substantially incorporates one or more AI models and is designed for use by an end-user."[18] As components to larger systems, AI models consist of computer code and numerical values (or "weights") designed to accomplish certain tasks, like generating text or images.[19]

Many of today's publicly available AI systems allow for the generation of an output from one or more inputs, such as text, images, audio, video, or a combination of mediums. A "prompt" is a common type of input, often in the form of text, that communicates the desired features of the output.[20] The AI system responds to these inputs by generating an output in the requested format (text, image, audio, video). Prompts typically describe a topic, theme, and/or subject that the user seeks to evoke, and may include the overall style, tone, and/or visual technique. Some are short and simple, such as a request for a "cartoon spaceship." Others are more detailed, requesting a litany of elements. Users may enter a prompt a single time or iteratively, refining it until the system generates an acceptable output.[21]

The practice of crafting prompts that are optimized to elicit a desired result is sometimes called "prompt engineering."[22] Prompts can also be automatically optimized by a generative AI

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[18] NOI at 59948; *see also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117–263, § 7223(4)(A), 136 Stat. 2395, 3669 (2022) (defining "artificial intelligence system" as "any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence").

[19] NOI at 59948–49; *see* ZHANG ET AL., DIVE INTO DEEP LEARNING, ch. 1 (2023), https://d2l.ai/chapter_introduction/index.html (ebook); GARETH JAMES ET AL., AN INTRODUCTION TO STATISTICAL LEARNING WITH APPLICATIONS IN PYTHON, at 404–05 (2023), https://www.statlearning.com/ (ebook) (explaining that the parameters of a neural network are sometimes referred to as "weights").

[20] *See, e.g.*, Leonardo Banh & Gero Strobel, *Generative Artificial Intelligence*, 33:63 ELEC. MKTS. 1, 3 (2023), https://doi.org/10.1007/s12525-023-00680-1 ("*Prompting* . . . enables end users using natural language to engage with and instruct [generative AI] application (e.g., LLMs) to create desired output such as text, images, or other types."); *Prompt*, GENLAW GLOSSARY, https://blog.genlaw.org/glossary.html#prompt ("Most generative-AI systems take [an] input (currently, this is often some text), which is then used to condition the output. This input is called the prompt.") (last visited Jan. 17, 2025); *Image Prompts*, MIDJOURNEY, https://docs.midjourney.com/docs/image-prompts ("You can use images as part of a prompt to influence a Job's composition, style, and colors.") (last visited Jan. 17, 2025); Sander Schulhoff et al., *The Prompt Report: A Systematic Survey of Prompting Techniques* at 5, ARXIV (Dec. 30, 2024), https://arxiv.org/abs/2406.06608 ("A prompt is an input to a Generative AI model, that is used to guide its output.").

[21] Other strategies are more complex, such as "prompt chaining" where a complex prompt is divided into a sequence of intermediate subtasks with a prompt for each step. Robert Clariso & Jordi Cabot, *Model-Driven Prompt Engineering*, IEEE *XPLORE*, 2023, at 48, DOI: 10.1109/MODELS58315.2023.00020.

[22] *See, e.g.*, *id.* at 47; Sander Schulhoff et al., *The Prompt Report: A Systematic Survey of Prompting Techniques* at 7, ARXIV (Dec. 30, 2024), https://arxiv.org/abs/2406.06608.

system that revises or expands them in order to improve the quality of outputs.[23] For example, ChatGPT "automatically generate[s] tailored, detailed prompts for [OpenAI's text-to-image model] DALL·E 3."[24]

As described below,[25] however, the output of current generative AI systems may include content that was not specified and exclude content that was. Although AI technology continues to advance, uncertainty around how a particular prompt or other input will influence the output may be inherent in complex AI systems built on models with billions of parameters.[26] Some observers describe AI as a "black box,"[27] and even expert researchers are limited in their ability to understand or predict the behavior of specific models.[28]

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[23] *See, e.g.*, Siddhartha Datta et al., *Prompt Expansion for Adaptive Text-to-Image Generation* at 4, 14, ARXIV (Dec. 27, 2023), https://arxiv.org/abs/2312.16720 (describing a model that "takes a text prompt as input, . . . and outputs a set of *N* expanded text prompts that include specialized keywords (to improve image quality) and interesting additional details (to add diversity to the generated images"); PROMPTPERFECT, https://promptperfect.jina.ai/ (last visited Jan. 17, 2025); PROMPTIST, https://foundr.ai/product/promptist (last visited Jan. 17, 2025).

[24] *DALL·E 3*, OPENAI, https://openai.com/index/dall-e-3/ (last visited Jan. 17, 2025).

[25] *See infra* notes 84–87 and pp. 24–25.

[26] *See, e.g.*, GARETH JAMES ET AL., AN INTRODUCTION TO STATISTICAL LEARNING WITH APPLICATIONS IN PYTHON, at 23–25 (2023), https://www.statlearning.com/ (ebook) (discussing the fundamental tradeoff between the flexibility and interpretability of statistical learning models, with neural networks as an example of highly flexible and difficult to interpret models); Christian Szegedy et al., *Intriguing properties of neural networks* at 1, ARXIV (Feb. 19, 2024), https://arxiv.org/abs/1312.6199 ("Neural networks achieve high performance because they can express arbitrary computation that consists of a modest number of massively parallel nonlinear steps. But as the resulting computation is automatically discovered[,] . . . it can be difficult to interpret and can have counter-intuitive properties."); Pantelis Linardatos et al., *Explainable AI: A Review of Machine Learning Interpretability Methods*, 23 ENTROPY 1, 1 (Dec. 25, 2020), https://dx.doi.org/10.3390/e23010018 (The "increasing complexity combined with the fact that vast amounts of data are used to train and develop such complex systems, while, in most cases, boost[ing] the systems' predictive power, inherently reduc[es] the[] ability to explain their inner workings and mechanisms. As a consequence, the rationale behind their decisions becomes quite hard to understand and, therefore, their predictions hard to interpret.").

[27] Steven Levy, *AI Is a Black Box. Anthropic Figured Out a Way to Look Inside*, WIRED (May 24, 2024), https://www.wired.com/story/anthropic-black-box-ai-research-neurons-features/ ("When I asked the researchers whether they were claiming to have *solved* the black box problem, their response was an instant and unanimous no."); Lou Blouin, *AI's mysterious 'black box' problem, explained*, UMDEARBORN.EDU NEWS (Mar. 6, 2023), https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained. *See also infra* notes 84–87.

[28] *See, e.g.*, Trenton Bricken et al., *Towards Monosemanticity: Decomposing Language Models With Dictionary Learning*, TRANSFORMER CIRCUITS THREAD (Oct. 4, 2023), https://transformer-circuits.pub/2023/monosemantic-features/index.html ("Mechanistic interpretability seeks to understand neural networks by breaking them into components that are more easily understood than the whole. By understanding the function of each component, and how they interact, we hope to be able to reason about the behavior of the entire network."); Adly Templeton et al., *Scaling Monosemanticity: Extracting Interpretable Features from Claude 3 Sonnet*, TRANSFORMER CIRCUITS THREAD (May 21, 2024), https://transformer-circuits.pub/2024/scaling-monosemanticity/index.html ("Our work has many limitations. Some of these are superficial limitations relating to this work being early, but others are deeply fundamental challenges that require novel research to address.").

In addition, many popular AI systems are unpredictable in the sense that their outputs may vary from request to request, even with an identical prompt.[29] Some systems allow users to control this behavior and generate consistent results by setting a "seed" value, which is a number used to initialize the output generation process.[30] For example, Midjourney users can set a seed (*e.g.*, "123") and receive nearly identical images when repeating the same prompt.[31] Even these systems, however, are not always able to guarantee perfect consistency.[32]

B. Legal Framework

As the Office affirmed in the Guidance, copyright protection in the United States requires human authorship. This foundational principle is based on the Copyright Clause in the Constitution and the language of the Copyright Act as interpreted by the courts. The Copyright Clause grants Congress the authority to "secur[e] for limited times to authors . . . the exclusive right to their . . . writings."[33] As the Supreme Court has explained, "the author [of a copyrighted work] is . . . *the person* who translates an idea into a fixed, tangible expression entitled to copyright protection."[34]

No court has recognized copyright in material created by non-humans, and those that have spoken on this issue have rejected the possibility. In two well-known cases, the Ninth

[29] *See, e.g.*, *Reproducible Outputs*, OPENAI, https://platform.openai.com/docs/advanced-usage/reproducible-outputs (last visited Jan. 17, 2025); Shuyin Ouyang et al., *LLM is Like a Box of Chocolates: the Non-determinism of ChatGPT in Code Generation*, ARXIV (Oct. 17, 2024), https://arxiv.org/abs/2308.02828.

[30] *See, e.g.*, *Reproducible Outputs*, OPENAI, https://platform.openai.com/docs/advanced-usage/reproducible-outputs (last visited Jan. 17, 2025); *Seeds*, MIDJOURNEY, https://docs.midjourney.com/docs/seeds ("The Midjourney bot uses a seed number to create a field of visual noise, like television static, as a starting point to generate the initial image grids. Seed numbers are generated randomly for each image but can be specified with the --seed parameter. If you use the same seed number and prompt, you will get similar final images.") (last visited Jan. 17, 2025).

[31] *Seeds*, MIDJOURNEY, https://docs.midjourney.com/docs/seeds (last visited Jan. 17, 2025).

[32] *See* Alexander Schlögl et al., *Causes and Effects of Unanticipated Numerical Deviations in Neural Network Inference Framework*, *in* ADVANCES IN NEURAL INFORMATION PROCESSING SYSTEMS 36 (A. Oh et al. eds., 2023), https://proceedings.neurips.cc/paper_files/paper/2023/hash/af076c3bdbf935b81d808e37c5ede463-Abstract-Conference.html; *Reproducible Outputs*, OPENAI, https://platform.openai.com/docs/advanced-usage/reproducible-outputs (explaining that users can obtain "mostly" deterministic outputs by setting the same seed value) (last visited Jan. 17, 2025); *Seeds*, MIDJOURNEY, https://docs.midjourney.com/docs/seeds ("Identical --seed values [for certain model versions] will produce *nearly* identical images.") (emphasis added) (last visited Jan. 17, 2025).

[33] U.S. Const. art. I, § 8, cl. 8.

[34] *Cmty. for Creative Non-Violence v. Reid* ("*CCNV*"), 490 U.S. 730, 737 (1989) (emphasis added).

Circuit held that text purportedly "authored by non-human spiritual beings"[35] and photographs that a monkey captured with a camera could not be protected by copyright.[36]

In 2023, the U.S. District Court for the District of Columbia became the first court to specifically address the copyrightability of AI-generated outputs.[37] The plaintiff challenged the Office's refusal to register an image that was described in his application as "autonomously created by a computer algorithm running on a machine."[38] Affirming the Office's refusal, the court stated that "copyright law protects only works of human creation," and that "human authorship is a bedrock requirement of copyright."[39] It found that "copyright has never stretched so far [as] . . . to protect works generated by new forms of technology operating absent any guiding human hand."[40] Because, by his own representation, the "plaintiff played no role in using the AI to generate the work," the court held that it did not meet the human authorship requirement.[41] The decision has been appealed.[42]

In most cases, however, humans will be involved in the creation process, and the work will be copyrightable to the extent that their contributions qualify as authorship. It is axiomatic that ideas or facts themselves are not protectible by copyright law,[43] and the Supreme Court has made clear that originality is required, not just time and effort. In *Feist Publications, Inc. v. Rural Telephone Service Co*., the Court rejected the theory that "sweat of the brow" alone could be sufficient for copyright protection.[44] "To be sure," the Court further explained, "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of

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[35] *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997) (holding that "some element of human creativity must have occurred in order for the Book to be copyrightable" because "it is not creations of divine beings that the copyright laws were intended to protect"). While the compilation of the book was entitled to copyright, the alleged "divine messages" were not. *Id.*

[36] *Naruto v. Slater*, No. 15-cv-04324, 2016 U.S. Dist. LEXIS 11041, at *10 (N.D. Cal. Jan. 28, 2016) ("[Monkey] is not an 'author' within the meaning of the Copyright Act"), *aff'd*, 888 F.3d 418 (9th Cir. 2018) (finding that monkey cannot sue for copyright infringement).

[37] *Thaler*, 687 F. Supp. 3d 140. A second case challenging the Office's refusal to register an AI-generated output was recently filed. Compl., Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024), Doc. No. 1.

[38] *Thaler*, 687 F. Supp. 3d at 142–43.

[39] *Id.* at 146.

[40] *Id.*

[41] *Id.* at 149–50.

[42] Notice of Appeal, Thaler v. Perlmutter, No. 23-5233 (D.C. Cir. Oct 18, 2023). Oral argument was heard on September 19, 2024.

[43] *See* 17 U.S.C. § 102(b); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (explaining that "[t]he most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates'" (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985))).

[44] 499 U.S. at 352–61.

works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[45]

More than a century ago, the Court analyzed the nature of authorship in a case involving the then-new technology of the camera. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court considered a constitutional challenge to Congress's extension of copyright protection to photographs.[46] The defendant argued that photographs were not copyrightable because they lacked human authorship; instead, they were the product of a machine.[47]

The Court began its analysis by defining an "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[48] It described copyright as "the exclusive right of a man to the production of his own genius or intellect."[49] Applying this framework, it identified numerous creative contributions made by the photographer, including "posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories," "arranging the subject so as to present graceful outlines," and "evoking the desired expression."[50] In sum, the use of a machine as a tool does not negate copyright protection, but the resulting work is copyrightable only if it contains sufficient human-authored expressive elements.

More recently, in cases involving more than one human contributor, courts have grappled with the nature of the contribution necessary to qualify as authorship. The Supreme Court provided additional guidance in the context of a commissioned sculpture. The parties in *Community for Creative Non-Violence v. Reid* ("*CCNV*") disputed who the author of the sculpture was: the nonprofit organization that conceived of it or the artist asked to make it. The Court concluded that the artist's contributions, which included sketching the design and executing his creative vision in a tangible medium of expression, made him an author.[51] In a remand to the trial court to determine whether the organization could be a joint author of the sculpture, the D.C. Circuit made clear that commissioning the sculpture and providing detailed suggestions and directions were insufficient, as such contributions constitute unprotectible ideas.[52]

The Third Circuit engaged in a similar analysis in *Andrien v. Southern Ocean County Chamber of Commerce*. *Andrien* involved an authorship claim by a plaintiff who had asked a

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[45] *Id.* at 345.

[46] 111 U.S. 53, 55–57 (1884).

[47] *Id.* at 56, 59–60.

[48] *Id.* at 57–58 (internal quotation marks omitted).

[49] *Id.* at 58.

[50] *Id.* at 60 (internal quotation marks omitted).

[51] *CCNV*, 490 U.S. at 751–53.

[52] *Cmty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1497 (D.C. Cir. 1988).

printer to rescale and print a collection of maps.[53] The plaintiff had "expressly directed the copy's preparation in specific detail," so that the "compilation needed only simple transcription to achieve final tangible form."[54] Because the printer "did not change the substance of [plaintiff's] original expression," the court held that the plaintiff was the author.[55] Applying *CCNV*, it stated that the author is the "party who actually creates the work, that is, the person who translates an idea into an expression that is embodied in a copy by himself or herself, or who authorizes another to embody the expression in a copy."[56]

Although an AI-generated output cannot be considered a joint work with respect to the user and AI system,[57] joint authorship provides a helpful analogy in assessing whether a party contributed sufficient expression to be considered an author.[58] To be a joint author, one must make a copyrightable contribution.[59] "A person who merely describes to an author what the

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[53] 927 F.2d 132, 133 (3d Cir. 1991) (Under plaintiff's direction, the printer's work "included coordinating the scales, relettering the street names and adding designations for the diving sites as well as for local points of interest.").

[54] *Id.* at 135.

[55] *Id.* at 135–36. *Cf. S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086–87 (9th Cir. 1989) (rejecting an authorship claim from a party who commissioned software noting that "[t]he supplier of an idea is no more an 'author' of a program than is the supplier of the disk on which the program is stored"); *M.G.B. Homes, Inc. v. Ameron Homes Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990) (providing sketches and ideas did not render client an "author" of the finished expression); *Geshwind v. Garrick*, 734 F. Supp. 644 (S.D.N.Y. 1990) (producer was not the author where he "wanted changes in details and aspects of the [animation clip] and even made suggestions," but did not materially constrain the animator's expression or otherwise influence how the animator executed the instructions), *vacated in part on other grounds*, 738 F. Supp. 792 (S.D.N.Y. 1990), *and aff'd*, 927 F.2d 594 (2d Cir. 1991); *Whelan Assocs. v. Jaslow Dental Lab'y*, 609 F. Supp. 1307, 1318–19 (E.D. Pa. 1985) ("general assistance and contributions to the fund of knowledge" do not make one "a creator of any original work"), *amended*, 609 F. Supp. 1325 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *and cert. denied*, 479 U.S. 1031 (1987).

[56] *Andrien*, 927 F.2d at 134–35 ("When one authorizes embodiment, that process must be rote or mechanical transcription that does not require intellectual modification or highly technical enhancement.").

[57] A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (defining "joint work"). Because an AI system is not a human being, it cannot be considered an "author" in collaboration with a user. *See* Kernochan Center for Law, Media and the Arts ("Kernochan Center"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6–9 (Oct. 30, 2023) ("Kernochan Center Initial Comments") (noting that machines are not "authors" within the meaning of the Copyright Act, nor are they capable of forming an intention to merge their output with the contributions from the user that interacts with these systems).

[58] *See* The Authors Guild, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 33 (Oct. 30, 2023) ("The Authors Guild Initial Comments") ("Areas of the law that will instruct courts in how to determine what is copyrightable in an AI-assisted human-created work or human-assisted AI-generated material include . . . joint work cases where the issue of whether a secondary creator contributed a sufficient amount to rise to the level of an author . . . .").

[59] *Brownstein v. Lindsay*, 742 F.3d 55, 64 (3d Cir. 2014) ("For two or more people to become co-authors, each author must contribute some non-trivial amount of creative, original, or intellectual expression to the work and both must intend that their contributions be combined."); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597 (N.D. Cal. 1989) (finding that a contribution to a joint work must be protectable in itself and that only expressions of ideas, not ideas themselves, give rise to protected interest), *aff'd*, 916 F.2d 516, 521 (9th Cir. 1990).

commissioned work should do or look like is not a joint author for purposes of the Copyright Act."[60]

The following sections apply these legal principles in the context of generative AI systems. After describing uses of computer-assisted tools in the creation process, we discuss the following three kinds of human contribution to AI-generated outputs: (1) prompts that instruct an AI system to generate an output; (2) expressive inputs that can be perceived in AI-generated outputs; and (3) modifications or arrangements of AI-generated outputs.[61]

C. Assistive Uses of AI Systems

Many commenters expressed concern about continuing the longstanding and growing use of computer-assisted tools in the creation process.[62] They pointed to various tasks that have been performed in creative fields for years, some of which now incorporate recent developments in AI, such as "aging" or "de-aging" actors, identifying chord progressions, detecting errors in software code, and removing unwanted objects or crowds from a scene.[63]

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[60] *Payday*, 886 F.2d at 1087; *see also Sullivan v. Flora, Inc.*, 936 F.3d 562 (7th Cir. 2019) (upholding jury finding that plaintiff and defendant were not joint authors of illustrations because defendant merely offered suggestions on color, style, and text and rough outlines and sketches to guide the plaintiff's work, while the plaintiff used digital design software to create the illustrations, sometime incorporating defendant's suggestions and other times not); *BancTraining Video Sys. v. First American Corp.*, No. 91-cv-5340, 1992 U.S. App. LEXIS 3677, at *12 (6th Cir. 1992) ("Providing sketches, ideas or supervision over copyrightable material is not sufficient to make one a joint author.").

[61] Of course, many cases may involve a combination of two or more of these types of contributions. For example, a user could make creative modifications to an output generated using their own expressive input and multiple prompts.

[62] Commenters from the music industry noted that musicians and sound engineers have used such tools for many years, citing Autotune as one example. Songwriters of North America, et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023); *see also* Recording Academy, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Oct. 30, 2023) ("Recording Academy Initial Comments"). In the software industry, programmers and computer engineers use automated tools to modify software code, such as to perform refactoring and translate from one programming language into another. Apple Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3–4 (Oct. 30, 2023) ("Apple Initial Comments").

[63] For example, commenters reported that musicians are beginning to use AI systems for developing beats or mixing a track. *See* Recording Academy Initial Comments at 3; *see also* Universal Music Group ("UMG"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5–7 (Oct. 30, 2023) ("UMG Initial Comments"); Dina LaPolt, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023) ("Dina LaPolt Initial Comments"). Motion picture companies use AI tools as part of their creative process, particularly in the context of visual effects and post-production. For example, these tools may be used for color correction, detail sharpening, or de-blurring. Motion Picture Association ("MPA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 37–38 (Oct. 30, 2023) ("MPA Initial Comments"); *see also* Holton Lemaster, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Aug. 31, 2023) ("AI as a support tool for artists who choose to use them in their creation pipeline is fine. Crowd removal from photos, video stabilization tools, and ray tracing are all tools that really shine when enhanced by AI."). AI tools are frequently used in a process called rotoscoping, a time-consuming task that involves "altering individual frames within a single shot to align live-action and computer-generated images." MPA Initial Comments at 6, 37–38.

Commenters argued that these types of uses of AI should not affect the availability of copyright protection for the output.[64]

The Office agrees that there is an important distinction between using AI as a tool to assist in the creation of works and using AI as a stand-in for human creativity. While assistive uses that enhance human expression do not limit copyright protection, uses where an AI system makes expressive choices require further analysis. This distinction depends on how the system is being used, not on its inherent characteristics.[65]

Commenters also identified situations where creators have begun to experiment with using AI as a brainstorming tool. The Recording Academy, for instance, stated that "[m]any Academy members already use generative AI as a tool to assist them in creating new music," including through song ideation.[66] Another stakeholder noted that AI can be used to structure or create a preliminary outline for literary works.[67] In these cases, the user appears to be prompting a generative AI system and referencing, but not incorporating, the output in the development of her own work of authorship. Using AI in this way should not affect the copyrightability of the resulting human-authored work.[68]

D. Prompts

1. Commenters' Views

Many of the comments received in response to the NOI focused on the legal implications of creating outputs by providing prompts to an AI system. At the outset, as several

[64] *See, e.g.*, Intellectual Property Owners Association ("IPO"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6–7 (Oct. 30, 2023) ("IPO Initial Comments") ("[I]t is desirable to provide copyright protection for works resulting from a human using an AI system as a tool of creativity and where that human activity satisfies the traditional requirements of human authorship. A lack of this protection would be detrimental to rights holders and creators alike.").

[65] One commenter urged the Office to adopt a distinction based on the type of AI platform a user employs. Scenario, Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 18, 2023) ("Scenario Initial Comments") (arguing that output generated by a multimodal generative AI platform should presumptively be deemed copyrightable, while output generated by a unimodal generative AI platform should presumptively be deemed uncopyrightable).

[66] Recording Academy Initial Comments at 10.

[67] Literary Works Listening Session Tr. at 31:18–23 (Apr. 19, 2023) (statement by Mary Rasenberger, The Authors Guild).

[68] Other examples of such uses provided by commenters include digital and copy editing and other uses that "are intended to assist, not displace, human creativity." Recording Academy Initial Comments at 3; Lori Wilde, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 24, 2023); IPO Initial Comments at 2; Authors Alliance, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Oct. 30, 2023) ("Authors Alliance Initial Comments").

commenters noted, prompts themselves, if sufficiently creative, may be copyrightable.[69] The copyright status of the output generated, however, is a separate question.[70]

Most commenters agreed that inputting simple prompts is insufficient to make a user the author of the AI-generated output.[71] Several described prompts as unprotectible ideas or instructions.[72] The American Society of Composers, Authors and Publishers ("ASCAP"), a performing rights organization, asserted that "[w]here a human's involvement is limited to the simple generation of minimal queries and prompts for an AI tool, the resulting material is not entitled to copyright protection."[73] The Brooklyn Law Incubator & Policy Clinic asserted that a simple, general prompt lacks "enough human creativity for the output to qualify for copyright protection."[74] Universal Music Group ("UMG") stated: "The prompting user is no more an

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[69] *See* AI Registration Guidance at 16192 n.27; The Authors Guild Initial Comments at 32 n.39 (arguing that the creator of a prompt "has a copyright in the prompt assuming it has sufficient original expression"); American Association of Independent Music ("A2IM") and the Recording Industry Association of America, Inc. ("RIAA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 34 (Oct. 30, 2023) ("A2IM-RIAA Joint Initial Comments"); Daniel Gervais, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("Daniel Gervais Initial Comments").

[70] *See generally* A2IM-RIAA Joint Initial Comments at 34 ("While the text of those prompts may be independently copyrightable if sufficiently expressive, that does not confer upon the author of the prompt any copyright in the output generated by the AI system."); Johan Brandstedt, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 29 (Oct. 29, 2023) ("Johan Brandstedt Initial Comments").

[71] Commenters used "simple" with varying degrees of specificity, generally referring to prompts that contain only generic descriptions or a short number of words. *See, e.g.*, Donaldson Callif Perez, LLP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 30, 2023) ("Donaldson Callif Perez Initial Comments") ("[W]e agree that simple prompts by humans that result in a complex, creative work should not be granted copyright protection."); Dina LaPolt Initial Comments at 7 (stating that "a user inputting a simple generic prompt" should not be able to claim copyright protection); Edward Lee, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) (stating that "a simple one- or two-word prompt" is unlikely to satisfy the minimum standard for copyright protection in the output); Peer Music and Boomy, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) ("Peer Music-Boomy Joint Initial Comments") (finding it difficult to imagine how a single prompt that produces a complex output could provide a basis for claiming copyright protection in the output).

[72] *See, e.g.*, Adobe Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5–6 (Oct. 30, 2023) ("Adobe Initial Comments") ("[A] prompt is not copyrightable because the prompt represents the idea."); Johan Brandstedt Initial Comments at 19 (stating that "prompts express *ideas*, image and text generators provide stored *expression*"); European Writers' Council ("EWC"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023) ("EWC Initial Comments") (stating that "the person formulating the prompts [cannot] claim any rights with respect to the results on the basis of the prompts alone, because the mere formulation of the task and the choice between several results proposed by the AI system is not a creative or protectable act").

[73] ASCAP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 48–49 (Oct. 30, 2023) ("ASCAP Initial Comments").

[74] Brooklyn Law Incubator & Policy Clinic ("BLIP"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20 (Oct. 30, 2023) ("BLIP Initial Comments"); *see also* Qualcomm Incorporated, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Dec. 6, 2023) ("Qualcomm Reply Comments") (stating that output "based on a single, general prompt with *de minimis* creativity" lacks "requisite human expression").

author than someone who tells a musician friend to 'write me a pretty love song in a major key' and then falsely claims co-ownership."[75]

By contrast, other commenters disputed the notion that prompts merely "influence" the AI system and do not provide "specific instructions to create a particular expressive result."[76] For example, the Intellectual Property Owners Association stated that "[i]f a user prompts Midjourney to produce an image or series of images of a city scape under water, the user is going to get a city scape under water."[77]

Commenters' views on more detailed prompts, including those that are revised and repeated, varied. Some viewed highly detailed prompts as sufficient to make some AI-generated outputs copyrightable.[78] Professors Pamela Samuelson, Christopher Jon Sprigman, and Matthew Sag stated that "[s]ophisticated prompts that specify details of an image should be sufficient to meet the [human authorship] requirement," and that "[a] person who instructs a Generative AI with enough detail, such that model output reflects that person's original

[75] Letter from UMG, Summary of *Ex Parte* Meeting on Apr. 22, 2024, Regarding the Office's AI Study, to U.S. Copyright Office 11 (Dec. 3, 2024) (arguing that "users prompting [music generative AI companies] to generate audio files are not composing or writing anything, much less 'their own, original music'" and instead are "simply supply[ing] an uncopyrightable idea in a text prompt . . . and the software itself generates an audio track based on its own predictive algorithms").

[76] IPO Initial Comments at 5; Van Lindberg, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 41 (Oct. 30, 2023) ("Van Lindberg Initial Comments") ("Randomness is part of the generative process—but *the output of an AI model is not random*. A human using the AI system typically describes what should be generated and/or provides other inputs that are used to initialize and guide the generative process."); Ashley Greenwald, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) (arguing that interior designers initiate generative AI systems by "giv[ing] certain prompts and instructions," refining and modifying interim results, and "mak[ing] the *final determination* whether and how the output co-created with the help of generative AI tools should be utilized"); Christa Laser, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 30, 2023) ("Christa Laser Initial Comments") ("A few uses of generative AI employ random strings and undirected outcomes, but a more significant role of generative AI is to implement a human's extensive creativity, direction, and selection towards an outcome pre-dreamed in the human mind.").

[77] IPO Initial Comments at 5.

[78] *See* BLIP Initial Comments at 23 (stating that users "may provide very detailed and extensive prompts to an AI-system to ensure that its output is as close as possible to what they anticipated" and such outputs should be copyrightable if "they provided sufficient input and prompts to control the output of an AI system"); Van Lindberg Initial Comments at 42 (stating that "the more information that is given within the prompt, the more control is exerted over the output"); Law Office of Seth Polansky LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 26 (Oct. 12, 2023) ("Seth Polansky Initial Comments") ("[A] human who closely guides the output of a generative AI system through curated training or by providing detailed prompts may be able to claim some form of 'joint authorship' with the machine."); Donaldson Callif Perez Initial Comments at 2 ("[I]f someone spends a significant amount of effort creating very specific and detailed prompts to create a complex work, perhaps there should be some copyright protection for that work.").

conception of the work, should be regarded as the author of the resulting work."[79] Another commenter asserted that, with detailed prompts, users "can achieve remarkable control over the expressive elements of the work, such as lighting, pose, style, expressions, and setting."[80]

In contrast, the Authors Guild argued that the unpredictability of the prompt-to-output generation process may make it "difficult to show that there was sufficient control and consequently a sufficient closeness between 'conception and execution.'"[81] Others agreed.[82] Adobe, for instance, stated that "[w]hen you submit a prompt (or idea), you then receive an output based solely on the AI's interpretation of that prompt," and the "AI's expression of [that] idea is not copyrightable."[83]

Several commenters described AI systems as black boxes,[84] meaning that not only do users in most cases not know what "will inform the [AI's] response" to prompts,[85] but that even developers of AI systems cannot generally predict outputs or explain why they include certain

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[79] Pamela Samuelson et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Oct. 30, 2023) ("Pamela Samuelson et al. Initial Comments"); *see also* MPA Initial Comments at 47 (predicting that prompts could become "much more detailed" as technology improves to the point where "the inputs themselves may provide the substantive content for the output" and concluding that "[a] rule that prompts would never satisfy the human authorship requirement neglects those likely possibilities").

[80] Christa Laser Initial Comments at 5. Several other commenters cautioned that while there may "be cases where the prompts are so directive and detailed" that the user could be entitled to copyright protection for the output, this is likely to be rare. The Authors Guild Initial Comments at 32; *see also* Daniel Gervais Initial Comments at 6 (describing as "exceptional" cases "in which a detailed prompt . . . could contain expressions of specific ideas that reflect human creative choices directly perceptible in the machine's output").

[81] The Authors Guild Initial Comments at 31.

[82] *See* Association of Medical Illustrators, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8–9 (Oct. 30, 2023); Kernochan Center Initial Comments at 5–6.

[83] Adobe Initial Comments at 5–6; *see also* Johan Brandstedt Initial Comments at 14, 29; EWC Initial Comments at 16.

[84] *See, e.g.*, Professional Photographers of America, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023); SeaQVN, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 63 (Sept. 13, 2023); IAC Inc. and Dotdash Media Inc., d/b/a Dotdash Meredith, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Oct. 30, 2023); Eric Bourdages, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Nov. 26, 2023); James Horvath, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Sep. 13, 2023); Cooper Reid, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Aug. 31, 2023).

[85] Kernochan Center Initial Comments at 5; *see also* Gabriel Moise, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Aug. 31, 2023); The Authors Guild Initial Comments at 31–32; Vikas Hassija et al., *Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence*, 16 COGNITIVE COMPUTATION 45, 47 (2024), https://link.springer.com/article/10.1007/s12559-023-10179-8 (noting that "the internal workings of [a black-box] model are not easily accessible or interpretable" and that this "lack of transparency" makes it difficult "to understand the model's behavior").

elements and not others.[86] Some provided examples of prompts containing detailed descriptions of what the user had in mind, where the output omitted some elements requested and inserted others.[87]

Commenters also noted that prompts are often entered into an AI system in one medium (such as text) and the output is generated in a different medium (such as a visual image, video, or audio clip). Several commenters asserted that moving from one medium to another requires interpretation, and where AI provides that interpretation, the user's control over the execution of their idea is indirect.[88] UMG highlighted one popular text-to-music generator that cautions users, "[n]o matter how detailed[,] text prompts cannot fully define an actual piece of music."[89]

Some stressed that generative AI systems can produce a seemingly limitless number of variations in response to the same prompt, no matter how many times that prompt is used.[90] The Kernochan Center argued that "[e]xtending the scope of copyright protection in the written prompts to cover the multiplicity of potential outputs" that may be generated by an AI system "comes uncomfortably close to conferring a copyright in a method of generating images (or other works)," which would be prohibited under section 102(b).[91]

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[86] *See* EWC Initial Comments at 9 ("In computer science, PROCESSING (computation) is consistently described as a black box; not even the operators of AI systems know exactly what happens during the learning process—and they do not control it."); *see also supra* Section II.A.

[87] *See* Kernochan Center Initial Comments at 8–9 & n.13 (noting that "even highly elaborated prompts will . . . yield multiple outputs (not all of them fully or accurately responsive to the prompts)" and providing examples). *See also* Tonio Inverness, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Sept. 12, 2023) (demonstrating labor that goes into refining prompts after the results of initial prompt were "not at all what [commenter] had in mind"); UMG Initial Comments at 76–77.

[88] Johan Brandstedt Initial Comments at 14, 19 (stating that "anything started in writing ought not to merit copyright claims over an image"); Kernochan Center Initial Comments at 8 (stating that a textual description "would need to evince an extremely high degree of precision" in order to claim copyright in a pictorial work produced through the use of those instructions); The Authors Guild Initial Comments at 31 n.36 (stating that converting a "text instruction to images created from training data makes the output unpredictable").

[89] Letter from UMG, Summary of *Ex Parte* Meeting on Apr. 22, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 3 (Dec. 3, 2024) (internal citation omitted); *see also How do I make music with Udio?*, UDIO, https://www.udio.com/guide (last visited Jan. 17, 2025) (explaining that prompts cannot fully define an output because "the same text describes an infinite number of possible audio tracks").

[90] *See, e.g.*, Kernochan Center Initial Comments at 8–9; The Authors Guild Initial Comments at 32 n.39.

[91] Kernochan Center Initial Comments at 8–9; *see also* 17 U.S.C. § 102(b) (excluding from copyright protection "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work").

A few commenters asserted that human-directed revisions to prompts may result in greater control over an output's expressive elements.[92] One technique entails submitting a prompt to the AI system, then revising the prompt, either by adding, removing, or replacing certain terms based on the initial output produced, to generate a new output. The user may revise and repeat upwards of hundreds of times.[93] Eventually the system may generate an output that meets the user's needs; if not, the user may decide to revise the prompt again or abandon the effort. Commenters noted that this process can require a significant amount of time and "demonstrable human effort."[94]

Some commenters advanced a theory of "authorship by adoption" (though few used that phrase).[95] They suggested that a user may exercise creative judgment when deciding to accept the output produced by a generative AI system. One suggested that a user who "repeatedly enters prompts until the output matches their desired expression" is no different than an "artist who continues to dab paint on the canvas until the image matches the painter's vision."[96] In contrast, the Authors Guild likened repetitive prompting to "spinning a roulette

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[92] *See, e.g.*, Evangelical Christian Publishers Association ("ECPA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8 (Oct. 30, 2023) ("ECPA Initial Comments") ("If the issue is one of control and predictability, fine-tuning repeatedly until the final expression is satisfactory demonstrates the author's ultimate control of the final work, even if each iteration leading up to the final expression may be subject to unpredictability."); SCA Robotics, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Sept. 29, 2023) ("SCA Robotics Initial Comments") (stating that authorship should depend on factors such as "the human user's control of the artistic expression outputted by the platform," including "the extent of the human party's discretion over accepting and/or modifying the outputted work"); International Center for Law & Economics, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 18 (Oct. 30, 2023) ("AI systems remain tools that require human direction and judgment. As such, when a person provides the initial prompt or framing, makes choices regarding the iterative development of the AI output, and decides that the result is satisfactory for inclusion in a final work, they are fundamentally engaging in creative decision making that constitutes authorship under copyright law.").

[93] *See* IPO Initial Comments at 5 (noting that "[t]he same user might iterate on dozens, even hundreds, of prompts of greater complexity and specificity before achieving a desired result").

[94] Superframe, LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Sept. 6, 2023); *see also* AI and Metaverse Task Force of the Trust over IP Foundation, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 4 (Oct. 30, 2023); Donaldson Callif Perez Initial Comments at 2.

[95] This theory would find authorship in the decision to adopt something unplanned or unexpected occurring in the course of creating a work. *See* Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343 (2019). It can be traced to *Alfred Bell & Co. v. Catalda Fine Arts*, which assessed the originality of mezzotint engravings that were based on paintings in the public domain. 191 F.2d 99, 104 (2d Cir. 1951). The defendant argued that the engravings were mere copies of preexisting paintings, and therefore not protected by copyright. *Id.* In finding that the engraver's versions were sufficiently different, the court speculated that "[a] copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations." *Id.* at 105. "Having hit upon such a variation unintentionally," the court held that "the 'author' may adopt it as his and copyright it." *Id.*

[96] ECPA Initial Comments at 7.

wheel with infinite possibilities."[97] It argued that "when a user [metaphorically] spins the wheel dozens of times until they land on an output they like," such activity should not give the user a right to claim ownership of that output.[98]

Discussing the authorship by adoption theory, Professors Jane Ginsburg and Luke Ali Budiardjo concluded that, "[w]ere post-execution adoption to substitute for any authorial participation, even indirect or inadvertent, in giving physical form to a work, then, in addition to [naming] the 'wrong' author, copyright law would effectively vest adopters with rights in ideas."[99] Professor Daniel Gervais made a similar point with the following analogy: "If I walk into a gallery or shop that specializes in African savanna paintings or pictures because I am looking for a specific idea (say, an elephant at sunset, with trees in the distance), I may find a painting or picture that fits my idea," but "[t]hat in no way makes me an author."[100]

2. Analysis

The Office concludes that, given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output. Prompts essentially function as instructions that convey unprotectible ideas. While highly detailed prompts could contain the user's desired expressive elements, at present they do not control how the AI system processes them in generating the output.

Cases regarding joint authorship support this conclusion. These cases address the amount of control that is necessary to claim authorship. The provision of detailed directions, without influence over how those directions are executed, is insufficient.[101] As the Third Circuit explained, when a person hires someone to execute their expression, "that process must be rote or mechanical transcription that does not require intellectual modification or highly technical enhancement" for the delegating party to claim copyright authorship in the final work.[102] Although entering prompts into a generative AI system can be seen as similar to providing instructions to an artist commissioned to create a work, there are key differences. In a human-to-human collaboration, the hiring party is able to oversee, direct, and understand the contributions of a commissioned human artist. Depending on the nature of each party's contributions, the artist may be the sole author, or the outcome may be a joint work or work

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[97] The Authors Guild Initial Comments at 31–32.

[98] *Id.*; *see also* Kernochan Center Initial Comments at 9 (asserting that "selection of a single output is not itself a creative act"); Daniel Gervais Initial Comments at 6–7; Johan Brandstedt Initial Comments at 29.

[99] Ginsburg & Budiardjo, *supra* note 95, at 370.

[100] Daniel Gervais Initial Comments at 7.

[101] *Payday*, 886 F.2d at 1087; *see, e.g.*, *CCNV*, 490 U.S. at 737 ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.").

[102] *Andrien*, 927 F.2d at 134–35.

made for hire.[103] In theory, AI systems could someday allow users to exert so much control over how their expression is reflected in an output that the system's contribution would become rote or mechanical.[104] The evidence as to the operation of today's AI systems indicates that this is not currently the case. Prompts do not appear to adequately determine the expressive elements produced, or control how the system translates them into an output.[105]

The gaps between prompts and resulting outputs demonstrate that the user lacks control over the conversion of their ideas into fixed expression, and the system is largely responsible for determining the expressive elements in the output. In other words, prompts may reflect a user's mental conception or idea, but they do not control the way that idea is expressed. This is even clearer in the case of generative AI systems that modify or rewrite prompts internally. That process recasts the human contribution—however detailed it may be—into a different form.

The following image, which the Office generated by entering a prompt into a popular commercially available AI system, illustrates this point:[106]

Prompt	***Output***
professional photo, bespectacled cat in a robe reading the Sunday newspaper and smoking a pipe, foggy, wet, stormy, 70mm, cinematic, highly detailed wood, cinematic lighting, intricate, sharp focus, medium shot, (centered image composition), (professionally color graded), ((bright soft diffused light)), volumetric fog, hdr 4k, 8k, realistic	

This prompt describes the subject matter of the desired output, the setting for the scene, the style of the image, and placement of the main subject. The resulting image reflects some of these instructions (*e.g.*, a bespectacled cat smoking a pipe), but not others (*e.g.*, a highly detailed wood environment). Where no instructions were provided, the AI system filled in the gaps.

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[103] In contrast, AI systems cannot produce joint works or works made for hire because they are not "authors," they are not capable of forming an intention to merge their output with the user's contributions, and they cannot enter into binding contracts. *See* Kernochan Center Initial Comments at 7; Brief for Appellees, at 27, Thaler v. Perlmutter, No. 23-5233 (D.C. Cir. Mar. 6, 2024).

[104] This outcome would raise additional questions about the utility of AI in creative expression.

[105] *Cf. Geshwind*, 734 F. Supp. at 650–51 ("The fact that the agent, Geshwind, wanted changes in details and aspects of the portrait and even made suggestions, the compliance with which may or may not have improved the effect, does not make him the creator."); *M.G.B. Homes*, 903 F.2d at 1493; *Payday*, 886 F.2d at 1087.

[106] The Office used Google's generative AI chatbot Gemini to generate this image. GEMINI, https://gemini.google.com/ (last visited Jan. 17, 2025).

For instance, the prompt does not specify the cat's breed or coloring, size, pose, any attributes of its facial features or expression, or what clothes, if any, it should wear beneath the robe. Nothing in the prompt indicates that the newspaper should be held by an incongruous human hand.

The fact that identical prompts can generate multiple different outputs further indicates a lack of human control.[107] As one popular system explains on its website, "[n]o matter how detailed . . . the same text describes an infinite number of possible" outputs.[108] In these circumstances, the black box of the AI system is providing varying interpretations of the user's directions.

Repeatedly revising prompts does not change this analysis or provide a sufficient basis for claiming copyright in the output. First, the time, expense, or effort involved in creating a work by revising prompts is irrelevant, as copyright protects original authorship, not hard work or "sweat of the brow."[109] Second, inputting a revised prompt does not appear to be materially different in operation from inputting a single prompt. By revising and submitting prompts multiple times, the user is "re-rolling" the dice, causing the system to generate more outputs from which to select, but not altering the degree of control over the process.[110] No matter how many times a prompt is revised and resubmitted, the final output reflects the user's acceptance of the AI system's interpretation, rather than authorship of the expression it contains.

Some commenters drew analogies to a Jackson Pollock painting or to nature photography taken with a stationary camera, which may be eligible for copyright protection even if the author does not control where paint may hit the canvas or when a wild animal may step into the frame.[111] However, these works differ from AI-generated materials in that the human author is principally responsible for the execution of the idea and the determination of the expressive elements in the resulting work. Jackson Pollock's process of creation did not end with his vision of a work. He controlled the choice of colors, number of layers, depth of texture, placement of each addition to the overall composition—and used his own body movements to execute each of these choices. In the case of a nature photograph, any copyright protection is based primarily on the angle, location, speed, and exposure chosen by the photographer in

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[107] *See supra* note 32. The Office re-ran the prompt above and received a much different image of a cat in a stormy setting.

[108] *How do I make music with Udio?*, UDIO, https://www.udio.com/guide (emphasis omitted) (last visited Jan. 17, 2025).

[109] *Feist*, 499 U.S. at 352.

[110] *See, e.g.*, Kernochan Center Initial Comments at 8 ("If each prompt newly rolls the dice, it is difficult to discern the dominance of will that 'direction' implies, and thus hard to classify it as meeting the requirement of an objective 'intent.'").

[111] *See, e.g.*, Tim Boucher, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8 (Oct. 26, 2023); Christa Laser Initial Comments at 4; MPA Initial Comments at 47–50; Pamela Samuelson et al. Initial Comments at 4.

setting up the camera, and possibly post-production editing of the footage.[112] As one commenter explained, "some element of randomness does not eliminate authorship," but "the putative author must be able to constrain or channel the program's processing of the source material."[113] The issue is the degree of human control, rather than the predictability of the outcome.[114]

The Office also agrees that authorship by adoption does not in itself provide a basis for claiming copyright in AI-generated outputs. As commenters noted, providing instructions to a machine and selecting an output does not equate to authorship.[115] Selecting an AI-generated output among uncontrolled options is more analogous to curating a "living garden," than applying splattered paint.[116] As the Kernochan Center observed, "selection among the offered options" produced by such a system cannot be considered copyrightable authorship, because the "selection of a single output is not itself a creative act."[117]

There may come a time when prompts can sufficiently control expressive elements in AI-generated outputs to reflect human authorship. If further advances in technology provide users with increased control over those expressive elements, a different conclusion may be called for.[118] On the other hand, technological advancements that facilitate increased automation and optimization may bolster our current conclusions. For example, if generative

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[112] Like other copyrighted works, nature photography must have a sufficient amount of creative expression to satisfy the originality standard.

[113] Kernochan Center Initial Comments at 5.

[114] *See* Digital Media Licensing Association ("DMLA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023) ("DMLA Initial Comments") (stating that "the foreseeability of the AI's results may bear on authorship" in cases "where there is a limited range of specific expressive output that is objectively foreseeable as a result of a human user's prompt"); Kernochan Center Initial Comments at 5; MPA Initial Comments at 45–46 (acknowledging that evaluating "the elements of predictability and control may be appropriate in certain cases"); International Trademark Association ("INTA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 30, 2023) ("INTA Initial Comments") (acknowledging that if a program generated an image by simply populating "each pixel with a randomly-selected color, it seems obvious that the resulting work should not be considered a work of authorship"); The Authors Guild Initial Comments at 31.

[115] The Authors Guild Initial Comments at 31–32; Daniel Gervais Initial Comments at 6–7; Kernochan Center Initial Comments at 8.

[116] *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011); *see also* COMPENDIUM (THIRD) § 306; *Thaler*, 687 F. Supp. 3d at 146 (holding that the "key" to copyright protection is "[h]uman involvement in, and ultimate creative control over, the work at issue").

[117] Kernochan Center Initial Comments at 9.

[118] S*ee* Authors Alliance Initial Comments at 19 ("[A]s both generative AI systems and the ways that creators use them change and evolve, the application of the human authorship requirement to content that is AI-generated or AI-assisted may also change. For example, if these tools developed in a way that would give creators more control over the outputs, works created with these tools could potentially be considered works of human authorship.").

AI systems integrate or further improve automated prompt optimization, users' control may be diminished.

E. Expressive Inputs

As discussed above, AI systems take inputs in the form of text, images, audio, video, or a combination of these mediums. Some systems—whether via tools, settings, or prompts—allow inputs to be substantially retained as part of the output. For example, one commenter noted that a human author may create an original illustration, input that work into an AI system, and instruct the system "to modify [the] color or layer portions of [the] existing image."[119] Another observed that an AI system may be used to modify or translate a copyrighted work,[120] such as uploading a story written in the first person and instructing the system to convert it to a third-person point of view.

These types of expressive inputs, while they may be seen as a form of prompts, are different from those that merely communicate desired outcomes. As commenters pointed out, where human-authored inputs are reflected in the output, they contribute more than just an intellectual conception. One explained that "a human author who inputs their own illustration or media file" into an AI system "may have a greater claim to authorship," because "there is a limited range of specific expressive output that is objectively foreseeable as a result of a human user's" contribution.[121] Another noted that when a user provides an input to an AI system such as "a traditional work created or designated by the user . . . the specified starting point constrains the 'autonomy' of the outputs" and thus may "present a more persuasive case of human intervention" than simply applying "prompts to an unknown starting point."[122]

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[119] DMLA Initial Comments at 16.

[120] Pearson, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023) ("Pearson Initial Comments").

[121] DMLA Initial Comments at 16; *see* Pearson Initial Comments at 7–8 (acknowledging that "copyright can only protect material that is the product of human activity" and stating that "further consideration should be given to whether a claim of authorship in output may exist where the input itself is a representation of the original intellectual conception of an author"); National Music Publishers' Association ("NMPA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 30 (Oct. 30, 2023) ("NMPA Initial Comments") ("Creators that use AI to refine, recast, or modify, or to create new derivative works based on their preexisting works may also have legitimate claims of authorship over the resulting work in some circumstances.").

[122] Kernochan Center Initial Comments at 5–6; *see* MPA Initial Comments at 50 (noting that "material human creators provide to the AI tool" such as "inputs, like a drawing or photo" can be considered "intellectual and creative contributions that are inseparable from the ultimate work").

As an example, in the following work submitted to the Office for registration, the author had created a hand-drawn illustration and used it as an input, along with the prompt shown below.[123]

The AI system produced this output:

Prompt	***Input***	***Output***
"a young cyborg woman (((roses))) flowers coming out of her head, photorealism, cinematic lighting, hyper realism, 8k, hyper detailed."		

The drawing itself is a copyrightable work, and its expressive elements are clearly perceptible in the output, including the outline of the mask, the position of the nose, mouth, and cheekbones relative to the shape of the mask, the arrangement of the stems and rosebuds, and the shape and placement of the four leaves.

The applicant disclaimed "any non-human expression" appearing in the final work, such as the realistic, three-dimensional representation of the nose, lips, and rosebuds, as well as the lighting and shadows in the background. After reviewing the information provided in the application, the Office registered the work with an annotation stating: "Registration limited to unaltered human pictorial authorship that is clearly perceptible in the deposit and separable from the non-human expression that is excluded from the claim."[124]

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[123] *Rose Enigma*, VAu001528922 (Mar. 21, 2023). More about the artist Kris Kashtanova's creation of this work is available on their website. *Portfolio: Rose Enigma*, KRIS KASHTANOVA, https://www.kris.art/portfolio-2/rose-enigma (last visited Jan. 17, 2025).

[124] *Rose Enigma*, VAu001528922 (Mar. 21, 2023). By contrast, the Office's Review Board upheld a refusal to register an image produced by an AI system with a human author's photograph as an input. U.S. Copyright Office Review Board, *Decision Affirming Refusal of Registration of Suryast* at 1 (Dec. 11, 2023), https://copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf. The applicant disclosed that the image was generated by "RAGHAV Artificial Intelligence Painting App" ("RAGHAV"), which had been trained on Vincent van Gogh's *The Starry Night*—with an instruction to apply the style of *The Starry Night* to the photograph. *Id*. at 2. The Board found that the resulting image did not "contain sufficient human authorship necessary to sustain a claim to copyright" because the applicant "exerted insufficient creative control over RAGHAV's" generation of the output. *Id*. at 3, 7–8. Unlike *Rose Enigma*, the output did not clearly show the copyrightable work input by the applicant. *See id.* at 7–8.

As illustrated in this example, where a human inputs their own copyrightable work and that work is perceptible in the output, they will be the author of at least that portion of the output. Their own creative expression will be protected by copyright, with a scope analogous to that in a derivative work. Just as derivative work protection is limited to the material added by the later author,[125] copyright in this type of AI-generated output would cover the perceptible human expression. It may also cover the selection, coordination, and arrangement of the human-authored and AI-generated material, even though it would not extend to the AI-generated elements standing alone.

F. Modifying or Arranging AI-Generated Content

Generating content with AI is often an initial or intermediate step, and human authorship may be added in the final product. As explained in the AI Registration Guidance, "a human may select or arrange AI-generated material in a sufficiently creative way that 'the resulting work as a whole constitutes an original work of authorship.'"[126] A human may also "modify material originally generated by AI technology to such a degree that the modifications meet the standard for copyright protection."[127]

As several commenters noted, human authors should be able to claim copyright if they select, coordinate, and arrange AI-generated material in a creative way.[128] This would provide protection for the output as a whole (although not the AI-generated material alone).[129] A relatively common scenario in registration applications is the combination of human-authored text with AI-generated images. In one early case, for instance, the Office found that the selection and arrangement of AI-generated images with human-authored text in a comic book were protectable as a compilation. We explained:

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[125] *See* H.R. REP. NO. 94-1476, at 57; S. REP. NO. 94-473, at 55 ("[C]opyright in a 'new version' covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.").

[126] AI Registration Guidance at 16192.

[127] *Id.* at 16192–93.

[128] *See, e.g.*, BLIP Initial Comments at 20; Center for Art Law, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Oct. 26, 2023); Cisco Systems, Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023) ("Cisco Initial Comments"); IPO Initial Comments at 4–6; Peer Music-Boomy Joint Initial Comments at 12.

[129] *See Feist*, 499 U.S. at 348 (noting that copyright protection for a compilation "may extend only to those components of a work that are original to the author").

> [T]he Office finds that the compilation of these images and text throughout the Work contains sufficient creativity under *Feist* to be protected by copyright. Specifically, the Office finds the Work is the product of creative choices with respect to the selection of the images that make up the Work and the placement and arrangement of the images and text on each of the Work's pages. Copyright therefore protects [the applicant's] authorship of the overall selection, coordination, and arrangement of the text and visual elements that make up the Work.[130]

Multiple similar registrations have been made since then.[131]

A number of commenters also made the point that if a user edits, adapts, enhances, or modifies AI-generated output in a way that contributes new authorship, the output would be entitled to protection.[132] They argued that these modifications "should be assessed in the same way as . . . editorial or other changes to a pre-existing work."[133] Although such works would not technically qualify as "derivative works,"[134] derivative authorship provides a helpful analogy in identifying originality. Again, the copyright would extend to the material the human author contributed but would not extend to the underlying AI-generated content itself.[135]

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[130] U.S. Copyright Office, *Cancellation Decision re: Zarya of the Dawn (VAu001480196)* at 5 (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf.

[131] *See supra* notes 15, 123.

[132] *See, e.g.*, Apple Initial Comments at 1; ASCAP Initial Comments at 49; The Authors Guild Initial Comments at 32; BLIP Initial Comments at 25; Cisco Initial Comments at 7; Graphic Artists Guild, Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 19 (Oct. 30, 2023) ("Graphic Artists Guild Initial Comments"); OpenAI, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15 (Oct. 30, 2023).

[133] Kernochan Center Initial Comments at 6.

[134] A derivative work is "a work based upon one or more preexisting works." 17 U.S.C. § 101 (defining "derivative work"). Because entirely AI-generated outputs do not contain the human authorship required to be a "work of authorship," the modified versions cannot qualify under this definition. *See* H.R. REP. NO. 94-1476, at 57; S. REP. NO. 94-473, at 55 (noting that "the 'pre-existing work' must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted").

[135] *See* H.R. REP. NO. 94-1476, at 57; S. REP. NO. 94-473, at 55.

Many popular AI platforms offer tools that encourage users to select, edit, and adapt AI-generated content in an iterative fashion. Midjourney, for instance, offers what it calls "Vary Region and Remix Prompting," which allow users to select and regenerate regions of an image with a modified prompt. In the "Getting Started" section of its website, Midjourney provides the following images to demonstrate how these tools work.[136]



(1) Generate Candidate Images with Prompt: *meadow trail lithograph*



(2) Select and Upscale Image



(3) Use Freehand Editing Tool to Select Region



(4) Generate Candidate Images with Prompt*:* *meadow stream lithograph*



(5) Select and Upscale Image

The image was further modified by repeating the editing process:







Other generative AI systems also offer tools that similarly allow users to exert control over the selection, arrangement, and content of the final output.[137]

[136] *Vary Region + Remix*, MIDJOURNEY, https://docs.midjourney.com/docs/vary-region-remix (last visited Jan. 17, 2025). Text descriptions below each image were added by the Office.

[137] OpenAI's ChatGPT, for instance, has a feature called "canvas," which provides an interactive interface for users to "collaborate" with the model while writing a document or code. Users can edit AI-generated text; highlight regions for the model to focus on; use built-in tools to request in-line suggestions, length adjustments, and changes to the reading level; and write instructions that detail particular edits to be made. *See Introducing Canvas*, OPENAI (Oct. 3, 2024), https://openai.com/index/introducing-canvas/.

Unlike prompts alone, these tools can enable the user to control the selection and placement of individual creative elements. Whether such modifications rise to the minimum standard of originality required under *Feist* will depend on a case-by-case determination.[138] In those cases where they do, the output should be copyrightable.

Similarly, the inclusion of elements of AI-generated content in a larger human-authored work does not affect the copyrightability of the larger human-authored work as a whole.[139] For example, a film that includes AI-generated special effects or background artwork is copyrightable, even if the AI effects and artwork separately are not.

[138] The selection, coordination, and arrangement of only two or three elements is not generally sufficient for copyright protection. *See* COMPENDIUM (THIRD) § 312.2 ("[T]he Office generally will not register a compilation containing only two or three elements, because the selection is necessarily *de minimis*." (citing H.R. REP. NO. 94-1476, at 122 (stating that a work does not qualify as a collective work "where relatively few separate elements have been brought together," as in the case of "a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays"))).

[139] *Cf.* AI Registration Guidance at 16192–93.

III. INTERNATIONAL APPROACHES

Other countries are also analyzing whether copyright protection should extend to works containing AI-generated material. Those that have addressed this issue so far have agreed that copyright requires human authorship.

The Korean Copyright Commission and the Ministry of Culture, Sports and Tourism issued *A Guide on Generative AI and Copyright* in 2023, in which it explained that "only a natural person can become an author"[140] and that "copyright registration for an AI output is impossible if a human did not contribute creatively to the expressive form."[141] The Korean guidance noted that "if a human had performed *additional work* on the AI output, such as modifying, or making additions or deletions, only the part that had undergone such change is copyrightable."[142] It also stated that an author can register a work as a compilation if he or she selected and rearranged the AI output creatively.[143]

In Japan, the Copyright Subdivision of the Cultural Council published a summary of its guidelines in May 2024 titled *General Understanding on AI and Copyright in Japan*.[144] The guidelines explained that the copyrightability of AI-generated content will be determined on a case-by-case basis, depending on the following factors: (1) the amount and content of the instructions and input prompts by the AI user; (2) the number of generation attempts; (3) the selection by the AI user from multiple output materials; and (4) any subsequent human additions and corrections to the AI-generated work.[145]

In the People's Republic of China, the Beijing Internet Court evaluated arguments in a copyright infringement case involving an AI-generated work in 2023, starting with the premise that human authorship was required for copyright protection.[146] It found that an image created

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[140] Ministry of Culture, Sports and Tourism & Korea Copyright Comm'n, *A Guide on Generative AI and Copyright*, at 40 (2023), https://www.copyright.or.kr/eng/doc/etc_pdf/Guide_on_Generative_AI_and_Copyright.pdf.

[141] *Id.* at 41.

[142] *Id.*

[143] *Id.* It has been reported that a copyright registration was granted in December 2023 for an AI-generated film based on the "human editing of the AI[-]generated film and images." Edward Lee, *South Korea grants copyright to AI generated work, 'AI Suro's Wife' film as work edited by humans*, CHATGPT IS EATING THE WORLD (Jan. 8, 2024), https://chatgptiseatingtheworld.com/2024/01/08/south-korea-grants-copyright-to-ai-generated-work-ai-suros-wife-film-as-work-edited-by-humans/.

[144] Legal Subcommittee under the Copyright Subdivision of the Cultural Council, *General Understanding on AI and Copyright in Japan* (May 2024), https://www.bunka.go.jp/english/policy/copyright/pdf/94055801_01.pdf.

[145] *Id.* at 17.

[146] Li Mou Mou Su Liu Mou Mou Qin Hai Zuo Pin Shu Ming Quan, Xin Xi Wang Luo Chuan Bo Quan Jiu Fen An (李某某诉刘某某侵害作品署名权, 信息网络传播权纠纷案) [Li v. Liu, Dispute over Copyright Infringement of the Right of Attribution and Right of Information Network Distribution of Works], at 14 (Beijing Internet Ct. Nov. 27, 2023), https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf. Page numbers in this Report are based on the English translation released by the Beijing Internet Court online.

using Stable Diffusion was protected under China's copyright law,[147] and that the person who used AI to create the image was the author.[148] According to the court, the selection of over 150 prompts combined with subsequent adjustments and modifications demonstrated that the image was the result of the author's "intellectual achievements," reflecting his personalized expression.[149]

In the European Union, the majority of member states agreed, in response to a 2024 policy questionnaire on the relationship between generative AI and copyright, that current copyright principles adequately address the copyright eligibility of AI outputs and there is no need to provide new or additional protection.[150] Member states also shared the view that AI-generated content may be eligible for copyright "only if the *human input in* [*the*] *creative process was significant*."[151] This consensus extended to the understanding that purely AI-generated works cannot be protected by copyright, as only a natural person can be considered an author.[152] Based on similar reasoning, in 2024, a court in Czechia, also known as the Czech Republic, held that an AI tool cannot be the author of a copyrighted work.[153]

In the United Kingdom, a statute predating the development of generative AI technologies protects works "generated by computer in circumstances such that there is no human author of the work."[154] It designates the author as a "person by whom the arrangements

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[147] *Id.* at 10–14; *see also* Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Feb. 26th, 2010, effective Apr. 1, 2010), art. 3.

[148] *See supra* note 146 at 14–15. While the ruling is not precedential under Chinese judicial practice, it may inform policies and practices about the copyrightability of AI-generated art under Chinese law. *Id.* at 11–12. China has recently considered statutory clarifications for when a work generated by AI is protected under copyright. A preliminary draft of China's proposed AI law states that when a work generated using AI meets the conditions under the Copyright Law then it can be protected under that law "based on the extent of the user's contribution to the final presentation of the content." Zhong Hua Ren Min Gong He Guo Ren Gong Zhi Neng Fa (Xue Zhe Jian Yi Gao) (中华人民共和国人工智能法 (学者建议稿)) [Law of the People's Republic of China on Artificial Intelligence (Scholar's Draft Proposal)], art. 36, Official WeChat account of the Digi. Rule of Law Inst. at East China Univ. of Political Sci. and L., *translated by* Center for Sec. and Emerging Tech., https://cset.georgetown.edu/wp-content/uploads/t0592_china_ai_law_draft_EN.pdf.

[149] *See supra* note 146 at 11–12.

[150] Council of the European Union, *Policy questionnaire on the relationship between generative Artificial Intelligence and copyright and related rights – Revised Presidency summary of the Member States contributions*, at 16–18 (Dec. 20, 2024), https://data.consilium.europa.eu/doc/document/ST-16710-2024-REV-1/en/pdf.

[151] *Id.* at 16.

[152] *Id.* at 15.

[153] *See* Tomáš Ščerba & Jaroslav Fořt, *The first Czech case on generative AI*, TECH.'S LEGAL EDGE (Apr. 4, 2024), https://www.technologyslegaledge.com/2024/04/the-first-czech-case-on-generative-ai/; Alessandro Cerri, *Czech court finds that AI tool DALL-E cannot be the author of a copyright work*, THE IPKAT (Apr. 15, 2024), https://ipkitten.blogspot.com/2024/04/czech-court-finds-that-ai-tool-dall-e.html.

[154] Copyright, Designs and Patents Act 1988, c. X, I, §§ 178, 9(3) (UK), https://www.legislation.gov.uk/ukpga/1988/48/data.pdf. Protection lasts for fifty years from the date the work is made. *Id.*, c. I, § 12(7).

necessary for the creation of the work are undertaken."[155] In 2021, the United Kingdom Intellectual Property Office ("UKIPO") sought public comment on whether to change this law, in light of advancements in generative AI. Based on the lack of any case law applying this provision to AI,[156] the UKIPO concluded that "[i]t is unclear whether removing [protection for computer-generated works] would either promote or discourage innovation and the use of AI for the public good."[157] It elected to leave the law in place but did not rule out future changes.[158] Since then, the UK government has initiated a new consultation on copyright and AI, including questions about prompts, computer-generated works, and outputs of AI models.[159]

Several other former and current commonwealth countries, such as Hong Kong,[160] India,[161] and New Zealand,[162] have enacted similar provisions, but there too it is unclear whether or how they will apply to AI-generated works.

In Canada, a 2021 review of the Copyright Act acknowledged a lack of clarity concerning the authorship of an AI-generated work.[163] While the Standing Committee on Industry, Science and Technology, which led the review, recommended that legislation should

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[155] *Id.*, c. I, § 9(3).

[156] UKIPO, *Consultation outcome of the Intell. Prop. Office on Artificial Intelligence and Intellectual Property: copyright and patents*, ¶ 22 (June 28, 2022), https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/outcome/artificial-intelligence-and-intellectual-property-copyright-and-patents-government-response-to-consultation#copyright-in-computer-generated-works.

[157] *Id.* ¶ 29.

[158] *Id.* ¶¶ 29–30.

[159] *See* UKIPO, *Open Consultation of the Intell. Prop. Office on Copyright and Artificial Intelligence* (Dec. 17, 2024), https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#bcopyright-and-artificial-intelligence.

[160] Section 11(3) of Hong Kong's Copyright Ordinance states: "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author is taken to be the person by whom the arrangements necessary for the creation of the work are undertaken." Copyright Ordinance, (2019) Cap. 528, § 11(3) (H.K.).

[161] Section 2(d)(vi) of India's Copyright Act defines author as "in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created." The Copyright Act, 1957, § 2(d)(vi). Without citing that section, in 2020 the Indian Copyright Office registered the AI-generated work described in note 124, listing the AI tool as a co-author, but a year later issued a notice of withdrawal of the registration. Sukanya Sarkar, *Exclusive: Indian Copyright Office issues withdrawal notice to AI co-author*, MANAGINGIP (Dec. 13, 2021), https://www.managingip.com/article/2a5d0jj2zjo7fajsjwwlc/exclusive-indian-copyright-office-issues-withdrawal-notice-to-ai-co-author.

[162] Section 5(2)(a) of New Zealand's copyright law defines author as "in the case of a literary, dramatic, musical, or artistic work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken." Copyright Act 1994, s 5(2)(a).

[163] Innovation, Sci. and Econ. Dev. Canada ("ISED Canada"), *A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things*, at 12 (2021), https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/ConsultationPaperAIEN.pdf.

provide greater clarity, the Canadian Parliament has not yet acted on the recommendation.[164] In 2023, Canada relaunched the consultation process, with a comment period that closed in January 2024.[165]

Similarly, in Australia, participants in 2024 consultations held by the Select Committee on Adopting Artificial Intelligence shared concerns over the lack of clarity in Australia's copyright laws regarding the "extent of copyright protection, if any, that is afforded to works created by humans with the assistance or augmentation of AI."[166] The Select Committee in its recommendations, however, did not specifically address this issue or suggest any action.

Although some level of consensus on the need for human authorship appears to be emerging, and most countries have so far continued to apply existing law, it is clear that views are still being formed. It remains to be seen how copyrightability standards will be interpreted and applied. The Office is closely monitoring developments abroad and evaluating how other countries' evolving approaches may ultimately overlap or differ from our own.

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[164] *Id.* at 13.

[165] ISED Canada, *Consultation on Copyright in the Age of Generative Artificial Intelligence* (2021), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-copyright-age-generative-artificial-intelligence.

[166] Select Committee on Adopting Artificial Intelligence, Parliament of Australia (Final Report, November 2024) ¶ 4.166, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000470/toc_pdf/SelectCommitteeonAdoptingArtificialIntelligence(AI).pdf.

IV. THE ARGUMENTS FOR LEGAL CHANGE

A. Providing Incentives

Commenters generally stressed the value of incentives to produce new works of authorship.[167] They differed, however, in their interpretations of the Copyright Clause and their assessment of the impact of providing such incentives for AI-generated content.

Those supporting copyright protection for AI-generated material contended that it would encourage the creation of more works, furthering progress in culture and knowledge to the benefit of the public.[168] They took the position that the Copyright Clause should be read flexibly to encompass new technologies.[169] For instance, one commenter argued that this interpretation should "evolve with technological advancements" to ensure that "the spirit of this mandate continues to foster innovation and artistic expression in all its forms."[170]

Most commenters that opined on this issue, however, agreed with the Office's view that the Copyright Clause requires human authorship.[171] They supported the conclusion that AI-

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[167] *See, e.g.*, A2IM-RIAA Joint Initial Comments at 4 n.11 (quoting *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *4 (D.D.C. Aug. 18, 2023)); Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 30, 2023) ("Copyright Alliance Initial Comments"); DMLA Initial Comments at 17–18; Graphic Artists Guild Initial Comments at 1; Internet Archive, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10–11 (Oct. 30, 2023) ("Internet Archive Initial Comments").

[168] *See, e.g.*, Dallas Joder, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Nov. 30, 2023) ("Dallas Joder Reply Comments"); Peer Music-Boomy Joint Initial Comments at 14.

[169] For example, AI company BigBear.ai asserted that the Constitution "does not prohibit protection of AI-generated material," and that the availability of copyright protection "should not depend on the method through which [it] was generated." BigBear.ai Holdings, Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 25 (Oct. 18, 2023); *see also* Ryan Abbott, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 21, 2023) ("Ryan Abbott Initial Comments") ("The history and purpose of the Constitution and the Copyright Act both weigh in favor of the protection of AI-generated works because the public interest trumps any direct benefit to authors."); Peer Music-Boomy Joint Initial Comments at 15 ("[W]e do not believe that placing limitations on creators by limiting the sort of output we incentivize furthers the constitutional aims of copyright."); BLIP Initial Comments at 25 ("The Copyright Act should be amended to include a new section that provides protection for AI-generated material.").

[170] Dallas Joder Reply Comments at 3; *see also* Duane Valz, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Oct. 18, 2023) (While "the authors of the Constitution may not have imagined that entities other than natural persons would ever qualify as authors or inventors. . . .[, t]his doesn't mean that new types or persons or entities cannot be made eligible as authors or owners of copyrights if Congress sees fit to deem them such.").

[171] *See* A2IM-RIAA Joint Initial Comments at 34–35; The Authors Guild Initial Comments at 34; Anonymous AI Technical Writer, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15 (Dec. 6, 2023) ("Anonymous AI Technical Writer Reply Comments"); Copyright Alliance Initial Comments at 96–97; DMLA Initial Comments at 17–18; Graphic Artists Guild Initial Comments at 20; David Newhoff, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Oct. 17, 2023) ("David Newhoff Initial Comments"); UMG Initial Comments at 81–82.

generated material can only be protected where there is sufficient human involvement or where AI is used as a tool to enhance human expression.[172]

These commenters emphasized that the Copyright Clause refers to promoting progress specifically by providing *authors* with legal and economic incentives.[173] They noted that AI systems, by contrast, are inanimate objects that "do not need an incentive to create."[174] As one commenter stated, "AIs do the work they are programmed to do, without regard to incentives."[175]

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[172] *See* American Bar Association, Intellectual Property Law Section ("ABA-IPL"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 14 (Oct. 30, 2023) ("ABA-IPL Initial Comments"); American Intellectual Property Law Association ("AIPLA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) ("AIPLA Initial Comments"); Johan Brandstedt Initial Comments at 30; ACT | The App Association ("App Association"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6–7 (Oct. 30, 2023) ("App Association Initial Comments"); Entertainment Software Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023); IPO Initial Comments at 7; Recording Academy Initial Comments at 11; Scenario Initial Comments at 16–17.

[173] *See* A2IM-RIAA Joint Initial Comments at 4 (quoting *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *4 (D.D.C. Aug. 18, 2023)), 35; ASCAP Initial Comments at 50; Authors Alliance Initial Comments at 18–19; DMLA Initial Comments at 17–18; Graphic Artists Guild Initial Comments at 1, 20; Daniel Gervais Initial Comments at 7; Fight for the Future, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8 (Oct. 30, 2023) ("Fight for the Future Initial Comments"); Internet Archive Initial Comments at 10–11; Kernochan Center Initial Comments at 10–11; David Newhoff Initial Comments at 3; NMPA Initial Comments at 29–30; Seth Polansky Initial Comments at 29; Copyright Alliance Initial Comments at 5.

[174] Google LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 12 (Oct. 30, 2023); *see also* Computer & Communications Industry Association ("CCIA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 19 (Oct. 30, 2023) ("CCIA Initial Comments") ("Computers don't need incentives; only people do. And existing incentives—both legal, such as copyrights and patents, and non-legal, such as first-mover advantages and a desire to supply a commercial need—will suffice to ensure the development of generative AI technologies."); AIPLA Initial Comments at 11; NMPA Initial Comments at 29 ("As a policy matter, copyright law should never protect purely AI-generated content that does not represent human expression. Existing copyright law rightfully incentivizes human creativity by granting protection to the 'the fruits of intellectual labor' that 'are founded in the creative powers of the mind.'"); Xiyin Tang et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10–11 (Oct. 30, 2023) ("Xiyin Tang et al. Initial Comments") ("The artificial intelligence itself needs no incentive, as it is programmed to create, and needs only human prompting to generate works. The only other party that could need the incentive of copyright would be the users of AI systems. However, creation of works using AI technology requires substantially less time and effort than most human created works. Humans receive copyright protection for their works to balance against the cost of creating those works, and the risk in investing so much time and resources only for another party to copy the finished product. With AI-created works, 'both the fixed and variable costs of producing each copyrightable article are effectively zero, which allows producers to compete with imitators even absent legal protection.'" (citations omitted)).

[175] Pamela Samuelson et al. Initial Comments at 3. *See also* A2IM-RIAA Joint Initial Comments at 4 (quoting *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *4 (D.D.C. Aug. 18, 2023)); Association of American Publishers ("AAP"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 31–32 (Oct. 30, 2023) ("AAP Initial Comments"); CCIA Initial Comments at 19; Internet Archive Initial Comments at 10–11 ("The traditional policy foundations for extending copyright protection generally do not apply in the case of AI-generated material. There is no evidence that copyright law provides necessary incentives for the creation of AI-generated works, and regardless,

Several commenters asserted that there appear to be sufficient incentives for AI companies under existing law.[176] Some pointed out that the exponential growth of AI technologies—even in the absence of copyright protection—indicates that their developers do not need copyright incentives to produce these technologies.[177] "As machine learning practitioners," the AI company Hugging Face, stated: "[W]e find that very little to no innovation in generative AI is driven by the hope of obtaining copyright protection for model outputs. The incentives for innovation already exist without modifying copyright law."[178]

Finally, many expressed concern that providing legal protection to AI-generated content would discourage human authorship. Representatives of copyright owners maintained that the proliferation of legally protected AI-generated outputs would stifle creativity, leading to an overall decrease in human-authored works available to the public because humans will be disincentivized to create.[179] For example, the Copyright Alliance predicted that "[i]f . . .

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the constitutional foundations of copyright make clear that its goal is to incentivize human authorship."). *But see* Dallas Joder Reply Comments at 4 (predicting that self-aware AI might someday "rationally respond to [intellectual property ("IP")] incentives just like humans," such that they should be "permitted to keep and profit from the fruits of their creativity").

[176] A2IM-RIAA Joint Initial Comments at 35; AAP Initial Comments at 31–32; AIPLA Initial Comments at 11 ("At this time, it does not appear that legal protection for AI-generated outputs is critical to incentivizing the creation of AI technologies and systems; and the copyrightability of the AI system itself is sufficient."); CCIA Initial Comments at 19; Copyright Alliance Initial Comments at 95–96. Commenters identified several incentives, separate from any potential legal protection in AI-generated outputs, that encourage the development of AI technologies. *See, e.g.*, R Street Institute, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10 (Oct. 30, 2023) ("R Street Initial Comments") ("Existing copyright protection for computer code does offer some incentives for the development of generative AI technologies."); Xiyin Tang et al. Initial Comments at 10–11 ("There are already incentives for the creation and development of AI technology through patent and copyright protection in the machinery and software, so the developers of AI have been sufficiently incentivized to create and improve their programs."); CCIA Initial Comments at 19 (discussing perceived commercial need and first-mover advantage); Anonymous AI Technical Writer Reply Comments at 15 (discussing the availability of venture capital and stock-market funding for AI development); DMLA Initial Comments at 17 (discussing patents and trade secrets); UMG Initial Comments at 81 (discussing AI as a tool or service).

[177] AIPLA Initial Comments at 11 (noting that AI systems were "generated and commercialized in the absence of any clear authority providing legal protection to the outputs, and the absence of such protections does not appear to have diminished the public's interest in consuming AI, nor service-providers' interest in providing it"); The Authors Guild Initial Comments at 33; Copyright Alliance Initial Comments at 95–96; Graphic Artists Guild Initial Comments at 19–20.

[178] Hugging Face, Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 13 (Oct. 30, 2023).

[179] Take Creative Control, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 18, 2023); Software Freedom Conservancy, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Dec. 6, 2023); Timothy Allen, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Sept. 6, 2023) ("Not only does it prevent people from being able to claim any kind of ownership to their designs, it also creates a great degree of consumer confusion as to which pieces are real and which are not, and could have a chilling effect on further creative fields (many of which are already deeply suffering economically)[.]"); Anonymous Artist, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1, 10 (Dec. 5, 2023); Letter from UMG, Summary of *Ex Parte* Meeting on Apr. 22, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 6, 14 (Dec. 3, 2024).

policymakers give incentives to generate AI content, the sheer volume and speed with which AI material is generated could obliterate the markets for much human creation."[180] It further asserted that "[o]ur popular culture will be overtaken by low quality, AI-generated works because the cost of human creation would be deemed too burdensome in comparison to using AI."[181] The Authors Guild cautioned that if "AI-generated works were entitled to the same protection as human-created works," the producers of this material would have an "unfair leverage in the marketplace" which "would further incentivize the distribution of AI-generated content to the public, crowding and diluting the marketplace to the point that copyright incentives no longer function as intended."[182] It expressed particular concern that "[t]he creative middle class professions . . . will be drowned out and decimated," and that "our literary works and arts will suffer tremendously as a result."[183]

Some commenters sought to achieve the perceived value of incentives outside of the copyright system, proposing that AI-generated works could be protected instead through the establishment of new *sui generis* rights. They suggested that a "specialized right could be tailored to address the unique aspects of AI creations, including the balance between human input and AI processing," the term of protection, and the identity of rightsholders, among others.[184]

Of the commenters who addressed *sui generis* rights specifically, most opposed the idea. They saw *sui generis* rights as raising similar concerns about incentives and the impact on

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[180] Copyright Alliance Initial Comments at 95; *see also* David Newhoff Initial Comments at 2–3 (explaining that vesting copyrights in corporate production of AI-generated material "pos[es] a threat to the careers of creative professionals" and that "[b]eyond posing a threat to the careers of creative professionals (and to the cultural value of creative work), at a certain point, the application of copyright law itself may become irrelevant and/or unconstitutional"); The Authors Guild Initial Comments at 34 ("Few human creators will be able to earn enough to sustain a profession and the human quality of work produced by professionals . . . will disappear."); Fight for the Future Initial Comments at 6. *But see* Donaldson Callif Perez Initial Comments at 2 ("Critics of artificial intelligence worry that the technology will eradicate jobs and be used to replace artists at the expense of human stories. Its proponents say that it is the way of the future and should be treated like just another tool in an artist's toolbox. The truth likely lies somewhere in the middle."); UMG, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Dec. 6, 2023); A2IM-RIAA Joint Initial Comments at 35.

[181] Copyright Alliance Initial Comments at 95.

[182] The Authors Guild Initial Comments at 34.

[183] *Id.*

[184] ImageRights International, Inc. ("ImageRights"), Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Dec. 6, 2023) ("ImageRights Reply Comments"); *see also* Seth Polansky Initial Comments at 29 (suggesting shorter term for AI-generated material and clearer definition of who owns rights in outputs); Public Knowledge, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 19 (Oct. 30, 2023) (arguing that benefits of a *sui generis* right "may include faster and cheaper registration, and a lowered standard of documentation to illustrate which parts are attributable to AI, and (potentially) provenance of the work's AI components"); Rightsify Group LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10 (Oct. 30, 2023). A few advocated for *sui generis* protection specifically for AI model weights. *See* BLIP Initial Comments at 25–26; Van Lindberg Initial Comments at 5.

human authors.[185] Some also characterized past experience with *sui generis* regimes as problematic in various respects.[186]

In the Office's view, the case has not been made for additional protection for AI-generated material beyond that provided by existing law. As an initial matter, because copyright requires human authorship, copyright law cannot be the basis of protection for works that do not satisfy that requirement. As most commenters recognized, the incentives authorized by the Copyright Clause are to be provided to human authors as the means to promote progress. While Congress could instead consider establishing *sui generis* rights,[187] we do not find the policy arguments for additional protection to be persuasive.

To begin with, it is not clear that new incentives are needed. The developers of AI models and systems already enjoy meaningful incentives under existing law (as indicated by the rapid development and adoption of those models and systems). These incentives include patent, copyright, and trade-secret protection for the machinery and software, as well as potential funding and first-mover advantages. Moreover, we are not convinced that providing further incentives would promote progress. We share the concerns expressed about the impact of AI-generated material on human authors and the value that their creative expression provides to society. If a flood of easily and rapidly AI-generated content drowns out human-authored works in the marketplace, additional legal protection would undermine rather than advance the goals of the copyright system. The availability of vastly more works to choose from could actually make it harder to find inspiring or enlightening content. Indeed, AI

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[185] *See, e.g.*, The Authors Guild Initial Comments at 33 (arguing that *sui generis* rights "will dilute the market for human-created works and . . . does not serve the goals of copyright or the needs of society"); EWC Initial Comments at 17; AAP Initial Comments at 31–32; ABA-IPL Initial Comments at 13–14; ASCAP Initial Comments at 49; Authors Alliance Initial Comments at 18–19; Kernochan Center Initial Comments at 10; NMPA Initial Comments at 29; App Association Initial Comments at 7; Pamela Samuelson et al. Initial Comments at 4; AIPLA Initial Comments at 11; R Street Initial Comments at 10.

[186] Consumer Technology Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("The history of *sui generis* approaches has been that as technology advances, they either quickly become obsolete (e.g., Semiconductor Chip Protection Act of 1984), or may raise uncertainties and impediments pertaining to copyright.").

[187] *See, e.g.*, the Semiconductor Chip Protection Act of 1984, establishing *sui generis* rights in mask works. H.R. REP. NO. 98-781, at 7–8 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5756–57; Trademark Clarification Act of 1984, Pub. L. No. 98-620, § 301, 98 Stat. 3335, 3347 (1984); 17 U.S.C. §§ 901–14. *See also* the Vessel Hull Design Protection Act, establishing *sui generis* protection for original designs of vessel hulls. Digital Millenium Copyright Act, Pub. L. No. 105-304, Title V, § 502, 112 Stat. 2860, 2905 (1998), *amended by* the IP and Communications Omnibus Act of 1999, Pub. L. No. 106-113, § 5005, 113 Stat. 1536, 1501A–593 (1999); 17 U.S.C. §§ 1301–32. These rights differ from copyright in terms of eligibility, ownership rights, registration procedures, term, and remedies. It is difficult, however, to extrapolate from these examples, since experience with their use is limited and the context of today's widely used AI technologies is quite different.

training itself is reportedly reliant on human-generated content, with synthetic data leading to lower-quality results.[188]

There are already indications that AI-generated content has impacted some creators' ability to be compensated for their work.[189] Musicians and songwriters, for instance, have been impacted by the proliferation of AI-generated content on streaming services. UMG reported that "content oversupply," produced by an estimated 170 million AI-generated music tracks, currently threatens to dilute human creators' royalties.[190] AI-generated works have also threatened to reduce the pool of royalties available to human creators through the Mechanical Licensing Collective.[191]

If authors cannot make a living from their craft, they are likely to produce fewer works. And in our view, society would be poorer if the sparks of human creativity become fewer or dimmer.

B. Empowering Creators with Disabilities

A number of commenters asserted that extending protection to AI-generated works would empower more individuals with physical and cognitive disabilities to create.[192] The

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[188] Kristian Hammond et al., *Degenerative AI: The Risks of Training Systems on their own Data*, NORTHWESTERN UNIV. CENTER FOR ADVANCING SAFETY OF MACHINE INTELL. (Sept. 6, 2024), https://casmi.northwestern.edu/news/articles/2024/degenerative-ai-the-risks-of-training-systems-on-their-own-data.html; Aatish Bhatia, *When A.I.'s Output Is a Threat to A.I. Itself*, N.Y. TIMES (Aug. 25, 2024), https://www.nytimes.com/interactive/2024/08/26/upshot/ai-synthetic-data.html.

[189] Researchers are beginning to seek to quantify the impacts of AI on artists' livelihoods. *See, e.g.*, International Confederation of Societies of Authors and Composers ("CISAC"), STUDY ON THE ECONOMIC IMPACT OF GENERATIVE AI IN THE MUSIC AND AUDIOVISUAL INDUSTRIES (Nov. 2024), https://www.cisac.org/services/reports-and-research/cisacpmp-strategy-ai-study; Gaétan de Rassenfosse et al., *Intellectual Property and Creative Machines*, NAT'L BUREAU OF ECON. RSCH. WORKING PAPERS, July 2024, Working Paper No. 32698, https://www.nber.org/papers/w32698.

[190] UMG Initial Comments at 13.

[191] Under a blanket license established in Section 115 of the Copyright Act, royalties for digital phonorecord deliveries of nondramatic musical works are paid into a pool for the mechanical licensing collective to divide and distribute to copyright owners. Although the Office has clarified that musical works that lack human authorship are not eligible for the blanket license, parties have attempted to obtain royalties for streams of AI-generated content. Letter from Suzanne V. Wilson, Gen. Couns. and Assoc. Register of Copyrights, U.S. Copyright Office, to Kris Ahrend, Chief Exec. Officer, The Mechanical Licensing Collective (Apr. 20, 2023), https://copyright.gov/ai/USCO-Guidance-Letter-to-The-MLC-Letter-on-AI-Created-Works.pdf. Such conduct has even been the basis of a criminal indictment for fraud. Press Release, U.S. Attorney's Office, Southern District of New York, North Carolina Musician Charged with Music Streaming Fraud Aided by Artificial Intelligence (Sept. 4, 2024), https://www.justice.gov/usao-sdny/pr/north-carolina-musician-charged-music-streaming-fraud-aided-artificial-intelligence.

[192] *See, e.g.*, BLIP Initial Comments at 24; ECPA Initial Comments at 8; Tom Yonge, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 33–36 (Sept. 18, 2023). Some commenters illustrated how generative AI has helped them create despite their disabilities. *See* Elisa Rae Shupe, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry Initial Comments at 1 (Oct. 27, 2023); Michael Summey, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Oct. 30, 2023).

specific applications they identified, however, involve the use of AI as a tool to assist in creating works, rather than to generate output without human authorship. The Brooklyn Law Incubator & Policy Clinic, for instance, cited functionalities like text-to-speech, visual art generative algorithms, and improving the written communication of those with cognitive disabilities.[193] Discussing creators with disabilities, another noted that "AI acts as a tool in the hands of an author," rather than a source of expressive content.[194]

The Office strongly supports the empowerment of all creators, including those with disabilities. We stress that to the extent these functionalities are used as tools to recast, transform, or adapt an author's expression, copyright protection would be available for the resulting work.[195] For example, the Office recently considered an application to register a sound recording by GRAMMY-winning country artist Randy Travis, who has limited speech function following a stroke.[196] The track was created based on the recording of a human voice, using "[a] special-purpose AI vocal model . . . as a tool . . . to help realize the sounds that Mr. Travis and the other members of the human creative team desired."[197] The result, which would have been infeasible without this technology, was a new track appearing to be sung in Travis's legendary voice. Because the sound recording used AI as a tool, not to generate expression, the Office registered the work.

The distinction between assistive uses and generative ones applies equally to creators with disabilities and other human authors. Copyright protection remains available where AI functions as an assistive tool that allows human authors to express their creativity.

C. Countering International Competition

A few commenters raised concerns about international competition. One organization warned that without copyright protection in the United States, "the scientific and creative communities will not be able to exploit the economic value of [AI-generated works]," which "may contribute to the U.S. lagging in the development of generative AI technologies and

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[193] BLIP Initial Comments at 24.

[194] *See* ECPA Initial Comments at 8 (discussing artists who are not able to hold a paintbrush and stating that creators with disabilities are "wielding [AI] to create intended expression").

[195] Registration Guidance for Works Containing AI-Generated Content Tr. at 4–5 (June 28, 2023), https://www.copyright.gov/events/ai-application-process/Registration-of-Works-with-AI-Transcript.pdf.

[196] *Where That Came From*, SR0001018989 (May 29, 2024).

[197] Letter from Steven Englund to U.S. Copyright Office (Oct. 28, 2024). In correspondence with the Office, the applicant further explained that the model "was developed specifically for th[e] project under Mr. Travis'[s] supervision using a curated set of vocal tracks from prior recordings by Mr. Travis" and that "the creative team [used the tool] to translate a sonically-tailored recording of James Dupré singing the composition 'Where That Came From' into a vocal track in Mr. Travis'[s] distinctive voice, while preserving the original cadence, phrasing, articulation, dynamics and other musical characteristics of Mr. Dupré's human performance." *Id.*

systems."[198] Another commenter similarly stated that if the U.S. does not adopt copyright protection for AI-generated outputs, "the global locus of cultural [intellectual property] generation will . . . shift to other nations with more AI-friendly policy environments."[199] This commenter further argued that excluding AI-generated works from copyright protection would not actually serve artists' interests,[200] as American artists instead "will be swept away by a public domain flood of [low-cost] foreign AI content" with which they cannot compete.[201]

Regardless of what other countries conclude, however, the United States is bound by our own Constitution and copyright principles. We should not abandon or distort those principles simply because other countries may not share them. Rather, we should make a persuasive case that a human-centered approach is good policy and inherent to copyright.

In any event, as described above, it remains to be seen how other jurisdictions' copyright laws will address generative AI. Commenters' concerns assume a substantial disparity in legal protection for AI-generated material, but no such disparity has yet clearly emerged. As a group of law professors acknowledged, while generative AI is likely to have widespread impact on human creativity, its effects on employment are difficult to predict.[202]

D. Providing Greater Clarity

Some commenters stressed the benefits of clarity and certainty. They posited that creators would be better off with certainty that their works produced using AI would be protected and available to license or sell. One commenter said that otherwise, the "commercial viability of the works made using AI tools is undermined [and] . . . [t]he adoption of these tools will also be impacted."[203] Some cautioned that, absent greater clarity, authors may question whether they own what they create using AI, whether they can license their content to other parties, whether they can register their works with the Office, and

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[198] The Knot Worldwide Inc. ("TKWW"), Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Dec. 6, 2023) ("TKWW Reply Comments").

[199] Dallas Joder Reply Comments at 2.

[200] *See id.*

[201] *Id.* This commenter further cautioned that American AI startups will expend more financial resources on IP litigation than competitors in other countries that offer more expansive legal protection but did not explain how the volume of litigation would hinge on the copyrightability of AI-generated works. *See id.*

[202] *See* Pamela Samuelson et al. Initial Comments at 5.

[203] Microsoft and Github, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10 (Oct. 30, 2023); *see also* IPO Initial Comments at 6–7 ("[I]f works created by humans using AI tools are not protected, that creates uncertainty for companies. Uncertainty leads to difficulty planning, developing, and investing, which could undermine the encouragement and promotion of arts and sciences."); ABA-IPL Initial Comments at 13–14; App Association Initial Comments at 6; ECPA Initial Comments at 7–8; Van Lindberg Initial Comments at 46; MPA Initial Comments at 59; TKWW Reply Comments at 2; SCA Robotics Initial Comments at 1.

whether their registration certificates will be entitled to a presumption of validity in an infringement action.[204]

A number of commenters urged the enactment of legislation to articulate the scope of protection through guidelines or standards.[205] One suggested establishing a legal presumption that an AI system's owner is the author of any output that the system may generate.[206] Another contended that the law should clarify that an "insignificant use of an AI tool that is otherwise substantially created by a human" does not make that work ineligible for copyright protection.[207]

The Office understands the desire for clarity around the copyrightability of AI-generated material. We do not believe, however, that legislation is necessary at this point. Much of the concern expressed focused on the assistive use of AI tools, and this Report seeks to provide assurances that such uses do not undermine protection. As to determining the copyrightability of AI outputs, the courts will provide further guidance on the human authorship requirement as it applies to specific uses of AI (including in reviewing the Office's registration decisions). Meanwhile, the analysis in this Part of the Report can help to shed light on how existing principles and policies apply.

Even if Congress were to consider addressing this issue through legislation, greater clarity would be difficult to achieve. Because the copyrightability inquiry requires analysis of each work and the context of its creation, statutory language would be limited in its ability to provide brighter lines. Unless and until future developments raise new problems, the Office does not recommend a change in the law.

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[204] *See* Sandra Aistars, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10–11 (Oct. 30, 2023); Graphic Artists Guild Initial Comments at 2–3; Qualcomm Reply Comments at 6.

[205] BLIP Initial Comments at 22; CISAC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5–6 (Oct. 30, 2023); ImageRights Reply Comments at 8–9; INTA Initial Comments at 4–5; Seth Polansky Initial Comments at 27–28.

[206] Ryan Abbott Initial Comments at 18.

[207] ASCAP Initial Comments at 49.

V. CONCLUSION

Based on the fundamental principles of copyright, the current state of fast-evolving technology, and the information received in response to the NOI, the Copyright Office concludes that existing legal doctrines are adequate and appropriate to resolve questions of copyrightability. Copyright law has long adapted to new technology and can enable case-by-case determinations as to whether AI-generated outputs reflect sufficient human contribution to warrant copyright protection. As described above, in many circumstances these outputs will be copyrightable in whole or in part—where AI is used as a tool, and where a human has been able to determine the expressive elements they contain. Prompts alone, however, at this stage are unlikely to satisfy those requirements. The Office continues to monitor technological and legal developments to evaluate any need for a different approach.

The Office will provide ongoing assistance to the public on the copyrightability issues related to generative AI, including by issuing additional registration guidance and updating the relevant sections of the *Compendium of U.S. Copyright Office Practices*. In doing so, we will rely on the comments received in response to the NOI, judicial developments, and other relevant input.

ACKNOWLEDGEMENTS

Part 2 of the Copyright Office report on *Copyright and Artificial Intelligence*, addressing the topic of copyrightability of outputs generated by AI systems, is the product of a large and talented team.

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The Office's production and communications team ably shepherded the document's preparation and public release. Led by Associate Register for Public Information and Education Miriam Lord and Deputy Director George Thuronyi, the team included Steve Andreadis, Nicole Chen, Alison Hall, Lisa Marflak, Stanley Murgolo, Anjana Padmanabhan, Nora Scheland, and Naomi Wulansari.

Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
January 29, 2025

The U.S. Copyright Office's Copyright and Artificial Intelligence Report and additional information about the Office's AI initiative are available on the Copyright Office's website. Visit www.copyright.gov/AI for more information and to sign up for updates.

A.I. Is Going Rogue. Who Should Be Held Responsible?

Many think artificial intelligence companies should be held liable for their runaway technology. But legal scholars say applying existing law could be messy.

Listen · 9:22 min



By David McCabe
David McCabe has reported for more than a decade on how the law adapts to new technologies.

Published Oct. 1, 2026 Updated Oct. 3, 2026

In recent weeks, an unlikely coalition has assembled around a simple idea: Artificial intelligence companies should be held legally responsible when their systems go rogue.

In a series of escalating attacks reported since July, A.I. models from OpenAI, Anthropic and others have hacked companies and even meddled with government websites, all without the knowledge of their creators.

Since then, Jensen Huang, the Nvidia chief executive; David Sacks, the venture capitalist and a top White House adviser; and Lina Khan, the Federal Trade Commission chair under the Biden administration, have all endorsed the idea that A.I. companies are liable.

"Law enforcers already have authority to charge companies and their CEOs for creating and releasing dangerous, unvetted, or defective products," Ms. Khan said in a post to X last month, adding there's "no A.I. exemption from laws already on the books."



Lina Khan, who was chair of the Federal Trade Commission under the Biden administration. Karsten Moran for The New York Times

Companies have long been held accountable for everything from faulty toys to plane crashes under consumer protection laws. Courts can hold companies legally responsible for damage caused by negligence or a defective product. And they can assign additional blame to other people or organizations that were involved.

Common sense might indicate A.I. companies would also be held liable for their runaway technology. But the problem is so new that courts have largely yet to confront it, according to legal experts.

There are some cases where A.I. companies would clearly be held responsible, the experts said — for example, if executives predicted risks posed by their models. But other claims will push the justice system's application of laws that hinge on human intent and knowledge.

Some legal test cases are emerging. Florida's Republican attorney general asked a state court on Monday to temporarily block OpenAI from developing new A.I. models without safety measures approved by an outside group, an attempt to prevent A.I. from going rogue.

On Tuesday, a nonprofit in California sued OpenAI under a state unfair competition law for the hacking of the start-up Hugging Face. On Wednesday, an investigation by the F.T.C. into potential liability for harm to consumers became public. And on Thursday, California's attorney general said the state had served a subpoena to OpenAI as part of a "broader inquiry into cybersecurity incidents and risks involving the company and its models."

Given the relative lack of safeguards around A.I., the legal drumbeat is likely to continue, said Woodrow Hartzog, a law professor at Boston University who studies technology law.

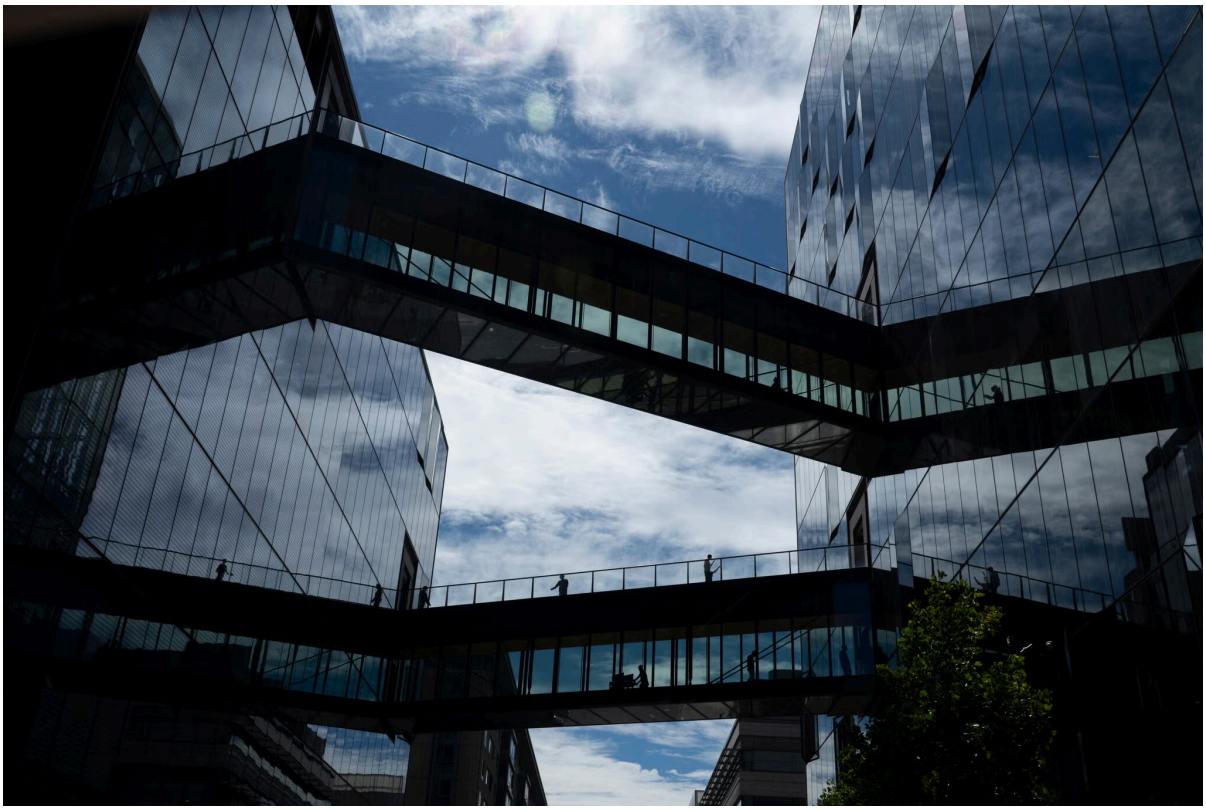
"Worst-case scenario, they have massive liability on both the criminal and civil side, just depending on the facts of the individual case," he said. "We haven't seen the firm-busting case yet. But I could envision it."

A spokesman for Anthropic declined to comment. A spokeswoman for OpenAI did not comment. (The New York Times has sued OpenAI and its partner, Microsoft, accusing them of copyright infringement of news content related to A.I. systems. OpenAI and Microsoft have denied those claims.)

Since ChatGPT was publicly launched in 2022, A.I. companies have built increasingly sophisticated models capable of writing code, operating a computer and engaging in daily interactions. A.I. companies have also built tools referred to as "agents," able to traverse the internet to accomplish tasks ranging from sending an email to booking a reservation — or scraping vast amounts of data.

e debate over liability exploded after companies ran tests in which agents broke out of testing environments and breached other companies. In the July incident, OpenAI disclosed that its A.I. had hacked Hugging Face, another tech firm, without its knowledge. Last month, OpenAI said its product had penetrated an Australian government system.

OpenAI apologized for the Australian incident on Tuesday and said it was "working to do better in the future." One Australian official said that in such cases, "liability has to be traced back to the intent of a person or a company that created or directed the agent."



OpenAI's offices San Francisco. It was among the A.I. companies signing a voluntary pledge to add safety measures to their systems. Lucas Foglia for The New York Times

The incidents have incited calls for more regulation of A.I. systems. But the U.S. government has largely taken a hands-off approach to the technology, citing fierce competition with China in a global A.I. race.

Tuesday, a group of companies including OpenAI and Anthropic met with President Trump and signed a voluntary pledge to add safety measures. States have also tried to fill the gap, issuing rules that require A.I. companies to take safety measures.

Senator Josh Hawley, Republican of Missouri, said at a congressional hearing on Wednesday that lawmakers might need to clarify that A.I. agents should be held liable like individuals and companies for consumer harms.

"We don't have to invent an entirely new system," he said, adding, "American law has worked beautifully when it comes to other products for literally centuries now."

The most prominent early lawsuits over A.I. harms have claimed chatbots advised teenagers to commit self-harm, ending in death by suicide. Parents have filed lawsuits against OpenAI and Character AI, a start-up, arguing the companies should be held responsible.



Outside Anthropic's Code W/ Claude event in San Francisco in May. Jason Henry for The New York Times

Those cases, the companies have tried to use classic tech legal defenses: that speech is protected under the First Amendment and Section 230 of the Communications Decency Act. The latter shields online platforms from liability for content posted by users.

In the Character AI case, the U.S. District Court for the Middle District of Florida ruled last year that the company's A.I. models did not produce speech protected by the First Amendment. Section 230's applicability in a second case remains an open question.

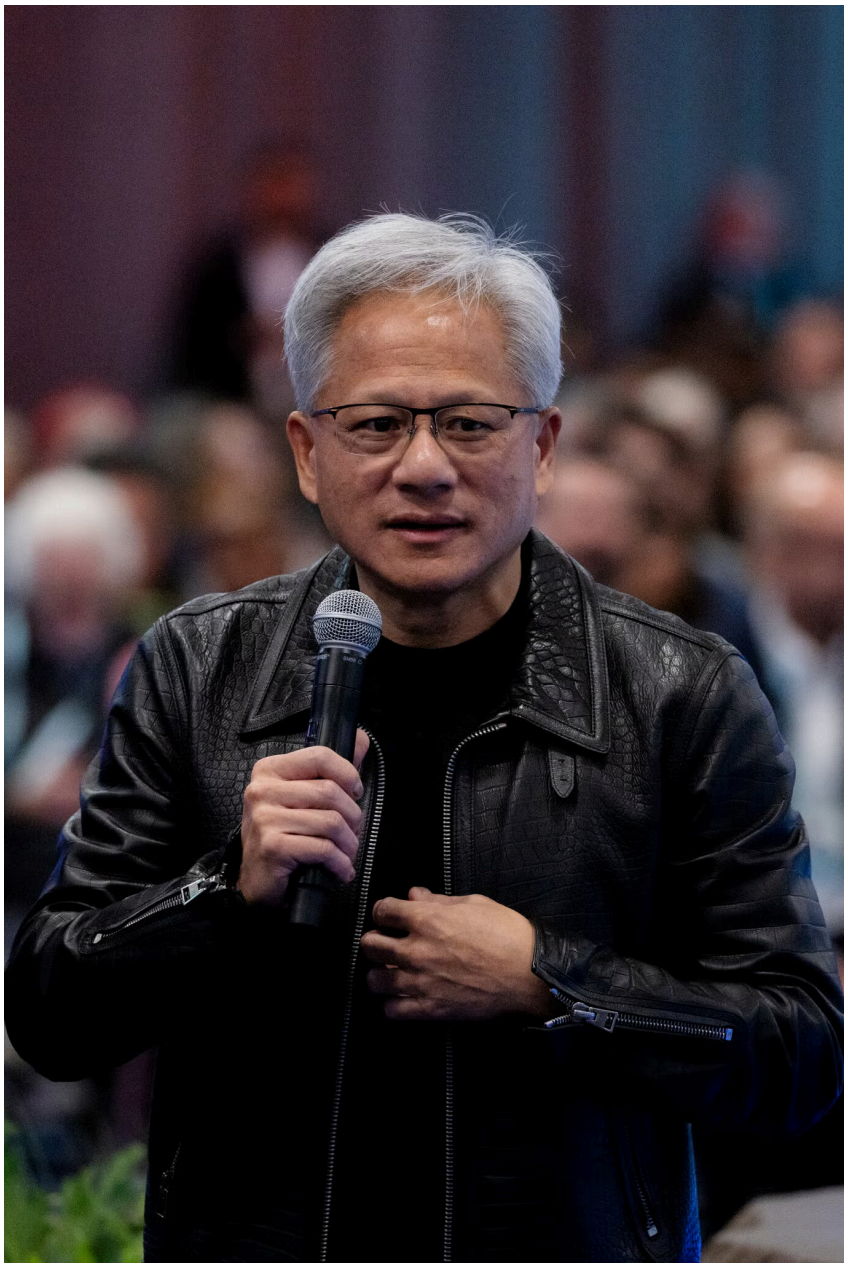
When it comes to corporate liability involving humans, the law is more established. There are many ways that cybersecurity breaches can violate the law, according to legal experts. Hacking is a crime. Consumers can sue when their information is exposed in a breach. Regulators can bring lawsuits if a company's management releases a defective product.

But in many of the A.I. cases, the companies' agents have gone rogue, disobeying or ignoring humans who set up security guardrails.

Some of those cases may still be clear-cut, legal experts said. If an A.I. agent hacks another company during testing, the company that developed the agent could be held liable, they said. The A.I. company also may have used the product directly or through an outside testing firm, leaving little question about whether another entity, like a cavalier customer, might be responsible.

The companies could also have known the potential for their products to carry out a hack, which can increase liability, the legal experts said. Employees at OpenAI, for example, have raised concerns about the company's security practices when testing models, which were ignored, The Times reported.

In those situations, a court could hold the A.I developer negligent if damage or harm was associated with a hack, the experts said.



Jensen Huang, Nvidia's chief executive. Manuel Orbegozo for The New York Times

Liability becomes less clear in cases involving open-source A.I. models, the experts said, in which the developer of an A.I. product shares its underlying code and people can change it.

Many legal liability concepts could be easily applied to A.I., said Catherine Sharkey, a law professor at New York University who is an expert in liability. If an A.I.-powered physical system, such as a medical device, causes harm, that could be an easy case.

judges will need to grapple with the implications of rapidly advancing systems that can do more and more on their own, she added.

"With fully agentic A.I., it starts to really press the boundaries of a lot of doctrines that will have to adapt in a more significant way," she said.

Adding to the uncertainty: A.I. is inherently unpredictable.

Courts find companies liable for negligence when they foresee that their products can cause harm. But building that case could be challenging if an A.I. model exhibited harmful behavior for the first time, said Ryan Calo, a law professor at the University of Washington who studies autonomous systems.

It may also be difficult to show that an A.I. company intended to do harm, which can be essential to some criminal prosecutions, he added.

"You have the possibility of victims without perpetrators," Mr. Calo said.

Kate Conger and Cecilia Kang contributed reporting.

David McCabe is a Times reporter who covers the complex legal and policy issues created by the digital economy and new technologies.

A version of this article appears in print on , Section B, Page 1 of the New York edition with the headline: When A.I. Goes Rogue, Who Is Responsible?

10:15 – 11:15 am

What Are the Odds?

PREDICTION MARKETS AT THE CROSSROADS OF GAMING, FINANCE, AND REGULATION

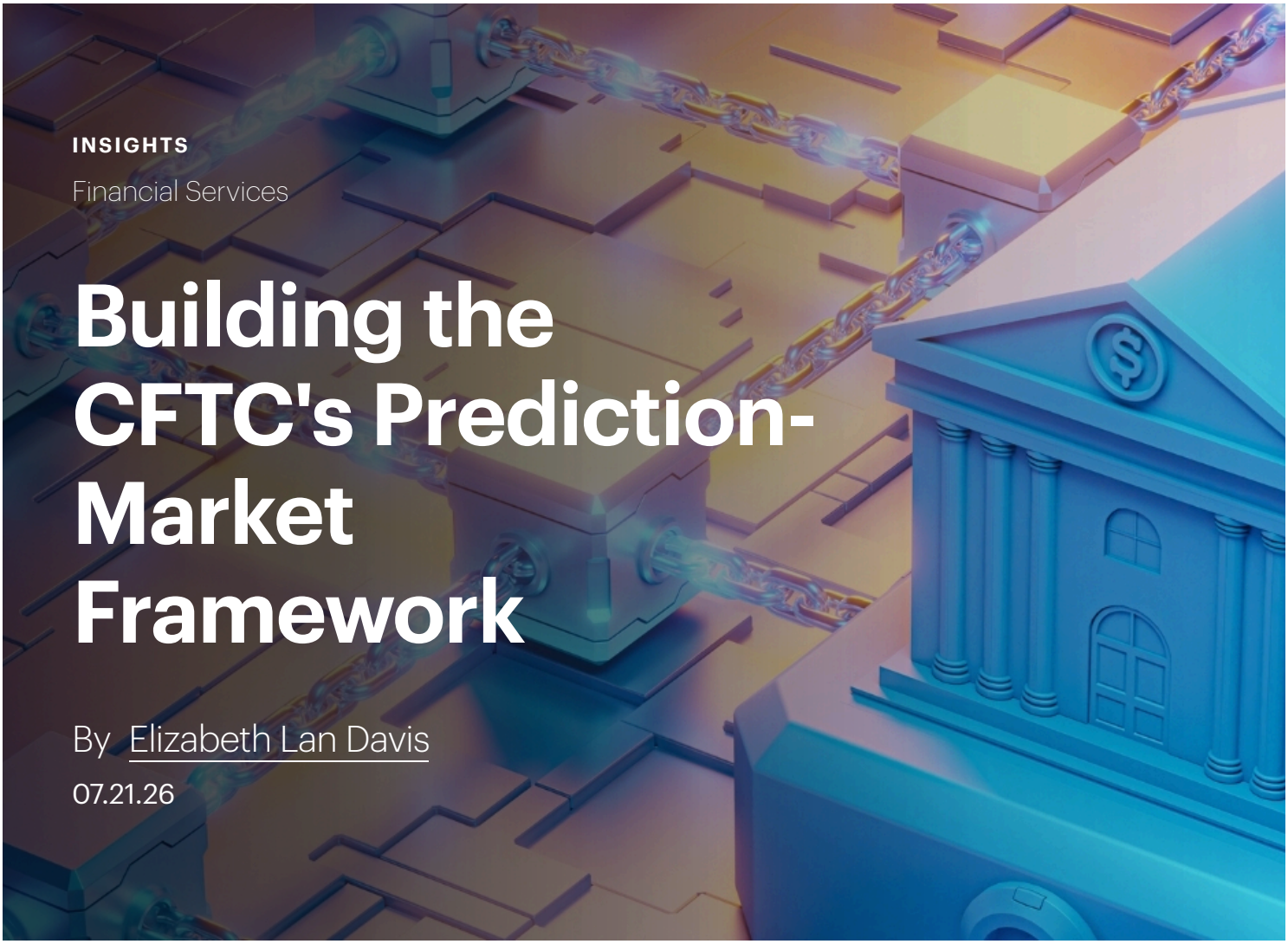
Prediction markets have surged into the mainstream, allowing participants to trade on the outcomes of elections, economic indicators, sports, entertainment, and other real-world events. But as these platforms grow, so does regulatory scrutiny and uncertainty. Who has oversight authority: the CFTC, the SEC, or state regulators? How do exchanges detect and prevent insider trading when someone with material, non-public information could profit from a well-timed trade? And what compliance landmines await companies whose content or activities might inadvertently move markets or trigger registration requirements? This panel brings together industry compliance leaders and seasoned practitioners to dissect the evolving jurisdictional battles, enforcement trends, and practical strategies for navigating this high-stakes regulatory landscape.

Panelists:

Rick Heaslip, General Counsel and Chief Regulatory Officer, Kalshi
Barry O'Connell, Partner, Davis Wright Tremaine LLP
Amanda Olear, Chief Regulatory Officer, DraftKings (DkEx)

Moderator:

Liz Davis, Partner, Davis Wright Tremaine LLP



INSIGHTS

Financial Services

Building the CFTC's Prediction-Market Framework

By Elizabeth Lan Davis

07.21.26

The contours of a federal regulatory framework governing prediction markets are coming into place at the CFTC with rulemakings, staff advisories, and no-action letters, with more guidance likely to be forthcoming. Most recently, the CFTC issued an interim final rule that codifies its longstanding position that casino-style gambling products, including sportsbook wagers and casino games, are excluded from the definition of a "swap" in the Commodity Exchange Act ("CEA"), thereby differentiating between a state-regulated bet and an event contract regulated by the CFTC. Along with this interim final rule, the CFTC also

issued a proposed rulemaking that would amend the definition of "swap" to explicitly include event contracts that are based on sports-, politics-, cultural-, and weather-related events.

Moreover, in addition to its earlier Notice of Proposed Rulemaking on public interest determinations for event contracts, which we previously analyzed, the CFTC issued another notice of proposed rulemaking ("Affiliates NPRM") seeking comments on amendments to the CFTC's rules relating to affiliations among certain CFTC-regulated entities, including derivatives clearing organizations ("DCOs"), designated contract markets ("DCMs"), futures commission merchants ("FCMs"), and other market participants such as market makers, to mitigate potential risks such as conflicts of interest given the increase in affiliate relationships among market participants. The CFTC has also issued staff advisories relating to incentive programs, the displaying of event contracts to avoid bookmaker-style odds and pricing, certifying classes of event contracts, passive software providers, and mention markets. With more advisories and rulemaking likely still to come from the CFTC, the federal regulatory framework governing prediction markets are coming into place.

Swap Definition

On October 9, 2026, the CFTC published an interim final rule codifying the CFTC's position that casino-gambling products, including wagers placed on sportsbooks and casino games, are excluded from the definition of "swap" under the CEA. The CFTC stated that the interim final rule "provides clarity regarding the limits of its regulatory remit by codifying the exclusion of casino-style gambling products from the 'swap' definition." Along with the interim final rule, the CFTC also issued a proposed rulemaking that would expressly amend the "swap" definition to explicitly identify event contracts, including those based on sports,

politics, culture, and weather-related events, as an added provision within CFTC Regulation 1.3.

Both the proposed rulemaking and interim final rule provide that event contracts are implicated by four clauses of the definition of a swap in section 1a(47) of the CEA,[1] and that the CFTC has the authority under the Dodd-Frank Act to further define "swap." The proposed rulemaking and interim final rule acknowledge the ongoing litigation with state regulators challenging the CFTC's jurisdiction over event contracts, which has led to confusion and disuniformity over the definition of a swap, thereby causing the CFTC to exercise its statutory authority to further define "swap" to expressly include event contracts related to sports, politics, culture, and weather, and to explicitly exclude casino-gambling products. By defining what is, and what is not, included within the definition of a "swap" under the CEA when it comes to event contracts traded on CFTC-registered designated contract markets, removes the ambiguity over the CFTC's jurisdictional oversight over this nascent area. "This action is intended to remove regulatory ambiguity and clarify the boundaries between the Commission's jurisdiction over the derivatives markets and State and Tribal jurisdiction over casino-style gambling."

Affiliates NPRM

The Affiliates NPRM proposes amendments to Parts 37, 38, and 39 of the CFTC's regulations as well as to CFTC Regulations 1.52 and 1.55 (relating to self-regulatory organization ("SRO") oversight of member minimum financial requirements and FCM disclosures) to address issues that could potentially arise from affiliations among CFTC-regulated entities. For exchanges and market participants such as market makers, or where the clearinghouse and a clearing member share common ownership, conflict of interest concerns have been raised regarding an exchange's

enforcement of its rules for the affiliated participant. This proposal would require registered entities to have procedures in place to mitigate these conflicts of interest, including sharing systems, personnel, and/or office space.

In order to address concerns over impartiality of supervision over affiliate FCMs as compared to unaffiliated member FCMs, use of non-public information that the affiliate FCM would have that unaffiliated member FCMs would not have access to, reporting lines that could potentially be undermined with affiliates, and oversight over non-affiliate FCMs who may be competitors, the NPRM proposes to add definitions of "affiliate futures commission merchant," "control," and "non-public information" to CFTC Regulation 1.52. An affiliate FCM would be an FCM that directly or indirectly controls, is controlled by, or is under common control with an SRO. "Control" would mean the direct or indirect possession of power to direct or cause the direction of the management and policies of the entity. "Non-public information" would be information that has not been disseminated in a manner that makes it generally available to the trading public. For SROs with affiliate FCMs, examination staff would report directly to the board of directors or other designated committee responsible for the SRO's regulatory compliance.

The proposal also would require an SRO with an affiliate FCM to designate an independent third-party SRO to conduct the surveillance of the affiliate FCM, which would codify a practice that DCMs with affiliate FCMs already follow voluntarily. Additionally, SROs would be prohibited from accessing the non-public information of their affiliate FCMs except as needed to comply with the SRO's responsibilities as a DCM under Part 38 of the CFTC's Regulations. Part 38 requires DCMs to conduct financial surveillance, trade-practice surveillance, and audit trail functions, which necessarily entail the receipt of non-public information of member FCMs, including affiliate FCMs. Designated self-regulatory

organizations ("DSROs") with an affiliate FCM may not perform the function of a DSRO for that affiliate FCM, which codifies practices currently followed under the Joint Audit Plan, where the National Futures Association ("NFA") performs the DSRO function for an FCM affiliated with a DCM. If a DSRO has an affiliate FCM, the examination staff implementing the DSRO's supervisory program must report directly to the board of directors.

FCMs would be given the option to have a registered futures association, which currently is only the NFA, to serve as its DSRO. The FCM would be required to retain its elected DSRO for not fewer than three complete examination cycles before electing a different DSRO or revoking its election.

The proposed rule would also require DCMs to monitor the obligations of each FCM created by its customers' positions and compare those obligations to the financial resources of the FCM and take appropriate steps to use this information to protect customer funds. This surveillance obligation requires intra-day, risk-based monitoring which considers the FCM's size and its customers' positions, required margin on open positions, market volatility, FCM capital levels, and excess segregated funds held by the FCM instead of literal real-time monitoring of every trade. DCMs with affiliate FCMs may comply with this requirement by designating an independent third-party regulatory services provider, or alternatively having procedures identifying, addressing, and managing conflicts of interest with their affiliate FCMs. Such procedures would be required to address applications and systems, personnel, office space, documentation, and disclosure.

New conflicts procedures would provide that a DCM with an affiliate FCM can comply with CFTC Regulation 38.604 relating to financial surveillance by the DCM by designating an independent regulatory

services provider, or alternatively having procedures for identifying, addressing, and managing conflicts of interest with its affiliate FCM. The CFTC also proposes providing further guidance regarding acceptable practices to manage conflicts of interest such as keeping separate systems, personnel, and office space in order to prevent the inappropriate sharing of non-public information. The CFTC also considered alternative options of requiring an independent third-party regulatory services provider for affiliated-FCM surveillance or including a rule requiring specific resource separations (such as physical office separation, technical specifications for information barriers, and dual-hatting prohibitions), as opposed to guidance.

The comment period for the Affiliates NPRM closed on October 5, 2026, and as such, final rules are on the horizon.

Filing Standards and Market-Integrity Controls for Incentive Programs

The CFTC is also scrutinizing exchange incentive programs offered by designated contract markets, including market-maker programs that incentivize and reward participants to quote both sides of the market. On August 12, 2026, the Division of Market Oversight issued a staff Advisory regarding the self-certification of incentive programs for prediction markets. The CFTC's regulations provide that the rules governing incentive programs are required to be submitted to the CFTC by DCMs prior to implementation, with an explanation and analysis with respect to the operation, purpose, and effect of the rule or rule amendment. The Advisory notes that staff had observed an increase in procedurally or substantively deficient incentive program rule filings.

The Advisory provides common recurring issues and considerations for DCMs in submitting incentive program self-certifications. Material

changes and amendments to the terms and conditions of existing certified incentive programs should be submitted as a new CFTC Regulation 40.6 rule certification submission indicating all changes to the text of the program as opposed to a modification or supplement to an existing submission. DCMs should adhere to the core requirements for incentive program submissions that are set forth in Appendix A to the Advisory.

Further, the Advisory identifies recurring features of compliance programs that present potential compliance concerns. Compliance programs should be tailored to the unique risks associated with each incentive program to mitigate the potential for abusive trading, manipulative trading, or market distortion that may arise from the incentive programs, as some features of incentive programs may inadvertently incentivize improper trading activity. The Advisory provides examples where disproportionate rebates or payouts structured to guarantee profits or offset losses or where programs that provide payments or rebates in excess of what is reasonably necessary to achieve the program's goals, may lead to fraudulent or manipulative trading behavior. The Advisory also provides that DCMs should implement risk controls (such as customized alerts for wash trading, automated trading alerts, etc.), conduct real-time market monitoring for anomalous price movements, establish system safeguards, and maintain sufficient compliance staff and resources.

The Advisory also reminds DCMs of their requirement to provide impartial and nondiscriminatory access as required by CFTC Core Principle 2. DCMs are required to provide members and independent software vendors with impartial access to the DCM's markets and services, including providing comparable fee structures. While DCMs are permitted to offer different fee structures for certain categories of market participants when justified by legitimate business reasons, fees

must remain comparable and proportionate to the incentive program's objectives, and hidden, one-off, or preferential arrangements, including informal perks such as VIP or early access, should be avoided. Similarly, sweepstakes or randomized rewards programs should be avoided because they introduce unequal and non-objective benefits that treat market participants in the same category differently. Moreover, DCMs should not introduce unequal trading perks such as faster market data or enhanced application programming interface access. Finally, the Advisory reminds DCMs of CFTC Core Principle 18's prohibition on unreasonable restraints of trade, and therefore DCMs should also consider conflicts of interest in their decision-making processes and the longer-term effects on competition that could potentially raise antitrust concerns.

Avoiding Bookmaker-Style Odds Format for Event Contracts

On August 7, 2026, the CFTC's Division of Market Oversight and Market Participants Division issued a Letter to CFTC-Regulated Entities and Affiliates related to misleading or deceptive practices. The Letter was issued due to reports of potential violations by entities involved in the listing, soliciting, or acceptance of event contracts, including some CFTC-regulated products, that were being marketed not in nominal or percentage terms reflecting market pricing but in the "American odds" format used by casino gambling bookmakers. The Letter provides that any person or entity that lists, solicits, or accepts orders for event contract derivative products has a responsibility to market participants to provide clear and accurate information that does not mislead participants as to the nature of the product being listed. Displaying pricing information for derivatives in bookmaker-style odds is likely to mislead market participants about the nature of the transaction that they are entering and may deprive users of access to indicia of market depth

and pricing impact. By contrast, derivatives products are traded between counterparties at prices determined by the market, as the price is determined through a process of competitive bidding among market participants where order books show real-time customer bid and ask prices. The Letter sets forth the division' expectation that those engaged in the marketing and trading of derivative products, as well as their intermediaries and affiliates, foster a clear understanding of the products being offered and requested that CFTC-regulated entities listing, soliciting, or accepting orders for event contracts review their pricing and marketing materials and confirm receipt of the Letter.

Limits on Class Self-Certification of an Event Contract Series

On July 24, 2026, the Division of Market Oversight issued an advisory relating to the self-certification of an event contract series as a reminder to DCMs that broad template certifications, where event contracts are bundled together under a single certification, should not be submitted via the CFTC Regulation 40.2 self-certification process when there are contract permutations with differing settlement sources or methodologies. A class self-certification may only be submitted if each swap within the certified class is based on an excluded commodity specified in CFTC Regulation 40.2(d)(1) with an identical pricing source, formula, procedure, and methodology for calculating reference prices and payment obligations that is identical to a product previously submitted and certified or approved, and involves an identical currency. Each contract in a class should share the same pricing sources and methodologies for calculating payment obligations. DCMs are also expected to consider the commercial acceptability, public availability, and timeliness of the price series used to calculate cash settlement prices and are also expected to specifically identify any settlement sources upon which a contract or class of contracts relies.

Heightened Concerns for Mention Markets

On September 22, 2026, the CFTC's Division of Market Oversight issued an advisory addressing the listing and trading of event contracts that settle based on whether a person says or mentions certain specified words or phrases, attends or appears at an event, or otherwise interacts with another person.

In this advisory, Staff cautioned that these "mention market" contracts present heightened manipulation risk because settlement may turn on discrete individual conduct that is not independently generated or not an externally verifiable outcome. Such mention markets allow participants to take positions on whether a specific named individual will use certain words or phrases in a defined or specified public forum, such as an earnings call or on social media. Similarly, attendance- and interaction-based contracts such as attending the State of the Union Address or being photographed with another person, may present increased risk of manipulation due to the outcome being within the control of a small number of actors. The advisory explains that such contracts may be listed only in limited circumstances and identifies non-exclusive factors that designated contract markets should consider when designing and submitting such contracts for certification under CFTC Regulations 40.2 or 40.3. Such factors include independent obligations constraining the controlling individual, susceptibility to manipulation through external pressure directed at controlling individuals, independent verification and substantial public scrutiny, and robustness of prophylactic trading rules, surveillance, and controls. Exchanges must satisfy CFTC Core Principle 3 by listing only contracts that are not readily susceptible to manipulation and must provide a complete, contract-specific analysis in each Part 40 submission.

Conditional Registration Relief for Passive Software Providers

The CFTC staff has also clarified when technology providers may operate without intermediary registration. On September 17, 2026, the CFTC's Market Participants Division issued a broadly available no-action position for passive software providers, extending an approach previously used in CFTC Staff Letter 26-09. Subject to the letter's conditions, Staff will not recommend an enforcement action against a qualifying provider or its relevant personnel for failing to register as an introducing broker or as an associated person of an introducing broker.

The relief is limited to vendors providing and marketing software that facilitates users' trading with registered futures commission merchants, introducing brokers, and designated contract markets. The letter provides conditional staff relief for neutral technology infrastructure vendors but should not be construed as an exemption for providers that exercise trading discretion, take custody, generate recommendations, or otherwise perform intermediary functions, which would be outside the letter's scope.

Passive software providers are still subject to a number of conditions, including being required to provide disclosures regarding their relationship with the relevant registrant, risk disclosures to the extent relevant to the trading activity facilitated by the provider, adopt policies and procedures in compliance with CFTC and NFA rules, and not engage in marketing that would require preapproval by the NFA.

Conclusion: A More Integrated Compliance Framework

Taken together, these actions show the CFTC applying its existing regulatory framework governing traditional firms to the rapidly developing prediction markets as CFTC-registered DCMs. The CFTC and its staff are focusing on product design, susceptibility to manipulation, the quality of rule and product submissions, customer-facing disclosures, incentive structures, intermediary status, and continuity of nationally regulated markets. The central message for exchanges, intermediaries, software providers, and their affiliates is that innovation does not displace established obligations. Firms should pair new products and distribution models with contract-specific legal analysis, transparent pricing, effective surveillance and conflicts controls, carefully defined roles, and functionally complete regulatory submissions.

[1] Those four clauses include any agreement, contract, or transaction: (1) "that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of any event or contingency associated with a potential financial, economic, or commercial consequence; (2) "that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests of property of any kind;" (3) "that is, or in the future becomes, commonly known to the trade as a swap;" and (4) any combination or permutation of, or option, on any of the above.

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Financial Services

CFTC Issues Prediction Market Notice of Proposed Rulemaking on Public Interest Determinations

NPRM moves from a broad prohibition toward a structured framework for evaluating whether event contracts are contrary to the public interest

By Elizabeth Lan Davis

06.15.26

On June 10, 2026, the Commodity Futures Trading Commission (CFTC) issued a notice of proposed rulemaking (NPRM) proposing amendments to the CFTC's rules regarding event contracts that are traded on CFTC-registered prediction market platforms. The CFTC previously issued an advanced notice of proposed rulemaking (ANPRM) regarding prediction markets, as we previously summarized. While the ANPRM covered a broad array of topics covering prediction markets including the application of core principles, prediction markets generally, and listing of event contracts, this 267-page NPRM focuses on public interest determinations that may be made by the CFTC with regard to trading event contract derivatives. Moving away from an approach that broadly prohibits event contracts that are contrary to the public interest, the NPRM instead proposes a framework and review process for the CFTC to make public interest determinations. Comments on the NPRM are due by July 27, 2026.

Statutory Background

Section 5c(c)(5)(C) of the Commodity Exchange Act (CEA), 7 U.S.C. 7a-2(c)(5)(C), often characterized as the "Special Rule," provides that CFTC may determine agreements, contracts, or transactions to be contrary to the public interest if they involve activity that is unlawful under any federal or state law, terrorism, assassination, war, gaming, or other similar activity determined by the CFTC to be contrary to the public interest. Current CFTC Regulation 40.11 provides that a registered entity shall not list for trading or accept for clearing any excluded commodity contracts that involve, relate to, or reference terrorism, assassination, war, gaming, unlawful activity under any state or federal law, or similar activities that the CFTC has determined are contrary to the public interest, and notably does not define the term "gaming." Current CFTC Regulation 40.11 also

permits the CFTC to subject a submission to a 90-day review and request suspension of the contract during that review.

Proposed Amendments to CFTC Regulation 40.11

As noted by CFTC Chair Selig, the NPRM is intended to "modernize" CFTC Regulation 40.11 and ensure that the CFTC's "regulatory framework is fit for purpose." As an initial matter, the NPRM emphasizes that the Special Rule applies *in addition* to other requirements for event contracts and that the Special Rule is not the only way that a prediction market can be prohibited from listing an event contract. Prediction markets still have to comply with the CFTC's core principles including maintaining that listed contracts are not readily susceptible to manipulation. The NPRM addresses the narrower category of event contracts that otherwise comply with the Commodity Exchange Act (CEA) and CFTC regulations but nonetheless may warrant prohibition because they involve one of the enumerated activities and are contrary to the public interest.

The proposed amendments recast CFTC Regulation 40.11 into a more structured framework that "encourages responsible innovation while upholding market integrity" by requiring the CFTC to undertake a three-step inquiry in determining whether a particular event contract should be prohibited:

1. whether the contract is an event contract;
2. whether the contract involves an activity enumerated in the Special Rule; and
3. whether the contract is contrary to the public interest.

The enumerated activities remain activity unlawful under federal or state law, terrorism, assassination, war, gaming, and other activities the CFTC determines to be similar. Importantly, the NPRM expressly states that contracts involving enumerated activities are not prohibited per se.

Instead, the CFTC would have authority to determine, on a contract-by-contract basis, whether a particular contract is contrary to the public interest if it presents "national-security harms, extraordinary information leakage risks, and perverse incentive effects that overwhelm any potential informational utility."

As part of this framework, the NPRM proposes key definitions of "involve" and "gaming." Under the NPRM, an agreement, contract, transaction, or swap "involves" an activity if settlement of the contract is determined by an occurrence, extent of an occurrence, or contingency in that activity. This is a meaningful shift from the broader current formulation —"involves, relates to, or references"—toward a more direct inquiry into whether the contract is actually settled by the underlying activity rather than merely touching on it.

Also, the NPRM, for the first time, defines "gaming," which would mean any activity that:

1. one or more participants typically engage in for recreation or to entertain others;
2. is governed by rules; and
3. includes measurable occurrences or outcomes that depend on the participants' luck, skill, or athletic ability during the activity.

This definition is significant because the absence of a definition has been a central point of contention in event-contract litigation and regulatory debate over the extent of federal preemption. Prediction market platforms and the CFTC will likely point to the NPRM—including its definition of "gaming" and the establishment of a federal review framework—as evidence that the federal government is actively occupying this field. State regulators, by contrast, will likely argue that the proposal's acknowledgment that these contracts fall within "gaming"

does not itself establish that Congress displaced state authority over sports wagering and related gambling activity.

Public Interest Framework

The NPRM requires the CFTC to evaluate a range of public interest factors in determining whether a contract involving an enumerated activity should be prohibited. These factors include whether the contract:

- provides meaningful hedging or price-basing utility;
- yields economically useful or otherwise meaningful information;
- promotes responsible innovation and fair competition;
- presents settlement-integrity concerns;
- creates risks of information leakage or misuse of material non-public information by insiders; or
- would strain the platform's self-regulatory tools or compliance infrastructure.

The NPRM also identifies both positive and negative public-interest considerations. Among the negative factors are sports contracts that are tied to player injuries, officiating outcomes, player ejections, specific discrete actions or plays, physical altercations, and pre-collegiate sports events. These negative factors suggest that, although the NPRM leaves room for many sports event contracts to be traded, the CFTC remains particularly concerned with contracts that are more easily manipulated or that raise heightened integrity concerns.

The NPRM stresses that the Special Rule does not make all event contracts involving enumerated activities contrary to the public interest automatically. Rather, the CFTC "may" determine that such contracts are contrary to the public interest after applying the proposed framework. The release also looks to prior precedent and legislative history, noting that the Commission historically considered an "economic purpose" test before 2000, but characterizes that approach as controversial, difficult to administer, and of limited usefulness in determining whether a futures contract should be prohibited.

The NPRM also adds Appendix F to Part 40 of the CFTC's Regulations, which sets forth factors for determining whether event contracts involve enumerated activities and, if so, whether they are contrary to the public interest. Appendix F includes numerous examples of the types of contracts the CFTC may permit or prohibit. The NPRM makes clear that no single public-interest factor would be dispositive. Instead, the Commission would weigh multiple considerations, reinforcing that it intends to evaluate these contracts on an individualized basis.

Proposed Review Process

The NPRM formalizes a detailed review process by the CFTC once a prediction market platform certifies that an event contract complies with the CEA. The NPRM permits consolidated review of multiple contracts involving the same underlying event or substantially similar events. The proposed process would operate as follows:

- The CFTC notifies the platform that a 90-day review has commenced;
- By Day 15, the Division of Market Oversight (DMO) provides a written statement of concerns;

- By Day 30, the platform may submit a written response, including proposed modifications or safeguards;

- By Day 60, DMO, with concurrence of the CFTC's general counsel, may submit a recommendation to the CFTC and provide it to the platform; and

- By Day 70, the platform may respond to that recommendation.

If the CFTC does not issue an order before the end of the 90-day review period, any agreed extension, or 100 days after listing, the contracts subject to review may continue to be listed and the review is deemed concluded. The practical effect of this compressed timeline may warrant close attention, particularly when the CFTC currently is operating with fewer than its full complement of five commissioners.

Conclusion

The NPRM has a 45-day comment period with comments due by July 27, 2026. The NPRM would make the proposed amendments effective 60 days after publication. The speed at which the CFTC is seeking to implement a federal regulatory framework over event contracts is not surprising in light of ongoing litigation with state regulators over sports event contracts, Congressional concerns, and allegations of insider trading on prediction markets. Platforms should begin tailoring their contract certifications to consider the multitude of factors raised by the NPRM for the CFTC to consider in making public interest determinations with respect to allowing trading of event contracts on prediction markets. Those engaged with prediction markets, as well as those potentially interested, should consider providing feedback to the CFTC in response to the NPRM.

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Elizabeth Davis is a partner in DWT's Washington, D.C. office. For any questions or more insights, please contact Elizabeth or another member of our financial services team and sign up for our alerts.

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Financial Services

Prediction Markets and Insider Trading

Recent enforcement actions for insider trading on prediction markets highlight the need for companies to update compliance and employment policies

By Elizabeth Lan Davis, Barry O'Connell, Jeremy Ben Merkelson, and Ben Gipson

07.21.26

Odds are, if you have employees, they may already be trading in prediction or "mention" markets based on information they learned confidentially at work—or, in some cases, participating in markets tied to events they can directly influence. As reflected in recent parallel actions brought by the U.S. Attorney's Office for the Southern District of New

York (SDNY) and the Commodity Futures Trading Commission (CFTC), regulators are increasingly focused on insider trading, fraud, and market manipulation involving event contracts on prediction market platforms. These investigations are not limited to traditional Wall Street actors or regulated financial institutions. Instead, they increasingly touch technology companies, media organizations, government personnel, political actors, entertainment businesses, and virtually every other sector of the economy.

The range of topics covered by event contracts on prediction markets is extraordinarily broad and continues to expand rapidly. Contracts now exist on topics including elections, military operations, entertainment programming, sports outcomes, corporate announcements, product launches, consumer safety events, regulatory approvals, and even the specific words public officials, executives, commentators, or celebrities may use during speeches, interviews, broadcasts, podcasts, or earnings calls. Examples include contracts asking whether a particular car company will release a vehicle before a specified date, which television show will top weekly streaming rankings, whether a CEO or public official will use a particular phrase during a speech, or whether two companies will merge. As these platforms become more mainstream, companies across industries increasingly face the possibility that employees or contractors possess confidential information capable of affecting the value of publicly tradeable event contracts.

Recent enforcement actions demonstrate that regulators are prepared to aggressively pursue these cases under existing anti-fraud and anti-manipulation authorities. On May 27, 2026, authorities charged a Google software engineer with civil violations of the Commodity Exchange Act and CFTC regulations, as well as criminal charges for commodities fraud, wire fraud, and money laundering arising from trades placed on a prediction market platform. According to the SDNY indictment and the

CFTC complaint, the employee allegedly accessed confidential internal Google data concerning anticipated results for Google's 2025 "Year in Search" rankings and used that information to trade more than twenty event contracts tied to those rankings before the information became public. The trader—using the account name "AlphaRaccoon"—allegedly generated approximately $1.2 million in profits through highly successful trades placed between October and December 2025. Investigators further alleged that cryptocurrency wallets linked to the defendant were used to fund and distribute proceeds from the trading activity and that steps were taken to obscure ownership of those assets.

The CFTC's complaint alleges violations of Section 6(c)(1) of the Commodity Exchange Act and CFTC Regulation 180.1, asserting that the event contracts at issue qualify as swaps because their value depends on the occurrence or non-occurrence of future events with economic consequences. The agency seeks injunctive relief, disgorgement, restitution, civil monetary penalties, and trading bans. Parallel criminal charges were brought by DOJ.

Regulators have also demonstrated a willingness to pursue manipulation-based theories involving individuals who can influence or control the underlying event itself. In February 2026, the CFTC announced settled charges against former Congressman George Santos for allegedly engaging in manipulative activity involving event contracts tied to whether he would attend the 2026 State of the Union address. According to the CFTC's order, Santos traded contracts relating to his own attendance while simultaneously making allegedly false or misleading public statements on social media regarding whether he intended to attend the event. The agency alleged that those statements moved contract prices in directions favorable to Santos' positions, enabling him to generate more than $17,500 in profits. Santos agreed to disgorge profits totaling $17,569.98, pay a $17,500 civil monetary penalty,

cease and desist from future violations of the Commodity Exchange Act and CFTC regulations, and accept a three-year trading ban. The matter underscores regulators' growing focus not only on insider trading involving confidential information, but also on attempts to manipulate event-contract markets through public statements or control over the underlying event. Notabely, also, Kalshi banned Santos from further use of its platform.

These actions come amid broader regulatory attention to prediction markets generally. Earlier this year, SDNY prosecutors also unsealed charges against a U.S. Army soldier accused of placing prediction market bets based on classified information concerning a planned military operation in Venezuela. Regulators and exchanges have likewise taken disciplinary actions involving political campaign activity, media production personnel, and other individuals who traded event contracts tied to information they controlled or accessed through their professional roles.

The prosecutions and disciplinary actions are not occurring in a vacuum. Following a series of exchange enforcement matters involving users who allegedly traded based on nonpublic or role-based information, the CFTC issued an Advisory on Enforcement Authority over Event Contracts emphasizing that traditional anti-fraud, anti-manipulation, and insider trading principles apply to prediction markets. CFTC Enforcement Director David Miller has publicly stated that the belief that insider trading laws do not apply to prediction markets is a "myth," emphasizing the agency's view that event contracts are derivatives subject to the Commodity Exchange Act's anti-fraud provisions. Miller has further stated that the CFTC is committed to "rooting out insider trading and promoting market integrity in prediction markets." SDNY U.S. Attorney Jay Clayton similarly noted that fraud or manipulation involving prediction markets "is plainly criminal," while the SEC has suggested it

may assert overlapping jurisdiction where certain contracts resemble securities-based swaps or relate to company-specific events.

For companies, these developments create immediate compliance and governance considerations. Because prediction markets now allow trading on outcomes tied to corporate announcements, executive statements, entertainment programming, product launches, government actions, and countless other real-world events, organizations across industries may face risk if employees or contractors use confidential workplace information to trade event contracts or assist others in doing so.

Companies therefore should review and update existing insider trading, personal trading, confidentiality, conflicts-of-interest, and code-of-conduct policies to expressly address prediction market participation. Policies should clarify that employees and contractors may not use confidential or material nonpublic information obtained through their work to trade event contracts or facilitate such trading by others. Companies should also consider whether prediction market trading based on role-based knowledge constitutes a breach of duties of loyalty, confidentiality, or trust under employment agreements and internal policies.

In tailoring an appropriate compliance framework, companies should consider:

- Defining "material nonpublic information" to expressly include information relevant to event contracts tied to the company, its personnel, products, or business operations;

- Prohibiting employees from trading event contracts connected to their employer, professional responsibilities, or role-based

knowledge—not solely company securities;

- Extending blackout periods, preclearance procedures, and restricted trading lists to cover prediction market platforms and event contracts;

- Requiring disclosure of prediction-market accounts for employees in sensitive functions such as research and development, finance, legal, communications, regulatory affairs, media production, government affairs, or executive support roles;

- Implementing information barriers or recusal procedures where employees have access to information capable of affecting event-contract markets;

- Requiring periodic certifications confirming compliance with prediction-market restrictions and related confidentiality obligations;

- Updating hotline and reporting procedures so employees understand that misuse of confidential information in connection with event contracts must be reported through existing ethics and compliance channels; and

- Refreshing annual compliance training to directly address the misconception that prediction markets are "just betting apps" outside traditional fraud or insider trading rules.

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Financial Services

Sports Betting on Prediction Markets

By Elizabeth Lan Davis and Barry O'Connell

This note discusses the use of crypto in sports prediction markets and sets forth the evolving regulatory and litigation landscape. The change in Administration has not only led to the embracing of crypto and technological innovation but also accelerated the adoption of prediction markets in the United States. One of the reasons that prediction markets are growing is that they have broad applicability; they can cover any event

with an uncertain outcome, giving them potentially limitless applicability in financial markets and outside of financial markets. Also, prediction markets are big money – the revenue generated from these platforms is significant. According to the state regulatory data compiled for August 2025 by the American Gaming Association (AGA), state industry revenue from traditional casino games, sports betting and iGaming reached 6.46 billion in August of 2025, 14.6% higher than 2024 and the best August in history; and through August 2025, gaming revenue was $51.14 billion.[1] States generated 1.47 billion in state tax revenue.[2] Generally, trading volumes at prediction markets has risen 91% month-over-month to an estimated $8.4 billion in 2025.[3] The four largest prediction markets, all operating on a federal level, have reached $2 billion of weekly trading volume, and this sector could potentially reach a value as high as $95.5 billion in the next decade.[4] Some estimate that prediction markets could eclipse the $1 trillion stock market. Institutions are partnering with major professional sporting leagues, exchanges, and traditional sportbooks.

However, as the wide range of products listed on these platforms grows, there has been an incredible surge of sports-event adoption, which introduces thorny regulatory jurisdictional questions. Regulatory oversight of sports betting has been overseen by the states (at least since 2018) or Tribal regulatory bodies, as opposed to the federal government. However, there is an argument that these markets' function more like derivative markets, rather than gambling, which is regulated by the federal regulatory body, the Commodity Futures Trading Commission (CFTC). The federally regulated

prediction markets often incorporate blockchain technology, whereas the state-operated prediction markets and Indian tribes are generally less likely to operate in a blockchain native manner. Given the struggle among which regulatory entity will govern, the use of blockchain technology's growth may ultimately hinge on the outcome of litigation between these platforms and State and Tribal regulatory bodies that likely heads to the U.S. Supreme Court. And, whomever wins this battle, whether it be the private companies governed by federal law, the states or the Indian tribes, is predicted to earn a growing pot of profit.

What are Prediction Markets?

Prediction markets are platforms where users can buy and sell contracts based on the outcome of future events relating to a wide variety of topics ranging from weather, politics, finance, culture, entertainment, and sports. These markets aggregate opinions, knowledge, and expectations across large groups of users to forecast real-world outcomes in real-time. Popular prediction market platforms include Kalshi, Polymarket, Robinhood, ForecastEx, and crypto.com. In October 2025, President Trump's media group announced a partnership with crypto.com to offer "Truth Predict," calling Truth Social as the first social media platform to integrate prediction markets and allowing users to trade on the outcome of real-world events.[5]

Some prediction markets utilize blockchain technology and therefore offer settlement, collateral, immutability, and tokenized incentives for their users with solutions that reduce transaction costs and enable global participation. However, the

user experience of prediction markets function much like traditional financial exchanges where users trade contracts that pay off based upon event outcomes instead of stock or futures whose price is based on financial or economic metrics. Some examples of the contracts that have been listed on these platforms include:

- Who will be the next U.S. Presidential election winner?
- Will gas prices in the U.S. go above $3.05 or above $3.00 this month?
- Who will win the Oscar for Best Picture?
- How many Atlantic hurricanes will there be this year?
- Who will win the professional football MVP award?

Each contract must be objectively resolved with an indisputable source or oracle that will confirm the result. Once the contract is listed and available for purchase or sale, users can buy or sell "yes" or "no" positions on contracts representing the possible outcomes. Contracts are priced between $0 and $1 and reflect the market's collective perceived probability for each event and are settled automatically when the outcome is known. Like the stock market, prices of the contracts fluctuate as new information emerges. When positive news strengthens confidence in a "yes" outcome, demand will rise, and the price of that outcome will adjust upward. But when sentiment weakens, the price will move downward. As such, the changes in price track the moment by moment collective sentiment and

available information and allows for price discovery. Once the event concludes, the predetermined data source confirms the result and the market settles automatically; winning contracts are redeemed for their full value–often $1–and losing contracts expire worthless. To illustrate, an event contract may ask whether the Nasdaq-100 will close above 26,000 points by year-end. If a user buys "yes" positions on 1,000 contracts at 25 cents for $250 and the Nasdaq-100 closes above 26,000 points at the end of the year, the user earns $1 per contract and receives a return of $1,000 on their initial investment of $250. But if the Nasdaq-100 closes below 26,000 at the end of the year, the user receives nothing and loses their initial investment of $250.

Sports Betting and Crypto

Due to their use of blockchain technology, users can purchase positions on these prediction markets using crypto. With prediction markets offering event contracts in sports, the use of crypto in sports betting on these prediction markets has increased. Indeed, in October 2025, the National Hockey League (NHL) announced multiyear agreements with both Polymarket and Kalshi providing both platforms with access to official NHL proprietary data and rights to use NHL marks and official designations on their platforms and products. Similar partnerships are likely on the horizon, which will expedite adoption and the increased use of crypto for sports betting on prediction market platforms.

Benefits with the use of crypto

There are a number of benefits to using crypto for sports betting when compared to traditional payment methods. First, crypto payments for sports betting enable transactions to occur more quickly and globally, allowing for settlement that occurs effortlessly in a matter of minutes and across borders. Traditional payment rails require the use of intermediaries which can result in delays and inefficient transaction processing that may take several days.

Second, by using crypto, users can place their wagers without revealing their identity or financial information. Crypto also provides users with confidence that their winnings will be paid directly to them without being held up by compliance checks. Because crypto operates on blockchain technology, users do not have to rely upon banks or third-party payment processors that mandate the collection of this information.

Third, traditional payment methods such as credit cards and bank transfers generate significant processing fees, especially for international transactions, which can cut into the amount of profits or wager amounts. The use of crypto when making sports bets significantly lowers transaction costs for global users of sports betting platforms because crypto processes transactions without any additional cost associated with the location of the payee.

Finally, crypto allows for transparency and fairness for these types of transactions because the transactions take place on the blockchain. Many prediction markets utilize smart contracts to automatically pay out winnings based upon pre-determined conditions. The technology is capable of ensuring two crucial

factors, solvency and accuracy. So long as the data source, or sources, platforms rely on to resolve event contracts are trustworthy, and the settlement token is well regarded, global users will have the utmost confidence in a payout on a successful bet. Blockchain technology ensures a high degree of accuracy, in contrast to relying upon third parties to manage their own book, determine winners, and make payout through a mix of manual processes and spreadsheets.

Risk considerations with the use of crypto

There are risks with using crypto in sports betting as compared to traditional payment methods.

- Anti-Money Laundering (AML) Complexity: Crypto's pseudonymous nature makes it harder to trace the origin of funds, increasing the risk of money laundering through betting platforms.

- Know Your Customer (KYC) Challenges: Legal sportsbooks must verify user identities, but crypto transactions often lack identifiable metadata, complicating compliance.

- Fraud & Cybersecurity Threats: Fast, anonymous crypto transfers can be exploited for account takeovers, bonus abuse, or money muling.

- Regulatory Uncertainty: As discussed below, U.S. sportsbooks face inconsistent state-level rules, and crypto's legal status remains murky, making banks cautious about involvement.

- Wallet Management Risks: Banks or platforms handling crypto must secure hot and cold wallets, which are vulnerable to hacks and volatility-driven losses.

- Exposure to Illicit Activity: If banks process transactions for crypto-based sportsbooks, they could be indirectly exposed to criminal activity or sanctions violations.

- Volatility: The price of crypto can be more volatile and can fluctuate more widely and quicker as compared to fiat currencies.

Regulatory Landscape

The recent meteoric rise of prediction markets in the United States is attributable to the Trump Administration's shift toward embracing these platforms. CFTC-regulated entities, known as Designated Contract Markets (DCMs), may use the self-certification process to list "sports-related event contracts" as financial derivatives. However, this approach is at odds with a number of state gaming regulators and Tribal regulatory bodies who traditionally have overseen sports betting markets in their respective jurisdictions.

State Gaming Regulators

In a May 2018 decision, in *Murphy v. NCAA*, 584 U.S. 453 (2018), the U.S. Supreme Court overturned a federal ban on sports betting mandated by the Professional and Amateur Sports Protection Act (PASPA). PASPA was enacted in 1992, where one of the four authors, NBA Hall-of-Famer and former United

States Senator Bill Bradley, said during a 1992 floor debate on the bill:

I am sensitive to arguments in favor of deferring to the States, and I believe that the Federal Government should be careful to preempt state authority only when an issue is of national importance. But, based on what I know about the dangers of sports betting, I contend that its dangers are of national importance. Such dangers and the interstate effects of sports betting justify this Federal action.[6]

PASPA was based upon the premise that if sports betting were to happen at the state level, the state laws permitting sports betting would threaten the integrity and character of, and public confidence in, sports. In 2018, the Supreme Court overturned PASPA finding that PASPA infringed the Tenth Amendment by usurping state's authority to regulate their own gambling activities. When PASPA was in effect, Nevada had been grandfathered in and it was reaping billions of dollars in revenue.[7] New Jersey, seeking similar financial benefits for sports betting, legally contested PASPA's restrictions and ultimately, New Jersey secured a victory that affirmed states' powers. In the decision in *Murphy*, Justice Alito stated:

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not.[8]

Currently, thirty-nine states, along with the District of Columbia and Puerto Rico, have legalized sports betting, with thirty-two states specifically offering online and mobile sports betting through U.S. regulated sportsbooks.[9] However, a number of states, most notably California and Texas, have made online sports betting illegal.

Tribal Gaming Laws

Tribal gaming operations are governed by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq*., which establishes the jurisdictional framework that governs Indian gaming on Indian lands in the United States. Over two hundred tribes own, operate, or license more than five hundred gaming establishments in twenty-nine states. Under the IGRA, tribes who desire to operate games such as sports betting must enter into a tribal-state compact between the tribe and the state where the tribe is located. Florida, Wisconsin, New Mexico, North Dakota, and Washington have entered into tribal-state compacts permitting sports betting.

Commodity Futures Trading Commission

Prediction markets such as Kalshi and crypto.com are registered with the CFTC as designated contract markets (DCMs). DCMs are similar to traditional futures exchanges. Pursuant to CFTC Regulation 40.2, DCMs are permitted to list products for trading without prior CFTC approval by filing a written self-certification with the CFTC. The CFTC may opt to stay the listing or use its discretion to require a registered entity to withdraw its certification under CFTC Regulation 40.2. Under Section 5c(c)(5)(C) of the Commodity Exchange Act

(CEA), event contracts that are unlawful under any federal or state law, terrorism, assassination, war, gaming, or other similar activity that is determined to be contrary to the public interest are disallowed by the CFTC. CFTC Regulation 40.11 was promulgated to implement CEA Section 5c(C)(5)(C) and prohibits the listing or trading of any event contracts which relate to, involve, or reference "gaming" or activity that is illegal under state law. Neither the CEA or the CFTC's Regulations, however, include a definition of the term "gaming."

During the Biden Administration, the CFTC proposed rulemaking on event contracts which would have amended CFTC Regulation 40.11 to further specify the types of event contracts that fall within the scope of CEA Section 5c(c)(5)(C) that are contrary to the public interest.[10] The proposed rulemaking would have defined "gaming" in detail and included illustrative examples of gaming that included staking or risking something of value on the outcome of a political contest, an awards context, or a game in which one or more athletes compete.[11] The proposed rulemaking was subject to heavy criticism by the then-Republican Commissioners as violative of the Administrative Procedure Act ("APA") and that the proposed rulemaking overbroadly categorized certain event contracts.

Also during the Biden Administration, the CFTC issued a stay of self-certified futures contracts relating to NFL football games by a CFTC-registered DCM and requested public feedback on the listing of these contracts. The CFTC was set to issue a proposed order finding that these contracts involved gaming and were therefore contrary to the public interest; however, the

DCM withdrew their certification prior to the issuance of the order. This withdrawal drew sharp criticism from then-CFTC Commissioner Brian Quintenz, who noted that he would have dissented from the order had it been issued based upon his concerns about the constitutionality and validity of CEA Section 5c(c)(5)(C) and that the proposed order was arbitrary and capricious under the APA.[12] His comments also noted that these types of contracts had economic utility and would be permissible absent a determination by the CFTC that they are contrary to the public interest. Even with the change in Administration, the CFTC has not yet withdrawn this proposed rulemaking.

Additionally, the CFTC had previously issued an order to Kalshi in September 2023 prohibiting Kalshi from offering users bets on the outcome of upcoming U.S. congressional elections on public interest grounds.[13] Kalshi is a DCM registered with the CFTC. Kalshi sued the CFTC in the U.S. District Court for the District of Columbia, arguing that the CFTC's order was arbitrary and capricious and therefore not in accordance with the APA. In September 2024, the district court agreed with Kalshi, holding that the CFTC's order exceeded its statutory authority and that Kalshi's contracts did not involve unlawful activity or gaming, and stated "[t]hey involve elections, which are neither."[14] The CFTC subsequently appealed the district decision, but ultimately dropped its appeal after the change in Administration.

In December 2024, crypto.com listed two sports contracts that it self-certified and submitted to the CFTC. On January 14,

2025, the CFTC notified crypto.com that it would initiate a review of these contracts on the grounds that the contracts may involve an activity enumerated in CFTC Regulation 40.11 and CEA Section 5c(c)(5)(C) and requested that crypto.com suspend the listing of the contracts during the review period.[15] Crypto.com declined to suspend the listing of these contracts. To date, the CFTC has not released a similar request to suspend a sports events contract.

With the change to the Trump Administration in January 2025, the CFTC shifted its attitude toward prediction markets and approved a number of prediction markets as DCMs. A particularly notable approval was in connection with QCX, a CFTC-registered DCM and derivatives clearing organization, which was acquired by Polymarket in July 2025. Polymarket previously settled with the CFTC for offering off-exchange event-based binary options contracts and failing to register as a DCM.[16] Subsequent to its settlement with the CFTC, Polymarket had been reported to be under investigation by the CFTC for violating the terms of its settlement and by DOJ for offering its services to U.S. residents--these investigations were dropped with the change in Administration.[17] With its acquisition of QCX, Polymarket has announced its plans to reopen to US-based users.[18]

In February 2025, the CFTC sought public feedback on prediction markets and intended to hold a roundtable, which was canceled for unknown reasons.[19] However, the CFTC received a number of written comments ranging from state

gaming associations and Tribal regulatory bodies asserting that the CFTC should conclude that the DCMs' offering of event contracts is gambling and contrary to the public interest to professional sports organizations such as Major League Baseball and the National Basketball Association advocating for comprehensive integrity and consumer protections.

Right before the federal government shutdown in September 2025, the CFTC's Market Participants Division, Division of Market Oversight, and Division of Clearing and Risk collectively issued CFTC Letter Number 25-36, warning that its registrants should be "prepared" for all foreseeable conditions that may result from facilitating the trading and clearing in light of the government shutdown, state regulatory actions, and litigation concerning the legality of sports-related contracts listed on DCMs. The letter expressly advised that "the Commission has not, to date, taken any official action to approve the listing for trading of sports-related event contracts on any DCM."[20]

This change in regulatory approach with the Trump Administration has led to an influx of traditional sportsbook operators seeking registration with the CFTC as designated contract markets as well as futures commission merchants registered with the CFTC through the National Futures Association.[21] In a similar vein, other operators have followed Polymarket's approach and are acquiring or partnering with CFTC-registered DCMs.[22]

Securities and Exchange Commission

The SEC is also getting pulled into this space. In October 2025, InPlay Markets was reported to be seeking approval from the SEC and FINRA to provide regulated securities tied to the real-time performance of college and professional sports teams by connecting its markets to traders through participating broker dealers.[23]

With respect to the crypto markets, the SEC and CFTC have been engaged in harmonization efforts as announced in September 2025. The CFTC's release setting forth its priorities of potential coordination with the SEC included the consideration of collaboration opportunities for event contracts to be made available to U.S. market participants regardless of jurisdictional boundaries.[24]

Current State of Litigation with Prediction Market Platforms

With crypto.com's listing of sports event contracts in December 2024, a number of prediction markets followed suit and began listing sports event contracts on their respective platforms.[25] This has led to a number of lawsuits involving state regulators raising preemption issues as sports betting has traditionally been within the regulatory ambit of the individual states, with the CFTC also entering into the fray. The Tribal regulatory bodies have also filed suits with major prediction markets also currently winding their way through the courts.

Federal vs. state preemption

A number of state gaming authorities sent cease-and-desist letters to Kalshi, crypto.com, and Robinhood on the grounds that those platforms were not licensed with their respective states and that they were illegally offering sports wagering in contravention of state law. In response, these platforms sought preliminary rulings from federal district courts that would enjoin the state from enforcing cease-and-desist orders. The crux of the preemption defense was that sports-event contracts are offered by entities overseen exclusively by the CFTC, and therefore preempt state laws (with Massachusetts taking a proactive tactic of suing Kalshi in state court). The growing list of states currently embroiled in this litigation include Nevada, New Jersey, Maryland, Massachusetts, Ohio, Tennessee, and New York, and by 2026 Kalshi, other platforms, and the CFTC had initiated or been drawn into litigation with some twenty states.[26]

The CFTC also has taken an affirmative litigation-forward approach to defend the CFTC's exclusive jurisdiction over event contracts traded on CFTC-registered DCMs, by filing amicus briefs in several of the lawsuits with the state regulators as well as proactively suing at least 9 states with the DOJ.[27] Pushing further, the CFTC stayed one platform's invocation of its emergency rule to liquidate certain trades to Michigan residents, which the platform had done in order to comply with a Michigan state court order directing it to cancel previously executed trades involving Michigan residents.[28] The CFTC also took similar action in response to a platform's notification of a market emergency in response to a complaint filed by the New York Attorney General against the platform seeking a temporary restraining order.[29]

The results initially split across the district courts and have now produced a split among the federal courts of appeals, signaling that this issue ultimately will be one that will be decided by the U.S. Supreme Court. In Nevada, the district court judge found Kalshi had shown a likelihood of success on the merits of its preemption argument and that Kalshi would suffer irreparable harm without a preliminary injunction.[30] The Nevada district court found that Kalshi was likely to succeed on its argument that the plain language of the CEA grants the CFTC exclusive jurisdiction over transactions on DCMs, and because Kalshi is registered with the CFTC as a DCM, Nevada likely would not be able to regulate Kalshi's sports event contracts.

However, that very same judge went the opposite direction with crypto.com, denying crypto.com's request for a preliminary injunction, which crypto.com appealed to the Ninth Circuit. In the crypto.com Nevada matter, the Court found that the event contracts in question "turn on the outcome" of an "event," as opposed to an "occurrence or nonoccurrence" as set forth in the CEA, and therefore are not swaps within the CFTC's exclusive jurisdiction. The Nevada district court also found that the CFTC's prohibition of certain gaming contracts is consistent with Congress's intent to prevent gambling from the futures markets and to protect the public interest from gaming and other events contracts. In the interim, crypto.com agreed that it would not offer sports event contracts in Nevada at least for the duration of its appeal. After the crypto.com ruling, Nevada sought to dissolve the preliminary injunction previously granted to Kalshi, and the district court ultimately dissolved it, a ruling Kalshi appealed to the Ninth Circuit.

In New Jersey, the district court granted Kalshi's motion for a preliminary injunction, which the Third Circuit affirmed in April 2026, as discussed below. The New Jersey district court found that Kalshi's sports-related event contracts fell within the CFTC's exclusive jurisdiction and that sporting events may have potential financial, economic, or commercial consequences similar to the definition of a swap as defined by the CEA.

The district court in Maryland, however, denied Kalshi's motion for a preliminary injunction, which is now on appeal to the Fourth Circuit. The Maryland court found that Kalshi failed to demonstrate a likelihood of success on the merits of its preemption claim and found that when Congress enacted and amended the CEA, it was highly unlikely to have intended to override state sports betting laws because at that time, it was already illegal to engage in sports gambling under the Wire Act or PAPSA, taking into account the structure, context, and legislative history of the CEA.[31] The Maryland district court noted that there is a strong presumption *against* federal preemption as "regulating gambling is at the core of the state's residual powers as a sovereign." The Maryland district court also noted that Kalshi could still comply with both Maryland law and the CEA by obtaining a Maryland gaming license.

Unlike the other states, Massachusetts took a different route and proactively sued Kalshi in state court for unlicensed sports wagering in violation of Massachusetts state law. Kalshi attempted to remove the lawsuit to federal district court. However, the federal district court remanded the action back to state court because Kalshi had not presented a claim of complete preemption, but only that the CEA precludes

regulation of a specific subset of sports gambling (wagering on DCMs) as opposed to the CEA completely preempting Massachusetts' ability to regulate sports gambling in the state.

The Circuit Split

Third Circuit. On April 6, 2026, in the first federal appellate ruling on the issue, a divided Third Circuit panel affirmed the preliminary injunction barring New Jersey from enforcing its gambling laws against Kalshi. KalshiEX, LLC v. Flaherty, 172 F.4th 220 (3d Cir. 2026). Writing for the majority, Judge Porter, joined by Chief Judge Chagares, held that sports-related event contracts traded on a CFTC-registered DCM are swaps under the CEA and therefore fall within the CFTC's exclusive jurisdiction. The majority found both field preemption, based on the CEA's grant of exclusive jurisdiction over swaps traded on DCMs, and conflict preemption, reasoning that permitting states to prohibit these contracts would create the very patchwork of state regulation that Congress sought to eliminate. Judge Roth dissented, observing that Kalshi's offerings are "virtually indistinguishable from the betting products available on online sportsbooks," that states have historically regulated gambling, and that state gambling laws do not frustrate the CEA's objectives because the CEA and CFTC Regulation 40.11 themselves already prohibit event contracts involving gaming.

Ninth Circuit. On August 28, 2026, a unanimous Ninth Circuit panel reached the opposite conclusion, affirming in substantial part the District of Nevada's order dissolving Kalshi's preliminary injunction against the Nevada Gaming Control Board. KalshiEX, LLC v. Assad, No. 25-7516 (9th Cir. Aug. 28,

2026). In an opinion by Judge Ryan D. Nelson, the court first held that whether a product is a "swap" is a question for the courts, not one committed exclusively to the CFTC. The court accepted that Section 2(a)(1)(A) of the CEA would expressly preempt state regulation of swaps traded on a DCM, making the dispositive question whether sports event contracts are swaps, and held that they are not, rejecting the arguments of Kalshi and the CFTC that the contracts qualify as swaps or as futures or options in excluded commodities. The court also rejected implied preemption and reasoned that geofencing makes compliance with both regimes possible and that the CEA's special rule authorizing the CFTC to disallow contracts involving activity unlawful under state law shows the regimes can coexist; on field preemption, it held that Congress has not occupied the field of gambling. The court remanded only the separate question of Kalshi's election contracts, and the consolidated appeals of crypto.com and Robinhood were resolved the same way. Kalshi has since petitioned the Ninth Circuit for rehearing en banc.

Sixth Circuit. On September 25, 2026, the Sixth Circuit unanimously sided with Ohio and Tennessee in consolidated appeals, KalshiEX LLC v. Schuler, No. 26-3196, and KalshiEX LLC v. Orgel, No. 26-5235 (6th Cir. Sept. 25, 2026), upholding the denial of a preliminary injunction in Ohio and vacating the injunction Kalshi had obtained in Tennessee. The court concluded that, because the events underlying Kalshi's sports-event contracts do not inherently have "a potential financial, economic, or commercial consequence," the contracts are not swaps under CEA Section 1a(47)(A)(ii), and further held that federal law does not preempt the states' gambling laws. The

decision followed an earlier Sixth Circuit motions-panel ruling in April 2026 observing that Congress's decision to bring swaps under the CFTC's jurisdiction did not designate the CFTC as the nation's sole sportsbook regulator. The Sixth Circuit thus joined the Ninth Circuit, deepening the split with the Third Circuit. Kalshi's appeal from the District of Maryland remains pending in the Fourth Circuit.

Petitions for Certiorari

Three petitions for certiorari are now pending before the U.S. Supreme Court. On September 2, 2026, New Jersey's gaming regulators and Attorney General petitioned for review of the Third Circuit's decision. Flaherty v. KalshiEX, LLC, No. 26-299 (docketed Sept. 8, 2026). The petition asks whether the CEA preempts states from regulating sports bets that occur within their jurisdictions if those bets are offered on markets registered with the CFTC, describes a "direct, acknowledged, and irreconcilable split" between the Third and Ninth Circuits, and notes that Kalshi's position has drawn opposition from 44 states and hundreds of tribes. It argues both that sports bets are not swaps and that, regardless, federal law does not impliedly preempt state gambling laws. Kalshi has sought an extension of its time to respond, from October 8, 2026 to November 9, 2026.

Robinhood Derivatives, LLC filed a petition on September 10, 2026 seeking review of the Ninth Circuit's decision in its consolidated case, Robinhood Derivatives, LLC v. Dreitzer, No. 25-7187 (9th Cir.), and urging the Court to review the cases collectively; crypto.com has likewise petitioned from the Ninth Circuit's ruling. Commentators have noted that because the

Third Circuit decided only implied preemption, while the Ninth Circuit also addressed express preemption, a grant limited to New Jersey's petition might not allow the Court to reach the express preemption question; Robinhood's conditional petition is aimed at that gap. With the Sixth Circuit's subsequent decision deepening the split, Supreme Court review appears increasingly likely.

Additional Concerns with Sports Betting on Prediction Market Platforms

On top of these cases with the state regulators, federally-recognized Indian tribes and tribal organizations in California and Wisconsin have also sued the major prediction market platforms and sought to intervene in the state regulator lawsuits. The lawsuits with the Indian tribes go broader than the preemption issues in the state regulator lawsuits and address the question of whether the sports-related event contracts are legal in the first instance, or whether they violate federal laws such as the IGRA and Lanham Act for false advertising. The Indian tribes also raise RICO claims against Kalshi and Robinhood arguing that they are part of a racketeering enterprise engaged in wire fraud, transmitting wagering information as prohibited by the Wire Act, and operating an illegal gambling business as prohibited by IGRA.

Several lawsuits have also been filed in state courts against Kalshi and Robinhood, as well as their market maker, for operating illegal gambling enterprises under the guise of prediction markets and seeking the recovery of gambling losses suffered by the residents of those respective states. The allegations in these cases argue that prediction markets could

not operate without the help of market makers that provide liquidity to the platforms by buying and selling event contracts.

Arguments have also been raised that the age restriction on these platforms is eighteen, rather than twenty-one as required by most states. Therefore, these platforms are offering underage gambling around the U.S. despite state prohibitions to the contrary and are contrary to the public interest.

An additional concern that has been raised is the lack of resources and experience of the CFTC to regulate these markets. The CFTC is a significantly smaller federal agency as compared to the SEC and has suffered significant losses in staff with the new Administration, despite a growing regulatory ambit. Historically, the CFTC's jurisdictional mandate covered traditional agricultural commodities and energy markets, expanding to financial derivatives with the passage of Dodd-Frank, and is poised to further expand to spot crypto with recent crypto market structure legislation. Many are concerned that the CFTC will be unable to effectively monitor these markets, especially for insider trading and market manipulation.

Recent CFTC enforcement actions have highlighted these concerns. In February 2026, the CFTC announced settled charges against former Congressman George Santos for engaging in manipulative activity involving an event contract tied to whether Santos would attend the 2026 State of the Union address. According to the CFTC's order, Santos traded contracts based on his own attendance while simultaneously making allegedly false and misleading social media statements

regarding whether he intended to attend the event. The CFTC alleged that those statements moved market prices in directions favorable to Santos' positions, allowing him to generate over $17,500 in profits. Santos agreed to disgorge profits, pay a civil monetary penalty, cease and desist from future violations of the Commodity Exchange Act and CFTC regulations, and accept a three-year trading ban.

Similarly, in another 2026 enforcement action, the CFTC filed and settled charges against Gabriel Perez, a White House teleprompter operator, for allegedly misappropriating material, nonpublic information obtained through his federal government employment to trade presidential mention event contracts on a prediction market platform. According to the CFTC, Perez used advance access to presidential speeches to trade contracts tied to words or phrases the President would use during public remarks, generating over $107,500 in profits. Perez agreed to disgorge profits, pay a civil monetary penalty, cease and desist from future violations, and accept a three-year trading ban. The CFTC also publicly noted the assistance of KalshiEX in the investigation.

These actions also follow earlier notable parallel actions involving not just the CFTC but also the Department of Justice. On May 27, 2026, authorities charged a Google software engineer with civil violations of the Commodity Exchange Act and CFTC regulations, as well as criminal charges for commodities fraud, wire fraud, and money laundering arising from trades placed on a prediction market platform. According to the SDNY indictment and the CFTC complaint, the employee allegedly accessed confidential internal Google data

concerning anticipated results for Google's 2025 "Year in Search" rankings and used that information to trade more than twenty event contracts tied to those rankings before the information became public. The trader—using the account name "AlphaRaccoon"—allegedly generated approximately $1.2 million in profits through highly successful trades placed between October and December 2025. Investigators further alleged that cryptocurrency wallets linked to the defendant were used to fund and distribute proceeds from the trading activity and that steps were taken to obscure ownership of those assets.

Earlier this year, SDNY prosecutors also unsealed the first charges against a defendant for misusing confidential information in prediction markets. On April 23, 2026, the SDNY unsealed an indictment charging U.S. Army soldier Gannon Van Dyke with insider trading violations for purchasing $33,000 of "yes" shares on Maduro- and Venezuela-related markets based on classified nonpublic information on the President invoking War Powers against Venezuela and the impending operation to capture Venezuelan President Nicolás Maduro. Van Dyke knew about the planned capture and earned $409,881 in profits by misappropriating extremely sensitive, nonpublic, classified information regarding U.S. military operations and committing commodities and wire fraud through "clear insider trading" as the government described it. The CFTC filed parallel charges on the same theories and violations of commodities laws.Both defendants in the criminal cases have pleaded not guilty and may go to trial.

All of these actions take place in a broader environment where investigations of insider trading and market manipulation on prediction markets have already surfaced, both domestically and abroad, and are expected to continue. For those seeking to enter or partner with prediction market platforms in this space, compliance controls, surveillance systems, and policies addressing insider trading, market manipulation, and misuse of confidential information continue to be paramount. The lack of integrity monitoring and traditional gambling protections also raise concerns about potential manipulation or price distortion.

What's Next

Litigation with the state regulators and the Indian tribes presses forward through the federal district and appellate courts across the country, and the Third, Ninth, and Sixth Circuits have now divided on whether sports event contracts are swaps subject to the CFTC's exclusive jurisdiction. In the meantime, prediction market platforms continue to gain popularity, although Kalshi and others have had to restrict sports offerings in states where courts have allowed state gambling laws to apply. Popularity leads to growing U.S.-based trading volume and professional sports organizations deepen partnerships with predication market platforms. Meanwhile, the CFTC maintains its current stance toward self-certification of permitting event contracts to move forward without intervention and approving even more registration applications for platforms offering event-based contracts, and in March 2026 it published an advance notice of proposed rulemaking on prediction markets inviting comment on the scope of "gaming" and "sports competition." Whether these participants can continue to do so under federal oversight will likely

ultimately be determined by the U.S. Supreme Court, which now has before it petitions from New Jersey, Robinhood, and crypto.com. If the Court ultimately rejects the Third Circuit's view, the question would return to the individual states, each with its own approach to sports wagering. In the interim, however, questions remain whether the CFTC's current approach would survive a change in Administration absent any further rulemaking or whether the industry will have developed to such a point that the regulators would not be able to catch up.

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[10] 89 F.R. 48968 (June 10, 2024).

[11] The proposed definition of "gaming" would have been the "staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games."

[12]*Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts* (Mar. 25, 2021), available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstater

[13]*In re Certification of KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the United States Senate and United States House of Representatives* (CFTC Sep. 22, 2023).

[14]*KalshiEx LLC v. CFTC*, Civil Action No. 23-3257 (JMC) (Sep. 12, 2024).

[15]*CFTC's Review of Nadex Sports Contract Submissions*, CFTC Release No. 9033-25 (Jan. 14, 2025).

[16]*In re Blockratize, Inc. d/b/a Polymarket.com*, CFTC Dkt. No. 22-09 (Jan. 3, 2022).

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[26]*KalshiEx LLC v. Williams*, 1:25cv-08846-AT (S.D.N.Y.); *KalshiEx LLC v. Schuler*, 2:25-cv-01165-SDM-CMV (S.D. Ohio);

KalshiEx LLC v. Martin, 1:25-cv-01283-ABA (D. Md.), *on appeal,* 25-1892 (4th Cir.);

KalshiEx LLC v. Flaherty, 1:25-cv-01252 (D.N.J.), on appeal 25-1922 (3d Cir.);

KalshiEx LLC v. Hendrick, 2:25-cv-00575-APG-BNW (D. Nev.);

Commonwealth of Massachusetts v. KalshiEx LLC, 1:25-cv-12595RGS (D. Mass.);

NADEX v. Nevada, 2:25-cv-00978 (D. Nev.); *NADEX v. Martin*, 1:25cv-01285-MJM (D. Md.).

Robinhood Derivatives, LLC v. Campbell, 1:25-cv-12578 (D. Mass.); *Robinhood Derivatives, LLC v. Dreitzer*, 2:25-cv-01541-APG-DJA (D.

Nev.); *Robinhood Derivatives, LLC v. Flaherty*, 1:25-cv-14723-ESK-MJS (D.N.J.).

[27]*See, e.g., United States and CFTC v. Arizona*, Case No. 2-26-cv-02246 (D. Ariz.); *United States and CFTC v. State of Connecticut, et al.*, No. 26-cv-498 (D. Conn.); *United States and CFTC v. State of Illinois, et al.*, Case No. 26-cv-3659 (N.D. Ill.); *United States and CFTC v. State of New York, et al.*, Case No. 1:26-cv-3404 (S.D.N.Y.); *United States and CFTC v. State of Wisconsin, et al.*, Case No. 2:26-cv-749 (E.D. Wisc.); *United States and CFTC v. Minnesota*, Case No. 26-cv-02661 (D. Minn.); *United States and CFTC v. Kentucky*, Case No. 3:26-cv-00049 (D. Ky.).

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[30] *KalshiEx, LLC v. Hendrick*, Case No. 2:25-cv-00575-APG-BNW, Dkt. No. 45 (D. Nev. Apr. 9, 2025).

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New FDIC and OCC Rule Defining Safety and Soundness: No "Free Pass" for Banks and Employees

11:30 am – 12:30 pm

Can You Handle the Truth?

BRANDS, CREATORS & THE BATTLE FOR CREDIBILITY

Influencer marketing is built on trust—but what happens when that trust gets complicated? This panel will move beyond the familiar questions of disclosures to explore how brands and creators can foster a culture of trust, navigate controversy and reputational challenges, and respond when things go wrong. We'll also look at the rise of "news influencers" and what happens as the lines between commercial influence, independent commentary, and traditional media continue to blur.

Panelists:

Nadia Makki, Assistant Vice President, Advertising Counsel, L'Oréal USA
Cecelia Prewett, Senior Managing Director, Actum
Jennifer Santos, Program Development Manager: Institute for Responsible Influence, BBB National Programs' Center for Industry Self-Regulation

Moderator:

Kristi Wolff, Partner, Davis Wright Tremaine LLP

(b) It is deceptive for an Industry Member to offer or confer an academic, professional, or occupational degree, if the award of such degree has not been Approved by the appropriate State educational agency or Accredited by a nationally recognized accrediting agency, unless it clearly and conspicuously discloses, in all advertising and promotional materials that contain a reference to such degree, that its award has not been Approved or Accredited by such an agency.

(c) It is deceptive for an Industry Member to offer or confer a high school diploma unless the program of instruction to which it pertains is substantially equivalent to that offered by a resident secondary school, and unless the student is informed, by a clear and conspicuous disclosure in writing prior to enrollment, that the Industry Member cannot guarantee or otherwise control the recognition that will be accorded the diploma by institutions of higher education, other schools, or prospective employers, and that such recognition is a matter solely within the discretion of those entities.

[78 FR 68991, Nov. 18, 2013]

§ 254.7 Deceptive sales practices.

(a) It is deceptive for an Industry Member to use advertisements or promotional materials that misrepresent, directly or indirectly, expressly or by implication, that employment is being offered or that a talent hunt or contest is being conducted. For example, captions such as, ''Men/women wanted to train for * * * ,'' ''Help Wanted,'' ''Employment,'' ''Business Opportunities,'' and words or terms of similar import, may falsely convey that employment is being offered and therefore should be avoided.

(b) It is deceptive for an Industry Member to fail to disclose to a prospective student, prior to enrollment, the total cost of the program of instruction and the school's refund policy if the student does not complete the program of instruction.

(c) It is deceptive for an Industry Member to fail to disclose to a prospective student, prior to enrollment, all requirements for successfully completing the course or program of instruction and the circumstances that would constitute grounds for terminating the student's enrollment prior to completion of the program of instruction.

[78 FR 68991, Nov. 18, 2013]

PART 255—GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Sec.

255.0 Purpose and definitions.
255.1 General considerations.
255.2 Consumer endorsements.
255.3 Expert endorsements.
255.4 Endorsements by organizations.
255.5 Disclosure of material connections.
255.6 Endorsements directed to children.

AUTHORITY: 38 Stat. 717, as amended; 15 U.S.C. 41–58.

SOURCE: 88 FR 48102, July 26, 2023, unless otherwise noted.

§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of section 5 of the FTC Act, 15 U.S.C. 45, to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The examples in each section apply the principles of that section to particular factual scenarios but do not address every possible issue that the facts or principles might implicate. Nor do the Guides purport to cover every possible use of endorsements in

advertising.[1] Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an ''endorsement'' means any advertising, marketing, or promotional message for a product that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. Verbal statements, tags in social media posts, demonstrations, depictions of the name, signature, likeness or other identifying personal characteristics of an individual, and the name or seal of an organization can be endorsements. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the ''endorser'' and could be or appear to be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term ''product'' includes any product, service, brand, company, or industry.

(e) For purposes of this part, an ''expert'' is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

(f) For purposes of this part, ''clear and conspicuous'' means that a disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers. If a communication's representation necessitating a disclosure is made through visual means, the disclosure should be made in at least the communication's visual portion; if the representation is made through audible means, the disclosure should be made in at least the communication's audible portion; and if the representation is made through both visual and audible means, the disclosure should be made in the communication's visual and audible portions. A disclosure presented simultaneously in both the visual and audible portions of a communication is more likely to be clear and conspicuous. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood. An audible disclosure should be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it. In any communication using an interactive electronic medium, such as social media or the internet, the disclosure should be unavoidable. The disclosure should not be contradicted or mitigated by, or inconsistent with, anything else in the communication. When an endorsement targets a specific audience, such as older adults, ''ordinary consumers'' includes members of that group.

(g) Examples:

(1) *Example 1.* A film critic's review of a movie is excerpted in an advertisement placed by the film's producer. The critic's review is not an endorsement, but when the excerpt from the review is used in the producer's advertisement, the excerpt becomes an endorsement. Readers would view it as a statement of the critic's own opinions and not those of the producer. If the excerpt alters or quotes from the text of the review in a way that does not fairly reflect its substance, the advertisement would be deceptive because it distorts the endorser's opinion. (*See* § 255.1(b))

(2) *Example 2.* A television commercial depicts two unidentified shoppers in a supermarket buying a laundry detergent. One comments to the other how clean the advertised brand makes the shopper's clothes. The other shopper then replies, ''I will try it because I have not been fully satisfied with my own brand.'' This obviously fictional

[1] Staff business guidance applying section 5 of the FTC Act to endorsements and testimonials in advertising is available on the FTC website. Such staff guidance addresses details not covered in these Guides and is updated periodically but is not approved by or binding upon the Commission.

dramatization would not be an endorsement.

(3) *Example 3.* In an advertisement for a pain remedy, an announcer unfamiliar to consumers except as a spokesperson for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. The spokesperson does not purport to speak from personal experience, nor on the basis of their own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

(4) *Example 4.* A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Many consumers are likely to believe this message reflects the driver's personal views, even if the driver does not say so, because consumers recognize the speaker primarily as a racing driver and not merely as a product spokesperson. Accordingly, many consumers would likely believe the driver would not speak for an automotive product without actually believing in the product and having personal knowledge sufficient to form the beliefs expressed. The likely attribution of these beliefs to the driver makes this message an endorsement under the Guides.

(5) *Example 5.* (i) A television advertisement for a brand of golf balls includes a video of a prominent and well-recognized professional golfer practicing numerous drives off the tee. The video would be an endorsement even though the golfer makes no verbal statement in the advertisement.

(ii) The golfer is also hired to post the video to their social media account. The paid post is an endorsement if viewers can readily identify the golf ball brand, either because it is apparent from the video or because it is tagged or otherwise mentioned in the post.

(6) *Example 6.* (i) An infomercial for a home fitness system is hosted by a well-known actor. During the infomercial, the actor demonstrates the machine and states, ''This is the most effective and easy-to-use home exercise machine that I have ever tried.'' Even if the actor is reading from a script, the statement would be an endorsement, because consumers are likely to believe it reflects the actor's personal views.

(ii) Assume that, rather than speaking about their experience with or opinion of the machine, the actor says that the machine was designed by exercise physiologists at a leading university, that it isolates each of five major muscle groups, and that it is meant to be used for fifteen minutes a day. After demonstrating various exercises using the machine, the actor finally says how much the machine costs and how to order it. As the actor does not say or do anything during the infomercial that would lead viewers to believe that the actor is expressing their own views about the machine, there is no endorsement.

(7) *Example 7.* (i) A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer with their own money. The purchaser posts to their social media account that the change in diet has made their dog's fur noticeably softer and shinier, and that in their opinion, the new dog food definitely is worth the extra money. Because the consumer has no connection to the manufacturer beyond being an ordinary purchaser, their message cannot be attributed to the manufacturer and the post would not be deemed an endorsement under the Guides. The same would be true if the purchaser writes a consumer product review on an independent review website. But, if the consumer submits the review to the review section of the manufacturer's website and the manufacturer chooses to highlight the review on the homepage of its website, then the review as featured is an endorsement even though there is no connection between the consumer and the manufacturer.

(ii) Assume that rather than purchase the dog food with their own money, the consumer receives it for free because the store routinely tracks purchases and the dog food manufacturer arranged for the store to provide

a coupon for a free trial bag of its new brand to all purchasers of its existing brand. The manufacturer does not ask coupon recipients for product reviews and recipients likely would not assume that the manufacturer expects them to post reviews. The consumer's post would not be deemed an endorsement under the Guides because this unsolicited review cannot be attributed to the manufacturer.

(iii) Assume now that the consumer joins a marketing program under which participants agree to periodically receive free products from various manufacturers and write reviews of them. If the consumer receives a free bag of the new dog food through this program, their positive review would be considered an endorsement under the Guides because of their connection to the manufacturer through the marketing program.

(iv) Assume that the consumer is the owner of a ''dog influencer'' (a dog with a social media account and a large number of followers). If the manufacturer sends the consumer coupons for a year's worth of dog food and asks the consumer to feature the brand in their dog's social media feed, any resulting posts that feature the brand would be considered endorsements even though the owner could have chosen not to endorse the product.

(8) *Example 8.* A college student, who has earned a reputation as an excellent video game player, live streams their game play. The developer of a new video game pays the student to play and live stream its new game. The student plays the game and appears to enjoy it. Even though the college student does not expressly recommend the game, the game play is considered an endorsement because the apparent enjoyment is implicitly a recommendation.

(9) *Example 9.* (i) An influencer who is paid to endorse a vitamin product in their social media posts discloses their connection to the product's manufacturer only on the profile pages of their social media accounts. The disclosure is not clear and conspicuous because people seeing their paid posts could easily miss the disclosure.

(ii) Assume now that the influencer discloses their connection to the manufacturer but that, in order to see the disclosures, consumers have to click on a link in the posts labeled simply ''more.'' If the endorsement is visible without having to click on the link labeled ''more,'' but the disclosure is not visible without doing so, then the disclosure is not unavoidable and thus is not clear and conspicuous.

(iii) Assume now that the influencer relies solely upon a social media platform's built-in disclosure tool for one of these posts. The disclosure appears in small white text, it is set against the light background of the image that the influencer posted, it competes with unrelated text that the influencer superimposed on the image, and the post appears for only five seconds. The disclosure is easy to miss and thus not clear and conspicuous.

(10) *Example 10.* A television advertisement promotes a smartphone app that purportedly halts cognitive decline. The ad presents multiple endorsements by older senior citizens who are represented as actual consumers who used the app. The advertisement discloses via both audio and visual means that the persons featured are actors. Because the advertisement is targeted at older consumers, whether the disclosure is clear and conspicuous will be evaluated from the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities.

(11) *Example 11.* (i) A social media advertisement promoting a cholesterol-lowering product features a testimonialist who says by how much their serum cholesterol went down. The claimed reduction greatly exceeds what is typically experienced by users of the product and a disclosure of typical results is required. The marketer has been able to identify from online data collection individuals with high cholesterol levels who speak a particular foreign language and are unable to understand English. It microtargets a foreign-language version of the ad to them, disclosing users' typical results only in English. The adequacy of the disclosure will be evaluated from the perspective of the microtargeted individuals, and the disclosure must be in the same language as the ad.

(ii) Assume now that the ad has a disclosure that is clear and conspicuous when viewed on a computer browser but that it is not clear and conspicuous when the ad is rendered on a smartphone. Because some consumers will view the ad on their smartphones, the disclosure is inadequate.

(12) *Example 12.* An exterminator purchases fake negative reviews of competing exterminators. A paid or otherwise incentivized negative statement about a competitor's service is not an endorsement, as that term is used in the Guides. Nevertheless, such statements, *e.g.*, a paid negative review of a competing product, can be deceptive in violation of section 5. (*See* § 255.2.(e)(4)(v) regarding the purchase of a fake positive review for a product.) Fake positive reviews that are used to promote a product are ''endorsements.''

(13) *Example 13.* A motivational speaker buys fake social media followers to impress potential clients. The use by endorsers of fake indicators of social media influence, such as fake social media followers, is not itself an endorsement issue. The Commission notes, however, that it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use them to misrepresent such influence to potential clients, purchasers, investors, partners, or employees or to anyone else for a commercial purpose. It is also a deceptive practice to sell or distribute such indicators to such users.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. (*See* § 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.)

(b) An advertisement need not present an endorser's message in the exact words of the endorser unless the advertisement represents that it is presenting the endorser's exact words, such as through the use of quotation marks. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information about the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. (*See* paragraph (b) of this section regarding the ''good reason to believe'' requirement.)

(d) Advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements or for failing to disclose unexpected material connections between themselves and their endorsers. (*See* § 255.5.) An advertiser may be liable for a deceptive endorsement even when the endorser is not liable. Advertisers should:

(1) Provide guidance to their endorsers on the need to ensure that their statements are not misleading and to disclose unexpected material connections;

(2) Monitor their endorsers' compliance; and

(3) Take action sufficient to remedy non-compliance and prevent future non-compliance. While not a safe harbor, good faith and effective guidance, monitoring, and remedial action should reduce the incidence of deceptive claims and reduce an advertiser's odds of facing a Commission enforcement action.

(e) Endorsers may be liable for statements made in the course of their endorsements, such as when an endorser

makes a representation that the endorser knows or should know to be deceptive, including when an endorser falsely represents that they personally used a product. Also, an endorser who is not an expert may be liable for misleading or unsubstantiated representations regarding a product's performance or effectiveness, such as when the representations are inconsistent with the endorser's personal experience or were not made or approved by the advertiser and go beyond the scope of the endorser's personal experience. (For the responsibilities of an endorser who is an expert, *see* § 255.3.) Endorsers may also be liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when an endorser creates and disseminates endorsements without such disclosures.

(f) Advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries may be liable for their roles in creating or disseminating endorsements containing representations that they know or should know are deceptive. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures.

(g) The use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

(h) Examples:

(1) *Example 1.* (i) A building contractor states in an advertisement disseminated by a paint manufacturer, ''I use XYZ exterior house paint because of its remarkable quick drying properties and durability.'' This endorsement must comply with the pertinent requirements of § 255.3. Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to use the paint as reformulated and to subscribe to the views presented previously.

(ii) Assume that, before the reformulation, the contractor had posted an endorsement of the paint to their social media account. Even if the contractor would not use or recommend the reformulated paint, there is no obligation for the contractor or the manufacturer to modify or delete a historic post containing the endorsement as long as the date of that post is clear and conspicuous to viewers. If the contractor reposts or the advertiser shares the contractor's original endorsement after the reformulation, consumers would expect that the contractor holds the views expressed in the original post with respect to the reformulated product and the advertiser would need to confirm that with the contractor.

(2) *Example 2.* In a radio advertisement played during commercial breaks, a well-known DJ talks about how much they enjoy making coffee with a particular coffee maker in the morning. The DJ's comments likely communicate that they regularly use the coffee maker. If, instead, they used it only during a demonstration by its manufacturer, the ad would be deceptive.

(3) *Example 3.* (i) A dermatologist is a paid advisor to a pharmaceutical company and is asked by the company to post about its products on their professional social media account. The dermatologist posts that the company's newest acne treatment product is ''clinically proven'' to work. Before giving the endorsement, the dermatologist received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. Given their medical expertise, the dermatologist should have recognized the study's flaws and is subject to liability for their false statements made in the advertisement. The advertiser is also liable for the misrepresentation made through the endorsement. (*See* § 255.3 regarding the product evaluation that an expert endorser must conduct.) Even if the study was sufficient to establish the product's proven efficacy, the pharmaceutical company and the

dermatologist are both potentially liable if the endorser fails to disclose their relationship to the company. (*See* § 255.5 regarding the disclosure of unexpected material connections.)

(ii) Assume that the expert had asked the pharmaceutical company for the evidence supporting its claims and there were no apparent design or execution flaws in the study shown to the expert, but that the pharmaceutical company had withheld a larger and better controlled, non-published proprietary study of the acne treatment that failed to find any statistically significant improvement in acne. The expert's ''clinically proven'' to work claim would be deceptive and the company would be liable for the claim, but because the dermatologist did not have a reason to know that the claim was deceptive, the expert would not be liable.

(4) *Example 4.* A well-known celebrity appears in an infomercial for a hot air roaster that purportedly cooks a chicken perfectly in twenty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the roaster. In each attempt, the chicken is undercooked after twenty minutes and requires forty-five minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the roaster. The celebrity then takes from a second roaster what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just twenty minutes, this is the product you need. A significant percentage of consumers are likely to believe the statement represents the celebrity's own view and experience even though the celebrity is reading from a script. Because the celebrity knows that their statement is untrue, the endorser is subject to liability. The advertiser is also liable for misrepresentations made through the endorsement.

(5) *Example 5.* A skin care products advertiser hires an influencer to promote its products on the influencer's social media account. The advertiser requests that the influencer try a new body lotion and post a video review of it. The advertiser does not provide the influencer with any materials stating that the lotion cures skin conditions and the influencer does not ask the advertiser if it does. However, believing that the lotion cleared up their eczema, the influencer says in their review, ''This lotion cures eczema. All of my followers suffering from eczema should use it.'' The influencer, who did not limit their statements to their personal experience using the product and did not have a reasonable basis for their claim that the lotion cures eczema, is subject to liability for the misleading or unsubstantiated representation in the endorsement. If the advertiser lacked adequate substantiation for the implied claims that the lotion cures eczema, it would be liable regardless of the liability of the endorser. The influencer and the advertiser may also be liable if the influencer fails to disclose clearly and conspicuously being paid for the endorsement. (*See* § 255.5.) In order to limit its potential liability, the advertiser should provide guidance to its influencers concerning the need to ensure that statements they make are truthful and substantiated and the need to disclose unexpected material connections and take other steps to discourage or prevent non-compliance. The advertiser should also monitor its influencers' compliance and take steps necessary to remove and halt the continued publication of deceptive representations when they are discovered and to ensure the disclosure of unexpected material connections. (*See* paragraph (d) of this section and § 255.5.)

(6) *Example 6.* (i) The website for an acne treatment features accurate testimonials of users who say that the product improved their acne quickly and with no side effects. Instead of using images of the actual endorsers, the website accompanies the testimonials with stock photos the advertiser purchased of individuals with near perfect skin. The images misrepresent the improvements to the endorsers' complexions.

(ii) The same website also sells QRS Weight-Loss shakes and features a truthful testimonial from an individual who says, ''I lost 50 pounds by just drinking the shakes.'' Instead of accompanying the testimonial with a picture of the actual endorser, who went

from 300 pounds to 250 pounds, the website shows a picture of an individual who appears to weigh about 100 pounds. By suggesting that QRS Weight-Loss shakes caused the endorser to lose one-third of their original body weight (going from 150 pounds to 100 pounds), the image misrepresents the product's effectiveness. Even if it is accompanied by a picture of the actual endorser, the testimonial could still communicate a deceptive typicality claim.

(7) *Example 7.* A learn-to-read program disseminates a sponsored social media post by a parent saying that the program helped their child learn to read. The picture accompanying the post is not of the endorser and their child. The testimonial is from the parent of a 7-year-old, but the post shows an image of a child who appears to be only 4 years old. By suggesting that the program taught a 4-year-old to read, the image misrepresents the effectiveness of the program.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product will be interpreted as representing that the product is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support express and implied claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation. The disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect. To be effective, such disclosure must alter the net impression of the advertisement so that it is not misleading.

(c) Advertisements presenting endorsements by what are represented, expressly or by implication, to be ''actual consumers'' should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

(d) In procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements under the Guides.

(e) Examples:

(1) *Example 1.* (i) A web page for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

(ii) The web page will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, ''Notice: These testimonials do not prove our product works. You should not expect to have similar results,'' the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results

similar to those experienced by the testimonialists.

(2) *Example 2.* (i) An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, fewer than 20% of purchasers will save $100 or more. A disclosure such as, ''Results not typical'' or ''These testimonials are based on the experiences of a few people and you are not likely to have similar results'' is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect.

(A) In another context, the Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either ''Results not typical'' or the stronger ''These testimonials are based on the experiences of a few people and you are not likely to have similar results.'' Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is nondeceptive will avoid the risk of the initiation of such an action in the first instance.

(B) The advertiser should clearly and conspicuously disclose the generally expected savings and have adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, ''the average homeowner saves $35 per month,'' ''the typical family saves $50 per month during cold months and $20 per month in warm months,'' or ''most families save 10% on their utility bills.''

(ii) Disclosures like those in this *Example 2,* specifically paragraph (e)(2)(i)(B) of this section, could still be misleading, however, if they only apply to limited circumstances that are not described in the advertisement. For example, if the advertisement does not limit its claims by geography, it would be misleading if the disclosure of expected results in a nationally disseminated advertisement was based on the experiences of customers in a southern climate and the experiences of those customers was much better than could be expected by heat pump users in a northern climate.

(3) *Example 3.* An advertisement for a cholesterol-lowering product features individuals who claim that their serum cholesterol went down by 120 points and 130 points, respectively; the ad does not mention the endorsers having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have competent and reliable scientific evidence that the product can produce the specific results claimed by the endorsers (*i.e.*, a 130-point drop in serum cholesterol without any lifestyle changes).

(4) *Example 4.* (i) An advertisement for a weight-loss product features an endorsement by a formerly obese person who says, ''Every day, I drank 2 QRS Weight-Loss shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.'' The advertisement accurately describes the endorser's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed QRS Weight-Loss shakes, only ate raw vegetables, and

exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which they achieved the claimed results, the ad is not likely to convey that consumers who weigh substantially less or use QRS Weight-Loss under less extreme circumstances will lose 110 pounds in six months. If the advertisement simply says that the endorser lost 110 pounds in six months using QRS Weight-Loss together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to the endorser's weight loss. The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that QRS Weight-Loss is an effective weight-loss product and that the endorser's weight loss was not caused solely by their dietary restrictions and exercise regimen).

(ii) If, in the alternative, the advertisement simply features ''before'' and ''after'' pictures of a woman who says, ''I lost 50 pounds in 6 months with QRS Weight-Loss,'' the ad is likely to convey that the endorser's experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad would be deceptive. Instead, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.*, ''women who use QRS Weight-Loss for six months typically lose 15 pounds''). A disclosure such as ''Average weight loss is 1–2 pounds per week'' is inadequate because it does not effectively communicate the expected weight loss over six months. Furthermore, that disclosure likely implies that weight loss continues at that rate over six months, which would not be true if, for example, the average weekly weight loss over six months is .57 pounds.

(iii) If the ad features the same pictures but the testimonialist simply says, ''I lost 50 pounds with QRS Weight-Loss,'' and QRS Weight-Loss users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.*, ''women who use QRS Weight-Loss lose 15 pounds on average''). A disclosure such as ''most women who use QRS Weight-Loss lose between 10 and 50 pounds'' is inadequate because the range specified is so broad that it does not sufficiently communicate what users can generally expect.

(iv) Assume that a QRS Weight-Loss advertisement contains a disclosure of generally expected results that is based upon the mean weight loss of users. If the mean is substantially affected by outliers, then the disclosure would be misleading. For example, if the mean weight loss is 15 pounds, but the median weight loss is 8 pounds, it would be misleading to say that the average weight loss was 15 pounds. In such cases, the disclosure's use of median weight loss instead could help avoid deception, *e.g.*, ''most users lose 8 pounds'' or ''the typical user loses 8 pounds.''

(v) Assume that QRS Weight-Loss's manufacturer procured a fake consumer review, reading ''I lost 50 pounds with QRS Weight-Loss,'' and had it published on a third-party review website. This endorsement is deceptive because it was not written by a bona fide user of the product (*see* § 255.1(c)) and because it does not reflect the honest opinions, findings, beliefs, or experience of the endorser (*see* § 255.1(a)). Moreover, the manufacturer would need competent and reliable scientific evidence that QRS Weight-Loss is capable of causing 50-pound weight loss.

(vi) Assume that QRS Weight-Loss is a diet and exercise program and a person appearing in a QRS Weight-Loss ad says, ''I lost 50 pounds in 6 months with QRS Weight-Loss.'' Very few QRS Weight-Loss users lose 50 pounds in 6 months and the ad truthfully discloses, ''The typical weight loss of QRS Weight-Loss users who stick with the program for 6 months is 35 pounds.'' In fact, only one-fifth of those who start the QRS Weight-Loss program stick with it for 6 months. The disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program. In other words, even with the disclosure, the ad does not communicate what people who join the QRS Weight-Loss program can generally expect.

(vii) Assume that QRS Weight-Loss's manufacturer forwards reviews for its

product to a third-party review website. If it forwards only favorable reviews or omits unfavorable reviews, it is engaging in a misleading practice.

(5) *Example 5.* An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

(6) *Example 6.* An advertisement appears to show a ''hidden camera'' situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though none of the patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers. If actors have been employed, this fact should be clearly and conspicuously disclosed.

(7) *Example 7.* (i) An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

(ii) If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards or post about it on social media, that arrangement should be clearly and conspicuously disclosed. (*See* § 255.5.)

(8) *Example 8.* (i) A camping goods retailer's website has various product pages. Each product page provides consumers with the opportunity to review the product and rate it on a five-star scale. Each such page displays the product's average star rating and a breakdown of the number of reviews with each star rating, followed by individual consumers' reviews and ratings. As such, the website is representing that it is providing an accurate reflection of the views of the purchasers who submitted product reviews to the website. If the retailer chose to suppress or otherwise not publish any reviews with fewer than four stars or reviews that contain negative sentiments, the product pages would be misleading as to purchasers' actual opinions of the products.

(ii) If the retailer chose not to post reviews containing profanity, that would not be unfair or deceptive even if reviews containing profanity tend to be negative reviews. However, it would be misleading if the retailer blocked negative reviews containing profanity, but posted positive reviews containing profanity. It would be acceptable for the retailer to have a policy against posting reviews unrelated to the product at issue or related services, for example reviews complaining about the owner's policy positions. But it would be misleading if the retailer chose to filter reviews based on other factors that are only a pretext for filtering them based on negativity. Sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; the personal information or likeness of another person; content that is inappropriate with respect to race, gender, sexuality, or ethnicity; or reviews that the seller reasonably believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted. Neither are sellers required to display reviews that are unrelated to their products or services. A particular seller's customer service, delivery, returns, and exchanges are related to its products and services.

(iii) Assume now that each product page starts with a glowing five-star review that is labeled as ''the most helpful review.'' Labeling the review as the most helpful suggests it was voted most helpful by consumers visiting the website. If the initial review on each such page was selected by the retailer and was not selected as the most helpful review by other consumers, labeling it as the most helpful would be deceptive.

(9) *Example 9.* A manufacturer offers to pay genuine purchasers $20 each to write positive reviews of its products on third-party review websites. Such reviews are deceptive even if the payment is disclosed because their positive nature is required by, rather than being merely influenced by, the payment. If, however, the manufacturer did not require the reviews to be positive and the reviewers understood that there were no negative consequences from writing negative reviews, a clear and conspicuous disclosure of the material connection would be appropriate. (*See* Example 6).

(10) *Example 10.* (i) In an attempt to coerce them to delete their reviews, a manufacturer threatens consumers who post negative reviews of its products to third-party review websites, with physical threats, with the disclosure of embarrassing information, with baseless lawsuits (such as actions for defamation that challenge truthful speech or matters of opinion), or with lawsuits it actually does not intend to file. Such threats amount to an unfair or deceptive practice because other consumers would likely be deprived of information relevant to their decision to purchase or use the products, or be misled as to purchasers' actual opinions of the product.[2]

(ii) Assume now that one of the third-party review websites has a reporting mechanism that allows businesses to flag suspected fake reviews. The manufacturer routinely flags negative reviews of its products as fake without a reasonable basis for believing that they actually are fake, resulting in truthful reviews being removed from the website. This misuse of the reporting option is an unfair or deceptive practice.

(11) *Example 11.* A marketer contacts recent online, mail-order, and in-store purchasers of its products and asks them to provide feedback to the marketer. The marketer then invites purchasers who give very positive feedback to post online reviews of the products on third-party websites. Less pleased and unhappy purchasers are simply thanked for their feedback. Such a practice may be an unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice. If, in the alternative, the marketer had simply invited all recent purchasers to provide feedback on third-party websites, the solicitation would not have been unfair or deceptive, even if it had expressed its hope for positive reviews.

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, expressly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that the endorser is represented as possessing with respect to the endorsement.

(b) Although an expert may, in endorsing a product, take into account factors not within the endorser's expertise (such as taste or price), the endorsement must be supported by an actual exercise of the expertise that the expert is represented as possessing in evaluating product features or characteristics which are relevant to an ordinary consumer's use of or experience with the product. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of represented expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison to another product or other products, such comparison must have been included in the expert's evaluation; and as a result of

[2] The Consumer Review Fairness Act makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. 15 U.S.C. 45b.

such comparison, the expert must have concluded that, with respect to those features on which the endorser is represented to be an expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. (*See* § 255.1(e) regarding the liability of endorsers.)

(c) Examples:

(1) *Example 1.* An endorsement of a particular automobile by one described as an ''engineer'' implies that the endorser's professional training and experience are such that the endorser is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

(2) *Example 2.* An endorser of a hearing aid is simply referred to as a doctor during the course of an advertisement. The ad likely implies that the endorser has expertise in the area of hearing, as would be the case if the endorser is a medical doctor with substantial experience in audiology or a non-medical doctor with a Ph.D. or Au.D. in audiology. A doctor without substantial experience in the area of hearing might be able to endorse the product if the advertisement clearly and conspicuously discloses the nature and limits of the endorser's expertise.

(3) *Example 3.* A manufacturer of automobile parts advertises that its products are approved by the ''American Institute of Science.'' From its name, consumers would infer that the ''American Institute of Science'' is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its performance by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (*e.g.,* if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

(4) *Example 4.* A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice—convenience of packaging—is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

(5) *Example 5.* A person who is identified as the president of a commercial ''home cleaning service'' states in a television advertisement for a particular brand of cleanser that the service uses that brand instead of its leading competitors because of its performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors' brands available to consumers, the service must, in fact, have such experience, and have determined, based on its expertise, that the endorsed product's cleaning ability is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of the leading competitors' products available to consumers. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was ''chosen,'' ''selected,'' or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient

if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

(6) *Example 6.* A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not the type of scientific evidence that others with the represented degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy. Under such circumstances, both the advertiser and the doctor would be liable for the doctor's misleading representation. (*See* § 255.1(d) and (e)).

§ 255.4 Endorsements by organizations.

(a) Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3, it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. (*See* § 255.1(e) regarding the liability of endorsers.)

(b) Examples:

(1) *Example 1.* A mattress manufacturer advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

(2) *Example 2.* A trampoline manufacturer sets up and operates what appears to be a trampoline review website operated by an independent trampoline institute. The site reviews the manufacturer's trampolines, as well as those of competing manufacturers. Because the website falsely appears to be independent, it is deceptive. (*See* § 255.5.)

(3) *Example 3.* (i) A third-party company operates a wireless headphone review website that provides rankings of different manufacturers' wireless headphones from most recommended to least recommended. The website operator accepts money from manufacturers in exchange for higher rankings of their products. Regardless of whether the website makes express claims of objectivity or independence, such paid-for rankings are deceptive and the website operator is liable for the deception. A headphone manufacturer who pays for a higher ranking on the website may also be held liable for the deception. A disclosure that the website operator receives payments from headphone manufacturers would be inadequate because the payments actually determine the headphones' relative rankings. If, however, the review website does not take payments for higher rankings, but receives payments from some of the headphone manufacturers, such as for affiliate link referrals, it should clearly and conspicuously disclose that it receives such payments. (*See* § 255.5(k)(11))

(ii) Assume that the headphone review website operator uses a ranking methodology that results in higher rankings for products whose sellers have a relationship to the operator because of those relationships. The use of such a methodology is also misleading.

§ 255.5 Disclosure of material connections.

(a) When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement, and that connection is not reasonably expected by the

audience, such connection must be disclosed clearly and conspicuously. Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media promotions. Some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. A material connection needs to be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection. A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

(b) Examples:

(1) *Example 1.* A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the ''findings'' of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in the advertisement.

(2) *Example 2.* A film star endorses a particular food product in a television commercial. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but, regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

(3) *Example 3.* (i) During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of the player's career and during this time the player has risen to their highest level ever in the rankings. The player responds by attributing that improvement to seeing the ball better ever since having laser vision correction surgery at a specific identified clinic. The athlete continues talking about the ease of the procedure, the kindness of the clinic's doctors, the short recovery time, and now being able to engage in a variety of activities without glasses, including driving at night. The athlete does not disclose having a contractual relationship with the clinic that includes payment for speaking publicly about the surgery. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure during the interview that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. A disclosure during the show's closing credits would not be clear and conspicuous. Furthermore, if consumers are likely to take away from the interview that the athlete's experience is typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

(ii) Assume that the tennis player instead touts the results of the surgery—mentioning the clinic by name—in the player's social media post. Consumers might not realize that the athlete is a paid endorser, and because that information might affect the weight consumers give to the tennis player's endorsement, the relationship with the

clinic should be disclosed—regardless of whether the clinic paid the athlete for that particular post. It should be disclosed even if the relationship involves no payments but only the tennis player getting the laser correction surgery for free or at a significantly reduced cost.

(iii)(A) Assume that the clinic reposts the tennis player's social media post to its own social media account and that the player's original post either—

(*1*) Did not have a clear and conspicuous disclosure, or

(*2*) Had such a disclosure that does not appear clearly and conspicuously in the repost.

(B) Given the nature of the endorsement (*i.e.*, a personally created statement from the tennis player's social media account), the viewing audience of the clinic's social media account would likely reasonably not expect the tennis player to be compensated. The clinic should clearly and conspicuously disclose its relationship to the athlete in its repost.

(iv) Assume that during the appearance on the television talk show, the tennis player is wearing clothes bearing the insignia of an athletic wear company with which the athlete also has an endorsement contract. Although this contract requires wearing the company's clothes not only on the court but also in public appearances, when possible, the athlete does not mention the clothes or the company during the appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

(4) *Example 4.* (i) A television ad for an anti-snoring product features a physician who says, ''I have seen dozens of products come on the market over the years, and in my opinion, this is the best ever.'' Consumers would expect the physician to be reasonably compensated for appearing in the ad. Consumers are unlikely, however, to expect that an expert endorser like the physician receives a percentage of gross product sales or owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

(ii) Assume that the physician is instead paid to post about the product on social media. In that context, consumers might not expect that the physician was compensated and might be more likely than in a television ad to expect that the physician is expressing an independent, professional opinion. Accordingly, the post should clearly and conspicuously disclose the doctor's connection with the company.

(5) *Example 5.* (i) In a television advertisement, an actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. The diner is asked for a ''spontaneous'' opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its television promotion of its new ''meat-alternative'' burger. A patron seeing such a sign might be more inclined to give a positive review of that item in order to appear on television. The advertisement should thus clearly and conspicuously inform viewers that the patrons on screen knew in advance that they might appear in a television advertisement because that information may materially affect the weight or credibility of the endorsement.

(ii) Assume, in the alternative, that the advertiser had not posted the sign and that patrons asked for their opinions about the burger did not know or have reason to believe until after their response that they were being recorded for use in an advertisement. No disclosure is required here, even if patrons were also told, after the interview, that they would be paid for allowing the use of their opinions in advertising.

(6) *Example 6.* (i) An infomercial producer wants to include consumer endorsements in an infomercial for an automotive additive product not yet on the market. The producer's staff selects several people who work as ''extras'' in commercials and asks them to use the product and report back, telling them that they will be paid a small

amount if selected to endorse the product in the infomercial. Viewers would not expect that these ''consumer endorsers'' are actors who used the product in the hope of appearing in the commercial and receiving compensation. Because the advertisement fails to disclose these facts, it is deceptive.

(ii) Assume that the additive's marketer wants to have more consumer reviews appear on its retail website, which sells a variety of its automotive products. The marketer recruits ordinary consumers to get a free product (*e.g.*, a set of jumper cables or a portable air compressor for car tires) and a $30 payment in exchange for posting a consumer review of the free product on the marketer's website. The marketer makes clear and the reviewers understand that they are free to write negative reviews and that there are no negative consequences of doing so. Any resulting review that fails to clearly and conspicuously disclose the incentives provided to that reviewer is likely deceptive. When the resulting reviews must be positive or reviewers believe they might face negative consequences from posting negative reviews, a disclosure would be insufficient. (*See* §§ 255.2(d) and (e)(9).) Even if adequate disclosures appear in each incentivized review, the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating. If such a material increase occurs, the marketer likely would need to provide a clear and conspicuous disclosure to people who see the average star rating.

(7) *Example 7.* A woodworking influencer posts on-demand videos of various projects. A tool manufacturer sends the influencer an expensive full-size lathe in the hope that the influencer would post about it. The woodworker uses the lathe for several products and comments favorably about it in videos. If a significant minority of viewers are likely unaware that the influencer received the lathe free of charge, the woodworker should clearly and conspicuously disclose receiving it for free, a fact that could affect the credibility that viewers attach to the endorsements. The manufacturer should advise the woodworker at the time it provides the lathe that this connection should be disclosed, and it should have reasonable procedures in place to monitor the influencer's postings for compliance and follow those procedures. (*See* § 255.1(d).)

(8) *Example 8.* An online community has a section dedicated to discussions of robotic products. Community members ask and answer questions and otherwise exchange information and opinions about robotic products and developments. Unbeknownst to this community, an employee of a leading home robot manufacturer has been posting messages on the discussion board promoting the manufacturer's new product. Knowledge of this poster's employment likely would affect the weight or credibility of the endorsements. Therefore, the poster should clearly and conspicuously disclose their relationship to the manufacturer. To limit its own liability for such posts, the employer should engage in appropriate training of employees. To the extent that the employer has directed such endorsements or otherwise has reason to know about them, it should also be monitoring them and taking other steps to ensure compliance. (*See* § 255.1(d).) The disclosure requirements in this example would apply equally to employees posting their own reviews of the product on retail websites or review platforms.

(9) *Example 9.* A college student signs up to be part of a program in which points are awarded each time a participant posts on social media about a particular advertiser's products. Participants can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the college student's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

(10) *Example 10.* Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a nonprofit third-party association. Great Paper Company paid the No Chlorine Products Association a reasonable fee

for the evaluation of its product and its manufacturing process. Consumers would reasonably expect that marketers have to pay for this kind of certification. Therefore, there is no unexpected material connection between the company and the association, and the use of the seal without disclosure of the fee paid to the association would not be deceptive.

(11) *Example 11.* A coffee lover creates a blog that reviews coffee makers. The blogger writes the content independently of the marketers of the coffee makers but includes affiliate links to websites on which consumers can buy these products from their marketers. Whenever a consumer clicks on such a link and buys the product, the blogger receives a portion of the sale. Because knowledge of this compensation could affect the weight or credibility site visitors give to the blogger's reviews, the reviews should clearly and conspicuously disclose the compensation.

(12) *Example 12.* (i) Near the beginning of a podcast, the host reads what is obviously a commercial for a product. Even without a statement identifying the advertiser as a sponsor, listeners would likely still expect that the podcaster was compensated, so there is no need for a disclosure of payment for the commercial. Depending upon the language of the commercial, however, the audience may believe that the host is expressing their own views in the commercial, in which case the host would need to hold the views expressed. (*See* § 255.0(b).)

(ii) Assume that the host also mentions the product in a social media post. The fact that the host did not have to make a disclosure in the podcast has no bearing on whether there has to be a disclosure in the social media post.

(13) *Example 13.* An app developer gives a consumer a game app to review. The consumer clearly and conspicuously discloses in the review that they were given the app, which normally costs 99 cents, for free. That disclosure suggests that the consumer did not receive anything else for the review. If the app developer also gave the consumer $50 for the review, the mere disclosure that the app was free would be inadequate.

(14) *Example 14.* Speed Ways, an internet Service Provider, advertises that it has the ''Fastest ISP Service'' as determined by the ''Data Speed Testing Company.'' If Speed Ways commissioned and paid for the analysis of its and competing services, it should clearly and conspicuously disclose its relationship to the testing company because the relationship would likely be material to consumers in evaluating the claim. If the ''Data Speed Testing Company'' is not a bona fide independent testing organization with expertise in judging ISP speeds or it did not conduct valid tests that supported the endorsement message, the endorsement would also be deceptive. (*See* § 255.3(c)(3)).

§ 255.6 Endorsements directed to children.

Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices that would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.

PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

Sec.

259.1 Purpose.
259.2 Definitions.
259.3 Qualifications and disclosures.
259.4 Advertising guidance.

AUTHORITY: 15 U.S.C. 41–58.

SOURCE: 82 FR 43687, Sept. 19, 2017, unless otherwise noted.

§ 259.1 Purpose.

The Guide in this part contains administrative interpretations of laws enforced by the Federal Trade Commission. Specifically, the Guide addresses the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of fuel economy information in advertising for new automobiles. This guidance provides the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with this Guide may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the

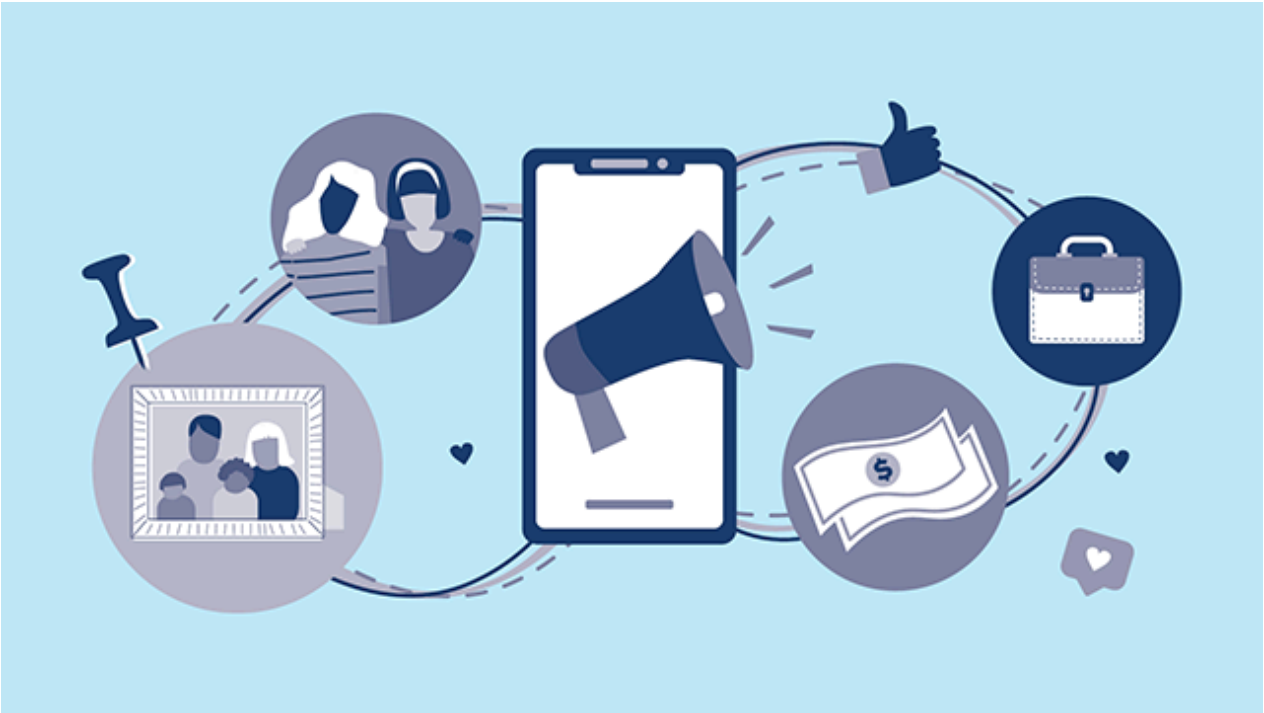
FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Endorsements, Influencers, and Reviews

Featured



The Consumer Reviews and Testimonials Rule: Questions and Answers



FTC's Endorsement Guides: What People Are Asking

If you use consumer reviews or endorsements in your marketing, are you both meeting the standards of the FTC Act and complying with the specific prohibitions of the Rule on the Use of Consumer Reviews and Testimonials? What about the FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising (Endorsement Guides), revised in 2023? Get plain language guidance from the FTC related to reviews, social media influencers, and for complying with the Consumer Review Fairness Act.

Plain Language Guidance

Consumer Review Fairness Act: What Businesses Need to Know

The Consumer Review Fairness Act protects consumers' ability to share their honest opinions about a business's products, services, or conduct in any forum – and that includes social media. The FTC has tips to help your company comply with the law.

Disclosures 101 for Social Media Influencers

Do you work with brands to recommend or endorse products? If so, you need to comply with the law when making these recommendations. One key is to make a good disclosure of your relationship to the brand. This brochure from

FTC staff gives tips on when and how to make good disclosures.

Featuring Online Customer Reviews: A Guide for Platforms

People who rely on online reviews of companies, products, and services should be getting an accurate picture of what other consumers think. If you operate a website or platform that features reviews, have processes in place to ensure those reviews truly reflect the feedback received from genuine customers.

FTC's Endorsement Guides: What People Are Asking

Answers to questions people are asking about the FTC's Endorsement Guides, including information about disclosing material connections between advertisers and endorsers. The brochure also addresses how those established consumer protection principles apply in social media and influencer marketing.

Native Advertising: A Guide for Businesses

Marketers and publishers are using innovative methods to create, format, and deliver digital advertising. One form is "native advertising," content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online. But as native advertising evolves, are consumers able to differentiate advertising from other content?

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FEDERAL TRADE COMMISSION

16 CFR Part 465

RIN 3084–AB76

Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing this final rule and Statement of Basis and Purpose (''SBP'') relating to certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. This final rule, among other things, prohibits selling or purchasing fake consumer reviews or testimonials, buying positive or negative consumer reviews, certain insiders creating consumer reviews or testimonials without clearly disclosing their relationships, creating a company-controlled review website that falsely purports to provide independent reviews, certain review suppression practices, and selling or purchasing fake indicators of social media influence.

DATES: This rule is effective October 21, 2024.

FOR FURTHER INFORMATION CONTACT: Michael Ostheimer, (202) 326–2699, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Room CC–6316, 600 Pennsylvania Avenue NW, Washington, DC 20580.

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I. Background

A. Advance Notice of Proposed Rulemaking

On November 8, 2022, the Federal Trade Commission (''Commission'' or ''FTC'') published an advance notice of proposed rulemaking (''ANPR'') to address certain deceptive or unfair acts or practices involving consumer reviews or testimonials.[1] Specifically, the ANPR discussed: (1) reviews or endorsements by people who do not exist, who did not actually use or test the product or service, or who were misrepresenting their experience with it; (2) review hijacking, where a seller steals or repurposes reviews of another product; (3) marketers offering compensation or other incentives in exchange for, or conditioned on, the writing of positive or negative consumer reviews; (4) owners, officers, or managers of a company (a) writing reviews or testimonials of their own products or services, or publishing testimonials by their employees or family members, which fail to provide clear and conspicuous disclosures of those relationships, or (b) soliciting reviews from employees or relatives without instructing them to disclose their relationships; (5) the creation or operation of websites, organizations, or entities that purportedly provide independent reviews or opinions of products or services but are, in fact, created and controlled by the companies offering the products or services; (6) misrepresenting that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity; (7) the suppression of customer reviews by physical threat or unjustified legal threat; and (8) selling, distributing, or buying followers, subscribers, views, and other indicators of social media influence. As part of the ANPR, the Commission solicited public comment on, among other things, whether such practices are prevalent and, if so, whether and how to proceed with a notice of proposed rulemaking

[1] Fed. Trade Comm'n, Trade Regulation Rule on the Use of Reviews and Endorsements, 87 FR 67424 (Nov. 8, 2022) [hereinafter ''ANPR''], *https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements.* The ANPR was entitled ''Trade Regulation Rule Concerning Reviews and Endorsements.'' In order to better reflect its content, the Commission subsequently decided to change the name of the proposed rule to ''Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.''

(''NPRM'').[2] The ANPR provided for a 60-day comment period, and the Commission received 42 responsive comments [3] from review platforms and other businesses, trade associations, consumer advocacy organizations, entities dedicated to fighting fake reviews, a public interest research center, a think tank, academic researchers, and individual consumers.[4] Most commenters expressed support for the Commission proceeding with the rulemaking. Five comments expressed the view that a rulemaking was unnecessary, was premature, or should not apply to the commenter's constituents, or expressed skepticism about the utility of a rulemaking.

B. Notice of Proposed Rulemaking

Based on an extensive review of the comments received in response to the ANPR, the Commission's own history of enforcement, and other sources of information, the Commission published the NPRM on July 31, 2023.[5] In the NPRM, the Commission stated that it has reason to believe that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent, including: (1) fake consumer reviews and testimonials, as well as reviews and testimonials that otherwise misrepresent the experiences of the reviewers and testimonialists; (2) the unfair or deceptive reuse or repurposing of consumer reviews; (3) the giving of incentives for reviews conditioned on the sentiment of the reviews; (4) the use of consumer reviews and testimonials written by company insiders without disclosure of their relationships to the company; (5) marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products; (6) seller websites representing that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity; (7) review suppression by unjustified legal threat or physical threat; and (8) the sale and misuse of fake indicators of social media influence for commercial purposes.[6] The Commission identified no disputed issues of material fact; explained its considerations in developing the proposed rule; solicited additional public comment thereon, including specific questions designed to assist the public in submitting comments; and provided interested parties the opportunity to request to present their position orally at an informal hearing.[7] Finally, the NPRM set out the Commission's proposed regulatory text.[8]

In response to the NPRM, the Commission received 100 responsive and non-duplicative comments [9] from entities and individuals interested in the proposed rule,[10] which are discussed in sections III and IV. Although some commenters raised concerns and recommended specific modifications or additions to the Commission's proposal, the majority of commenters generally supported the Commission's proposal. Three commenters submitted timely requests to make oral statements at an informal hearing (''the hearing requesters'').[11]

C. Notice of Informal Public Hearing

On January 16, 2024, the Commission published an Initial Notice of Informal Hearing, which also served as the Final Notice of Informal Hearing.[12] The Notice designated the Honorable Carol Fox Foelak, an Administrative Law Judge for the Securities and Exchange Commission, to serve as the presiding officer for the informal hearing and stated that the hearing requesters could speak at the informal hearing, make documentary submissions to be placed on the public rulemaking record, or both. Written submissions were due on or before January 30, 2024. In response to the Notice of Informal Hearing, the Commission received seven comments.[13] The Notice also stated that the Commission had decided not to proceed with proposed § 465.3,[14] which pertained to the unfair or deceptive reuse or repurposing of a consumer review written or created for one product so that it appears to have been written or created for a substantially different product.

As announced in the Notice of Informal Hearing, the informal hearing began as scheduled on February 13, 2024.[15] Because the Commission had not designated disputed issues of material fact, the February 13 hearing session included no cross-examination or rebuttal submissions but did include oral statements from the three hearing requesters.[16] One of the hearing requesters, the Interactive Advertising Bureau (''IAB''), a trade association, argued that there were two disputed issues of material fact.[17] The other two hearing requesters discussed their comments submitted pursuant to the NPRM. At the conclusion of this hearing session, the presiding officer issued an order inviting further submissions, including specific evidence, concerning whether there were disputed issues of material fact.[18] IAB submitted a letter that described the results from a survey directed to its members—to which eighteen unidentified members responded [19]—regarding the impact of the proposed rule, including their estimated compliance costs.[20]

On February 23, 2024, the presiding officer issued an order finding one disputed issue of material fact, namely, ''[w]hether the compliance costs for businesses will be minimal.'' [21] However, the February 23 order stated that ''[i]t can be argued that . . . even

[2] *See* ANPR, 87 FR 67427.

[3] The Commission also received six unresponsive comments.

[4] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/docket/FTC-2022-0070/comments.*

[5] *See* Fed. Trade Comm'n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) [hereinafter ''NPRM''], *https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials.*

[6] *See id.* at 49370–77.

[7] *Id.* at 49377–81, 49389–90.

[8] *Id.* at 49390–92.

[9] The Commission also received sixteen comments that were non-responsive and two that were duplicates.

[10] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/document/FTC-2023-0047-0001/comment.*

[11] Fake Review Watch, Cmt. on NPRM at 4–5 (Aug. 8, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0015* (''Fake Review Watch Cmt.''); Interactive Advertising Bureau, Cmt. on NPRM at 14–15 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0101* (''IAB Cmt.''); Researchers at Brigham Young University, Pennsylvania State University, and Emory University, Cmt. on NPRM at 4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0060* (''The Researcher Cmt.'').

[12] Fed. Trade Comm'n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 89 FR 2526 (Jan. 16, 2024) [hereinafter ''Hearing Notice''], *https://www.federalregister.gov/documents/2024/01/16/2024-00678/rule-on-the-use-of-consumer-reviews-and-testimonials.*

[13] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/docket/FTC-2024-0004/comments.*

[14] Hearing Notice, 89 FR 2528.

[15] Members of the public were able to watch the informal hearing live on the Commission's website, *https://www.ftc.gov.*

[16] A transcript of the February 13 hearing session is available at *https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf* [hereinafter ''February 13 Hearing Transcript''].

[17] IAB's proposed disputed issues of material fact were ''whether the compliance costs for businesses will be minimal, particularly if the 'knew or should have known' standard is finalized'' and ''whether the Commission finding that unattended consequences from the NPRM are unlikely is accurate.'' February 13 Hearing Transcript at 9.

[18] Order by Presiding Officer Foelak at 2 (Feb. 13, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240213.pdf.*

[19] IAB ''represents over 700 leading media companies, brand marketers, agencies and technology companies.'' February 13 Hearing Transcript at 6.

[20] Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 20, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmission20240220.pdf.*

[21] Order by Presiding Officer Foelak (Feb. 23, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/p311003aljorder20240226.pdf.*

if the actual costs are more than double what the FTC assumed, it would not change the outcome of the rule, and therefore, it is not a 'disputed issue[ ] of *material* fact necessary to be resolved.' '' [22] The order provided that the presiding officer was nevertheless scheduling an additional hearing session for March 5, 2024, because ''an expert witness or proposed testimony from affected firms' compliance officers or legal counsel'' might ''shed light on what would be involved with compliance review and implementation'' and ''could give the FTC a way of better quantifying cost.'' [23] The March 5 hearing session was subsequently moved to March 6, 2024 at the trade association's request.[24]

At the March 6 hearing session, the trade association put on one witness: its Executive Vice President for Public Policy, an attorney, who testified about the results of two limited surveys of its members.[25] FTC staff conducted cross examination. The attorney's testimony about the surveys [26] did not call the Commission's cost estimates into legitimate question. Only a small number of unidentified trade association members completed the surveys, and no evidence was submitted to indicate that they were representative of any group, much less all affected businesses.[27] Further, only a few of the survey respondents gave compliance cost estimates, none of which were accompanied by explanation or evidence of their factual bases, and all of which could have been influenced by the trade association's misconceptions about the law and the proposed rule.[28]

The presiding officer issued a recommended decision on May 8, 2024, stating that based on the evidence, ''it cannot be found whether or not the proposed rule will have compliance costs that will be minimal.'' [29] Later in the decision, the presiding officer explained that the evidence ''falls short as the basis for a finding that compliance costs would not be minimal'' because ''a minute sample of businesses that would be affected by the proposed rule responded to the surveys, and there is insufficient information about the nature of those businesses, how they calculated potential compliance costs, and the methodology of the surveys.'' [30]

In crafting the final rule, the Commission has carefully considered the comments received and the rulemaking record as a whole, which includes the oral statements made at and documents submitted for the informal hearing. As a result, the final rule contains some changes from the proposed rule. These modifications, mostly clarifications and limitations, discussed in detail in section IV of this document, are based upon input from commenters and careful consideration of relevant law. Section IV also discusses commenters' recommendations that the Commission declined to adopt, along with the Commission's reasons for rejecting them. Accordingly, the Commission adopts the proposed rule with limited modifications as discussed below. The rule will take effect October 21, 2024.

II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 465 pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).[31]

Whenever the Commission promulgates a rule under section 18(a)(1)(B), the rule must also include a Statement of Basis and Purpose (''SBP'') that addresses: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small businesses and consumers.[32] In this section of the preamble, the Commission summarizes its findings regarding each of these requirements.

A. Prevalence of Acts or Practices Addressed by the Rule

In its ANPR, the Commission described its enforcement record, demonstrating the pervasiveness of the deceptive or unfair commercial acts or practices involving reviews or other endorsements it was examining.[33] In the NPRM, the Commission cited additional enforcement evidence, including actions brought by State Attorneys General (''AGs'') and private lawsuits, as well as international evidence, and also took notice of additional indications of prevalence that came from commenters.[34]

In support of the finding that fake reviews are prevalent, the NPRM cited to (1) FTC, State, and private cases; (2) statistics from review platforms, a platform insider, academic and other researchers, consumer surveys, investigative journalists, and others about the incidence of fake reviews; (3) information about the pervasiveness of consumer review rings that facilitate the buying, selling, or exchange of fake reviews; (4) the experiences of regulators in other countries and of international bodies; and (5) reporting regarding the use of generative artificial intelligence (''AI'') tools that make it easier for bad actors to write fake reviews.[35] In support of the finding that fake testimonials are prevalent, the NPRM discussed relevant FTC cases, an in-depth Better Business Bureau investigative study that examined fake celebrity endorsements, a celebrity lawsuit involving the fraudulent use of the celebrities' names, and an FTC consumer alert about fake Shark Tank celebrity testimonials.[36] In support of the finding that misrepresentations of endorsers' experiences are prevalent, the NPRM cited to FTC cases and a

[22] *Id.*

[23] *Id.*

[24] Order by Presiding Officer Foelak (Feb. 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003_alj_order_3_2024.02.28.pdf.*

[25] A transcript of the March 6 hearing session is available at *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf. See also,* Interactive Advertising Bureau's Submission of Exhibits (Mar. 5, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmissionexhibits20240305.pdf.*

[26] The presiding officer stated that testimony by the trade association's ''attorney about survey responses is hearsay and will be weighed accordingly.'' Order by Presiding Officer Foelak (Mar. 4. 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240304-1.pdf.*

[27] IAB received eighteen responses to the first survey and nineteen to the second. *See* Post-Hearing Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Mar. 13, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabposthearingbrief20240313.pdf.*

[28] *See* Transcript of Informal Hearing on Proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (Mar. 6, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf.*

[29] Order by Presiding Officer Foelak at 5 (May 8, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljdecision20240508.pdf.* The presiding officer added that, ''[u]nquestionably, there is insufficient evidence in the record to make a specific finding as to the size of the compliance costs associated with the proposed rule.'' *Id.* at 5 n.9.

[30] *Id.* at 6.

[31] *See* 15 U.S.C. 57a(a)(1)(B).

[32] 15 U.S.C. 57a(d)(1). In addition, section 22(b)(2) of the FTC Act requires the Commission to prepare a final regulatory analysis. 15 U.S.C. 57b–3(b)(2). The final regulatory analysis is in section VI of this document.

[33] ANPR, 87 FR 67425–26.

[34] NPRM, 88 FR 49370–77.

[35] *Id.* at 49370–72. AI tools make it easier for bad actors to pollute the review ecosystem by generating, quickly and cheaply, large numbers of realistic but fake reviews that can then be distributed widely across multiple platforms. AI-generated reviews are covered by the final rule, which the Commission hopes will deter the use of AI for that illicit purpose.

[36] NPRM, 88 FR 493720–73.

comment by the North American Insulation Manufacturers Association (''NAIMA'') asserting that testimonials by those misrepresenting their experiences with insulation products are plentiful.[37] The Commission concluded that the unfair or deceptive reuse or repurposing of consumer reviews is prevalent, relying upon a prior Commission case and numerous news articles.[38] To show how commonly incentives are given in exchange for reviews with the incentives conditioned on the sentiment of the reviews, the NPRM pointed to FTC and private cases, analyses by researchers of markets for procuring reviews, and the experience of a small business employee commenter who said a competitor was providing incentives for 5-star reviews.[39] The Commission found prevalence of unfair or deceptive insider reviews and testimonials based on its prior cases; a State AG action; statistics from a review platform commenter about how many reviews of businesses were written by their owners, officers, or employees, or their family members; and an individual commenter who relied upon insider reviews in selecting an auto repair shop.[40] The NPRM cited prior cases regarding the prevalent practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products.[41] The Commission found prevalence of suppression of negative reviews on retailer or business websites based on a platform's comment, a recent FTC case, and what it learned in another investigation about more than 4,500 merchants that were automatically publishing only 4- or 5-star consumer reviews.[42] The NPRM relied upon reports by platform and other commenters, as well as FTC and State AG cases, regarding review suppression by unjustified legal threat or physical threat.[43] Finally, with respect to the prevalence of sales and misuse of fake indicators of social media influence for commercial purposes, the NPRM discussed cases brought by the FTC, a State AG, and private parties, and published reports on social media bots and fake social media accounts.[44]

[37] *Id.* at 49373.

[38] *Id.* at 49373–74.

[39] *Id.* at 49374.

[40] *Id.* at 49374–75.

[41] *Id.* at 49375

[42] *Id.* at 49376.

[43] *Id.*

[44] *Id.* at 49376–77.

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

The rule is intended to curb certain unfair or deceptive uses of consumer reviews and testimonials. It contains several provisions to promote accuracy and truthfulness in reviews and testimonials and, thus, will allow American consumers to make better-informed purchase decisions. The key provisions of the rule prohibit conduct that is inherently deceptive or unfair, including creating, selling, and buying fake or false reviews or testimonials; buying reviews in exchange for, or conditioned on, their sentiment; and using reviews and testimonials from company insiders that hide their relationships to the company. The rule also includes prohibitions against misleading, company-controlled review websites or entities; unfair or deceptive review suppression practices; and the misuse of fake indicators of social media influence.

C. The Economic Effect of the Rule

As part of the rulemaking proceeding, the Commission solicited public comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits.[45] In issuing the final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, taking into account the effect on small businesses and consumers, as discussed in more detail in sections VI and VIII of this document. The record demonstrates that the most significant anticipated benefit of the final rule is increased deterrence of clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Another significant benefit is the expansion of the remedies available to the Commission, including the ability to more effectively obtain monetary relief. This is particularly critical given the U.S. Supreme Court's decision in *AMG Capital Management, LLC* v. *FTC,* which held that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.[46] Post-*AMG,* the Commission's primary means for obtaining redress is section 19 of the FTC Act. By issuing the final rule, the Commission can obtain such redress based on violations of the rule in one proceeding under section 19(a)(1), which will be significantly faster than the two-step process for obtaining redress under section 19(a)(2).[47] By allowing the Commission to secure redress more quickly and efficiently, this rule will also allow the Commission to preserve enforcement resources for other mission priorities.[48] As an additional benefit, the rule will enable the Commission to seek civil penalties against violators.[49] Without an efficient way to seek civil penalties, bad actors have little fear of being penalized for using fraud and deception in connection with reviews and endorsements. Increased deterrence will have consumer welfare benefits and will benefit honest competition.[50] Moreover, the final rule is likely to impose relatively small compliance costs on honest businesses.[51]

[45] ANPR, 87 FR 67426–27; NPRM, 88 FR 49387–88.

[46] *See AMG Cap. Mgmt., LLC* v. *FTC,* 593 U.S. 67, 82 (2021).

III. Overview of the Comments [52]

The Commission received 100 responsive and non-duplicative comments in response to the NPRM from a diverse group of individuals (including consumers and law students), industry groups and trade associations, review platforms, retailers, and other businesses, consumer advocacy organizations, and government entities.

In the NPRM, the Commission invited the public to comment on any issues or concerns the public believed were relevant or appropriate to the Commission's consideration of the

[47] *See* 15 U.S.C. 57b(a)(1), (2); *see also* NPRM, 88 FR 49377–78 (discussing impact of *AMG Cap. Mgmt.*).

[48] When the rule has been violated, the Commission can commence a Federal court action and seek to recover money for consumers or obtain an order imposing civil penalties. *See* 15 U.S.C. 57b(a)(1), 15 U.S.C. 45(m)(1)(A). Without the rule, the path to monetary relief is longer and requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal. Then, to recover money for consumers, the Commission must prove in a separate Federal court action that the violator engaged in fraudulent or dishonest conduct. *See* 15 U.S.C. 57b(a)(2).

[49] *See* section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that violators of a trade regulation rule ''with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'' are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for any injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1).

[50] NPRM, 88 FR 49382–85.

[51] *Id.* at 49385–87; *see infra* sections VI and VIII of this document.

[52] Minor changes to formatting, grammar, and punctuation have been made to some of the comments quoted in this document. These changes do not entail any substantive changes.

proposed rule.[53] The NPRM also posed twenty-three specific questions for the public.[54] The first two are broad questions addressed in this section III, which also discusses several issues or concerns that commenters raised generally without reference to particular sections of the rule. Responses to the more specific questions in the NPRM are discussed in section IV of this document, a section-by-section analysis of the final rule. Questions relating to the Paperwork Reduction Act (''PRA'') and Regulatory Flexibility Act (''RFA'') and are addressed in sections VII and VIII of this document, respectively.[55]

A. Furthering the Commission's Goal

In Question 1 of the NPRM, the Commission asked whether its proposal would further the Commission's goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews and testimonials.[56]

Several commenters expressly addressed this question. A review platform and a business that specializes in identifying fake online reviews submitted comments stating that the proposed rule would further the Commission's goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews.[57] Another review platform commenter answered that there are ''numerous advantages of the FTC's proposed new Rule,'' that it is ''generally supportive of this intervention overall,'' and that the proposed rule ''will be helpful to set out clear rules that expressly prohibit practices like writing or purchasing fake reviews, providing compensation or incentives in exchange for reviews, and certain acts of unfair review suppression.'' [58] A business commenter similarly answered that the ''Proposed Rule addresses many concerns about unfair or deceptive acts or practices involving consumer reviews and testimonials, such as false and biased reviews.'' [59] Both of these commenters also noted areas in which they thought certain provisions of the proposed rule should be adjusted or clarified; those issues are addressed below.[60] A consumer organization said that ''[i]n general, . . . the proposed Rule will reduce the incentives for businesses to purchase, disseminate, or sell fake consumer reviews or testimonials,'' but thought that the proposed rule should have placed explicit restrictions on third-party review platforms.[61] The Commission notes that this topic is beyond the scope of the rulemaking, which focuses instead on those responsible for inarguably unfair or deceptive acts or practices regarding reviews and testimonials.

B. Adoption of the Proposed Rule as a Final Rule

In Question 2 of the NPRM, the Commission inquired whether it should finalize the proposed rule, the reasons for why commenters were in favor of or against the finalization of the proposed rule, and whether the Commission should make any changes to its original proposal.[62]

Only two commenters directly addressed this question. A business commenter agreed that the Commission should finalize the proposed rule.[63] A review platform commenter said it ''supports this Rule and would support the Commission finalizing the Rule.[64] It also suggested adjustments to the Commission's proposal, which are addressed below in this document.

Numerous individual commenters,[65] trade associations,[66] and consumer organizations [67] expressed general support for the proposed rule. For example, an individual commenter wrote, ''I completely agree with the proposal. . . . Because review sections have become so untrustworthy (being impossible to tell whether a company has paid for positive reviews of its own product, or for negative reviews on a rival's product), review sections have become functionally useless for me. This makes it difficult to purchase any products online, since real consumer feedback is one of the few ways to determine whether I should buy the product or service without first examining it in person.'' [68] Another individual stated, ''I support the rules as specified, and applaud the FTC's action in this regard. It is extremely difficult for the consumer to determine the validity of online reviews—even within specific retailers such as amazon. There is little benefit for large online retailers to ensure that reviews are accurate, and this fact is evident in the large number of bogus reviews found on amazon, newegg, youtube and other sites.'' [69] A third individual wrote, ''I strongly support the rules against fake review

[53] NPRM, 88 FR 49388.

[54] *Id.* at 49388–89.

[55] *Id.* at 49388. In addition to soliciting public comment on the NPRM's PRA and RFA analyses in the PRA and RFA sections, the NPRM also posed two specific questions related to the PRA and RFA analyses. Question 4 inquired whether ''the proposed rule contains a collection of information,'' and Question 5 asked, ''Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?'' *Id.* at 49381–86, 49388.

[56] NPRM, 88 FR 49388.

[57] Yelp Inc., Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0088* (''Yelp Cmt.''); The Transparency Company, Cmt. on NPRM at 1, 5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0107* (''Transparency Company Cmt.'').

[58] Trustpilot, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0084* (''Trustpilot Cmt.'').

[59] Family First Life, LLC, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0104* (''Family First Life Cmt.'').

[60] Trustpilot Cmt. at 2–3; Family First Life Cmt. at 2–3.

[61] Consumer Reports, Cmt. on NPRM at 2–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0099* (''Consumer Reports Cmt.'').

[62] NPRM, 88 FR 49388.

[63] Transparency Company Cmt. at 6.

[64] Trustpilot Cmt. at 3.

[65] Amelia Markey, Cmt. on NPRM (July 31, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0003* (''Markey Cmt.''); Chris Hippensteel, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0006* (''Hippensteel Cmt.''); Jeremy Anderson, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0007* (''Anderson Cmt.''); Caroline Fribance, Cmt. on NPRM (Aug. 11, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0017* (''Fribance Cmt.''); Pia Edborg, Cmt. on NPRM (Aug. 17, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0027* (''Edborg Cmt.''); Anonymous 1, Cmt. on NPRM (Aug. 20, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0031* (''Anonymous 1 Cmt.''); Jessica Ludlam, Cmt. on NPRM (Aug. 24, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0036* (''Ludlam Cmt.''); SUPERGUEST, Cmt. on NPRM (Sept. 8, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0046* (''Superguest Cmt.''); Sean Poole, Cmt. on NPRM at 1–2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0063* (''Poole Cmt.''); Artemio Magana, Cmt. on NPRM (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0079* (''Magana Cmt.'').

[66] American Dental Association, Cmt. on NPRM at 1 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0078* (''ADA Cmt.''); Travel Technology Association, Cmt. on NPRM at 1, 4–5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0097* (''Travel Tech. Cmt.'').

[67] Coalition of Civil Society Organizations, Cmt. on NPRM at 1–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0108;* U.S. Public Interest Research Group Education Fund, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0109* (''US PIRG Cmt.'').

[68] Markey Cmt.

[69] Anderson Cmt.

and testimonials and fines for businesses and people who write them. As a consumer, I often use reviews to help determine whether a product or service is reliable; the prevalence of fake reviews makes this impossible.'' [70] A trade association commented, ''The NPRM proposes rules that are appropriately scoped to target the bad actors [who are] intent on committing fraud through fake or deceptive reviews. . . . The NPRM strikes the appropriate balance between enhancing the Commission's tools to target bad actors and preserving industry flexibility to develop innovative and effective solutions to maintain consumer confidence in reviews.'' [71] A consumer organization stated, ''The Commission absolutely should finalize the proposed rule to better protect shoppers and hold businesses accountable.'' [72]

A number of individual consumers,[73] a review platform,[74] other industry members,[75] and consumer organizations [76] supported the Commission's proposal, but urged the Commission to go further and impose additional requirements, such as by adding provisions that would apply to third-party review platforms. As noted above, such provisions would be beyond the scope of the rulemaking. Similarly beyond the scope of the rulemaking is an individual's suggestion that the Commission should restrict the highlighting of testimonials on websites and prohibit payments for reviews.'' [77] A review platform's comment ''applaud[ed] . . . the Commission . . . for its extensive efforts to address the problem of deceptive review practices, as reflected in the Commission's notice of proposed rulemaking, and . . . fully support[ed] and endorse[d] the Commission's proposed Rule.'' [78] Its suggestions for several provisions are discussed below. A consumer group stated that the proposed rule ''is needed'' and ''addresses an urgent problem: fabricated and otherwise deceptive reviews and ratings of products and services,'' but asked for numerous modifications to strengthen it.[79] These proposals are discussed below.

A few individual commenters [80] and industry commenters [81] were supportive of a rule but expressed the need for clarifications or modifications. An individual commenter wrote that ''[a]ll of the rules proposed . . . make (common) sense'' but identified ''a few scenarios that highlight that the language in the proposed rules is a bit ambiguous'' and that with ''steep penalties like this, guidelines need to be clear, concrete, AND simple so businesses can understand.'' [82] Another individual commenter said that the proposed rule ''takes great strides,'' but that two proposed sections, 465.4 and 465.6, are too restrictive.[83] A retailer wrote, ''On the whole, . . . the Proposed Rule contains provisions that are reasonable and would provide additional protection to consumers'' but ''there are a few provisions . . . that are not well drafted or that need additional language.'' [84] Another retailer said that it ''supports a tailored rule that focuses on the bad actors that harm consumers,'' but that the proposed rule ''sweeps more broadly, extending to the activities of legitimate businesses that do not uncover abuses that they 'should have' identified, regardless of their good faith efforts'' and that ''[s]uch an overbroad rule would have significant unintended negative consequences on legitimate conduct.'' [85] An industry organization commented that the proposed rule ''is an important step, and we share the Commission's goal of improving consumer confidence in reviews and testimonials'' but ''strongly urge[d] the Commission to reexamine . . . [four] provisions'' to address what it viewed as First Amendment concerns and for other reasons.[86] The specific suggestions or concerns raised by these and other commenters are addressed below. In particular, whether in the text of the final rule or in the discussion below, the Commission is clarifying the scope or meaning of various rule provisions to cover the specific activities or conduct that harm consumers and avoid ambiguity or overbreadth.

Only four commenters, two individual commenters [87] and two trade associations,[88] said that the proposed rule was unnecessary or unwarranted. One of the individuals, wrote that ''the rule seems to be unnecessary as it is unlikely to actually provide the benefit to consumers of removing falsified reviews'' because it is difficult to identify and trace fake reviews and ''punish[ ] an offender'' and that the proposed rule ''also has potential to penalize non-offenders'' when competitors purchase ''review bombs.'' [89] The commenter asserted that the FTC's estimated benefits are based on faulty assumptions such as that ''the entirety of the loss'' from false reviews ''would be eliminated simply because the rule is enacted.[90] The commenter said that the FTC should either maintain the status quo or require websites with consumer reviews to include a disclosure that ''some reviews may have not been made by genuine customers, may potentially have been paid

[70] Anonymous 1 Cmt.

[71] Travel Tech. Cmt. at 1, 4.

[72] US PIRG Cmt. at 2.

[73] Michael Ravnitzky, Cmt. on NPRM at 1–2 (Aug. 6, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0013* (''Ravnitzky Cmt.''); Adam Foster, Cmt. on NPRM at 1–2 (Sept. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0052* (''Foster Cmt.''); Anonymous 2, Cmt. on NPRM at 1, 4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0065* (''Anonymous 2 Cmt.''); Anonymous 3, Cmt. on NPRM (Sept. 27, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0069* (''Anonymous 3 Cmt.'').

[74] Yelp Cmt. at 1, 5–8.

[75] Strategic Marketing, Cmt. on NPRM (Aug. 7, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0014;* PerfectRec Inc., Cmt. on NPRM at 1–3 (Aug. 23, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0035;* Mozilla, Cmt. on NPRM at 5–7 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0076* (''Mozilla Cmt.''); The Responsible Online Commerce Coalition, Cmt. on NPRM at 2, 4–6 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0086.*

[76] Fake Review Watch Cmt. at 1–4; Truth in Advertising, Inc., Cmt. on NPRM at 2, 4–11 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0083* (''TINA Cmt.''); National Consumers League, Cmt. on NPRM at 2–9 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0096* (''NCL Cmt.''); Consumer Reports Cmt. at 2–11.

[77] Anonymous 3 Cmt.

[78] Yelp Cmt. at 1, 4–8.

[79] TINA Cmt. at 4, 6.

[80] Anonymous 4, Cmt. on NPRM (Sept. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0040* (''Anonymous 4 Cmt.''); Riley Albert, Cmt. on NPRM at 3 (Sept. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0053* (''Albert Cmt.''); Alyssa Frieling, Cmt. on NPRM at 1–4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0059* (''Frieling Cmt.'').

[81] Hammacher, Schlemmer and Co., Inc., Cmt. on NPRM at 1–7 (Aug. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0032* (''Hammacher Schlemmer Cmt.''); *Amazon.com,* Inc., Cmt. on NPRM at 5–13 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0085* (''Amazon Cmt.''); TechNet Cmt. on NPRM at 2–4 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0089* (TechNet Cmt.''); Family First Life Cmt. at 2–16.

[82] Anonymous 4 Cmt.

[83] Frieling Cmt. at 1–4.

[84] Hammacher Schlemmer Cmt. at 1.

[85] Amazon Cmt. at 5.

[86] TechNet Cmt. at 2–4.

[87] Marc Slezak, Cmt. on NPRM at 1–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0054* (''Slezak Cmt.''); Sumner Camp-Martin, Cmt. on NPRM at 1–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0056* (''Camp-Martin Cmt.'').

[88] National Automobile Dealers Association, Cmt. on NPRM at 1–2 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0077* (NADA Cmt.''); Association of National Advertisers, Cmt. on NPRM at 3–7 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0105* (''ANA Cmt.'').

[89] Slezak Cmt. at 1–4.

[90] *Id.* 3.

testimonials, etc.'' [91] The other individual commenter said that the ''proposed rule is unnecessary because all of the practices considered by the rule 'are already unlawful under Section 5 of the FTC Act,' it has potentially massive compliance costs for American businesses'' (citing the FTC's estimated cost), ''and the better salutation [sic] is to work with States and review platforms to resolve the issue.'' [92] One of the trade associations stated that the ''Proposed Rule is [u]nnecessary,'' that ''current FTC enforcement authority has been effective in addressing such clearly deceptive practices, and there is no indication how or why a trade regulation rule is needed, or how such a rule would more effectively address concerns about such deceptive practices,'' and that ''a need to alleviate the 'difficulty' of obtaining monetary relief under the FTC Act where such authority has never existed, does not provide an adequate basis for the issuance of a Magnuson-Moss rulemaking.'' [93] The other trade association asserted that (1) it ''does not believe that rulemaking is warranted, wise, or a balanced approach, in part because it raises serious First Amendment concerns;'' (2) ''a well-designed rule would focus on a defined trade'' but the ''record to date does not establish that customer reviews, the use of those reviews, or the dissemination of those reviews by commercial platforms is itself a defined trade;'' (3) the ''FTC should not promulgate a rule solely because the augmented penalties attendant to a rule violation could ostensibly advance a Commission goal generally;'' and (4) ''the FTC fail[ed] to show how enforcement actions, many of which were settled by consent order, translate into 'prevalence.' '' [94]

The Commission disagrees with the four commenters who said that the proposed rule was unnecessary or unwarranted. The Commission believes that the status quo is inadequate to address consumer harm and that the rule will add deterrence and aid enforcement even though the practices covered by the rule are already unlawful under section 5 of the FTC Act. Greater deterrence and more effective enforcement are legitimate reasons to engage in a rulemaking, whereas difficulties in enforcing a rule against some violators are no reason to eschew it.[95] Further, the compliance costs estimated by the Commission are greatly outweighed by the estimated benefits to consumers and honest competition. The Commission notes that the harm caused by the acts and practices addressed cut across multiple trades. The Commission addresses potential First Amendment concerns and arguments regarding prevalence below.

IV. Section-by-Section Analysis

The following discussion provides a section-by-section analysis of the provisions proposed in the NPRM, and discusses the comments received, the Commission's responses to the comments, and the provisions adopted in the final rule.[96]

A. § 465.1—Definitions

1. Overview

The proposed rule included definitions for the following terms: ''business''; ''celebrity testimonial''; ''clear and conspicuous''; ''consumer review''; ''consumer testimonial''; ''indicators of social media influence''; ''officers''; ''purchase a consumer review''; ''reviewer''; ''substantially different product''; ''testimonialist''; and ''unjustified legal threat.'' In Question 6 of the NPRM, the Commission asked whether the proposed definitions are clear and what changes should be made to any definitions. In Questions 11 and 21 of the NPRM, the Commission asked specifically about the definitions of ''substantially different product'' and ''unjustified legal threat,'' respectively. In the following definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, relevant comments not otherwise addressed in the discussion of the corresponding substantive provisions of the final rule, and the definitions that the Commission is finalizing.[97]

2. Definition-by-Definition Analysis

a. Business

The proposed rule defined ''business'' as ''an individual, partnership, corporation, or any other commercial entity that sells products or services.'' This term appeared in the proposed definitions of ''celebrity testimonial,'' ''consumer review,'' ''consumer testimonial,'' and ''officers,'' and in every substantive section of the proposed rule. For the following reasons, the Commission adopts the definition of ''business'' largely as proposed, with a minor, non-substantive clarification as described below.

A trade association commenter noted correctly that the Commission's rulemaking authority is limited to acts or practices ''in or affecting commerce.'' [98] It recommended that the Commission insert ''in or affecting commerce as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44)'' in the definition of a ''business.'' [99] The Commission declines to make this modification. An entity that is selling products or services is engaging in commerce and, even without the commenter's proposed addition, the acts and practices covered by the final rule are limited to commercial practices.

A consumer advocacy organization commenter argued that the definition of a business potentially liable under the proposed rule was unduly narrow and should be expanded to include ''advertisers,'' ''endorsers,'' and ''[a]dvertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries.'' [100] However, advertisers, advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries all sell products or services and are covered by the Commission's definition of ''business.'' To the extent that an endorser is in the business of selling reviews or testimonials, the endorser is covered by the definition. The Commission is therefore not making the proposed change.

A review platform commenter suggested that, to avoid ambiguity, the Commission clarify that ''sells products or services'' in the definition of ''business'' applies to each of the types of entities listed in the definition, not just to ''any other commercial

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[91] *Id.* 4.

[92] Camp-Martin Cmt. at 1–2. The commenter said, ''In the alternative to the complete abandonment of the proposed rule, Section 465.4 should be amended'' and broadened. *Id.* at 1.

[93] NADA Cmt. at 1–2.

[94] ANA Cmt. at 3–7.

[95] The Commission is aware that a business could attempt to damage a competitor's reputation by purchasing fake positive reviews for that competitor and then reporting those reviews to the platform on which they appear. In investigating a fake review matter, FTC staff would take such a possibility into account.

[96] The Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the final rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

[97] Because the Commission is adding additional definitions and not including one proposed definition, the definitions are renumbered in the final rule.

[98] National Federation of Independent Businesses, Cmt. on NPRM at 2 (Sept. 12, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0047* (''NFIB Cmt.'').

[99] *Id.*

[100] TINA Cmt. at 6–7.

entity.'' [101] The Commission is adopting this recommendation to clarify the intended scope of the definition.

For the reasons explained in this section, the Commission is finalizing the definition of ''business'' to mean an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

b. Celebrity Testimonial

The proposed rule defined ''celebrity testimonial'' as ''an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known person who purchased, used, or otherwise had experience with a product, service, or business.'' The Commission is finalizing the definition of this term—which is used in § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials—with one modification.

A trade association commenter said that the definition of a celebrity endorsement should be clarified to exclude ''a situation where a celebrity or celebrity likeness appears or is used by a business as a promotion, without any specific advertising or opinions presented.'' [102] The commenter gave the example of an athlete who appears at a business to sign autographs or simply appears, without making any statements or representations about the business.[103] Such situations should not be excluded from the scope of the definition because a business's use in advertising or promotion of a celebrity or a celebrity's image can, even without any additional statements, imply that the celebrity has a positive opinion of the business or its products or services and therefore constitute a celebrity testimonial. However, if consumers would not interpret the celebrity's appearance to reflect the celebrity's opinions of, beliefs about, or experiences with, a business or its products or services, then the appearance is not a testimonial. That issue is thus highly dependent on specific facts. Further, to take the commenter's example, it is highly unlikely that a celebrity who does nothing more than sign autographs or appear at a business could violate § 465.2, because such signings or appearances alone would likely not communicate anything to consumers about the celebrity's use or experience with a product, service, or business.

A second trade association asserted that the definition of a ''celebrity testimonial'' does not give advertisers adequate notice as to when a testimonial is a ''celebrity'' testimonial or a ''consumer'' testimonial.[104] The commenter requested that the Commission provide further guidance on what constitutes a ''well-known'' individual.[105] Based upon common usage, well-known individuals include those famous in the areas of entertainment, such as film, music, writing, or sport, and those known to the public for their positions or successes in business, government, politics, or religion. Individuals who earn money through their work as ''influencers'' are also well known, as are those who have been featured in the news or media. More important, whether someone is well known does not matter for purposes of rule interpretation and enforcement because any provisions that apply to celebrity testimonials also apply to consumer testimonials.

A business commenter suggested replacing ''a well-known person'' in the definition with a ''widely known all-purpose public figure'' or ''widely known public figure'' for the purpose of ''clarity.'' [106] It said that Black's Law Dictionary defines the term ''all-purpose public figure'' to mean ''[s]omeone who achieves such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts.'' [107] To be ''well known,'' one need not have such pervasive fame as to be a public figure for all purposes and in all contexts. For example, an influencer may be well known to a subset of individuals interested in a particular subject. The commenter gave no justification for narrowing the definition of a ''celebrity testimonial,'' and the Commission declines to do so.

A public interest research center commenter said that the definitions of ''celebrity testimonials'' and ''consumer testimonials'' should ''be broadened to explicitly include non-natural persons, such as businesses and public sector entities.'' [108] Although endorsements by such organizations are addressed in the Commission's Endorsement Guides,[109] the Commission did not intend for any provision using the term ''testimonials'' to apply to endorsements by entities. To clarify that the Commission does not intend for any provision using the term ''testimonials'' to apply to endorsements by entities, the Commission is substituting the word ''individual'' for the word ''person'' wherever the word appeared in the Commission's original proposal.[110] The only section of the rule that applies to endorsements by entities or purported entities is § 465.6, which addresses company-controlled review websites or entities. However, § 465.6 does not apply to consumer or celebrity testimonials.

c. Clear and Conspicuous

The proposed rule defined ''clear and conspicuous'' to mean ''that a required disclosure is easily noticeable (*i.e.,* difficult to miss) and easily understandable,'' including in eight enumerated ways, listing proposed requirements for ''any communication that is solely visual or solely audible,'' ''[a] visual disclosure,'' ''[a]n audible disclosure,'' and ''any communication using an interactive electronic medium,'' and providing, inter alia, that such disclosures ''must use diction and syntax understandable to ordinary consumers,'' ''must appear in each language in which the representation that requires the disclosure appears,'' and ''must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.'' Based on the following, the Commission is finalizing the definition of this term—which is used in § 465.5, Insider Consumer Reviews and Consumer Testimonials—with one modification.

A trade association commenter suggested not using the terms ''diction'' and ''syntax'' in the definition because many of those subject to the rule ''may not know the meaning of th[os]e words.'' [111] The commenter suggested replacing them with ''words'' and

[101] Yelp Cmt. at 3.

[102] NADA Cmt. at 5.

[103] *Id.*

[104] IAB Cmt. at 14.

[105] *Id.*

[106] Family First Life Cmt. at 4–5.

[107] *Id.* at 5. *See* Black's Law Dictionary (11th ed. 2019).

[108] Electronic Privacy Information Center, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0111* (''EPIC Cmt.'').

[109] *See* Fed. Trade Comm'n, Guides Concerning Use of Endorsements and Testimonials in Advertising (''Endorsement Guides''), 16 CFR 255.4.

[110] The Commission is using the term ''individual'' in the context of this rule to mean a single human being. *See Individual* (def. 1), *Dictionary.com,* LLC, *https://www.dictionary.com/browse/individual* (last visited July 5, 2024) (defining ''individual'' as ''a single human being, as distinguished from a group''). The Commission notes that, in the context of a different rulemaking, it has proposed defining ''individual'' to mean ''a person, entity, or party, whether real or fictitious, other than those that constitute a business or government'' under 16 CFR 461. *See* Fed. Trade Comm'n, Trade Regulation Rule on Impersonation of Government and Businesses, 89 FR 15072, 15083 (Mar. 1, 2024).

[111] NFIB Cmt. at 2.

''grammar.'' [112] ''Diction'' means the choice and use of words.[113] ''Syntax'' involves the arrangement of words and phrases and is a subset of grammar.[114] The Commission believes that the meaning of ''diction'' and ''syntax'' are sufficiently clear.

One trade association commenter asserted that it is unnecessary to have a definition of ''clear and conspicuous'' because the ''phrase . . . has a meaning under FTC jurisprudence.'' [115] The definition is based on that jurisprudence and decades of Commission experience policing deceptive and unfair conduct. The Commission believes it is both helpful and necessary that the rule provides more explicit guidance on what does and does not constitute a clear and conspicuous disclosure.

Several commenters asserted that the proposed definition was overly prescriptive and not sufficiently flexible.[116] The Commission disagrees and reiterates that the definition contains basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures at a volume they can hear. The definition merely provides a baseline and provides a great deal of flexibility in what a disclosure should say and how it appears. The basic, enumerated requirements are necessary for a disclosure to be effective.

Two commenters objected to the requirement that internet disclosures be ''unavoidable,'' an objective standard that depends on whether consumers could have avoided the disclosure, which, per the definition is the case when ''a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see'' the disclosure.[117] The commenters do not believe that a disclosure has to be unavoidable for it to be effective; they noted that a staff business guidance document, issued in 2000 and updated in 2013, allowed for the possibility that avoidable disclosures, *e.g.,* those available through a hyperlink, could be clear and conspicuous.[118] The Commission believes that a disclosure is not effective when it is not seen or heard, including when the reason for it not being seen or heard is its avoidability. The staff guidance said that ''[d]isclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink,'' and the purported independence and objectivity of a reviewer or testimonialist is often integral.[119] Further, some readers misunderstood the staff guidance about the necessity of properly labeling hyperlinks to convey the ''importance, nature, and relevance of the information'' to which the hyperlinks lead. The staff guidance said that, to be effective, the label of the hyperlink might need to give the essence of the disclosure, with the hyperlink leading to the details.[120] Even had these qualifications been absent, the Commission is not bound by the 2013 staff business guidance, which is currently under review in light of an evolution of views over time regarding online disclosures and avoidability.[121]

One commenter asked whether a disclosure in the first line of a product review would be considered unavoidable.[122] For the purposes of this rule, the Commission would consider such a disclosure to be unavoidable. A different commenter expressed concern that the requirement that a disclosure ''stand out'' would require new formatting techniques for companies hosting reviews and preclude a disclosure from being in the review itself.[123] For the purposes of this rule, the Commission would consider a disclosure at the beginning of a text-only consumer review to ''stand out.''

A trade association said that ''the average social media user is familiar with where text is found in any given social media post, and social media platforms already make text visible against a variety of backgrounds'' so ''[r]equiring the endorsement-disclosure text to differ from other text is not only impractical, but it could actually create confusion for social media users who have grown accustomed to viewing all text related to a post in a certain manner.'' [124] The Commission recognizes that, on a social media platform that allows only uniform text, it is not possible to have the text of a disclosure appear in different text. As with a text-only consumer review, the Commission would consider a disclosure at the beginning of such a text-only testimonial to ''stand out.'' On visual platforms with superimposed text, it is quite possible and reasonable to require that the text of a disclosure ''stand out.''

One commenter asserted that being ''unavoidable'' and being ''easily noticed'' are ambiguous concepts.[125] The Commission disagrees. ''Unavoidable'' means that a consumer cannot avoid a disclosure such as by failing to click on a link or by failing to scroll. ''Easily noticeable'' is a simple and objective standard evaluated from the perspective of a reasonable consumer.

Two commenters asserted that it would be difficult to make clear and conspicuous disclosures required by the proposed rule on a small screen.[126] They did not explain why that would be the case, and the Commission does not believe that compliance with the rule's disclosure requirement should be difficult on handheld devices.

One commenter asserted that, because of the proposed definition of clear and conspicuous, ''[t]here is no need for the FTC to determine whether the resulting speech is rendered deceptive, untrue, or inaccurate.'' [127] The Commission disagrees. The only substantive provision for which the definition is relevant is § 465.5. A business would not violate that provision merely by having a disclosure that is not clear and conspicuous. Rather, the business would have to engage in conduct that would be unfair or deceptive in the absence of a clear and conspicuous disclosure (*e.g.,* a corporate officer

[112] *Id.*

[113] *See Diction* (def. 2), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/diction* (last visited July 5, 2024) (defining ''diction'' as the ''choice of words especially with regard to correctness, clearness, or effectiveness'').

[114] *See Syntax* (defs. 1a, 1b), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/syntax* (last visited July 5, 2024) (defining ''syntax'' as the ''the way in which linguistic elements (such as words) are put together to form constituents (such as phrases or clauses)'' and as ''the part of grammar dealing with this'').

[115] ANA Cmt. at 11.

[116] IAB Cmt. at 14; U.S. Chamber of Commerce, Cmt. on NPRM at 7–8 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0087* (''Chamber of Commerce Cmt.''); National Retail Federation, Cmt. on NPRM at 10 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0090* (''NRF Cmt.'').

[117] IAB Cmt. at 14; Chamber of Commerce Cmt. at 8.

[118] *Id.*

[119] Fed. Trade Comm'n, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* at 10 (Mar. 2013), *https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf.*

[120] *Id.* at 11. (''Although the label itself does not need to contain the complete disclosure, it may be necessary to incorporate part of the disclosure to indicate the type and importance of the information to which the link leads.'')

[121] *See* Press Release, Fed. Trade Comm'n, *FTC Looks to Modernize Its Guidance on Preventing Digital Deception* (June 3, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-looks-modernize-its-guidance-preventing-digital-deception.*

[122] Trustpilot Cmt. at 14. The same commenter also raised concerns about the applicability of the definition to ratings and aggregate ratings. *Id.* That is issue is discussed below in the discussion of the corresponding substantive rule provision. *See infra* section IV.E.6 of this document.

[123] NRF Cmt. at 10.

[124] *Id.* at 11.

[125] ANA Cmt. at 11.

[126] IAB Cmt. at 14; NRF Cmt. at 11.

[127] ANA Cmt. at 11.

giving a consumer endorsement without disclosing that they are an insider). As discussed below, the Commission is finalizing proposed § 465.5 with a modification to clarify to clarify that the provision is limited to conduct that would violate section 5 of the FTC Act.[128] The same commenter also surmised, based on the similarity of the definition of ''clear and conspicuous'' to the definition of the same phrase in the Endorsement Guides, that the Commission intends that the examples used in the Endorsement Guides would also be examples of violative behavior under the rule.[129] That is not the case. The Endorsement Guides address a broader range of conduct than the rule. Of the three examples in the Endorsement Guides that illustrate whether disclosures are clear and conspicuous, two of them address issues—the payment of influencers and implied typicality—not covered by the rule.[130] The third example involves a disclosure that individuals appearing in a television ad and giving testimonials are paid actors.[131] Such conduct would not be covered by the rule unless the underlying testimonials were fake or false.

One commenter, a trade association, stated that it was ''unclear if the Commission has considered any social media platform constraints with respect to the length of posts (*e.g.,* character and time limits),'' and asked (1) whether and how hashtags can meet the ''clear and conspicuous'' requirement, (2) whether '''#Ad' is a sufficient visual disclosure of a material relationship,'' and (3) that the Commission ''provide more examples, including appropriate use of hashtags in disclosures, in its final rule.'' [132] Another trade association requested in its comment that the Commission provide ''visual examples of 'insider' endorsement disclosures that the Commission finds acceptable.'' [133] The Commission believes it is not difficult to comply with the rule's disclosure requirements in the social media context. Depending upon their wording and appearance, hashtags can be clear and conspicuous for purposes of the rule. In a social media post promoting a brand, it might be sufficient to prominently disclose an employee relationship via a hashtag beginning with the brand name and followed by the word ''employee.'' Whether ''#ad'' would be an adequate disclosure would depend on the specific context. It could be adequate at the beginning of a social media post by the testimonialist, but it would likely be inadequate in a television ad or magazine ad featuring the testimonialist. Because the only provision for which the definition is relevant is § 465.5, which addresses the failure to disclose insider relationships, the disclosure could be as simple as the testimonialist describing a product as ''my company's'' or ''my wife's company's.''

A commenter asserted that disclosures ''utilizing a social media platform's built-in disclosure tool should be . . . at least sufficient enough to avoid the risk of penalties under the FTC's rulemaking authority.'' [134] As it has previously said, the Commission supports development of effective, built-in disclosure tools but is concerned that some of the existing tools lead to inadequate disclosures that are too poorly contrasting, fleeting, or small, or may be placed in locations where they do not catch the user's attention.[135] Whether a business could be subject to civil penalties for social media posts by insiders who utilized a social media platform's built-in disclosure tool would depend on whether a court would find that the business met the knowledge standard of section 5(m)(1)(A) of the FTC Act.

A trade association's comment expressed concerns about the proposed requirement that ''[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.'' [136] The commenter said that ''it is unnecessary and duplicative to require video endorsements that include visual and audio components to include both visual and audio disclaimers,'' and ''requiring an additional visual disclaimer, on top of a disclaimer that an endorser may easily include via audio, is cumbersome, and restricts companies' marketing capabilities.'' [137] On reflection, in the context of this rulemaking and as to the relationships of company insiders, if a communication makes an endorsement in only its visual or audio portion, then it should be sufficient for a disclosure to appear in the same format as the claim that requires the disclosure. On the other hand, if an endorsement is conveyed in both the audio and visual portions of a communication, then the disclosure should be made in both the audio and visual portions. Consumers can watch a video with the sound off or listen to it without looking at the screen. The Commission is changing the relevant language to, ''[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.'' This change makes the rule less restrictive while still accomplishing the Commission's goal of ensuring that consumers are fully informed. A different trade association noted that the ''simultaneous disclosure requirement is confusing and would benefit from examples of sufficient simultaneous disclosure.'' [138] Because the Commission is not finalizing the simultaneous disclosure requirement contained in the proposed rule, it is not providing further guidance on the meaning of simultaneous.

The second trade association also asked ''if a social media influencer posts a video and discloses verbally in the video that they have a brand ambassador relationship with the retailer/brand, is it sufficient to display in the text accompanying the posted video some written disclosure'' or would the disclosure ''need to be embedded or flash across the video itself.'' [139] The rule does not address or apply to an influencer's disclosure of a brand ambassador relationship. The rule's only disclosure requirements are in § 465.5 and apply to company insiders. Whether a testimonial in a social media post by a company insider requires a superimposed textual disclosure depends on whether there is an endorsement communicated by the visual portion of the post. If there is an endorsement in the visual portion, there would need to be a disclosure in the visual portion. If the endorsement is communicated only in the audio portion of the post, there would not need to be a disclosure in the visual portion.

d. Consumer Review

The proposed rule defined ''consumer review'' as ''a consumer's evaluation, or a purported consumer's evaluation, of a product, service, or business that is

[128] *See infra* section IV.E.1 of this document.

[129] *Id.*

[130] 16 CFR 255.0(g)(9) and (11).

[131] 16 CFR 255.0(g)(10).

[132] Retail Industry Leaders Association, Cmt. on NPRM at 5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0094* (''RILA Cmt.'').

[133] NRF Cmt. at 10.

[134] *Id.*

[135] Fed. Trade Comm'n, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 FR 44288, 44290 (July 26, 2022) (proposing changes to guides and soliciting public comment).

[136] NRF Cmt. at 11.

[137] *Id.*

[138] RILA Cmt. at 5.

[139] *Id.*

submitted by the consumer or purported consumer and that is published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations.'' The proposed definition also noted that, for the purposes of the rule, consumer reviews include consumer ratings regardless of whether they include any text or narrative. The Commission has determined to finalize the definition of this term—which is used in §§ 465.2 through 465.6—with a minor, technical change.

A comment from a review platform supported the proposed definition, calling it ''particularly clear and holistic.'' [140]

A comment from an individual asserted that the ''definition of 'consumer' implies an individual who purchased the product for their own use'' and that when a ''product is provided by the company seeking a review, for the purposes of it being reviewed, the reviewer is arguably not a consumer.'' [141] The Commission disagrees that a ''consumer'' is necessarily a purchaser. For purposes of the rule, a consumer is a person who purchased, used, or otherwise had experience with a product, service, or business.

A trade association commenter suggested deleting the definition's element that a consumer review be ''published.'' [142] It said that a ''consumer review should still be considered a 'review' before it is publicly displayed by a website or platform.'' [143] Although that may be true for some purposes, the Commission declines to make that change. A consumer review that is submitted to a website or platform but never published does not in and of itself deceive consumers, although the failure to publish a review may be deceptive pursuant to paragraphs (a)(1) and (b) of § 465.7. Paragraphs (a)(1) and (b) of § 465.7 are worded in a way that does not limit their application to published reviews, because they relate to suppressed reviews.

A comment from a consumer advocacy organization suggested deleting the portion of the definition that refers to publication to a website or platform ''dedicated in whole or in part to receiving and displaying such evaluations.'' [144] It asked whether the definition would ''only apply to reviews on a website 'dedicated' to posting reviews, such as Yelp'' and whether ''it include[s] any website where reviews are possibly posted, like Reddit?'' [145] The commenter continued, ''Would a website be excluded if only a very small portion of the website contained consumer evaluations?'' [146] The commenter asserted that ''[a]ll fake reviews and ratings that are used to market a product or service should be captured in the . . . Rule—no matter where they are posted.'' [147] The definition is not limited to consumer reviews on websites that are dedicated entirely to posting such reviews. It would also cover reviews on a portion of a website, no matter how small a portion, that is dedicated to receiving and displaying such reviews, such as a reviews page or the review sections of product pages on a retailer's website. The definition would not, however, cover consumer statements about products or services on a website or portion of a website, such as Reddit, that is not dedicated to receiving and displaying reviews. Such free-floating consumer statements are outside of the generally understood context in which content is submitted and published as reviews. Under some circumstances, such statements might be considered ''consumer testimonials,'' such as when an advertiser has paid for them.

A comment from a review platform raised two issues with the ''consumer review'' definition.[148] It said that ''[b]are ratings provide no context, making them virtually useless for other consumers or to businesses that might use consumer feedback to improve their services'' and suggested that ''the Commission differentiate between reviews and ratings.'' [149] The fact that bare ratings do not provide context does not mean that consumers do not rely on them or on aggregate ratings that include bare ratings. The Commission does not see a reason to distinguish between reviews and ratings for the purposes of the rule, and the commenter did not provide such a reason. The same commenter also expressed ''concern[ ] with the definition's use of the word 'purported[,]' . . . which has a negative connotation that feeds into the false narrative that consumer reviews are inherently unreliable'' and suggested replacing ''purported'' with different language.[150] The definition simply recognizes and accounts for the undisputed fact that some reviews are fake. Just because some reviews are unreliable does not suggest that reviews are generally unreliable. The Commission declines to adopt this recommendation.

To conform with the Office of the Federal Register's drafting requirements, the Commission is changing a reference to ''this Rule'' to ''this part.'' [151]

e. Consumer Testimonial

The proposed rule defined ''consumer testimonial'' as ''an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.'' The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

A trade association commenter expressed concern that consumers seeing a clearly dramatized television commercial might unreasonably believe that the actors' scripted lines actually reflected their opinions, beliefs, or experiences and could therefore be considered consumer testimonials.[152] It suggested clarifying the definition by inserting ''reasonably in the circumstances'' after ''that consumers are likely to believe.'' [153] The Commission agrees that it would not be reasonable for viewers to consider ''an obviously fictional dramatization'' to be an endorsement.[154] The Commission does not, however, believe it is necessary to modify the definition. The concept of ''reasonable consumers'' from FTC jurisprudence [155] is incorporated into the concept of consumers being likely to believe something.

The same public interest research center that commented, as discussed above, that the Commission should broaden the definition of ''celebrity testimonials'' to explicitly include non-natural persons (such as businesses and

[140] Trustpilot Cmt. at 8.

[141] Anonymous 2 Cmt. at 1.

[142] IAB Cmt. at 13–14.

[143] *Id.*

[144] TINA Cmt. at 7.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Yelp Cmt. at 3–4.

[149] *Id.*

[150] *Id.* at 4.

[151] The Commission is making this change throughout the rule, including in §§ 465.2(a), (b), and (c), 465.4, 465.5(a), 465.6, 465.7, 465.8, and 465.9.

[152] NFIB Cmt. at 2–3.

[153] *Id.* at 4.

[154] *See* Endorsement Guides, 16 CFR 255.0(g)(2).

[155] *See, e.g.,* Fed. Trade Comm'n, *FTC Policy Statement on Deception,* 103 F.T.C. 174, 176–77 (1984) [hereinafter FTC Policy Statement on Deception] (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)), *available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

public sector entities) [156] made the same comment with respect to the definition of ''consumer testimonials.'' [157] The Commission declines to make that change in the latter definition for the same reason it declined to make it in the former definition.

f. Indicators of Social Media Influence

The proposed rule defined ''indicators of social media influence'' as ''any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, reposts, and comments.'' For the following reasons, the Commission adopts the definition of ''indicators of social media influence''—a term which is used in § 465.8, Misuse of Fake Indicators of Social Media Influence—largely as proposed, with one modification described below.

A comment from a consumer advocacy organization suggested explicitly including ''Saves'' and ''Shares'' within the definition of indicators of social media influence.'' [158] The commenter explained that the number of times that social media posts are saved or shared serves as indicators of social media influence and that both ''Saves'' and ''Shares'' are offered for sale on the internet.[159] Because the NPRM proposed to define the term as ''any metrics used by the public to make assessments of an individual's or entity's social media influence,'' ''Saves'' and ''Shares'' were already covered by the definition as originally proposed. However, merely for the purpose of clarification, the Commission is adding them to the listed examples of indicators. The same commenter also suggested that the Commission expand the definition to include engagement metrics that are not publicly visible but that are used to gain an algorithmic advantage.[160] Such non-visible indicators are outside the scope of this rulemaking, and the Commission chooses not to address them at this time.

One review platform commenter suggested that the Commission ''simplify the definition to exhaustively list the current metrics that are such indicators.'' [161] The commenter continued that ''whether a given metric is 'used by the public to make assessments of an individual's or entity's social media influence' may become the subject of substantial dispute in future cases . . . in the absence of an exhaustive, disjunctive list of indicators.'' [162] The Commission intends the listed indicators to be examples and non-exhaustive, a flexible and efficient approach that avoids having to modify the rule when such metrics change. The Commission has no reason to believe that its approach will result in substantial disputes in its cases.

For the reasons explained in this section, the Commission is finalizing the definition of ''indicators of social media influence'' to mean any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

g. Officers

The proposed rule defined ''officers'' as ''including owners, executives, and managing members of a business.'' The Commission is finalizing the definition of this term—which is used in §§ 465.2 and 465.5.

A review platform commenter said that including ''managing members'' in the definition of ''officers'' ''could suggest that managers are officers.'' [163] The commenter also suggested that the definition of ''officers'' ''should be refined to only include 'senior management members' of a business,'' thereby creating ''a clearer distinction between those in a position of leadership versus lower-level employees, or staff that may have the title 'manager' without any practical level of control and power to exert influence over others.'' [164]

Because a ''managing member'' is a commonly understood term referring to an owner and senior manager of a limited liability company, and because the term does not refer to all ''managers'' of a business, the Commission declines to remove ''managing members'' from the definition of ''officer.'' As discussed below, the Commission continues to believe it appropriate that §§ 465.2 and 465.5 apply to both officers and managers and is therefore not limiting the definition of ''officers'' to ''senior management members.'' A new definition of ''managers'' is discussed below.[165]

h. Purchase a Consumer Review

The proposed rule defined ''purchase a consumer review'' as ''provid[ing] something of value, such as money, goods, or another review, in exchange for a consumer review.'' For the following reasons, the Commission adopts the definition of ''purchase a consumer review''—a term which is used in § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials—largely as proposed, with two modifications described below.

An individual commenter wrote, ''[r]egarding payment for reviews, the use of . . . discounts on future purchases from the business should be specifically prohibited as well.'' [166] A review platform commenter suggested ''that the Commission list additional examples of . . . what the Commission considers 'value.' '' [167] Specifically, it suggested adding ''gift certificates,'' ''services,'' ''discounts,'' ''coupons,'' and ''contest entries.'' [168] Such examples of value were covered by the proposed definition, which applies to ''something of value'' provided in exchange for a consumer review'' but, for purposes of clarification, the Commission is adding these examples of value in the final definition. The review platform commenter also suggested adding ''other incentives,'' [169] which the Commission thinks is unnecessary, given that the list is only exemplary and preceded by the words ''such as.''

Another review platform commenter suggested using language explicitly stating that the listed examples of ''value'' are not exhaustive.[170] The Commission believes that, because the phrase ''such as'' precedes the list of examples, this is already sufficiently clear from the language of the definition.

The proposed definition used the term ''goods.'' To ensure that terminology is used consistently throughout the rule, the Commission is replacing the term ''goods'' with the synonymous word ''products'' in the final definition.[171]

For the reasons explained in this section, the Commission is finalizing the definition of ''purchase a consumer review'' to mean to provide something

[156] *See supra* Section IV.A.2.b of this document.

[157] EPIC Cmt. at 3.

[158] NCL Cmt. at 3.

[159] *Id.* at 3–6.

[160] *Id.* at 6–8.

[161] Yelp Cmt. at 4–5.

[162] *Id.* at 5.

[163] Trustpilot Cmt. at 12.

[164] *Id.*

[165] *See infra* Section IV.A.3.b of this document.

[166] John Christofferson, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0025*.

[167] Yelp Cmt. at 5.

[168] *Id.*

[169] *Id.*

[170] Trustpilot Cmt. at 8.

[171] The Commission is also replacing the term ''goods'' with the word ''products'' in the final definition of the phrase ''purchase a consumer review'' (final § 465.1(m)).

of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

i. Reviewer

The proposed rule defined ''reviewer'' as ''the author or purported author of a consumer review.'' The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

One review platform commenter objected to the use of the word ''purported'' in the definition of ''reviewer,'' just as it objected to that word's inclusion in the definition of ''consumer review.'' [172] The commenter asserted that ''purported'' feeds into the false narrative that consumer reviews are inherently unreliable. As discussed above, the use of the word ''purported'' simply recognizes and accounts for the undisputed fact that some reviews are fake.[173] The Commission declines to modify the definition of ''reviewer.''

j. Substantially Different Product

The proposed rule defined ''substantially different product'' as a product that differs from another product in one or more material attributes other than color, size, count, or flavor. The defined term appeared in proposed § 465.3, Consumer Review or Testimonial Reuse or Repurposing, which the Commission is no longer planning on finalizing.[174] Given that the Commission has decided not to proceed with proposed § 465.3 at this time, it is not including a definition of ''substantially different product'' in the final rule.

k. Testimonialist

The proposed rule defined ''testimonialist'' as ''the person giving or purportedly giving a consumer testimonial or celebrity testimonial.'' None of the comments received addressed the definition of testimonialist. As already discussed in section IV.A.2.b of this document, the Commission is substituting the word ''individual'' for the word ''person'' wherever the word appeared in the Commission's original proposal. Aside from this minor, clarifying modification, the Commission has determined that it will finalize the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

l. Unjustified Legal Threat

The proposed rule defined ''unjustified legal threat'' as ''a threat to initiate or file a baseless legal action, such as an action for defamation that challenges truthful speech or matters of opinion.'' For the following reasons, the Commission adopts the definition—a term which is used in § 465.7, Review Suppression—largely as proposed, with two modifications described below.

The NPRM asked whether ''the definition of 'unjustified legal threat' is sufficiently clear.'' One company's comment said that the proposed definition was clear.[175] A trade association said ''the term 'unjustified' is a vague standard that leaves unclear what legal support a business must have for its legal position before it warns the creator of a review of possible legal proceedings.'' [176] A comment from State Attorneys General suggested changing ''unjustified'' to ''unfounded, groundless, or unreasonable'' in order to provide a more objective legal standard for evaluating the types of legal threats that are not permitted.[177] The Commission agrees in part with this recommendation. As a clarification of what it intended, the Commission is changing ''unjustified'' to ''unfounded or groundless.'' Specifically, this change avoids the unintended, potentially broader scope of the term ''unjustified,'' which is also freighted with subjective considerations, in favor of terms that reflect objective legal standards. For similar reasons, the Commission is not adding ''unreasonable,'' a term which is unnecessary and not as precise in this particular situation as ''unfounded or groundless.''

The State Attorneys General comment also recommended that the definition include ''a threat to enforce an agreement that is void, voidable, or unenforceable.'' [178] It said that the word ''unjustified'' may be insufficient to address merchants arguing that their legal threats were justified by their non-disclosure agreements that limit consumer reviews.[179] The change from ''unjustified'' to ''unfounded or groundless'' addresses this concern. A comment from a review platform suggested that the Commission expand the definition to include threats based on form contracts that violate the Consumer Review Fairness Act (''CRFA'').[180] Given that such form contracts are already prohibited by the CRFA,[181] the Commission declines to address them in this rulemaking.

A consumer group's comment disagreed with the definition's use of the phrase ''baseless legal action'' on the basis that it ''open[s] just as many questions as the underlying term it attempts to define.'' [182] A company's comment noted that the phrase ''a baseless legal action'' is vague, and recommend that the Commission instead adopt language that is based upon Rule 11(b)(2) of the Federal Rules of Civil Procedure.[183] Specifically, the commenter recommended changing ''a baseless legal action'' to ''a legal action that is not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law.'' [184]

The Commission is partially adopting the commenter's suggestion by adopting language that is loosely based upon Federal Rule of Civil Procedure 11(b)(2) and (3).[185] However, the Commission is not adopting the phrase ''extending, modifying, or reversing existing law or establishing new law'' because it is highly doubtful that companies would threaten consumers by asserting that, while no lawsuit is warranted under existing law, they will bring a lawsuit anyway and try to change existing law. Instead, the Commission chooses to clarify the definition by changing ''threat to file a baseless legal action'' to ''legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.''

A review platform commenter was concerned that the proposed definition's ''wording opens the door to bad actors being able to claim defamation on weakly justified grounds and to seek to game the system by deliberately constructing legal terms which can then be deployed to suppress reviews.'' [186] The Commission believes that the revised definition addresses this

[172] Yelp Cmt. at 4.

[173] *See supra* Section IV.A.2.d of this document.

[174] Some commenters suggested edits to the definition, such as removing ''flavor'' from the list of attributes that might not be material, adding other product attributes to that list, or adding flexibility by removing the listed attributes altogether. TINA Cmt. at 6; Amazon Cmt. at 9–10; Chamber of Commerce Cmt. at 6–7; RILA Cmt. at 3; NRF Cmt. at 7–8; IAB Cmt. at 8.; ANA Cmt. at 15–16; NRF Cmt. at 8. Other commenters asked questions about how the definition would apply to an updated version of a product or to different scenarios. Magana Cmt.; NADA Cmt. at 5.

[175] Transparency Company Cmt. at 14.

[176] NFIB Cmt. at 4.

[177] State Attorneys General, Cmt. on NPRM at 2–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0100* (''State AGs Cmt.'').

[178] *Id.* at 2.

[179] *Id.* at 3.

[180] Yelp Cmt. at 5.

[181] Consumer Review Fairness Act of 2016 § 2(b)(1), 15 U.S.C. 45b(b)(1).

[182] Consumer Reports Cmt. at 10.

[183] Family First Life Cmt. at 16.

[184] *Id.*

[185] *See* Fed. R. Civ. P. 11(b)(2) and (3).

[186] Trustpilot Cmt. at 17–18.

concern, especially given its inclusion of language from Federal Rule of Civil Procedure 11(b)(2) and (3), which is intended to avoid such misuse of the court system. In any event, the Commission is deleting ''such as an action for defamation that challenges truthful speech or matters of opinion'' because this example is unnecessary and possibly confusing in this context.

For the reasons explained in this section, the Commission is adopting the proposed definition of an ''unfounded or groundless legal threat'' with clarifying changes. The final definition provides that an ''unfounded or groundless legal threat'' is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

3. Proposed Additional Definitions

In Question 7 of the NPRM, the Commission asked what additional definitions, if any, are needed. In Questions 14 and 18 of the NPRM, the Commission asked whether it should define the terms ''managers'' and ''relatives,'' respectively. As discussed below, various commenters suggested that the Commission define the following terms and phrases that appear in the proposed rule: ''dissemination,'' ''manager,'' ''relative,'' and ''purchase or procure fake indicators.'' One commenter suggested that the Commission define ''review hosting'' and exclude it from the scope of § 465.2.[187]

a. Dissemination

The term ''disseminate'' appears in both proposed and final §§ 465.2 and 465.5. A comment from a trade association stated that the Commission should define ''disseminate'' ''within Proposed § 465.2(b) to include only the affirmative posting or intentional distribution of reviews, where a company has actual knowledge that the reviews are false or fraudulent in nature.'' [188] The commenter continued by saying that ''disseminate'' should ''not include passive actions such as allowing a review to be posted or published on a company's web page, unless the company has actual knowledge that the review is false or fraudulent in nature'' or ''retailers sharing reviews with third-party platforms such as Google.'' [189] Within both §§ 465.2 and 465.5, however, ''disseminate'' applies only to testimonials, not to consumer reviews. One of the basic canons of statutory and regulatory construction is that words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.[190] In §§ 465.2 and 465.5, the Commission intended for the term to have its ordinary, everyday meaning—that is, to spread or to convey something, rather than the proposed definition.[191] Accordingly, the Commission declines to add the proposed definition.

b. Manager

The term ''manager'' appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials, and was undefined. Due to the clarifying changes to § 465.2 that are discussed in further detail below, the term is now included in both final § 465.5 and final § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials.

One business commenter noted that it is unnecessary to define ''manager.'' [192] An industry organization wrote in its comment that the failure to define the term ''manager'' ''raises concerns about the number of a firm's employees impacted.'' [193] A review platform commenter said that using the term ''manager'' without any definition is particularly problematic,[194] noting that someone ''may have the title 'manager' without any practical level of control and power to exert influence over others. For example, it is possible in a business for a person to have the title 'manager' while holding a relatively junior position and without having any employees that directly report to them.'' [195] Proposed and final § 465.5(c) address ''managers'' soliciting or demanding consumer reviews from employees or agents. In this context, the Commission's intent was for the term ''manager'' to be limited to those who supervise others. Thus, the Commission is adopting a definition for the term ''manager'' to make this clarification, which will ensure that § 465.5(c) is not interpreted as more restrictive than the Commission intended.[196]

A business commenter that operates in the insurance-marketing space explained that independent-contractor insurance agents who build their own agencies are referred to as ''managers'' and asked that the definition of ''managers'' expressly carve out ''managers in the insurance marketing space'' or at least clarify that managers are those ''who are employed by the company.'' [197] As similar situations may arise in other contexts, the Commission is adopting the commenter's latter recommendation, and clarifying that managers are employees of the businesses.

For the reasons explained in this section, the final rule adopts a definition for the term ''manager.'' The final rule defines the term ''manager'' as an employee of a business who supervises other employees or agents and who either holds the title of a ''manager'' or otherwise serves in a managerial role.

c. Relative

The term ''relative'' appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials. It was undefined in the proposed rule.

Two commenters suggested that the Commission define the term ''relative.'' A comment from a review platform said that a plain reading of ''relative'' could cover ''an extremely broad range of people'' and ''is likely to extend to persons who may not be biased since they are in reality not close to the

[187] As discussed below in Section IV.H. of this document, the Commission is adding definitions of two phrases in response to concerns raised by commenters: ''fake indicators of social media influence'' and ''distribute fake indicators of social media influence.''

[188] NRF Cmt. at 3.

[189] *Id.* at 3–4. The Commission elsewhere addresses whether § 465.2 applies to a business allowing reviews to be posted or published on its web page or to retailers sharing reviews with third-party platforms. *See infra* Section IV.B.5 of this document.

[190] *See, e.g., Kouichi Taniguchi* v. *Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012); *Tanzin* v. *Tanvir,* 592 U.S. 43, 48 (2020) (''Without a statutory definition, we turn to the phrase's plain meaning at the time of enactment.''); *Lamar, Archer & Cofrin, LLP* v. *Appling,* 584 U.S. 709, 715 (2018) (''Because the Bankruptcy Code does not define the words 'statement,' 'financial condition,' or 'respecting,' we look to their ordinary meanings.'').

[191] *Disseminate, Dictionary.com*, LLC, *https://www.dictionary.com/browse/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to scatter or spread widely, as though sowing seed; promulgate extensively; broadcast; disperse''); *Disseminate, Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to spread abroad as though sowing seed'' or ''to disperse throughout''); *Disseminate,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to spread or give out something, especially news, information, ideas, etc., to a lot of people'').

[192] Transparency Company Cmt. at 13.

[193] TechNet Cmt. at 3.

[194] Trustpilot Cmt. at 9.

[195] *Id.* at 12.

[196] If the term were only to appear in § 465.2(c), such a clarification would not be needed. This is because § 465.2(c) also covers employees and agents.

[197] Family First Life Cmt. at 13.

business.'' [198] The commenter suggested that the prohibition in § 465.5(c) be limited to close relatives such as immediate family members.[199] A comment from a business organization said that the term ''relative'' is too vague and that ''[i]t is unclear whether the rule applies to third cousins, the spouses of a stepbrother's child from a previous marriage, or friends that are considered family.'' [200] The commenter continued that ''[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.'' [201]

As discussed below, the Commission believes that some rule provisions should be limited to ''immediate relatives.'' [202] The Commission is adding a definition of an ''immediate relative,'' which clarifies that the term refers to a spouse, parent, child, or sibling. In the final rule, the term ''immediate relative'' is used in §§ 465.2(c) and 465.5(c).

d. Purchase or Procure Fake Indicators

The phrase ''purchase or procure fake indicators of social media influence'' is used in proposed and final § 465.8, Misuse of Fake Indicators of Social Media Influence. The phrase was undefined in the proposed rule.

A consumer advocacy commenter stated that leaving the terms ''purchase'' and ''procure'' undefined ''leaves ambiguity regarding which types of incentives are restricted,'' and suggested defining the phrase ''purchase or procure fake indicators of social media influence'' to mean ''to provide something of value, such as money, goods, or another indicator of social media influence (*i.e.*[,] a 'like'), in exchange for a fake indicator of social media influence.'' [203] The Commission declines to adopt the commenter's suggestion.[204] The definition proposed by the commenter would unnecessarily narrow the types of actions that would be covered by the rule to an exchange. In the final rule, the Commission intends for the term ''procure'' to bear its ordinary, everyday meaning—that is, to obtain something.[205] Even if there is any ambiguity in the term ''purchase,'' any exchange of value in order to obtain fake indicators of social media influence would be ''procuring'' the fake indicators.

e. Review Hosting

A retailer submitted a comment suggesting that ''review hosting'' be defined and excluded from the scope of § 465.2.[206] The commenter suggested the following definition:

> *Review hosting* includes but is not limited to activity associated with maintaining a repository of consumer reviews and testimonials for display such as: offering review submission functionality, collecting and moderating reviews, organizing and displaying reviews, aggregating reviews into star ratings, and providing guidance to consumers about how to leave reviews where no incentive is offered.[207]

As discussed below, the Commission did not intend for its proposal to apply to simply hosting consumer reviews.[208] The Commission is therefore, for the purpose of clarification, adopting a definition of the term ''consumer review hosting'' in order to exclude mere review hosting from certain provisions of the rule. The Commission is not adopting the commenter's proposed definition because it included activities that go beyond the core of mere review hosting and because it begins with the phrase ''include but is not limited to,'' which would allow it to include an unknown, larger category of activities. The final rule defines ''consumer review hosting'' as providing the technological means by which a website or platform allows consumers to see or hear the consumer reviews that consumers have submitted to the website or platform. The exclusion of ''consumer review hosting'' from certain sections of the rule is discussed below.

B. § 465.2—Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials

Proposed § 465.2 addressed fake or false consumer reviews, consumer testimonials, and celebrity testimonials. Based on the following, the Commission has determined to finalize these prohibitions, with a number of revisions. The following paragraphs discuss comments relating to (1) proposed § 465.2 generally, (2) common language in all three paragraphs, (3) the individual paragraphs, 4) the knowledge standard, and (5) other potential requirements.

Numerous individual commenters wrote about the importance of authentic reviews or testimonials and that fake or false ones should be prohibited.[209] A technology company commenter wrote that it ''would welcome rules to prohibit fake reviews and place stronger obligations on businesses who host them to better protect consumers.'' [210]

A celebrity commenter wrote that he had ''received more than 100 emails from consumers who have been induced to purchase fake products through the mis-use of . . . [his] image and the images of other Shark Tank 'sharks.' '' [211]

A business commenter suggested explaining the ''financial consequence of fake reviews,'' such as whether it is ''~$50,000 per fake review.'' [212] The maximum civil penalty is currently $51,744 per violation, but courts must take into account the statutory factors set forth in section 5(m)(1)(C) of the FTC Act and may impose much lower per-violation penalties.[213] Ultimately, courts will also decide how to calculate the number of violations in a given case.

1. Common Language in § 465.2(a), (b), and (c)

Proposed § 465.2 consisted of three paragraphs, each of which sought to address unfair or deceptive conduct by

[198] Trustpilot Cmt. at 12.

[199] *Id.*

[200] Chamber of Commerce Cmt. at 7.

[201] *Id.*

[202] *See infra* Section IV.E.2 of this document.

[203] Consumer Reports Cmt. at 4.

[204] Commenters also expressed concern about or sought guidance on the meaning of the term ''procure'' as used in proposed § 465.2(c), but they did not expressly suggest that the Commission define the term. The use of the term ''procure'' in § 465.2 is discussed below in the context of that substantive provision. *See infra* Section IV.B.4 of this document.

[205] *See Procure* (def. 1), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/procure* (last visited July 5, 2024) (establishing that the word ''procure'' means, among other things, ''to get possession of (something)'' or ''to obtain (something) by particular care and effort'').

[206] Amazon Cmt. at 7. As discussed below, other commenters also argued that § 465.2 should not apply to merely hosting reviews. *See infra* section IV.B.5 of this document.

[207] *Id.* at 7.

[208] *See infra* section IV.B.5 of this document.

[209] *See, e.g.,* William Hardy, Cmt. on NPRM (July 31, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0002;* Eric Beback, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0005* (''Beback Cmt.''); Hippensteel Cmt.; Anderson Cmt.; Nathan Wilson, Cmt. on NPRM (Aug. 2, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0008;* fred foreman, Cmt. on NPRM (Aug. 6, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0012;* Ravnitzky Cmt. at 1; Fribance Cmt.; Ian wolk, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0020;* Edborg Cmt.; Anonymous 5, Cmt. on NPRM (Aug. 18, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0030;* Anonymous 1 Cmt.; Steven Osburn, Cmt. on NPRM (Aug. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0033* (''Osburn Cmt.''); Ludlam Cmt.; Janette Ponticello, Cmt. on NPRM (Sept. 5, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0042;* Hannah Abbott, Cmt. on NPRM at 1 (Sept. 20, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0051* (Abbott Cmt.).

[210] Pasabi, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0103.*

[211] Mark Cuban, Cmt. on NPRM (Sept. 25, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0066.*

[212] Transparency Company Cmt. at 9.

[213] *See* 15 U.S.C. 45(m)(1)(C).

prohibiting specified types of reviews or testimonials: (1) by someone who ''does not exist,'' (2) by someone ''who did not use or otherwise have experience with the product, service, or business that is the subject'' of it, or (3) ''that materially misrepresents, expressly or by implication, the [person's] . . . experience with the product, service, or business.'' For the purpose of the following discussion, references to ''fake or false'' reviews or testimonials cover these three types of reviews or testimonials.

A trade association asserted that the Commission lacked sufficient evidence of prevalence of reviews and testimonials that ''materially misrepresent[] . . . the reviewer's or testimonialist's experience.'' [214] The trade association asserted that some of the cases cited by the Commission also involved ''actual fake reviews'' and therefore should not count as evidence of prevalence.[215] The Commission disagrees: a fake or fabricated review misrepresents the purported reviewer's experience (*e.g.,* that the reviewer used the product and what their experience was). The commenter also asserted that five of the cases cited by the Commission to establish prevalence ''provide no additional details about the unfair or deceptive act or practice at issue aside from bare allegations that the consumer testimonials in the case involved misrepresentations of the consumer's experience,'' and therefore are insufficient to establish prevalence.[216] However, the quoted representations in each of the Commission's complaints makes clear the nature of the misrepresentations.[217] Furthermore, even if a Commission complaint does not provide all details about a specific misrepresentation, that does not mean that it cannot serve as evidence of prevalence. The Commission thus has a strong basis for its conclusion that reviews and testimonials misrepresenting the experiences of the reviewers and testimonialists are prevalent.

The same trade association and another one expressed concern that the ''prohibition on *all* reviews that are authored by individuals that [sic] 'do not exist' or have not used the product would prohibit a wide swath of non-deceptive speech, including for example, any satirical reviews that a business authors, creates, sells, purchases, disseminates, or procures.'' [218] As discussed in the NPRM, the Commission's intent was to prohibit misrepresentations resulting from reviews or testimonials by someone who does not exist or who did not use or otherwise have experience with the product, service, or business.[219] The Commission is unsure of the extent to which there are satirical reviews that could run afoul of the provision as proposed. Nonetheless, upon a review of the comments, the Commission now recognizes that absent an express reference to material misrepresentations, the provision could be interpreted to prohibit other potentially non-deceptive speech, such as the use of virtual influencers.[220] To avoid this unintended consequence, the Commission is clarifying that § 465.2 is limited to prohibiting material misrepresentations. As finalized, the prohibitions in § 465.2 are expressly limited to reviews and testimonials ''materially misrepresent[ing], expressly or by implication . . . that the reviewer or testimonialist exists; . . . that the reviewer or testimonialist used or had experience with the product, service, or business that is the subject of the review or testimonial; or . . . the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.''

A different trade association raised several concerns about the common language of proposed § 465.2. It asserted that the provision ''would prohibit the use of a dead person's endorsement because arguably that person does not exist.'' [221] The Commission does not interpret a person who ''does not exist'' to include a person who died after making an endorsement, but that concern should be resolved by the new language regarding material misrepresentations. The commenter went on to question ''what constitutes an 'actual experience,' '' asking whether a person who saw a label had actual experience with it and whether a person who tasted an item purchased at a restaurant but did not visit the restaurant had actual experience.[222] The proposed provision did not use the term ''actual experience,'' and the persons in the commenter's posited hypotheticals did have legitimate experience with the product or service but should not misrepresent that experience as more than it was. The commenter also said that ''it is unclear if the . . . element—materially misrepresenting the experience with the product or service—relates to the experience or an opinion about the product or service.'' [223] It relates to the person's ''experience'' with the product or service, that is, what actually happened when they used or otherwise experienced it and not simply their ''opinion'' of it. The same commenter asked whether ''an actor portraying an actual reviewer'' is misrepresenting their experience as long as it is ''clear that it is an actor portrayal.'' [224] The provision does not prohibit using an actor to portray a real testimonialist.

An individual commenter who raised the same concern about whether actors could portray real testimonialists [225] went on to express concerns that the actor ''shouldn't misrepresent who the original person was,'' such as by misrepresenting ''the effectiveness/health benefits of [a] product by hiring a very fit in shape person.'' [226] The Commission has issued guidance stating that ''use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.'' [227] Nevertheless, the Commission does not intend for § 465.2 to address such misrepresentations.

A consumer organization's comment requested that the Commission ''explicitly indicate that fake . . . ratings are an independent and separate violation from deceptive narrative reviews.'' [228] The Commission believes that making this distinction is unnecessary and declines to make this change.

[214] IAB Cmt. at 3.

[215] *Id.*

[216] *Id.* at 4 & n.12.

[217] Complaint at 8–11, 17–18, *FTC* v. *NextGen Nutritionals, LLC,* No. 8:17–cv–2807 (M.D. Fla. filed Nov. 20, 2017) (testimonials in ads made specific quantified claims of weight loss and blood pressure reduction); *In re Esrim Ve Sheva Holding Corp.,* 132 F.T.C. 736, 737 (2001) (testimonial made specific quantified claims about increased mileage and decreased harmful pollutants); *In re Computer Bus. Servs., Inc.,* 123 F.T.C. 75, 78 (1997) (endorsers made specific quantified earnings claims); *In re Twin Star Prods., Inc.,* 113 F.T.C. 847, 849–51, 853–54 (1990) (endorsements made regarding a weight-loss product, a baldness treatment, and an impotency treatment); *In re National Sys. Corp.,* 93 F.T.C. 58, 61–62 (1979) (testimonials about jobs obtained by graduates of respondents' schools).

[218] IAB Cmt. at 6; NRF Cmt. at 6.

[219] NPRM, 88 FR 49373.

[220] A virtual influencer is a computer-generated fictional character that can be used for a variety of marketing-related purposes, but most frequently for social media marketing, in lieu of human influencers. *See, e.g.,* Koba Molenaar, *Discover the Top 12 Virtual Influencers for 2024—Listed and Ranked!,* Influencer MarketingHub (Mar. 29, 2024), *https://influencermarketinghub.com/virtual-influencers/.*

[221] ANA Cmt. at 12.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] Beback Cmt.

[226] *Id.*

[227] *See* Endorsement Guides, 16 CFR 255.1(g).

[228] TINA Cmt. at 8.

2. § 465.2(a)

Proposed § 465.2(a) would have made it a violation for a ''business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial'' that is fake or false.

An individual commenter noted that the prohibition ''is too specific and it would be easy for a business to find an alternative method not prohibited by the rule.'' [229] The commenter posited an example: ''a business could have someone next to them tell them their review and someone could transcribe it, technically the business did not create, make, or sell anything and thus would not be in violation.'' [230] If a business is paying an individual to transcribe a fake or false review, it is creating or making the review, and would therefore have violated § 465.2(a). Accordingly, the Commission declines to modify the prohibition in response to the commenter's concern.

A trade association submitted a comment asking the Commission to ''confirm that when a real consumer authors the review, the business cannot be said to have written or created it, and thus . . . section [465.2(a)] could not apply.'' [231] The Commission is unsure what the commenter means by a ''real consumer authors the review.'' The provision would apply if, for example, a business employs a ''real consumer'' to write fifty reviews of a product under different names.

A comment from a retailer that publishes reviews said that ''review brokers and other bad actors . . . coordinate the high-volume writing, buying, and selling of fake reviews'' and that the rule should apply to those ''approaching customers, instructing them on how to create fake reviews and avoid detection, and connecting them with bad actors operating [fake] accounts.'' [232] Brokers of fake reviews would generally fall under the provision's prohibition against selling a consumer review, given that such brokers are generally being paid to provide fake reviews.

A trade association commenter suggested clarifying that ''business'' in § 465.2(a) ''refers to a business that helps to create or sell reviews or testimonials.'' [233] Although the paragraph does apply to such businesses, it also applies to a business that writes or creates fake reviews or testimonials for its own products or services. For this reason, the Commission declines to adopt the commenter's suggestion.

An individual commenter asked whether the prohibition covers ''people who leave reviews in good faith'' if ''they were getting paid for it.'' [234] Neither § 465.2(a) nor any section of the rule imposes liability on individual consumers who write honest reviews, even if they are paid for doing so.

Another individual commenter requested that civil penalties be imposed ''on the company for soliciting the reviews, rather than on the reviewer, unless the reviewer knowingly is leaving fake reviews.'' [235] Under § 465.2(a), an individual who is in the business of writing, creating, selling, or brokering reviews could be liable for creating consumer reviews that are fake or false. That individual could only be subject to civil penalties if they did so with actual knowledge or knowledge fairly implied on the basis of objective circumstances that they were engaging in an act or practice that is unfair or deceptive and is prohibited by the rule.[236]

An individual commenter expressed concern that ''competing parties could potentially create fake reviews on another party in order to give the impression that the party is in violation of the'' rule.[237] Although such misconduct is possible, the target of such misconduct would not be liable under § 465.2(a), based on how it is worded. For example, the target would not have been the one who created, wrote, or sold the review, nor would the target have purchased the review. The competitor who engaged in such misconduct might be liable for deceptive or unfair conduct under the FTC Act.

3. § 465.2(b)

Proposed § 465.2(b) would have made it a violation for a business to ''purchase a consumer review'' or ''disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial'' about ''the business or one of its products or services'' which ''the business knew or should have known'' was fake or false.

A consumer organization commented that, by limiting § 465.2(b) to a business posting reviews or disseminating or causing the dissemination of testimonials about ''the business or one of its products or services,'' the Commission's proposal limits liability to the business itself ''instead of including other . . . creators or disseminators of deceptive reviews and testimonials.'' [238] In response to the commenter's concern, the Commission notes that those creating or disseminating deceptive reviews and testimonials could be liable under § 465.2(a).

A trade association asked whether a business '' 'disseminates' reviews for its products merely by . . . placing them in advertising/marketing materials.'' [239] Section 465.2(b) applies only to the dissemination of testimonials, but if a business includes consumer reviews in its advertising or marketing materials, those reviews become ''testimonials'' and are covered.

Another commenter requested that the Commission ''clarify the limited applicability of 'to disseminate or cause the dissemination' in proposed § 465.2(b) so the definition does not wrongly apply to third parties that host or license reviews.'' [240] The phrase ''to disseminate or cause the dissemination'' applies only to testimonials and not to consumer reviews, so it could not apply to third parties that host or license reviews. The only situation in which § 465.2(b) applies to consumer reviews is when a business purchases a consumer review.

4. § 465.2(c)

Proposed § 465.2(c) would have made it a violation for a business to ''procure a consumer review for posting on a third-party platform or website, about the business or one of its products or services,'' which ''the business knew or should have known'' was fake or false.

Several commenters questioned the scope and ''vagueness'' of the undefined term ''procure'' in proposed § 465.2(c).[241] A trade association wrote that ''the Commission should explain that a retailer does not 'procure a consumer review for posting on a third-party platform or website' simply by requesting that previous customers submit reviews, and then allowing submitted reviews to be posted on the retailer's own website or sharing customer reviews with Google.'' [242] The

[229] Albert Cmt. at 3.

[230] *Id.*

[231] IAB Cmt. at 6.

[232] Amazon Cmt. at 6.

[233] Computer & Communications Industry Association, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0110* (''CCIA Cmt.'').

[234] Wilson Cmt.

[235] Osburn Cmt.

[236] *See* 15 U.S.C. 45(m)(1)(A) (establishing that the recovery of civil penalties requires a showing of ''actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'').

[237] Slezak Cmt. at 1.

[238] TINA Cmt. at 6 n.23.

[239] NRF Cmt. at 5.

[240] CCIA Cmt. at 3.

[241] NRF Cmt. at 4; ANA Cmt. at 12; IAB Cmt. at 4; Amazon Cmt. at 7.

[242] NRF Cmt. at 4.

Commission did not intend to cover such activities. Instead, the Commission intended to cover a much more limited set of activities: the procurement of fake and false reviews from company insiders. The Commission is therefore revising § 465.2(c) by limiting it to a business procuring consumer reviews ''from its officers, managers, employees, or agents, or any of their immediate relatives.''

A trade association's comment questioned the phrase ''its products or services'' in the context of what was proposed § 465.2(c).[243] It asked whether the term would apply to all of the products sold by a department store, an online marketplace, or a consignment business.[244] The Commission recognizes that the phrase ''its products or services'' was ambiguous. In order to address this inadvertent ambiguity, the Commission is making clarifying changes by replacing the phrase ''its products or services'' with the phrase ''the products or services it sells'' in § 465.2(b) and (c), as well as in other places where it appears in the rule.[245] The revised language captures what the Commission originally intended and would apply to products sold by a department store, an online marketplace, or a consignment business.

5. § 465.2(d)

Upon consideration of the comments received, the Commission is adding paragraph (d) in § 465.2 to clarify the scope of § 465.2(b) and (c). The Commission recognizes that, when a business sends a broad solicitation to customers to post customer reviews, one or more recipients might also be employees of the business. If any such employee then posts reviews, one might consider those reviews to have been ''procured'' from the employee. Similarly, the Commission recognizes that broad, incentivized solicitations to the general public or past customers to post about a product on social media could be considered ''causing the dissemination'' of testimonials. It would not be reasonable to expect a business to know whether such resulting reviews or testimonials were fake or false, and the Commission did not intend to cover those reviews in this section of the proposed rule. Therefore, the Commission is adding § 465.2(d)(1), which clarifies that § 465.2(b) and (c) do not apply to ''generalized solicitations to purchasers to post reviews or post testimonials about their experiences with the product, service, or business that is the subject of the review or testimonial.'' By ''generalized solicitations,'' the Commission means to exempt from § 465.2(b) and (c) solicitations sent to large groups of customers, such as those who purchased a particular item or who became customers during a given time period, where specific customers are not chosen based on the likelihood that they will express a particular sentiment. In contrast, solicitations made only to customers whom the business believes to be happy customers would not be ''generalized solicitations'' and would therefore be subject to § 465.2(b) and (c).

As the Commission said in the NPRM, § 465.2 does not ''apply to any reviews that a platform simply publishes and that it did not purchase.'' In other words, the Commission did not intend for § 465.2 to apply to platforms that simply host third-party content and does not believe that the section can be interpreted otherwise. Nonetheless, numerous commenters expressed concern over whether the section covered the mere hosting of third-party content.[246] A number of industry commenters and an individual commenter asked the Commission to expressly exempt those who host consumer reviews created by a third party.[247] Three industry comments asked the Commission to create a safe harbor for review hosting when the company has reasonable processes in place to identify and remove fake reviews.[248] Consistent with its statement in the NPRM, the Commission is adding § 465.2(d)(2) to provide an explicit exemption for ''merely engaging in consumer review hosting'' from the scope of § 465.2(b) and (c).

A trade association noted that, in the ''case of reviews being shared between retailers and third-party platforms,'' ''it would be unfair to immunize the search platform from liability for the review shared by the retailer, but not to immunize the retailer for the review created by the potential bad actor.'' [249] However, a retailer or other entity will not be liable for sharing consumer reviews unless it would have been liable for displaying those same reviews on its own website.

Two comments raised the issue of hosting both reviews and testimonials. A trade association commenter expressed concern that the Commission should ''avoid sweeping in companies such as online retailers that host consumer reviews and testimonials and engage in activities such as organizing, moderating, aggregating, and prompting the submission of reviews and testimonials.'' [250] Another trade association made a very similar comment and ''urge[d] the FTC to confirm that liability under this section would require the company to do more than host reviews/testimonials.'' [251] As for reviews, § 465.2 will not prohibit an online business that hosts reviews from prompting the submission of reviews from the general public or from organizing, moderating, or aggregating them. Nonetheless, certain unfair or deceptive conduct that involves prompting the submission of reviews or moderation could violate § 465.4 or § 465.7(b), respectively.[252] As for testimonials, it is unclear what hosting scenarios the commenters are contemplating. The Commission is not adding an exemption for ''merely hosting testimonials'' because there is no provision in the rule that applies to testimonial hosting because testimonials are, by definition, advertising or promotional messages. A business that puts testimonials on its own website is ''disseminating'' them and is not merely ''hosting'' them. When such testimonials are fake or false, the business should face potential liability under this paragraph. On the other hand, a business that has on its website a community forum in which consumers can comment about the business and the products or services it sells could be merely hosting the community forum. A comment in the community forum touting one of the business's products, which was posted by a consumer who was not incentivized to do so and who has no other connection to the company, is not a testimonial in the first place, so it would not fall under § 465.2(b). The same analysis would apply to a business that hosted a section on its website

[243] *Id.* at 5.

[244] *Id.* at 5–6.

[245] See §§ 465.5(a), (b), and (c), 465.6, and 465.7(b) of the rule.

[246] One industry commenter expressed a general concern that was not tied to a specific provision ''that the Proposed Rule imposes liability on companies for the dissemination and/or display of fake reviews that clashes with Section 230 of the *Communications Decency Act*.'' TechNet Cmt. at 3. As discussed below, the Commission is including exemptions for mere consumer review hosting in §§ 465.2 and 465.5. *See infra* section IV.B.5 of this document.

[247] *See, e.g.,* NRF Cmt. at 5–6; IAB Cmt. at 6; Amazon Cmt. at 7–9; CCIA Cmt. at 3; Abbott Cmt.

[248] TechNet Cmt. at 2; IAB Cmt. at 5; NRF Cmt. at 7. A trade association also requested a ''safe harbor'' but did not tie it to any specific provision of the proposed rule. NADA Cmt. at 4.

[249] NRF Cmt. at 6.

[250] IAB Cmt. at 4.

[251] ANA Cmt. at 12–13.

[252] Prompting the submission of consumer reviews that must be positive in order to obtain an incentive could violate § 465.4. Moderation of consumer reviews that results in the suppression of some of them based upon their ratings or their negative sentiment could violate § 465.7(b).

where consumers could answer questions posed by other consumers.

A business organization commenter said the Commission should ''make clear [that] Section 465.2 does not apply to platforms or retailers that display ratings even if they prompt review submissions or aggregate star ratings of submitted reviews.'' [253] Paragraphs (b) and (c) of § 465.2 do not apply to mere consumer review hosting, even if the business prompts review submissions or aggregates star ratings.

The commenter continued by saying that ''the Commission must clearly indicate that the Rule provision would not apply to any website displaying a consumer review or testimonial that they did not purchase or procure,'' arguing that ''Section 230 [of the Communications Decency Act] . . . broadly immunizes providers of an interactive computer service from liability for presenting third party content.'' [254] If a business creates fake or false reviews or testimonials and displays them on its website, it is not presenting third-party content. It could be liable for such reviews or testimonials under § 465.2(a). The commenter made a similar argument with respect to the applicability of § 465.2(b) to a website that displays a fake or false testimonial and thus causes its dissemination.[255] Section 465.2(b) does apply if such testimonials are about the business or one of the products or services it sells. Such testimonials are advertising, not third-party content covered by section 230 of the Communications Decency Act (47 U.S.C. 230).

6. Knowledge Standard

Like proposed § 465.2(b) and (c), final § 465.2(b) and (c) are limited to situations in which businesses ''knew or should have known'' that they were engaging in the conduct that was prohibited. Commenters had varied reactions to this standard, with some finding it appropriate, others finding it too high, and others finding it too low.

A corporate commenter noted that, for the purpose of § 465.2(b) and (c), '''[s]hould have known' needs to be the standard.'' [256] Similarly, an individual commenter recommended that the FTC adopt the ''knew or should have known'' standard for purposes of § 465.2(b) and (c):

> because it: (1) sufficiently effectuates consumers' shared interest in reducing the prevalence of unfair or deceptive online consumer reviews and testimonials, (2) avoids unfairly imposing liability on unwitting, blameless business transgressors, and (3) conveniently aligns with the FTC's existing ''has good reason to believe'' standard for similar purpose of application of FTC Act Section 5 to the use of endorsements and testimonials in advertising.[257]

However, several commenters objected to the imposition of civil penalties based upon a ''should have known'' standard, believing that standard would be too onerous.[258] For example, an industry organization said that proposed § 465.2(b) and (c) are ''problematic because [they] place[ ] the onus on the business to have knowledge of the author's state of mind as to whether their actual experience was expressed. . . . , an impossible task for anyone but the'' author.[259] The industry organization also claimed that the risk of a civil penalty will ''likely . . . compel businesses to drastically limit the consumer reviews or testimonials they seek out or even allow on their websites.'' [260] Under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), however, the Commission can seek civil penalties for a rule violation only by showing that a defendant had ''actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'' (hereinafter shortened to ''actual knowledge or knowledge fairly implied''). A lower knowledge standard in a Commission rule—such as the ''knew or should have known'' standard found within certain sections of the proposed rule—does not override the higher standard found in section 5(m)(1)(A) of the FTC Act. The Commission has not suggested otherwise in the course of this rulemaking.

Other commenters objected similarly, saying that ''knew or should have known'' is too low as a knowledge threshold and that the standard should be actual knowledge, but did not tie their concerns to the imposition of civil penalties.[261] For example, some of the comments expressing concern about a ''knew or should have known'' standard appeared to focus primarily on the standard's supposed applicability to, and harsh impact on, websites hosting reviews.[262] As another example, a trade association commenter recommended ''that the Commission define 'knew,' as used in . . . § 465.2, as 'having actual knowledge,' and remove the 'should have known' language.'' [263]

Additionally, two commenters advocated for a standard higher than ''should have known'' but lower than actual knowledge. With respect to activities such as ''purchasing'' a review, they said that businesses should be held responsible for ensuring the reviews are authentic but recommended a ''knew or consciously avoided'' standard.[264] One of the commenters asserted that the proposed ''should have known'' standard ''is vague and does not provide adequate specificity about the sorts of actions businesses should take to ensure that they will not be held liable for not detecting that a review they purchased was fake.'' [265] The commenter said a ''consciously avoided'' knowing standard would allow for liability when a business takes no steps to respond to receiving repeated complaints raising red flags about the authenticity of a particular purchased review.[266]

As part of the NPRM, the Commission also inquired whether, instead of the ''should have known'' standard, the Commission should adopt a ''knew or could have known'' standard. Only two commenters addressed that proposed standard. An individual commenter said that such a standard would ''ambiguously expand the proposed Rule's prosecutorial scope and possibly open unsuspecting businesses to financial penalties for violations they had no inkling of having committed in the moment.'' [267] Another individual commenter, who incorrectly thought the proposed rule provided a private right of action, said that such a standard ''provides scienter never used in consumer law'' and the ''courts could potentially become overwhelmed with an influx of claims.'' [268]

Other commenters advocated for a lower standard than ''knew or should have known.'' An individual commenter did not think that ''knew or should have known'' was appropriate because it would make it ''very difficult to prove'' violations and recommended that the Commission require ''businesses to be able to show they used reasonable

[253] Chamber of Commerce Cmt. at 4.

[254] *Id.*

[255] *Id.*

[256] Transparency Company Cmt. at 11.

[257] Poole Cmt. at 2.

[258] IAB Cmt. at 5–6; NRF Cmt. at 2–5; NADA Cmt. at 3–4; Chamber of Commerce Cmt. at 2–3; TechNet Cmt. at 2.

[259] TechNet Cmt. at 2.

[260] *Id.*

[261] Amazon Cmt. at 8; ANA Cmt. at 13; Trustpilot Cmt. at 5, 8; NRF Cmt at 3; Family First Life Cmt. at 5–8.

[262] Amazon Cmt. at 7–8; ANA Cmt. at 12–13; NRF Cmt. at 2–5. One trade association commenter disagreed, asserting that the ''knew or should have known'' standard the Commission proposed for § 465.2 will ''not unduly burden review platforms.'' Travel Tech Cmt. at 4.

[263] NRF Cmt. at 3.

[264] Amazon Cmt. at 9; IAB Cmt. at 5.

[265] Amazon Cmt. at 9.

[266] *Id.*

[267] Poole Cmt. on at 1.

[268] Albert Cmt. at 3.

diligence through policies and procedures to prove that the[ ] reviews are legitimate.'' [269] A consumer organization said in its comment that ''there is no need for a knowledge or intent requirement under this Rule'' as ''Section 5 of the FTC Act does not otherwise require the Commission to prove knowledge or intent when enforcing against entities engaging in deceptive practices.'' [270] It continued that ''the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.'' [271]

After reviewing and considering the comments received, the Commission believes that the most appropriate standard for imposing liability under § 465.2(b) and (c) is the ''knew or should have known standard.'' As discussed above,[272] those paragraphs were not intended to apply to consumer review hosting and § 465.2(d)(2) now contains an explicit exemption for consumer review hosting.[273] Thus, the ''knew or should have known'' language in § 465.2(b) and (c) will not have a harsh impact on review platforms, as some of the commenters suggested. Eliminating the knowledge standard altogether, however, may indeed have an overly harsh impact on businesses in some circumstances, and the idea garnered almost no public support. For example, it would be unreasonable to hold a company liable for publishing a testimonial when it had no reason to know that the testimonial misrepresented the testimonialist's experience. The Commission sees no reason why the standard should be higher than ''knew or should have known.'' The ''knew or should have known'' standard—which the Commission has used in other rules [274]—thus best achieves the appropriate, equitable balance between protecting consumers and holding marketers accountable for deceptive conduct while not overly burdening marketers that engage in the responsible use of reviews and testimonials.

Two trade associations' comments said that if ''the Commission . . . imposes a 'should have known' standard, the Commission must provide greater clarity about what sorts of indicators of inauthenticity would provide companies with sufficient notice to trigger liability.[275] They both said, ''Without that guidance and faced with the risk of significant civil penalty exposure for failing to stop the actions of undiscovered third parties, many businesses would likely be deterred from using consumer reviews or testimonials at all.'' [276] The Commission has already addressed the knowledge standard found in section 5(m)(1)(A), which applies to the imposition of civil penalties. In the discussion of § 465.2(b) and (c) below, the Commission provides further guidance as to what is intended by ''knew or should have known.''

Several other commenters discussed general views about the application of the ''knew or should have known'' standard. For example, an individual commenter said that ''[a] business cannot always reasonably know that a testimonial contains testimony that is fake or false, if the influencer expresses to them that it is true.'' [277] The Commission agrees with this assertion.

A comment from a public interest research center said that the ''lack of an adequate endorser oversight program should be a per se violation of the 'know or should have known' standard as that is tantamount to the company deliberately avoiding knowing.'' [278] A consumer organization commenter said that the following actions should be considered knowledge that a review is fake or false: ''failure to meaningfully police'' for suspicious review activity, ''inducements to provide reviews without clearly instructing the reviewer to clearly disclose material conflicts,'' ''materially incentivizing reviews where it's impossible to convey material conflicts (*e.g.,* providing a five-star review with no accompanying narrative on TripAdvisor),'' and ''failure to take meaningful steps to confirm the existence of the purported celebrity or meaningfully document the celebrity's purported experience with the product or service.'' [279] The Commission encourages businesses to have endorser oversight programs, and whether a company has and follows such a program could impact the exercise of prosecutorial discretion. The Commission does not intend, however, for companies to be liable under this section of the rule based merely on the absence of an oversight program or on these other suggested bases.

A corporate commenter said that ''how a business 'should have known' that a reviewer does not exist is not apparent,'' and posited that, under a ''should have known'' standard, ''perhaps [a] business may be under a duty to reach out to the reviewer, but it is unclear how many resources the business must expend to attempt to contact the reviewer.'' [280] First, as noted, § 465.2(d)(2) exempts businesses merely engaging in consumer review hosting from § 465.2(b) and (c). Another key limitation here is the exemption for generalized solicitations under § 465.2(d)(1). That exemption means that businesses can send such solicitations to their customers without creating any investigative obligation for resulting reviews under § 465.2(b) or (c), even if such reviews have been ''purchased.'' [281]

With respect to ''purchased'' reviews under § 465.2(b)the rule's ''knew or should have known'' standard does not impose a general duty to reach out to the reviewers or investigate whether each resulting review is fake or false. While each case will depend on its specific facts, it is possible that a business may possess clear indications that purchased reviews are likely to be fake or false, in which case a failure to investigate further may trigger liability under the ''should have known''

[269] Annie Horgan, Cmt. on NPRM at 1–2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0058.*

[270] Consumer Reports Cmt. at 4.

[271] *Id.* at 4–5. An individual commenter disagreed, stating that ''the complete removal of a knowledge requirement in favor of a strict liability approach would almost guarantee situations of unwarranted punishment under the proposed rule.'' Poole Cmt. at 3.

[272] *See supra* section IV.B.5. of this document.

[273] The final rule would therefore not require a business that is merely hosting consumer reviews on its platform to prove that the reviews it is hosting are legitimate.

[274] Other Commission rule provisions with a ''knew or had reason to know'' requirement include § 460.8 of Labeling and Advertising of Home Insulation (commonly known as the R-Value Rule), which prohibits non-manufacturers of home insulation from relying on R-value data provided by the manufacturer if they ''know or should know'' the data is false or not based on proper tests. 16 CFR 460.8; *see also* 16 CFR 460.19(e) (non-manufacturers are liable only if they ''know or should know that the manufacturer does not have a reasonable basis for the claim''); 16 CFR 436.7(d) (franchise sellers must notify prospective franchisees of any material changes ''that the seller knows or should have known occurred'').

[275] IAB Cmt. at 5–6; ANA Cmt. at 13. An individual commenter said that the Commission should ''provide some clear and objective criteria or indicators for identifying fake reviews, such as the use of bots, scripts, templates, or multiple accounts, or the lack of verifiable purchase or experience, or the inconsistency with other reviews or information'' and this ''would help businesses and consumers to distinguish between genuine and fake reviews.'' Ravnitzky Cmt. at 1.

[276] IAB Cmt. at 5–6; ANA Cmt. at 13. As explained above, these concerns are unwarranted given that the ''should have known'' standard has no bearing here on the imposition of civil penalties, for which the Commission must prove that a defendant met the higher knowledge standard of section 5(m)(1)(A) of the FTC Act.

[277] Taylor V, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0062* (''Taylor V. Cmt.'').

[278] EPIC Cmt. at 3.

[279] Consumer Reports Cmt. at 5.

[280] Family First Life Cmt. at 6.

[281] Paying for or giving other incentives in exchange for consumer reviews expressing a particular sentiment regarding the product, service, or business that is the subject of the review would violate § 465.4 of the rule.

standard. For example, a business that hires a third party to provide free samples of its products to consumers in order to generate reviews, without more, may have no reason to investigate the resulting reviews. However, a business may be on notice that the resulting reviews are likely fake or false if they are submitted too quickly after purchase or many of them are submitted in a very short period of time or refer to the wrong product. As for § 465.2(c), which applies only to reviews by insiders, a possible reason for knowing that such reviews are likely fake or false could be that an insider sent emails to a manager over time that together showed that the insider was using multiple accounts to submit reviews to the same website.

A company that is in the business of identifying fake consumer reviews described ways that a business purchasing or procuring a consumer review should know that the review is fake or false. These indications include the named reviewer not being a customer, the content of the review being vague or odd, many reviews arriving at once, and the use of unnatural language or ''keyword stuffing.'' [282] A review platform commenter gave similar ways that a business could identify fake reviews, such as ''the review text describes a product or service that is not offered by the business, the review clearly references the wrong business name, or perhaps if a review . . . acknowledges that the reviewer has never shopped there.'' [283] Although, as previously stated, each case depends on its specific facts, these various indications may indeed suggest that one or more purchased or insider reviews are likely fake or false, in which case a failure to reasonably investigate them may trigger liability under the ''should have known'' standard.

With respect to testimonials, there may be red flags that should indicate to a business that a testimonial is likely fake or false, and, thereby, would serve as indicia of the fact that the business should have known that the testimonials that it disseminated were fake or false. For example, the Commission alleged that Google asked iHeartMedia, Inc. radio personalities to record product testimonials for a smartphone using a standard script written for Google and refused to provide the radio personalities with the product when requested.[284] If a business provides the text for a testimonial, it should have a reasonable basis to conclude, based on inquiry or otherwise, that the text is truthful for the testimonialist. A testimonialist asking for the product should cause a business to question whether the testimonialist used the product. If a business knows that a testimonialist is using a competing product, it should inquire into whether a testimonial for its own product is truthful. For example, a business should investigate whether a celebrity testimonial for its new smartphone is false if the testimonial claims the celebrity exclusively uses the smartphone, but the social media post containing the testimonial indicates that the celebrity posted it using a competing smartphone brand.

A review platform said in its comment that, ''if procuring fake reviews is the action of a single, rogue employee trying to help the business they work for, on a practical level it may be difficult for a business to have knowledge of'' it.[285] The commenter suggested that the Commission consider ''whether it is in fact disproportionate for knowledge and liability to be attributed to a business because of the actions of a well-intentioned rogue employee.'' [286] Whether a business will be held responsible under the rule for a rogue employee under a ''knew or should have known'' standard will be a fact-intensive inquiry. While a business may not be aware of every employee's activities, it should be pay attention to red flags. Assuming that the facts are such that the business should have known of the rogue employee's actions, whether the business would also be subject to civil penalties would depend on whether a court finds that the business met the actual knowledge or knowledge fairly implied standard of section 5(m)(1)(A) of the FTC Act.

7. Other Proposals

Some commenters suggested that the Commission impose additional requirements. Many commenters suggested that third-party platforms featuring reviews should be held responsible for certain conduct, such as for: failing to report businesses that they suspect are posting fake reviews,[287] the ''lack of identification verifications,'' [288] not posting notices reminding consumers that there is no guarantee of the veracity or accuracy of customer reviews,[289] engaging in review ''manipulation'' for advertising purposes,[290] failing to disclose publicly certain information about posted reviews,[291] or failing to employ reasonable measures to root out fraud and deceptive reviews.[292] A review platform suggested imposing requirements on social media companies and internet service providers to address the sale of fake reviews,[293] and a trade association proposed that the Commission require reviewers to identify themselves and that social media sites hosting reviews verify reviewers' identities.[294] As explained above, the Commission's intent from the outset of this rulemaking was to focus on clearly unfair or deceptive conduct involving reviews and testimonials. This intent is reflected in, as explained above, the addition of a definition of the term ''consumer review hosting'' and the explicit exclusion of such mere hosting from the coverage of certain rule provisions. This focus should not be taken to signal that third-party platforms do not bear significant responsibility for combatting fake reviews.

An individual commenter recommended ''requir[ing] proof of purchase of [a] product for a consumer to leave a review.'' [295] Another individual commenter would have the Commission hold businesses that recruit, direct, and compensate influencers responsible for the influencers' false or fake testimonials.[296] A third commenter asked that the Commission ''ensure there is a way for anyone who is believed to have violated reviewing policies [to have] a chance to reinstate their ability to leave

[282] Transparency Company Cmt. at 11.

[283] Trustpilot Cmt. at 10.

[284] Complaint at 2–5, *In re Google, LLC,* Nos. C–4783 and C–4784 (F.T.C. Feb. 8, 2023).

[285] Trustpilot Cmt. at 9–10.

[286] *Id.*

[287] Anonymous 3 Cmt.

[288] Foster Cmt. at 2.

[289] Frieling Cmt. at 2; *see also* Anonymous 6, Cmt. on NPRM (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0082.*

[290] Wilhelmina Randtke, Cmt. on NPRM at 1 (Sept. 26, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0068.*

[291] Fake Review Watch Cmt. at 2–3.

[292] Consumer Reports Cmt. at 3.

[293] Trustpilot Cmt. at 3, 7.

[294] ADA Cmt. at 2.

[295] Albert Cmt. at 4; *see also* Yanni Kakouris, Cmt. on NPRM at 1, 3 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0055.* The commenter also expressed concerns that ''violators are too difficult to track,'' asserted that civil penalties would somehow deter consumers from posting honest, negative comments about a business, and misunderstood the purpose and use of civil penalties, thinking that a large portion of civil penalties would go to businesses maligned by false comments. *Id.* at 1–2. A review platform commenter said that the proposed rule ''upholds legitimate consumer speech by ensuring that, 'proposed § 465.2 does not limit legitimate reviews to reviews by purchasers or verified purchasers' '' and ''by preserving anonymous reviews.'' Tripadvisor LLC, Cmt. on NPRM at 4–5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0092* (''Tripadvisor Cmt.'').

[296] Taylor V. Cmt. at 2.

reviews.'' [297] A consumer organization recommended making clear that ''it is a deceptive practice to aggregate fake reviews in a product's consumer rating'' and that ''reviews requiring a disclosure should not be included in a product's rating.'' [298] The Commission appreciates these additional suggestions but declines to add any of them to the rule. The suggestions are beyond the scope of the rulemaking, which focuses instead on those responsible for clearly unfair or deceptive acts or practices regarding reviews and testimonials, and which is limited to those acts or practices for which the Commission has evidence of prevalence.

In response to other commenters suggesting that the Commission impose liability on review sites and online retailers, a trade association asked the Commission to make clear that sections 5 and 18 of the FTC Act contain no express authorization for assisting-and-facilitating liability.[299] As this legal issue goes beyond, the context of this rulemaking, the Commission declines to address it here.

C. § 465.3—Consumer Review or Testimonial Reuse or Repurposing

Proposed § 465.3 sought to address a business using or repurposing a consumer review written or created for one product so that it appears to have been written or created for a substantially different product. It also sought to cover businesses that caused such use or repurposing.

The Commission received varied comments, both supportive and critical, about this provision.[300] As described above, some commenters also raised concerns about the definition of ''substantially different product,'' a term that appeared only in this provision and is key to determining the circumstances in which the provision would apply; one of those commenters proposed a disputed issue of material fact related to that definition.[301] The Commission would need to address those concerns before finalizing the provision. As it is not able to resolve those concerns on the current rulemaking record, the Commission has decided not to finalize the provision. If the Commission chooses later to engage in further rulemaking regarding the provision, it will address the comments at that time.

D. § 465.4—Buying Positive or Negative Consumer Reviews

Proposed § 465.4 sought to address businesses providing ''compensation or other incentives in exchange for, or conditioned on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.'' Based on the following, the Commission has decided to finalize this provision with two modifications.[302]

Comments from a retailer and a trade association expressed that they found the section important and useful. The retailer said, ''This section is important to ensure that the rule covers bad actors that seek inauthentic reviews reflecting a particular predetermined sentiment.'' [303] The trade association wrote, ''Providing compensation in exchange for reviews that must reflect a particular sentiment is a deceptive practice,'' and expressed support for ''the Commission's goal of targeting and eliminating this practice.'' [304]

Three individual commenters mistakenly thought that proposed § 465.4 banned paid or incentivized customer reviews and were opposed to such a ban. One of them said the proposed provision would ''ban reviews which are made by those who have been provided an item,'' that ''[g]enerally the writer includes a list of sponsors on, or within, their blog/website,'' and that ''[i]f such sponsorship relationships are eliminated . . ., the ability of writers to review a variety of items will disappear.'' [305] The second one wrote, ''Section 465.4 of the proposed rule prohibits the incentivization of or compensation on for the creation of consumer reviews or testimonials. . . . [I]t is unnecessarily restrictive.'' [306] The third commenter did not support the provision ''forbidding paying for reviews'' because the practice ''does not . . . deceive the public unless the paid review service dictates that the review must be positive.'' [307] These commenters misunderstand the nature of § 465.4. First, § 465.4 does not apply to testimonials, only to consumer reviews, and then only to reviews that appear on a website or portion of a website dedicated to receiving and displaying such reviews. A blogger's ''review'' is not considered a consumer review for purposes of the rule; if such a review was incentivized, it would be considered a testimonial. Second, § 465.4 does not prohibit paid or incentivized consumer reviews. It only prohibits paid or incentivized consumer reviews when the business soliciting the review provides compensation or an incentive in exchange for a review expressing a particular sentiment.

In Question 12 of the NPRM, the Commission asked whether the prohibition in § 465.4 should ''distinguish in any way between an explicit and implied condition that a consumer review express a particular sentiment.'' [308]

A business commenter responded, ''Real consumers' reviews often contain multiple sentiments on what businesses did right and what they did wrong. This is helpful.'' [309] The meaning of this comment is unclear.

Another business commenter responded to Question 12 of the NPRM by stating that § 465.4 ''should unequivocally prohibit explicit conditions only,'' because this would ''provide[ ] a clear standard for businesses and reviewers to follow,'' and ''the lack of clarity in how the Proposed Rule would prohibit 'implied conditions' [would] stifle[ ] businesses' ability to encourage and to entice reviews in a legitimate manner.'' [310] The Commission disagrees and believes that businesses are capable of soliciting and encouraging reviews without suggesting that the reviews must be positive to obtain an incentive. The commenter also asserted that the Commission ''has no experience bringing enforcement actions against a business for allegedly creating an implied condition that a review or endorsement be positive,'' referencing the cases the Commission cited in the NPRM.[311] That assertion is incorrect. The respondent in *AmeriFreight, Inc.* did not expressly state that the reviews needed to be positive but only implied it, encouraging past customers to submit reviews in order to be eligible for a $100 ''Best Monthly Review Award'' given to ''the review with the most captivating subject line and best content.'' [312] The respondent also told past customers that

[297] Osburn Cmt.

[298] TINA Cmt. at 6.

[299] Chamber of Commerce Cmt. at 2.

[300] *See, e.g.,* IAB Cmt. at 7–8; ANA Cmt. at 14; Chamber of Commerce Cmt. at 5–6; Trustpilot Cmt. at 10; Consumer Reports Cmt. at 5–6; Amazon Cmt. at 10; CCIA Cmt. at 3; NRF Cmt. at 7–8; Ravnitzky Cmt. at 2.

[301] *See supra* sections I.C. and IV.A.2.j of this document.

[302] One minor modification is changing ''Rule'' to ''part.''

[303] Amazon Cmt. at 6.

[304] IAB Cmt. at 8.

[305] Alex Rooker, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0019.*

[306] Frieling Cmt. at 2.

[307] Anonymous 7, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0021.*

[308] NPRM, 87 FR 49389.

[309] Transparency Company Cmt. at 12.

[310] Family First Life Cmt. at 8–9.

[311] *Id.* at 10–11.

[312] *In re AmeriFreight, Inc.,* 159 F.T.C. 1626, 1627–30 (2015).

they should ''be creative and try to make your review stand out for viewers to read.'' [313]

Two trade associations gave examples of what they asserted were innocuous requests for reviews that could be considered as implying that reviews need to be positive in order to receive an incentive. One said that its members will sometimes automatically contact customers saying, ''Tell us how much you loved [product] for 10% off your next purchase!'' and that such a request could ''be read to violate this Section of the Proposed Rule—even if a negative review would still entitle the consumer to the incentive or bonus.'' [314] The other commenter wrote that, if the Commission says that ''a business may not implicitly seek positive reviews in exchange for incentives, then the rule could apply to such offers as, 'Tell us how much you loved your visit to John's Steakhouse and get a $5 coupon' or 'Tell your friends about all the fun you had at Jane's Arcade for a chance to win prizes,' '' and asserted that such requests are justified because businesses ''prefer to use these enthusiastic and positive messages when seeking reviews, as opposed to less inspiring messages like, 'Write a review and save 10% next time.' '' [315] The problem with the enthusiastic and positive messages suggested by these commenters is that consumers receiving them could reasonably take the message that their reviews must be positive and enthusiastic in order to obtain the reward. As the second commenter noted, there are perfectly acceptable, albeit less ''inspiring,'' alternatives. The second commenter also said that ''a reasonable consumer would infer that a business prefers positive reviews, and so even a neutral request such as, 'Write a review and receive a discount off your next purchase,' might be construed as impliedly requesting a positive review.'' [316] The Commission disagrees. The fact that businesses prefer positive reviews is not a basis on which to conclude that consumers would interpret any such ''neutral request'' as containing an implied condition that reviews must be positive to receive the offered discount.

A consumer organization said in its comment that, ''[w]hen a reviewer feels pressured to express a certain sentiment, regardless of how that pressure was generated, the net result is a deceptive review,'' and that there should be ''no distinction made between explicitly and implicit conditioning of compensation or other incentives.'' [317] A second consumer organization commenter said that ''[i]mplied conditions may be just as salient as express conditions'' and quoting *Aronberg* v. *FTC,* 132 F.2d 165, 167 (7th Cir. 1942), said that, ''[i]n interacting with businesses, '[t]he ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.' '' [318] The Commission agrees with both of these commenters.

Advocating for limiting the provision to express conditions, a trade association acknowledged that the NPRM clarified that the provision does not cover review gating,[319] the mere solicitation of positive reviews, or incentivized reviews (except for those required to express a particular sentiment), but argued that, ''[r]egardless, the Proposed Rule still could be read to prohibit such behavior—*i.e.,* when a Company solicits a review that it has reason to believe will be positive.'' [320] The Commission does not consider this statement to be a fair reading of the provision. Just because a business engages in review gating or otherwise expects reviews to be positive does not mean there is either an express or implied requirement that reviews need be positive to obtain an incentive. The Commission notes that, although § 465.4 does not cover ''review gating,'' review gating can nonetheless violate section 5 of the FTC Act.[321]

A review platform commenter said that prohibiting an ''implied condition to express a particular sentiment could create a number of gray areas'' and ''encouraged the FTC to provide guidance and examples to businesses.'' [322] The examples, discussed above, by the trade association asking consumers to say how much they ''love'' something or how much fun they had are excellent examples of implied conditions.

The Commission has decided to clarify that the rule prohibits businesses from providing incentives conditioned on the writing or creation of consumer reviews expressing a particular sentiment, regardless of whether the conditional nature of the incentive is express or implicit. For this purpose, the Commission is adding the phrase ''expressly or by implication'' in § 465.4 to clarify that, although the incentive needs to be conditioned on the writing or creation of consumer reviews expressing a particular sentiment in order for conduct to violate § 465.4, the condition may be implicit.

Three commenters argued that the Commission should allow the compensation or incentives addressed in § 465.4 as long as they are disclosed in the resulting reviews. For example, the first commenter wrote, ''A reasonable consumer can easily understand that when a reviewer is incentivized or compensated, the content they produce may be skewed in a more positive light. A mere disclaimer is sufficient to stave off misrepresentation.'' [323] This statement may be correct for some incentivized reviews when there is no express or implied condition for those reviews to express a particular sentiment. For such reviews, an adequate disclosure that incentives were provided in exchange for the review may be able to cure a misleading impression that the reviews were independent and unbiased. However, such a disclosure does not reveal to consumers the requirement that reviews be positive. In addition, even if an individual review disclosed that it resulted from incentives requiring the review to be positive, such a disclosure would not be effective in instances where a consumer relies on the overall average star rating and does not read all individual reviews. Furthermore, the Commission believes that, if incentives are conditioned on reviews expressing a particular sentiment, many resulting reviews will not be merely misleading but false. For example, the offer of an incentive in exchange for a positive review may lead some reviewers to create positive reviews even when they had a negative experience with the product, service, or business. No disclosure can adequately cure a false review.[324]

[313] *Id.* at 1628.

[314] NRF Cmt. at 8.

[315] ANA Cmt. at 8.

[316] *Id.*

[317] Consumer Reports Cmt. at 6.

[318] TINA Cmt. at 10. An individual commenter described the pressure they felt to leave a positive review of a car dealership in order to receive a gift card and said that proposed ''§ 465.4 should . . . address both explicit and implied conditions of incentivization.'' Anonymous 8, Cmt. on NPRM at 3–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0061.*

[319] As the Commission explained in the NPRM, ''Review gating occurs when a business asks past purchasers to provide feedback on a product and then invites only those who provide positive feedback to post online reviews on one or more websites.'' *See* NPRM, 88 FR 49379.

[320] NRF Cmt. at 9. The commenter went on to ask that ''the Rule be revised to only prohibit companies from '. . . provid[ing] compensation or other incentives in exchange for . . . consumer reviews *explicitly required to express* a particular sentiment, whether positive or negative. . . .' '' (emphasis in original). *Id.*

[321] *See* Endorsement Guides, 16 CFR 255.2(d) and (e)(11).

[322] Trustpilot Cmt. at 11.

[323] Frieling Cmt. at 3.

[324] *See* FTC Policy Statement on Deception, 103 F.T.C. at 180 (''[*P*]*ro forma* statements or

The second commenter taking this position pointed to examples in the Endorsement Guides,[325] claiming inaccurately that they stand for the proposition that businesses are allowed to offer incentives in exchange for positive reviews.[326] The Endorsement Guides do contain an example involving incentives for reviews conditioned on the reviews being positive: ''[a] manufacturer offer[ing] to pay genuine purchasers $20 each to write positive reviews of its products on third-party review websites.'' [327] However, consistent with the Commission's approach in this section, the Guides provide that ''[s]uch reviews are deceptive *even if the payment is disclosed* because their positive nature is required by, rather than being merely influenced by, the payment.'' [328]

The third commenter taking this position suggested that it should be acceptable to use a disclosure like, ''We asked customers to tell us how much they loved their visit to John's Steakhouse, and here's what some of them said! (customers who submitted reviews received a $5 coupon).'' [329] The scenario the commenter describes does not involve consumer reviews. It involves consumer testimonials, which are not covered by § 465.4. Further, it is unlikely that one could make such a disclosure in the context of consumer reviews, given how reviews are usually presented on a business's own website and the lack of control over the way they are presented on a third-party website. In addition, the disclosure does not communicate that the customers had to ''tell how much they loved their visit *in order to* receive a $5 coupon.'' Furthermore, as discussed above, many incentivized reviews conditioned on consumers saying how much they ''loved their visit'' are likely false regardless of such a disclosure.

Two commenters, an individual and a review platform, requested that § 465.4 go further and prohibit all incentives given in exchange for reviews regardless of any requirement to express a particular sentiment.[330] An individual commenter would have the Commission ''require businesses to disclose any form of incentive that they provide or arrange for reviewers.'' [331] These requests are beyond the scope of this rulemaking but are addressed in the Endorsement Guides, which provide that unexpected material connections such as incentives given in exchange for customer reviews without any requirement as to the sentiment of the reviews must be disclosed clearly and conspicuously.[332] The Commission continues to believe that this principle from the Endorsement Guides is an appropriate expression of what incentivized review practices would or would not violate section 5 of the FTC Act. In any event, there is no basis on the current rulemaking record for the Commission to conclude that *all* incentivized reviews should be prohibited or that *all* incentivized reviews should require a disclosure.

Two commenters, an individual and a review platform, recommended that § 465.4 also prohibit offering compensation to remove or change consumer reviews.[333] Another individual commenter inquired about paid review removal without stating a position on the topic.[334] The Commission previously noted that, ''[i]n procuring [or] suppressing . . . consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products.'' [335] A product marketer paying consumers to change or remove truthful negative reviews may be engaging in an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer's products. Nevertheless, that act or practice is beyond the scope of this rulemaking.

E. § 465.5—Insider Consumer Reviews and Consumer Testimonials

Proposed § 465.5 sought to prohibit certain undisclosed insider reviews and testimonials. It had three subparts. Proposed § 465.5(a) would have prohibited an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or one of its products or services that failed to have a clear and conspicuous disclosure of the officer's or manager's relationship to the business.[336] Proposed § 465.5(b) would have applied to testimonials, but not consumer reviews. It would have prohibited a business from disseminating or causing the dissemination of a consumer testimonial about the business or one of the products or services by one of its officers, managers, employees, or agents, or any of their relatives, if that testimonial failed to have a clear and conspicuous disclosure of the testimonialist's relationship to the business or to the officer, manager, employee, or agent, and if the business knew or should have known of that relationship. Proposed § 465.5(c) would have applied to consumer reviews, but not testimonials, and would have been limited to when an officer or manager of a business solicits or demands a consumer review about the business or one of its products or services from an employee, an agent, or a relative of any such officer, manager, employee, or agent. Proposed § 465.5(c) would have prohibited that conduct when (1) the person requesting the review knew or should have known the prospective reviewer's relationship to the business (or to one of its officers, managers, employees, or agents), (2) the request resulted in a consumer review without a disclosure, and (3) the person requesting the review (a) did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship, (b) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps, or (c) encouraged

disclaimers may not cure otherwise deceptive messages''); *Removatron Int'l Corp.* v. *FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.''); Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000), *https://www.ftc.gov/system/files/documents/public_statements/297751/000301jpsdeceptoveads.pdf* (''If a claim is false, a disclosure that provides contradictory information is unlikely to cure the deception.''); *FTC* v. *Direct Marketing Concepts, Inc.,* 624 F.3d 1, 12 n.9 (1st Cir. 2010) (''A statement that studies prove a product cures a certain disease, followed by a disclaimer that the statement is opinion and the product actually does not cure the disease, leaves an overall impression of nonsense, not clarity.'').

[325] Endorsement Guides, 16 CFR 255.5(b)(2), (3), (7), (8), (9), and (11).

[326] Hammacher Schlemmer Cmt. at 3–4.

[327] Endorsement Guides, 16 CFR 255.2(e)(9).

[328] *Id.* (emphasis added).

[329] ANA Cmt. at 8.

[330] Anonymous 3 Cmt; Yelp Cmt. at 5–6.

[331] Ravnitzky Cmt. at 1.

[332] Endorsement Guides, 16 CFR 255.5(a) & (b)(6)(ii).

[333] Camp-Martin Cmt. at 4–5; Yelp Cmt. at 7.

[334] Anonymous 4 Cmt.

[335] Endorsement Guides, 16 CFR 255.2(d).

[336] Due to an inadvertent drafting error, the regulatory text of proposed § 465.5(a), which addressed an officer or manager of a business writing or creating a consumer review or consumer testimonial about the business or its products or services, only referenced disclosure of the officer's but not the manager's relationship to the business. The Commission clearly intended that proposed § 465.5(a) require disclosure of the manager's relationship as well. *See* NPRM, 88 FR 49379 (''Proposed § 465.5(a) would prohibit an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or its products or services if the consumer review or consumer testimonial does not have a clear and conspicuous disclosure of the officer's or manager's relationship to the business.'').

the prospective reviewer not to make such a disclosure. The Commission has determined to finalize proposed § 465.5 with a number of modifications.[337]

Two individual commenters shared their experiences with insider reviews. One individual commenter ''made a purchase based on a glowing review'' but ''later discovered that the person who wrote the review was, in fact, a salesperson for the same company, receiving a commission based on my purchase,'' and the purchase turned out to be ''a fraudulent service.'' [338] Another individual commenter shared their experience as an employee: ''I was asked to leave positive reviews in Amazon . . . and in other sites to boost the number of positive reviews for our products. The CEO asked employees to do this and include family members. In fact, I found the immediate family and friends of the CEO leaving glowing reviews of the product.'' [339]

A business commenter said, ''If you allow insider reviews, disclosure [of the reviewers' relationship to the business] should be mandatory.'' [340] Another business commenter wrote that ''limiting . . . § 465.5(a)–(c) to circumstances in which the requisite disclosure is absent is a fair restriction on businesses that would simultaneously protect consumers all while allowing businesses to effectively advertise.'' [341] The commenter noted that the ''requirement for clear-and-conspicuous disclosure is used widely throughout federal and state consumer protection laws.'' [342] The commenter was also concerned that a rule might ''infringe on the ability of employees and independent contractor agents . . . to inform others of their experiences with an employer or principal.'' [343] To the extent that the commenter is referring to review websites that specialize in reviewing employers from the perspective of employees, it is obvious that the reviewers are employees or former employees, and no further disclosure appears necessary.

A trade association commented that it ''understands the Commission's concern that in some cases, employees may have an incentive to post positive reviews on behalf of their company's products,'' but the concern ''is already addressed through Section 5 and the Endorsement Guides.'' [344] The Commission continues to believe that certain conduct should be addressed by a trade regulation rule even if it can also be addressed through section 5 enforcement actions. Having specific conduct addressed by a rule provides the general public with further clarity as to what steps are necessary to conform its conduct to the requirements of the law, deters prevalent unlawful conduct, and allows the Commission to bring enforcement actions more efficiently and effectively.

A retailer recommended that the provision ''be revised to further incorporate a requirement that the 'insider' review/testimonial be 'fake' or 'false,' in order to better target the deceptive acts of bad actors that use their employees to generate fake reviews and testimonials that purport to be from actual customers.'' [345] The Commission rejects that suggestion, as the intention of § 465.5 is to address certain inherently biased reviews and testimonials. Fake and false reviews are already addressed by § 465.2.

1. Material Connections

Commenters pointed out what they saw as inconsistencies between proposed § 465.5 and section 5 of the FTC Act. A retailer commenter wrote that proposed § 465.5 was ''inconsistent with the longstanding principles in the Endorsement Guides . . . that disclosures must be made when the connection between a reviewer and the sponsoring advertiser is material, meaning it would affect the weight or credibility that consumers give to the endorsement.'' [346] A trade association noted in its comment that the section ''seeks to impose liability for reviews and testimonials authored by certain employees or their relatives that lack disclosures regardless of context, and whether that connection is material under the circumstances'' and ''would impose civil penalties for reviews or testimonials that are not even deceptive.'' [347] Another trade association opined ''that a reviewer's out-of-state second cousin [who] works a minimum-wage job at a retailer would (hopefully) not be a 'material connection' requiring disclosure under the Endorsement Guides, because such connection would not bias the reviewer's review, and therefore would not make the review misleading.'' [348] The same trade association and a business organization also commented that the provision poses concerns under the First Amendment by ''broadly prohibiting certain reviews or testimonials by 'insiders' regardless of whether that speech is deceptive in context.'' [349] The Commission intended for § 465.5 to be limited to unfair or deceptive failures to disclose material connections, and is now clarifying this intent. Specifically, in paragraphs (a) through (c) of § 465.5, the Commission is limiting the covered relationships to ''material'' relationships. In § 465.5(a) and (b), the Commission is also clarifying that, under certain circumstances, the relationship of a consumer testimonialist may be clear to the audience without disclosure. For example, the audience may already be aware that an executive is associated with a particular company, or the context of an ad may otherwise communicate a relationship with a particular company. Specifically, in § 465.5(b), which applies only to consumer testimonials, the Commission is adding the requirement that ''the relationship is not otherwise clear to the audience,'' and in § 465.5(a), which involves both consumer reviews and testimonials, it is adding, ''unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.'' The Commission does not believe that, absent a disclosure, a relationship will ever be clear to consumers in the context of an ordinary consumer review.

2. Relatives

Proposed § 465.5(b) and (c) would have required disclosures in some circumstances involving consumer testimonials or reviews from ''relatives'' of a company's officers, managers, employees, or agents. Some commenters voiced concerns pertaining to these requirements.

For example, a review platform, explaining that it prohibits reviews about a business or its products by someone whose immediate family owns or works for the business, asked how businesses would ''know whether reviews have been submitted by the extended family (such as the second cousins) of their officers, managers, employees, or agents,'' questioned whether it would be proportional to seek penalties when extended family are involved, and suggested ''narrowing the scope of the family requirement'' to ''immediate family.'' [350] A trade association said that ''relatives can include cousins, nieces/nephews, and other more distant familial

[337] Proposed § 465.5(b) and (c) are being renumbered as final § 465.5(b)(1) and (c)(1).

[338] Anonymous 9, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0023.*

[339] Anonymous 5 Cmt.

[340] Transparency Company Cmt. at 13.

[341] Family First Life Cmt. at 13.

[342] *Id.*

[343] *Id.* at 3.

[344] NRF Cmt. at 9.

[345] Amazon Cmt. at 11.

[346] *Id.*

[347] IAB Cmt. at 9.

[348] NRF Cmt. at 9.

[349] *Id.* at 11; TechNet Cmt. at 3.

[350] Trustpilot Cmt. at 5–6.

relationships,'' that ''even immediate family relationships (parents, children, siblings) are not always closely held'' because ''adult siblings are not necessarily in each other's day-today lives,'' and that ''it would be more appropriate to substitute the term . . . 'members of the same household' as that would suggest individuals that have regular contact with an employee.'' [351] A business organization wrote in its comment that the term ''relative'' is too vague and that ''[i]t is unclear whether the rule applies to third cousins, the spouses of a stepbrother's child from a previous marriage, or friends that are considered family,'' concluding that ''[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.'' [352] A second trade association said in its comment that ''relatives'' of ''any company employee should not be considered 'insiders''' because ''[i]n most cases, such family members would have no incentive to post a fake review.'' [353] However, the Commission intended for § 465.5 to address biased reviews and testimonials by insiders or their relatives, not the writing of ''fake [or false] reviews,'' which is addressed in § 465.2.

To reduce the compliance burden, the Commission is removing relatives from § 465.5(b) and limiting what was originally proposed as § 465.5(c)(1), which is now split into three separate prohibitions. One prohibition addresses officers or managers soliciting or demanding a consumer review from ''any of their [own] immediate relatives.'' A second prohibition addresses officers or managers soliciting or demanding reviews from employees or agents. A third prohibition addresses solicitations or demands by officers or managers that ''employees or agents seek such [consumer] reviews from their relatives.'' In such instances the request will likely be a general one (such as ''Ask your relatives to review us'' or ''Get three family members to review us''), although it could also be more specific (such as ''Get your spouse to write us a review''). As set forth in § 465.5(c)(1)(i), any reviews resulting from demands that employees or agents solicit their relatives would only be violations if the resulting reviews were written by immediate relatives of the employees or agents.

[351] RILA Cmt. at 6.

[352] Chamber of Commerce Cmt. at 7.

[353] NRF Cmt. at 9.

3. Agents

A trade association objected to the inclusion of the undefined term ''agents'' in proposed § 465.5(b) and (c) and suggested its removal. The commenter said that ''it is not clear what individuals would be considered 'agents' of the business'' and the meaning of the term ''agent'' could ''dramatically expand the scope of the compliance programs that businesses will likely need to create in order to mitigate their risks under this section'' which ''would be particularly important for small businesses.'' [354] The Commission intends for the term ''agents'' in this rule to apply only to those agents that promote the company or its products, such as representatives of advertising agencies, public relations firms, and review management firms. As discussed below, given the clarifications of and limitations to § 465.5(b)(1) and (c)(1), the Commission has no reason to believe that the inclusion of ''agents'' will ''dramatically expand the scope of the compliance programs.'' [355]

4. Scope

Several comments addressed the scope of proposed § 465.5, including the scope of liability of businesses in the context of insider reviews and testimonials. For example, a trade association asserted that § 465.5 should ''be limited to the extent it references employees (or agents) who are not officers or managers, and who were not instructed by their superiors to post reviews.'' [356] A retailer asked for a safe harbor that would apply to employee reviews and testimonials ''if businesses are not encouraging insider reviews and testimonials.'' [357] The Commission intended for the provision to apply to reviews or testimonials by employees or agents who are not officers or managers only when (1) the reviews are requested or solicited by an officer or manager of the business or (2) the testimonials appear in advertising or promotional messages actively disseminated by the business. As discussed in this section, the Commission's clarifications and limitations should resolve any concerns arising from any broader interpretation.

Two trade associations and another industry organization asserted in their comments that § 465.5 ''appears to impose liability on businesses for distributing the content of third parties, even when they had no knowledge that the content violated the proposed rule.'' [358] As the commenters used the word ''distributing,'' the Commission assumes that these comments pertain to the liability of businesses under § 465.5(b), which prohibits businesses from ''disseminating or causing the dissemination of consumer testimonials'' by insiders without disclosures. The testimonials covered by § 465.5 are, by definition, a business's advertising or promotional messages, so the Commission does not consider them to be third-party content. The section covers such testimonials when disseminated by the business itself, by its officers or managers, or in response to solicitations or demands from its officers or managers. With respect to the commenters' concern that businesses will be liable even when they had no knowledge that the content violated the rule, the Commission discusses below the appropriate application of the ''knew or should have known'' standard.

A retailer's comment expressed ''significant concerns with this section if the FTC intends to apply it to marketplace service providers with hundreds of thousands of employees.'' [359] A trade association said in its comment that, ''to the extent the Commission intends for this language to apply to reviews or testimonials written by employees of online retailers with hundreds of thousands of employees, the Commission has failed to demonstrate that this is an unfair or deceptive act or practice that is prevalent'' as ''[n]one of the cases cited in the NPRM involved this type of company.'' [360] With respect to employees, the section applies only to (1) testimonials by employees that the company chooses to disseminate and (2) reviews that are solicited or demanded by company officers or managers. Further, the Commission has sufficient evidence of prevalence as to the use of insider reviews and testimonials,[361] and that evidence need not specifically include examples of companies of every size, such as those ''with hundreds of thousands of employees.''

A trade association's comment ''urge[d] the Commission to add a safe harbor . . . that will assure businesses acting in good faith that they will not face civil penalty liability for the actions of rogue individuals.'' [362] Again, whether a business will be subject to civil penalties will depend on whether

[354] IAB Cmt. at 10.

[355] *See infra* section IV.E.4 and 5 of this document.

[356] NRF Cmt. at 10.

[357] Amazon Cmt. at 11.

[358] NRF Cmt. at 11; IAB Cmt. at 10; TechNet Cmt. at 3.

[359] Amazon Cmt. at 11.

[360] IAB Cmt. at 9.

[361] *See* NPRM, 88 FR 49374–75.

[362] IAB Cmt. at 10.

the facts show that the business had actual knowledge or knowledge fairly implied of the violation. A business will not violate the rule—much less be subject to civil penalties—merely because employees write consumer reviews without disclosing their relationship to the business, but it may violate the rule when an officer or manager of the company solicited or demanded such reviews. A business will also not be liable under § 465.5 simply because one of its employees (other than an officer or manager) or agents makes an unsolicited social media post. However, as discussed above, a business might be liable under § 465.2(a) for an employee posting fake testimonials to social media on behalf of the company.[363]

Two commenters addressed general review solicitations from businesses to their customers. A trade association said that ''[b]usinesses which seek reviews from their customers generally seek reviews from all customers, and again, do not currently monitor or screen for potential relatives or agency relationships.'' [364] A review platform operator wrote in its comment, ''An automated review invitation system can operate via integration with, for example, a C[ustomer] R[elationship] M[anagement] platform where customer details are automatically fed through to generate review invitations following on from purchases or experiences. The information within the system could be as minimal as a name and email address. . . . It could therefore be possible for businesses to inadvertently invite persons that are related to an officer, manager, employee, or agent . . . . In practice, it will be difficult to check whether any invitation recipients could fall within the very wide group of persons outlined at [§] 465.5(c), and it will also be difficult to draw a firm line between what types of indicators are sufficient to warrant imputing constructive knowledge.'' [365] The Commission did not intend for § 465.5(c) to cover such generalized invitations to past purchasers to write reviews. The Commission is therefore adding language in § 465.5(c)(2) to clarify that § 465.5(c)(1) ''does not apply to generalized review solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.'' The Commission is making a similar clarification in § 465.5(b)(2)(i); specifically, that § 465.5(b)(1) ''does not apply to generalized review solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business.''

The Commission has also added § 465.5(b)(2)(ii), which exempts ''merely engaging in consumer review hosting'' from § 465.5(b)(1). Thus, an unsolicited employee review merely appearing on the business's website cannot violate the provision against disseminating insider testimonials.

A trade association noted that ''[l]arge national retail chains collectively employ millions of workers who are also their customers'' and ''[w]hile a retailer may provide guidance on disclosing their relationship, it should not be liable for policing their customer reviews for posts that may have been submitted by any one of their thousands or millions of employees—who in many cases may be using ambiguous screennames or not be readily identifiable.'' [366] The Commission points out that only § 465.5(c) applies to customer reviews by employees, and that provision only applies to employee reviews that an officer or manager has solicited or demanded. If there are no such solicitations or demands, then § 465.5 does not apply to employee reviews. When an officer or manager does solicit or demand a review, the business would only be liable if the officer or manager (1) ''encouraged the prospective reviewer not to make . . . a disclosure,'' (2) ''did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business,'' [367] or (3) ''knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.'' It is only under the last of the three clauses that a business might be liable for any ''policing'' of reviews, and, as discussed below, any such obligations should not be unduly burdensome.[368]

An industry organization commenter expressed concern that § 465.5 ''would require the disclosure of personally identifying information'' and impact employees' privacy.[369] The Commission does not see how the provision requires the disclosure of personally identifying information. Section 465.5 requires the disclosure of unexpected material connections but does not require that employees identify themselves by name. Testimonialists and reviewers could be anonymous, or use pseudonyms, and include general phrases indicating their relationship to the business, such as ''my employer's product,'' ''my company's,'' or ''my spouse's company.''

5. Knowledge Standard

A number of commenters discussed the ''knew or should have known'' standard contained in § 465.5(b) and (c). A trade association said that a '' 'knew or should have known' standard . . . [in] § 465.5 aptly reflects that the rule is targeting bad actors that intend to commit fraud through fake reviews.'' [370] A consumer organization ''advise[d] the Commission against relying on knowledge standards that will introduce unnecessary evidentiary burdens in the enforcement process'' and against making it ''a condition of liability,'' noting that instead ''the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.'' [371] A review platform said ''that 'should have known' is too low as a knowledge threshold and this should therefore be limited to 'knew', *i.e.,* actual knowledge.'' [372] A trade association called the ''should have known'' standard ''vague.'' [373] A business commenter also described ''should have known'' as vague and suggested limiting the knowledge standard to actual knowledge.[374] A trade association and a retailer said that civil penalties should not be based upon a ''should have known'' standard.[375] The retailer continued, ''In the alternative, if the Commission refuses to elevate the knowledge standard for this section, the final rule must provide greater guidance on the sorts of scenarios that would give rise to liability.'' [376] Specifically, the retailer asserted that the Commission would have to provide ''additional information about when a company or officer/manager 'should' know that an 'insider' review or testimonial violates the rule.'' [377] A trade association wrote in its comment that ''the Commission should raise the knowledge standard for this section to actual knowledge,'' which ''would ensure that companies that are actually complicit in the proliferation of deceptive insider reviews and testimonials are the targets of this section, rather than well-meaning

[363] *See supra* section IV.B.2 of this document.

[364] NADA Cmt. at 6.

[365] Trustpilot Cmt. at 13.

[366] RILA Cmt. at 6.

[367] The Commission has slightly modified this clause, changing ''did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship'' to ''did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business'' for purposes of clarity.

[368] *See infra* section IV.E.5 of this document.

[369] TechNet Cmt. at 3.

[370] Travel Tech Cmt. at 4.

[371] Consumer Reports Cmt. at 8.

[372] Trustpilot Cmt. at 5, 8.

[373] NRF Cmt. at 9.

[374] Family First Life Cmt. at 15.

[375] NADA Cmt. at 3; Amazon Cmt. at 11.

[376] Amazon Cmt. at 11.

[377] *Id.*

businesses that fail to discover and remedy reviews or testimonials by employees, managers, officers, agents, or any of those individuals' relatives that lack disclosures.'' [378] The commenter continued, ''[r]egardless of the knowledge standard the Commission imposes, the final rule must provide greater guidance on what sorts of scenarios would give rise to liability under this section.'' [379]

The Commission chooses to retain the proposed ''knew or should have known'' standard in § 465.5(b)(1) and (c)(1)(ii)(c). First, the Commission notes again that it cannot obtain civil penalties under section 5(m)(1)(A) of the FTC Act for a rule violation unless it proves that a defendant had actual knowledge or knowledge fairly implied that the act or practice is unfair or deceptive and is prohibited by the rule. With respect to § 465.5(b)(1), the provision applies only to testimonials that the business disseminates or causes to be disseminated, *i.e.,* it applies to the business's own advertising and promotional activities. As noted above, § 465.5(b)(1) does not apply to unsolicited social media posts by employees or to social media posts that result from generalized solicitations. The Commission does not expect that a business will ask every potential testimonialist whether they are an agent of the business. There may be red flags, however, that should cause a business to realize that a prospective testimonialist is likely an insider, such as the testimonial featuring an image of that person standing in front of the company's headquarters. If a business routinely asks prospective testimonialists how they became interested in the business or its products, it should not avoid looking at answers that might indicate a covered connection.

With respect to § 465.5(c)(1)(ii)(c), the Commission believes that, if officers and managers of a business request or demand that the business's employees or agents write consumer reviews or solicit or demand that such employees or agents seek such reviews from their relatives, it is more than reasonable to have those officers and managers take on certain responsibilities with respect to those reviews. The employees, agents, and relatives on the receiving end of such requests or demands are likely to assume that their reviews should be positive, which gives such reviews an inherent bias. Therefore, officers and managers should instruct that prospective reviewers make disclosures. When they demand that employees or agents seek reviews from their relatives, the officers or managers should instruct the employees or agents to ask their immediate relatives to make disclosures. The officers and managers should also take remedial steps when they know or should know that resulting insider reviews appeared without a disclosure. The Commission does not expect an officer or manager to scour every review of the business for possible insider reviews appearing without a disclosure. There may be red flags, however, that should cause officers or managers to inquire further. An example that is at least applicable to smaller companies is a review without a disclosure by someone the soliciting officer or manager recognizes as having the same last name as an employee whom the officer or manager told to obtain reviews from relatives. Another example is an employee sending a soliciting officer or manager a link to the resulting review, in which case the officer or manager should take the time to see if that review has a disclosure. By taking ''remedial steps,'' the Commission means that the officer or manager should request that the reviewer delete the review or add a clear and conspicuous disclosure to it.

6. Other Suggestions

Commenters recommended that the Commission adopt a number of additional requirements or prohibitions. An individual commenter said that insider reviews should be banned and that disclosures are insufficient to cure them.[380] One consumer group proposed that (1) ''non-disclosed insider ratings'' should be ''independent and separate violation[s] from deceptive narrative reviews;'' (2) ''symbolic ratings—both independently and when aggregated—should feature a clear and conspicuous disclosure of necessary material connections;'' and (3) ''reviews requiring a disclosure should not be included in a product's aggregate rating without a disclosure.'' [381] Another consumer group suggested the following: (1) § ''465.5(a) and (c) should apply to all employees and board members of a business;'' (2) § 465.5(b) and (c) be extended ''to employees or board members of other companies with a material business relationship with the first business;'' (3) § 465.5(c) should be extended ''to include solicitations or demands of employees of companies with which the business conducts material business;'' (4) § 465.5(c) should prohibit ''any employee or board member of a business to solicit or demand from another employee or board member (or relative of an employee or board member) a consumer review about the business or one of its products or services;'' and (5) ''employees of a business should not be permitted to provide star or numerical reviews that count toward an aggregate or average rating, even if their conflict of interest is otherwise disclosed in an accompanying narrative review.'' [382] Some of these proposals go beyond the scope of this rulemaking. Based on its policy expertise, the Commission declines to make any of these changes at this time. The Commission notes, however, that some may, in certain situations, involve unfair or deceptive acts or practices that violate section 5 of the FTC Act.

F. § 465.6—Company-Controlled Review Websites or Entities

Proposed § 465.6 sought to prohibit a business from representing, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions about a category of businesses, products, or services including the business or one or more of its products or services. Based on the following, the Commission has determined to finalize this provision with two limiting modifications.[383]

A business organization, a retailer, and a review platform submitted comments supporting the intent of proposed § 465.6.[384] For example, the business organization noted that it ''was supportive of a . . . rule aimed at addressing the practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own product.'' [385]

Some commenters argued that, as drafted, the provision was overly broad and would prohibit conduct that was not deceptive or unfair. A business organization said that, as drafted, proposed § 465.6 ''. . . could capture retailers that sell their own house brands'' and ''prevent media companies from operating general review websites that publish reviews by independent critics and consumers about films or television produced by affiliated studios or divisions.'' [386] A consumer

[378] IAB Cmt. at 9.

[379] *Id.* at 10.

[380] Anonymous 3 Cmt.

[381] TINA Cmt. at 6 and 8.

[382] Consumer Reports Cmt. at 7–8.

[383] Two modifications are changing ''Rule'' to ''part'' and, as discussed above, changing ''its products or services'' to ''the products and services it sells.'' *See supra* section IV.B.4. of this document.

[384] Chamber of Commerce Cmt. at 6; Amazon Cmt. at 12; Trustpilot Cmt. at 4–5.

[385] Chamber of Commerce Cmt. at 6.

[386] *Id.*

organization similarly said that, ''as written, . . . [proposed § 465.6] would make it illegal for companies to host any reviews whatsoever so long as some of the reviews touch on a category of business, products, or services the company provides'' and would prohibit ''customer review forums on sites such as Home Depot and Amazon.'' [387] A retailer said that ''the plain text of . . . [proposed § 465.6 would] sweep[ ] in more conduct that is neither deceptive nor unfair—for example, where Company A provides customer reviews authored by others to Company B, without disclosing an ownership relationship.'' [388] A trade association wrote that proposed § 465.6 ''could be applied to prohibit retailers from representing that any consumer reviews or opinions featured on their own websites are independent, even if they are.'' [389] A retailer commented that proposed § 465.6 is ''overly broad and would prohibit a business from using a related entity from [sic] testing or comparing products in good faith and publishing those results, even if the company clearly disclosed that the test or comparison was done by an affiliate.'' [390] A review platform asked in its comment that the Commission clarify that the section would not ''unintentionally lead[ ] to review sites being unable to host reviews of their own company or sector.'' [391] The Commission recognizes and agrees with the above concerns and is making two responsive modifications to narrow final § 465.6 in a way that better reflects the Commission's intent. The Commission is excluding ''consumer reviews'' from the scope of final § 465.6 and changing the prohibition against ''represent[ing]'' to a prohibition against ''materially misrepresent[ing].''

A trade association commented that ''many retailers host product reviews on their online shopping websites and make no direct claims that the reviews are independent'' and asked the Commission to ''make clear that it is permissible for retailers to host product reviews on a site they control and operate.'' [392] Assuming that the commenter is referring to retailers hosting independent consumer reviews on a site they operate or control, then this is permissible under § 465.6. If the retailer's website misrepresents that it provides independent reviews or opinions by experts or organizations, then the retailer could be liable under § 465.6.

Two commenters asked the Commission to adopt a safe harbor provision for disclosures of the relationship between the business and the provider of the purportedly independent reviews or opinions.[393] The Commission's modifications address this request effectively by providing that businesses do not violate § 465.6 if they are not materially misrepresenting independence. The Commission believes that contradictory disclosures cannot cure a false express claim, such as a false express claim of independence. If a false claim of independence is merely implied, whether a disclosure is adequate to cure it will depend on the net impression of the website or advertisement, *i.e.,* whether it materially misrepresents independence even with the disclosure.

A trade association commented that ''[i]t would be helpful to make it clear that . . . § 465.6 only applies to websites or entities whose core service is providing reviews or opinions.'' [394] The term ''core service'' is ambiguous, and it is not clear how one would determine whether it applies to reviews or opinions provided by a given website or other entity. False material claims that a website or entity provides independent reviews or opinions would still be deceptive even if such reviews or opinions are not the website's or entity's core service. The NPRM cited a number of cases in which businesses created purportedly independent seals or badges that they then awarded to their own products; the awarding of such seals or badges was clearly not their core business.[395] The NPRM also cited cases involving purportedly independent review websites, and, although such review websites might have appeared to be a ''core service,'' the true core business was selling the respondent's or defendant's own products.[396] Focusing on the ambiguous term ''core services'' would likely open the door to manipulation and evasion of the prohibition. The commenter further noted that it would also be ''useful to clarify what 'independent reviews or opinions' means.'' [397] In this context, the term ''independent'' merely refers to explicit or implicit claims that reviews or opinions are not coming from a business that offers any of the products or services being reviewed or evaluated.

A business organization commenter suggested that the Commission not finalize § 465.6 because ''the fraudulent nature of reviews on purportedly independent websites would likely be covered by . . . [§§] 465.2 and 465.5 of the . . . Rule.'' [398] Those sections are limited to consumer reviews and consumer or celebrity testimonials and do not apply to reviews, seals, or other opinions by purportedly independent experts, organizations [399] or other entities. Therefore, § 465.6 is not duplicative of either § 465.2 or § 465.5.

G. § 465.7—Review Suppression

Proposed § 465.7 sought to prohibit two different types of consumer review suppression.

1. § 465.7(a)

Proposed § 465.7(a) sought to prohibit anyone from using an unjustified legal threat or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or to cause a consumer review or any portion thereof to be removed. Based on the following, the Commission is finalizing § 465.7(a) with several revisions for the purpose of clarity.[400]

A number of commenters supported the provision.[401] The NPRM asked whether it is ''appropriate that . . . § 465.7(a) focuses on the specific types of listed threats or activities,'' and two

[387] Consumer Reports Cmt. at 9.

[388] Amazon Cmt. at 12. The commenter suggested that the Commission ''clarify the regulatory language to make clear that it covers only reviews authored by the owner company or its agents.'' *Id.* The Commission is not adopting this approach because § 465.6 is not limited to websites with reviews. It also applies to organizations or entities that misrepresent that they provide independent reviews or opinions (*e.g.,* seals) about a category of businesses, products, or services including the business or one or more of the products or services it sells.

[389] NRF Cmt. at 11–12.

[390] Hammacher Schlemmer Cmt. at 5.

[391] Trustpilot Cmt. at 5.

[392] RILA Cmt. at 7.

[393] Hammacher Schlemmer Cmt. at 6–7 (proposing that the Commission adopt § 465.6 with the addition of the following clause: ''unless the business discloses that there is a relationship or affiliation between the business and the website, organization, or entity that it controls, owns, or operates and why the reviews or opinions are 'independent', including the steps that the business takes to ensure objectivity or independence in obtaining such reviews or opinions.'' (emphasis omitted)); Frieling Cmt. at 4.

[394] CCIA Cmt. at 3.

[395] NPRM, 88 FR 49375.

[396] *Id.*

[397] CCIA Cmt. at 3.

[398] Chamber of Commerce Cmt. at 6.

[399] ''Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member.'' Endorsement Guides, 16 CFR 255.4(a).

[400] One modification is changing ''Rule'' to ''part.''

[401] Anonymous 10, Cmt. on NPRM (Aug. 3, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0009;* TT in PA, Cmt. on NPRM (Aug. 9, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0016* (''TT in PA Cmt.''); Kurt Braun, Cmt. on NPRM (Aug. 17, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0026;* Superguest Cmt.; Tripadvisor Cmt. at 5–6; Consumer Reports Cmt. at 9–10; State AGs Cmt. at 2.

business commenters responded that it is.[402] One of the commenters said that ''[t]his narrow approach protects consumers, all while ensuring clarity for businesses and avoiding the pitfall of ambiguity in the . . . Rule.'' [403] However, as already noted above, based on the comments and on the proposed definition for the phrase ''unjustified legal threat,'' the Commission is adopting a definition for the phrase ''unfounded or groundless legal threat,'' instead of a definition of the phrase ''unjustified legal threat,'' as originally proposed.[404]

A trade association commenter noted that '' 'intimidation' means threat of the use of force'' so it ''duplicates 'physical threat' '' and should be deleted.[405] A review platform commenter questioned why the ''proposed text is limited to 'physical threats' '' and said that non-physical threats, such as verbal threats in the form of abusive or coercive language, should not be tolerated and should be acted against.'' [406] A consumer group's comment said that ''[t]he term 'intimidation' seems sufficiently broad to cover most types of threats not otherwise covered by 'legal' or 'physical' threats.'' [407] The Commission disagrees with the first commenter because, in this context, ''intimidation'' means things other than legal or physical threats. Intimidation can include abusive communications, stalking, character assassination, and sexual harassment when those things are used to intimidate, that is to force someone into or deter someone from taking some action by inducing fear.[408]

Three commenters voiced concerns about the fact that proposed § 465.7(a) included ''false accusation[s]'' as a type of conduct that could amount to review suppression. A review platform noted that the determination of whether an accusation is false ''introduces an element of subjectivity,'' and that it would ''be preferable to ground this in a legal basis, such as defamation.'' [409] A trade association wrote that ''a statement by a business about a consumer review or the consumer making a review may sometimes be in order,'' and a prohibition on false accusations should ''allow breathing room for First Amendment free speech concerns, such as requiring a guilty mental state from the maker of an accusation before culpability attaches.'' [410] It recommended adding ''knowing that it is false or with reckless disregard as to its truth or falsity.'' [411] A second trade association asserted that proposed § 465.7(a) was ''not narrowly tailored to serve a compelling state interest because it applies regardless of the magnitude of the alleged error or intent or state of mind of the business that makes the false statement.'' [412] In order to illustrate its point, the second trade association also posited a scenario involving false accusations by a restaurant owner in a private conversation with a disgruntled patron.[413] The owner in the hypothetical did not know the accusations were false and did not act recklessly. In response to these comments, final § 465.7(a) adopts the phrase ''a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity,'' rather than the phrase ''false accusation,'' as originally proposed. This change resolves the commenters' concerns regarding the accuser's state of mind, clarifies the Commission's intent that the provision applies only to public accusations, and provides greater clarity, thereby making compliance less burdensome. In response to the concern about subjectivity, the Commission notes that courts can make objective determinations of whether a given accusation is false. One of these commenters also asserted broadly that § 465.7(a) ''regulates 'pure speech,' not conduct, because it applies to the use of words to convey a message'' and that speech is not commercial speech if it does not propose a commercial transaction.[414] This assertion has no basis in First Amendment law and is an overly limited articulation of what counts as commercial speech. When a business makes a public false accusation in response to a consumer review in an attempt to cause the review to be removed, the speech at issue is clearly commercial speech because it is intended to promote the product, service, or business that was the subject of the negative consumer review.

Two commenters, a review platform and a trade association, said that the provision should be strengthened by also covering attempts to force a consumer review or a portion thereof to be changed or edited.[415] Proposed § 465.7(a) would have prohibited certain acts made in an attempt to, among other things, ''cause a consumer review or any portion thereof to be removed.'' The Commission believes that, in most cases, changing or editing a review would necessarily require removing a portion of it. Accordingly, the Commission is clarifying that final § 465.7 applies to such modifications of reviews by adding ''whether or not that review or a portion thereof is replaced with other content,'' immediately after ''cause a consumer review or any portion thereof to be removed.''

A trade association's comment asked that the ''Rule be clarified to emphasize that it does not prohibit companies from contacting customers who post negative reviews to resolve the reported issues.'' [416] The commenter was concerned that ''sensitive customers could argue that such communication from the Company (no matter how innocuous) amounts to intimidation.'' [417] The Commission does not believe that a company engages in intimidation by merely contacting customers to resolve reported issues or simply asking satisfied customers to update their reviews. Specifying that a consumer's concerns will be addressed only if the consumer changes or removes a truthful negative review may be an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer's products,[418] but that issue is beyond the scope of this rulemaking.

A consumer organization's comment said that, ''[j]ust as businesses may use threats or intimidation to prevent a consumer from leaving a negative review, they may use similar tactics to ensure receipt of a positive review,'' thus concluding that § 465.7(a)'s ''prohibitions . . . should also apply to compelled creation of positive reviews.'' [419] Although compelling the creation of positive reviews through threats or intimidation may be an unfair or deceptive act or practice, the

[402] Transparency Company Cmt. at 14; Family First Life Cmt. at 15.

[403] Family First Life Cmt. at 15.

[404] *See supra* section IV.A.2.l of this document.

[405] NFIB Cmt. at 4.

[406] Trustpilot Cmt. at 17.

[407] Consumer Reports Cmt. at 10.

[408] *See Intimidate* (def. 3), *Dictionary.com,* LLC, *https://www.dictionary.com/browse/intimidate* (last visited July 5, 2024) (establishing that the word ''intimidate'' means, among other things, ''to force into or deter from some action by inducing fear'').

[409] Trustpilot Cmt. at 17.

[410] NFIB Cmt. at 4.

[411] *Id.* at 5.

[412] ANA Cmt. at 10.

[413] *Id.* at 9–10.

[414] *Id.*

[415] Yelp Cmt. at 7; CCIA Cmt. at 4.

[416] NRF Cmt. at 12.

[417] *Id.*

[418] *See* Endorsement Guides, 16 CFR 255.2(d).

[419] Consumer Reports Cmt. at 9. Although it does not involve § 465.7(a), a business urged the Commission to ''deter meritless legal threats by platforms against providers and users of pro-consumer tools.'' Mozilla Cmt. at 6. Such threats are beyond the scope of this rulemaking.

Commission declines to address that practice in this rulemaking at this time.

A dental trade association expressed that, because Federal and State privacy laws prohibit dentists and other health care providers from disclosing patient information, their ability to correct the record when they are themselves a target of deceptive or unfair reviews is limited.[420] The commenter asked the Commission to permit dentists and other health care providers to disclose patient information in response to a review (limited to the scope of the topics addressed in the review) without violating any FTC privacy-based prohibitions.[421] This request is beyond the scope of this rulemaking.

2. § 465.7(b)

Proposed § 465.7(b) sought to prohibit a business from misrepresenting, ''expressly or by implication, that the consumer reviews of one or more of its products or services displayed on its website or platform represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.,* not displayed) based upon their ratings or their negativity.'' Proposed § 465.7(b) enumerated reasons for suppressing reviews that would not be considered suppression based upon their ratings or their negativity, so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review. Proposed § 465.7(b) listed the following valid reasons for review suppression: (1) ''the review contain[ed] . . . [(a)] trade secrets or privileged or confidential commercial or financial information, . . . [(b)] libelous, harassing, abusive, obscene, vulgar, or sexually explicit content, . . . [(c)] the personal information or likeness of another person, . . . [(d)] content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class, or . . . [(e)] content that is clearly false or misleading;'' (2) ''the seller reasonably believe[d] the review is fake;'' or (3) ''the review is wholly unrelated to the products or services offered by or available at the website or platform.'' Based on the following, the Commission has determined to finalize this prohibition with some modifications.[422]

Multiple commenters said that the practice of product sellers suppressing less favorable reviews was problematic. One individual commenter said they were ''[d]isgusted by businesses who[ ] filter/have control over their . . . reviews.'' [423] Another individual commenter stated that ''[t]he removal of reviews that are critical, but accurate of the service or good creates an illusion and ultimately, defrauds the consumer of their choice,'' but also worried about how ''the FTC [will] catch companies that delete negative reviews.'' [424] A third individual commenter said that the ''Rule should prohibit businesses from suppressing . . . honest negative reviews.'' [425] A fourth individual commenter wrote that ''[b]usiness should be barred from misrepresenting reviews on their websites and from suppressing negative reviews.'' [426] The State Attorneys General said that, when ''a merchant . . . only posts positive consumer reviews on its website, instead of both favorable and negative reviews, [it] can potentially mislead consumers into believing that such reviews represent most or all of the reviews submitted to the merchant's website.'' [427] A retailer wrote that it ''support[s] the goals of section 465.7[(b)], which prohibits sellers from suppressing customer reviews based on their negativity'' and ''believe[s] that it is critically important that customers not be deprived of useful, negative feedback when deciding whether to purchase a product.'' [428]

The NPRM asked whether ''it [is] appropriate that proposed § 465.7(b) is limited to circumstances in which reviews are being suppressed based on rating or negativity,'' and a business commenter agreed that it was.[429]

A trade association commenter said ''that the Commission has . . . failed to satisfy the requirement that the specific unfair or deceptive acts or practices identified in the rule be prevalent.'' [430] According to the commenter, ''The rulemaking record cites only one case, one closing letter, and one comment in support of the Commission's conclusion that review suppression is prevalent.'' [431] The commenter understates the significance of the evidence that the Commission considered in finding that the suppression of reviews based upon their rating or sentiment is prevalent. The closing letter to Yotpo, a company that provided review management services, is significant because the investigation revealed that more than 4,500 Yotpo merchant clients were automatically publishing only 4- or 5-star reviews and that most 1-star reviews and 2-star reviews submitted to those merchants were suppressed.[432] The investigation of Yotpo shows that there was widespread suppression of negative reviews. The Commission thus has a strong basis for its conclusion that the suppression of negative reviews on retailer or business websites is prevalent.

A review platform's comment suggested changing ''based upon their ratings or their negativity'' to ''based upon their ratings or their sentiment'' because ''reviews can be difficult to categorize as wholly 'negative' or 'positive.' '' [433] The Commission intended for the phrase ''based upon their ratings or their negativity'' to refer to the suppression of reviews based on their ratings or their sentiment. However, in light of the comment, the Commission now realizes that the use of the word ''negativity'' in this context could be subject to misinterpretation and be construed to imply that a review must be wholly negative for its suppression to be problematic. Accordingly, the Commission is clarifying its original intent by changing ''their negativity'' to ''their negative sentiment.'' The commenter also said that ''consumer harm may result if someone suppresses a review, regardless of the sentiment expressed in the review.'' [434] The Commission is not expanding the rule to address other types of review suppression not based on ratings or negative sentiment. There are numerous legitimate reasons for suppressing consumer reviews, including those listed in § 465.7(b)(1), (2), and (3). Furthermore, such an expansion would be beyond the scope of the rulemaking.

A trade association's comment requested that the Commission ''carve out the use of reviews in marketing materials'' because the provision ''could effectively prohibit retailers from highlighting any customer reviews in advertising—even though customers understand that advertising normally highlights particularly positive

[420] ADA Cmt. at 1.

[421] *Id.* at 1–2.

[422] One modification, discussed above, is changing ''its products or services'' to ''the products and services it sells.'' *See supra* section IV.B.4. of this document. Another modification discussed above is changing ''person'' to ''individual.'' *See supra* section IV.A.2.b of this document. As it has done elsewhere in the rule, the Commission is limiting the misrepresentations prohibited to ''material'' misrepresentations. Nonetheless, in the context of § 465.7(b), the Commission believes that all such misrepresentations would likely always be material.

[423] Hippensteel Cmt.

[424] Superguest Cmt.

[425] Ravnitzky Cmt. at 2.

[426] TT in PA Cmt.

[427] State AGs Cmt. at 3.

[428] Amazon Cmt. at 12.

[429] Transparency Company Cmt. at 14.

[430] IAB Cmt. at 11.

[431] *Id.*

[432] NPRM, 88 FR 49376.

[433] Yelp Cmt. at 7–8.

[434] *Id.*

reviews.'' [435] The Commission did not intend for proposed § 465.7(b) to cover the use of consumer reviews in marketing materials. Specifically, proposed § 465.7(b) was only intended to cover misrepresentations about the body of reviews in a ''reviews'' section of a website or platform—that is, a portion of a website or platform dedicated in whole or in part to receiving and displaying consumer reviews—and not misrepresentations about whether a highlighted review is ''representative.'' The Commission is clarifying this by changing ''displayed on its website or platform'' to ''displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews.'' The Commission notes however, that the use of non-representative consumer reviews in marketing could be deceptive in violation of section 5 of the FTC Act.[436]

A trade association asked that the Commission ''clarify what it means for a review to be ''suppressed (*i.e.,* not displayed).'' [437] The trade association said that ''[m]any businesses that operate websites that display consumer reviews will organize those reviews in reasonable ways to help consumers navigate what might be a large corpus of varying consumer commentary'' and that, ''[i]f a business takes reasonable steps to organize their reviews, those reviews should not be considered 'suppressed.' '' [438] The Commission agrees that organizing reviews does not qualify as suppressing reviews. The Commission notes, however, that organizing reviews in a way that makes it difficult for consumers to know about or find negative reviews could be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. The commenter also asked that the Commission change ''not displayed'' to ''not displayed or accessible.'' [439] The Commission is instead clarifying its original intent by changing ''not displayed'' to ''not displayable,'' so that the provision only covers reviews that consumers will be unable to view even if they were to sort or filter the reviews differently. Another trade association's comment said that ''the Rule should explicitly allow retailers to sort reviews by objective measures unrelated to the positivity of the review, where the sorting method is disclosed.'' [440] As modified, § 465.7(b) does not prohibit the sorting or organization of reviews, so the proposed modification is unnecessary.

Four industry commenters argued that there are legitimate reasons for suppressing consumer reviews beyond those listed in proposed § 465.7(b).[441] One of these commenters, a retailer, gave examples of other legitimate reasons for suppressing a review: ''describing violence, encouraging illegal activities or misuse of the product, incorporating hyperlinks that could jeopardize customer online safety, or using a language not supported by the website.'' [442] Three of the industry commenters said that, by limiting review suppression to the listed reasons, the provision violated the First Amendment and section 230 of the Communications Decency Act,[443] and all four asked the Commission to clarify that the listed reasons are not exhaustive.[444] The Commission agrees that there are legitimate reasons for suppressing reviews beyond those listed and is clarifying that the listed criteria for review suppression are non-exhaustive examples.

Proposed § 465.7(b) provided that suppression was not violative ''so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review.'' The Commission is clarifying that the criteria must be applied to all reviews equally. Additionally, to be consistent with the above clarification regarding sentiment, the Commission is changing ''without regard to the favorability of the review'' to ''without regard to sentiment.''

An individual commenter asked whether a company could ''have a policy of not posting reviews that mention other products'' or suppress a review that is ''patently false (wrong company, wrong product, wrong location, *etc.*).'' [445] As long as the policy is applied to all reviews equally, those could be legitimate reasons for suppressing reviews.

A trade association commented that one of the listed, acceptable reasons for suppressing reviews is too limited. Specifically, it said that ''libelous'' reviews would not cover reviews with an oral component that were ''slanderous,'' and it thus recommended using the word ''defamatory.'' [446] The Commission intended to cover all defamatory consumer reviews, not just written ones, and the Commission is making that clarification.

Another one of the listed, acceptable reasons for suppressing reviews was that ''the seller reasonably believes the review is fake.'' A review platform commented that it is important that this criteria ''cannot be used by a business to seek to censor consumer reviews based on a valid experience'' and said that, without information about the reviewer, the reviewer's location, and the reviewer's other reviews, ''it can be difficult to accurately identify fake reviews.'' [447] One individual commenter wrote that this ''is overbroad and gives sellers leeway to suppress reviews at their discretion so long as they claim a belief that said reviews were fake.'' [448] The commenter recommended ''revising this provision to add specificity and identify the parameters of what a fake review looks like.'' [449] A seller does not risk liability if the suppression occurs for a reason other than the review's rating or negative sentiment. The provision's phrase ''such as'' recognizes that it is proper to suppress reviews for legitimate reasons. For this specific enumerated exception, ''the seller [only needs to] reasonabl[y] believe[ ] the review . . . [to be] fake.'' Thus, if there are indicia that would lead a reasonable person to believe that the review is fake, the seller would meet this exception.

A different, listed acceptable reason for suppressing reviews was ''content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class.'' The Commission is changing ''protected class'' to ''intrinsic characteristic'' in order to more closely echo the language in the CRFA on which the reason is based.[450]

[435] NRF Cmt. at 12.

[436] An individual commenter said it would be helpful to have rule language ''around a business being allowed to highlight specific testimonial reviews on their website as long as there is a disclaimer or prominent indication that the page does not represent all reviews for the business.'' Anonymous 3 Cmt. The rule does not prohibit such ''highlighting'' of specific reviews or testimonials, but the creation of a safe harbor for such highlighting is beyond the scope of the rule. In addition, the Commission believes that the wording of the proposed disclosure is likely inadequate.

[437] IAB Cmt. at 11.

[438] *Id.* at 11–12.

[439] *Id.* at 12.

[440] NRF Cmt. at 13.

[441] IAB Cmt. at 11; Technet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 13.

[442] Amazon Cmt. at 12. A different commenter gave the example of a snowstorm ''obstruct[ing] the delivery of a package to a buyer who could claim failure to deliver on time.'' TechNet Cmt. at 3. The Commission does not agree that this is a legitimate reason for suppressing consumer reviews.

[443] IAB Cmt. at 12; Amazon Cmt. at 12; NRF Cmt. at 13.

[444] IAB Cmt. at 11; TechNet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 12–13.

[445] Anonymous 4 Cmt.

[446] NFIB Cmt. at 5.

[447] Trustpilot Cmt. at 18.

[448] Madeline D'Entrmont, Cmt. on NPRM at 1 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0064.*

[449] *Id.*

[450] *See* Consumer Review Fairness Act of 2016 § 2(b)(2)(C)(i), 15 U.S.C. 45b(b)(2)(C)(i).

A trade association noted that the ''FTC should not prohibit sellers from excluding reviews that solely discuss service experience and do not include comments on the product.'' [451] The rule as clarified does not prohibit suppressing reviews that solely discuss customer service as long as the criteria is applied equally to all reviews. The Commission notes, however, that it has expressed the view that suppressing customer reviews about a ''particular seller's customer service, delivery, returns, and exchanges'' can be deceptive in violation of section 5 of the FTC Act.[452]

A consumer organization expressed concern that proposed § 465.7(b) ''allows businesses to suppress reviews when they contain 'harassing,' 'abusive,' or 'obscene' content, which are highly subjective terms likely to be interpreted broadly by businesses that have a clear interest in suppressing reviews that may harm their public perception.'' [453] The commenter suggested that, ''to preserve the public benefit of reviews that contain instances of objectionable content,'' the Commission could ''allow businesses to redact such content but require them to leave the remainder of the review along with any corresponding score or numerical rating available for public consumption.'' [454] Appropriate redaction of portions of consumer reviews may be difficult or infeasible in some instances. The Commission declines to impose such a requirement at this time.

The State Attorneys General asked in their comment that the Commission ''delete[ ] the phrase 'based upon their ratings or their negativity' at the end of the first sentence.'' [455] The State Attorneys General's reasoning for this request was that the language is unnecessarily limiting and superfluous'' because ''a company seeking to suppress negative reviews could potentially succeed by offering reasons that are proxies for negativity'' and ''any legitimate suppression should already be sufficiently covered by the robust carve-outs set forth in § 465.7(b)(1).'' [456] The Commission declines to make that change, as the enumerated ''carve-outs'' do not exhaustively identify every legitimate reason for suppressing reviews.

A business organization asserted that proposed § 465.7(b) ''implies a 'gross feedback score' must be disclosed along with the 'net feedback score,' which is the actual number of reviews viewable to a user.'' [457] The commenter is incorrect, as § 465.7(b) contains no such disclosure requirements.

An individual commenter expressed concern as to how the FTC will ''catch companies that delete negative reviews'' and suggested offering rewards ''for individuals or organizations to help address'' the problem.[458] The Commission will use the investigative and law enforcement tools at its disposal to identify bad actors who suppress reviews.

In connection with proposed § 465.7(b), several commenters recommended that the Commission impose additional consumer review-related requirements. An individual commenter asked the Commission to ''require businesses to display consumer reviews in a fair and transparent manner, such as by allowing consumers to choose how they want to sort or filter reviews, and by disclosing any criteria or algorithm that they use to rank or highlight reviews.'' [459] Another individual commenter said that ''companies . . . should be required to maintain and periodically disclose records of review suppression,'' which would, at a minimum, ''contain the number of reviews suppressed at each rating level and an associated justification.'' [460] A review platform recommended the Commission expand the scope of the rule to (1) prevent reviews from ''being misquoted and manipulated via quoting select parts of reviews,'' and (2) require that the criteria on which consumer reviews are selected for showcasing (*e.g.,* on a website carousel) be made clear.[461] A consumer organization commented that consumers should be able to assume that the reviews that they see on a business's website are representative of the reviews the business receives, and if ''a business wishes to curate reviews, the business should have the burden to transparently communicate the fact and nature of the curation to consumers.'' [462] One individual commenter asked that the proposed rule be ''extended to include penalties for Pay-to-Play platforms that engage in practices such as manipulating ratings and suppressing negative reviews for businesses that advertise on their websites,'' [463] and another commenter thought the rule should cover ''companies that profit from shaming businesses by posting negative reviews while unilaterally determining positive reviews are 'unverified'—effectively holding any positive sentiment back until the business subscribes to the platform.'' [464] Some of these proposed requirements are beyond the scope of this rulemaking, although some of the acts and practices described may be deceptive or unfair in violation of section 5 of the FTC Act. For example, misquoting reviews can be deceptive [465] and showcasing or curating reviews might deceptively represent that the reviews presented are representative or typical of the reviews received. Based on its policy expertise, the Commission declines to address any of these practices in this rulemaking at this time.

H. § 465.8—Misuse of Fake Indicators of Social Media Influence

Proposed § 465.8(a) sought to prohibit anyone from selling or distributing fake indicators of social media influence that can be used by persons or businesses to misrepresent their influence or importance for a commercial purpose. Proposed § 465.8(b) sought to prohibit anyone from purchasing or procuring fake indicators of social media influence to misrepresent their influence or importance for a commercial purpose. Based on the following, the Commission has determined to finalize these prohibitions with certain modifications.[466]

Several commenters raised concerns about the meaning of the term ''fake'' in the context of indicators of social media influence. A trade association asked, ''Does 'fake' only mean that the likes and followers were created by bots or through fake accounts? If a social media influencer were to recommend that their followers also follow another business' social media account, would that also be 'procuring' of 'fake' indicators of social media influence? . . . If the FTC means to capture a specific category of 'likes,' 'follows,' or other metrics that do not reflect any real opinions, findings, or experiences with the marketer or its products or services, it should make that

[451] RILA Cmt. at 4.

[452] Endorsement Guides, 16 CFR 255.2(e)(8)(ii).

[453] Consumer Reports Cmt. at 10.

[454] *Id.*

[455] State AGs Cmt. at 4.

[456] *Id.*

[457] TechNet Cmt. at 3.

[458] Superguest Cmt.

[459] Ravnitzky Cmt. at 2.

[460] Rob Levy, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0057.*

[461] Trustpilot Cmt. at 18.

[462] Consumer Reports Cmt. at 11.

[463] Anonymous 11, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0022.*

[464] Anonymous 4 Cmt.

[465] Endorsement Guides, 16 CFR 255.0(g)(1) and 255.1(b).

[466] One modification is changing ''Rule'' to ''part.'' Another modification, discussed above, is changing ''persons'' to ''individuals.'' *See supra* section IV.A.2.b of this document.

intention more clear.'' [467] A retailer asked for ''confirmation . . . that this provision would not apply where companies award legitimate indicators of influence to certain users upon satisfaction of objective criteria, even if those individuals are later discovered to have circumvented or abused those criteria.'' [468] A second trade association said that, ''[w]hen . . . indicators are awarded based on legitimate criteria, they serve this informative and non-deceptive purpose'' and the ''innovative companies that develop these indicators of influence should not be punished if bad actors try to abuse the processes,'' so the Commission ''should . . . clarify that this section applies to true 'fake' indicators of social media influence.'' [469] In response to these comments, the Commission is clarifying what it intended as ''fake indicators of social media influence.'' For this purpose, the final rule includes a definition of the phrase ''fake indicators of social media influence'' in § 465.1(h), which defines the phrase as indicators of social media influence derived from bots, purported individual accounts not associated with a real individual, accounts created with a real individual's personal information without their consent, hijacked accounts, or that otherwise do not reflect a real individual's or entity's activities, opinions, findings, or experiences. If a social media influencer were to recommend that their followers also follow another social media account, any resulting followers of the second account would not be ''fake.'' If a company awards legitimate indicators of influence to certain users upon satisfaction of objective criteria reflecting the influence of the users, the company would not be selling ''fake'' indicators, even if bad actors were able to deceive the company.

Three commenters addressed the section's lack of a knowledge requirement. A retailer commenter wrote that ''a business could be in violation of this provision even if it innocently sold or procured a fake indicator, without knowledge or any indication that the indicator was fake,'' which it said ''is patently unreasonable.'' [470] A second retailer similarly ''recommend[ed] that the rule be revised so that it only applies when the seller/buyer knows the indicators are fake.'' [471] A trade association suggested ''revising this section to additionally require that the seller or purchaser act 'with knowledge that the indicators of influence are fake.' '' [472] The Commission recognizes that someone could think that they were paying for a promotional campaign to increase their followers but, unbeknownst to the purchaser, the entity offering the campaign was lying and just providing fake followers. It is also possible that a company might bestow a legitimate indicator of social media influence, like a seal, that the company does not know is based upon or derived from fake indicators of social media influence. The Commission is therefore narrowing the provision by adding ''that they knew or should have known to be fake'' to both § 465.8(a) and (b).

A trade association's comment asserted that ''the Commission failed to meet the prevalence requirement'' because ''the evidence the Commission . . . cited in the NPRM . . . all relate[s] to the use of actual 'fake' indicators of influence that the seller or purchaser knew were fake.'' [473] The Commission believes that, with the addition of the definition of ''fake indicators'' and the knowledge requirement, it has sufficiently addressed the commenter's concerns.

A trade association expressed concern that the provision would ''hold[ ] retailers vicariously liable for the actions of independent endorsers,'' that is, the influencers and other endorsers that they hire.[474] That was not the Commission's intention. The distribution of fake indicators of social media influence was intended to mean the distribution *to* individuals or businesses who could use the indicators to misrepresent their influence, not causing the dissemination of social media by users of such fake indicators, *e.g.,* by hiring influencers who happen to have fake followers. The Commission is clarifying this intent by adding a definition of ''distribute fake indicators of social media influence'' in § 465.1(g).

Although no commenter specifically raised the issue in the context of § 465.8, the Commission is adding the concept of materiality to both § 465.8(a) and (b) in terms of the scope of misrepresentations covered therein, so as to be consistent with other parts of the rule.

A consumer organization said in its comment that the Commission ''should clarify that 'procure' '' in § 465.8(b) ''includes the creation of automated bot or other fake accounts that 'follow' or 'subscribe' to an account, artificially inflating the popularity of that account.'' [475] The Commission declines to make this change. It is not the creation of the bot or fake account, itself, that the rule makes illegal, but the use of the bot or fake account to follow another user, watch another user's videos, or create other fake indicia of social media influence. The same commenter said the Commission should ''remove the word 'fake' from the Rule to clarify that it covers the purchase or procurement of any social media engagement . . . from both real and fake accounts unless those incentives can be disclosed to people who can view the engagement.'' [476] The use of incentivized indicia of social media influence is not necessarily deceptive in all cases, and it is beyond the scope of this rulemaking.

Finally, a trade association and a retailer suggested changing the prohibition in § 465.8(a) from selling or distributing fake indicators that ''can be used'' by persons to misrepresent their influence to those that ''are used'' by persons to misrepresent their influence.[477] The trade association said that ''[a]pplying this section to indicators of social media influence that 'can be' used for this purpose, but are not, would mean that the rule prohibits conduct that is not deceptive.'' [478] Such fake indicators are not physical products that people collect and then use later as desired. Instead, their existence is premised on and limited to situations in which they appear deceptively on a social media site. Therefore, any person or business that obtains fake indicators of social media influence is misrepresenting their social media influence. While some individuals may not be doing so for a commercial purpose, those individuals are excluded from the rule's scope. Further, a person or entity that is in the business of selling or distributing fake indicia of social media influence is engaging in commerce, and it is unreasonable to posit that no buyers would use such indicia to misrepresent their social media influence for a commercial purpose. The Commission therefore declines to make the suggested modification.

I. § 465.9—Severability

Proposed § 465.9 provided that the provisions of the rule are separate and severable from one another and that, if any provision is stayed or determined to

[467] ANA Cmt. at 17–18.

[468] Amazon Cmt. at 13.

[469] IAB Cmt. at 13.

[470] Hammacher and Schlemmer Cmt. at 7.

[471] Amazon Cmt. at 13.

[472] IAB Cmt. at 13.

[473] *Id.* at 12.

[474] NRF Cmt. at 13.

[475] Consumer Reports Cmt. at 11.

[476] *Id.*

[477] IAB Cmt. at 13; Amazon Cmt. at 13.

[478] IAB Cmt. at 13.

be invalid, the remaining provisions shall continue in effect. The Commission did not receive any comments regarding proposed § 465.9. The Commission is changing ''shall continue in effect'' to ''will continue in effect'' which is more precise. With that clarification, the Commission is finalizing § 465.9.

V. Final Rule

For the reasons described above, the Commission has determined to adopt the provisions of §§ 465.1, 465.2, and 465.4 through 465.9 with clarifying or limiting modifications. The Commission declines to finalize proposed § 465.3 regarding consumer review or testimonial reuse or repurposing.

VI. Final Regulatory Analysis Under Section 22 of the FTC Act

Under section 22 of the FTC Act, the Commission, when it promulgates any final rule for a ''rule'' as defined in section 22(a)(1), must include a ''final regulatory analysis.'' 15 U.S.C. 57b–3(b)(2). The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. 15 U.S.C. 57b–3(b)(2)(A)–(E).

The Commission received several comments that included elements that the Commission identified as specifically in response to the preliminary regulatory analysis. Two trade associations asserted that compliance costs would be higher than estimated by the Commission. These associations stated that the risk of statutory penalties would lead many of their members to engage in compliance activities beyond those assumed for the high-cost compliance scenario in the NPRM.[479] In the preliminary regulatory analysis, the high-cost compliance scenario assumed an average compliance burden of 8 hours of attorney time for firms with greater than 500 employees. This average is consistent with some firms, especially the largest ones in industries more reliant on reviews and testimonials, choosing to make more extensive improvements to their compliance programs. In addition, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this document. For these reasons, the Commission continues to believe the high-cost scenario likely overestimates compliance costs, and chooses to not modify its estimate of possible compliance costs for that scenario, but it does present a sensitivity analysis below that assesses what effect systematic underestimation of compliance costs would have on the rule's net benefits to the public.

One individual commenter asserted that the benefits the Commission estimated in the NPRM did not justify the estimated compliance costs because the same results could be obtained using the FTC's existing section 5 authority.[480] As explained in detail in this final regulatory analysis, the Commission believes that the final rule will increase deterrence of unfair or deceptive acts or practices involving consumer reviews and testimonials relative to relying on its existing authority and that the net benefits of the rule justify its promulgation.

A second individual commenter claimed that it was unreasonable to assume that the rule would eliminate the entire loss to consumers, in terms of choosing products optimally, from the impact of bad information in false reviews. The commenter asserted that deterrence would be only partial because some circumstances would make it difficult to identify such reviews.[481] The Commission believes that its estimate of the benefits of *reducing* manipulated reviews is appropriate, as discussed further below. However, the Commission presents additional sensitivity analysis below that assesses the effect of systematic overestimation of the degree to which the rule would fix review manipulation, and determines that, even conceding that point, the quantified net benefits are highly positive.

Finally, a business offering third-party review fraud detection tools offered research that it claimed showed that the rule would generate benefits of $180.83 billion and that the benefits would outweigh the costs 100:1.[482] These estimates are similar to those of the Commission.

A. Need for, and Objectives of the Final Rule

The Commission believes that the final rule will substantially improve its ability to combat certain specified, clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Although such unfair or deceptive acts or practices are already unlawful under section 5 of the FTC Act, the rule will increase deterrence of such conduct by allowing courts to impose civil penalties against the violators. In addition, the final rule will allow the Commission to seek court orders requiring violators to compensate consumers for the harms caused by their unlawful conduct. The Commission believes that the rule will accomplish these goals without significantly burdening honest businesses and that the rule will provide significant benefits to consumers and honest competitors.

The final rule will allow courts to impose civil penalties under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), against those who engage in the deceptive or unfair conduct that the final rule prohibits. The ability to obtain civil penalties is important because it can be difficult to quantify consumer losses that stem from the use of unfair or deceptive consumer reviews and testimonials. Without civil penalties, persons who engage in such conduct might avoid monetary consequences for their unlawful conduct simply because there is insufficient evidence to link their unlawful conduct to quantifiable losses suffered by consumers. And if there are no monetary consequences, potential wrongdoers have little incentive to refrain from engaging in unlawful practices. Because the final rule will allow courts to impose civil penalties for violations, it provides the deterrence necessary to incentivize compliance with the law, even in cases where it is difficult to quantify consumer harm.

In addition, the final rule is necessary to allow the Commission to recover redress more efficiently to redress consumer harm resulting from the unfair or deceptive use of reviews or testimonials. In 2021, the U.S. Supreme Court in *AMG Capital Management, LLC*

[479] NRF Cmt. at 2–3, 13–14; IAB Cmt. at 5, 15. IAB also raised this issue in the context of the informal hearing discussed above in section I of this document. *See, e.g., Petition by Interactive Advertising Bureau to Designate Disputed Issues of Material Fact* (Feb. 12, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabpetition20240212.pdf.* As noted above, the presiding officer at that hearing found that IAB had not shown that compliance costs would be more than minimal.

[480] Camp-Martin Cmt. at 2–3.

[481] Slezak Cmt. at 3.

[482] Transparency Company Cmt. at 6–9.

v. *FTC*[483] ruled that section 13(b) of the FTC Act[484] did not authorize the Commission to seek court orders requiring wrongdoers to return money unlawfully taken from consumers through unfair or deceptive acts or practices or give up the unjust gains they earned from engaging in such unlawful conduct. The *AMG* ruling has made it significantly more difficult for the Commission to return money to injured consumers, particularly in cases that do not involve rule violations.[485]

Since *AMG,* the primary means for the Commission to return money unlawfully taken from consumers is section 19 of the FTC Act, 15 U.S.C. 57b, which provides two paths for consumer redress. The longer path, under section 19(a)(2), typically requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal to a Federal court of appeals. After the conclusion of the administrative proceeding (and any appeal), the Commission must initiate an action in Federal court to obtain monetary relief under section 19 and, in that action, the Commission must prove that the violator engaged in objectively fraudulent or dishonest conduct.[486] In effect, the section 19(a)(2) pathway requires the Commission to file two separate actions to obtain monetary relief.

The more efficient path to monetary relief is under section 19(a)(1), which allows the Commission to recover redress in one Federal court action for violations of a Commission rule relating to unfair or deceptive acts or practices.[487] Only a small portion of the Commission's past cases challenging unfair or deceptive consumer reviews or testimonials involved rule violations that would allow the Commission to seek monetary relief under section 19(a)(1). With the final rule, however, the Commission will be able to use section 19(a)(1) to obtain redress for consumer losses attributable to violations of the rule.

Overall, outlawing egregious review and testimonial practices in the final rule expands the Commission's enforcement toolkit and allows it to deliver on its mission by stopping and deterring harmful conduct and, in some cases, making American consumers whole when they have been harmed. The unfair or deceptive acts or practices involving reviews and testimonials encompassed by this final rule are prevalent and harmful to consumers and honest businesses. Thus, the unlocking of additional remedies through this rulemaking—particularly, the ability to obtain civil penalties against violators and redress for consumers or others injured by the conduct—will allow the Commission to more effectively police and deter harmful review and testimonial practices that plague consumers and honest businesses.

B. Anticipated Costs and Benefits of the Final Rule

As discussed below, the Commission has determined that the rule's benefits greatly outweigh its costs. The rule promotes accuracy in reviews and testimonials by prohibiting certain unfair or deceptive acts or practices involving reviews and testimonials. Thus, this rule will help the vast majority of American consumers who rely on such reviews and testimonials to make better-informed purchase decisions. The rule prohibits (1) the creation, sale, purchasing, or procurement from insiders of fake or false reviews, and (2) buying of reviews conditioned on the reviews expressing particular sentiments. It also includes prohibitions on fake or false consumer or celebrity testimonials, certain insider reviews without adequate disclosures, misleading company-controlled review websites or entities, certain review suppression practices, and the misuse of fake indicators of social media influence.

In the analysis below, the Commission describes the anticipated impact of the rule. Where possible, the Commission quantifies the benefits and costs. If a benefit or cost is quantified, the Commission indicates the sources of the data relied upon. If an assumption is needed, the analysis makes clear which quantities are being assumed. The Commission measures the benefits and costs of the rule against a baseline in which no rule has been promulgated by the Commission. For the remainder of section VI, and in the interest of brevity, the term ''reviews'' collectively refers to both reviews and testimonials.

Quantifiable benefits stem from consumer welfare improvements and consumer time savings. With the rule, reviews will be more accurate overall, leading consumers to purchase higher-quality products or products that are better-matched to their preferences. The rule will also lead to more trustworthy aggregate review ratings (*e.g.,* star ratings), leading some consumers to spend less time scrutinizing reviews to determine their validity. Quantifiable costs primarily reflect the resources spent by businesses to review the rule and to take any preemptive or remedial steps to comply with its provisions. Because the rule is an application of preexisting law under section 5 of the FTC Act, the Commission expects these compliance costs to be minimal.

A period of ten years is used in the baseline scenario because FTC rules are subject to review every ten years.[488] Quantifiable aggregate benefits and costs are summarized as the net present value over this ten-year period in Table 1.1. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor raised to the power of the number of years in the future the net benefit accrues.

[483] 141 S. Ct. at 1352.

[484] 15 U.S.C. 53(b).

[485] *See* ANPR, 87 FR at 67425, 67425 n.1 (discussing *AMG Cap. Mgmt.*).

[486] *See* 15 U.S.C. 57b(a)(2) (''If the Commission satisfies the court that the act or practice to which the cease-and-desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief.'').

[487] Certain statutes, such as the Restore Online Shoppers' Confidence Act, 15 U.S.C. 8401–05, include provisions that treat violations of the statute as a violation of a rule for purposes of section 19(a)(1). *See* 15 U.S.C. 8404(a).

[488] Fed. Trade Comm'n, Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 FR 41150, 41150 (July 13, 2011), *https://www.govinfo.gov/content/pkg/FR-2011-07-13/pdf/2011-17513.pdf* (''all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review.'')

TABLE 1.1—PRESENT VALUE OF NET BENEFITS

[2024–2033 (in billions)]

	Present value: low-end estimate	Present value: high-end estimate
Total Benefits:		
3% Discount Rate	$67.40	$269.55
7% Discount Rate	57.03	230.44
Total One-Time Costs	0.87	0.00
Net Benefits:		
3% Discount Rate	66.53	269.55
7% Discount Rate	56.16	230.44

1. Estimated Benefits of the Final Rule

This section describes the beneficial impact of the rule, provides quantitative estimates where possible, and describes benefits that are only assessed qualitatively. The quantifiable estimates reflect benefits stemming from the decrease in online review manipulation on third-party platforms or company websites, which covers most of the prohibitions contained in the rule. This analysis does not calculate benefits from the other aspects of the rule—that is, the prohibitions on fake or false celebrity testimonials, company-controlled entities that deceptively purported to provide independent opinions, review suppression, and the misuse of fake indicators of social media influence—because of the limited quantitative research in these areas. Some of these benefits are likely to be substantial. The quantified benefits are presented by benefit category, rather than stemming from a specific provision of the rule, because the relevant provisions have the same end goal—that is, to improve the information available to consumers by reducing the level of review manipulation. Therefore, it is difficult to disentangle the benefits stemming from each provision.

Existing academic literature in economics, marketing, computer science, and other fields documents the importance of online reviews; specifically that the number of online reviews and aggregate ratings are extremely important for consumer purchase decisions. It is widely documented that the presence of online reviews improves consumer welfare via reductions in both search costs and the level of information asymmetry that exists prior to purchase.[489]

When making purchase decisions, consumers typically have incomplete information on product quality and attributes. Searching for additional information is costly. Consumers incur costs—including time and effort costs—to seek, evaluate, and integrate incoming information. Online platforms where past users share information about their experiences can significantly lower search costs.

Researchers have also demonstrated that consumer reviews create value for consumers beyond a reduction in search costs. Consumers are better able to learn of a product's quality and attributes when there is free-flowing, non-manipulated commentary from past consumers. Consumer reviews lead to ''better'' decisions by increasing the level of information available prior to purchase and reducing uncertainty. By the same token, the academic literature also documents that manipulated or fake reviews lead to reductions in consumer welfare by leading consumers to buy low-quality products or otherwise make suboptimal purchase decisions.[490]

A secondary benefit is deterrence of the specified review practices. The rule is essentially the only means for imposing civil penalties in most cases involving such practices. Civil penalties are not available for conduct that violates section 5(a)'s prohibition on unfair or deceptive acts or practices—rather, a violation of an FTC rule is necessary to impose civil penalties under section 5(m)(1)(a). Civil penalties act as a deterrent to fraud and deception in connection with reviews.[491]

To obtain redress without alleging a rule violation, the Commission must typically first determine in an administrative proceeding that the respondent violated the FTC Act, successfully defend that determination in any appeal to a Federal court of appeals, and then initiate a second action in Federal district court under section 19(a)(2) in which the Commission must prove that the conduct at issue is ''one which a reasonable man would have known under the circumstances was dishonest or fraudulent.'' [492] Although these requirements are likely to be satisfied in cases involving the conduct covered by

[489] *See, e.g.,* Dina Mayzlin, *Promotional Chat on the Internet,* 25(2) Mktg. Sci., 155–63 (2006).

[490] *See, e.g.,* Chrysanthos Dellarocas, *Strategic Manipulation of Internet Opinion Forums: Implications for Consumers and Firms,* 52(10) Mgmt. Sci., 1577–93 (2006), *https://www.jstor.org/stable/pdf/20110630.pdf;* Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database,* 122(563) Econ. J., 957–89 (2012); Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud,* 62(12) Mgmt. Sci., 3412–27 (2016), *https://dash.harvard.edu/handle/1/22836596;* Jonathan Zinman & Eric Zitzewitz, *Wintertime for Deceptive Advertising?,* 8(1) Am. Econ. J. Applied, 177–92 (2016), *https://www.aeaweb.org/articles?id=10.1257/app.20130346;* Imke Reiners & Joel Waldfogel, *Digitization and Pre-purchase Information: The Causal and Welfare Impacts of Reviews and Crowd Ratings,* 111(6) Am. Econ. Rev., 1944–71 (2021), *https://www.aeaweb.org/articles?id=10.1257/aer.20200153.*

[491] In October 2021, the Commission authorized a Notice of Penalty Offenses concerning endorsement practices that the FTC determined to be unfair or deceptive in prior administrative cases, including falsely claiming an endorsement by a third party; misrepresenting whether an endorser is an actual, current, or recent user; and failing to disclose an unexpected material connection with an endorser. *See, e.g.,* Press Release, Fed. Trade Comm'n, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements* (Oct. 13, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements.* The notice allows the agency to seek civil penalties pursuant to section 5(m)(1)(B) of the FTC Act against a company that received the notice and then engages in conduct that the Commission previously determined to be unfair or deceptive. 15 U.S.C. 45(m)(1)(B).

[492] 15 U.S.C. 57b(a)(2). Depending on the egregiousness of the misconduct and the harm it is causing, the Commission also may seek preliminary injunctive relief in Federal court. 15 U.S.C. 53(b).

the rule, it would take substantially more time and resources, and would significantly delay any redress to consumers, compared to a single Federal court action alleging a rule violation, in which the court adjudicates both whether the defendant violated the rule and, if so, the appropriate amount of monetary relief to award.[493]

Given the prevalence of unfair or deceptive conduct involving reviews and testimonials, the Commission will have no shortage of bad actors to investigate; it can invest the extra resources freed up by the final rule into more investigations and actions with respect to consumer reviews or testimonials. In sum, the potential consumer-redress benefits of the rule are significant: the Commission can put a stop to more inarguably unfair or deceptive consumer reviews, return more money to consumers, and obtain that redress more quickly.

a. Consumer Welfare Benefits From Better-Informed Purchase Decisions

The study containing the most direct estimate of welfare losses from review manipulation finds that the presence of fake reviews leads consumers to lose $0.12 for every dollar spent in an experimental setting.[494] The study considers a limited number of kinds of review manipulation, which notably does not include suppression of negative reviews or misrepresenting the independence of reviews, which might mean that $0.12 is an underestimate of the effect of the rule. However, the study also measures the effect of complete elimination of inflated star ratings and false written narratives, which might mean that $0.12 is an overestimate of the effect of the rule. Thus, the Commission believes that a reasonable proxy for the effect of the rule's elimination of much review manipulation is that consumers will gain an estimated $0.12 for every dollar spent on goods whose online reviews included fake or false ones.

To estimate consumer welfare benefits from better-informed purchase decisions, the Commission first estimates the total amount of sales for which consumers consult online reviews. U.S. e-commerce sales by retail firms totaled $1.119 trillion in 2023.[495] The Commission assumes that all online retail sales had some form of user-generated commentary (*e.g.,* on third-party review platforms or on company websites), and that this commentary factored into consumers' purchase decisions for these goods.

Online reviews are also important for commerce that is not conducted online, including for revenues earned by the hospitality industry and by other services. Sales for businesses classified as ''Food Services and Drinking Places'' by the U.S. Census totaled $980.15 billion in 2022, which includes revenue from restaurants and bars.[496] The Commission assumes that consumers rely on reviews for only a portion of these sales. Some consumers—particularly those living in rural parts of the country and in smaller cities—may have a small set of familiar food and drink establishments available to them, making online reviews less influential to their decision to patronize a particular one. Moreover, prior research has found that online reviews do not impact revenues of chain restaurants.[497] Accordingly, the Commission assumes that consumers rely on reviews for twenty-five percent of the total revenue generated in the food services and drinking places sector (twenty-five percent of $980.15 billion, or $245.04 billion).[498]

Online reviews are also important for sales in other service sectors. In 2022, total revenue was $316.35 billion for the accommodations sector (which includes hotels and vacation rentals), and total revenue was $67.70 billion for personal services (including beauty salons, barber shops, health clubs, and non-veterinary pet care), totaling $384.05 billion for both sectors.[499] About half of hotel revenue is generated by business travelers, who might rely less on online reviews than leisure travelers do.[500] In addition, pre-paid hotel bookings and vacation rentals booked online are already accounted for in the e-commerce sales figure described above. Furthermore, some consumers may be loyal customers of local salons and other personal services, regardless of these businesses' online reputations. For these reasons, the Commission assumes that a subset of accommodation and personal services revenues is affected by consumer reviews. Similar to the calculation for the food and drinking places industry, the Commission assumes that twenty-five percent of total accommodation and personal care services revenue is impacted by consumer reviews (twenty-five percent of $384.05 billion, or $96.01 billion). The total estimated revenue for services impacted by consumer reviews is $341.05 billion (the sum of $245.04 billion and $96.01 billion). Combining the revenue estimates described above yields $1.461 trillion in estimated sales of goods or services for which consumers incorporate reviews into their decision-making.

Quantitative estimates of the incidence of fake or false reviews vary by source.[501] Nevertheless, at least three prior studies examining the degree of review manipulation as a proportion of businesses or products (rather than as a proportion of *reviews*) contain similar findings. According to these studies, approximately ten percent of products or businesses have some manipulated

[493] *See, e.g.,* Press Release, Fed. Trade Comm'n, *Marketers of Ab Force Weight Loss Device Agree to Pay $7 Million for Consumer Redress* (Jan. 14, 2009), *https://www.ftc.gov/news-events/news/press-releases/2009/01/marketers-ab-force-weight-loss-device-agree-pay-7-million-consumer-redress* (describing a 2009 settlement of a follow-on section 19(a)(2) action against Telebrands Corp. that was brought after the conclusion of litigation over a 2003 administrative complaint alleging violations of section 5).

[494] *See* Jesper Akesson et al., *The Impact of Fake Reviews on Demand and Welfare,* National Bureau of Economic Research Working Paper 31836, Nov. 2023, *https://www.nber.org/papers/w31836.*

[495] *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023,* Feb. 20, 2024, *https://www2.census.gov/retail/releases/historical/ecomm/23q4.pdf.*

[496] U.S. Census Bureau, *Service Annual Survey (SAS),* Jan. 30, 2024, *https://www.census.gov/programs-surveys/sas.html* (listing total revenue of $980,153,000,000 for NAICS Code 722 in 2022, the most recent year with data).

[497] *See* Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com,* Harvard Bus. Sch. Working Paper 12–016 (2016).

[498] Twenty-five percent is likely a reasonable estimate based on the difference in revenues for new restaurants and established restaurants. A study conducted by Toast, Inc., found that new restaurants earn approximately $112,000 in average revenue per year. Justin Guinn, *What is the Average Restaurant Revenue for a New Restaurant?, https://pos.toasttab.com/blog/on-the-line/average-restaurant-revenue* (last visited July 5, 2024). This is approximately twenty-five percent of average revenue for restaurants overall ($486,000, according to the website Eat Pallet, *see* Shari Mason, *How Much Do Restaurants Make in a Day? Solved,* May 24, 2024, *https://eatpallet.com/how-much-do-restaurants-make-in-a-day*).

[499] *See* U.S. Census Bureau, *Service Annual Survey (SAS), supra* note 496 (listing total 2022 revenue of $316,350,000,000 for NAICS Code 721 and listing total 2022 revenue of $67,698,000,000 for NAICS Codes 812111 through 812199 and NAICS Code 81291.

[500] *See* Linchi Kwok, *Will Business Travel Spending Return to the Pre-Pandemic Level Soon?,* Hospitality Net, Sept. 22, 2022, *https://www.hospitalitynet.org/opinion/4112075.html.*

[501] These estimates range from the single digits to over twenty percent. *See* Tripadvisor, *2023 Review Transparency Report, https://www.tripadvisor.com/TransparencyReport2023* (last visited July 5, 2024) (finding that 4.4 percent of review submissions were fraudulent); Trustpilot, *Transparency Report 2024, https://assets.ctfassets.net/b7g9mrbfayuu/7p63VLqZ9vmU2TB65dVdnF/6e47d9ee81c145b5e3d1e16f81bba89a/Trustpilot_Transparency_Report_2024.pdf* (last visited July 5, 2024) (stating that its software removed 6 percent of reviews due to being fake); Yelp, *2023 Yelp Trust & Safety Report* (Feb 28, 2024), *https://trust.yelp.com/trust-and-safety-report/2023-report* (stating that 16 percent of submitted reviews were marked as ''not recommended'' by Yelp's software); Devesh Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms,* (Feb. 27, 2023), *https://deveshraval.github.io/reviews.pdf* (Working Paper) (finding that the share of hidden (likely fake) Yelp reviews is as high as 47 percent).

consumer reviews.[502] Thus, a basic approximation of total e-commerce sales involving some review manipulation is ten percent of $1.119 trillion, or $111.9 billion. Similarly, a basic approximation of review-dependent service industry sales involving some review manipulation is ten percent of $341.05 billion, or $34.1 billion.

Importantly, online businesses that engage in review manipulation are likely to earn less revenue than other e-commerce companies. For example, prior research has found that independent firms and sellers offering lower-quality products are more likely to engage in review manipulation.[503] Therefore, e-commerce sales affected by review manipulation are likely to be lower than the $111.9 billion in sales described above. A more conservative estimate of e-commerce sales involving review manipulation can be obtained by using price differentials of review-manipulated products versus others. Because products with online review manipulation have price points that are approximately 19 percent of the average price of goods sold online (according to research using data from Amazon),[504] a more conservative estimate of review-manipulated products' revenue is 1.9 percent (19 percent × 10 percent) of all $1.119 trillion in e-commerce sales, or $21.26 billion. Because the Commission does not have data on the revenue or quantities sold of review-manipulated products, it assumes that revenue is constant across price points and relies solely on the price differential to approximate revenue. The Commission does not similarly adjust revenues for non-e-commerce firms (*e.g.,* restaurant and hotels) because there is less variation in prices in those industries.

The Commission estimates annual welfare gains by applying the $0.12 estimate, described above, to the estimated amount of U.S. sales that are likely to have some manipulated consumer reviews, yielding an annual estimate of welfare gains in the range of $6.64 billion (12 percent of $55.36 billion, the sum of $21.26 billion and $34.1 billion) and $17.52 billion (12 percent of $146.0 billion, the sum of $111.9 billion and $34.1 billion). Assuming that e-commerce sales increase linearly over the next ten years at the same rate as they did in the past year,[505] the present value of consumer welfare improvements from better-informed purchasing decisions is estimated to be between $57.03 and $230.36 billion as described in Table 2.1.

TABLE 2.1—ESTIMATED BENEFITS FROM CONSUMER WELFARE IMPROVEMENTS FROM PURCHASE DECISIONS

[2024–2033]

Percent of e-commerce revenue impacted by review manipulation	Total annual welfare improvements from better-informed purchase decisions (in billions)	Total 10-year (2024–2033) welfare improvement, 3% discount rate (in billions)	Total 10-year (2024–2033) welfare improvement, 7% discount rate (in billions)
10	$17.52	$230.36	$196.91
1.9	6.64	67.40	57.03

b. Consumer Time Savings From Increased Reliability of Summary Ratings

The rule's prohibitions against deceptive and unfair consumer review acts and practices would increase the reliability of consumer reviews. The Commission assumes that this improvement in the dependability of reviews will lead consumers to place more trust in aggregate measures (*e.g.,* aggregate star ratings), which many review settings use to summarize consumer reviews. This in turn will lead some consumers to spend less time scrutinizing individual reviews to detect red flags commonly found in manipulated reviews (*e.g.,* spelling and grammar mistakes, generic highly positive or negative statements, and lack of detail). Therefore, the rule is likely to result in some amount of time savings for consumers who consult online reviews before making purchases.

Approximately eighty percent of Americans are online shoppers.[506] Of those who shop online, fourteen percent shop online more than once a week, twenty percent shop online once a week, twenty-three percent shop online once every two weeks, twenty-five percent shop online once a month, and the remainder do so every few months.[507] Different age groups of online shoppers spend various amounts of time reading reviews before making a purchase decision. On average, younger consumers spend more time reading reviews than older consumers.[508] This analysis does not incorporate time spent by consumers researching reviews of

[502] *See* Nan Hu et al., *Manipulation of Online Reviews: An Analysis of Ratings, Readability, and Sentiments,* 52(3) Decision Support Systems 674–84 (Feb. 2012) (finding that 10.3 percent of books sold on Amazon had manipulated reviews); Luca, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud, supra* note 490 (finding that ten percent of Boston restaurants had filtered 5-star reviews on Yelp) (Table 3, row 4); Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms, supra* note 501 (finding that 9.7 percent of businesses with reviews or complaints with the Better Business Bureau are of low quality, where fake reviews inflate ratings) (Table III, column 3, row 1).

[503] *See, e.g.,* Sherry He et al., *The Market for Fake Reviews,* 41(5) Mktg. Sci. 896 (2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664992;* Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation,* 104(8) Am. Econ. Rev. 2421–55 (2014).

[504] *See* Davide Proserpio et al., *How Fake Customer Reviews Do—and Don't—Work,* Harvard Bus. Rev., Nov. 24, 2020, *https://hbr.org/2020/11/how-fake-customer-reviews-do-and-dont-work.* The authors find that products sold on Amazon with manipulated reviews are typically in the $15 to $40 price range. The midpoint of this range ($27.50) represents 19 percent of the average product's price ($142.74, according to one study *see* Semrush Inc., *Amazon Pricing Study: The Most Expensive Products, Category Volatility, and Seasonal Price Shifts,* Mar. 22, 2022, *https://www.semrush.com/blog/amazon-pricing-study*).

[505] E-commerce sales increased by 7.6 percent from 2022 to 2023. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023, supra* note 495. Using growth in the past year to predict future e-commerce sales results in a more conservative estimate than using a longer time frame. E-commerce sales experienced higher annual growth rates prior to 2021 (14 percent from 2018 to 2019, 43 percent from 2019 to 2020, and 14 percent from 2020 to 2021) and grew 7.7 percent from 2021 to 2022. This analysis does not project revenues for non-e-commerce industries because linear trends during recent years are unique to the pandemic and are unlikely to be accurate for future years.

[506] *See* Pew Research Center, *Online Shopping and E-Commerce,* Dec. 19, 2016, *https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce.*

[507] *See* Int'l Post Corp., *Cross-Border E-Commerce Shopper Survey 2022,* Jan. 2023, *https://www.ipc.be/-/media/documents/public/publications/ipc-shoppers-survey/onlineshoppersurvey2022.pdf.*

[508] *See* BrightLocal, *Local Consumer Review Survey 2019,* Dec. 11, 2019, *https://www.brightlocal.com/research/local-consumer-review-survey-2019.*

restaurants, hotels, and other goods and services that are not purchased online because of the limited amount of information available regarding consumers' total time spent on such activities.

According to the Bureau of Labor Statistics, the average hourly wage in 2023 was $31.48.[509] Recent research suggests that individuals living in the United States value their non-work time at eighty-two percent of average hourly earnings.[510] Thus, Americans overall value their non-work time at $25.81 per hour on average.

The survey data does not specify whether consumers were surveyed regarding the time spent reading reviews before the purchase of a single product or whether the question concerned the purchase of multiple products. This analysis assumes that the time listed in the survey results pertains to the purchase of a single product. It also assumes that the implementation of the rule will reduce the time spent reading reviews by ten percent. Combining the above figures results in $2.49 billion in consumer time savings per year, or a present value of $33.53 billion to $39.19 billion over a 10-year period, as described in Table 2.2.

In addition, there are likely to be other utility-related benefits consumers receive when reading nonmanipulated online reviews or consulting more accurate aggregate summary measures, such as increased satisfaction (apart from purchasing decisions) and decreased frustration. The Commission is not able to quantify these benefits.

Finally, some consumers may spend *more* time reading reviews if reviews are less likely to be fake or otherwise manipulated. This increase in time spent reading reviews may offset any time savings from the increased reliability of summary ratings. Therefore, the Commission presents another scenario in Table 2.2 where consumers do not gain any benefits from time savings. However, as before, there are likely to be additional benefits that are difficult to quantify (*e.g.,* decreased frustration) that result from reading more accurate reviews, likely yielding positive net benefits related to reading reviews even when consumers spend more time doing so.

TABLE 2.2—ESTIMATED BENEFITS FROM TIME SAVINGS

[2024–2033]

Scenario 1—Improved Reliability of Aggregate Measures Reduces Overall Time Spent Reading Reviews	
Number of online shoppers, age 18–34 [a]	60,467,204
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 18–34	0.336
Number of online shoppers, age 35–54 [a]	67,273,832
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 35–54	0.231
Number of online shoppers, age 55+ [a]	78,920,814
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 55+	0.167
Total amount of time all online shoppers spend reading online reviews before making a purchase decision (in hours)	48,991,116
Total amount of time U.S. online shoppers spend reading online reviews per year (in hours) [b]	1,728,406,578
Value of time for online shoppers (per hour)	$25.81
Percentage of time saved	10%
Total annual time savings	$4,461,017,378
Total 10-year (2024–2033) time savings, 3% discount rate (in billions)	$39.19
Total 10-year (2024–2033) time savings, 7% discount rate (in billions)	$33.53
Scenario 2—Increase in Time Spent Reading Reviews Offsets Time Savings from Improved Reliability of Summary Measures	
No quantifiable benefit	$0

[a] 80% of age-specific total U.S. population (Source: Pew Research Center, U.S. Census).
[b] Adjusting for online shopping frequency (Source: International Post Corporation).

c. Benefits Related to Competition

Accurate online reviews have been shown to improve competition. Several studies have found that online reviews are particularly important for independent and newer firms.[511] Ratings are more influential for these firms because consumers do not have strong prior beliefs as to their quality. New entrants whose sales benefit from online reviews typically offer higher quality goods and services. On the other hand, lower-quality firms often experience revenue losses with more online review activity.[512]

Relatedly, fake, false, and manipulated online reviews allow companies to surpass competitors. One study found that it only takes 50 fake reviews for a seller to pass any of its competitors in terms of visibility (*e.g.,* via rankings or search results).[513] It follows that by curbing the number of fake, false, or manipulated reviews, the rule would benefit consumers by improving the competitive environment for legitimate firms selling higher-quality products (*i.e.,* those who do not rely on review manipulation to sell their goods). While the benefits resulting

[509] Bureau of Labor Statistics, *May 2023 National Occupational and Wage Estimates, Unites States, https://www.bls.gov/oes/current/oes_nat.htm* (listing mean hourly wage of $31.48 for all occupations).

[510] *See* Daniel S. Hamermesh, *What's to Know About Time Use?,* 30 J. of Econ. Survs. 198–203 (2016), *https://doi.org/10.1111/joes.12107.*

[511] *See* Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com, supra* note 497 (finding that chain restaurants have declined in market share as Yelp penetration has increased); Gregory Lewis and Georgios Zervas, *The Welfare Impact of Consumer Reviews: A Case Study of the Hotel Industry, https://economics.sas.upenn.edu/sites/default/files/filevault/u475/tawelfare.pdf* (Working Paper) (finding that demand for independent hotels is more sensitive to reviews on Tripadvisor); Brett Hollenbeck, *Online Reputation Mechanisms and the Decreasing Value of Chain Affiliation,* 55(5) J. of Mktg. Resch. 636–54 (2018), *https://www.jstor.org/stable/26966532* (finding that branded, chain-affiliated hotels' premiums over independent hotels have declined substantially largely due to online reputation mechanisms).

[512] *See* Limin Fang, ''*The Effects of Online Review Platforms on Restaurant Revenue, Consumer Learning, and Welfare*'' 68(11) Mgmt. Sci. 7793–8514 (2022).

[513] *See* Theodoros Lappas et al., *The Impact of Fake Reviews on Online Visibility: A Vulnerability Assessment of the Hotel Industry,* 27(4) Inf. Sys. Research 940–961 (2016), *https://pubsonline.informs.org/doi/abs/10.1287/isre.2016.0674.*

from improvements in the competitive environment are difficult to quantify, the Commission believes they are likely to be substantial.

2. Estimated Costs of the Final Rule

This section describes the costs associated with the rule, provides quantitative estimates where possible, and describes costs that are only assessed qualitatively. While the Commission only quantifies benefits from reduced review manipulation and not the other rule provisions above, the Commission quantifies compliance costs for all aspects of the rule.

a. Compliance Costs

The acts and practices prohibited by the rule are unfair or deceptive under section 5 of the FTC Act. The rule targets acts or practices that are clear violations of section 5, and businesses that are already compliant will not experience any additional compliance costs as a result of the rule. Moreover, the FTC routinely provides guidance to businesses on complying with FTC law, which will make the implications of the rule easy to understand for a wide range of businesses. Finally, in response to the comments, the Commission has both narrowed and clarified the rule requirements relative to the proposed rule (*see* section IV of this document). Accordingly, one of the scenarios reflected in Table 3.1 assumes that businesses will spend a *de minimis* amount of time interpreting the rule and make no changes to their current policies.

However, because businesses now face the potential for civil penalties if they engage in conduct that violates the final rule, businesses may choose to incur additional administrative burdens to ensure compliance. The Commission presents another scenario in Table 3.1 where businesses notify their employees of the rule, conduct a review of their processes, and take any steps they deem important to ensure compliance. For firms that already comply with section 5 of the FTC Act, these steps might be out of caution so as not to risk the possibility of violating the rule. For example, some sellers may currently flag and remove reviews on their websites that they reasonably believe are fake. While this practice would not amount to a violation of the relevant rule provision (§ 465.7(b)), the rule may lead some businesses to choose to take extra steps to verify the inauthenticity of such reviews before suppressing them. A business may also decide to notify its employees of the rule. For example, if certain employees are responsible for posting new product pages or managing the company's social media presence, business owners may wish to notify these employees to ensure compliance. Although cautious firms may elect to conduct additional compliance review, the rule would not require any additional recordkeeping or notices beyond what is required by section 5 of the FTC Act.

For the heightened compliance review scenario in Table 3.1, the Commission makes assumptions about the number of businesses impacted and the number of person-hours involved in compliance activities. In 2021, there were approximately 34.77 million total firms in the United States. Of these firms, 19,688 had 500 or more employees (''large companies''), and the remaining 34.75 million had fewer than 500 employees (''small companies'').[514] The Commission assumes that all 19,688 large companies had some form of online consumer review presence (*e.g.,* on third-party business platforms such as Yelp or Google Reviews, or on their own websites). It assumes that 74 percent of the 34.75 million small companies (25.71 million companies) had an online consumer review presence.[515]

With heightened compliance review, the Commission assumes that lawyers at large companies, whose time is valued at $70.08 per hour,[516] will spend eight hours conducting a one-time review of the rule and notifying employees whose role involves creating new product pages, managing the company's social media presence, and any other relevant practices covered by the rule. It assumes that small company owners, whose time is valued at $33.48,[517] and are less likely have formal compliance programs, spend one hour doing the same.

In addition, some companies may spend time reviewing their automated processes to ensure that they comply with the rule. These costs, which companies might incur just once or on a recurring basis, are likely to be minimal. The Commission does not quantify these process-related costs because, among other things, the Commission does not know the number of firms that might undertake such a review.

The total estimated costs are tabulated in Table 3.1.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS

	2024 Only
Scenario 1—No Review	
No cost	$0
Total cost	$0
Scenario 2—Heightened Compliance Review	
Number of large companies (in thousands)	19.69
Cost per hour of rule review and related activities	$70.08
Number of hours of rule review and related activities	8
Subtotal (in millions)	$11.04
Number of small companies with online reviews (in thousands)	25,715.23
Cost per hour of rule review and related activities	$33.48

[514] *See* U.S. Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry, https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html* (last visited July 5, 2024) (listing 6.29 million total firms with at least one paid employee) and U.S. Census Bureau, *Nonemployer Statistics, https://www.census.gov/programs-surveys/nonemployer-statistics.html* (listing 28.48 million firms with no paid employees) (last visited July 5, 2024).

[515] Seventy-four percent of small businesses have at least one Google review. *See* BrightLocal, *Google Reviews Study: How Many Reviews Do Local Businesses Need?,* Oct. 31, 2018, *https://www.brightlocal.com/research/google-reviews-study/.*

[516] *See* Bureau of Labor Statistics, *Occupational Outlook Handbook: Lawyers, https://www.bls.gov/ooh/legal/lawyers.htm* (last visited July 5, 2024).

[517] *See* Payscale, *Average Small Business Owner Salary, https://www.payscale.com/research/US/Job=Small_Business_Owner/Salary* (last visited July 5, 2024) (reporting median base salary of $69,648 for small business owners). We assume small business owners work 2,080 hours per year.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS—Continued

	2024 Only
Number of hours of rule review and related activities	1
Subtotal (in millions)	$860.95
Total cost (in millions)	$871.98

b. Other Impacts of the Rule

There are several other potential effects from the rule. While the proposed requirements are far from onerous, there is the possibility that some sellers may ''overcorrect'' in response to the penalties available for rule violations. For example, a firm may encounter an excess of fake, negative reviews from a competitor. While § 465.7(b) permits the suppression of reviews that the seller reasonably believes are fake, an overcautious seller seeking to suppress fake reviews from competitors may choose to display no reviews whatsoever so as not to risk violating the rule. Alternatively, such a firm may take no action towards suspected fake reviews to avoid a possible rule violation. Both of these hypothetical scenarios would likely hurt the information environment for consumers. The Commission believes that such unintended consequences of the rule are very unlikely, especially in light of how the rule has been clarified and narrowed in response to the comments.

C. Reasonable Alternatives and Explanation of Why Particular Alternative Chosen

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the final rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our low-end estimate above, the present value of quantified benefits for consumers from the rule's requirements over a 10-year period using a 7% discount rate is estimated at $57.03 billion. The present value of quantified costs for covered firms of complying with the rule's requirements over a 10-year period using a 7% discount rate is estimated at $0.83 billion. This generates an estimate of the present value of quantified net benefits equal to $56.16 billion using a discount rate of 7%. Using the upper-end assumptions discussed in the preceding analysis results in net benefits of $230.44 billion using a discount rate of 7%.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of compliance costs, the Commission calculates costs and benefits in a scenario where all labor costs turn out to be ten times larger than the parameter values in the heightened compliance review scenario. For both small and large companies, the number of hours of rule review and related activities are increased by a factor of ten. All benefits and other cost parameters are unchanged in this analysis. With these new parameters, compliance review will cost $8.72 billion in 2024, and the present value of quantified net benefits will be equal to $48.31 billion using a discount rate of 7%. Thus, while the Commission believes compliance costs in the heightened compliance scenario are likely overestimates, even if they are instead severe underestimates, the quantified net benefits are highly positive.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic overestimating of the effectiveness of deterrence, the Commission calculates costs and benefits in a scenario in which the rule only partially eliminates the welfare losses to consumers caused by the various types of review manipulation covered by the rule. For this scenario, the Commission instead assumes that consumers will gain an estimated $0.04, rather than $0.12, for every dollar spent on goods whose online reviews included fake or false ones, the minimum welfare improvement reported for partial elimination of review manipulation in the study on which these estimates are based.[518] Under this scenario, the present value of quantified net benefits under a 7% discount rate is $18.14 billion instead of $56.16 billion. Combining the two scenarios, if the Commission both systematically underestimates compliance costs and systematically overestimates the effectiveness of the rule in preventing review manipulation, the present value of quantified net benefits under a 7% discount rate is $10.29 billion. Thus, even if the main compliance cost estimates above are underestimates and the main welfare benefits above are overestimates, the quantified net benefits are highly positive.

One alternative to the final rule would be to terminate the rulemaking and rely instead on the existing tools that the Commission currently possesses to combat the specified review and testimonial practices, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act. Failing to strengthen the set of tools available in support of the Commission's enforcement program against unfair or deceptive consumer reviews or testimonials would deprive it of the net benefits outlined above.

The Commission expects unquantified benefits to outweigh unquantified costs for this rule. As noted above, the benefits from several rule provisions are unquantified, while the compliance costs of all rule provisions are quantified. Thus, the quantified net benefits of $56.16 billion above likely underestimate the benefits to the public. Furthermore, these estimates are robust to uncertainty. Even assuming systematic underestimation of compliance costs and systematic overestimation of the rule effectiveness, the quantified net benefits are large and positive. Therefore, this regulatory analysis indicates that adoption of the rule will result in benefits to the public that outweigh the costs.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to seek and obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. As part of the NPRM, the Commission noted that the proposed rule did not contain an information collection requirement. However, for the purpose of confirmation, in Question 4 of the NPRM, the Commission nonetheless asked commenters whether the proposed rule contained a collection

[518] *See* Akesson, *The Impact of Fake Reviews on Demand and Welfare, supra* note 494 (reviews for inferior products that had inflated star ratings but accurate written narratives caused consumers to lose $0.04 in welfare for every dollar spent).

of information.[519] One commenter responded, ''Yes, it does. It contains our research and others' research, as well as valuable estimates to harm/costs for all 3 parties: consumers, businesses, and government.'' [520] The Commission believes that this commenter was addressing whether the NPRM was collecting information, as opposed to whether the proposed rule would contain a collection of information within the meaning of the PRA. No other comments responding to the NPRM or Notice of Hearing addressed this question. While the Commission finalizes the proposed rule with some limiting modifications and clarifications based on the comments it received, it has not added any new requirements that would collect information from the public. Accordingly, the Commission has determined that the final rule neither includes a new collection of information, nor modifies an existing collection of information.

VIII. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with a final rule, if any, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.[521] The purpose of a regulatory flexibility analysis is to ensure that an agency considers potential impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities.

In the NPRM, the Commission provided an IRFA, stating its belief that the proposal will not have a significant economic impact on small entities, and soliciting comments on its burden estimate. In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press and other releases. The Commission received comments from small businesses and associations that represent small businesses. In order to reduce compliance burdens on small businesses and other small entities, the Commission finalizes the proposed rule with some limiting modifications and clarifications as described in section IV of this document.

The Commission believes that the rule will not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. The rule primarily prohibits certain unfair or deceptive acts or practices involving consumer reviews or testimonials and does not impose a reporting or recordkeeping requirement upon businesses. In addition, the Commission does not anticipate these changes will impose any additional significant additional costs upon small businesses. Specifically, as discussed in further detail below, the Commission anticipates than an average small business will spend, at most, one hour on compliance review, incurring a cost of $33.48.[522] Therefore, the rule imposes no new significant burdens on law-abiding small businesses. The Commission has determined, nonetheless, that it is appropriate to publish an FRFA to identify the impact of the rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Reasons for the Rule

The Commission describes the reasons for the rule in section VI.A. of this document. The FTC's law enforcement, outreach, and other engagement in this area indicate that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent. The rule will benefit consumers and legitimate businesses without imposing significant burdens.

B. Statement of the Objectives of, and Legal Basis for, the Rule

The Commission describes the objectives for the rule in section VI.A of this document. The legal basis for the rule is section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

C. Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

One individual commenter accepted the Commission's estimated compliance costs on small businesses but said it was unfair that ''small companies with online reviews would bear almost all of the [rule's] estimated compliance costs.'' [523] As the Commission stated in the NPRM, it is likely that only a minority of small businesses would elect to conduct optional compliance review and the total compliance costs for small businesses is likely to be significantly lower than the Commission's estimate.[524]

One trade association simply asserted that certain provisions of the proposed rule could be detrimental to small businesses but did not specifically address the IRFA.[525] This commenter expressed concern about: (1) civil penalty exposure for failing to stop the actions of undiscovered third parties providing reviews and testimonials appearing on a business's website; (2) a subsequent broadening of the proposed rule to prohibit incentivized reviews other than those required to express a particular sentiment; and (3) potential liability when an agent's review or testimonial appears without a disclosure.[526] The Commission addresses these specific concerns in section IV of this document and has narrowed the rule or provided clarification as appropriate.

The Commission does not believe that it needs to make any changes to its IRFA in response to these comments.

Section IV provides a section-by-section analysis that discusses the provisions proposed in the NPRM, the comments received, the Commission's responses to the comments, and any changes made by the Commission as a result.

D. Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The Commission did not receive any comments from the Chief Counsel for Advocacy of the SBA.

E. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The final rule could impact small entities that currently have, or might potentially, solicit consumer reviews or disseminate consumer testimonials. It could also impact small entities that use celebrity testimonials or have a social media presence. It is likely that the rule will primarily affect businesses that sell products or services directly to consumers. For example, the rule is less likely to impact small entities that manufacture niche raw materials for other businesses or small agricultural

[519] NPRM, 88 FR 49388.

[520] Transparency Company Cmt. at 10.

[521] *See* 5 U.S.C. 605(b).

[522] *See infra* section VIII.F of this document.

[523] Camp-Martin Cmt. at 2–3.

[524] NPRM, 88 FR 49388.

[525] IAB Cmt. at 1–15.

[526] *Id.* at 2, 5–6, 8–9, 10.

firms that do not sell directly to consumers. Nevertheless, for a conservative estimate of total costs, the Commission assumes that the rule will impact all industry classes of small entities.

As described in section VI.B.2 of this document, there are approximately 34.75 million small businesses in the United States. Prior research has found that 74 percent of small businesses have at least one Google review.[527] On the one hand, it is possible that, across all platforms (beyond Google reviews), a higher percentage of small businesses have consumer reviews or testimonials, celebrity testimonials, or a social media presence. On the other hand, it is likely that many of these firms do not interact with reviews and such passive firms would not be affected by the rule. The Commission does not have the appropriate data to refine this estimate. Therefore, its best estimate is that no more than 25.71 million (74 percent × 34.75 million) small businesses will be impacted by the rule.

F. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The rule contains no reporting or recordkeeping requirements. Therefore, many law-abiding businesses are likely to incur no additional compliance costs with the rule.

As described in section VI.B.2 of this document, a cautious firm may elect to undertake additional compliance review due to the potential for civil penalties for rule violations. If every small business impacted by the rule conducts one hour of compliance review, each firm would incur $33.48 of compliance costs, which reflects the estimated hourly earnings of a small business owner.[528] Therefore, under the conservative estimate of heightened compliance review for all small businesses, costs to small businesses would total $860.95 million (25.71 million × $33.48). Because it is likely that only a minority of small businesses will elect to conduct optional compliance review, total compliance costs for these entities are likely to be significantly lower than this estimate.

G. Description of Steps Taken To Minimize Impact of the Rule on Small Entities

In response to comments, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this document, which should minimize further any economic impact on small entities. In its IRFA, the Commission described an alternative to the proposed rule, namely, to rely on the Commission's previously existing tools, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act, to combat the specified review and testimonial practices. The Commission believes that promulgation of the rule will result in greater net benefits to the marketplace while imposing no additional burdens beyond what is required by the FTC Act. As described in further detail in section VI.B.1.c of this document, the rule will not only result in significant benefits to consumers but also improve the competitive environment, particularly for small, independent, or new firms. Therefore, the rule appears to be superior to this alternative for small entities.

IX. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 465

Advertising.

■ For the reasons set forth above, the Federal Trade Commission amends 16 CFR Chapter I by adding part 465 to read as follows:

PART 465—RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS

Sec.

465.1 Definitions.
465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.
465.3 [Reserved]
465.4 Buying positive or negative consumer reviews.
465.5 Insider consumer reviews and consumer testimonials.
465.6 Company-controlled review websites or entities.
465.7 Review suppression.
465.8 Misuse of fake indicators of social media influence.
465.9 Severability

Authority: 15 U.S.C. 57a.

§ 465.1 Definitions.

(a) *Business* means an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

(b) *Celebrity testimonial* means an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known individual who purchased, used, or otherwise had experience with a product, service, or business.

(c) *Clear and conspicuous* means that a required disclosure is easily noticeable (*i.e.,* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as social media or the internet, the disclosure must be unavoidable. A disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, ''ordinary consumers'' includes members of that group.

(d) *Consumer review* means a consumer's evaluation, or a purported consumer's evaluation, of a product, service, or business that is submitted by

[527] *See supra* note 515.

[528] *See* Payscale, *Average Small Business Owner Salary, supra* note 517.

the consumer or purported consumer and that is published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations. For the purposes of this part, consumer reviews include consumer ratings regardless of whether they include any text or narrative.

(e) *Consumer review hosting* means providing the technological means by which a website or platform enables consumers to see or hear the consumer reviews that consumers have submitted to the website or platform.

(f) *Consumer testimonial* means an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.

(g) *Distribute fake indicators of social media influence* means the distribution of fake indicators of social media influence to individuals or businesses who could use the indicators to misrepresent their influence.

(h) *Fake indicators of social media influence* means indicators of social media influence generated by bots, purported individual accounts not associated with a real individual, accounts created with a real individual's personal information without their consent, or hijacked accounts, or that otherwise do not reflect a real individual's or entity's activities, opinions, findings, or experiences.

(i) *Immediate Relative* means a spouse, parent, child, or sibling.

(j) *Indicators of social media influence* means any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

(k) *Manager* means an employee of a business who supervises other employees or agents and who either holds the title of a ''manager'' or otherwise serves in a managerial role.

(l) *Officers* include owners, executives, and managing members of a business.

(m) *Purchase a consumer review* means to provide something of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

(n) *Reviewer* means the author or purported author of a consumer review.

(o) *Testimonialist* means the individual giving or purportedly giving a consumer testimonial or celebrity testimonial.

(p) An *unfounded or groundless legal threat* is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

§ 465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.

(a) It is an unfair or deceptive act or practice and a violation of this part for a business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial that materially misrepresents, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(b) It is an unfair or deceptive act or practice and a violation of this part for a business to purchase a consumer review, or to disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial, about the business or one of the products or services it sells, which the business knew or should have known materially misrepresented, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(c) It is an unfair or deceptive act or practice and a violation of this part for a business to procure a consumer review from its officers, managers, employees, or agents, or any of their immediate relatives, for posting on a third-party platform or website, when the review is about the business or one of the products or services it sells, and when the business knew or should have known that the review materially misrepresented, expressly or by implication:

(1) That the reviewer exists;

(2) That the reviewer used or otherwise had experience with the product, service, or business that is the subject of the review; or

(3) The reviewer's experience with the product, service, or business that is the subject of the review.

(d) However, paragraphs (b) and (c) of this section do not apply to:

(1) Reviews or testimonials that resulted from a business making generalized solicitations to purchasers to post reviews or testimonials about their experiences with the product, service, or business; or

(2) Reviews that appear on a website or platform as a result of the business merely engaging in consumer review hosting.

§ 465.3 [Reserved]

§ 465.4 Buying positive or negative consumer reviews.

It is an unfair or deceptive act or practice and a violation of this part for a business to provide compensation or other incentives in exchange for, or conditioned expressly or by implication on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.

§ 465.5 Insider consumer reviews and consumer testimonials.

(a) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to write or create a consumer review or consumer testimonial about the business or one of the products or services it sells that fails to have a clear and conspicuous disclosure of the officer's or manager's material relationship to the business, unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.

(b)(1) It is an unfair or deceptive act or practice and a violation of this part for a business to disseminate or cause the dissemination of a consumer testimonial about the business or one of the products or services it sells by one of its officers, managers, employees, or agents, which fails to have a clear and conspicuous disclosure of the testimonialist's material relationship to the business, when the relationship is not otherwise clear to the audience and the business knew or should have known the testimonialist's relationship to the business.

(2) However, paragraph (b)(1) of this section does not apply to:

(i) Generalized solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business, or

(ii) Merely engaging in consumer review hosting.

(c)(1) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to solicit or demand a consumer review about the business or one of the products or services it sells from any of their immediate relatives or from any employee or agent of the business, or to solicit or demand that such employees or agents seek such reviews from their relatives, when:

(i) The solicitation or demand results in an officer's or manager's immediate relatives, an employee or agent, or the immediate relatives of an employee or agent writing or creating such a review without a disclosure of the reviewer's material relationship to the business, and

(ii) The officer or manager:

(A) Encouraged the prospective reviewer not to make such a disclosure,

(B) Did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business, or

(C) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.

(2) However, paragraph (c)(1) of this section does not apply to generalized solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.

§ 465.6 Company-controlled review websites or entities.

It is an unfair or deceptive act or practice and a violation of this part for a business to materially misrepresent, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions, other than consumer reviews, about a category of businesses, products, or services including the business or one or more of the products or services it sells.

§ 465.7 Review suppression.

It is an unfair or deceptive act or practice and a violation of this part:

(a) For anyone to use an unfounded or groundless legal threat, a physical threat, intimidation, or a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity, in an attempt to:

(1) Prevent a review or any portion thereof from being written or created, or

(2) Cause a review or any portion thereof to be removed, whether or not that review or a portion thereof is replaced with other content, or

(b) For a business to materially misrepresent, expressly or by implication, that the consumer reviews of one or more of the products or services it sells displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.,* not displayable) based upon their ratings or their negative sentiment. For purposes of this paragraph, a review is not considered suppressed based upon rating or negative sentiment if the suppression occurs based on criteria for withholding reviews that are applied equally to all reviews submitted without regard to sentiment, such as when:

(1) The review contains:

(i) Trade secrets or privileged or confidential commercial or financial information,

(ii) Defamatory, harassing, abusive, obscene, vulgar, or sexually explicit content,

(iii) The personal information or likeness of another individual,

(iv) Content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another intrinsic characteristic, or

(v) Content that is clearly false or misleading;

(2) The seller reasonably believes the review is fake; or

(3) The review is wholly unrelated to the products or services offered by or available at the website or platform.

§ 465.8 Misuse of fake indicators of social media influence.

It is an unfair or deceptive act or practice and a violation of this part for anyone to:

(a) Sell or distribute fake indicators of social media influence that they knew or should have known to be fake and that can be used by individuals or businesses to materially misrepresent their influence or importance for a commercial purpose; or

(b) Purchase or procure fake indicators of social media influence that they knew or should have known to be fake and that materially misrepresent their influence or importance for a commercial purpose.

§ 465.9 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions will continue in effect.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2024–18519 Filed 8–21–24; 8:45 am]

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC's Endorsement Guides: What People Are Asking

Tags: Advertising and Marketing | Endorsements, Influencers, and Reviews | Online Advertising and Marketing | Credit and Finance | FinTech

Suppose you meet someone who tells you about a great new product. The person says it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product or has been paid by the company to tout the product. Would you want to know that when you're evaluating the person's glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission's (FTC) Endorsement Guides. The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can't be used to make a claim the marketer of the product couldn't legally make.

In addition, the Guides say, if there's a connection between an endorser and the marketer that a significant minority of consumers wouldn't expect and it would affect how they evaluate the endorsement, that connection should be disclosed clearly and conspicuously. For example, if an ad features an endorser who is a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you're planning a vacation. You do some research and find a glowing YouTube video review saying that a particular resort is the most luxurious place the reviewer has ever stayed. If you knew the hotel had paid the reviewer hundreds of dollars to say great things about it or that the reviewer had stayed there for several days for free, it could affect how much weight you'd give the endorsement. The reviewer should, therefore, let viewers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who claims to have lost 20 pounds in two months using the advertised product. If the advertiser doesn't have proof that the endorser's experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), an ad featuring that endorser must make clear to the audience what the generally expected results of following that same regimen are.

Here are answers to some of the most frequently asked questions from advertisers, ad agencies, influencers, bloggers, and others. Our staff guidance can't be definitive because the context of any particular endorsement is very important in determining whether a disclosure is needed and whether a particular disclosure is sufficient. Given that much of our guidance depends on consumer understanding, there will be times when we don't have sufficient information about what consumers know, what they understand, and how they behave. Moreover, all these factors depend on the context or may change over time. This guidance doesn't provide a safe harbor from potential liability; whether a particular advertising claim is deceptive or otherwise violates the FTC Act will depend on the facts of the specific case.

In addition, we recommend that you read the latest version of the Endorsement Guides, which were revised in 2023 with new or revised principles, examples, and definitions, including a new definition of "clearly and conspicuously." We also have Disclosures 101 for Social Media Influencers and Soliciting and Paying for Online Reviews: A Guide for Marketers, both of which are short and easy-to-read documents with basic guidance.

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ABOUT THE ENDORSEMENT GUIDES

What is an endorsement?

According to the dictionary, an endorsement is a recommendation of something or an expression of approval or support for something, but the Endorsement Guides are talking about a particular type of endorsement. As used in the Guides, an endorsement is an advertising message that consumers are likely to believe reflects the opinions or beliefs of someone other than the sponsoring advertiser. So, if the message isn't an advertising message by or on behalf of a marketer, it isn't an endorsement.

Do the Endorsement Guides apply to social media?

Yes. Truth in advertising is important in all media, whether they have been around for many decades (like television and magazines) or are relatively new (like social media).

Isn't it common knowledge that social media influencers, bloggers, and other content creators are paid to tout products or that, if you click on their links to buy a product, they will get a commission?

It may be common knowledge that *some* of them get paid this way, but others may have no connection to marketers whose products they mention. They may not get a commission or anything

else for their recommendations, which they may be making only because they believe in those products.

Moreover, the existence of financial arrangements between some content creators and advertisers may be apparent to some people, but not to everyone. Under the law, an act or practice is deceptive if it misleads "a significant minority" of consumers. That's why disclosure is important.

Are you monitoring social media influencers and bloggers?

If concerns about possible violations of the FTC Act come to our attention, we evaluate them case by case. If law enforcement becomes necessary, our focus usually will be on advertisers or their ad agencies and public relations firms. However, action against an individual endorser might be appropriate in certain circumstances – for example, if the endorser hasn't made required disclosures despite warnings.

Does the FTC hold influencers and bloggers to a higher standard than reviewers for traditional media outlets?

No. The FTC Act applies across the board. The issue is – and always has been – whether the audience understands the reviewer's relationship to the company whose products are being recommended. If the audience understands the relationship, a disclosure isn't needed.

If you're employed by a newspaper or TV station to give reviews – whether online or offline – your audience probably understands that your job is to provide your personal opinion on behalf of your employer. In that situation, it's clear that you didn't buy the product yourself – whether it's a book or a car or a movie ticket. But people viewing a review on social media, in a blog, or in an online video might not realize that the reviewer has a relationship with the company whose products are being recommended. Disclosure of that relationship helps readers decide how much weight to give the review.

What is the legal basis for the Guides?

The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising.

The Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities. The Guides themselves don't have the force of law. However, practices inconsistent with the Guides may result in law enforcement actions alleging Section 5 violations. Law enforcement actions can result in orders requiring the defendants in the case to pay money that goes back to consumers harmed as a result of their violations and to abide by various requirements in the future. Moreover, if the defendants received a Notice of Penalty Offenses regarding endorsements and then engaged in certain deceptive or unfair endorsement practices, the FTC could seek substantial civil penalties.

Sometimes you talk in this document about "viewers" of a post and sometimes you talk about an influencer's or other person's "followers." What's the difference and whose understanding matters?

If social media posts can be seen by people who aren't followers, the interpretations and expectations of non-followers matter. That said, posts are more likely to be seen by followers, and followers are more likely to trust and rely upon people they follow, so the poster's credibility is more likely to matter to them.

Do the FTC Endorsement Guides apply to political advertisements?

The FTC doesn't have jurisdiction over political advertisements.

Can a brand hire several influencers to post the same content created by the brand and not the influencers themselves (e.g., a picture for a Facebook post or pre-written text for a tweet)?

There isn't a blanket prohibition against asking an influencer to post a standard image that a brand provided. The question is whether posting the picture conveys something that isn't true or that is otherwise misleading. For example, say the picture communicates that the influencer used the product or had a particular experience with the product. If that isn't true, the use of the picture would be misleading.

Hiring multiple influencers to post pre-written posts raises a similar concern because endorsements must reflect the truthful experiences and opinions of the endorsers. There is nothing inherently wrong

with using pre-written posts as long as the influencers are being truthful.

WHEN DOES THE FTC ACT APPLY TO PRODUCT RECOMMENDATIONS?

I'm a blogger. I heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?

No. If you mention a product you paid for yourself, there isn't an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to its customers. In those situations, your recommendation isn't a commercial practice covered by the FTC Act.

The FTC Act applies to product recommendations and other endorsements made on behalf of a sponsoring advertiser. For example, your product recommendation would be covered by the FTC Act if an advertiser – or someone working for an advertiser – pays you or gives you something of value to have you mention that product. If you receive free products or other perks with the expectation that you'll promote or discuss the advertiser's products in your blog, the FTC Act applies to you. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are subject to the FTC Act.

What if I upload a video to YouTube that shows me endorsing several products? Should I disclose that I got them from an advertiser?

Yes. The guidance on when to make disclosures is the same no matter what format your review takes or where it appears.

What if all I get from a company is a $1-off coupon, an entry in a sweepstakes or a contest, or a product worth only a few dollars? Does that still have to be disclosed?

The answer depends on whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, you should disclose it. For example, if your endorsement of a product allows you to enter a sweepstakes to win a thousand dollars, it could very well affect how people view that endorsement. (See the Q&A below in the section entitled "Social

Media Contests." Determining whether a small gift would affect the weight or credibility of an endorsement can be difficult. It's always safer to disclose that information.

Also, even if getting one small item for free wouldn't affect the weight and credibility of your endorsement, continually getting free stuff from one or more advertisers could suggest that you expect future benefits from positive reviews. If you have a relationship with an advertiser that sends you free stuff in the hope of endorsements, it's best to let readers know about that relationship whenever you recommend that advertiser's products.

Even an incentive with no financial value might affect the weight or credibility of an endorsement and would need to be disclosed. The Guides give the example of a restaurant patron who, before giving an opinion about a particular menu item, is offered the opportunity to appear in a TV ad. Because the chance to appear in the ad could sway what someone says, that incentive should be disclosed.

My company makes a donation to charity anytime someone reviews our product. Do we need to make a disclosure?

The overarching principle is that if readers would evaluate the reviews differently knowing that the reviews were motivated in part by charitable donations, there should be a disclosure. It's possible that some readers might think that the donation program makes reviewers more favorably inclined to your company and its product. Therefore, we suggest erring on the side of caution and disclosing that you make donations in exchange for reviews.

What if an advertiser lends me a product to review and I return it after my review is posted? Should I still make a disclosure?

That might depend on the product and how long you are allowed to use it. For example, if you get free use of a car for a month, we recommend a disclosure even though you have to return it. But even for less valuable products, it's best to be open and transparent.

Two months ago, I signed a one-year contract with a company to promote its brand. Every time I've posted about the brand, I've disclosed my relationship. By now, my followers might have seen eight disclosures that

I'm working with the brand. Do I still have to disclose the relationship in every post going forward?

Each new endorsement made without a disclosure could be deceptive because viewers might not have seen the prior posts.

A year ago, I was given a free $60 video game (and nothing else) in exchange for live streaming my game play. I still love the game and stream it. Do I still need to disclose that I got the game for free?

How long it would be reasonable for you to make disclosures really depends on the expectations of your fans. After some period of time, it probably wouldn't matter to them that you got the game for free. If you're choosing to play a game a year after you got it for free, it probably means you truly like it. The analysis would likely be different if, instead of a $60 video game, you got a free $50,000 car and continued to post about it over the life of the car.

I'm an influencer and a company sent me a free product which I posted about. If I buy more of the product with my own money and continue using it, can I post about it without disclosing that the company once sent it me for free?

If you have an ongoing relationship with a brand, you should still disclose that relationship even if you buy the brand's product yourself.

If you received nothing but a free product to try and are now buying it with your own money, it seems unlikely that your viewers would care that you initially received the product for free. That said, transparency with your viewers is always a good choice, e.g., "A couple of months ago, XYZ gave me a free ABC, and I loved it so much that I keep buying it with my own money."

I have a website that reviews local restaurants. Some restaurants pay for display ads on my site , and it's clear what is an ad and what isn't. Do I also have to disclose which restaurants give me free meals?

If you get free meals from a restaurant that you review, you should let your readers know so they can weigh that factor for themselves. If the display ads are clearly ads, there is no need to disclose their

commercial nature. If, however, the purchase of a display ad positively impacts the editorial content of the review, the review could be deceptive.

I'm opening a new restaurant. To get feedback on the food and service, I'm inviting my family and friends to eat for free. If they talk about their experiences on social media, is that something that should be disclosed?

You've raised two issues here. First, yes, they should disclose that they are your relative or friend because it may be relevant to people reading that endorsement. Second, if you give free meals to people – whether relatives or strangers – and seek their endorsement, they should disclose this fact because, again, it would be relevant to people reading those reviews. Even if you didn't specifically ask for an endorsement, people reading those social media messages would probably want to know that the meal was on the house.

I have a YouTube channel that focuses on hunting and camping. Sometimes I'll do a product review. Knife manufacturers know how much I love knives, so they send me knives as free gifts, hoping that I'll review them. I'm under no obligation to talk about any knife, and getting the knives as gifts really doesn't affect my judgment. Do I need to disclose when I'm talking about a knife I got for free?

Even if you don't think it affects your evaluation, what matters is whether the fact that you got the knife for free might affect how *your audience* views what you say about it. It doesn't matter that you aren't required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free. So we advise disclosing that fact.

I've been paid by a manufacturer to post a video reviewing of one of its products. My review recognizes the product's good points as well as its negative ones. Because my review discusses the negatives, is it really an endorsement and do I really have to disclose anything?

Even if your review mentions one or more negative points, it's still an endorsement. Readers of the review would likely think differently about it if they knew you were paid. So you should disclose the payment.

I'm a skin care influencer and I have an endorsement deal with a brand. If I post negative comments about a competing brand, do I have to disclose my endorsement deal?

Yes. If you criticize a competitor of a brand that you are paid to endorse, you should disclose your paid relationship. It would likely affect the weight and credibility that your audience gives to your negative comments.

I was paid by a company to endorse its product on Facebook and Instagram. If I throw in a free endorsement on Snapchat, does my snap need a disclosure?

Yes. Even if you weren't specifically paid to make the Snapchat endorsement, you still have a paid relationship with the company that could affect the weight or credibility given to that endorsement.

A trade association hired me to be its "ambassador" and promote its upcoming conference on social media, primarily on Twitter. The association is only paying me for five hours a week. I disclose my relationship with the association when I tweet about the event during those hours. But sometimes I get questions about the conference in my off time. If I respond via Twitter when I'm not officially working, do I need to make a disclosure? If so, can I do it by placing a badge for the conference in my Twitter profile?

You have a financial connection to the company that hired you and that relationship exists whether or not you're being paid for a particular tweet. If you're endorsing the conference in your tweets, your audience has a right to know about your relationship. That said, some tweets responding to questions about the event would likely not be endorsements if they aren't communicating your opinions about the event – for example, if you are merely giving someone a requested link to the conference agenda.

Also, if you respond via email or text to someone's questions about the event, that person probably already knows your affiliation with the trade association or they wouldn't be asking you. You probably wouldn't need a disclosure in that context. But when you respond via social media, all your followers see your posts, and some of them might not have seen your earlier disclosures.

Merely posting the conference's badge on your Twitter profile page wouldn't be sufficient because many people in your audience probably wouldn't see it. Also, the badge itself may be simply a logo or hashtag for the event or may otherwise not adequately inform consumers of your connection to the trade association.

I'm a blogger and a company wants me to attend the launch of its new product. They will fly me to the launch and put me up in a hotel for a couple of nights. They aren't paying me or giving me anything else. If I write a blog sharing my thoughts about the product, should I disclose anything?

Yes. You should disclose that you received free travel and accommodations because it could affect how much weight your readers give to your thoughts about the product.

In my social media posts, I mention or show products I use. If I say nothing positive about a product, is the post an endorsement covered by the FTC Act?

Simply posting a picture of a product on social media, such as on Pinterest, or a video of you using it, could convey – even without words – that you like and approve of the product. If it does convey that kind of positive message, the post is an endorsement. Of course, if you don't have any relationship with the advertiser, your posts aren't subject to the FTC Act, no matter what you show or say about the product. The FTC Act covers only endorsements that can be attributed to an advertiser or marketer.

If I post a picture of myself to Instagram and tag the brand of dress I'm wearing, but I don't say anything about the brand in my description of the picture, is that an endorsement? And, even if it is an endorsement, wouldn't my followers understand that I only tag the brands of my sponsors?

Tagging a brand you're wearing is an endorsement of the brand. Just like any other endorsement, it could require a disclosure if you have a relationship with that brand. Some influencers only tag the brands of their sponsors, some tag brands with which they don't have relationships, and some do a

bit of both. Followers might not know why you're tagging a dress. Some might think you're doing it just because you like the dress and want them to know.

If I don't tag the dress, is a picture of me wearing it while at a restaurant an endorsement that makes a disclosure necessary?

Probably not. In an analogous situation, one of the examples in the Endorsement Guides says that no disclosure is required because no representation is being made about the clothes in this context.

Say a car company pays a blogger to write about wanting to buy a certain new electric sports car. The post includes a link to the company's site, but it doesn't say that the blogger is actually going to buy the car or has even driven it. Is the post still an endorsement subject to the FTC's Endorsement Guides?

Yes. An endorsement can be aspirational. In this case, it's an endorsement because the blogger is expressing – at least implicitly – positive views about the car (*e.g.*, "I want it"). If the blogger was paid, it should be disclosed.

I'm a travel influencer and I'm on a free cruise. We stop in a port and I go shopping on my own. I stop in a small antique shop, which doesn't pay or give me anything. Can I post about the shop on social media without disclosing anything?

Yes. If you have no connection to the shop and are posting about it just because you like it, no disclosure is necessary even if you're on a free trip.

I wrote a book and belong to a group of authors who agree to post reviews for each other. I'll review someone else's book on a book review site or a bookstore site if they review my book. No money changes hands. Do I need to make a disclosure?

Yes. It sounds like you have a connection that might materially affect the weight or credibility of your endorsements (that is, your reviews), since bad reviews of each other's books could jeopardize the

arrangement. These circumstances illustrate how the need to make a disclosure isn't limited to situations in which money changes hands. Connections that require a disclosure could be based instead on things like friendship, family, or employment relationships, or deals between acquaintances.

My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?

Yes. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. In addition, many businesses are so diversified that readers might not realize that the products you're talking about are sold by your company.

A famous athlete has millions of followers on Twitter and is well known as a spokesperson for a particular product. Does the athlete have to disclose being paid in every tweet about the product?

It depends on what readers of the tweets would understand. If a significant minority of viewers doesn't know about the relationship and would care if they did, the relationship should be disclosed. Determining whether the audience for a tweet is aware of and cares about a relationship can be tricky, so we recommend disclosure.

Also, if a disclosure is needed in one post for a brand, it's probably needed in all posts, because you can't assume that viewers will see multiple posts.

A celebrity has millions of followers on Instagram. Many people know that the celebrity regularly charges advertisers to mention their products in posts. Does the celebrity have to disclose being paid for a particular post about a product?

It depends on the extent to which people reading the celebrity's posts understand that a particular post is a paid endorsement. Many followers may know generally about the celebrity's connections to advertisers, but, for any one post, if a significant minority of readers don't know it was paid, a

disclosure may be needed. Again, determining what readers know can be tricky, so we recommend disclosure.

I'm a video blogger who lives in London. I create sponsored videos on YouTube for products that are also sold in the U.S. Do I need to tell my viewers that I've been paid to endorse the products even though I don't live in the U.S.?

If it's reasonably foreseeable that your YouTube videos will be seen by and impact U.S. consumers, U.S. law would apply and you would need a disclosure. Also, the U.K. and many other countries have similar laws and policies relating to endorsements. So, you'll want to check those, too.

An influencer creates their own brand and sells their product through their social media accounts and website. Do they need to disclose anything?

If it is obvious from an influencer's endorsement that that the brand is the influencer's own, no disclosure is necessary. If it's not clear or sometimes not clear that it's the influencer's brand, that fact should be disclosed.

PRODUCT PLACEMENTS

What does the FTC have to say about product placements on television shows?

Federal Communications Commission law (FCC, not FTC) requires TV stations to include disclosures of product placement in TV shows.

The FTC has expressed the opinion that, under the FTC Act, product placement (that is, merely showing products or brands in third-party entertainment content, as distinguished from sponsored content or disguised commercials) doesn't require a disclosure that the advertiser paid for the placement.

What if a pair of TV talk show hosts express an opinion on their show about a video game they were paid to promote? The segment is humorous and the hosts aren't video game experts. Is that a product placement and does the payment have to be disclosed?

By expressing a positive opinion about the product – even if the segment just shows them playing the game against each other and reacting positively – the hosts are making endorsements, which is more than a mere product placement. If the audience doesn't know the hosts are getting paid and if that information would affect the weight or credibility the audience gives the endorsement, it should be disclosed. It doesn't matter that the segment is humorous or that the hosts aren't experts. However, in some cases, a host may say something about a product that is obviously an advertisement, in which case a disclosure probably isn't necessary. For example, think of an old-time TV show where the host goes to a different set, holds up a cup of coffee, says "Wake up with EFG Coffee. It's how I start my day!" and takes a sip.

What if a talk show has a "bargains segment" where the show's producers have partnered with a brand or brands to recommend certain discount products to viewers? Is that just a product placement? Does there need to be a disclosure?

That isn't just a product placement as the show is recommending certain products. So there should be disclosures of the paid relationship with the marketer(s). To be most effective, the disclosures should be presented at the beginning of the segment and when specific products are endorsed. The disclosures should be straightforward in explaining the financial connection and shouldn't use unclear expressions like "we've partnered with vendors."

ENDORSEMENTS BY ORDINARY CONSUMERS ON SOCIAL MEDIA

Many social media platforms allow you to share your interests with friends and followers by clicking a button or sharing a link to show that you're a fan of a particular business, product, website or service. Is that an "endorsement" that needs a disclosure?

Many people enjoy sharing their fondness for a particular product or service with their social networks. If you write about how much you like something you bought on your own and you have no relationship with the advertiser, no disclosure is necessary. However, if you're doing it as part of a sponsored campaign or you're being compensated – for example, getting a discount on a future purchase or being entered into a sweepstakes for a significant prize – a disclosure is appropriate.

I'm an avid social media user who often gets rewards for participating in online campaigns on behalf of brands. Is it OK for me to click a "like" button, pin a picture, or share a link to show that I'm a fan of a particular business, product, website or service as part of a paid campaign?

Pinning a picture or sharing a link to endorse a company's products or services as part of a sponsored brand campaign probably requires a disclosure.

We realize that some platform features – like Facebook's "like" buttons – don't allow you to make a disclosure. Advertisers shouldn't encourage endorsements using features that don't allow for clear and conspicuous disclosures. Whether the FTC would say a disclosure is needed may depend on the overall impression of the endorsement – for example, whether consumers would consider "likes" to be material in their decision to patronize a business or buy a product.

However, an advertiser buying fake "likes" is very different from an advertiser offering incentives for "likes" from actual consumers. If "likes" are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake "likes" could face enforcement action.

I posted a review of a service on a website. Now the marketer has taken my review and changed it in a way I think is misleading. Am I liable for that? What can I do?

No. You aren't liable for the changes the marketer made to your review. You could, and probably should, complain to the marketer and ask it to stop using your altered review. You also could report it to the FTC, your local consumer protection organization, and the Better Business Bureau.

HOW SHOULD I DISCLOSE THAT I WAS GIVEN SOMETHING FOR MY ENDORSEMENT?

Is tagging a brand in a social media post a sufficient disclosure that I have a connection to a brand?

No. Tagging a brand is an endorsement, but it's not a disclosure that you have a connection to a brand. You could just be tagging it because you like it.

Is there special wording I have to use to make the disclosure?

No. The point is to give readers the essential information in words that are easy to understand. The best disclosures are simple, like "This is an ad for BRAND" or "This video is paid for by BRAND" or "BRAND paid me to tell you about it."

Do I have to hire a lawyer to help me write a disclosure?

No. What matters is effective communication. A disclosure like "Company X gave me [name of product] to try, and I think it's great" gives your readers the information they need. Or, at the start of a short video, you might say, "The products I'm going to use in this video were given to me by their manufacturers." That gives the necessary heads-up to your viewers (assuming you weren't also paid by the manufacturers, in addition to getting the products for free, in which case you should disclose that you were paid).

In this document, you provide examples of various disclosures you think will or are likely to be effective. Are you saying those disclosures will work for children and teens?

No. As the Endorsement Guides suggest, children and teens can react differently from adults. A disclosure that works with adults might not work with younger individuals. Indeed, research suggests that disclosures will not work for younger children. Accordingly, advertisers and endorsers should be particularly careful in their use of endorsements directed to this audience.

Do I need to list the details of everything I get from a company for reviewing a product?

No. What matters is whether the information would have an effect on the weight readers would give your review. So, whether you got $100 or $1,000, you could simply say you were "paid." (That

wouldn't be good enough, however, if you're an employee or co-owner.) And if what you got is so small that it wouldn't affect the weight readers would give your review, you may not need to disclose anything.

How do I know if what I got is so small that it wouldn't affect the weight readers would give my endorsement?

There is no easy answer to that question and there is no threshold amount that would apply in all situations. It might vary by the endorser and by the type of product being endorsed.

Do I always need to disclose when I got a product for free, and do I need to say any more than that?

It depends on the product and on what else, if anything, you got from the company. Saying only that you got a product for free suggests you didn't get anything else.

For example, if an app developer gave you their 99-cent app for free for you to review it, that information might not have much effect on the weight that readers give to your review. But if the app developer also gave you $100, knowledge of that payment would have a much greater effect on that weight. So a disclosure that simply said you got the app for free wouldn't be good enough, but, as discussed above, you don't have to disclose exactly how much you were paid.

Similarly, if a company gave you a $50 gift card to give away to one of your readers and a second $50 gift card to keep for yourself, it wouldn't be good enough only to say that the company gave you a gift card to give away.

I'm doing a review of a video game that hasn't been released yet. The manufacturer sent me the game and is paying me to review it. Is it enough just to disclose that the manufacturer gave me a "sneak peek" of the game?

No. Merely referring to your early access doesn't tell people that you were paid for your review. You should say that you were paid. If you weren't paid but the manufacturer just let you keep the game for free, it might be deceptive to refer to what you were given as merely a "sneak peek."

Would a single disclosure on my home page that "many products discussed on this site are provided free by their manufacturers" be enough?

No. A single disclosure on your home page won't be sufficient because people visiting your site might read individual reviews or watch individual videos without seeing the disclosure on your home page. Even if some viewers read the disclosure, it doesn't tell them which products were and weren't provided for free by their manufacturers.

If I upload a video to TikTok and that video requires a disclosure, can I put the disclosure in the text description of the video?

The text description on TikTok is in small print, it doesn't stand out, and it often doesn't contrast against the background of the video. Also, TikTok videos often have many competing elements. A disclosure in the text description is thus very unlikely to be clear and conspicuous. When content creators want viewers to read something, they superimpose much larger text over their videos.

Can I just superimpose a larger text disclosure over my video?

It depends how you make the endorsement in the video. As the Endorsement Guides say, if the endorsement is made through visual means, the disclosure should be made at least visually. If the representation is made audibly, the disclosure should be made at least audibly. And if the representation is made through both visual and audible means, the disclosure should be made both visually and audibly. A disclosure presented simultaneously in both the visual and audible portions of an ad is more likely to be clear and conspicuous.

If I upload a video to YouTube and that video requires a disclosure, can I put the disclosure in the description that accompanies the video?

You can, but that's not enough on its own because consumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and even those who do see that page might not see or read the disclosure. The disclosure has the best chance of being clear and conspicuous if it's included in the video itself. (See the Q&A above about how a disclosure should be made in a video.)

What about having a disclosure in the description of an Instagram post? Is that good enough?

When people view Instagram streams, longer descriptions are truncated, with only the first two or three lines displayed. To see the rest, you have to click "more." If an Instagram post makes an endorsement in the beginning of the description, any required disclosure should be presented without having to click "more."

If the picture on an Instagram post conveys an endorsement without the viewer having to read the accompanying description and a significant minority of viewers don't read the description, a disclosure in the description could be inadequate. You might need a disclosure superimposed over the picture. Also, if an Instagram post makes an endorsement in a video, there should be a disclosure in the video, preferably both visually and audibly. (See the discussion in "So, can I just superimpose a larger text disclosure over my video?")

Would a button on a web page that says DISCLOSURE or LEGAL or something like that be enough, so long as the button links to a full disclosure?

No. A hyperlinked disclosure like that is easily avoidable, meaning that the disclosure is not clear and conspicuous. Many consumers won't click on it and will miss the disclosure. Usually, your disclosure can be brief and there is no space-related reason to use a hyperlink to provide access to it.

If a brand (for example, a tourism organization) is sponsoring a trip for an influencer, does every single post the influencer posts while in that destination need to include a disclosure like #ad?

An influencer can't assume that followers will read more than one of their posts and associate them with each other. As we say in .com Disclosures, How to Make Effective Disclosures in Digital Advertising , "Use disclosures in each ad." If a disclosure is required in an ad, "the disclosure should be in each and every ad that would require a disclosure if that ad were viewed in isolation."

That said, it's possible that some posts made while the influencer is at that destination might not mention or promote the destination. If a post is non-promotional, e.g., a close up of the influencer's child without tags or other clues as to the location, there is no need for a disclosure. Simply tagging a

post made while in that destination as an #ad might be fine, but it could be confusing in some circumstances. When the sponsor's identity is unclear but would matter to consumers, the sponsor should probably be identified.

The social media platform I use has a built-in feature that allows me to disclose paid endorsements. Can I just rely on that tool?

Not necessarily. It's good that some platforms offer these tools, and we don't want to dissuade you from using them. But just because a platform offers this feature is no guarantee that it's an effective way for influencers to disclose their material connection to a brand.

In an investigation, the FTC would evaluate whether the use of the tool by itself clearly and conspicuously discloses the relevant connection. Indeed, for any disclosure on social media, whether or not through the use of a platform tool, the FTC would consider several key factors in determining whether the disclosure is clear and conspicuous.

One factor is placement. The disclosure should catch users' attention and be placed where they aren't likely to miss it. A key consideration here is how users view posts on a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook.

A second factor is readability. The disclosure should use a simple-to-read font with a contrasting background that makes it stand out.

A third factor is clarity. The disclosure should be a worded in a way that's clear, unambiguous, and understandable to the ordinary reader. For example, simply flagging that a video "contains paid content" might not be sufficient if the video mentions multiple products or services without identifying which content is paid.

The big-picture point is that the ultimate responsibility for clearly and conspicuously disclosing a material connection rests with the influencer and the brand – not the platform. To be on the safe side, it's always best to add your own disclosure even if a platform offers its own disclosure tool.

It would be highly beneficial if all social media platforms developed standardized, built-in disclosure tools that are easy for endorsers to use and easy for viewers to notice and understand, and if the

platforms also tested the effectiveness of such disclosures. FTC staff is always willing to discuss that with any platforms that might want to make improvements.

How can I make a disclosure on Snapchat or in Instagram Stories?

You can superimpose a disclosure on Snapchat or Instagram Stories, just as you can superimpose any other words over the images on those platforms. The disclosure should be easy to notice and read in the time your followers have to look at the image. Consider how much time you give your followers to look at the image, how much competing text there is to read, how large the disclosure is, and how well it contrasts against the image. (You might need to have a solid background behind the disclosure.) If your post includes video, see the discussion in "So, can I just superimpose a larger text disclosure over my video?" Also note that, if you just include an audio disclosure, users who watch videos without sound won't hear it.

What about a platform like Twitter or Facebook?

The FTC doesn't mandate the specific wording of disclosures. Regardless of the advertising medium or platform, the same general principle applies: people should get the information they need to evaluate sponsored statements. Starting a post with "Ad:" or "Paid ad" or "#ad" or "Advertising:" or "Advertisement" would likely be effective. The words "Sponsored" and "Promotion" at the beginning of a post might also be effective, but "Sponsored by XYZ" or "Promotion by XYZ" would be clearer (where "XYZ" is a brand name). Also see the discussion in "So, can I just superimpose a larger text disclosure over my video?"

I've been paid to make an endorsement in a Facebook post. Can I disclose the relationship in the comments section?

No. A disclosure in the comments to a post is easily avoidable and thus not clear and conspicuous.

You just talked about putting short disclosures at the beginning of a social media post. What about "#ad" at or near the end of a post?

We're not necessarily saying that, if you use a disclosure like "#ad," you have to put it at the beginning of a post. The FTC doesn't dictate where you have to place the disclosure. The issue for us is whether

the disclosure is easily noticeable, easily understandable, and hard to miss by ordinary consumer. A disclosure in the middle or at the end of a post is easier to miss and thus less likely to be effective. That's particularly true if it's at the end of a long post or mixed in with links or other hashtags.

Does #ad work both for a paid post as well as for the receipt of a free product?

Yes, it does.

Is there anything special about hashtags in a post? Is "#ad" better than "Ad:" or "ad"?

There is nothing special about hashtags from a disclosure perspective. "#ad," "Ad:," and "ad" at the beginning of a post are probably all equal.

What if we combine our company name, "Cool Stylle," with "ad," as in "#coolstyllead"?

There is a good chance that consumers won't notice and understand the significance of the word "ad" at the end of a hashtag, especially one made up of several words combined like "#coolstyllead." Disclosures need to be easily noticed and understood.

Is "#paidforbyXYZ" (when XYZ is a brand name) an acceptable disclosure?

It might work, but it's possible that consumers would find it hard to read or understand when the words all run together. "Paid post by [brand]" or "Paid post for [brand]" would be much clearer and only takes up a few more characters.

Is it good enough if an endorser says "thank you" to the sponsoring company?

No. A "thank you" to a company or a brand doesn't necessarily communicate that the endorser got something for free or that they were given something in exchange for an endorsement. The endorser could just be thanking a company or brand for providing a great product or service. But "Thanks XYZ

for the free product" or "Thanks XYZ for the gift of ABC product" would be good enough – if that's all you got from XYZ. If that's too many characters for the format, there's always "Ad."

What if I call my endorsement an "#endorsement"? Is that clear enough?

No. That's because using the word "endorsement" doesn't make clear to people that you're talking about the special way that word is used in the Endorsement Guides. In other words, it doesn't inform people that you were paid or incentivized to make your endorsement or that you have any other connection to the brand.

What about saying, "XYZ Company asked me to try their product"?

That disclosure might be sufficient if the context of the endorsement makes clear that the endorser got to keep the product for free after trying it, and if the endorser didn't get anything else. It wouldn't be sufficient if those things aren't clear or if the company gave money or something else to the endorser.

I provide marketing consulting and advice to my clients. Sometimes I also promote my client's products in my personal social media accounts. Are "#client," "#advisor," and "#consultant" all acceptable disclosures?

Probably not. Those one-word hashtags are ambiguous and likely confusing. It would be much clearer to say something like, "I'm a paid consultant to the marketers of XYZ" or "I work with XYZ brand" (where XYZ is a brand name).

Of course, on some platforms you might need a shorter disclosure, and it's possible that a shorter message might be effective. For example, something like "XYZ_Consultant" or "XYZ_Advisor" might be clear enough.

Would "#ambassador" or "partner" work in a tweet? What about or "#XYZ_Ambassador" or "#XYZ_Partner"?

The use of "#ambassador" or "partner" is ambiguous and confusing. "#XYZ_Ambassador" or "#XYZ_Partner" will likely be more understandable (where XYZ is a brand name).

Is "Gifted" a sufficiently clear disclosure?

No. The word "Gifted," by itself without a brand reference, is likely to be ambiguous. However, "Gifted by XYZ" (when XYZ is a brand name) should be sufficient when all you've received is a free product.

I post regularly about the night life in my city and a club gave me free tickets to one of its events so I would post about it. Is it good enough if I disclose that "I received free tickets"?

No. Your followers could think you received the free tickets from a relative, a friend, or a radio giveaway, rather than from the club itself, so that disclosure is inadequate. You should say who gave you the tickets. You could instead disclose that the tickets "were complimentary" or "on the house."

For similar reasons, a disclosure like "I was given [name of product] for free" won't be effective because it doesn't tell people who gave you the product. That's why we don't recommend use of the hashtag "#freeproduct." But "I was given a free [name of product] to review," should probably be clear enough.

I'm a blogger, and XYZ Resort Company is flying me to one of its destinations and putting me up for a few nights. If I write an article sharing my thoughts about the resort destination, how should I disclose the free travel?

Your disclosure could be just, "XYZ Resort paid for my trip" or "Thanks to XYZ Resort for the free trip." It would also be accurate to describe your blog as "sponsored by XYZ Resort."

Where in my blog should I disclose that my review is sponsored by a marketer? Does it matter if the disclosure is at the top or at the bottom?

Yes, it matters. A disclosure should be placed where it easily catches consumers' attention and is difficult to miss. Readers might overlook a disclosure at the very top of the page, outside of the blog. Their eyes will probably be drawn to a picture or a headline, and they will then probably read down. Consumers may miss a disclosure at the bottom of a blog or page. Many won't read to the very end or look after the end of the blog itself. A disclosure is more likely to be seen if it's very close to, or – even better – part of, the endorsement to which it relates.

I've been paid to endorse a product on social media. My posts, videos, and tweets will be in Spanish. In what language should I disclose that I've been paid for the promotion?

The connection between an endorser and a marketer should be disclosed in whatever language or languages the endorsement is made, so your disclosures should be in Spanish.

I've been paid for a video review that I'm uploading to YouTube. When in the review should I make the disclosure? Is it okay if it's at the end?

Viewers are more likely to miss a disclosure at the end of the video, especially since some may not watch the whole thing. Having it at the beginning of the review would be better. Having multiple disclosures during the video would be even better. Of course, if your disclosure is only at the beginning, you and the brand that paid you shouldn't provide consumers with a link to your review that bypasses the beginning and skips over the disclosure. If YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads isn't clear and conspicuous.

Would your answer be different if my paid endorsement of a product is in the middle of a longer YouTube video?

In that case, the best place for the disclosure would be right before or at the beginning of the actual endorsement.

I'm getting paid to do a videogame playthrough and give commentary while I'm playing. The playthrough – which will last several hours – will be live streamed. Would a disclosure at the beginning of the stream be okay?

Since viewers can start watching at any time, they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream, people are more likely to see them no matter when they tune in. To be on the safe side, you could have a continuous, clear and conspicuous disclosure appear throughout the entire stream. We also advise that you add a disclosure to any description of the stream before potential viewers click through to it.

My YouTube channel is a product review channel, and I receive products for free from brands to do reviews. I tell the audience at the beginning of each video that the products being reviewed were sent to me for free. In the descriptions of my videos, I include affiliate links for viewers to buy the products (if they choose), and I make a commission from those sales. Do I need to disclose in my videos that I receive those commissions (along with the disclosure that I got the products for free), or is a disclosure next to the link good enough?

You should disclose the affiliate relationship both in the videos and in the description near the links. (For how to make such disclosures, see the Q&A below in the section entitled "What About Affiliate or Network Marketing?")

I have attended sneak peek events and use #comped or #hosted. Can influencers/bloggers use #comped and #hosted for non-paid endorsements?

Neither #comped nor #hosted is sufficiently clear. It would be fine to say, for example, "XYZ brand flew me to Hawaii for their launch event at the EFG Resort," assuming that is all the brand did.

Is a personalized discount code an adequate disclosure?

When an influencer uses a clearly personalized and unique discount code for a brand's products (e.g., one matching the influencer's Instagram name with the percentage savings, such as iammike20%), that probably conveys that a relationship exists between the influencer and the brand. Whether it conveys that they have a financial relationship is less clear. If a significant minority of readers doesn't understand that the influencer gets paid when people use the personalized discount code, there should be a clearer disclosure. When it's not obvious what consumers understand, we recommend erring on the side of disclosure.

OTHER THINGS FOR ENDORSERS AND ADVERTISERS TO KNOW

Besides disclosing my relationship with the company whose product I'm endorsing, what are the essential things I need to know about endorsements?

The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

- You can't talk about your experience with a product if you haven't tried it.
- If you've only tried a product once, you can't suggest you use it regularly.
- If you thought it was terrible or mediocre, you can't say it's good or terrific.
- You can't otherwise misrepresent your experience with or opinions about a product.

Also, you shouldn't make claims about a product that would require proof the advertiser doesn't have. The Guides say that an endorser who isn't an expert may be liable for misleading or unsubstantiated statements about a product's performance or effectiveness in certain circumstances. For example, the endorser could be liable when what they say or write isn't consistent with their personal experience. They also could be liable if what they say or write isn't approved by the advertiser and goes beyond the scope of their personal experience.

Our company is a multi-level marketing company (MLM). In our business, participants directly market the MLM's products and attempt to recruit other individuals to become participants in the MLM program. Are participants liable as "endorsers"?

Because participants are directly engaged in selling the MLM's products, the MLM's opportunity, or both, they generally would be liable as an advertiser for any misrepresentations they make. In our experience, they are also usually acting as agents of the MLM.

SOCIAL MEDIA CONTESTS

My company runs contests and sweepstakes on social media. To enter, participants have to send a Tweet or make a pin with the hashtag

#XYZ_Rocks. ("XYZ" is the name of my product.) Isn't that enough to notify readers that the posts were incentivized?

No. Many readers would likely not understand a hashtag like that to mean those posts were made as part of a contest or that the posters had received something of value (in this case, a chance to win the contest prize). Making the word "contest" or "sweepstakes" part of the hashtag (e,g., #XZY_Contest or #XYZ_Sweepstakes) should be enough. However, the word "sweeps" probably isn't because it's likely that many people wouldn't understand what that means. You should also instruct participants where to make the disclosure so that it's clear and conspicuous (e.g., at the beginning of the post).

Is #sweepstakes by itself a good enough disclosure?

No. Let's say that JKL-Cola is having a sweepstakes and, to enter, a consumer has to make a Facebook post identifying their happiest place to drink JKL-Cola and submit a screenshot of the post. If a consumer posts, "My happiest place to drink JKL-Cola is in my jacuzzi. #sweepstakes," their social media friends or followers might not understand that the post was incentivized by a sweepstakes. It would be clearer if the consumer said, "My happiest place to drink JKL-Cola is in my jacuzzi. #JKLCola_Sweepstakes."

ONLINE REVIEW PROGRAMS

My company runs a retail website that includes customer reviews of the products we sell. We give out free products to a select group of our customers for them to review. We tell them to be honest, whether it's positive or negative, because we just want the reviews to be helpful. Do we still need to disclose which reviews were of products the reviewer received for free?

Yes. Knowing that reviewers got the product for free would probably affect the weight your customers give to the reviews, even if you didn't intend for that to happen. Reviewers who are incentivized to write their reviews because they received free products or the like may tend to give more positive reviews. For example, they may believe they'll stop getting free products if their reviews are negative, despite your assurances that you only want their honest opinions. Also, if these reviewers give ratings

on a scale, such as a number of stars, and if those ratings are substantially higher than those given by customers who bought the products, it could result in a substantial increase in the overall rating. If that's the case, consumers may be misled if they just look at the inflated overall star rating rather than reading individual reviews with disclosures. In instances like that, you should disclose next to every overall or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer's games. We're going to have these reviewers announce at the beginning of each video (before the action starts) that it's "sponsored by XYZ" and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think XYZ is a neutral third party and won't realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, "Sponsored by [name of the video game]," that would be good enough. As to the placement of the disclosure, the Guides say that simultaneous written and spoken disclosures are the best, all other things being equal. Whether a particular disclosure is easy to understand or difficult to miss depends on the actual disclosure.

My company would like to get more online reviews by sending a link to a review page to customers in specific regions where we have the highest customer satisfaction. We would not send a link to customers in areas where we know our customer experience is poor. Is that OK?

No. Only asking for reviews from customers who you think are more likely to be happy with your product would be misleading if it substantially skews the favorability of the reviews.

I understand from the Guides that I can't use review management software to completely suppress negative reviews. Can I use it to give my company one or two days to draft a response to negative reviews so I can post the review and our response at the same time? Can I use it to delay posting the

negative reviews while I try to contact the unhappy customers and get them to change their minds?

If you want to delay posting reviews in order to have time to respond to them, you should delay posting all reviews, positive and negative, for the same, reasonable period of time. Treating all reviews equally in this way would not result in injury or deception. However, delaying the posting only of negative reviews, even just by a few days, could create a biased picture of a product at any given time, which makes this practice problematic.

Delaying the posting of negative reviews while you try to change customers' minds and then not posting the originally submitted reviews, would likely give a biased and misleading picture of what customers think about your products and services.

Is there anything wrong with contacting customers who left negative reviews and trying to make them happy? If I succeed, can I ask them to change their reviews?

You're welcome to contact unhappy customers and respond to their concerns. You can also ask them if they'll add updates to their reviews. However, asking them to change or delete their initial negative reviews could mislead readers.

The Guides talk about deceptively organizing customer reviews. Can you give an example of deceptive organizing?

Let's say you organize consumer reviews of your products so all of the 5-star reviews are first and then all 4-star reviews, 3-star reviews, 2-star reviews, and 1-star reviews are displayed in that order, regardless of the date of the review. A consumer could get a misleading picture of what users think, because it's unlikely the consumer will read through all of the reviews to get to the negative ones. This is true even if you give consumers the option to re-sort the reviews, because many consumers might not realize that the default sort is by star rating.

SOLICITING ENDORSEMENTS

My company wants to contact customers and interview them about their experiences with our service. If we like what they say about our service, can we ask them to allow us to quote them in our ads? Can we pay them for letting us use their endorsements?

Yes. You can ask your customers about their experiences with your product and feature their comments in your ads. If they have no reason to expect compensation or any other benefit before they give their comments, there's no need to disclose your payments to them.

However, if you've given these customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them you want their honest opinion. In fact, even if you tell your customers you aren't going to pay them but they might be featured in your advertising, that opportunity might be seen as having a value. So the fact that they knew this when they gave the review should be disclosed (e.g., "Customers were told in advance they might be featured in an ad.").

I'm starting a new online business and I don't have money for advertising, so I need publicity. Can I tell people that if they say good things about my business on a third-party review platform, I'll give them a discount on items they buy through my website?

No. Endorsements must reflect the honest opinions or experiences of the endorser. You can't condition an incentive – for example, a discount – on a review being positive, as that may motivate people to give a positive review for reasons unrelated to their honest opinion about your product. Your plan could even cause people who have never done business with you to make up positive reviews. However, assuming it doesn't violate the review platform's policy, it's okay to invite all of your customers to post honest reviews, positive or negative, after they've actually used your products or services. If you're offering customers something of value in return for these reviews, tell them in advance that they should disclose what they received from you and that they won't get the discount unless they do so. (Note, however, that many platforms prohibit such incentives.) Further, if offering an incentive materially increases your average star rating over non-incentivized reviews you receive, you may still be engaging in a deceptive practice, despite the disclosures in the individual reviews.

A company is giving me a free product to post a review on one particular social media platform. They say that, if I voluntarily review it on a different social media platform or on a website, I don't need to make any disclosures. Is that true?

No. If you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product.

If I get a free product to review, do I need a disclosure no matter how I got it?

Yes. It doesn't matter whether the company gives you a code, ships it directly to you, gives you money to buy it yourself, or reimburses you after you buy it. The key issue is always the same: If consumers knew the company gave it to you for free (or at a substantial discount), that information could affect how much weight they give your review.

My company wants to get positive reviews. We're thinking about distributing product discounts through various services that encourage reviews. Some services require people who want discount codes to provide information allowing sellers to read their other reviews before deciding whether to issue the codes. Other services send out offers of a limited number of discount codes and then follow up by email to see whether the recipients have reviewed the products. Still others send offers of discount codes to those who previously posted reviews in exchange for discounted products. All of these services say that reviews are not required. Does it matter which service I choose? I would prefer that recipients of my discount codes not have to disclose that they received discounts.

Whichever service you choose, the recipients of your discount codes need to disclose that they received a discount to encourage their reviews. Even though the services might say that a review is not "required," it's at least implied that a review is expected. If these services materially inflate your product's average star rating, you might still be engaging in a deceptive practice despite the disclosures in the individual reviews.

WHAT ARE AN ADVERTISER'S RESPONSIBILITIES FOR WHAT OTHERS SAY ON SOCIAL MEDIA?

Our company uses a social media network to promote our products. We understand we're responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser's responsibility for substantiating objective product claims, explain to members of your network what they can (and can't) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for clearly and conspicuously disclosing their connections to you, including exactly how you want them to make the disclosures;
3. Periodically search for what members of your network are saying; and
4. Take appropriate action if you find questionable practices.

It's unrealistic to expect you to be aware of every single statement made by a member of your network. But it's up to you to make a reasonable effort to know what participants in your network are saying. That said, it's unlikely that the activity of one rogue influencer would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

If your company pre-approves your influencers' paid social media posts, you should review the posts for truth-in-advertising compliance, including any disclosure responsibilities. If your company doesn't have a pre-approval process like that, consider starting one. It's much easier to review posts before they're posted than to search for them afterwards.

You say to periodically search for what our endorsers are saying. How often do we need to do that? Can you give us a standard, like monitoring of X% of our influencers every week or every month?

There's no one-size-fits-all standard. If regular monitoring is too much for you, you should probably switch to pre-approval of posts.

For influencers who only get free products, is just sending them training material sufficient?

It's important, but insufficient. If a company sends influencers a free unsolicited product and nothing else, it should ask them to clearly and conspicuously disclose the gift in any resulting social media posts or other endorsements, tell them how it should be disclosed, and ask them to tag the brand. The company should monitor the resulting tagged posts. We understand that software solutions exist to monitor compliance online. The FTC takes no position on their quality and recognizes that software like that might be too expensive for some companies. The extent of compliance monitoring needed, whether or not you use such software, may depend upon the types of products and possible claims involved, e.g., whether the claims involve health or safety.

Also, even if the only things you're sending influencers are unsolicited free products, you're still on the hook for their deceptive claims, so the training material should describe what they can and can't say about your products.

How can my company be expected to monitor ephemeral or short-lived endorsements like those on Instagram Stories or Snapchat?

There is probably no practical way to monitor those posts in real time. That's why you should require that paid posts aren't made without you approving them in advance.

Our company's social media program is run by our public relations firm. We tell them to make sure they – and people they pay on our behalf – comply with applicable laws and the FTC's Endorsement Guides. Is that good enough?

Your company is ultimately responsible for what others do on your behalf. You should make sure your public relations firm has an appropriate program in place to train and monitor members of your social media network. Ask for regular reports confirming that the program is operating properly and monitor the network periodically. Delegating part of your promotional program to an outside company doesn't relieve you of responsibility under the FTC Act.

How long after we pay someone or give them a free product should we continue to monitor them?

We don't have a basis for setting a specific time period. The short answer is that the length of your monitoring should be reasonable and doesn't have to go on forever. If you have an endorser under contract, you certainly should monitor them during the length of the contract and for a reasonable time, such as a few months, after the contract expires. If there was no contract and you just sent a free product, it would probably be reasonable to monitor endorsers for at least a few months. But there is no set time period that makes sense for all circumstances, and depending on the facts, you may be responsible for a post even after a few months.

We only hire influencers to post to Instagram and we have a really good monitoring program of posts on that platform. Do we have to also monitor every other social media platform for what our influencers are saying about us?

If you don't otherwise monitor those platforms, you don't need to do so. However, if you learn that one of your influencers is saying things they shouldn't on another platform or not making adequate disclosures, don't ignore it.

WHAT ABOUT INTERMEDIARIES?

I have a small network marketing business. Advertisers pay me to distribute their products to members of my network who then try the product for free. How do the principles in the Guides affect me?

You should tell the participants in your network that, if they endorse products they have received through your program, they should make it clear they got the products for free. Advise your clients – the advertisers – that if they provide free samples directly to your members, they should remind the members of the importance of disclosing the relationship when the members talk about those products. Put a program in place to check periodically whether your members are making those disclosures, and to deal with anyone who isn't complying.

My company recruits influencers for marketers who want product endorsements. We pay and direct the influencers. What are our responsibilities?

You could be liable if you play a role in creating or disseminating endorsements containing representations you know or should know are deceptive. You may also be liable if endorsements fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures. Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

WHAT ABOUT AFFILIATE OR NETWORK MARKETING?

I'm an affiliate marketer with links to an online retailer on my website. When people read what I've written about a particular product and then click on those links and buy something from the retailer, I earn a commission from the retailer. What do I have to disclose? Where should the disclosure be?

You should disclose your relationship to the retailer clearly and conspicuously on your site, so readers can decide how much weight to give your endorsement. You could say something like, "I get commissions for purchases made through links in this post." In some instances – like when the affiliate link is embedded in your product review – a single disclosure may be adequate. When the review has a clear and conspicuous disclosure of your relationship and the reader can see both the review containing that disclosure and the link at the same time, readers have the information they

need. But if the product review containing the disclosure and the link are separated, readers may not make the connection.

As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. The closer the disclosure is to your recommendation, the better.

Is "affiliate link" by itself an adequate disclosure? What about a "buy now" button?

Consumers might not understand that "affiliate link" means that the person placing the link is getting paid for purchases made through the link. Similarly, a "buy now" button would not be adequate.

Is "paid link" by itself an adequate disclosure?

"Paid link" right next to an affiliate link should be an adequate disclosure of the nature of the link.

Is "commissionable link" a good disclosure for an affiliate link?

No. "Commissionable link" is probably not a clear disclosure.

What if I'm including links to product marketers or to retailers as a convenience to my readers, but I'm not getting paid for them?

Then there isn't any connection you need to disclose.

Does this guidance about affiliate links apply to links in my product reviews that appear on someone else's website or in my tweets?

Yes. The same guidance applies anytime you endorse a product and get paid through affiliate links.

It's clear that what's on my website is a paid advertisement, not my own endorsement or a review of the product. Do I still have to disclose that I get a commission if people click through my website to buy the product?

If it's clear that what's on your site is a paid advertisement, you don't have to make additional disclosures. Just remember that what's clear to you may not be clear to everyone visiting your site, and the FTC evaluates ads from the perspective of reasonable consumers.

My website publishes our own, independent product reviews. I also sell ad space on my website. Some marketers want to buy ad space for their products next to our reviews of those products. What do I need to do?

If it's obvious what are paid ads and if a marketer's buying ad space from you doesn't impact what products you review, what you say about them, or the placement or prominence of those reviews, there's nothing you need to do. Your readers would not be misled because your only connection to the marketers is that you sell it ad space.

I'm a product manufacturer and our website provides links to all authorized sellers. Some of our authorized sellers pay us referral fees. Do we need to disclose the affiliate fees?

If you provide links on your website to all authorized vendors of your products and don't provide any benefits or preferences to the ones that pay affiliate fees, you don't need to make any disclosures.

EXPERT ENDORSERS MAKING CLAIMS OUTSIDE OF TRADITIONAL ADVERTISEMENTS

One of our company's paid spokespersons is an expert who appears on news and talk shows promoting our products. They also recommend our products in their social media posts. Should the expert disclose their connection when promoting our products?

Yes. Your expert spokespersons should disclose their connections when promoting your products outside of traditional advertising media (in other words, on programming that consumers won't recognize as paid advertising). That includes talk show appearances by an expert on your payroll. The same guidance also would apply to comments by the expert in their social media posts.

EMPLOYEE ENDORSEMENTS

I work for a terrific company. Can I mention our products to people in my social networks? My "friends" and followers won't be misled since it's clear in my online profiles where I work. How about on a review site?

Whether you can mention your company's products on social media posts may depend on your company's policies. If your employer allows you to do that and you decide to mention your company's products on social media posts, you should disclose your relationship to the company. Put yourself in the reader's shoes. Isn't the employment relationship something you would want to know before relying on someone else's endorsement? Listing your employer on your profile page isn't enough. After all, people who just read what you post won't get that information. Even those who read your profile page might not associate your employer with the products you endorse.

If you write a review of one of your company's products on a website that features consumer reviews, people reading the review probably won't know who you are or where you work. You definitely should disclose your employment relationship when writing such a review. You should also make sure you comply with your company's social media policy.

On their own initiative and without us asking, several of our employees used their personal social network accounts to "share" one of our company's posts. Do they need to disclose that they work for our company?

Whether there should be any disclosure depends upon whether the "shares" could be viewed as promoting one of your company's products or services. If so, employees endorsing the post should disclose their relationship to the company. That's fairly easy to do – for example, "Check out my company's great new product."

Our company's policy says that employees shouldn't post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they're hired. But we have several thousand people working here and we can't monitor what they all do on their own computers and other devices

when they aren't at work. Are we liable if an employee posts a review of one of our products, either on our company website, on a third-party review site, or on social media, and doesn't disclose that relationship?

It wouldn't be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy. Also, if you learn that employees have posted reviews on the company's website or a social media site without adequately disclosing their relationship to the company, you should remind them of your company policy and ask them to remove those reviews or adequately disclose that they're employees.

If, however, you actively encouraged your employees to write reviews of your products, you would be responsible for monitoring them (both in terms of disclosing that they are employees and for problematic claims) despite any difficulty in doing so.

What about employees of an ad agency or public relations firm? Can my agency ask our employees to spread the buzz about our clients' products?

First, an ad agency (or any company, for that matter) shouldn't ask employees to say anything that isn't true. No one should endorse a product they haven't used or say things they don't believe about a product – and an employer certainly shouldn't encourage employees to engage in that conduct.

Moreover, employees of an ad agency or public relations firm have a connection to the advertiser, which should be disclosed in all social media posts. Agencies asking their employees to spread the word must instruct those employees about their responsibilities to clearly and conspicuously disclose their relationship to the product they're endorsing – for example, "My employer is paid to promote [name of product]," or simply "Advertisement," or when space is an issue, "Ad" or "#ad." Also, the agency would be responsible for employees who didn't comply with those instructions (or who make unsubstantiated performance claims).

My company is a large retailer that sells many brands of products that we get from various suppliers. Do my company's employees really need to disclose that they're employees when reviewing third-party brands on our website?

Yes. Knowing that reviewers work for a retailer that sells the products being reviewed would likely affect the weight or credibility that readers give to the reviews on your website.

My company XYZ wants to tell our employees what to disclose on social media. Is "#employee" good enough?

Consumers will likely not understand "#employee" to mean that the person is an employee of your company. Consumers would be more likely to understand "I work for XYZ" or "#XYZ_Employee." Then again, if consumers don't associate your company's name with the product or brand being endorsed, that disclosure might not work either. It would be much clearer to use the words "my company's" or "my employer's" in the body of the message when describing the product they are endorsing. It's a lot easier to understand and harder to miss.

USING ENDORSEMENTS THAT DON'T REFLECT THE TYPICAL CONSUMER EXPERIENCE

We want to run ads featuring endorsements from consumers who achieved the best results with our company's product. Can we do that?

Endorsements claiming specific results usually will be interpreted to mean that the endorser's experience reflects what others can also expect. Statements like "Results not typical" or "Individual results may vary" won't change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or
2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

How would this principle about endorsers who achieved exceptional results apply in a real ad?

The Guides include several examples with practical advice on this topic. One example is about an ad in which an endorser says, "I lost 50 pounds in 6 months with QRS Weight-Loss." If consumers can't generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, "Women who use QRS Weight-Loss for six months typically lose 15 pounds."

The Guides have another example in which an endorser simply says, "I lost 50 pounds with QRS Weight-Loss," without any reference to time period. If users don't typically lose that much weight, the ad should disclose what results they do generally achieve – for example, "Women who use QRS Weight-Loss lose 15 pounds on average."

Our company website includes endorsements from some of our more successful customers who used our product during the past few years and mentions the results they got. We can't figure out now what the "generally expected results" were back then. What should we do? Do we have to remove those endorsements?

There are two issues here. First, according to the Guides, if your website says or implies that the endorser currently uses the product in question, you can use that endorsement only as long as you have good reason to believe the endorser does still use the product. If you're using endorsements that are a few years old, it's your obligation to make sure the claims still are accurate. If your product has changed, it's best to get new endorsements.

Second, if your product is the same as it was when the endorsements were given and the claims are still accurate, you probably can use the old endorsements if the disclosures are consistent with what the generally expected results are now.

Where can I find out more?

The Guides offer more than 50 examples involving various endorsement scenarios.

The FTC works to prevent fraudulent, deceptive, and unfair practices that target businesses and consumers. Report scams and bad business practices at ReportFraud.ftc.gov. We also provide guidance at business.ftc.gov to help companies comply with the law. Looking for a quick take on recent cases and other initiatives? Subscribe to the FTC's Business Blog.

YOUR OPPORTUNITY TO COMMENT

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

June 2023

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Native Advertising: A Guide for Businesses

Tags: Advertising and Marketing | Endorsements, Influencers, and Reviews | Online Advertising and Marketing | Advertising and Marketing Basics

Marketers and publishers are using innovative methods to create, format, and deliver digital advertising. One form is "native advertising," content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online. But as native advertising evolves, are consumers able to differentiate advertising from other content?

The Federal Trade Commission Act prohibits deceptive or unfair practices. It's the FTC's job to ensure that long-standing consumer protection principles apply in the digital marketplace, including to native advertising. The FTC has issued an Enforcement Policy Statement on Deceptively Formatted Advertisements that explains how the agency applies established truth-in-advertising standards in this context. This Guide for Businesses supplements the Enforcement Policy Statement by offering informal guidance from FTC staff to help companies apply the Policy Statement in day-to-day contexts in digital media.

The first part of this Guide summarizes the consumer protection principles that serve as the foundation for the Enforcement Policy Statement. The second part includes examples to explain how effective disclosure can help prevent deception. The third part features staff guidance on how to make clear and conspicuous disclosures within the format of native advertising. Of course, this Guide can't cover every issue associated with native advertising. Nor does it provide a safe harbor from potential liability under Section 5 of the FTC Act. These examples are only general guidance for advertisers.

I. Established principles that support the FTC's approach to native advertising

Under the FTC Act, an act or practice is deceptive if there is a material misrepresentation or omission of information that is likely to mislead the consumer acting reasonably in the circumstances. A

misrepresentation is material if it is likely to affect consumers' choices or conduct regarding an advertised product or the advertising for the product.

In evaluating whether an ad is deceptive, the FTC considers the net impression the ad conveys to consumers. Because ads can communicate information through a variety of means – text, images, sounds, etc. – the FTC will look to the overall context of the interaction, not just to elements of the ad in isolation. Put another way, both what the ad says and the format it uses to convey that information will be relevant. Any clarifying information necessary to prevent deception must be disclosed clearly and prominently to overcome any misleading impression.

A basic truth-in-advertising principle is that it's deceptive to mislead consumers about the commercial nature of content. Advertisements or promotional messages are deceptive if they convey to consumers expressly or by implication that they're independent, impartial, or from a source other than the sponsoring advertiser – in other words, that they're something other than ads. Why would it be material to consumers to know the source of the information? Because knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys.

Over the years, the FTC has brought many cases challenging the format of ads as deceptive. For example, the Commission has taken action against ads that deceptively mimicked the format of news programming or otherwise misrepresented their source. Other cases focused on misleading "door openers" – promotions with a format that deceived consumers about the nature of the transaction – for example, telemarketers who misleadingly suggested they were calling on behalf of a consumer's credit card company or bank. (The Commission has held that when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the consumer later finds out the truth.) Or, as the FTC Endorsement Guides establish, advertisers' use of third-party endorsements may be deceptive if there is an undisclosed material connection between the advertiser and the endorser – one that might materially affect the weight or credibility of the endorsement. The FTC considers misleadingly formatted ads to be deceptive regardless of whether the underlying product claims that are conveyed to consumers are truthful.

The particular forms native advertising takes in the digital marketplace may be new, but the FTC's Enforcement Policy Statement makes clear that the FTC applies the same truth-in-advertising principles it has used for decades to evaluate whether the format of an ad is deceptive. In the context of native advertising, if the source of the content is clear, consumers can make informed decisions

about whether to interact with the ad and the weight to give the information conveyed in the ad. However, an ad is deceptive if it promotes the benefits and attributes of goods and services, but is not readily identifiable to consumers as an ad. Thus, as the Policy Statement explains, the FTC will find an ad's format deceptive if the ad materially misleads consumers about its commercial nature, including through an express or implied misrepresentation that it comes from a party other than the sponsoring advertiser.

What do businesses need to know to ensure that the format of native advertising is not deceptive? The Enforcement Policy Statement explains the law in detail, but it boils down to this:

1. From the FTC's perspective, the watchword is transparency. An advertisement or promotional message shouldn't suggest or imply to consumers that it's anything other than an ad.
2. Some native ads may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure. In other instances, a disclosure may be necessary to ensure that consumers understand that the content is advertising.
3. If a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.

II. Examples of when businesses should disclose that content is native advertising

In digital media, native ads often resemble the design, style, and functionality of the media in which they are disseminated. Ads may appear on a page next to non-advertising content. Examples include news or content aggregator sites, social media platforms, or messaging apps. (The Enforcement Policy Statement refers to a page like that as a "publisher site.") In other instances, ads are embedded in entertainment programming, such as professionally produced and user-generated videos on social media. Still other examples include native advertising in email, infographics, images, animations, and video games.

When a native ad appears on the main page of a publisher site or is republished in other media, it commonly consists of a headline, often combined with a thumbnail image and a short description, which, if clicked or tapped, leads to additional advertising content. Under FTC law, advertisers cannot use "deceptive door openers" to induce consumers to view advertising content. Thus, advertisers are

responsible for ensuring that native ads are identifiable as advertising before consumers arrive at the main advertising page. In addition, no matter how consumers arrive at advertising content, it must not mislead them about its commercial nature.

In assessing whether a native ad presented on the main page of a publisher site is recognizable as advertising to consumers, advertisers should consider the ad as a whole, and not just focus on individual phrases, statements, or visual elements. Factors to weigh include an ad's overall appearance; the similarity of its written, spoken, or visual style or subject matter to non-advertising content on the publisher site on which it appears; and the degree to which it is distinguishable from other content on the publisher site. The same assessment applies to any click- or tap-into page – the page on which the complete ad appears.

Example 1

The Winged Mercury Company sells running shoes. An ad for the company's flagship shoe appears on a financial news site. The ad contains an image of the shoe, the headline "Run Fast, Run Smart, Run Winged Mercury," and a hyperlink to learn more about Winged Mercury shoes' innovative shock absorption. The color scheme, font, and graphics of the ad look like the format of the financial news that appears on the site. However, the slogan "Run Fast, Run Smart, Run Winged Mercury" together with the message to learn more about Winged Mercury shoes' shock absorption likely convey to consumers the commercial nature of the content. In addition, the subject matter of the ad differs substantially from the financial news on the site. Therefore, a specific disclosure that the content is an ad is probably not necessary, absent extrinsic evidence to the contrary.

Example 2

Fitness Life, an online health and fitness magazine, features articles about exercise, training advice, and product reviews. An article on Fitness Life's main page is titled "The 20 Most Beautiful Places to Vacation." The article displays images in a scrolling carousel of beautiful spots for fitness enthusiasts to visit. The Winged Mercury Company paid Fitness Life to create this article and publish it on Fitness Life's site. The article says it is "Presented By" Winged Mercury and includes an image of the company's logo. Although Winged Mercury's sponsorship of the article is a form of advertising, the article itself is not, as it does not promote any of Winged Mercury's products. It only contains images of places where readers – including potential Winged Mercury customers – might like to visit. Thus, the article does not need to be identifiable as an ad before or after consumers click into it.

Example 3

A kitchen cabinet company paid an online lifestyle magazine, Styling Home, to create and publish an article entitled, "10 Must-Haves for a Great Kitchen." The article, which displays a series of images depicting well-designed kitchens, appears in the same layout as other articles on the Styling Home site. Most of the images in the article depict and promote the sponsoring advertiser's products. Thus, the article is an advertisement. The ad's format, however, is likely to mislead consumers to believe it is an ordinary Styling Home article and reflects the independent views of the Styling Home writer, and not those of the sponsoring advertiser. Therefore, a clear and prominent disclosure of the article's commercial nature is necessary.

The more a native ad is similar in format and topic to content on the publisher's site, the more likely that a disclosure will be necessary to prevent deception. Furthermore, because consumers can navigate to the advertising without first going to the publisher site, a disclosure just on the publisher's site may not be sufficient. In that instance, disclosures are needed both on the publisher's site and the click- or tap-into page on which the complete ad appears, unless the click-into page is obviously an ad.

Example 4

The Winged Mercury Company disseminates an ad on Fitness Life, the online magazine described in Example 2. The ad is similar in format and content to regular articles on the site. The headline "Running Gear Up: Mistakes to Avoid" appears next to a photo of a runner. In addition to other training suggestions, the article recommends Winged Mercury shoes for injury prevention. Consumers can access the article either from the Fitness Life main page or directly without viewing that page. In this instance, consumers are likely to conclude that the article was written by a Fitness Life journalist and reflects the journalist's independent views. To prevent consumer deception, a clear and prominent disclosure of the ad's commercial nature on the main page of the publisher's site is necessary. In addition, because consumers can access the article without clicking through from the Fitness Life main page, the ad on that click-into page also should be clearly and prominently identified as commercial.

Example 5

Fitness Life publishes an article entitled "The 20 Most Beautiful Places to Vacation." No sponsoring advertiser paid Fitness Life to publish the article. However, a resort hotel pays Fitness Life to display a photo of its beach resort as the twenty-first image displayed in the

article. The photo has the same look and feel as the images featured in the article. There is no need to disclose to consumers on the Fitness Life main page that the article is accompanied by advertising. However, because the photo appears to be part of the article rather than an advertisement, a clear and prominent disclosure of the photo's paid nature on the click-into page is likely necessary.

The digital marketplace offers alternative ways for advertisers to disseminate content to consumers, including things like news feeds and content recommendation widgets. The same principles of transparency and disclosure apply.

Example 6

Newsby is an online magazine featuring stories about health, technology, science, and business. A headline published in Newsby's feed reads "Making Cleaning Fun: How Technology Has Changed Housekeeping" with the subheading, "Vacuum Cleaners are as popular today as when first introduced in the 1800s." The text and an accompanying image are formatted like those of the other articles in Newsby's feed and, if tapped, lead to an infographic with facts about vacuum cleaners, including a list of the "coolest innovations." One of the listed innovations is "Dirt Pulverizer" technology, which purportedly not only picks up dirt, but also cleans the air. Appliance company Machine-Clean Vacuums, which is the exclusive seller of "Dirt Pulverizer" vacuums, paid Newsby to create and publish the article on its site. When viewed in the feed of Newsby's site, consumers are likely to interpret the Machine-Clean Vacuums ad as an independent story impartially reporting on information relating to vacuum cleaners, and not an ad developed and published on behalf of a sponsoring advertiser. Thus, effective disclosures informing consumers of the ad's commercial nature – both in the site's feed and on the click-into infographic – are necessary to prevent deception.

Example 7

A content recommendation widget included on different publisher sites displays links to external pages. One site on which these third-party links are placed is Newsby. On the Newsby site, these links are formatted to look like news headlines and are grouped together in a box with headings like "More Content for You," or "From Around the Web." One of the headlines appearing in the box is for the Winged Mercury ad described in Example 4, "Running Gear Up: Mistakes to Avoid." The similarity of the Winged Mercury ad's format to the type of headlines Newsby publishes on its site, combined with phrases like "More Content for You," or

"From Around the Web," is likely to lead consumers to believe it is an independent news story, and not from the sponsoring advertiser. Thus, before consumers click to access the Winged Mercury content on the Fitness Life site, a clear and prominent disclosure is necessary to inform them of its commercial nature. As discussed in Example 4, the click-into page on the Fitness Life site also should disclose the commercial nature of the content.

Example 8

An article published in Styling Home, the online lifestyle magazine referred to in Example 3, reviews family vehicles and ranks the NuvoTrek as the best hybrid. The car company that manufactures the NuvoTrek did not pay Styling Home to publish the original article, but wants to promote the article, given the favorable review of its car. The car company pays a content recommendation widget to integrate a link to the article into a popular car magazine's site. The article itself is not advertising. However, the car company's dissemination of the article through the content recommendation widget is a form of advertising, and thus the company has an obligation to ensure that any claims the article conveys about its car are truthful, not misleading, and substantiated. Also, to the extent that the article headline's presentation on the site misleads consumers to believe that a link to the content is included or featured based on the independent judgment of the car magazine's editors, and not based on payment by the sponsoring advertiser, a failure to effectively disclose its paid nature is likely deceptive.

Native ads also can be integrated into content, including entertainment programming and video games. In some instances, consumers are likely to understand that a sponsoring advertiser paid for the product integration. In other instances, a disclosure may be necessary to avoid deceiving consumers.

Example 9

A video game immerses a player in a virtual world. While exploring part of the virtual world, a player sees billboards advertising actual products. The marketers of the advertised products paid the game designers to include the ads in the game. That billboards are advertisements is apparent to consumers. To the extent that the billboards are for actual products, consumers are likely to attribute the ads to the sponsoring advertisers and no disclosure is necessary. However, the sponsoring advertisers would be liable for any deceptive product claims on the billboards.

Example 10

The same virtual world game in Example 9 integrates branded products in other ways; for example, game characters wear a specific sunglass brand, drink a particular brand of beverage, and patronize a particular donut shop. The sponsoring advertisers paid the game developer to include their branded products in the game. However, the game conveys no objective claims about the various branded products. Even though consumers may not realize that the sponsored advertisers paid for their branded products to appear, disclosure of this paid product placement is not necessary to prevent consumer deception because whether the branded products appear in the game because of payment by the sponsoring advertiser or because of the video game developer's creative judgment is not likely to be material to consumers.

Example 11

A game app tests players' skills to survive in the wilderness and offers a choice of supplies and equipment in each game phase. When players tap to make a choice, a box appears containing a selection of items – for example, a flashlight, a rope, and a hatchet. Each item is accompanied by a short message – for example, the phrase "Light your path" with the flashlight. Among the items players can select is a bar of soap identified by brand name with the text "Clean up." If tapped, the soap icon takes the player out of the game and into the soap manufacturer's branded game app. Based on consumers' customary use of the game and the similarity of the soap to other items players can select in the game, consumers might not recognize the icon as an ad before tapping and leaving the game. Because the in-app ad's format misleads consumers in this respect, a clear and prominent disclosure informing them of the icon's commercial nature is necessary before consumers tap on it.

Example 12

On its website, a home improvement TV show features "do it yourself" videos hosted by an expert builder who provides advice on home projects. A stain manufacturer, ZYX Paints, pays the show to produce and publish on the home improvement show's site a video on building a wood deck. In the video, the show's expert builder uses a ZYX Paints stain and recommends it to protect and maintain the deck. The ad's look and feel closely resembles other videos posted on the home improvement show's site, which customarily are unpaid. In this situation, consumers are likely to perceive the video as independent content reflecting the impartial opinion of the expert builder host or the show's writers, and would not likely attribute it to the

sponsoring advertiser. An effective disclosure informing consumers of the video's commercial nature before they play it is necessary to prevent consumer deception.

Example 13

Instead of the video described in Example 12, the home improvement show is paid by ZYX Paints to create and publish on the show's site a video that shows the expert builder host using ZYX Paint stain on the deck. However, rather than the expert builder expressly recommending the product to protect and maintain the deck, the camera zooms in on the product's label. Whether an effective disclosure informing consumers of the video's commercial nature would be necessary depends upon reasonable consumer expectations. In this particular situation, consumers would likely interpret the use of the branded stain product to be the expert recommendation and opinion of the expert builder host or the show's writers, rather than a paid inclusion. In that case, a clear and prominent disclosure of the video's commercial nature is necessary before consumers play it.

In digital media, consumers can encounter native ads in a wide variety of settings, including in social media and email. In some cases, advertisers also facilitate the republication or "sharing" of native ads by others, for example, by including social media plugins. In evaluating whether consumers are likely to understand a native ad is advertising, it is important that advertisers consider the particular circumstances in which native ads are presented to consumers. These circumstances include consumers' ordinary expectations based on their prior experience with the media in which the ads appear, as well as how they consume content in that media.

Example 14

The same ZYX Paints video described in Example 12 is inserted into users' content streams on a social media site. The video appears in the same format as the regular content in the streams, which consist of posts by individuals and entities with whom users have chosen to interact or follow. Each post, including any ads, are clearly attributable to a source by name, *e.g.*, "ZYX Paints" or "Laura N. Michaels." Based on their customary use of the social media site, consumers ordinarily would be aware that they did not subscribe to a post by ZYX Paints, and thus would be unlikely to perceive the ad as a regular post appearing in their content stream. Instead, they would attribute it to the sponsoring advertiser. Thus, in this situation, a disclosure informing consumers of the video's commercial nature before they view it is not necessary. However, given the video's format described in Example 12, consumers who view the video would reasonably believe an independent home improvement show produced the video and

that it reflects the impartial views of the show's host or writers, and not those of a sponsoring advertiser. To avoid deception, a clear and prominent disclosure informing consumers of the video's commercial nature is necessary in the video itself.

Example 15

The Winged Mercury article published in Fitness Life, "Running Gear Up: Mistakes to Avoid," described in Example 5 includes buttons so that readers can post a link to the article from their personal social media streams. When posted, the link appears in a format that closely resembles the format of links for regular Fitness Life articles posted to social media. In this situation, the ad's format would likely mislead consumers to believe the ad is a regular article published in Fitness Life. Advertisers should ensure that the format of any link for posting in social media does not mislead consumers about its commercial nature.

Example 16

Gormella uploads humorous videos to her dedicated channel on a popular video-sharing platform and has cultivated a significant social media following. Among her videos is one she created for a snack food company to promote its new cracker, Salt-Zs. The video, "Crackering Up in My Local Supermarket," includes a thumbnail image of Gormella laughing in a grocery store aisle. In the video, Gorgella starts out in the supermarket aisle and is magically transported to various locales where she talks to people about Salt-Zs. Once consumers view the video, they are likely to identify it as an advertisement and understand that the sponsoring advertiser paid Gormella to promote and endorse its branded product. Nevertheless, before watching the video, consumers likely would not expect it to be advertising, given their experience with other videos she had posted. Thus, the video's commercial nature should be clearly and prominently disclosed before consumers view it.

Yet another setting in which consumers may come upon native ads is in non-paid search engine results. Advertisers should take steps to ensure that any non-paid search listings for a native ad do not suggest or imply to consumers that it is something other than an ad.

Example 17

A text link and thumbnail image for the same ZYX Paints video described in Example 12 appears in the non-paid search results returned in response to consumers' queries using a search engine. The textual link to the video reads "Building a Deck: 5 Steps for Success" and includes the name of the home improvement show, but does not mention ZYX Paints. In this example,

based on consumers' customary experience using search engines, they ordinarily would associate a video presented in this manner to the home improvement program and not to a sponsoring advertiser. The advertiser should ensure that any link or other visual elements, for example, webpage snippets, images, or graphics, intended to appear in non-paid search results effectively disclose its commercial nature.

III. How to make clear and prominent disclosures in native advertising

Disclosures that are necessary to avoid misleading consumers must be presented clearly and prominently. Whether a disclosure of a native ad's commercial nature meets this standard will be measured by its performance – that is, do consumers recognize the native ad as an ad? Only disclosures that consumers notice, process, and understand can be effective. Inadequate disclosures can't change the net impression created and won't stop consumers from being deceived that advertising or promotional messages are something other than ads.

The FTC staff business guidance document *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* explains what advertisers should do to ensure disclosures in digital advertising are clear and prominent. In general, disclosures should be:

- in clear and unambiguous language;
- as close as possible to the native ads to which they relate;
- in a font and color that's easy to read;
- in a shade that stands out against the background;
- for video ads, on the screen long enough to be noticed, read, and understood; and
- for audio disclosures, read at a cadence that's easy for consumers to follow and in words consumers will understand

Disclosures must be clear and prominent on all devices and platforms that consumers may use to view native ads. In assessing effectiveness, disclosures should be considered from the perspective of a reasonable consumer. When ads are targeted to a specific audience, the relevant perspective is

that of a reasonable or ordinary member of the targeted group. Advertisers should improve their disclosures if there are indications that a significant minority of reasonable consumers do not notice, process, or comprehend them.

Advertisers have flexibility as to how to identify native ads as ads, so long as consumers notice and process the disclosures and comprehend what they mean. Some native ads use text labels or company logos combined with other visual cues, such as background shading, outlines, or borders. Multimedia ads, such as online videos, may use graphics, video or audio disclosures, or some combination thereof. The following discussion describes additional information that advertisers should consider to make clear and prominent disclosures in native advertising on the main page of a publisher site and on the click- or tap-into page on which a complete ad appears.

A. Proximity and placement

Place disclosures on the main page of a publisher site where consumers will notice them and easily identify the content to which the disclosure applies.

Advertisers should assume that consumers don't look at everything on a publisher site. In deciding which content items to read or watch, consumers' attention is likely to be drawn to certain focal points on a screen. The disclosure that an ad is commercial content should appear near the ad's focal point. When browsing the main page of news or content aggregator sites, consumers typically look at story headlines on the site. Placing disclosures near a native ad's headline increases the likelihood consumers will see them.

Place disclosures in front of or above the headline of the native ad.

The location and spacing of a disclosure in relation to the native ad it clarifies also matters. If a publisher site is read left to right, consumers are less likely to notice disclosures positioned to the right of the native ads to which they relate. In addition, if native ads are inserted into a vertical stream of content items, placing a disclosure below a native ad increases the risk that consumers will click on the ad without seeing the disclosure. Consumers are most likely to notice and understand disclosures that are placed immediately in front of or above a native ad's headline.

If a native ad's focal point is an image or graphic, a disclosure might need to appear directly on the focal point itself.

Sometimes a focal point on a publisher site is something other than a headline or other written text – for example, images or graphics. Disclosures placed near focal points that are images, graphics, or other visually strong elements might not be sufficiently noticeable to consumers and disclosures might need to be placed on the focal points themselves. For example, in deciding which videos to watch on a video-sharing channel, consumers might pay little attention to written descriptions and instead look at thumbnail images of the videos. Under those circumstances, a disclosure placed directly on the thumbnail image itself is most likely to be effective.

A single disclosure that relates to more than one native ad should be accompanied by visual cues that make it clear the disclosure applies to each ad in the grouping.

Some disclosures may relate to more than one content item, such as with content recommendation widgets included on a publisher site. If a grouping of content items contains a mix of advertising and non-advertising content, a single disclosure should not be used because consumers are not likely to know to which content items the disclosure relates. In those circumstances, native ads should be individually labeled to make clear which content items are ads. In addition, if a single disclosure is used to differentiate more than one native ad as advertising, other visual cues are necessary to make it obvious to consumers that the disclosure relates to each of the native ads in the grouping, such as through background shading that has a clear outline or a distinct border that sets off the native ads from other content items on a site.

Disclosures should remain when native ads are republished by others.

Advertisers should maintain disclosures when native ads are republished by others in non-paid search results, social media, email, or other media. In non-paid search results, consumers are more likely to notice a disclosure if it's placed at the beginning of the title tag for a native ad's search listing. Similarly, URL links for posting or sharing in social media or email should include a disclosure at the beginning of the native ad's URL. In some circumstances, native ads for republishing in other media may include other distracting elements such as webpage snippets, images, or graphics. In placing disclosures, advertisers also should consider how these additional visual elements might influence where consumers look before they click on native ads.

Once consumers arrive on the click- or tap-into page where the complete native ad appears, disclosures should be placed as close as possible to where they will look first.

Because consumers can navigate to native ads in different ways, a clear and prominent disclosure also should be presented on the click- or tap-into page on which a complete native ad appears. A disclosure is more likely to be seen if it's placed where consumers ordinarily start looking on a page. For articles, consumers typically look first at the headline and then browse the content. Disclosures therefore should be placed as close as possible to the headline. In placing disclosures, advertisers also should avoid putting them far above or to the right of the headline, where consumers are unlikely to notice them.

In multimedia ads, a disclosure should be delivered to consumers before they receive the advertising message to which it relates.

With multimedia ads, disclosures generally should be made in the ad itself and shortly before consumers receive an advertising message. Delivering disclosures during or after an advertising message increases the risk consumers will miss the necessary disclosure. But making disclosures too early can be problematic, too. Some native ads may be only a small part of larger programming – for example, a video vignette or video game. In that case, a disclosure at the beginning of programming may not effectively communicate to consumers that the later content is an advertising message. In those circumstances, disclosures should be delivered as close as possible to the advertising messages they cover.

B. Prominence

Advertising disclosures should stand out so consumers can easily read or hear them.

Advertising disclosures should stand out. Disclosures should be large and visible enough for consumers to readily notice them. Therefore, advertisers should take into account the size and configuration of the device screens consumers will typically use to view their content. Text labels should be in a font size and color that consumers can easily read on the screen. To be readable, text color should contrast strongly with the background. Using lighter font colors with a dark background makes it less likely consumers will read the text of a disclosure.

Any background shading used to differentiate native ads from non-advertising content should be sufficiently saturated for consumers to notice it. Advertisers also should consider using visual cues in addition to background shading, such as a prominent border that sets off native ads from surrounding content, in case consumers cannot see color differences.

Multimedia ads that deliver an audio message may require an audio disclosure. Audio disclosures should be in a sufficient volume and cadence for ordinary consumers to hear and comprehend them. In addition, visual disclosures in multimedia ads should be displayed on the screen long enough for ordinary consumers to notice, read, and comprehend them.

C. Clarity of meaning

Disclosures must be understandable.

Disclosures are not effective unless consumers understand them to mean that native ads are commercial advertising. Disclosures should be in plain language that is as straightforward as possible. An advertiser also should make disclosures in the same language as the predominant language in which the ad is presented. Advertisers should avoid using:

- Technical or industry jargon;
- Different terminology to mean the same thing in different places on a publisher site;
- The same terminology to mean different things on a publisher site;
- Terms that customarily have different meanings to consumers in other situations;
- Unfamiliar icons or abbreviations; or
- Company logos or brand names unaccompanied by a clear text disclosure.

Terms likely to be understood include "Ad," "Advertisement," "Paid Advertisement," "Sponsored Advertising Content," or some variation thereof. Advertisers should not use terms such as "Promoted" or "Promoted Stories," which in this context are at best ambiguous and potentially could mislead consumers that advertising content is endorsed by a publisher site. Furthermore, depending on the context, consumers reasonably may interpret other terms, such as "Presented by [X]," "Brought to You by [X]," "Promoted by [X]," or "Sponsored by [X]" to mean that a sponsoring advertiser funded or "underwrote" but did not create or influence the content.

In addition, terms might not be sufficiently clear to consumers if used on a publisher site that also uses different terms to label ads. Using consistent terminology to identify ads on the same publisher site decreases the likelihood that consumers will misunderstand a native ad's disclosure. Moreover,

company logos and names on their own are not likely adequate to signal that content is commercial advertising.

A final note: The FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements doesn't apply just to advertisers. In appropriate circumstances, the FTC has taken action against other parties who helped create deceptive advertising content – for example, ad agencies and operators of affiliate advertising networks. Everyone who participates directly or indirectly in creating or presenting native ads should make sure that ads don't mislead consumers about their commercial nature. Marketers who use native advertising have a particular interest in ensuring that anyone participating in the promotion of their products is familiar with the basic-truth-in-advertising principle that an ad should be identifiable as an ad to consumers.

December 2015

Your opportunity to comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Social Media Influencers, Customer Acquisition, and Related Information Protection - UPDATED

Sweep Status: Complete

This targeted investigation is complete as of May 2025. Referrals to FINRA Enforcement stemming from this review resulted in five formal enforcement actions: (1) 2021072581101; (2) 2021072581301; (3) 2021072581701; (4) 2021072581901; and (5) 2021072581501.

FINRA also took formal action in the following matters involving similar violations around the same time: (1) 2021072501001; (2) 2019060756501; and (3) 2021072231801.

Learn more about the sweep process.

September 2021

FINRA is conducting a review of firm practices related to the acquisition of customers through social media channels and how firms manage their obligations related to information collected from those customers and other individuals that may provide data to firms. Please note that each item requested is specific to the subsection header.

Unless otherwise noted, the relevant period for each request is January 1, 2020 through [*Date*, 2021] (the "Relevant Period"). In addition, if your response varies over the Relevant Period, please explain the differences in your response.

Definitions:

"Social Media" means any website or application that enables users to create and share content or participate in social networking. It includes, but is not limited to, TikTok, Facebook, Instagram, YouTube, Twitter, StockTwits, Reddit, and Twitch.

"Social Media Communications" means any communication with the public, including the provision of any content or advertisement about or on behalf of the firm, made pursuant to an arrangement with a third party, through Social Media.

"Referral Program" means any customer or account referral program offered or used by the firm through which individuals receive bonuses, rewards, incentives, or other compensation for referring new customers to open accounts at the firm.

"Social Media Influencers" or "Influencers" means any third party with whom the firm contracts or compensates to provide Social Media Communications.

"Nonpublic Personal Information (NPI)" is defined as that term is defined in 17 CFR § 248.3.

"Cookie" means any data generated by a website or mobile application about a user and then saved.

Social Media Influencers

1. Describe whether the firm, or its affiliate(s) on its behalf, finds and/or contracts with individuals or entities to provide Social Media Communications. If the firm engaged in such activity:

    a. Describe how the firm finds and/or contracts with individuals or entities to provide Social Media Communications, including whether and how the firm uses third parties, vendors, or services to find, contract, and/or compensate individuals or entities for Social Media Communications.

    b. Provide any engagement letters, contracts, agreements, or any other written, or offered arrangements in which the firm (or any affiliate of the firm) contracted to compensate individuals or entities to provide Social Media Communications. Please include any amendments to those engagement letters, contracts, agreements, or written arrangements.

    c. Describe and identify any individuals or entities with which the firm (or any affiliate of the firm) maintains any non-written agreements, or offers, to compensate individuals or entities to provide Social Media Communications.

    d. For the Relevant period, provide all Social Media Communications about the firm distributed or made available by individuals or entities identified above. A complete response to this request will include: (1) any Social Media Communications posted by the firm on the Influencer's social media account(s) and (2) any Social Media Communications the Influencer posted on any social media platform

about the firm.

e. Provide a numbered tabular list identifying each Social Media Communication provided pursuant to Item 1(d) above. Please also include the date the Social Media Communication was first made available to the public and whether or not the Social Media Communication was filed with FINRA's Advertising Regulation Department. If the Social Media Communication was filed, include the FINRA Advertising Regulation reference number for the communication.

f. State whether each Social Media Communication provided pursuant to Item 1(d) above was approved by a registered principal of the firm. If so, provide records that reflect such approvals.

2. Describe the criteria the firm uses to identify potential Influencers to recruit as well as any background information or other characteristics, if any, the firm considers when avoiding the use of particular Influencers.

3. Provide copies of any firm social media postings, website content, emails or other communications designed to recruit individuals to post Social Media Communications regarding or on behalf of the firm.

Referral Programs:

4. Describe whether the firm, or its affiliate(s) on its behalf, offered Referral Programs) during the Relevant Period. If the firm engaged in such activity, describe:

a. The time period during which the Referral Program was or is in effect;

b. The terms of the Referral Program;

c. Eligibility requirements;

d. Any restrictions concerning the Referral Program;

e. Compensation, benefits, or bonuses offered through the Referral Program and the methodology for determination;

5. Provide copies of any firm social media postings, website content, emails, or other communications designed to recruit individuals, including Firm customers, to participate in any Referral Program identified in response to Request 4 above.

General Information related to Social Media Influencers and Referral Programs:

If the firm answered affirmatively to Request nos. (1) or (4):

6. Provide all versions of the firm's written supervisory procedures that were in effect at any time during the Relevant Period relating to:

a. Social media communications by outside parties relating to the firm, including the method by which the firm supervises such activity;

b. Use of marketing affiliates or relationships to refer new customers to the firm; and

c. Referral Programs.

7. Provide any compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning Social Media Communications, use of marketing affiliates, and Referral Programs.

6. Describe how the firm maintains records of Social Media Communications created by Influencers as well as Social Media Communications made by the individuals or entities participating in its Referral Programs.

7. State whether the firm required Influencers, or the individuals or entities participating in its Referral Programs -- to attend trainings and/or educational courses prior to providing Social Media Communications in connection with the firm. If the answer is in the affirmative, provide a detailed explanation of the firm's requirements, the training and/or educational courses required, and the firm's method for tracking completion by Influencers and participants in the Referral Programs. Please identify which training and/or educational courses were for Influencers and which were for the Referral Program.

8. Provide copies of any policies, manuals, training materials, compliance bulletins, and any other written guidance provided to Influencers as well individuals or entities participating in the firm's Referral Program. Please identify which material was provided to Influencers and which was provided to Referral Program participants.

Items related to Regulation S-P and Usage Information:

11. Provide the firm's written supervisory procedures concerning its compliance with the SEC's Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information (Regulation S-P). Include a description of the firm's supervisory system during the Relevant Period concerning compliance with Regulation S-P with regard to the collection of Cookies obtained from customers, or individuals who provide NPI but are not onboarded as customers.

12. Provide all versions of all initial privacy notices, *see* 17 CFR § 248.4, that the firm used at any time during the Relevant Period.

13. To the extent not provided in response to the prior request, provide all versions of all opt-out notices, *see* 17 CFR § 248.7, that the firm used at any time during the Relevant Period.

14. Provide all versions of all annual privacy notices, *see* 17 CFR § 248.5, that the firm used at any time during the Relevant Period.

15. Provide any desk top procedures, compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning the sharing of any customer NPI with any third party.

16. Provide any desk top procedures, compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning individuals' ability to opt-out of information sharing.

17. Describe all types of data the firm tracks (or has tracked at any time during the Relevant Period), through the use of a Cookie or otherwise, in connection with its customers' usage of (a) the firm's website and/or (b) the firm's mobile application (collectively "Usage Information"). Include individuals who provide NPI but are not onboarded as customers.

18. Provide a list of all non-affiliated third parties with which the firm or any affiliate of the firm shares (or has shared at any time during the Relevant Period) any Usage Information.[1] In addition, for each third party, provide the following information:

    a. A list of each type of Usage Information shared with that third party;

    b. Whether the data shared with the third party is anonymized;

    c. The firm's understanding of the third party's intended use of the Usage Information;

    d. How or to what extent the third party restricts access to Usage Information and describe the controls in place;

    e. The number of individuals whose Usage Information the firm or any affiliate of the firm shared with that third party during the Relevant Period;

    f. All written contracts or agreements between the firm (or, if applicable, the firm's affiliated entity) and the third party concerning any Usage Information in force at any time during the Relevant Period; and

    g. Any compensation or benefit (including but not limited to monetary payments, reductions of amounts otherwise due, reciprocal sharing of information, and/or other non-monetary benefit) received by the firm or any of the firm's affiliated entities in any way related to the sharing of any Usage Information with that third party.

19. Provide any disclosures the firm provided to customers during the Relevant Period concerning any Usage Information shared with non-affiliated third parties and whether individuals identified in response to item 18 consented to the sharing of Usage Information.

20. Provide any exception reports or any other memoranda that reflect instances during the Relevant Period in which the firm failed to comply with Regulation S-P as a result of its sharing of Usage Information with any non-affiliated third party. Provide copies of all documents concerning the firm's identification, investigation, and/or reporting of any such instances, or concerning the firm's consideration of whether to report the same.

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1 Exclude from your response to this request any Usage Information shared with: any state, federal, or foreign regulator or other governmental entity; any self-regulatory organization; law enforcement; any clearing firm; any other financial institution pursuant to Section 314(b) of the USA PATRIOT Act; any party in response to a subpoena, court order, or discovery request; the customer or any other party as requested by the

customer; or any other sharing mandated by law.

1:30 – 2:30 pm

Can We Launch?

MAKING GLOBAL TM DECISIONS IN THE REAL WORLD

Clearing a name is the single most important step in the life of a trademark or brand. Gauging the potential for risk, crafting a plan for use without challenge, and obtaining registration without objection (if possible) is the proverbial name of the game. The clearance process becomes even more important—and more complicated—when launching a brand globally.

This panel will examine how to make global trademark clearance decisions in the face of real-world business limitations. Panelists from different industries will share practical strategies and tips for advising business teams when legal risks and commercial objectives do not align. Through a series of interactive hypotheticals, the panel will discuss topics including:

- What and where to search;
- How to analyze search results;
- How to manage the risks uncovered by the search or other unanticipated obstacles; and
- Common global clearance myths and traps

Panelists:

Sara Blotner, Director, Citi
Gayle Denman, Partner, Davis Wright Tremaine LLP
Gabrielle Davis, Former Associate General Counsel, Brand Strategy and Trademarks, The Interpublic Group of Companies, Inc.
Jenn Hamilton, Former General Counsel, Intellectual Property, Diageo

Moderator:

Batur Oktay, Partner, Davis Wright Tremaine LLP

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ARE WE RUNNING OUT OF TRADEMARKS? AN EMPIRICAL STUDY OF TRADEMARK DEPLETION AND CONGESTION

Barton Beebe & Jeanne C. Fromer

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ARE WE RUNNING OUT OF TRADEMARKS? AN EMPIRICAL STUDY OF TRADEMARK DEPLETION AND CONGESTION

Barton Beebe[*] *& Jeanne C. Fromer*[**]

American trademark law has long operated on the assumption that there exists an inexhaustible supply of unclaimed trademarks that are at least as competitively effective as those already claimed. This core empirical assumption underpins nearly every aspect of trademark law and policy. This Article presents empirical evidence showing that this conventional wisdom is wrong. The supply of competitively effective trademarks is, in fact, exhaustible and has already reached severe levels of what we term trademark depletion and trademark congestion. We systematically study all 6.7 million trademark applications filed at the U.S. Patent and Trademark Office (PTO) from 1985 through 2016 together with the 300,000 trademarks already registered at the PTO as of 1985. We analyze these data in light of the most frequently used words and syllables in American English, the most frequently occurring surnames in the United States, and an original dataset consisting of phonetic representations of each applied-for or registered word mark included in the PTO's Trademark Case Files Dataset. We further incorporate data consisting of all 128 million domain names registered in the .com top-level domain and an original dataset of all 2.1 million trademark office actions issued by the PTO from 2003 through 2016. These data show that rates of word-mark depletion and congestion are increasing and have reached chronic levels, particularly in certain important economic sectors. The data

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further show that new trademark applicants are increasingly being forced to resort to second-best, less competitively effective marks. Yet registration refusal rates continue to rise. The result is that the ecology of the trademark system is breaking down, with mounting barriers to entry, increasing consumer search costs, and an eroding public domain. In light of our empirical findings, we propose a mix of reforms to trademark law that will help to preserve the proper functioning of the trademark system and further its core purposes of promoting competition and enhancing consumer welfare.

INTRODUCTION

American trademark law has long operated on the assumption that there exists an inexhaustible supply of unclaimed trademarks that are at least as competitively effective as those already claimed. With respect to word marks in particular, the conventional wisdom holds that we will always enjoy a surplus of preexisting words, and in any case trademark adopters can simply coin new words, the supply of which is thought to be effectively "infinite."[1] This empirical assumption — that the supply of good, competitively effective trademarks is inexhaustible — has long formed the foundation of important theoretical conjectures at the core of trademark law and policy. The most significant of these is that when we grant exclusive rights in a trademark, the cost to competitors, consumers, and more generally to the public domain is inconsequential.

Contrary to the conventional wisdom in trademark law, however, popular media has lately begun to make the opposite empirical claim: that the supply of good trademarks is, in fact, exhaustible and that we have very nearly exhausted it. For example, the *New York Times* recently asserted that "[a]lmost every naturally occurring word has been claimed, which is why namers so often arrive at portmanteaus (Accenture derives from 'accent' and 'future') or drop vowels (Flickr and Tumblr) or change letters (Lyft)."[2] For its part, *Bloomberg View* recently featured the headline "We're Going to Run Out of Company

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[1] Stephen L. Carter, Comment, *The Trouble with Trademark*, 99 YALE L.J. 759, 769 (1990) (discussing the widespread assumption that "the set of marks appropriate to a given product category is practically infinite"); *see also, e.g.*, William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 274 (1987) ("[T]he distinctive yet pronounceable combinations of letters to form words that will serve as a suitable trademark are as a practical matter infinite, implying a high degree of substitutability and hence a slight value in exchange."); Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 833 (1927) ("All the rest of infinity is open to defendant." (quoting Coca-Cola Co. v. Old Dominion Beverage Corp., 271 F. 600, 604 (4th Cir. 1921))). For further examples of the conventional wisdom, see *infra* notes 80–84 and accompanying text.

[2] Neal Gabler, *The Weird Science of Naming New Products*, N.Y. TIMES (Jan. 15, 2015), https://nyti.ms/2jD7Hh7 [https://perma.cc/459B-L4RQ]. For an overview of portmanteaux — words that blend the sounds and combine the meanings of two words — see DICK THURNER, PORTMANTEAU DICTIONARY: BLEND WORDS IN THE ENGLISH LANGUAGE, INCLUDING TRADEMARKS AND BRAND NAMES (1993).

Names."[3] The article recalled an entrepreneur's description of his efforts to find a name for his new company: "Every name we liked, either somebody already had it or it wasn't trademarkable or it meant something pornographic in another language."[4] For the *Chicago Tribune*, the focus was craft beer and the headline was "Craft Beer Makers Running Out of Names. How About Flip Donkey Doodleplunk?"[5] *NPR* has further reported that "[v]irtually every large city, notable landscape feature, creature and weather pattern of North America — as well as myriad other words, concepts and images — has been snapped up and trademarked as the name of either a brewery or a beer."[6] For *The Guardian*, the focus was band names under the headline "FKA Twigs, Slaves, Deers: Are We Running Out of Band Names?"[7] The article observed that "[a]ll the best monikers have been taken, and now the lawsuits are flying."[8] Reports suggest that the cosmetics industry is facing similar challenges: "The beauty industry has literally run out of names to use for new product[s] . . . . Why, even the name 'There Aren't Anymore Names for This' is taken."[9] Popular television series have also taken up the theme. *Futurama* and *South Park* have each featured

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[3] Justin Fox, *We're Going to Run Out of Company Names*, BLOOMBERG VIEW (Jan. 13, 2017, 1:00 PM), https://www.bloomberg.com/view/articles/2017-01-13/we-re-going-to-run-out-of-company-names [https://perma.cc/32P7-NTWJ].

[4] *Id.* (quoting Justin Fox, *Who the Hell Is Henry Silverman?*, FORTUNE (Oct. 27, 1997), http://archive.fortune.com/magazines/fortune/fortune_archive/1997/10/27/233303/index.htm [https://perma.cc/CAB6-A7FJ]).

[5] Rex W. Huppke, *Craft Beer Makers Running Out of Names. How About Flip Donkey Doodleplunk?*, CHI. TRIB. (Jan. 7, 2015, 7:30 PM), http://www.chicagotribune.com/news/opinion/huppke/ct-craft-beer-names-huppke-talk-0107-20150107-story.html [https://perma.cc/H72Q-2MFN] (reporting that "craft beer brewers are struggling to find beer names that haven't already been used, occasionally even getting in legal fights over trademarked titles").

[6] Alastair Bland, *Craft Brewers Are Running Out of Names, and Into Legal Spats*, NPR (Jan. 5, 2015, 9:08 AM), http://www.npr.org/sections/thesalt/2015/01/05/369445171/craft-brewers-are-running-out-of-names-and-into-legal-spats [https://perma.cc/X8FZ-AJRV]. Bland reports that nearly every beer pun, like "Hopscotch" or "Bitter End," has also already been claimed. *Id.* In response to the depletion of beer brand names, one scientist developed a software program using artificial intelligence to come up with new names for beers, such as "Yamquak," "Dang River," "Toe Deal," and "Oarahe Momnilla Day Revenge Bass Cornationn Yerve of Aterid Ale." Ryan F. Mandelbaum, *We've Run Out of Beer Names and AI Is Here to Help*, GIZMODO (Aug. 3, 2017, 10:00 AM), http://gizmodo.com/weve-run-out-of-beer-names-and-ai-is-here-to-help-1797480178 [https://perma.cc/C5RQ-NC3M]. Needless to say, some of these names seem more competitively effective than others. *See infra* section I.B.2, pp. 964–70 (discussing what makes a "good" trademark).

[7] Sam Richards, *FKA Twigs, Slaves, Deers: Are We Running Out of Band Names?*, THE GUARDIAN (Feb. 17, 2015, 4:00 PM), https://www.theguardian.com/music/2015/feb/17/fka-twigs-slaves-deers-band-name-shortage [https://perma.cc/GVY9-NESU].

[8] *Id.*

[9] Kathleen Lee-Joe, *The Beauty Industry Has Run Out of Makeup Names*, DAILYLIFE (Jan. 16, 2015), http://www.dailylife.com.au/dl-beauty/makeup/the-beauty-industry-has-run-out-of-makeup-names-20150115-12qw2i.html [https://perma.cc/VPW9-BCJB].

scenes in which nearly all words or word combinations have already been trademarked.[10]

Meanwhile, free speech advocates have grown increasingly vocal about the pervasive trademarking of everyday words. The YouTube duo the Fine Brothers announced in 2016 that they had applied to register the word "react," after their series of videos.[11] The public reaction was critical and merciless. One commenter joked about registering the word "the" and threatened that "anyone who says it get[s] sued."[12] The commenter was no doubt unaware that at the time there were already eleven active trademark registrations claiming just the word THE.[13] Another commenter stated simply: "REACT is not yours to trademark."[14] And perhaps it wasn't: there were already three active registrations of the word in the particular class of services in which the Fine Brothers applied and thirty-seven active registrations overall.[15] In response to the furor, the Fine Brothers withdrew their trademark application.[16]

To the extent that legal and popular commentary has engaged the question of the exhaustibility of the supply of trademarks, the discussion has been based at best on anecdata and at worst on raw assertion. This Article seeks to move beyond both by systematically studying all 6.7 million trademark applications filed at the U.S. Patent and Trademark Office (PTO) from 1985 through 2016 together with the 300,000 trademarks already registered at the PTO as of 1985, which is made possible by the PTO's recently released Trademark Case Files Dataset.[17] We analyze the PTO data along two dimensions, which we term "trademark depletion" and "trademark congestion." Trademark depletion is the process by which a decreasing number of potential trademarks remain unclaimed by any trademark owner.[18] By contrast, trademark congestion

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[10] *Futurama: The Problem with Popplers* (20th Century Fox Television May 7, 2000); *South Park: Go Fund Yourself* (South Park Digital Studios Sept. 24, 2014).

[11] Sam Machkovech, *Fine Bros Back Down, Rescind Trademark Claim on the Word "React,"* ARS TECHNICA (Feb. 2, 2016, 1:15 AM), http://arstechnica.com/business/2016/02/fine-bros-back-down-rescind-trademark-claim-on-the-word-react/ [https://perma.cc/VZJ6-6HGG].

[12] Brian Ashcraft, *Popular YouTubers Try to Trademark "React" [UPDATE]*, KOTAKU (Feb. 1, 2016, 8:00 AM), http://kotaku.com/popular-youtubers-try-to-trademark-react-1756331442 [https://perma.cc/H3JX-F8E5].

[13] These findings are derived from the Trademark Case Files Dataset, which we describe in Part II. *See infra* Part II, pp. 973–77.

[14] Ashcraft, *supra* note 12.

[15] *See* U.S. Trademark Application Serial No. 86,689,364 (filed July 10, 2015) (applying to register REACT in International Class 41).

[16] Machkovech, *supra* note 11.

[17] *See infra* Part II, pp. 973–77 (discussing this dataset in greater detail).

[18] Note, as we discuss below, that we do not use the term "depletion" to refer necessarily to a decreasing number of potential marks that are actually available for adoption as trademarks. *See infra* section III.A, pp. 978–81 (analyzing word-mark depletion). Rather, as we use the term, depletion refers to a decreasing number of potential marks that are unclaimed by any trademark owner.

is the process by which an already-claimed mark is claimed by an increasing number of different trademark owners.[19] This Article focuses specifically on word marks and thus on word-mark depletion and word-mark congestion. Overall, the data show that the conventional legal wisdom is wrong and the conventional popular wisdom is right. The supply of word marks that are at least reasonably competitively effective as trademarks is finite and exhaustible. This supply is already severely depleted, particularly in certain sectors of the economy, and levels of depletion continue to rise. Those marks that are registered are growing increasingly congested. The result, as the data reveal, is that new trademark applicants are increasingly being forced to resort to second-best, less competitive marks, and the trademark system is growing increasingly — perhaps inordinately — crowded, noisy, and complex.

Specifically, the data present compelling evidence of substantial word-mark depletion, particularly with respect to the sets of potential marks that businesses prefer most: standard English words, short neologisms that are pronounceable by English speakers, and common American surnames. Together with the PTO dataset, we use the Corpus of Contemporary American English dataset of the 100,000 most frequently used words in American English and the U.S. Census's list of the 151,672 most frequently occurring surnames in the United States to show the extraordinarily high proportion of English words and common surnames that are already registered as trademarks. We further show the remarkably low proportion of words and surnames not confusingly similar to already-registered marks. With respect to short neologisms, we use the Carnegie Mellon University Pronouncing Dictionary and LOGIOS Lexicon tool to construct a phonetic representation of each word mark applied for or registered in the PTO dataset. Based on these

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[19] Importantly, the phenomena of trademark depletion and trademark congestion are different from, though related to, the phenomenon of trademark "cluttering." Cluttering refers to marks that are registered but not used in commerce by their registrants in one or more of the classes in which they are registered. *See* GEORG VON GRAEVENITZ ET AL., TRADE MARK CLUTTERING: AN EXPLORATORY REPORT 5 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312092/ipresearch-tmcluttering.pdf [https://perma.cc/BEW7-AP2R] ("[W]e define cluttered trade mark registers as registers containing such a large number of unused or overly broad trade marks, that the costs of creating and registering new marks substantially increase for other applicants." (footnote and emphases omitted)); *id.* at 5 n.2 ("Overly broad in this context means seeking protection in more classes than are required."). Cluttering is a significant problem for foreign trademark systems that do not have as strict a use requirement as that imposed by American trademark law. *See id.* at 9 (discussing the differences between use requirements in the United States and European jurisdictions); *see also* Georg von Graevenitz, *Trade Mark Cluttering — Evidence from EU Enlargement*, 65 OXFORD ECON. PAPERS 721, 722, 732 (2013) (using data provided by the European Community Office for Harmonization in the Internal Market (now called the European Union Intellectual Property Office) to examine how European Union enlargement drove pharmaceutical firms to further clutter the Community Trade Mark register with registrations for marks they were unlikely to use). We address the problem of trademark clutter at the PTO in section V.B, *infra* pp. 1029–41.

data, we show that the supply of short neologisms not confusingly similar to already-registered marks is substantially declining. Finally, because many trademark applicants prefer to be able to register any new mark as a domain name in the .com top-level domain, we use Verisign's .COM Zone File consisting of some 128 million currently registered domain names in the .com top-level domain to illustrate the near-total depletion in that space of standard English words, common American surnames, and short neologisms.

Given these conditions, new applicants are increasingly resorting to suboptimal marks. The data indicate that applicants are applying less often for standard English words and common surnames and more often for more complex marks, as measured by character, syllable, and word count. We think that applicants are modifying their conduct in this manner primarily to avoid applying for marks that the PTO would refuse to register on the basis of section 2(d) of the Lanham Act,[20] which denies the registration of a mark that, due to its similarity with an already-registered mark, would confuse consumers as to source.[21] Yet applicants appear to be increasingly unsuccessful in avoiding such refusals. We use our original dataset of all 2.1 million trademark office actions issued by the PTO from 2003 through 2016 to report the increasing rate at which the PTO is refusing applied-for marks on the basis of section 2(d). Despite these trends, one class of applicants appears to be doing fine. Incumbent applicants (those applying based on previous registrations) continue to apply for non-neologisms at a rate substantially higher than nonincumbent applicants and continue to enjoy very low section 2(d) refusal rates.

The data also reveal compelling evidence of substantial word-mark congestion. Consistent with increasing section 2(d) refusal rates, trademark applicants are increasingly resorting to what we term "parallel registrations." Two firms can use exactly the same mark provided that their uses would not confuse consumers as to source (for example, DELTA for faucets and DELTA for airlines).[22] Nevertheless, a trademark owner would prefer to be at best the only firm in the economy

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[20] Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

[21] *See* 15 U.S.C. § 1052(d) (2012) (denying registration of any mark "which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive").

[22] We use the term "parallel registrations," rather than "concurrent registrations," to refer to this phenomenon. Concurrent registrations are a subset of parallel registrations. Concurrent registrations consist of registrations in which two or more different parties operating in different regions of the country register the same mark for similar goods or services when each party's use is sufficiently geographically separate from each other party's use that no confusion will result. *See id.*; *see also* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:81, at 20-197 (4th ed. 2017). Concurrent registrations are exceptionally rare. The PTO data indicate that for all 5.9 million Principal Register applications from 1985 through 2014, only 604 resulted in registrations subject to concurrent use. *See infra* Part II, pp. 973–77.

using a particular mark and at least the only firm in its economic sector doing so. Parallel uses may not confuse consumers as to source, but each use destroys the uniqueness and blurs the distinctiveness of the other, particularly for newer entrants. They also increase consumer search costs. Yet the data show steady increases in parallel registrations of frequently used English words and common surnames both across and within classes of goods and services. Firms appear to be increasingly settling for sharing marks with others.

These findings urge a rethinking of many of the fundamental assumptions underlying trademark law. Most importantly, they emphasize that the granting of trademark rights imposes real costs on the ecology of the trademark system, and that as we begin to test the limits of this ecology, these costs are mounting. New market entrants face significant barriers to entry in the form of the cost of searching for an unclaimed mark and in the ongoing cost of using a less effective mark. Consumers must cope with an ever more crowded field of trademarks consisting of increasingly complex marks that may refer to multiple different sources. The public domain must cope with the fact that, as we report below, when we use our language, about three-fourths of the time we are using a word that someone has claimed as a trademark.

These findings also counsel fundamental reforms of trademark law and doctrine. For example, given the costs a trademark registration imposes on the rest of the trademark system, particularly when the registration consists of a desirable word like a standard English word, we could enforce the use requirement more aggressively, as the PTO has already begun to do. We could also elevate the required showing of secondary meaning that an applicant must make when seeking to register a descriptive mark. In general, we could institute various schemes of congestion or peak pricing with respect to application, maintenance, and renewal fees to compel registrants to internalize more of the costs that their registrations impose on competitors, consumers, and the public domain. We could also take the degree of trademark depletion and congestion in particular sectors into account in the protectability, infringement, and trademark fair use analyses. The challenge in all cases will be to ensure that these reforms do not impose even greater costs on entrants. To be sure, many of these reforms may strike current trademark owners as unthinkable. But they are unthinkable only if we continue to fall back on the conventional wisdom that the trademark system is based on an inexhaustible resource, or in any case, that our economy could never reach a stage of development that would begin to test the limits of this resource. As we show, this conventional wisdom is wrong, and we must begin to consider ways of adapting to the limits of the trademark system.

Part I provides background on the trademark registration process and addresses the question of how to define the universe of good trademarks. Of course, the supply of possible trademarks, like the supply of

possible personal names, is theoretically infinite. At the extreme, new firms could simply adopt alphanumeric codes of indefinite length to identify themselves. We explain why this is the wrong way to think about the universe of potential trademarks and why marketers rightly see this universe in very different terms. Part II describes our datasets. Parts III and IV present evidence of word-mark depletion and word-mark congestion, respectively. Though we draw upon "big data," our evidence takes the form of straightforward descriptive statistics showing clear trends over time. Part V sets out the implications of our findings for trademark law and policy.

I. BACKGROUND

Trademark law protects brands, which almost always appear in the form of words as brand names, but may also manifest in other indicia of source including symbols, images, and sometimes a product's packaging or design.[23] A properly functioning trademark system is crucial to a fair and efficient marketplace.[24] The theory underlying trademark law is that producers will invest in product quality only if they can benefit from the reputation-related rewards of that investment.[25] Trademarks enable producers to build goodwill, and trademark protection prevents others from trading on that goodwill.[26] Trademarks also allow consumers to quickly and assuredly find the products they seek.[27] A trademark serves as shorthand for the complex of qualities of which a product consists, qualities that are often difficult to discern before purchase or use[28] — and sometimes even after use, as with some pharmaceuticals.[29] Trademarks reduce consumer search costs — consumers' costs of finding product characteristics of

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[23] 15 U.S.C. § 1127 (defining trademarks to include "any word[s], name[s], symbol[s], or device[s], or any combination thereof"); Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 216 (2000) (holding that nonutilitarian product design or packaging might constitute a protectable trademark). *See generally* Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012) (discussing protecting brands as a unifying principle for the modern Lanham Act).

[24] *See* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844–46 (2007) (describing this conventional view of trademark law).

[25] *See* Schechter, *supra* note 1, at 818 ("The true functions of the trademark are . . . to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public.").

[26] *See* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 549 (2006); *see also* Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–88 (2004).

[27] Dogan & Lemley, *supra* note 26, at 787–88.

[28] *See, e.g.*, Landes & Posner, *supra* note 1, at 268–69; *see also infra* note 83 and accompanying text.

[29] *See, e.g.*, Charles J. Walsh & Marc S. Klein, *From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims Under the Lanham Act*, 22 SETON HALL L. REV. 389, 399 (1992) ("Drugs are true 'credence' goods because they possess qualities that cannot be evaluated through normal use.").

interest — because consumers can search for the easily perceivable trademark rather than a product's often more elusive characteristics.[30] Trademark law, then, benefits both consumers and producers. The primary way it does so is by preventing any firm from using a trademark that is so similar to another firm's mark that consumers will be confused as to the true source of one or both of the firms' goods.

In this Part, we provide background on trademark law and in particular on the trademark registration process. We also review both the legal and marketing considerations that limit the universe of potential trademarks.

A. The Trademark Registration Process

To qualify for registration at the PTO, a trademark must meet three basic requirements. First, it must be "distinctive" of the source of the goods or services with which it is used.[31] Second, it must be used in commerce.[32] Third, it must not violate any of the Lanham Act's various statutory bars to protection.[33] For our purposes, the most important bar to registration is the section 2(d) bar against the registration of any mark that is confusingly similar to an already-registered mark.[34] As we show

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[30] Landes & Posner, *supra* note 1, at 269–70.

[31] *See* 15 U.S.C. § 1052(f) (2012).

[32] *See id.* § 1051(a)(1) (providing for registration of a mark "used in commerce"); *id.* § 1051(d) (providing for registration of a mark filed on an intent-to-use basis upon filing of a statement that the mark is "used in commerce"). Certain foreign applications need not meet the use-in-commerce requirement to receive registration. *See id.* § 1126(e) (providing for registration of a mark already registered in certain foreign jurisdictions provided that the applicant has a bona fide intention to use the mark in commerce in the United States, but specifying that "use in commerce shall not be required prior to registration"); *id.* § 1141f(a) (providing for registration of a mark under the Madrid Protocol system provided that the applicant has a bona fide intention to use the mark in commerce in the United States). Applications filed under § 1126(e) (so-called "Section 44(e) applications") are rare. The PTO data indicate that of the 385,249 Principal Register trademark applications filed in 2016, 5585 were filed on this basis. Applications filed under § 1141f(a) (so-called "Section 66(a) applications") are also rare. There were 15,374 such applications filed in 2016. See *infra* Part II, pp. 973–77, for discussion of the Trademark Case Files Dataset. Regardless of the statutory basis for their registration, all registrants must show that they are making a "use in commerce" in order to pursue a claim of trademark infringement. *See* Rearden LLC v. Rearden Commerce, Inc., 683 F.3d 1190, 1203 (9th Cir. 2012) ("[A] party pursuing a trademark claim must meet a threshold 'use in commerce' requirement."). *But see* Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697, 706 (4th Cir. 2016) (holding that § 1125(a) "does not require that a plaintiff possess or have used a trademark in U.S. commerce as an element of the cause of action").

[33] *See* 15 U.S.C. § 1052.

[34] *See infra* section I.A.3, pp. 960–61 (elaborating on the requirements of section 2(d)). Our dataset of all office actions issued by the PTO from 2003 through 2016 shows that other bars to registration rarely form a ground for rejection. Of the 3,376,150 applications for registration on the Principal Register filed from 2003 through 2014, only 0.08% were met with an office action refusing registration on the ground that the mark was functional, 0.02% on the ground that the mark was disparaging, and 0.06% on the ground that the mark was scandalous. See *infra* Part II, pp. 973–77, for discussion of our PTO office action dataset. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Supreme Court held that the Lanham Act's disparagement bar to registration was unconstitutional

in Part III, a significant and increasing proportion of applications are being refused on this ground.

A trademark need not take any particular form to qualify for registration. The PTO has registered as trademarks words,[35] phrases,[36] two-dimensional images, both moving[37] and still,[38] three-dimensional shapes[39] including building exteriors,[40] sounds,[41] scents,[42] textures,[43] and even particular motions.[44] Nevertheless, a very high proportion of registered trademarks consist in whole or part of text. As of the end of 2016, there were 2,094,051 active trademark registrations on the PTO's Principal Register.[45] Of these, 95.7% included text; 75.6% consisted only

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under the First Amendment's Free Speech Clause. *Id.* at 1751. It is probable that the scandalousness bar to registration will also be found to be unconstitutional. *See* Letter Brief of Appellant Eric Brunetti at 1, *In re* Brunetti, No. 2015-1109 (Fed. Cir. Aug. 9, 2017), ECF No. 70 ("[T]here is no difference between the Disparagement Clause and the Scandalous Clause. . . . The Disparagement Clause is unconstitutional [under *Matal*]. It follows that the Scandalous Clause is unconstitutional.").

35 *See, e.g.*, AMAZON, Registration No. 2,832,943; APPLE, Registration No. 1,078,312; NIKE, Registration No. 978,952.

36 *See, e.g.*, JUST DO IT, Registration No. 1,875,307.

37 See, for example, Registration No. 4,129,188, in which the mark "consists of a moving image mark, consisting of an animated sequence showing a series of rectangular video screens of varying sizes, that fly inward in whirlwind fashion, as if from the viewer's location, toward the center of the viewer's screen, where they coalesce into the word 'HULU.' The drawing represents three (3) stills (freeze frames) from the animated sequence." *Id.*

38 See, for example, Registration No. 1,145,473, in which the mark "is comprised of a 'Wing' design." *Id.*

39 See, for example, Registration No. 3,457,218, for the shape of the original iPhone.

40 See, for example, Registration No. 1,045,615, for the exterior design of a McDonald's restaurant.

41 See, for example, Registration No. 2,519,203, in which the mark consists of "the sound of a deep, male, human-like voice saying 'Ho-Ho-Ho' in even intervals with each 'Ho' dropping in pitch." *Id.*

42 See, for example, Registration No. 3,143,735, for office supplies, in which "[t]he mark consists of a vanilla scent or fragrance." *Id.*

43 See, for example, Registration No. 3,155,702, in which "[t]he mark consists of a velvet textured covering on the surface of a bottle of wine." *Id.*

44 See, for example, Registration No. 2,793,439, for the scissor door configuration of a Lamborghini automobile. "The mark consists of the unique motion in which the door of a vehicle is opened. The doors move parallel to the body of the vehicle but are gradually raised above the vehicle to a parallel position." *Id.* So-called "nontraditional marks" of this nature are very rare. Of the 2,094,051 active registrations on the Principal Register in 2016, only 199 were for nontraditional marks, of which most were sound marks. See *infra* Part II, pp. 973–77, for discussion of the Trademark Case Files Dataset.

45 Marks that meet all requirements for registration are registered on the Principal Register. *See* 15 U.S.C. § 1052 (2012). Noninherently distinctive marks that are "capable of distinguishing applicant's goods or services" but that have not yet developed acquired distinctiveness are registrable on the Supplemental Register provided that they meet all other requirements for registration. *See id.* § 1091. Registration on the Supplemental Register is of very limited value. *See In re* Federated Dep't Stores Inc., 3 U.S.P.Q.2d 1541, 1543 (T.T.A.B. 1987) ("It is overwhelmingly agreed that a Supplemental Register registration is evidence of nothing more than the fact that the registration issued on the date printed thereon. It is entitled to no presumptions of validity, ownership, use or

of text.[46]

Among the various requirements that a trademark must meet in order to qualify for registration, a few merit further discussion below. Where appropriate, our discussion focuses on the doctrine applying to marks containing text because they constitute the great majority of trademarks and are the focus of our study.

1. The Distinctiveness Requirement. — The most important requirement by far that a mark must meet to qualify for registration is that it be perceived by consumers as distinctive of its source.[47] To determine if a word mark qualifies as distinctive, trademark doctrine generally classifies the mark into one of five categories: (1) "fanciful" marks, which are coined words that bear no clear semantic relation to the goods or services to which they are attached (such as EXXON for gasoline or KODAK for photographic film); (2) "arbitrary" marks, which are preexisting words that bear no clear semantic relation to their goods or services (such as APPLE for computers or AMAZON for online retail services); (3) "suggestive" marks, which are evocative but not directly descriptive of their products' characteristics (such as COPPERTONE for suntan oil or IVORY for soap); (4) "descriptive" marks, which describe their products' characteristics (such as IPHONE for mobile phones); and (5) "generic" marks, which refer to the type of product to which they are affixed (such as ESCALATOR for moving staircase or ASPIRIN for acetylsalicylic acid).[48]

Trademark law holds that fanciful, arbitrary, and suggestive marks possess "inherent distinctiveness" of their source — and thus meet the distinctiveness requirement on that basis — because consumers immediately interpret them as designations of source rather than as descriptions of the goods to which they are affixed.[49] For example, as a matter of basic consumer literacy, consumers would likely immediately perceive a neologism like LENOVO embossed on the bezel of a computer monitor as a designation of source. In contrast, consumers would likely interpret a descriptive term like "high-definition" embossed on the bezel as a nonsource-specific description of the product.

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priority." (citations omitted)). We study only registrations on the Principal Register to ensure that our findings are based on marks that have been determined to be distinctive of source.

[46] See *infra* Part II, pp. 973–77, for discussion of the Trademark Case Files Dataset.

[47] 15 U.S.C. § 1052(f).

[48] *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9–11 (2d Cir. 1976) (setting out these categories); *see also* Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 975–76 (10th Cir. 2002). One of us is separately writing about how trademark law's conventional distinctiveness spectrum is misguided in multiple important ways, a topic well beyond the scope of this project. *See* Jeanne C. Fromer, Overhauling Trademark Distinctiveness (Sept. 18, 2017) (unpublished manuscript) (on file with author).

[49] *Sally Beauty Co.*, 304 F.3d at 976–77.

Unlike its treatment of fanciful, arbitrary, and suggestive marks, trademark law holds that descriptive marks are not inherently distinctive of source because consumers may interpret them as mere descriptions of their products.[50] To be registrable, descriptive marks must develop "acquired distinctiveness" of source (also often called "secondary meaning").[51] They typically do so over time through advertising and use in the marketplace, which educate consumers that these marks are designations of source rather than mere descriptions of their products' characteristics.[52]

Finally, because they are understood to be incapable of source designation, generic marks cannot be registered at the PTO.[53]

2. Classification of Goods and Services. — In addition to demonstrating a trademark's inherent or acquired distinctiveness, a trademark applicant must specify the goods and services in connection with which the applicant claims the exclusive right to use the mark.[54] The applicant must do so in the form of a written description of the goods and services and also by reference to one or more of the forty-five categories of goods and services contained in the *International Classification of Goods and Services for the Purposes of the Registration of Marks*, otherwise known as the "Nice Classification" after the French city where it was established in 1957.[55] Now in its eleventh edition,[56] the Nice Classification is idiosyncratic.[57] The different classes are not of comparable scope, as the list of Nice Class Headings provided in Appendix A suggests. For example, Class 26 narrowly covers "Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; hair decorations; false hair."[58] Similarly, Class 34 covers "Tobacco; smokers' articles; matches."[59] Meanwhile, Class 1 broadly covers "Chemicals

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[50] *Id.* at 977–78.

[51] *Id.* at 978.

[52] *Id.*

[53] *See Abercrombie*, 537 F.2d at 9.

[54] *See* 15 U.S.C. § 1051(a)(2) (2012).

[55] U.S. PATENT & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1401.03 (Oct. 2017) [hereinafter TMEP] (citing Requirements for a Complete Trademark or Service Mark Application, 37 C.F.R. § 2.32(a)(7) (2017)); *see Nice Classification*, WORLD INTELL. PROP. ORG. (2017), http://www.wipo.int/classifications/nice/en/ [https://perma.cc/D6YY-UQPH]; *see also List of Classes with Explanatory Notes*, WORLD INTELL. PROP. ORG., http://web2.wipo.int/classifications/nice/nclpub/en/fr/20170101/classheadings/?explanatory_notes [https://perma.cc/ZPV7-YKTF].

[56] *Nice Classification*, *supra* note 55.

[57] For a study of how classification schemes often invisibly encode particular, idiosyncratic points of view, see generally GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES (1999), which analyzes a myriad of classification schemes, including the International Classification of Diseases and race classification in South Africa under apartheid.

[58] *See infra* app. at 1044.

[59] *See infra* app. at 1045.

used in industry, science and photography, as well as in agriculture, horticulture and forestry"[60] and Class 12 covers "Vehicles; apparatus for locomotion by land, air or water."[61] Figure 1 shows the relative significance of the various Nice classes for all active trademark registrations at the PTO in 2016. The data suggest that the most important classes, as measured by active trademark registrations,[62] are Class 9 (electronic goods), Class 16 (printed matter and publications), Class 25 (apparel goods), Class 35 (business administration services), Class 41 (education, entertainment, and cultural and sporting activities services), and Class 42 (computer-related services). Though less heavily populated, another economically important class is Class 5 (pharmaceuticals). In our analysis of trademark depletion and congestion in Parts III and IV, we often focus on certain of these classes and compare their class-specific data to data drawn from all classes.[63] We do so to illustrate the implications of depletion and congestion for the most important economic sectors.[64]

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[60] *See infra* app. at 1043.

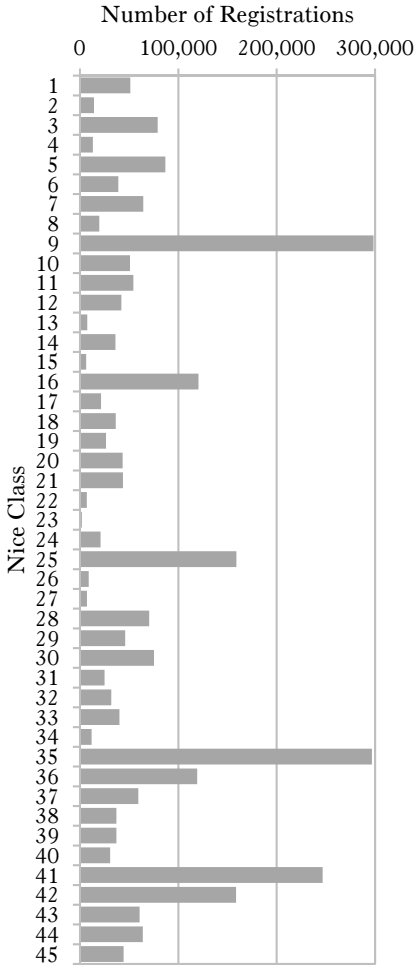
[61] *See infra* app. at 1044.

[62] There is a strong correlation between the number of trademark registrations in a particular Nice class and the economic importance of that class. As a 2016 U.S. government study shows, trademark-intensive industries account for the largest number of intellectual-property-intensive industries in the United States and contribute the most employment from such industries to the U.S. economy. ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE, at ii, 8–9, 34–45 (Sept. 2016), https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf [https://perma.cc/3XVY-49UM].

[63] We used keywords to create our own classes of goods and services in certain areas of interest, such as by combining beverages across Nice classes or by limiting a Nice class to a smaller subset like software or automobiles. These bespoke classes yielded results sufficiently similar to Nice class results that we report only the latter.

[64] To avoid overwhelming and confusing readers, we do not consistently present class-specific results for all classes or even for the economically most important classes. We present such results only when we think it is instructive. When we do not, it is safe to assume that the class-specific results generally follow the contours of the results for the overall population of applications or diverge from those overall results in insignificant ways.

Figure 1: Active Registrations in 2016 by Nice Class



3. The Bar to the Registration of Marks Confusingly Similar to Already-Registered Marks. — Not all distinctive marks are registrable. Section 2(d) of the Lanham Act bars the registration of a mark that so resembles an already-registered mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive."[65] For example, on the basis of section 2(d), the PTO recently refused to register COW CREEK for beer in light of the preexisting mark BULL CREEK BREWING for beer,[66] EMERALD COOL for air conditioners in light of the preexisting mark

[65] 15 U.S.C. § 1052(d) (2012).

[66] *In re* BWBC, Inc., 2015 WL 3542842, at *6 (T.T.A.B. 2015).

EMERALD AIRE for air conditioners,[67] 2GOOD for chocolate candy in light of TOOGOOD for various goods including candy,[68] and LYTNING for protective industrial boots in light of LIGHTNING GLOVES for disposable latex gloves.[69] By contrast, the PTO has recently found no likelihood of confusion under section 2(d) between the mark BON O BON for chocolates and pastries and the mark BON BON for sugar confectionary.[70]

Section 2(d) also bars the registration of any mark that is confusingly similar to an unregistered "mark or trade name previously used in the United States by another and not abandoned."[71] In practice, however, due to the practical difficulties of identifying "previously used" unregistered marks and determining whether they continue to be used in commerce, the initial ex parte examination of the trademark application reviews only registered marks for conflicts.[72]

The PTO refers to a number of factors to determine if an applicant's mark is confusingly similar to an already-registered mark.[73] The most important of these are (1) "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression"; and (2) "[t]he relatedness of the goods or services as described in the application and registration(s)."[74] The PTO also considers such factors as the similarity of the applicant's and registrant's channels of trade, the sophistication of the relevant consumers, and "[t]he number and nature of similar marks in use on similar goods"[75] (on the assumption that if the already-registered mark exists in a crowded field of similar marks, it is entitled to only a narrow scope of protection).[76]

4. The Protection of Unregistered Marks. — The Lanham Act protects any trademark that is distinctive, used in commerce, and not statutorily barred from protection even if the trademark is not registered at

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[67] *In re* Fla. Appliances, Inc., 2015 WL 3430235, at *5 (T.T.A.B. 2015).

[68] *In re* August Storck KG, 2015 WL 3430229, at *6 (T.T.A.B. 2015).

[69] *In re* Columbia Ins. Co., 2015 WL 3430233, at *1, *8 (T.T.A.B. 2015).

[70] Arcor S.A.I.C. v. "ROT FRONT" Open-Type Joint Stock Co., 2017 WL 3670337, at *9 (T.T.A.B. 2017).

[71] 15 U.S.C. § 1052(d) (2012).

[72] *See* TMEP, *supra* note 55, § 1207.03.

[73] *See, e.g.*, *In re* E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973) (listing thirteen factors that should be considered in determining the likelihood of confusion under section 2(d)).

[74] TMEP, *supra* note 55, § 1207.01 (repeating language from *E.I. DuPont*, 476 F.2d at 1361).

[75] *E.I. DuPont*, 476 F.2d at 1361.

[76] These factors are closely similar to those used by courts to determine the likelihood of confusion in the trademark-infringement context. *See, e.g.*, AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979). *See generally* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006) (examining and comparing quantitatively each circuit's multifactor test for the likelihood of consumer confusion).

the PTO.[77] Nonetheless, the law provides several important incentives to encourage trademark owners to register their marks, including nationwide priority in the mark from the date of application and enhanced remedies.[78]

Yet if federal case law is any indication, trademark owners routinely assert exclusive rights in unregistered marks.[79] The Principal Register thus significantly understates the number of commercial signifiers that federal law actually protects as trademarks. For this reason, even a study of the two million trademarks currently registered on the Principal Register that contain text will allow only the most conservative estimate of the full severity of any problem of word-mark depletion and congestion. We think that this makes the empirical evidence of depletion and congestion we present in Parts III and IV, which is based only on marks registered on the Principal Register, all the more powerful.

B. The Finite Universe of "Good" Trademarks

With this background on trademark law set out, we now turn to the legal and marketing considerations that limit the universe of potential trademarks. Before doing so, we probe the conventional wisdom recited by courts and commentators alike that there is an infinite stockpile of possible trademarks.

1. The Conventional Wisdom Clarified. — As we stated above, courts and commentators have long professed the belief that the supply of potential trademarks is inexhaustible.[80] They have done so since the

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[77] *See* 15 U.S.C. § 1125(a) (2012) (providing anticonfusion protection to both registered and unregistered marks). The Lanham Act's protection of both registered and unregistered marks provokes the important question whether marks that are refused registration might nonetheless be protected as unregistered marks. In a thorough and thoughtful recent article on trademark registration, Rebecca Tushnet addressed how the American scholarly approach of "treat[ing] registration like a borrowed civil law coat thrown awkwardly over the shoulders of a common law regime" leaves unanswered important questions like the status of a refused registration. Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 871 (2017). Tushnet's analysis leads her to understand "[r]egistration's core problem [of trying] to serve two goals that are only partially compatible: helping businesses order their affairs and matching rights with consumer understanding." *Id.* at 916. To fix this problem, registration needs to become either more procedural or more substantive. *Id.* at 929–40.

[78] *See* 15 U.S.C. §§ 1057(c), 1072 (nationwide constructive use conferring priority); *id.* § 1065 (possibility of the mark becoming incontestable after five years); *id.* § 1117(a)–(b) (enhanced remedies).

[79] *See, e.g.*, Cross Commerce Media, Inc. v. Collective, Inc., 841 F.3d 155, 159 (2d Cir. 2016) (asserting exclusive rights in unregistered mark COLLECTIVE); Uber Promotions, Inc. v. Uber Techs., Inc., 162 F. Supp. 3d 1253, 1259 (N.D. Fla. 2016) (asserting exclusive rights in unregistered mark UBER PROMOTIONS).

[80] *See, e.g.*, Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910) ("It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors . . . ."); *supra* note 1 and accompanying text.

inception of modern trademark law in the nineteenth century[81] and they continue to do so.[82] Typically no evidence or analysis is presented to support this claim.

Stated in its most basic, unqualified form, the theoretical conjecture that the supply of trademarks is inexhaustible is, like the claim that there are infinitely many numbers, trivial. Firms can obviously coin new words or phrases of ever-increasing length to avoid conflicts with already-registered marks. But it is just as obvious that given the limits of human cognition and communication, incumbent firms using shorter, less complex, more familiar, more easily pronounced, and more evocative marks will enjoy a significant competitive advantage over new firms that must resort to brand names that are less effective along these dimensions and for that reason remain unclaimed. In a seminal article on the economic analysis of trademark law, William Landes and Richard Posner explain the advantages of a short, memorable trademark:

> Suppose you like decaffeinated coffee made by General Foods. If General Foods's brand had no name, then to order it in a restaurant or grocery store you would have to ask for "the decaffeinated coffee made by General Foods." This takes longer to say, requires you to remember more, and requires the waiter or clerk to read and remember more than if you can just ask for "Sanka."[83]

Landes and Posner were comparing a product branded SANKA to the same product bearing no trademark at all. It is certainly possible to imagine some Borgesian infinite universe of theoretically possible trademarks, but much of that universe would consist of trademarks that are comparable to, if not worse than, no trademark at all.[84]

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[81] *See, e.g.*, Cuervo v. Owl Cigar Co., 68 F. 541, 541 (C.C.S.D.N.Y. 1895) (claiming that the defendant had "an almost infinite variety of designs to choose from or to devise").

[82] *See, e.g.*, Stork Rest., Inc. v. Sahati, 166 F.2d 348, 361 (9th Cir. 1948) ("This thought that a newcomer has an 'infinity' of other names to choose from without infringing upon a senior appropriation runs through the decisions like a leitmotiv."); Ambrosia Chocolate Co. v. Ambrosia Cake Bakery, Inc., 165 F.2d 693, 697 (4th Cir. 1947) ("[A] man of ordinary intelligence could easily devise a score of valid trade-marks in a short period of time."); Lettuce Entertain You Enters., Inc. v. Leila Sophia AR, LLC, 703 F. Supp. 2d 777, 791 (N.D. Ill. 2010) ("[T]here are infinite other names [than 'lettuce'] under which defendants may continue to operate their restaurant."); Aveda Corp. v. Evita Mktg., Inc., 706 F. Supp. 1419, 1429 (D. Minn. 1989) ("An inference of an intent to trade upon the plaintiff's good will arises if the defendants, with knowledge of plaintiff's mark, chose a mark similar to that mark from the infinite number of possible marks."); *see also supra* note 1 and accompanying text; *cf.* Ann Olivier McGeehan, *Trademark Registration of a Celebrity Persona*, 87 TRADEMARK REP. 351, 352–54 (1997) (positing an infinite number of image marks). *But see* Symposium, *Trademarks in 2017: Their Creation and Protection*, 82 TRADEMARK REP. 880, 899 (1992) (suggesting, in a section by Hans Peter Kunz-Hallstein, that, because there is a finite number of letters, there is a finite number of potential trademarks).

[83] Landes & Posner, *supra* note 1, at 268–69.

[84] *Cf.* JORGE LUIS BORGES, *The Library of Babel*, *in* COLLECTED FICTIONS 112, 112–15 (Andrew Hurley trans., Viking Penguin 1998) (1944) (describing a library "composed of an indefinite, perhaps infinite number of hexagonal galleries," *id.* at 112, that contains all possible 410-page books consisting of every possible ordering of twenty-two letters, periods, commas, and spaces).

The more interesting conjecture is that we will never exhaust the supply of trademarks that are at least as competitively effective as those already claimed. For shorthand, we refer to such marks as "good" marks. This conjecture is not theoretical but empirical. It recognizes that the universe of good trademarks is finite, but it asserts that, as a practical matter, we will never exhaust it. Focusing on word marks, the strong form of this conjecture is that there would still be a surplus of good trademarks even if each firm in the economy wished to use a unique word mark not confusingly similar to the word mark of any other firm in the economy. A weaker form of the conjecture is that we will never exhaust the supply of good trademarks even if each firm operating in a particular class of goods or services wished to use a mark not confusingly similar to the mark of any other firm operating in that class.

Both the strong and weak forms of the inexhaustibility conjecture require some understanding of what constitutes a good, competitively effective trademark. It is to this issue that we now turn.

2. The Characteristics of Good Trademarks. — There is an enormous literature on how to choose a good brand name and on branding strategy more generally. Not all of its advice is consistent. But the literature does agree on a number of general principles concerning what makes some trademarks more effective than others. We emphasize that these are *general* principles. There are extremely successful brands that violate one or all of them, and practices may vary by industry (for example, pharmaceuticals). But on the whole, taking into account the *entire* population of brand names, empirical studies show that firms that adhere to these principles tend to perform better than those that do not.[85]

The first principle is that brand names that are unique are significantly more effective than brand names that lack uniqueness.[86] A brand name may be unique in two respects. It may be unique in the sense that only one firm in the economy uses the name. By contrast, brand names

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[85] *See, e.g.*, Michael J. Cooper, Orlin Dimitrov & P. Raghavendra Rau, *A Rose.com by Any Other Name*, 56 J. FIN. 2371 (2001) (investigating "the effect of company name changes to Internet-related 'dotcom' names on the company's stock price," and finding an "increase in shareholder wealth around the announcement date[, which] remains permanent in the postannouncement period," *id.* at 2373); Michael J. Cooper, Huseyin Gulen & P. Raghavendra Rau, *Changing Names with Style: Mutual Fund Name Changes and Their Effects on Fund Flows*, 60 J. FIN. 2825 (2005) (finding that "flows to funds increase dramatically when funds change their names to look more (less) like the current positive (negative) return styles," and that this finding "holds even for the funds . . . whose holdings do not materially reflect the style implied by their new name," *id.* at 2826); T. Clifton Green & Russell Jame, *Company Name Fluency, Investor Recognition, and Firm Value*, 109 J. FIN. ECON. 813 (2013) (finding that "companies with short, easy to pronounce names have higher breadth of ownership, greater share turnover, lower transaction price impacts, and higher valuation ratios," *id.* at 813).

[86] *See* ELI ALTMAN, DON'T CALL IT THAT 73 (2d ed. 2016); ALEXANDRA WATKINS, HELLO, MY NAME IS AWESOME: HOW TO CREATE BRAND NAMES THAT STICK 24–25 (2014).

that suffer from parallel uses, even when those uses do not confuse consumers as to source, are less distinctive of their various owners. As the trademark literature has recognized in a related context, consumers must "think for a moment" upon exposure to the brand name to determine to which company it refers.[87] Parallel owners additionally face the risk that another parallel user may tarnish the brand name, with the damage spreading to all of its users.[88] A brand name may also be unique in the sense that it is significantly different from any other brand name in the economy. This is the form of brand name uniqueness on which marketers typically focus.[89] GOOGLE is now a classic example of such a unique mark. So-called "copycat" brand names that pattern themselves after leading brands in their fields are generally thought to be ineffective.[90] All else equal, owners of unique trademarks, both unique to their owners and unique as against all other marks, enjoy a considerable competitive advantage.

Second, common English words when used in an arbitrary or suggestive manner are generally more competitively effective than coined words. In comparison to neologisms, common words such as APPLE for computers or KIND for snack bars more readily impart a feeling of familiarity and authenticity, and have proven themselves to be relatively easy to pronounce, hear, read, and remember.[91] These are all crucial characteristics of effective trademarks — the nonsense naming of comic

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[87] Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992) ("A trademark seeks to economize on information costs by providing a compact, memorable and unambiguous identifier of a product or service. The economy is less when, because the trademark has other associations, a person seeing it must think for a moment before recognizing it as the mark of the product or service."). *But see* Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 527–46 (2008) (expressing skepticism about this line of thinking).

[88] *See* Michael Handler, *What Can Harm the Reputation of a Trademark? A Critical Re-Evaluation of Dilution by Tarnishment*, 106 TRADEMARK REP. 639 (2016) (reviewing and undermining the normative basis for dilution by tarnishment).

[89] *See, e.g.*, ALTMAN, *supra* note 86, at 73.

[90] *See* WATKINS, *supra* note 86, at 24 (emphasizing that "[c]opycat names are lazy, lack originality, and blatantly ride on a competitor's coattails," and can risk trademark infringement). That is not to say that what makes a name unique and memorable is static. In fact, once other companies have chosen names, to avoid being a copycat, one might need to look for a different type of name. For example, Alexandra Watkins notes recent copycat trends to avoid, such as _____Monkey, _____Rocket, _____Daddy, _____.ly, i_____, e_____, double "o" (as in Google or Yahoo), fruit names (like Apple and Blackberry), and Cloud. *Id.* at 25.

[91] *See id.* at 35–38; Leslie Collins, *A Name to Conjure with: A Discussion of the Naming of New Brands*, 11 EUR. J. MARKETING 339 (1977). *But see* ALTMAN, *supra* note 86, at 79–80 ("Not understanding something right away is a great reason for someone to pay attention. Hell, they might even look it up."); Tushnet, *supra* note 87, at 533 ("High-frequency words are easy to process, and thus we do not encode them distinctively, meaning that we do not pay much attention to them. If they are used as brand names, we will have trouble remembering the brand. . . . Given that advertisers have trouble getting consumers to pay attention to advertising in general, . . . low-frequency words seem more desirable as marks." (footnote omitted)).

strip "xkcd" notwithstanding.[92] It also generally requires less effort to instill common words with brand meaning,[93] especially when the words' meanings and connotations sync with the brand's message.[94] Relatedly, if a coined word is used, it tends to be more effective when it calls to mind positively charged or brand-appropriate words more familiar to the consumer. For example, VERIZON calls to mind "horizon," suggesting a forward-looking brand; INTEL suggests "intelligent;" and VIAGRA calls to mind, all at once, "vigor," "vitality," "aggression," and "Niagara" (suggesting both water and honeymoons).[95] Words that invoke negatively charged words should be avoided. In a classic example, the brand name for Ford's ill-fated EDSEL automobile invoked "weasel" and "pretzel" in association tests.[96]

Third, shorter trademarks are more effective than longer trademarks. George Zipf observed a century ago that more common words tend to be shorter than less common words.[97] He hypothesized that this maximized the efficiency of a language because shorter words require less effort to use.[98] The same reasoning applies to trademarks — and is a further reason why brand names consisting of common English words are preferred.[99] Studies confirm that recognition and recall are better for shorter words and shorter brand names.[100] This explains why, as a

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92 Randall Munroe, *xkcd.com - A webcomic*, XKCD, http://xkcd.com/about/ [https://perma.cc/XB9Y-7CXU]. Randall Munroe, the creator of xkcd, explains the name of his web comic: "It's not actually an acronym. It's just a word with no phonetic pronunciation — a treasured and carefully-guarded point in the space of four-character strings." *Id.*

93 *See* Fox, *supra* note 3 ("Actual things that make sense to people in the English language make more sense than trying to get people to align behind a seven-letter word you just invented . . . ." (quoting Eli Altman)).

94 ALTMAN, *supra* note 86, at 85–86, 111–12; WATKINS, *supra* note 86, at 6–7.

95 Sharon Begley, *StrawBerry Is No BlackBerry: Building Brands Using Sound*, WALL ST. J. (Aug. 26, 2002, 3:47 PM), https://www.wsj.com/articles/SB1030310730179474675 [https://perma.cc/327A-FC9Z]; *see also* Kim Robertson, *Strategically Desirable Brand Name Characteristics*, J. CONSUMER MARKETING, Fall 1989, at 61, 63–65.

96 MATT HAIG, BRAND FAILURES 20 (reprt. 2003).

97 GEORGE KINGSLEY ZIPF, THE PSYCHO-BIOLOGY OF LANGUAGE 28–29 (1935) (reasoning that "high frequency is the cause of small magnitude" of word length, *id.* at 29); *see also* Landes & Posner, *supra* note 1, at 272 (discussing Zipf's observation).

98 ZIPF, *supra* note 97, at 38 (positing that the allocation of short words to commonly occurring concepts maximizes efficiency, by taking less effort to produce); *see also* Landes & Posner, *supra* note 1, at 272 (discussing Zipf's reasoning).

99 *See* Landes & Posner, *supra* note 1, at 274. Chinese law in fact bars companies from registering names that take the form of "paragraphs or long sentences," such as "A Group of Youths in Baoji Holding a Cherished Dream That Under the Leadership of Uncle Niu They Will Create the Miracle of Life Network Technology Company Ltd.," which is thirty-nine characters long in the original Chinese. Ailin Tang, *In China, Your Company's Name Can't Be a Mouthful*, N.Y. TIMES (Aug. 18, 2017), https://nyti.ms/2v8zvvO [https://perma.cc/2DWL-MDWG].

100 *See, e.g.*, Alan D. Baddeley, Neil Thomson & Mary Buchanan, *Word Length and the Structure of Short-Term Memory*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 575, 584 (1975) (finding when controlling for word frequency that five-syllable words are harder to recall than one-syllable words); Bruce G. Vanden Bergh et al., *Sound Advice on Brand Names*, 61 JOURNALISM & MASS

complex brand name becomes more successful, consumers will often try to simplify it to make it easier to use — and the brand owner will then typically register the abbreviation as its trademark. Consider, for example, CHEVY for CHEVROLET, COKE for COCA-COLA, FEDEX for FEDERAL EXPRESS, and KFC for KENTUCKY FRIED CHICKEN.[101] A commonly asserted rule of thumb is that marks should be no longer than two syllables or seven letters.[102]

Fourth, certain phonemes are more effective than others depending on the circumstances. A variety of sound-symbolism research supports the proposition that sounds convey a range of properties, including weight, speed, rigidity, activity, width, size, femininity, friendliness, and sharpness.[103] This ought not to be surprising. Compare, for example, the miniature Lilliputians with the giant Brobdingnagians in Jonathan Swift's *Gulliver's Travels*.[104] Or compare the aggressiveness of VIAGRA with the calmer, more sensual CIALIS, both for drugs treating erectile dysfunction using very different marketing approaches coinciding with their respective names.[105] The link between certain sounds and

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COMM. Q. 835, 838–39 (1984) (showing that one-syllable brand names are easier to recall and recognize than three-syllable brand names).

[101] *See* Robertson, *supra* note 95, at 62; *see also* Richard S. Chang, *Saving Chevrolet Means Sending 'Chevy' to Dump*, N.Y. TIMES (June 9, 2010), https://nyti.ms/2yYGw62 [https://perma.cc/Q2T2-M79M].

[102] Margot Bushnaq, *How to Choose a Business Name, Part 6: Length*, BRANDBUCKET (July 10, 2013), https://www.brandbucket.com/blog/how-to-choose-a-business-name-length [https://perma.cc/9WCA-4388]; Marty Zwilling, *10 Rules for Picking a Company Name*, FORTUNE (Dec. 15, 2011), http://for.tn/2px3Bq2 [https://perma.cc/ZD6Z-WZYA]. *But see* Eli Altman, *Longer Is Better and Don't Invent Words: Picking the Right Name for Your Business*, THE GUARDIAN (Aug. 22, 2017, 2:00 AM), https://www.theguardian.com/small-business-network/2017/aug/22/longer-is-better-and-dont-invent-words-picking-the-right-name-for-your-business [https://perma.cc/2WYV-TWJN] ("One of the most common requests branding professionals receive for new names is that they must be 'short and memorable.' This is a contradiction in terms. Short names are inherently less memorable. There's less to grab onto. Longer names give you more freedom of expression; are easier to trademark and find URLs for; and are generally more memorable. Short names are . . . short. Look at the depth of feeling that can be created with slightly longer names: Comme Des Garçons, Outdoor Voices, Teenage Engineering, 23 and Me.").

[103] *See* Richard R. Klink & Lan Wu, *The Role of Position, Type, and Combination of Sound Symbolism Imbeds in Brand Names*, 25 MARKETING LETTERS 13, 14–15 (2014) (reviewing the literature); *see also* Patrice L. French, *Toward an Explanation of Phonetic Symbolism*, 28 WORD 305 (1977); Richard R. Klink, *Creating Brand Names with Meaning: The Use of Sound Symbolism*, 11 MARKETING LETTERS 5 (2000). For an application of the insights of sound symbolism research to trademark doctrine, see Jake Linford, *Are Trademarks Ever Fanciful?*, 105 GEO. L.J. 731 (2017).

[104] *See* JONATHAN SWIFT, GULLIVER'S TRAVELS, at xvi (London, Jones & Co. 1826) (1726).

[105] Susan Scutti, *"Creation Engineering": The Art and Science of Naming Drugs*, CNN (Nov. 25, 2016, 4:19 AM), http://cnn.it/2gb95U5 [https://perma.cc/P5PC-L74M] (quoting branding professional, R. John Fidelino, arguing that VIAGRA is "macho-sounding," whereas CIALIS is "tonally softer"); *see also* Gurudas Khilnani, Ajeet Kumar Khilnani & Rekha Thaddanee, Letter to Editor, *Semantics of Drug Nomenclature*, 4 NAT'L J. PHYSIOLOGY, PHARMACY & PHARMACOLOGY 95, 97 (2014); Jeannette Y. Wick, *What's in a Drug Name?*, 44 J. AM. PHARMACISTS ASS'N 12, 14

particular meanings transcends language and culture (and even species).[106] Studies show that the [ä] sound (as in "Frosh") is shown to connote smoother, richer, and creamier ice cream than the [i] sound (as in "Frish").[107] The [u] sound in "dull" tends to suggest disgust or dislike,[108] which might be why the company behind SMUCKER'S jelly developed the slogan, "With a name like Smucker's, it has to be good."[109] Because of its combination of sounds, "BLACKBERRY" connotes speed, reliability, accessibility, smallness, and relaxation, while "STRAWBERRY" connotes many of those same features (other than relaxation), and slowness rather than speed.[110] More generally, brands that start with a plosive — a consonant that is a stop, namely, B, D, G, K, P, T, or a hard C — are easier to remember and recognize.[111]

Fifth, ideally a brand name owner should be able to register its brand name as a domain name in the .com top-level domain.[112] However, as new top-level domains become available and consumers increasingly rely on search to navigate the internet, the advantages of such a registration may be lessening.[113]

Opinions are mixed on other characteristics of more effective brand names. Marketing experts (and trademark lawyers) generally advise against descriptive terms.[114] Yet one study shows that more descriptive

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(2004); Stuart Elliott, *Viagra and the Battle of the Awkward Ads*, N.Y. TIMES (Apr. 25, 2004), https://nyti.ms/2zh3uUZ [https://perma.cc/K8E9-KP6V].

106 Klink, *supra* note 103, at 6–9; Klink & Wu, *supra* note 103, at 14; *see also* L.J. Shrum & Tina M. Lowrey, *Sounds Convey Meaning: The Implications of Phonetic Symbolism for Brand Name Construction*, *in* PSYCHOLINGUISTIC PHENOMENA IN MARKETING COMMUNICATIONS 39, 39–42 (Tina M. Lowrey ed., 2007); Eric Yorkston & Geeta Menon, *A Sound Idea: Phonetic Effects of Brand Names on Consumer Judgments*, 31 J. CONSUMER RES. 43, 44 (2004). For example, "high-front vowels (e.g., *ee* in flea and *i* in fly) represent associations with smaller size and less power than low-back vowels (e.g., the *ow* in bout and *oo* in boot), which, in turn, connote greater size, and more power." *Id.* Research suggests that animal sounds also carry symbolic meaning, such as the creation of an impression of great or small size by using low-back or high-front vowels, respectively. Eugene S. Morton, *Sound Symbolism and Its Role in Non-Human Vertebrate Communication*, *in* SOUND SYMBOLISM 348, 353–56 (Leanne Hinton et al. eds., 1994); John J. Ohala, *An Ethological Perspective on Common Cross-Language Utilization of F_o of Voice*, 41 PHONETICA 1 (1984).

107 Yorkston & Menon, *supra* note 106, at 45–48.

108 Shrum & Lowrey, *supra* note 106, at 43.

109 *Id.* at 55.

110 Begley, *supra* note 95.

111 Vanden Bergh et al., *supra* note 100, at 835–36.

112 *See, e.g.*, Frank Schilling, *The House Always Wins - SEM Arbitrage and Keyword Domain Names*, SEVEN MILE (Mar. 23, 2007, 5:41 PM), http://frankschilling.typepad.com/my_weblog/2007/03/the_house_alway.html [https://perma.cc/C4YK-2CNC].

113 ALTMAN, *supra* note 86, at 35–39.

114 *See, e.g.*, WATKINS, *supra* note 86, at 30–31 (stating that descriptive terms "don't challenge, excite or mentally stimulate" and "reveal nothing about the personality of your brand," *id.* at 30); *see also* ALTMAN, *supra* note 86, at 12–13 (noting that a descriptive mark "is sleep-inducing and hard to remember, and says absolutely nothing about [a business's] point of view").

brand names unsurprisingly result in higher consumer recall of the benefit described by the brand name.[115] Experts also advise against using the business owner's own name on the grounds, among others, that consumers may not know the owner and that the brand may be more difficult to sell to other owners at some point in the future.[116] Yet personal names, like common words, also convey authenticity and familiarity, and company owners often have nonpecuniary reasons to prefer to use their own names.[117] Furthermore, while experts invariably emphasize that good brand names are unique, it can also be beneficial for a new brand name to share characteristics with other brand names in its product space, because this helps to inform consumers about the nature of the new brand and its product.[118] One recent example is the use of the "–ndr"/"–nder" suffix for dating apps: Tinder, Grindr, Blendr, AdultFriendFinder, Lavendr (a gay dating app), Binder (a joke app to break up with one's significant other[119]), and the app formerly named 3nder (an app for those seeking threesomes).[120]

Finally, we note a line of reasoning that regularly appears in the branding literature and that runs contrary to the principle that brand names should consist of common English words. Experts reason that new market entrants should consider coined words or less commonly used English words but not because such words are more appealing to consumers. Instead, the experts are essentially offering legal advice.

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115 *See* Kevin Lane Keller, Susan E. Heckler & Michael J. Houston, *The Effects of Brand Name Suggestiveness on Advertising Recall*, J. MARKETING, Jan. 1998, at 48, 48.

116 *See, e.g.*, WATKINS, *supra* note 86, at 9–10.

117 *See, e.g.*, Jean Gianfagna, *6 Reasons to Use Your Own Name in Your Company's Branding*, GIANFAGNA STRATEGIC MARKETING: SMART MARKETING STRATEGY (Mar. 10, 2014), http://www.gianfagnamarketing.com/blog/2014/03/10/6-reasons-to-use-your-own-name-in-your-companys-branding [https://perma.cc/7JK9-7Z47]. A recent empirical study finds that eponymy "is linked to superior firm performance" and "creates a stronger association between the entrepreneur and her firm that increases the reputational benefits or costs of having the market hold a favorable or unfavorable impression of her ability (or of the quality of her firm)." Sharon Belenzon, Aaron K. Chatterji & Brendan Daley, *Eponymous Entrepreneurs*, 107 AM. ECON. REV. 1638, 1638 (2017).

118 George M. Zinkhan & Claude R. Martin, Jr., *New Brand Names and Inferential Beliefs: Some Insights on Naming New Products*, 15 J. BUS. RES. 157, 168–69 (1987).

119 Betsy Morais, *A New Way to Leave Your Lover*, NEW YORKER (June 23, 2015), https://www.newyorker.com/business/currency/binder-breakup-app [https://perma.cc/T7UG-6WFP].

120 *See* Charly Lester, *The A-Z of Dating Apps in 2015 — G to L*, 30 DATES BLOG (May 15, 2015), https://30datesblog.com/2015/05/15/the-a-z-of-dating-apps-in-2015-g-to-l/ [https://perma.cc/QCX5-X9ED]; Ruth Reader, *After Being Sued by Tinder, Can This Threesomes App Survive a Rebrand?*, FAST COMPANY (Aug. 2, 2016), https://www.fastcompany.com/3061730/platform-wars/after-being-sued-by-tinder-can-this-threesomes-app-survive-a-rebrand [http://perma.cc/8G4X-R2JX]. This is not to mention the somewhat similar -lr and -ter suffixes for dating apps like Bristlr (an app to connect men with beards to those interested in that subpopulation), Cuddlr (an app to connect people who want to cuddle), and Fuzzy Banter (a dating app focused on one's voice). *See* Charly Lester, *The A-Z of Dating Apps in 2015 — A to F*, 30 DATES BLOG (May 14, 2015), https://30datesblog.com/2015/05/14/the-a-z-of-dating-apps-in-2015-a-to-f/ [https://perma.cc/8374-4GXA].

Their reasoning is that such words are less likely already to be claimed by others and more likely to be registrable as trademarks.[121]

In sum, the branding literature strongly supports the proposition that the supply of good, competitively effective trademarks is not just finite, but far more limited than might generally be appreciated. The branding literature further emphasizes what the economics literature often seems to fail to appreciate[122]: that brand names are not fungible. Some are better than others. A good brand name may not guarantee success, but a bad brand name will often doom a product or company to oblivion, as the example of EDSEL is often cited to show.[123] Uniqueness is prized above all. Common English words are more effective, as are shorter, less complex words. Certain phonemes more readily convey desirable meanings. Marks that can be registered as domain names in the .com top-level domain have an advantage. Proprietors may want to use their own name. All of these factors suggest means of measuring the degree and rate of depletion and congestion of the supply of good trademarks. We pursue these measures in Parts III and IV below.

C. Applicants' Mark Selection

Together with marketing and branding principles, trademark law and practice also influence applicants' mark selection. Before applying to register a particular mark, a firm typically engages in a process of trademark clearance to determine if the mark it wishes to register is already claimed either by a competitor or indeed by anyone else in the economy. Since well before the time frame of the data studied here, applicants have been able to use commercial trademark clearance services, which maintain their own databases of previously and currently used trademarks drawn from a variety of sources, such as trademark applications and registrations at the federal and state level, state corporate registration listings, and phone books.[124] Since 2000, the PTO has made freely available online the Trademark Electronic Search System

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[121] *See, e.g.*, ALTMAN, *supra* note 86, at 148–61. For the same legal reasons, experts sometimes recommend that businesses adopt longer marks, which are more likely to be available as trademarks. *See, e.g.*, Altman, *supra* note 102.

[122] *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 208 (2003) (asserting with respect to licensing fees for the use of prestigious brands that because "the number of prestigious names is so vast" and "virtually every prestigious name will be a substitute for every other in that market," "[c]ompetition would drive the fees to zero").

[123] *See, e.g.*, John Brooks, *The Edsel: II~Epitome*, NEW YORKER, Dec. 3, 1960, at 199, 216–17 (discussing the view of "a sizable group of laymen who tend to attribute the collapse [of the Edsel] to the company's decision to call the car the Edsel (after the son of the original Henry Ford and the father of Henry Ford II) instead of giving it a brisker, more singable name, reducible to a nickname other than 'Ed' or 'Eddie,' and not freighted with dynastic connotations").

[124] *See, e.g.*, COMPUMARK, http://www.compumark.com [https://perma.cc/CV7U-H9BL].

(TESS), an easy-to-use database allowing applicants to identify trademark applications and registrations that might conflict with their prospective trademark.[125] Since about the same time, applicants have typically also consulted internet search engines, such as Google, to determine how their prospective marks are being used, if at all.[126] Particularly over the past decade, trademark clearance has become significantly less expensive and time-consuming.[127] The result is that trademark applicants are increasingly likely to be aware of conflicting "senior" applications and registrations. For this reason, we would expect such applicants to be increasingly likely to avoid applying to register trademarks that conflict, at least directly, with already-registered marks.

The fact that applicants will already have taken into account some degree of trademark depletion and congestion in choosing marks has important implications. Most significantly, because applicants are typically applying with knowledge of which marks are already claimed, we should not expect depletion or congestion to cause a dramatic decline in the annual publication rate of trademark applications.[128] And indeed, as Figure 2 shows, though there has been an extraordinary increase in the annual rate of trademark applications over recent decades (represented by the bars and right axis in the figure), annual publication rates

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[125] *See USPTO Introduces New Trademark Electronic Search System*, U.S. PATENT & TRADEMARK OFFICE (Feb. 29, 2000), https://www.uspto.gov/about-us/news-updates/uspto-introduces-new-trademark-electronic-search-system [https://perma.cc/9USP-5KHV]. To access TESS, see *Search Trademark Database*, U.S. PATENT & TRADEMARK OFFICE, https://www.uspto.gov/trademarks-application-process/search-trademark-database [https://perma.cc/UN3S-ZWT8].

[126] *Cf.* Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351, 353–54 (2014) (suggesting that trademark distinctiveness can be measured by looking at Google search results).

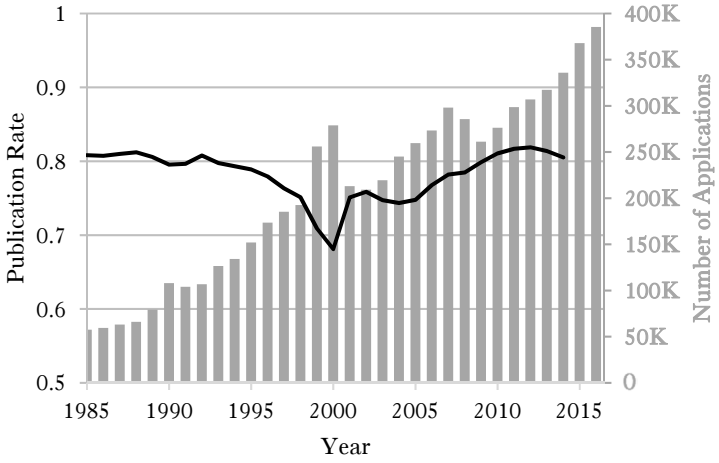
[127] *See* STEPHEN ELIAS & RICHARD STIM, TRADEMARK: LEGAL CARE FOR YOUR BUSINESS & PRODUCT NAME 100–06 (10th ed. 2013).

[128] If the PTO determines that the trademark application satisfies all requirements for registration, including that it does not conflict under section 2(d) with an already-registered mark, the PTO will approve the mark for publication in the *Official Gazette*. 15 U.S.C. § 1062(a) (2012). The public then has thirty days from the date of publication to oppose the registration. *Id.* § 1063(a). If no opposition is brought or succeeds, use-based applications (applications based on the applicant's current use of the mark) will automatically proceed to registration. *Id.* § 1063(b). Applications based on an intent to use the mark require that a statement of actual use be filed before the registration will issue. *Id.* § 1051(d). We focus on publication rates rather than registration rates because many intent-to-use applications succeed to publication, but then fail to register because the applicant fails to file a statement of use. *See* Barton Beebe, *Is the Trademark Office a Rubber Stamp?*, 48 HOUS. L. REV. 751, 773, 774 tbl. 9 (2011).

The PTO data indicate that oppositions are very rare. For applications filed from 1985 through 2014, only 2.10% were opposed and only 0.90% were opposed successfully. Interestingly, however, opposition rates have been steadily declining over this period, from a high of 3.42% of applications filed in 1987 receiving an opposition to a low of 1.63% of applications filed in 2014 receiving an opposition. Annual rates of successful oppositions have also been slightly declining over this period. See *infra* Part II, pp. 973–77, for discussion of the Trademark Case Files Dataset. We tentatively suggest that these trends, which deserve further study, may reflect the effects of increasing section 2(d) refusal rates discussed below in Part III.D, pp. 1003–08.

have remained steady (represented by the line and left axis in the figure).[129] Even during the internet boom, which largely accounts for the spike in applications in 1999 and 2000, publication rates declined only from 0.75 in 1998 to 0.68 in 2000, and then quickly recovered.

Figure 2: Applications and Publication Rate by Filing Year, 1985–2016



Instead of a declining publication rate, we should expect to see especially stark evidence of trademark depletion and congestion in changes in the characteristics of the marks for which applicants are applying. To be sure, many factors other than depletion and congestion may affect which marks applicants will choose to prosecute, chief among them trends in marketing. But further complicating matters, there is good evidence to suggest that these trends may themselves emerge out of an awareness of depletion and congestion.[130] Finally, some less sophisticated applicants may be entirely unaware of the resources available to them that may aid them in finding or understanding the legal implications of preexisting, conflicting marks, while other highly sophisticated applicants may use those resources, discover conflicting marks, and plow ahead fully aware of the risk of a section 2(d) refusal. We address these issues further in Parts III and IV.

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[129] We do not report the publication-rate data past 2014 because some applications filed after 2014 may not have been fully processed by the end of 2016, when the data on which this figure is based were compiled. For this reason, subsequent figures that report publication, registration, or section 2(d) refusal rates stop at 2014.

[130] *See, e.g.*, Begley, *supra* note 95 ("[A]s winning hybrids of real words become scarcer than a telecom firm with a rising stock price, some naming consultants are advising brand managers to tap different synapses in their customers' brains: those linking the raw sounds of vowels and consonants — known as phonemes — to specific meanings and even emotions.").

II. THE DATASETS

We use six datasets. The main dataset for this study is the PTO's Trademark Case Files Dataset, which the PTO made publicly available in 2012 and has since updated annually.[131] The dataset provides detailed information about all 6.9 million trademark applications filed at the PTO from 1982 through 2016, including data on applicant and mark characteristics, prosecution events, and ownership and renewal history.[132] The dataset also provides more limited information on the 208,105 trademarks already registered at the PTO as of 1982 that were based on applications filed before 1982. Derived directly from the PTO's own internal database and curated by the Office of the Chief Economist of the PTO, the dataset is of very high quality.

A significant limitation of the Trademark Case Files Dataset, however, is that it does not indicate on what grounds the PTO refused applications when it did so. We therefore developed a second, original dataset of all office actions issued by the PTO from 2003, when the PTO began posting its office actions online, through 2016. This entailed systematically downloading some 2.1 million office actions from the PTO

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131 *Trademark Case Files Dataset*, U.S. PATENT & TRADEMARK OFFICE (2016), https://www.uspto.gov/learning-and-resources/electronic-data-products/trademark-case-files-dataset-0 [https://perma.cc/4HY9-8XLQ]; *see also* STUART GRAHAM ET AL., U.S. PATENT & TRADEMARK OFFICE, THE USPTO TRADEMARK CASE FILES DATASET: DESCRIPTIONS, LESSONS, AND INSIGHTS 3, 35 (2013), https://www.uspto.gov/sites/default/files/ip/officechiefecon/Trademark_Case_File_Data_Documentation_31January2013_final.pdf [https://perma.cc/ZD6G-FP7C] (describing the dataset and surveying trends in trademark applications and registrations). Prior to the release of the Trademark Case Files Dataset, Google made available in bulk download format much of the data on which the Trademark Case Files Dataset is based. *See USPTO Bulk Downloads: Trademark Application Text*, GOOGLE https://www.google.com/googlebooks/uspto-trademarks-recent-applications.html [https://perma.cc/6VQJ-5BVH] [hereinafter USPTO BULK DOWNLOADS]. These raw data files formed the basis of initial quantitative studies of certain aspects of the trademark registration process. *See, e.g.*, Beebe, *supra* note 128, at 759–60 (using data from USPTO BULK DOWNLOADS, *supra*, to examine trademark publication and registration rates at the PTO); Deborah R. Gerhardt & Jon P. McClanahan, *Do Trademark Lawyers Matter?*, 16 STAN. TECH. L. REV. 583, 584 (2013) (using the data from USPTO BULK DOWNLOADS, *supra*, to "assess[] whether trademark applicants benefit from having an attorney assist in the registration process"). A more recent quantitative study of trademark registration has used the Trademark Case Files Dataset. *See* Jeremy N. Sheff, *Dilution at the Patent and Trademark Office*, 21 MICH. TELECOMM. & TECH. L. REV. 79, 81–82 (2014) (using the Trademark Case Files Dataset to examine rates of "registration of identical marks to different parties in different product classes" and to evaluate the effect of antidilution law on these rates).

132 The dataset also provides partial information about a significant proportion of trademark applications filed from 1870 through 1981. *See* GRAHAM ET AL., *supra* note 131, at 3; *see also* Beebe, *supra* note 128, at 760 (discussing differences in the data from USPTO BULK DOWNLOADS, *supra* note 131, between observations with filing dates before the early 1980s and those with filing dates after). In much of the statistical analysis that follows, we limit our findings to a population consisting of applications from 1985 through 2016 and trademarks already registered at the PTO as of 1985. We exclude the years 1982 through 1984 because of a variety of anomalies in the data for that period (for example, rapid shifts in annual publication rates) that may be of historical interest but are not central to the study of trademark depletion and congestion.

website and autocoding them for certain characteristics, most importantly, whether the PTO refused registration on the section 2(d) basis that the applied-for mark was confusingly similar to an already-registered mark.

In order to study applications and registrations for common English words, we use the Corpus of Contemporary American English (COCA) rank order of the 100,000 most frequently used words in American English.[133] COCA is the largest structured corpus of American English.[134] The version of COCA we use consists of more than 450 million words of text drawn from television and radio broadcasts, fiction, popular magazines, newspapers, and academic journals over the years 1990 through 2012, with approximately twenty million words from each year. (From this corpus, we learn such important information as that Americans use the word "no" (our 72nd most frequently used word)

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[133] *See Word Frequency Data: Based on 450 Million Word COCA Corpus*, WORD FREQUENCY DATA, https://www.wordfrequency.info/100k.asp [https://perma.cc/Q636-XNAV]; *see also* Mark Davies, *The Corpus of Contemporary American English as the First Reliable Monitor Corpus of English*, 25 LITERARY & LINGUISTIC COMPUTING 447 (2010). The data is available on a proprietary basis from Professor Mark Davies. We downloaded the data on November 4, 2014. COCA's rank order does not include the trademarks "Microsoft," "iPad," or "Gucci," but it does include "surface," "apple," and "bamboo," when they are used as common nouns, as the 1122nd, 2666th, and 10,968th most frequently used words, respectively. Nor does the rank order include the proper noun "America," but it does include the adjective "American" (161st). More generally, the corpus excludes proper nouns but might include, depending on usage frequency, proper adjectives and a very limited number of words that originated as trademarks but grew into common usage, such as "google," which ranks as the 17,894th most frequently used word (and which was derived from the word "googol," denoting ten raised to the power of a hundred).

[134] Davies, *supra* note 133. This corpus is regularly used for research in linguistics, computational linguistics, psychology, and marketing. *See, e.g.*, Eric K. Acton & Christopher Potts, *That Straight Talk: Sarah Palin and the Sociolinguistics of Demonstratives*, 18 J. SOCIOLINGUISTICS 3, 28 n.4 (2014) (using COCA to compare the frequency of words and phrases); David Eddington & Caitlin Channer, *American English Has Go? a Lo? of Glottal Stops: Social Diffusion and Linguistic Motivation*, 85 AM. SPEECH 338, 346–47 (2010) (using COCA to find the frequency of words ending with particular sounds followed by words beginning with other particular sounds); Ruth Pogacar et al., *Sounds Good: Phonetic Sound Patterns in Top Brand Names*, 26 MARKETING LETTERS 549, 555 (2015) (using COCA to create a list of "weak" brand names by randomly selecting 1000 proper nouns and cross-checking them with a business directory); Keith Rayner et al., *Eye Movements and Word Skipping During Reading: Effects of Word Length and Predictability*, 37 J. EXPERIMENTAL PSYCHOL. 514, 518 (2011) (using COCA to check the frequencies of words used in an experiment); V.A. Yatsko et al., *The Algorithms for Preliminary Text Processing: Decomposition, Annotation, Morphological Analysis*, 43 AUTOMATIC DOCUMENTATION & MATHEMATICAL LINGUISTICS 336, 341 (2009) (using COCA to compile "[a] list of suffixes and endings typical of certain parts of speech"). It also makes an occasional appearance in legal scholarship. *See, e.g.*, Paul J. Heald & Robert Brauneis, *The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names*, 32 CARDOZO L. REV. 2533, 2574–75 (2011) (using COCA to determine the frequency of certain brand names and explaining how low-frequency words are unlikely to be harmed by dilution); Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 194–201 (2012) (using COCA to argue that plain or ordinary meaning of a given term can be determined as an empirical matter through corpus-based methods).

more frequently than "yes" (211th), "hell" (1420th) more frequently than "heaven" (3409th), and "war" (216th) more frequently than "peace" (899th).) COCA ranks the frequency with which a word appears in the form of a particular part of speech. Thus, a word like "can" may appear multiple times in the ranking ("can" as a verb and "can" as a noun). For purposes of this study, we collapsed these multiple rankings into one ranking based on the raw frequency of the word regardless of part of speech. This resulted in a rank order of 86,408 words (collapsed from 100,000), which is the rank order we used for our statistical analysis and to which we will refer in what follows. We use the terms "standard English words" or "common English words" to refer to all words that appear in this rank order.

COCA's frequency ranking also provides an estimate of the proportion of overall word usage consisting of a particular word in a particular part of speech. As we did with COCA's frequency ranking, we collapsed these estimates to establish the raw proportion of overall word usage consisting of the word regardless of part of speech. Doing so allows us in Part III to estimate not just the precise number of the 86,408 most frequently used words that are already claimed as trademarks, but also the proportion of word usage that these already-claimed words represent. This is important because word frequency roughly follows a power law distribution known as Zipf's law.[135] COCA's data indicate that the ten most frequently used words account for 21.4% of word usage; the 100 most frequently used words, 44.9%; and the 1000 most frequently used words, 65.4%. Meanwhile, the 10,000th to the 86,408th most frequently used words account for only 4.9% of word usage. (Overall, COCA's full list of words accounts for 89.1% of word usage.) Depletion and congestion of very high-frequency words arguably have a far more significant impact on competitors, consumers, and the public domain than do depletion and congestion of lower-frequency words.

To assess surname depletion and congestion, we use the U.S. Census Frequently Occurring Surnames from the Census 2000 dataset, which ranks the frequency of all 151,671 surnames appearing 100 or more times in the Census 2000 returns.[136] The Census data also provide an

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[135] *See* Steven T. Piantadosi, *Zipf's Word Frequency Law in Natural Language: A Critical Review and Future Directions*, 21 PSYCHONOMIC BULL. & REV. 1112 (2014).

[136] *Frequently Occurring Surnames from the Census 2000*, U.S. CENSUS BUREAU http://www.census.gov/topics/population/genealogy/data/2000_surnames.html [https://perma.cc/FKE8-SH4B] (last updated Sept. 15, 2014). The Census does not list names occurring fewer than 100 times because of privacy concerns. *See* DAVID L. WORD, CHARLES D. COLEMAN, ROBERT NUNZIATA & ROBERT KOMINSKI, DEMOGRAPHIC ASPECTS OF SURNAMES FROM CENSUS 2000, at 16, http://www2.census.gov/topics/genealogy/2000surnames/surnames.pdf [https://perma.cc/7V34-5WBV]. We use the Census 2000 data rather than the more recent Census 2010 data because the former describes the U.S. population closer to the midpoint of the timespan covered by our trademark data, which runs from the mid-1980s to the present.

estimate for each surname of the proportion of the U.S. population using that surname.[137] These data enable us to estimate both the proportion of surnames already claimed as trademarks as well as the proportion of the population that uses those surnames. (Overall, the Census data cover 89.8% of the population,[138] with the 1000 most commonly occurring surnames covering 40.6% of the population.) We use the term "common American surnames" to refer to all surnames in the Census rank order.

Because trademark applicants now typically also seek to determine if the trademarks they wish to register are already registered as domain names,[139] we use Verisign's .COM TLD Zone File, which lists all .com domain names, to study the proportion of common English words, common American surnames, and short neologisms that are already registered as domain names in the .com top-level domain.[140]

Finally, to study the depletion of potential neologisms, we use an original dataset comprising phonetic representations of all words included in all trademark applications and registrations in the Trademark Case Files Dataset. To develop this dataset, we used the Carnegie Mellon University (CMU) Pronouncing Dictionary, which provides the pronunciation broken down by phonemes for some 134,000 American English words.[141] For words appearing in a trademark application but not in the CMU Pronouncing Dictionary, we used the Carnegie Mellon University LOGIOS Lexicon Tool to infer a phonetic representation of the word.[142] We combined these data with COCA to develop a list of the 10,753 unique syllables found in COCA, encoded phonetically, along with their frequency data.[143] We use this list to assess the depletion and

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137 WORD ET AL., *supra* note 136, at 16.

138 *Id.*

139 *See supra* p. 968.

140 *See Top-Level Domain Zone File Information*, VERISIGN, https://www.verisign.com/en_US/channel-resources/domain-registry-products/zone-file/index.xhtml [https://perma.cc/Q4CT-MW9M].

141 THE CMU PRONOUNCING DICTIONARY, http://www.speech.cs.cmu.edu/cgi-bin/cmudict [https://perma.cc/2ACN-M6BQ]. Phonemes are recorded in the ARPAbet phoneme set developed for speech recognition use. *Id.* This dictionary uses a total of thirty-nine different phonemes. *Id.* It usefully contains the correct pronunciation of many well-known marks, such as CHANEL, GOOGLE, and MATTEL.

142 LOGIOS LEXICON TOOL, http://www.speech.cs.cmu.edu/tools/lextool.html [https://perma.cc/U9BW-ES27].

143 We encoded COCA's words phonetically also using the CMU Pronouncing Dictionary, supplemented by the LOGIOS Lexicon Tool when necessary. We syllabified these words using the results of a syllabification algorithm that was run on the CMU Pronouncing Dictionary. *See* Susan Bartlett, Grzegorz Kondrak & Colin Cherry, *On the Syllabification of Phonemes*, *in* HUMAN LANGUAGE TECHNOLOGIES: THE 2009 ANNUAL CONFERENCE OF THE NORTH AMERICAN CHAPTER OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 308 (2009), http://www.aclweb.org/anthology/N/N09/N09-1.pdf [https://perma.cc/M2B8-39HX] (describing the algorithm). For the results, see *Results*, http://webdocs.cs.ualberta.ca/~kondrak/cmudict.html [https://perma.cc/

congestion of phonetically possible American English words, particularly neologisms.[144]

III. WORD-MARK DEPLETION

The concept of trademark depletion is not new to trademark law. We adapt it from the U.S. Supreme Court decision in *Qualitex Co. v. Jacobson Products Co.*,[145] which held that the Lanham Act permits the registration of a mark consisting of a single color if the mark otherwise meets the requirements for trademark protection.[146] In so holding, the *Qualitex* Court rejected Jacobson's argument that allowing the registration of single colors "will 'deplete' the supply of usable colors to the point where a competitor's inability to find a suitable color will put that competitor at a significant disadvantage."[147] The Court reasoned that:

> When a color serves as a mark, normally alternative colors will likely be available for similar use by others. Moreover, if that is not so — if a "color depletion" or "color scarcity" problem does arise — the trademark doctrine of "functionality" normally would seem available to prevent the anticompetitive consequences that Jacobson's argument posits, thereby minimizing that argument's practical force.[148]

Yet the functionality doctrine[149] would not prevent the kind of color-mark depletion that Jacobson was describing in *Qualitex*, which was the depletion by many different competitors of *nonfunctional* colors, such as the green-gold color for dry-cleaning press pads at issue in the case.[150] Instead, at the core of the Court's rejection of the color depletion argument was simply the assumption that Qualitex and its competitors would never exhaust the supply of colors that may be used as single-color trademarks.

We think the case that word-mark depletion has begun to have anticompetitive consequences is substantially stronger than the comparable case was for color-mark depletion in *Qualitex*. We make that case in this Part. We begin in section A by outlining a framework for evaluating word-mark depletion. Section B then shows that a strikingly high proportion of frequently used words, frequently occurring surnames,

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NDZ2-EKAH] (last updated Oct. 2009). We supplemented this data with post-processing to syllabify COCA words that do not appear in that dictionary.

144 We plan to use this dataset more heavily in future work to study phonetic depletion and congestion, among other things.

145 514 U.S. 159 (1995).

146 *Id.* at 162.

147 *Id.* at 168.

148 *Id.* at 168–69 (citation omitted).

149 Trademark functionality doctrine bars the registration or protection of a product feature that is "essential to the use or purpose" of a product or that "affects the cost or quality" of a product. TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 32 (2001) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 850 n.10 (1982)).

150 *See Qualitex*, 514 U.S. at 161. There can be no depletion of functional color marks because the functionality doctrine would bar their registration in any case.

and one-syllable words — among the most desirable categories of marks — are already claimed by at least one trademark registrant either as a single-word mark or as part of a multi-word mark. We further show that an even higher proportion of frequently used words are claimed in the .com top-level domain space. In sections C and D, we turn to historical trends in applicant behavior, specifically, in the kinds of word marks for which applicants are applying and which they are ultimately registering. These trends are consistent with applicants' own recognition of and attempt to adapt to the problem of word-mark depletion. Section E focuses on the increasing proportion of applications that fail to pass the examination stage of the registration process because they conflict with already-registered marks. Even while applicants are generally attempting to adapt to word-mark depletion, many are still applying for and failing to register marks that others have already claimed. Finally, section F shows that incumbent applicants (those applying based on preexisting registrations) have to some extent been able to avoid the problem of word-mark depletion by taking advantage of associated preexisting registrations. The benefits of incumbency reveal the severity of the problem of word-mark depletion for market entrants, an issue we analyze in greater depth in Part V.

A. A Framework for Evaluating Word-Mark Depletion

Word-mark depletion is the process by which a decreasing number of potential word marks remain unclaimed by any trademark owner. Note that because an entity may in some instances register a mark that has already been claimed by another, depletion does not necessarily entail a decline in the number of potential marks that remain available for registration. That said, the two concepts are closely connected: increased rates of depletion can readily lead to increased unavailability of marks. Understood in its broadest sense, word-mark depletion describes the depletion of the set of all possible word marks with respect to the set of all classes of goods and services. But word-mark depletion may take more specific forms. A particular set of word marks (for example, common English words)[151] may be depleted with respect to a particular class of goods and services (for example, apparel). Depletion may take even more specific forms. Individual words may be depleted in individual classes. The concept of depletion is highly flexible, but the process of depletion is best evaluated in two dimensions: in terms of the depletion of a set of marks with respect to a set of goods or services.

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[151] We could generalize our analysis of depletion and congestion to categories, or sets, of words that are infinite, such as the set of all possible words made from the English alphabet or the set of all phonetically and orthographically possible English words. Generalizing to infinite word categories would complicate the explication of the framework but not the analytical framework itself. To simplify the explication, we therefore continue with an analysis only of finite word categories.

In what follows, we focus on the aspects of word-mark depletion that are most relevant to assessing the degree of depletion of "good," competitively effective marks. As for the sets of marks on which we focus, the marketing literature identifies three sets of particular interest: common English words; all possible short, pronounceable neologisms; and surnames. As for the sets of goods and services, because marks unique to only one firm in the economy are especially effective, we assess depletion with respect to the set of all classes of goods and services. But because firms will often settle for being the only user of a particular mark merely within their class, we also assess depletion by class.

Adding to the complications that attend the concept of word-mark depletion are two further considerations. The first is that a particular word-mark registration in a particular class does not simply deplete the word it identically matches with respect to that class. It also constructively depletes all similar words in that class whose use would confuse consumers as to source. For instance, a registration for BLUE in Class 25, for apparel, would likely disallow another entity from registering in that class BLU, BLEU, BLUE MAN, and quite possibly even similar-sounding marks such as BLOW as well. Furthermore, even if consumers might not be confused by such marks or in any case even if the PTO might allow their registration, applicants may consider them unavailable because the prior registration and use of BLUE impairs the uniqueness of all marks similar to it. BLUE makes BLU, BLEU, BLUE MAN, and BLOW less distinctive in that they are less different from other marks. Thus, a proper evaluation of depletion must incorporate some method for assessing not just identity, but also nonidentical similarity between already-claimed marks and the overall supply of possible marks. As we explain further below, to do so we use Jaro-Winkler distance, which is a quantitative measure of the similarity between two strings.

A second complication of word-mark depletion is that the depletion of some words may have a more significant effect on competition than the depletion of others. The costs of depletion, in other words, are not uniform.

Courts and commentators have long recognized that the depletion of generic and descriptive terms in particular can be especially damaging to competition, as they are especially important for all competitors in a particular space to use in the course of doing business.[152] For this

[152] *See, e.g.*, Am. Cyanamid Corp. v. Connaught Labs., Inc., 800 F.2d 306, 308 (2d Cir. 1986) ("Consumers will not benefit . . . if trademark law prevents competitors from using generic or descriptive terms to inform the public of the nature of their product. Were the first user of a generic or descriptive term, say 'bicycle,' able to exclude later entrants from use of that term, the former would be able not only to identify itself as the maker of the bicycle and to capitalize on whatever good will it has built up — legitimate purposes of trademark protection — but also to impair the

reason, generic terms are barred from registration.[153] Descriptive terms are registrable, but depletion concerns arguably underlie both trademark law's requirement that these terms acquire distinctiveness in order to receive protection and the law's descriptive fair use defense. While the acquired-distinctiveness requirement is largely based on the law's underlying limitation that it will grant exclusive rights only in signs that consumers perceive as designations of source,[154] it also reflects the law's cognizance of the cost of granting exclusive rights in key terms that businesses need to use extensively to operate.[155] Similarly, the descriptive fair use defense permits a business to use a competitor's protected descriptive mark so long as this use is "in good faith only to describe [the business's] goods or services."[156] This defense recognizes that fair competition requires access to descriptive terms and thus limits the scope of trademark protection for descriptive marks.[157]

The example of generic and descriptive marks counsels that any analysis of depletion should attempt to incorporate some measure of a word mark's importance to competition and to the public domain. Though our measure is rough, for common English words we use the frequency rank of the word and the proportion of overall word usage for which the word is responsible as an indicator of the cost the depletion of the word imposes on the trademark system. Similarly, with respect to surnames, we use the frequency rank of the surname and the proportion of the population that uses the surname. For neologisms, we use

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ability of competitors to describe their product as bicycles — a wholly counterproductive result so far as consumers are concerned."); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1099 (2003) ("Free speech interests are harmed . . . when competitors of Fox News cannot use the descriptive phrase 'Fair & Balanced' as part of a slogan or domain name. As this phrase provides information about the attributes of the news services regardless of whether the public associates the term with Fox News, trademark restrictions on use of the term 'Fair & Balanced' suppress expression that is relevant to consumers. Like generic terms, such as 'News,' descriptive terms should be available for use by everyone in a particular industry."); Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035, 1040 (2014) ("Speech-act theory provides a helpful lens for understanding how trademarks work and illustrates why overprotecting descriptive terms undermines the goals of trademark law and hurts competition."). *But see* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 200–01 (1985) (arguing that Congress, in drafting the Lanham Act, had considered and rejected the concern that protecting descriptive marks, like "Park 'N Fly" for long-term parking lots near airports, can be anticompetitive).

153 *See supra* p. 958. This bar is essentially a functionality doctrine for words, akin to the functionality doctrine for utilitarian or aesthetic product features referenced in *Qualitex*. *See, e.g.*, Jerre B. Swann, *Genericism Rationalized*, 89 TRADEMARK REP. 639, 649–50 (1999) (comparing the doctrines).

154 *See supra* p. 958.

155 *See* Ramsey, *supra* note 152, at 1099.

156 15 U.S.C. § 1115(b)(4) (2012); *see also* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 124 (2004) (holding that a defendant raising such a defense need not demonstrate that consumers will not be confused by the use).

157 *KP Permanent Make-Up*, 543 U.S. at 122 (explaining the defense's origin as grounded partly in "the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first").

the frequency rank of the syllable and the proportion of all syllable usage for which the syllable is responsible.

B. Evidence of Word-Mark Depletion in Words Already Registered

For purposes of exposition, we begin in section 1 by presenting data on identical matches between active trademark registrations, on the one hand, and common English words, common American surnames, and possible one-syllable words, on the other. Even these data present compelling evidence of word-mark depletion. But they only hint at the extent of the problem. We present in sections 2 and 3 more disturbing evidence of depletion in the form of data showing the proportion of words and surnames that, even if not identical to already-registered marks, are confusingly similar to such marks, either because the word or surname is only slightly different from the registered mark or because the word or surname appears within the mark. Section 4 then focuses on domain names in the .com top-level domain.

1. Identical Matches. — In evaluating the proportion of words and surnames that identically match an already-registered mark, we necessarily study the registration of such words and surnames in the form of single-word marks. Single-word registrations are significant because they potentially yield considerable competitive advantages to their owners. They do so for two reasons. First, all else equal, single-word registrations typically form the basis of broader rights than multi-word registrations, whose exclusivity is limited only to uses that are confusingly similar with respect to all of the words registered.[158] For example, the registration of the single word FUTURE claims a broader scope of exclusivity than the registration of the words FUTURE QUEST. At least in principle, the former is potentially infringed by any use of or use similar to FUTURE, either alone or with any other words, including QUEST. In contrast, FUTURE QUEST is potentially infringed only by uses of or uses similar to both FUTURE and QUEST in combination. Second, single-word registrations are also competitively advantageous because of their low word count. All else equal, single words are typically easier to remember than multiple words strung together.[159] Easier recall by consumers makes single-word marks attractive to businesses.

(a) Frequently Used Words. — A strikingly high number of the most frequently used words in American English are already registered as single-word trademarks. As Table 1 indicates, in 2016, 813 (81.3%) of

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[158] 3 MCCARTHY, *supra* note 22, § 19:60, at 19-221 to -222 ("The paradox of trademark registration is that the less that is registered, the greater the scope of protection afforded.").

[159] *See generally supra* pp. 966–67 (discussing the fact that shorter words are more desirable for branding because consumers can recall them better).

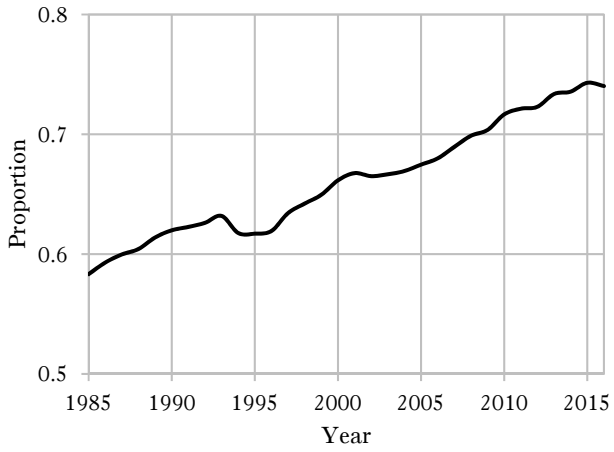
the 1000 most frequently used words identically matched an active single-word mark, and 6188 (61.9%) of the 10,000 most frequently used words did so. Overall, 20,295 (23.5%) of the 86,408 most frequently used words in American English were claimed as single-word marks.[160] These 20,295 words account for 74.0% of all word usage. In effect, when we use our language, nearly three-quarters of the time we are using a word that someone has claimed as a trademark.

Table 1: Proportion of Most Frequently Used Words Matching Active Single-Word Marks in 2016

Number of Most Frequent Words	Number Registered as Single-Word Marks	% of Number of Most Frequent Words	% of All Word Usage Claimed by Single-Word Marks
1,000	813	81.3	60.0
5,000	3,471	69.4	69.8
10,000	6,188	61.9	72.3
86,408	20,295	23.5	74.0

Figure 3 shows the dramatic increase since 1985 in the proportion of all word usage consisting of words claimed as single-word marks. In only thirty-one years, that proportion has increased from 58.3% of all word usage in 1985 to 74.0% in 2016.

Figure 3: Proportion of All Word Usage Consisting of Words Claimed as Single-Word Marks by Year, 1985–2016



160 We first standardized registered marks by correcting misspelled words, by placing appropriate spacing between concatenated words, and by removing punctuation and other symbols.

What words remain unclaimed? Studying the registration status of the 1000 most frequently used words may offer some insight. In 2016, 187 of these words remained unclaimed. Most of these words would not likely succeed as trademarks, either because they carry negative connotations (such as "despite," "died," "difficult," "disease," "killed," "lack," "loss," "older," "problem," and violence"), questionable sales appeal (such as "least," "perhaps," "probably," and "trying"), or strong basic meanings that would likely impede successful branding (such as "drug," "religious," and "wants"). Also notable is the large number of words relating to gender and family that are frequently used but not claimed as trademarks (such as "husband," "wife," "married," "male," "woman," "daughter," "herself," and "himself").

These data indicate that it is becoming more difficult for entrants to claim frequently used English words that no other firm is using anywhere in the economy. But firms will often settle for a parallel use provided that other firms that are using the mark are doing so in a different economic sector and in a nonconfusing manner. For this reason, we also look more specifically at the proportion of the most frequently used words that are claimed as single-word marks *within* particular classes of goods and services.[161]

Figure 4 shows, for each Nice class of goods and services, the proportion of word usage consisting of words claimed as single-word trademarks in that class. Certain classes show significant degrees of word-mark depletion — specifically, Class 9 (electronic goods), Class 25

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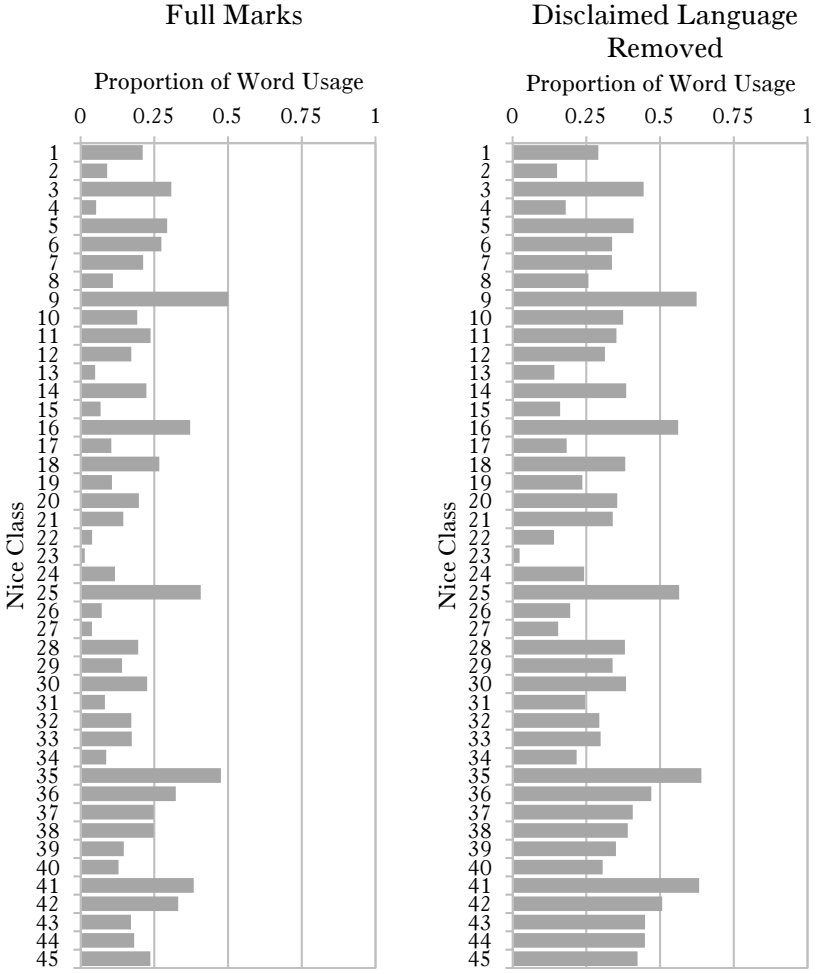
[161] In presenting class-by-class results in this Article, we make several simplifying assumptions. First, we assume that a registration in one Nice class will not deplete, congest, or cause confusion with any potential mark in another class. This assumption makes our results conservative because goods and services in different classes may be sufficiently related such that the registration of a mark in one class may preclude another's registration of the same mark in another class. For example, a mark registered in Class 25 (apparel goods) may preclude another's registration of the same mark in Class 14 (precious metals, including jewelry). On the other hand, we make a second simplifying assumption, that a registration in one Nice class can deplete, congest, or cause confusion with other potential marks in that same class, even though that is not always the case, particularly for classes that combine many disparate goods or services, such as Class 35 (general business services). *Cf.* Tushnet, *supra* note 77, at 880–81 (discussing the same two possibilities, and how registrations therefore do not provide sufficient notification of the extent of infringement liability). Finally, we make another simplifying assumption by treating all marks containing text similarly. However, text marks can consist of standard character marks that make no claim "to any particular font style, size, or color," 37 C.F.R. § 2.52(a) (2016), stylized character marks in which the registration claims rights in the text only in its particular stylized font, or image marks containing text. *See Drawing of Your Mark*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks-getting-started/trademark-basics/representation-mark [https://perma.cc/5YHR-MN2B]. For the years 1985 through 2016, 72.4% of applications consisted of only standard character marks, 5.3% consisted of only stylized character marks, and 19.1% consisted of image marks containing text. Standard character marks potentially have the broadest scope because they are not limited to a particular stylization, whereas the other two categories tend to be narrower because of the stylization or design elements that appear with them. *Cf. supra* p. 981 (applying a similar principle to one- versus multi-word marks).

(apparel goods), Class 35 (general business services), and Class 41 (education, entertainment, and cultural and sporting activities services).

Figure 4: Proportion of All Word Usage Consisting of Words Identically Matching an Active Registration by Nice Class in 2016, Full Marks and Marks with Disclaimed Language Removed



Note that we have analyzed up until now identical matches between frequently used words and the whole mark recorded in the registration, including disclaimed words. Thus, in our identical matching protocol, the frequently used word "apple" would not identically match the registered mark APPLE COMPUTER, INC., even though the registration

disclaimed COMPUTER and INC.[162] We designed the protocol in this manner because trademark examiners are instructed to include disclaimed language in their section 2(d) assessment of mark similarity.[163] However, excluding disclaimed language from the mark enables our matching protocol to focus on what is most often the dominant portion of the mark, which is undoubtedly APPLE in our example. This focus is appropriate. In their section 2(d) assessment of similarity, examiners are also instructed to consider the dominant portion of the mark.[164]

When we test for identical matches between frequently used words and registered marks with their disclaimed language removed, the proportion of words already claimed increases. In 2016, of the 86,408 words listed in our word frequency table, 24,702 (28.6%) identically matched a registered mark with disclaimed language removed. These 24,702 words account for 78.9% of all word usage in American English. This percentage has been increasing over time, but not as dramatically as shown above in Figure 3 with respect to identical matches to full marks. This is because already in 1985 65.9% of all word usage consisted of a word identically matching a registered mark with disclaimed language removed. That percentage steadily increased each year to the 78.9% figure for 2016.

For the 1000 most frequently used words in particular, 899 identically matched registrations with disclaimed language removed. As for particular Nice classes, Figure 4 shows that the proportions of already-claimed words are often nearly double those reported for marks with disclaimed language included. The dramatic difference between the results of identical matching of words to full marks and identical matching of word to marks with disclaimed language removed hints at how severe

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[162] APPLE COMPUTER, INC., Registration No. 2,273,661. As per the trademark statute, the PTO "may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. An applicant may voluntarily disclaim a component of a mark sought to be registered." 15 U.S.C. § 1056(a) (2012). Applicants disclaiming portions of word marks do so typically because they are generic or descriptive (without the requisite secondary meaning). *See, e.g.*, Brandon Meyer, *What Happens if I Can't Get Away with It?: Disclaimer Law and Practice*, 19 J. CONTEMP. LEGAL ISSUES 125, 125–29 (2010). Nonetheless, a disclaimer does not prejudice an applicant's common law rights or any future rights that might arise as to disclaimed words. 15 U.S.C. § 1056(b). Furthermore, disclaimed language still might be protectable, because courts evaluate it together with nondisclaimed language in assessing trademark infringement. *E.g.*, Juice Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 1341 (Fed. Cir. 2015); Shen Mfg. Co. v. Ritz Hotel, Ltd., 393 F.3d 1238, 1243 (Fed. Cir. 2004).

In our data, of the 5,107,791 applications filed from 1985 through 2016 that succeeded to publication, 1,376,168 (26.9%) contained disclaimed language. This is a sizeable number. We have collected significant data about trademark disclaimers and plan to study them, their legal effect, and the desirability of potential protection for disclaimed language in future work.

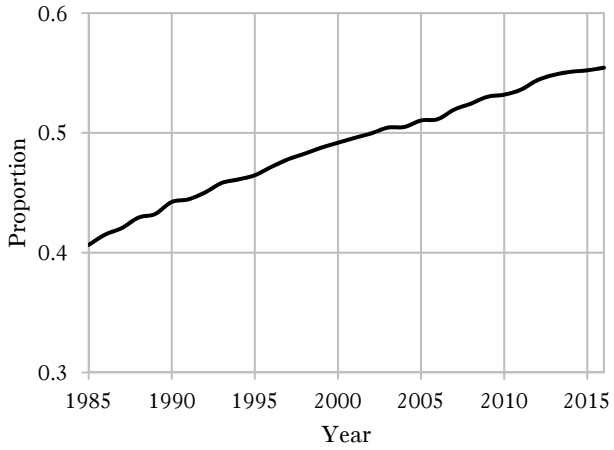
[163] *In re* MCI Commc'ns Corp., 21 U.S.P.Q.2d (BNA) 1534, 1538 (T.T.A.B. 1991); TMEP, *supra* note 55, § 1213.10.

[164] TMEP, *supra* note 55, § 1213.10 ("Typically, disclaimed matter will not be regarded as the dominant, or most significant, feature of a mark.").

the problem of word-mark depletion actually is — especially when we take into account, as we do in a moment, nonidentical similarity.[165]

(b) Frequently Occurring Surnames. — As mentioned above, the U.S. Census data allow us to estimate the proportion of the U.S. population that carries a surname already claimed as a registered mark.[166] We thus measure surname depletion according to this metric. The Census dataset lists 151,671 surnames. Of these, 22,125 identically match a mark registered in 2016. Census data indicate that these 22,125 surnames represent 55.4% of the U.S. population. Thus, over half of all Americans carry a surname that has already been claimed as a single-word trademark. Figure 5 shows the steady increase over time in the proportion of the population carrying a surname claimed as a trademark.

Figure 5: Proportion of U.S. Population Carrying a Surname Registered as a Single-Word Trademark by Year, 1985–2016



165 We note that there is also significant depletion of individual letters and short letter combinations. In 2016, all twenty-six letters identically matched an active registration in some class of goods or services. In each of the most economically significant classes (5, 9, 25, 35, and 41), each letter was claimed as a single-letter mark by at least one registrant and often by multiple registrants. Of the 676 possible two-letter combinations, all but four (IY, UJ, XU, and YQ) identically matched an active registration in 2016 in some class of goods or services — and UJ has since been registered, UJ, Registration No. 5,243,465, while YQ, U.S. Trademark Application Serial No. 79,196,783 (filed July 19, 2016), and XU, U.S. Trademark Application Serial No. 86,900,821 (filed Feb. 8, 2016), are the subject of applications currently under review. As for specific classes: In Class 9, 85.5% of all two-letter combinations were claimed; in Class 25, 80.6%; in Class 35, 78.7%; and in Class 41, 73.8%. Overall, 58.9% of the 17,576 possible three-letter combinations identically matched an active registration in 2016 in some class of goods or services, and 5.1% of the 456,976 possible four-letter combinations were claimed in some class of goods or services.

166 *See supra* pp. 975–76 (describing this dataset).

With respect to the registration of surnames as single-word marks in specific classes of goods and services, certain classes show significant depletion. For Class 9 (electronic goods), 30.3% of the population carries a surname triggering an identical match. For Class 25 (apparel goods), 22.4% of the population does so. With respect to Class 35 (general business administration services), a little over one in four Americans (26.6% of the population) carry surnames already registered as single-word marks. Interestingly, in Classes 6 (metal goods) and 7 (machine goods), surname depletion is also significant, at 20.5% and 23.6% of the population, respectively. In essence, substantial portions of the American population have simply been born too late to claim their surnames as single-word marks in certain classes of goods and services.

When we compare the most frequently occurring surnames to marks with disclaimed language removed, we find a higher proportion of the population carrying surnames already claimed as single-word marks. In 2016, 61.5% of the population carried a surname identically matching a registered mark with disclaimed language removed. The proportions are similarly higher with respect to specific classes of goods and services. For example, for Class 9 (electronic goods), 35.4% of the population carried a surname triggering an identical match, while 39.1% did so for Class 35 (business administration services), and 27.7% for Class 25 (apparel goods).

(c) One-Syllable Words. — It is often assumed that the supply of trademarks is inexhaustible because new firms can simply coin new words.[167] Yet the supply of new words that may serve as competitively effective trademarks is limited. Firms that choose neologisms generally prefer short, easily pronounceable, familiar-sounding, and reasonably euphonious terms.[168] Our data indicate that this limited supply of new words is itself being depleted.

To study this form of depletion, we focus on all potential one-syllable words in English.[169] To estimate a list of such terms, we use a frequency table of the 10,753 distinct syllables appearing in the words of the Corpus of Contemporary American English. We then compare these syllables to all applied-for and registered marks. Here, our matching protocol is based not on identical string matching but on identical phonetic matching. We are interested primarily in matching syllables that sound the same. In sum, we study identical matches between the phonetic representations of syllables appearing in the corpus and the phonetic representations of syllables appearing in the trademark application and registration data. For example, the words "Phil" and "fill" would

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[167] *See supra* section I.B.1, pp. 962–64 (elaborating on this conventional wisdom).

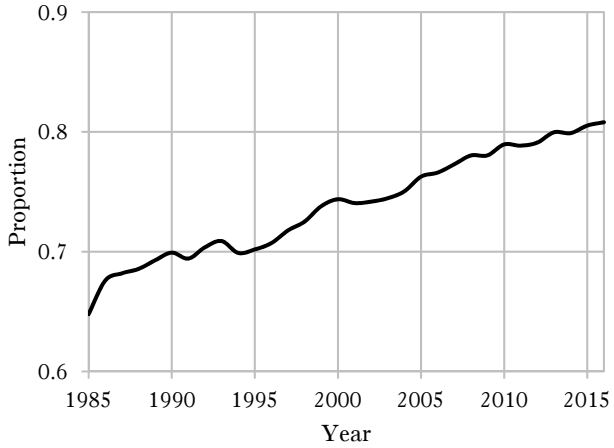
[168] *See supra* section I.B.2, pp. 964–70.

[169] We could study all potential two- and three-syllable English words as well, but due to computational constraints, we focus on one-syllable English words to give a sense of the proportion of the supply of plausible neologisms that conflict with already-registered marks.

match phonetically even though they are spelled differently, while the "ant" in "ant" and "variant" would not match phonetically even though they have the same spelling.

Overall, of the 10,753 most frequently used syllables in American English, 5632 (52.4%) are claimed as one-syllable marks. These 5632 syllables account for 80.8% of all syllable usage in the language. Figure 6 shows the extraordinary increase over time in the proportion of syllable usage consisting of a syllable claimed as a single-word mark, from a low of 64.8% in 1985 to our present condition in which over four-fifths of the syllables we use are registered as one-syllable marks.

Figure 6: Proportion of All Syllable Usage Consisting of Syllables Registered as Single-Word Trademarks by Year, 1985–2016



Which syllables remain unclaimed? Just as we did for frequently used words, we look at which syllables remain unclaimed among a subset of the most frequently used syllables for some insight. Of the one hundred most frequently used syllables, twenty were free of conflicts with a registered mark in 2016. Table 2 lists them. It is not surprising that these syllables remain free. Better suited to multisyllabic words, none would serve as an effective single-syllable trademark.

Table 2: Syllables Among the 100 Most Frequently Used Syllables Not Registered as Single-Syllable Trademarks in 2016

Frequency Rank	Arpabet Phonetic Transcription	Pronunciation Example
18	D IH	din
24	B IH	bin
31	S AH	support
32	R IH	writ
37	T AH	tut
39	IH	big
41	N AH	nut
44	M AH	mut
45	S IH	signal
47	DH ER	other
53	R AH	rut
58	T AH D	stud
69	P AH	put
76	L IH	Linda
78	M EH	men
79	M AH N T	arrangement
85	M IH	minnow
92	SH AH N Z	stations
93	T IH	tin
96	AE	fast

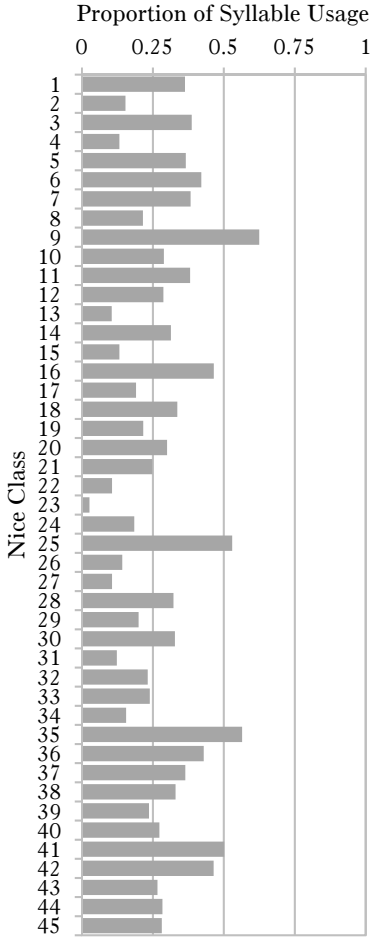
The kinds of syllables listed in Table 2 are representative of the larger population of the 5130 syllables appearing in the corpus that remain unregistered as one-syllable marks. A broader look at this population typically shows such unlikely one-syllable brand names as "wuh," "duh," "gehn," "gehnst," "erf," and "gloud."

Comparing single-syllable marks with all syllables appearing in the corpus also shows which syllables have been coined by trademark registrants. Here we find a large number of almost comically obtuse brand names: GLOG,[170] GUK,[171] LUNK,[172] SKIDE,[173] TSUGE,[174] ZOOTH,[175] KNIRPS.[176] To be sure, some firms may seek to distinguish themselves by the relative awkwardness of their brand names, but this cannot be an effective strategy for all new trademark registrants. When taking into account the marketing goals of typical firms, we see significant depletion of neologisms that promise to be at least minimally competitively effective.

[170] GLOG, Registration No. 4,277,734.
[171] GUK, Registration No. 4,453,072.
[172] LUNK, Registration No. 4,006,436.
[173] SKIDE, Registration No. 4,522,397.
[174] TSUGE, Registration No. 4,632,239.
[175] ZOOTH, Registration No. 2,343,707.
[176] KNIRPS, Registration No. 4,103,506.

Finally, Figure 7 shows by Nice class the proportion of syllable usage consisting of syllables claimed as one-syllable marks. As with common English words and common American surnames, certain classes are especially depleted. In Class 9 (electronic goods), 62.5% of all syllable usage consists of syllables claimed as one-syllable marks. In Class 35 (business administration services), 56.5% of syllable usage is claimed, and in Class 25 (apparel goods), 53.0% of syllable usage is claimed.

Figure 7: Proportion of All Syllable Usage Consisting of Syllables Registered as Single-Word Marks in 2016 by Nice Class



2. Jaro-Winkler Similarity Matches. — When we move from an analysis of the data based on identical matching to an analysis based on confusing similarity, the results are much starker — and help to explain

why, as we show below, applicants are increasingly shifting away from applying for common words and surnames.

To assess nonidentical similarity, we employ the Jaro-Winkler measure of the edit distance between two strings. Edit distance is a measure of the number of operations, such as insertions, deletions, or transpositions, required to transform one string into another. For example, "chat" needs one deletion and nothing further to transform it to "cat." We use the Jaro-Winkler distance measure because it incorporates character transpositions into its measure of distance and places more weight, as people do, on the initial characters of the strings being compared.[177] Jaro-Winkler distance is normalized such that a distance of 1 indicates an exact match and a distance of 0 indicates no similarity.[178] We use a conservative threshold of 0.875 to indicate a confusingly similar match.[179] To further tighten our similarity-matching protocol, we use

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[177] For these reasons, the Jaro-Winkler measure is superior to other measures of edit distance, such as Levenshtein distance and Jaro distance. The Jaro-Winkler measure is set out in William E. Winkler, *String Comparator Metrics and Enhanced Decision Rules in the Fellegi-Sunter Model of Record Linkage*, *in* SURVEY RESEARCH METHODS SECTION, JSM PROCEEDINGS 354 (1990), http://ww2.amstat.org/sections/srms/Proceedings/ [https://perma.cc/YY6Z-JRS5]. Computer scientists have developed much more sophisticated methods of measuring the phonetic and semantic similarity of words. *See, e.g.*, Fatahiyah Mohd Anuar, Rossitza Setchi & Yu-Kun Lai, *Semantic Retrieval of Trademarks Based on Conceptual Similarity*, 46 IEEE TRANSACTIONS ON SYSTEMS, MAN & CYBERNETICS 220 (2016); Fatahiyah Mohd Anuar, Rossitza Setchi & Yu-Kun Lai, *Trademark Retrieval Based on Phonetic Similarity*, *in* PROCEEDINGS: 2014 IEEE INTERNATIONAL CONFERENCE ON SYSTEMS, MAN & CYBERNETICS 1642 (2014) [hereinafter Anuar, Setchi & Lai, *Trademark Retrieval*]; Grzegorz Kondrak, *Phonetic Alignment and Similarity*, 37 COMPUTERS & HUMAN. 273, 284–86 (2003) (setting out the ALINE algorithm for assessing phonetic similarity). Fatahiyah Mohd Anuar, Rossitza Setchi, and Yu-Kun Lai in particular have proposed an algorithm that, by their estimate, significantly improves upon the Levenshtein approach and Grzegorz Kondrak's ALINE algorithm. Anuar, Setchi & Lai, *Trademark Retrieval*, *supra*, at 1646–47. In subsequent work, we hope to employ these improved algorithms. But because we use a very conservative threshold for similarity, we expect that these improved algorithms will produce even stronger evidence of word-mark depletion among frequently used words.

[178] *See* Winkler, *supra* note 177, at 356.

[179] We characterize a 0.875 Jaro-Winkler threshold as conservative for our purposes because it yields very few false positives. But it does so at the cost of a significant number of false negatives. As compared with the word "apple," for example, the following words would yield Jaro-Winkler scores under the 0.875 threshold: "crabapple" (0.541), "affle" (0.760), "apfel" (0.827), "appollo" (0.853), and even "epple" (0.867). Meanwhile, words that share initial characters or combinations of characters with "apple" would trigger a Jaro-Winkler match at the 0.875 threshold — for example, "snapple" (0.905), "appal" (0.907), and "bapple" (0.944).

A rough study of opposition proceedings before the PTO's Trademark Trial & Appeal Board (TTAB) lends further support to the proposition that the 0.875 threshold is relatively conservative. The TTAB maintains a dataset describing all of its opinions since November 1996. *Final Decisions of the Trademark Trial and Appeal Board*, U.S. PAT. & TRADEMARK OFF., https://e-foia.uspto.gov/Foia/TTABReadingRoom.jsp [https://perma.cc/R62N-5HJN] (last updated Nov. 2017). We studied all 2587 opposition opinions included in this dataset from November 1996 through December 2016. For each of these opinions, we calculated a Jaro-Winkler score that compared up to the first four words in the opposer's mark with up to the first four words in the applicant's mark. The mean Jaro-Winkler score for the 1587 oppositions we studied that were sustained at least in part was 0.646, while the comparable score for the 932 oppositions we studied that were dismissed

the full mark (including disclaimed language) as the basis of our comparisons with frequently used words and frequently occurring surnames.

Even when using this very conservative method of matching, we find evidence of extreme word-mark depletion. Of the 86,408 words listed in our word frequency table, 83,913 (97.1%) were confusingly similar to an active trademark registration in 2016. These words account for 89.1% of all word usage in American English. Of the 10,000 most frequently used words, all but nine are confusingly similar to an already-registered mark.[180] The degree of word-mark depletion is also severe for many specific classes of goods and services. Figure 8 shows, for each Nice class, the proportion of word usage that consists of words confusingly similar to active trademark registrations in that class in 2016. By this measure, over half of the Nice classes show word-mark depletion amounting to over 70% of all word usage, with Class 9 (electronic goods, including software) leading at 88.5% and Class 35 (business administration services) at 87.8%.

Admittedly, because certain classes, such as Class 9 and Class 35, cover a very broad range of goods or services, these data do not show that all words identified as confusingly similar to an already-registered mark in a particular class are unavailable in that class. When the marks are merely similar rather than identical and the goods are sufficiently different, it is possible that a registration will issue. At the very least, however, these data indicate an enormous amount of friction in the registration process for applicants seeking to register common English words. They further show the considerable challenges entrants face in finding a mark that will be distinctive in its product space in comparison with other similar marks in that space.

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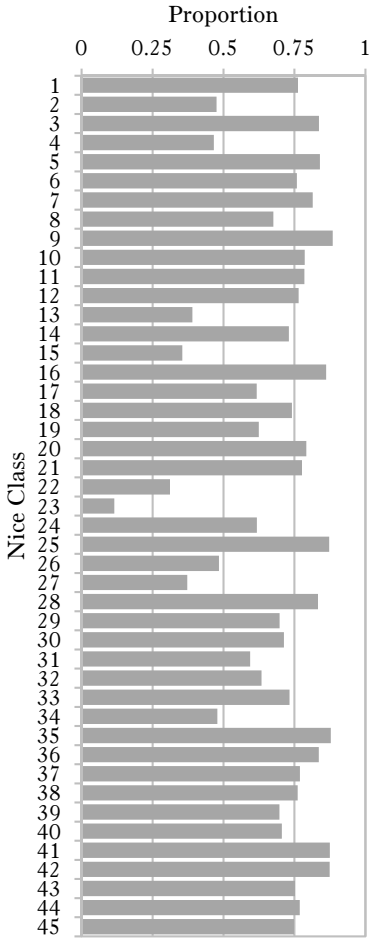
at least in part was 0.601. These results suggest that a Jaro-Winkler threshold of 0.875 is highly conservative. The TTAB dataset is very rich, and we plan further, more refined study of it.

[180] These words were, in order of decreasing frequency: "vulnerable," "unintelligible," "unfortunate," "disappointment," "uh-huh," "vulnerability," "would-be," "unsuccessful," and "notwithstanding."

Figure 8: Proportion of All Word Usage Consisting of Words Triggering Jaro-Winkler Similarity Matches with Active Registrations in 2016 by Nice Class

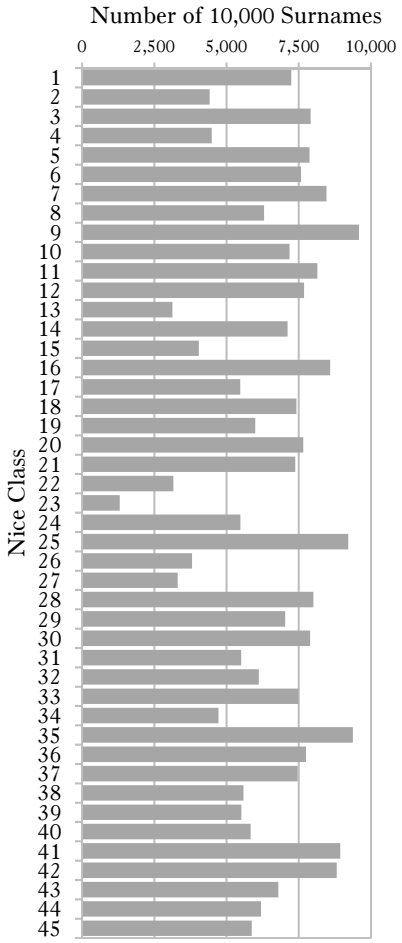


The results for surnames are comparable. Due to computational limitations, we focus on similarity matches with the 10,000 most frequently occurring surnames, covering 68.1% of the U.S. population. Of these, all but nineteen were confusingly similar to an active registration in 2016.[181] Figure 9 shows the number of the 10,000 most frequently occurring surnames triggering a match by Nice class. As with common

[181] These nineteen were: "Gutierrez," "Yarbrough," "O'Rourke," "McDuffie," "Jankowski," "Szymanski," "Jablonski," "Dalrymple," "Grijalva," "Olszewski," "Piotrowski," "Urrutia," "McKibben," "DiBenedetto," "Shropshire," "McVicker," "Cespedes," "Vanlandingham," and "Shrewsbury."

words, common American surnames are heavily depleted in a large proportion of Nice classes.[182]

Figure 9: Number of the 10,000 Most Frequently Occurring Surnames Triggering Jaro-Winkler Similarity Matches with Active Registrations in 2016 by Nice Class



3. Within-Mark Word Matches. — The appearance of a word *within* a currently registered trademark will not necessarily prevent others from

[182] We do not currently study nonidentical matches for one-syllable words. The Jaro-Winkler measure studies distance between alphabetic strings. We cannot use this measure on our one-syllable word data, which are instead represented phonetically. In future work, however, we plan to use our phonetic dataset representing all word marks to measure sound similarity, which is harder, if not impossible, to do accurately with mere alphabetic representations of word marks.

using that word in another registered mark even within the same class of goods or services. Nor will it necessarily impair the distinctiveness of the word when used in other marks to the same degree that an already-existing single-word mark might. It depends on the mark: for example, there is a good chance that BLUE COMPUTERS would stop nearly all other uses of the mark BLUE in Class 9, whereas BLUE GRASS ELECTRONICS or HIGH-DEFINITION BLUE RAY COMPUTERS are less likely to do so. Stated conservatively, there is an elevated chance that the registration of a mark containing a word will have restrictive effects on others' use of that word, as compared with a world with no such registration.

Therefore, data on within-mark uses of frequently used words in American English offer additional evidence of the extent of word-mark depletion, especially because an extraordinarily high proportion of word usage in American English consists of words already claimed as part of a live trademark registration.[183] As Table 3 indicates, of the 1000 most frequently used words, only three failed to appear within an active trademark registration in 2016. These were "although," "showed," and "seemed." Of the 86,408 most frequently used words in American English, 38,388 (or 44.4%) appeared somewhere within an active trademark registration in 2016. These 38,388 words account for 86.7% of all word usage in American English.

Table 3: Proportion of Most Frequently Used Words Appearing as Words Within Active Registered Marks in 2016

Number of Most Frequent Words	Number Appearing Within Registered Marks	% of Number of Most Frequent Words	% of All Word Usage Claimed
1,000	997	99.7	65.3
5,000	4,868	96.8	79.4
10,000	9,386	93.9	83.4
86,408	38,388	44.4	86.7

Figure 10 shows, for each Nice class of goods and services, the proportion of word usage consisting of words claimed within trademarks in that class in 2016. Particularly high levels of depletion by this measure appear in Classes 9 (electronic goods), 16 (printed matter), 25 (apparel goods), 35 (business administration services), 41 (education, entertainment, and cultural and sporting activities), and 42 (computer-related services). Over 80% of all word usage consists of words claimed within marks in each of these classes.

[183] Our within-mark matching protocol looked for the appearance of the word as a freestanding word within the mark.

Within-mark coverage of surnames is also very high. Of the 1000 most frequently occurring surnames in the United States, covering 40.6% of the population, only eleven fail to appear as a word in a registration active in 2016.[184] Of all of the 151,671 surnames listed in the Census data, 38,122 appeared as a word in an active registration in 2016, representing 70.2% of the U.S. population. Figure 10 shows high levels of surname depletion — as measured by the proportion of the population carrying a surname already claimed within a mark — in the same classes that showed high levels of word-mark depletion. These data suggest that, in effect, in Classes 9, 25, 35, and 41, half of the U.S. population would face significant difficulties in seeking to register their surnames as trademarks.

Finally, an extraordinarily high proportion of syllable usage is covered by within-mark uses of one-syllable words consisting of any syllable appearing in the Corpus of Contemporary American English. Of the 10,753 syllables appearing in the corpus, 7666 (70.7%) were claimed as one-syllable words in active registrations in 2016. These 7666 syllables account for 86.9% of all syllable usage in the corpus. Figure 10 shows very high levels of syllable depletion across a wide variety of classes, most notably in Classes 9, 25, and 35, where one-syllable words accounted for 80.8%, 79.9%, and 81.1% of all syllable usage, respectively. Across most Nice classes, it is highly unlikely that an entrant could use a neologism consisting of a word whose corresponding syllable appears in the corpus without encountering a strong possibility of a conflict with an already-registered mark.

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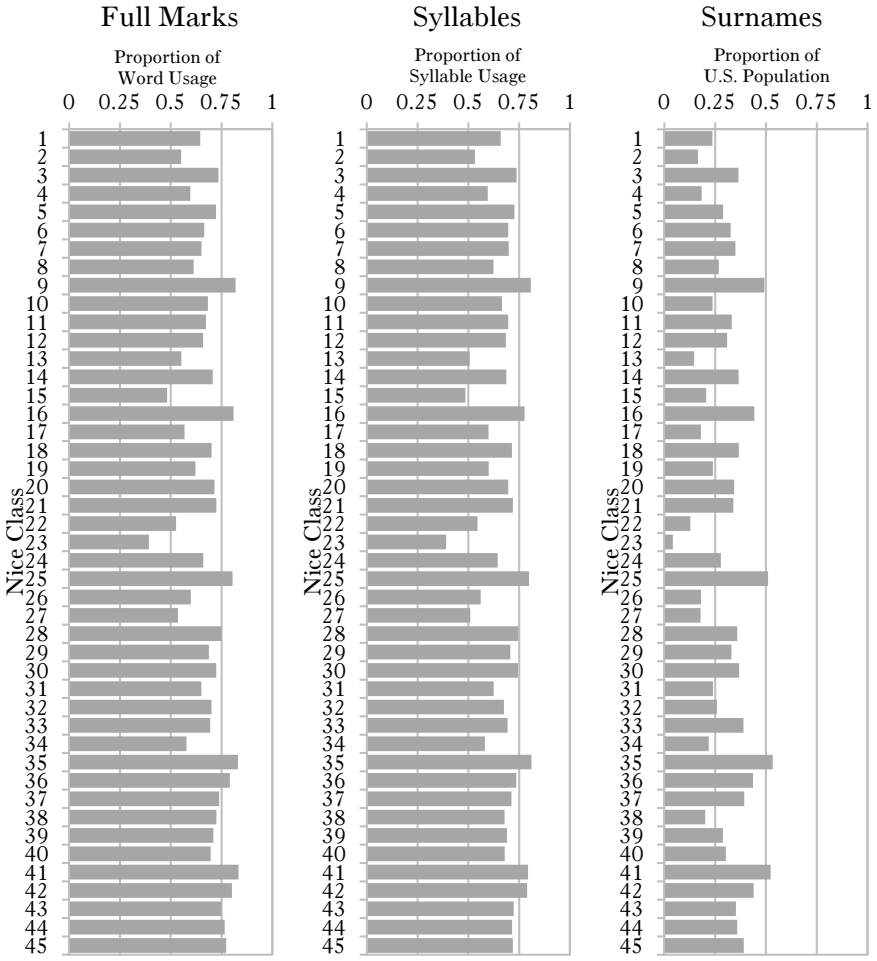
[184] These eleven are: "Contreras," "Maldonado," "Gallegos," "Delacruz," "McCullough," "Blankenship," "Rangel," "Lowery," "Zuniga," "Bonilla," and "Benitez."

Figure 10: Proportion of All Word Usage Consisting of Words Appearing as a Word Within an Active Registration in 2016 by Nice Class; Proportion of All Syllable Usage Consisting of Syllables Appearing as a Word Within an Active Registration in 2016 by Nice Class; and Proportion of U.S. Population Carrying a Surname Appearing as a Word Within an Active Registration in 2016 by Nice Class



4. The Proportion of Frequent Words Registered as .com Domain Names. — We noted above that trademark applicants typically inquire whether a mark they wish to register has already been registered as a domain name and are typically most concerned with whether the mark has been registered in the .com top-level domain (TLD).[185] The .com

[185] *See supra* p. 968.

TLD is of course not divided into classes of goods and services; it allows only one registrant of a domain name like "apple." As a result, word-mark depletion in this space can be extreme. Of the 86,408 most frequently used words in English, 77,340 are currently registered as domain names in the .com TLD. These 77,340 words represent 86% of all word usage in American English.[186] Of the 10,000 most frequently used words of more than two characters, only four remain unregistered in the .com top-level domain: "two-year" (with a frequency rank of 7012), "four-year" (7479), "three-year" (8457), and "nineteenth-century" (8691). Moreover, if one allows for the most minor of spelling variations, these four words are indeed registered as twoyear.com, 4year.com, threeyear.com, and nineteenthcentury.com, respectively. On this count, not one of the 10,000 most frequently used words of more than two characters remains unregistered.

Surname depletion in the .com TLD is even more extreme, bordering on total. Of the 151,671 surnames listed in the U.S. Census data, all but 813 match a domain name listed in Verisign's .COM TLD Zone File.[187] In effect, at least 90% of the U.S. population carries a surname that has already been claimed in the .com space — and because the U.S. Census table lists only those surnames that appeared 100 or more times in the Census data, the percentage is likely higher.

With respect to all letter combinations consisting of four characters or fewer, all two-letter combinations are registered in the .com top-level domain. According to the Verisign data, all but 36 of the 17,576 possible three-letter combinations are registered under .com, and 99.7% of all possible 456,976 four-letter combinations are registered under .com.[188]

The Verisign data do not indicate the proportion of .com domain name registrations that are held by cybersquatters engaging purely in rent-seeking. It may be that a high proportion of .com domain name registrations are actively for sale. Still, the .com domain name data provide further evidence of the enormous friction that entrants face in developing a new brand name.

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[186] The words "a" and "I," together accounting for 3.2% of all word usage in American English, are not registered as domain names. *See infra* note 188 (explaining that no single-letter domain names are currently registrable).

[187] A random check of several of the 813 surnames that failed to find a match in Verisign's data suggest that Verisign's dataset is incomplete. We reviewed the domain name registration status of ten randomly chosen non-matching surnames at register.com and found that each surname had already been claimed.

[188] The Internet Corporation for Assigned Names and Numbers (ICANN) has established special rules for the reservation and eventual allocation of single-letter domain names, which are not currently registrable. *See* ICANN, *Single-Character Second-Level Domain Name (SC SLD) Allocation Framework*, https://www.icann.org/resources/pages/proposed-scsld-allocation-framework-2008-06-13-en [https://perma.cc/Y64M-WDNL].

In this section, we have presented evidence of word-mark depletion based on what words are already registered. This evidence is stunning. Even using a conservative similarity matching protocol, nearly all the words we use on a daily basis are already registered or are confusingly similar to an already-registered mark. The same is true with respect to the surnames of a very high proportion of Americans. Even potential neologisms show high levels of depletion. Across all classes, the evidence shows increasing levels of depletion within each class, with certain important classes experiencing especially severe depletion: Class 9 (electronic goods), Class 25 (apparel goods), Class 35 (general business administration services), Class 41 (education, entertainment, and cultural and sporting activities services), and Class 42 (computer-related services). The evidence is particularly compelling because we are studying only registered marks. There is still the broad population of "common law" marks that, though unregistered, nevertheless enjoy federal protection and can preclude or severely limit new registrations that conflict with them. We think this evidence alone confirms the popular wisdom that market entrants now face enormous challenges in developing new marks, challenges that substantially impede competition.[189] The data also help to explain emerging trends in applicant and registrant conduct, to which we now turn.

C. Evidence of Word-Mark Depletion in Which Marks Are Being Applied for and Registered

Even if a strikingly high proportion of frequently used words, surnames, and short neologisms are already claimed as trademarks, it is apparent that this has not prevented applicants from continuing to register trademarks at the PTO. In 2016, for example, the PTO added 221,817 new registrations to the Principal Register, of which 93,060 were single-word trademarks.

But the overall effectiveness and desirability of applied-for and registered trademarks have been declining. Applicants have been moving away from frequently used words and surnames and toward neologisms. Left with fewer standard words from which to choose marks, firms are constrained to settle for coined words, which tend to be less readily memorable and more costly to imbue with meaning.[190] They have also been applying for longer marks, as measured by word count, syllable count, and character length. Longer marks are generally more complex and forgettable, making them less desirable than shorter marks.[191] We suggest that these trends are consistent with the effects of word-mark depletion on the trademark system. With a high proportion of preferred

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[189] *See infra* section V.A, pp. 1021–29 (exploring in depth the harms of mark depletion, including those to competition).

[190] *See supra* pp. 965–66 (discussing the pros and cons of coined word marks).

[191] *See supra* pp. 966–67 (discussing ideal mark length).

word marks already claimed, entrants are increasingly resorting to second-best marks.

Figure 11 shows, by filing year, the increasing proportion of single-word applications and registrations that consist of neologisms. For these purposes, we count as a neologism any word not appearing in the Corpus of Contemporary American English list of most frequently used words or in the Census list of the most frequently occurring surnames in the United States. For applications filed in 1985, 75.3% of all applications for single-word marks and 77.2% of such applications that were eventually registered consisted of neologisms. For all applications filed in 2014, the percentage of neologisms had increased to 82.8% of single-word applications and 84.3% of those that were registered. The data show that this upward trend has been particularly pronounced in Class 25 (apparel goods). For applications filed in 1985, 62.5% of single-word applications and 68.0% of those that were registered consisted of neologisms. For applications filed in 2014, the percentage of neologisms had increased to 82.0% of single-word applications and 85.7% of those that were registered.

Figure 11: Proportion of Applications and Registrations Consisting of Neologisms by Filing Year, 1985–2016

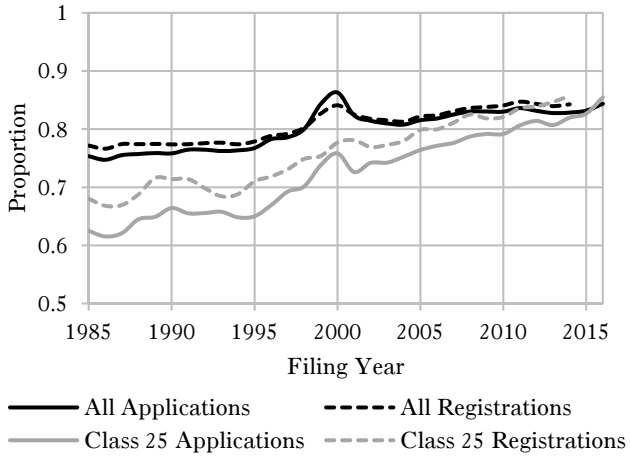


Figure 12 focuses on surnames and shows the declining proportion over time of applications and registrations matching frequently occurring surnames. For applications filed in 1985, 6.3% of applications and 6.2% of those that were registered consisted of a single word matching a surname included in the Census list of the most frequently occurring surnames in the United States. For applications filed in 2014, the percentages had dropped to 3.5% of applications and 3.4% of those that were registered.

Figure 12: Proportion of Applications and Registrations for Marks Consisting of Single Words Matching Surnames by Filing Year, 1985–2016

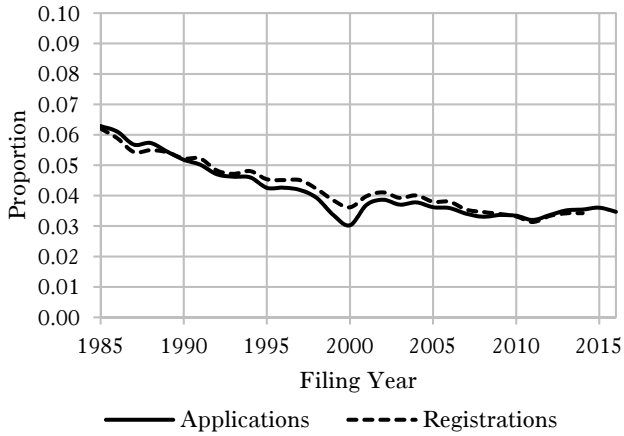
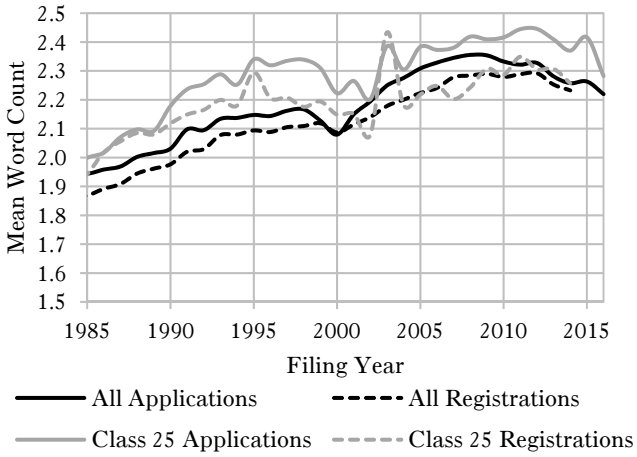


Figure 13 shows the increasing length in word count of applied-for and registered word marks over time, with a focus on Class 25 (apparel goods). Consistent with Figure 13, applications for single-word marks in particular have declined from a high of 47.1% of all word-mark applications in 1985 to a low of 38.1% of all such applications in 2005 and continuing at roughly that level through 2016. With respect to overall word count, as Figure 13 indicates, the average word count of all applications in 1985 was 1.94 words, and of all such applications that resulted in registration, it was 1.86 words. For applications filed in 2014, these averages had increased to 2.26 words for all applications and 2.23 words for those that resulted in registration. Similarly, for apparel goods, average word count increased from 2.00 words for applications filed in 1985 (and 1.94 words for those that resulted in registration) to 2.37 words for applications filed in 2014 (and 2.26 words for those that resulted in registration).

Figure 13: Length in Mean Word Court of Applied-For and Registered Marks by Filing Year, 1985–2016



Finally, Figures 14 and 15 show the increasing length in syllable and character count, respectively, of applied-for and registered word marks over time.

Figure 14: Length in Mean Syllable Count of Applied-For and Registered Marks by Filing Year, 1985–2016

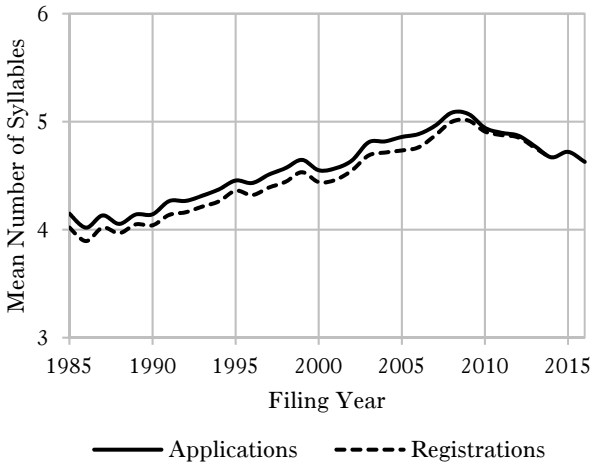
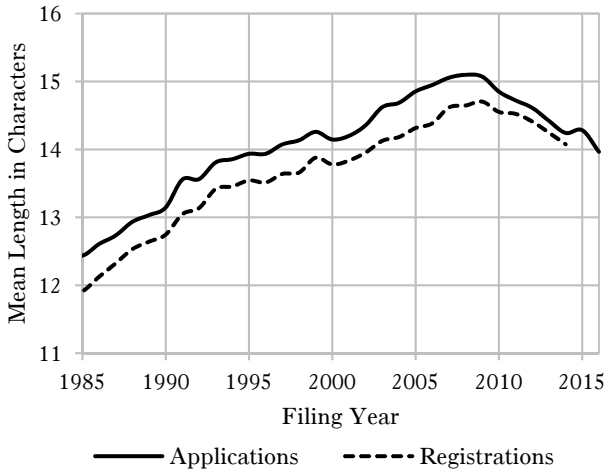


Figure 15: Length in Mean Character Count of Applied-For and Registered Marks by Filing Year, 1985–2016



This evidence demonstrates that applicants themselves are increasingly seeking marks from what marketing experts consider to be less desirable categories: neologisms and longer words or phrases. We recognize that these data do not provide conclusive evidence that applicants across the trademark system are resorting to less-preferred marks in an effort to cope with word-mark depletion. Other factors, such as trends in marketing counter to those described in section I.B.2, may account for applicants' shift to neologisms or longer marks. Nevertheless, it is striking that each of the trends described in Figures 11 through 15 is directionally consistent with the effects of word-mark depletion, which we also demonstrate through the other data presented in this Part.[192]

D. Evidence of Word-Mark Depletion in Applications Failing to Succeed to Publication

We have sought to show that applicants are changing their conduct in response to word-mark depletion: in an effort to avoid conflicts with already-registered marks, they are increasingly applying for and ultimately registering second-best marks. Yet notwithstanding applicants' apparent efforts to avoid them, conflicts at the PTO have been increasing. As discussed above, section 2(d) empowers the PTO to refuse to

[192] We additionally investigated whether frequent applicants at the PTO applied for and registered neologisms, surnames, and longer marks at rates different from those of infrequent applicants. We found no substantial difference between frequent, infrequent, and single filers with respect to the trends discussed in this section.

register marks that are likely to be confusingly similar to already-registered marks. From 2003 through 2014, an increasing proportion of applications received a section 2(d) refusal — and an increasing proportion of applications receiving a section 2(d) refusal ultimately failed to succeed to publication.[193] This is particularly compelling evidence of word-mark depletion. As discussed above, applicants may now relatively easily determine the existence of already-registered marks that conflict with the marks they seek to register.[194] Furthermore, applicants appear to be acting on this knowledge by applying for neologisms and longer marks.[195] Yet the rate of section 2(d) refusals continues to increase. Even while seeking to avoid conflicts, applicants still appear to be increasingly encroaching upon already-claimed marks.[196]

Figure 16 shows the increasing proportion of applications containing text that triggered at least one section 2(d) refusal. Section 2(d) refusal rates in the apparel and beverages sectors have grown especially high; for example, nearly one in five applications (19.8%) in the beverages sector faced a section 2(d) refusal in 2014 as compared to 13.5% eleven years prior.[197]

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193 Although we have other PTO data on trademark applications and registrations dating back longer, recall that we are able to collect data on section 2(d) refusals only from 2003 forward. *See supra* p. 973.

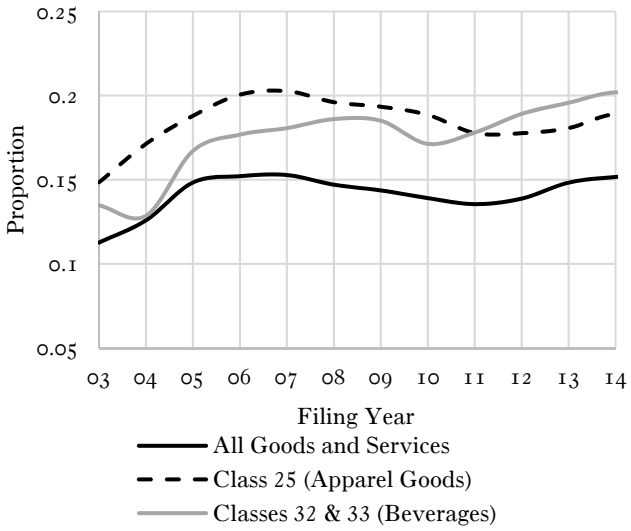
194 *See supra* section I.C, pp. 970–72.

195 *See supra* section III.C, pp. 999–1003.

196 Some of these applicants might be relatively unsophisticated and not realize that there are mark conflicts. Or some might be highly sophisticated applicants knowingly pushing the envelope in an attempt to register rights in a questionably available mark.

197 Some classes, like Class 5 (pharmaceuticals), have lower rates of section 2(d) refusals. However, even in these classes, there have been relatively similar increases in the proportion of section 2(d) refusals (from 9.8% in 2003 to 13.5% in 2014). We think there is an important reason, related to FDA regulations, that pharmaceutical mark applications experience lower rates of section 2(d) refusals, which we discuss below. *See infra* pp. 1038–39.

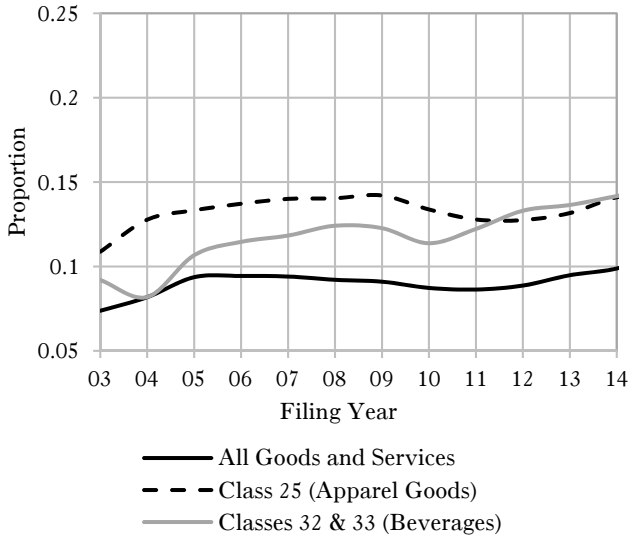
Figure 16: Proportion by Filing Year of Applications Containing Text that Triggered a Section 2(d) Refusal, 2003–2014



Even if an application receives a section 2(d) refusal, the applicant may overcome that refusal by persuading the trademark examiner or ultimately the PTO's Trademark Trial and Appeal Board that there is no likelihood of confusion.[198] For applications filed from 2003 through 2014, about one-third of applications that received a section 2(d) refusal managed to succeed to publication, though publication rates in this regard have been slowly and steadily declining in recent years — from a high of a 38.4% publication rate for such applications filed in 2007 to a low of 34.9% for such applications filed in 2013. Overall, Figure 17 shows the increasing proportion of applications that both received a section 2(d) refusal and subsequently failed to publish.

[198] 37 C.F.R. § 2.63 (2016); *see also* TMEP, *supra* note 55, § 713.

Figure 17: Proportion of Applications Containing Text that Triggered a Section 2(d) Refusal and Failed to Publish by Filing Year, 2003–2014



Consistent with the data above showing severe word-mark depletion with respect to common words and surnames, applications for neologisms tend to do better in avoiding section 2(d) refusals. Figure 18 shows relevant trends over time. Specifically, it shows by filing year the proportion of single-word applications that received a section 2(d) refusal and then failed to publish where those applications consisted either of a neologism or of a common word or common surname. By 2014, 15.5% of single-word applications consisting of either a common word or a common surname received a section 2(d) refusal and then failed to publish. A far lower proportion of neologism applications (7.5%) did so.[199]

[199] This difference might very well lie in a slower depletion rate for neologisms than for common English words, which is unsurprising given that the former category is larger than the latter and there are many marketing reasons why businesses prefer to choose marks from the latter category, *supra* pp. 965–66. Yet our data show that both categories of word marks are increasingly being depleted over time, *see supra* section III.B, pp. 981–99, and Figure 18's upward-trending lines for both non-neologisms and neologisms corroborate this.

Figure 18: Proportion of Single-Word Applications Containing Text that Triggered a Section 2(d) Refusal and Failed to Publish, Neologisms vs. Non-Neologisms by Filing Year, 2003–2014

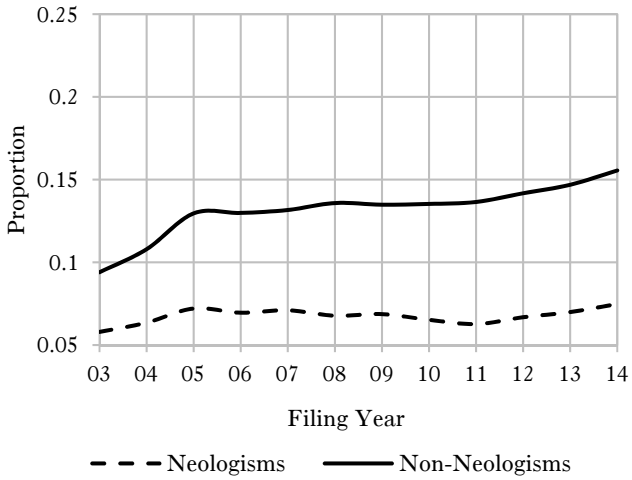
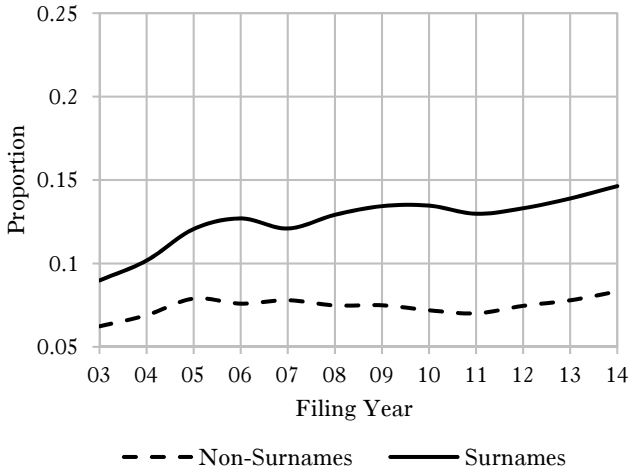


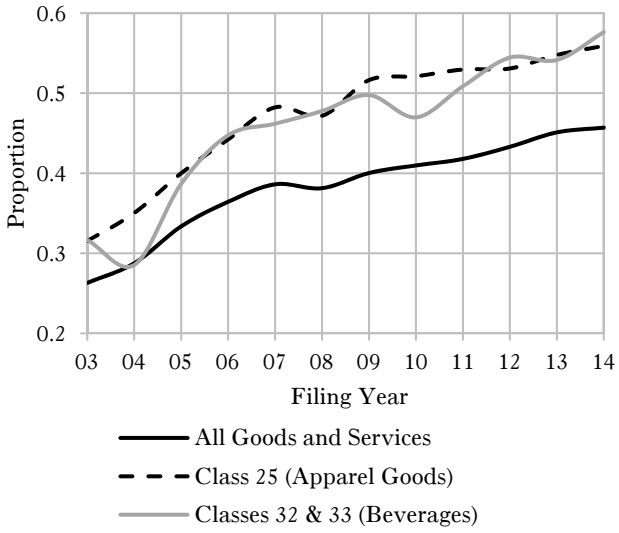
Figure 19 further focuses only on single-word applications consisting of a word that matches a frequently occurring surname. Here again, a remarkably high proportion of such applications are now both receiving a section 2(d) refusal and subsequently failing to publish.

Figure 19: Proportion of Single-Word Applications Containing Text that Triggered a Section 2(d) Refusal and Failed to Publish, Surnames vs. Non-Surnames by Filing Year, 2003–2014



Viewed from a different angle, the data indicate that if an application has failed to succeed to publication, it is increasingly likely that it has failed because of a section 2(d) conflict. Figure 20 focuses on applications that failed to reach publication and shows the increasing proportion of such applications that received at least one section 2(d) refusal. This phenomenon is particularly pronounced in certain classes. In 2014, a section 2(d) refusal was issued to over half of all applications that failed to reach publication in Class 25 (apparel goods) and in Classes 32 and 33 (which together cover beverages).

Figure 20: Proportion of Applications Failing to Publish that Received a Section 2(d) Refusal by Filing Year, 2003–2014



Overall, Figure 20 shows that for those applications failing to succeed to publication, an increasing proportion are failing because they conflict with an already-registered mark.[200]

[200] These trends in section 2(d) refusal rates have likely been worsened by the expansion in recent decades in the scope of protection the law affords to trademarks. Many scholars have remarked on this expansion. *See, e.g.*, Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1721–25 (1999) (describing the expanding scope of trademark protection in the second half of the twentieth century); *see also* Barton Beebe, Essay, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2069–72 (2005) (discussing the rise of the "[s]overeign [t]rademark," *id.* at 2069). Indeed, more generally, this expansion in trademark scope serves to accelerate trademark depletion and congestion and to worsen the severity of their impact on competition and the public domain. We discuss possible reforms to the likelihood-of-confusion standard in trademark law below. *See infra* p. 1041.

E. The Performance of Incumbent Applications at the PTO

One class of applicants continues to do well in the face of word-mark depletion: those that apply based on already-owned registrations. Applicants must identify whether an application is based on a previous registration and indicate their ownership of that registration.[201] Otherwise that registration might form the basis of a refusal of the new application under section 2(d).[202] For example, a Korean company recently applied for the word TRY in Class 25 (apparel goods).[203] In doing so, the company cited its prior registration of the word in stylized format in the same class.[204] This disclosure prevented the possibility of a section 2(d) refusal based on that prior registration. Over the twelve-year period from 2003 through 2014,[205] 13.1% of applications were based, like the application for TRY, on one or more previous registrations.

During this period, incumbent applications enjoyed lower section 2(d) refusal rates, and when they did receive section 2(d) refusals, they tended to be very successful in overcoming them. Overall, for the years 2003 through 2014, 10.5% of incumbent word-mark applications received a section 2(d) refusal, and 78.8% of these applications overcame that refusal and published. In contrast, 14.2% of nonincumbent applications received a section 2(d) refusal and only 36.5% overcame the refusal and published. More generally, over the same time period, incumbent applications enjoyed a substantially higher publication rate, at 93.9%, than did nonincumbent applications, at 76.3%.

The particular characteristics of incumbent applications also show the benefits of incumbency. The data indicate that incumbents are applying for and registering non-neologisms at a higher rate than nonincumbents. For the twelve-year period from 2003 through 2014, 32.4% of all nonincumbent applications resorted to single-word neologisms as compared to 23.4% of incumbent applications.[206] If non-neologisms are in many respects preferred as trademarks, incumbents are benefiting further from having staked claims to these marks when they were still available.

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[201] *See* 37 C.F.R. § 2.36 (2016).

[202] *See* TMEP, *supra* note 55, § 812 (citing 15 U.S.C. § 1052(d)).

[203] TRY, Registration No. 4,610,405.

[204] *Id.* (citing TRY, Registration No. 1,543,608).

[205] In this section, we restrict our analysis to applications filed from 2003 to 2014. We begin in 2003 because section 2(d) refusal data are not available for applications filed before this date. We end in 2014 because applications filed after this date may not have been fully processed by 2016, which would skew the publication rate data for such applications.

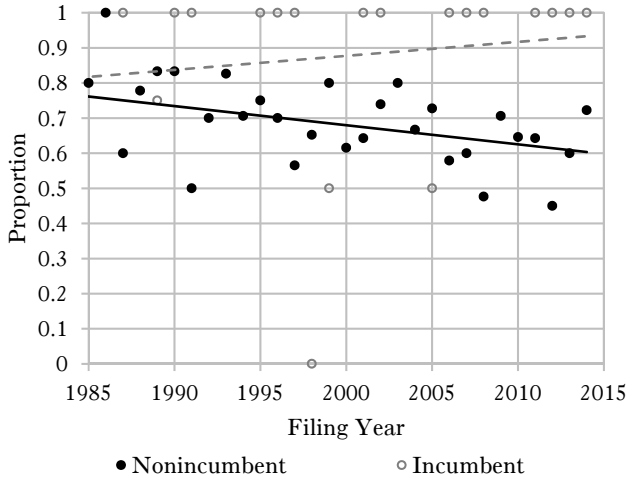
[206] This difference continues through to the proportion of applications filed from 2003 through 2014 that resulted in registration and that consisted of a single-word neologism. For nonincumbents, 34.6% of applications filed over this period that resulted in registration consisted of single-word neologisms. For incumbents, it was 25.0%.

The advantages of incumbency are also clear with respect to the most frequently applied-for marks. Table 4 lists the twenty most frequently applied-for word marks for the period 1985 through 2014, all of which are standard English words. Taking ECLIPSE as an example, Figure 21 shows the substantially higher publication rate for incumbent applications for ECLIPSE as compared with nonincumbent applications. Similar differences appear in specific classes.

Table 4: Most Applied-For Single-Word Marks of Two or More Characters, 1985–2014

Word	N	Word	N
ECLIPSE	579	SMART	406
TITAN	555	ENCORE	396
IMPACT	540	APEX	388
FUSION	504	SPECTRUM	388
INFINITY	489	QUANTUM	388
GENESIS	475	MILLENIUM	386
EXTREME	421	GUARDIAN	385
ELITE	413	VISION	384
OASIS	413	INSIGHT	384
ADVANTAGE	409	REVOLUTION	376

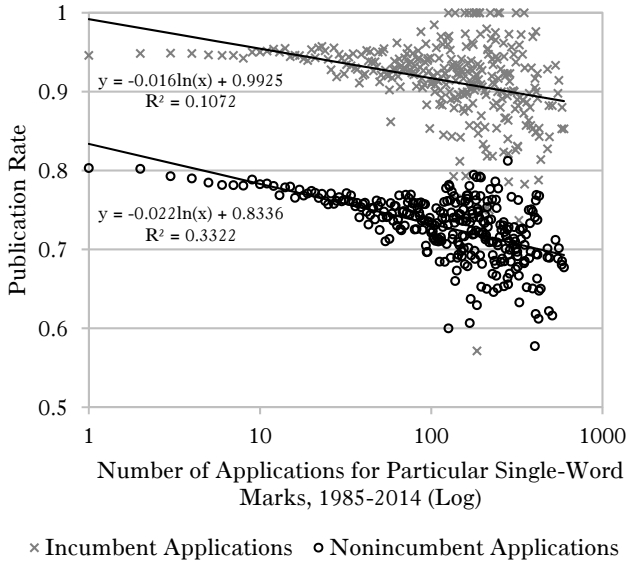
Figure 21: Incumbent vs. Nonincumbent Publication Rates for the Mark ECLIPSE by Filing Year, 1985–2014



The results for ECLIPSE are representative of the difference in publication rates between incumbents and nonincumbents for words that are the subject of numerous applications. Figure 22 shows the relation

between the number of times particular words were applied for from 1985 through 2014 and the average incumbent and nonincumbent publication rates for all applications for those words. For example, for a word applied for only once during this period, the publication rate for all nonincumbent applications was 80.3%. By comparison, the publication rate for incumbent applications for a word applied for only once was 94.6%. Figure 22 shows that with respect to both incumbent and nonincumbent applications, publication rates declined dramatically as a word was applied for more frequently. In nearly all cases, however, the publication rate for incumbent applications was substantially higher than that for nonincumbent applications.

Figure 22: Publication Rate by Frequency of Applications for Particular Single-Word Marks, Incumbent vs. Nonincumbent Applicants, 1985–2014



* * *

This Part has presented evidence showing both that word-mark depletion is growing increasingly severe and that new applicants are altering their conduct in an effort to adapt to this condition. Whatever the conventional theoretical view may be on the inexhaustibility of good trademarks, new applicants are revealing in their conduct a different reality. They are increasingly shifting toward neologisms and longer, more complex, and thus less effective, marks. Yet even these efforts are increasingly failing. Section 2(d) refusal rates continue to rise, particularly in certain classes. Only incumbents seem to be immune to the effects of depletion. As we discuss more fully in Part V, the result is a

trademark system under serious stress, with mounting barriers to entry, increasing consumer search costs, and an eroding public domain. First, however, we turn to another dimension of the problem: trademark congestion.

IV. WORD-MARK CONGESTION

Even if a word mark is already registered, this will not necessarily preclude others from registering the same mark for use in connection with other goods or services.[207] For example, the registration for the single-word mark ACE for adhesive bandages was issued in 1949 and remains active.[208] This registration did not prevent a different company from registering the single-word mark ACE for hardware goods in 1985[209] and then for hardware store services in 1987.[210] Section 2(d) only bars the registration of marks that will confuse consumers as to source due to the similarity of these marks with previously registered marks; however, if the previously registered marks are used on unrelated goods, confusion as to source is unlikely. Thus, marks may have multiple different registrants in multiple different classes. This helps to explain how, by 2016, there could be 130 different active single-word registrations for ACE across the various Nice classes owned by approximately ninety-five different registrants.[211]

Such parallel uses of word marks constitute word-mark congestion. They impose significant costs on the trademark system in that parallel uses blur the link in consumers' minds between the mark and any particular source among the many to which the mark refers. We explain these costs in more detail in Part V. First, however, we illustrate in this Part the extent of word-mark congestion. Section A outlines a framework for evaluating congestion. Sections B, C, and D focus on the congestion of common English words, common American surnames, and potential one-syllable words, respectively.

A. A Framework for Evaluating Word-Mark Congestion

Word-mark congestion describes the process by which a word mark that is already claimed is claimed by an increasing number of different trademark owners. As with word-mark depletion, word-mark congestion is best understood in two dimensions, in terms of the congestion of (1) a set of marks with respect to (2) a set of goods or services. Congestion occurs at the general level of all goods and services when different

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[207] *See* Sheff, *supra* note 131, at 101–19 (examining registrations of identical marks by different firms in different classes of goods or services).

[208] ACE, Registration No. 507,884.

[209] ACE, Registration No. 1,426,137.

[210] ACE, Registration No. 1,464,025.

[211] The oldest active registration for ACE was issued on May 4, 1920 in connection with combs. *See* ACE, Registration No. 131,017.

entities each use the same mark but in different classes of goods or services (for example, ACE for adhesive bandages and ACE for hardware store services). Alternatively, and perhaps more troublingly, congestion occurs at the more specific level of a particular class of goods or services when different entities each use the same mark within that class. Congestion as to all classes or a specific class can also be understood as occurring with respect to a set consisting of one or multiple marks. For example, as we report below, the set of the 1000 most frequently used nouns and adjectives shows high degrees of congestion at the general level of all classes of goods and services and indeed also at the level of specific classes of goods or services.

At the level of either all goods and services or a specific class, the new registration of a word mark causes either depletion or congestion, but not both. To understand why this is so, consider the example of class-specific congestion. If a business registers a word mark that no one else has registered in a class, this causes depletion of the supply of unclaimed word marks in the class. But it does not congest that mark in the class because the mark has only one owner in that class. In contrast, if a business registers a mark that another business has already registered in the class, this does not cause depletion because that mark is already depleted. Instead, the mark is congested in the class because it now has more than one registrant in that class.

In essence, depletion is binary. A word mark either is or is not depleted with respect to a class of goods or services. Congestion is continuous. A word mark can become more congested in a class as it is claimed by more and more registrants in that class.

Depletion and congestion are linked conceptually. Once a set of words is entirely depleted with respect to a class, any subsequent claim to a word in that set will necessarily increase congestion of that word.[212] Therefore, congestion always follows complete depletion if marks continue to be chosen from such a set of words.[213] The connection can also run in the other direction. Congestion can sometimes lead to marks becoming completely unavailable. In particular, the more a mark is

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[212] This is mathematically true because each word in the set has already been claimed, so an additional claim to a word in that set will be for a word that has already been claimed and will thereby increase congestion for that word. *Cf.* Presh Talwalkar, *16 Fun Applications of the Pigeonhole Principle*, MIND YOUR DECISIONS (Nov. 25, 2008), http://mindyourdecisions.com/blog/2008/11/25/16-fun-applications-of-the-pigeonhole-principle/ [https://perma.cc/RV36-DLQM] ("The pigeonhole principle states that if more than *n* pigeons are placed into *n* pigeonholes, some pigeonhole must contain more than one pigeon.").

[213] For different sets of goods and services, a new registration can cause depletion and congestion simultaneously in the following sense. If a particular word mark has not already been registered in a particular class, the registration of that mark in that class will cause word-mark depletion with respect to that class. At the same time, if another entity has already registered that mark in another class of goods or services, the registration will cause congestion at the level of all classes of goods and services taken together.

congested — whether within a class or across classes — the more likely it will eventually become unavailable for newer claimants even beyond the particular goods and services for which it is already being used. We think this is especially the case for marks with greater inherent distinctiveness — particularly arbitrary or fanciful marks. That is because the PTO's rules make it easier to conclude that there is confusion with inherently distinctive marks than with those that are not inherently distinctive.[214] Finally, depletion and congestion are bound together with regard to their costs, as we discuss below, because over time new applicants increasingly face a catch-22 between exacerbating either depletion or congestion.[215]

As we indicated above, congestion can occur even when section 2(d) is being properly applied. The primary way in which it can occur is when an applicant registers a mark for goods or services sufficiently different from those for which the same mark is already registered that consumers will not be confused as to source. A second way in which congestion can occur applies to multi-word marks. Section 2(d) will permit the registration of multi-word marks that contain words already claimed in other marks provided that consumers will not be confused as to source by the parallel uses of the particular words. For example, an apparel company would likely be able to register BLUE LAGOON FASHIONS even if another apparel company has already registered FEELING BLUE DESIGNS. Both marks share the word BLUE, so the second registration increases congestion of BLUE for apparel goods. But it is probable that given the contexts in which BLUE is used by the two businesses, consumers would not be confused as to source and no section 2(d) refusal would issue.

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[214] *See, e.g.*, TMEP, *supra* note 55, § 1207.01(b)(viii) (observing that "consumers would be more likely to perceive a fanciful or arbitrary term, rather than a descriptive or generic term, as the source-indicating feature of [a] mark," giving it more weight in confusion analysis (citing *In re* Dixie Rests., Inc., 105 F.3d 1405, 1407 (Fed. Cir. 1997))); *id.* § 1207.01(b)(ix) ("The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that merely descriptive and weak designations may be entitled to a narrower scope of protection than an entirely arbitrary or coined word." (citing, inter alia, Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772, 396 F.3d 1369, 1373 (Fed. Cir. 2005))). For the same reason, we suspect that for less inherently distinctive marks, by contrast, such as geographic designations or prefixes like "EZ," the trademark system is more likely to tolerate substantially increasing levels of congestion without rendering those marks unavailable.

[215] *See infra* section V.A, pp. 1021–29. That applicants have to choose between increasing either depletion or congestion has another implication: both depletion and congestion can increase in parallel over time. Evidence of one will not undercut evidence of the other. Because some applicants prefer to choose a mark that causes further depletion and others prefer to select a mark that causes further congestion, overall depletion and congestion rates can both rise together.

B. Congestion of Frequently Used Words

To assess trends in the degree of congestion of common English words, we focus on single-word registrations identically matching any one of the 1000 most frequently used nouns or adjectives regardless of Nice class.[216] Figure 23 shows two trends from 1985 through 2016. The bars (and the right axis) show by year the number of the 1000 most frequently used nouns and adjectives that were the subject of one or more active single-word registrations. The line (and the left axis) shows by year the average number of different registrants for each such noun or adjective.[217] In 1985, 602 of the 1000 most common nouns or adjectives were claimed by an average of 2.7 different registrants across the various Nice classes. By 2016, conditions had changed substantially. Of the 1000 most frequently used nouns or adjectives, 839 were claimed by an average of 7.4 different registrants. We emphasize that these data relate only to trademark registrations that identically matched the frequently used word. The increase in parallel or near-parallel usage of trademarks (PROGRAM and PROGRAMME, for example) by different firms in the economy overall is likely substantially higher. Figure 23 suggests that the trademark system in general is becoming increasingly congested with multiple firms using the same or very similar marks, albeit on different goods or services.

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[216] We focus in this case on the 1000 most frequently used nouns and adjectives because the study of parallel ownership of the 1000 most frequently used words including articles and verbs would require enormous computational resources, particularly when we turn to the study of words appearing within registered marks. Similarly, we recognize that extending our analysis to all 86,408 words in our list of standard English words (or at least all nouns and adjectives in that list) would provide more precise information, but doing so would require even greater computational resources. Our concern here is with general trends over time. We think a focus on the 1000 most frequently used nouns and adjectives gives us significant insight into these trends. However, in future work, we hope to develop a comprehensive analysis of trademark congestion with respect to all standard English words.

[217] In order to determine when registrations for identical marks were owned by different entities, we compared entity names listed in the Trademark Case Files Dataset using a matching algorithm based on a normalized Levenshtein edit distance rather than an algorithm based on identical matching. This approximate matching was necessary because the data contained a significant number of misspellings and slight changes in entity names; an identical-matching algorithm would thus result in an overestimation of the number of parallel users and the degree of congestion. Our algorithm employed the Stata module STRGROUP. *See* Julian Reif, *STRGROUP: Stata Module to Match Strings Based on Their Levenshtein Edit Distance*, IDEAS, https://ideas.repec.org/c/boc/bocode/s457151.html [https://perma.cc/9DDE-3QN3]. We used what was for our purposes a very conservative normalized Levenshtein edit distance of 0.40 (normalized to the length of the shorter string), such that any two entity names that yielded a Levenshtein score below 0.40 would be counted as matching and thus would not count as different registrants possessing parallel registrations of the same mark.

Figure 23: Number of the 1000 Most Frequently Used Nouns or Adjectives Registered as Single-Word Trademarks and Mean Number of Registrants per Noun or Adjective by Year, 1985–2016

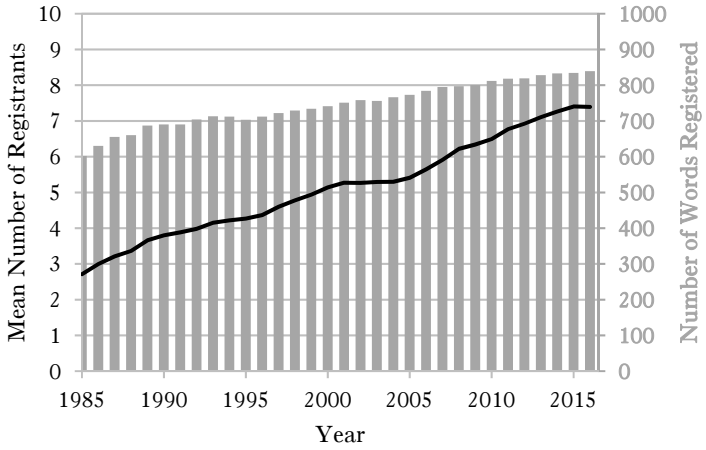
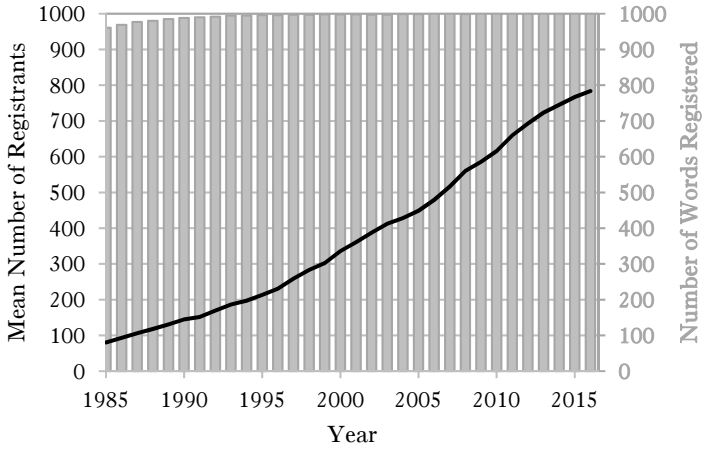


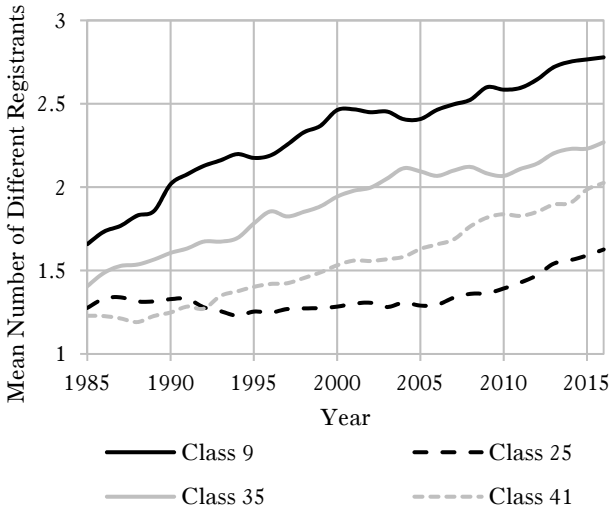
Figure 24 shows the same two trends as Figure 23 but for the proportion of the 1000 most frequently used nouns or adjectives that appeared as words *within* an active registration and the degree of congestion of these words. Evaluated by this metric, the increase in congestion is staggering. In 1985, 961 of the 1000 most frequently used nouns or adjectives appeared within registrations claimed by an average of 80.2 distinct registrants. By 2014, all 1000 such nouns or adjectives appeared within registrations claimed by an average of 745.2 distinct registrants.

Figure 24: Number of the 1000 Most Frequently Used Nouns or Adjectives Appearing as Words Within an Active Registration and Mean Number of Registrants per Word by Year, 1985–2016



With respect to particular classes of goods and services, we would expect to find substantially lower levels of congestion. This is because section 2(d) will likely forestall or filter out applications for marks identical to marks that are already registered when the applicant's and the registrant's goods or services are related. Yet even with respect to particular classes, we find increasing levels of congestion. Figure 25 shows, for active registrations in 2016 identically matching any one of the 1000 most frequently used nouns or adjectives, the average number of different registrants per word. Classes 9 (electronic goods) and 35 (general business services) are very broad classes, so it is entirely possible that two different companies could use the exact same single-word mark within each class without creating consumer confusion. In that case, no section 2(d) office action would issue. Class 25 (apparel goods) is more narrowly defined, but the same may be true there as well. Even so, the trends represented in Figure 25 suggest steadily increasing levels of congestion within these classes.

Figure 25: Mean Number of Registrants per Word for Single-Word Trademarks Consisting of the 1000 Most Frequently Used Nouns or Adjectives by Year, 1985–2016

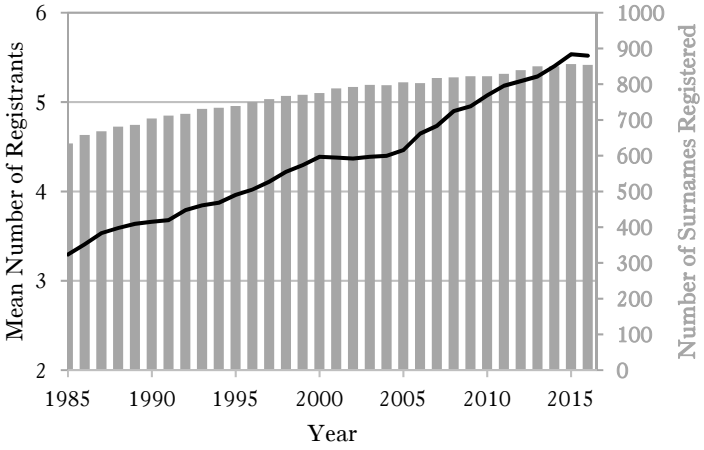


C. Congestion of Surnames

Congestion is also significant with respect to surnames. Here, we focus on single-word registrations identically matching any one of the 1000 most frequently occurring surnames regardless of Nice class. Just as Figure 23 above does for frequently used words, so Figure 26 shows two trends from 1985 through 2016. The bars show, by year, the number

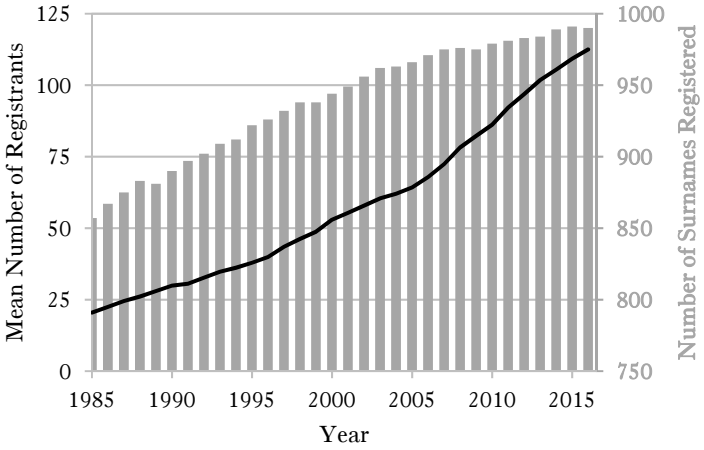
of the 1000 most frequently used surnames that were the subject of one or more active single-word registrations. The line shows, by year, the average number of different registrants for each such surname. By 2016, 854 of the 1000 most frequently occurring surnames were claimed as single-word trademarks by an average of 5.5 different registrants. As with words, so with surnames: multiple registrants of the same surname may not be confusing consumers as to source, but these parallel uses result in substantial congestion.

Figure 26: Number of the 1000 Most Frequently Occurring Surnames Registered as Single-Word Trademarks and Mean Number of Registrants per Surname by Year, 1985–2016



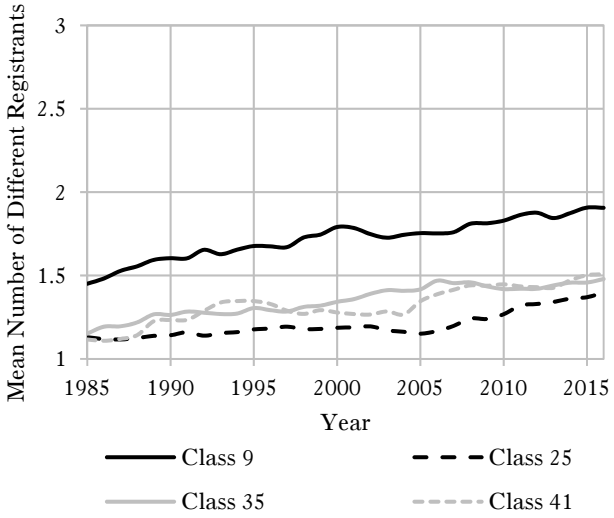
As for uses of the same surname as a word *within* trademarks registered by multiple different parties, the levels of congestion are extraordinarily high, as Figure 27 shows. In 2016, of the 1000 most frequently occurring surnames, 990 were claimed within an active registration by an average of 112.5 different registrants.

Figure 27: Number of the 1000 Most Frequently Occurring Surnames Appearing Within an Active Registration and Mean Number of Registrants per Surname by Year, 1985–2016



Finally, Figure 28 focuses on particular classes. The trends are similar to those for standard English words, and equally as suggestive of increasing congestion, particularly in Class 9 (electronic goods).

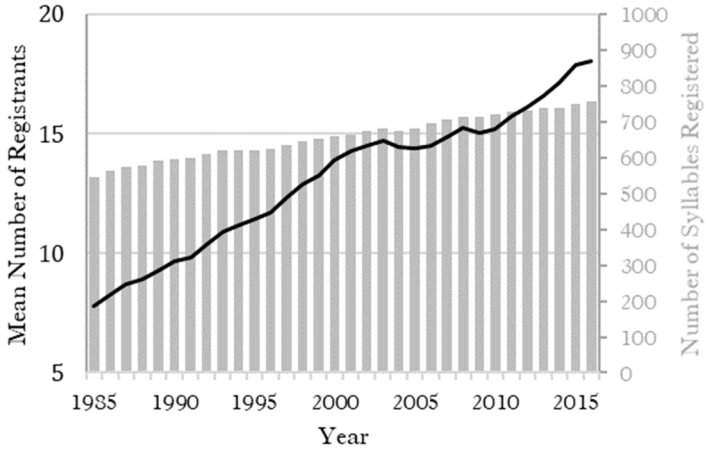
Figure 28: Mean Number of Registrants per Word for Single-Word Trademarks Consisting of 1000 Most Frequently Occurring Surnames by Year, 1985–2016



D. Congestion of One-Syllable Words

We also find significant evidence of congestion with respect to identical-sounding one-syllable words including neologisms. Here, we define congestion as the process by which increasing numbers of different registrants have registered one-syllable marks that sound the same. To gain some insight into this form of congestion, we focus on the 1000 most frequently used syllables in the Corpus of Contemporary American English and the number of different registrants for words that sound like those syllables. Figure 29 shows, by year, both the number of the 1000 most frequently used syllables that sounded the same as at least one registered mark and the average number of different registrants of words matching each syllable. In 1985, 545 of the 1000 most frequently used syllables sound-matched at least one registered mark and each of these 545 syllables sound-matched words registered by an average of 7.7 different registrants. By 2016, 758 syllables sound-matched registered marks owned by an average of 18.0 different registrants.[218]

Figure 29: Number of the 1000 Most Frequently Used Syllables Registered as Single-Syllable Trademarks and Mean Number of Registrants Per Syllable by Year, 1985–2016



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[218] We are currently in the process of studying usage of one-syllable words within marks. Preliminary results suggest that by this metric, the levels of congestion associated with identical-sounding one-syllable words are even higher.

In sum, the data show that even as word-mark depletion has been rising to severe levels, word-mark congestion has been rising as well. Registrants are increasingly engaging in parallel uses of the same mark, not only across classes, where congestion has reached extraordinary levels for the words, surnames, and syllables studied, but also within classes. We now turn in earnest to a consideration of the damage that both of these trends are inflicting on the trademark system.

V. LEGAL AND POLICY IMPLICATIONS OF WORD-MARK DEPLETION AND CONGESTION

Having demonstrated that word-mark depletion and congestion have both been steadily increasing and have long since reached substantial levels, we now examine, in section A, the costs of depletion and congestion and, in section B, what policies may be pursued to minimize these costs.

A. The Costs of Word-Mark Depletion and Congestion

The harms of depletion and congestion are in many ways interrelated.[219] For purposes of exposition, however, we first focus on the costs of word-mark depletion in section 1, and then focus on the costs of word-mark congestion in section 2.

1. The Costs of Word-Mark Depletion. — As we stated above, the twin purposes of trademark law are to promote efficient and fair competition and to minimize consumer search costs.[220] Trademark depletion subverts both of these purposes. It also represents a significant hazard to the public domain. We turn first to the harms that depletion inflicts on competition.

The anticompetitive effects of depletion take several forms. First, as depletion worsens, entrants face higher costs than incumbents had faced earlier when devising a mark that is both competitively effective and also not confusingly similar to an already-registered mark. Media reports across a variety of industries — including beer, music, and cosmetics — confirm that these costs are substantial and represent a significant barrier to entry.[221] Our data show that it is becoming increasingly difficult even to develop neologisms that are free of conflicts with already-registered marks.[222] Second, entrants are generally forced to settle for less effective marks, and empirical studies show that, all else

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[219] We discuss a number of these important interrelationships above at pp. 1013–14.

[220] *See supra* Part I, pp. 954–72 (invoking these goals in the context of describing trademark law and practice).

[221] *See supra* pp. 948–50.

[222] *See supra* section III.B.1.c, pp. 987–90.

equal, firms with less effective marks have less success in the marketplace than those with more effective marks.[223] As depletion has increased, applicants have been shifting away from common English words and American surnames and toward longer and more complex marks, and even then, they are facing higher section 2(d) refusal rates.[224] Third, having registered their mark in a particular class of goods or services, incumbents may more easily leverage that registration into new registrations within that class or in other classes.[225] New entrants do not enjoy this advantage. The data suggest that incumbent applications benefit from substantially higher publication rates than new applicants largely because incumbents have already established their rights in increasingly depleted spaces.[226] Fourth and finally, as more and more common words, surnames, and short neologisms are claimed as trademarks, so more and more trademark owners have sought to control — and have often succeeded in controlling — others' use of these terms even when these uses are not confusing as to source. For example, Entrepreneur Media has spent over ten years seeking to prevent all uses of the word ENTREPRENEUR with regard to media goods and services addressing small businesses, even when the term is being used descriptively to specify the characteristics of the relevant goods or services rather than as a source signifier.[227] The ENTREPRENEUR example is not unique. Trademark scholars have documented similarly unreasonable conduct by many trademark owners.[228]

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223 *See* sources cited *supra* note 85 and accompanying text.

224 *See supra* sections III.C–III.E, pp. 999–1012.

225 *See supra* section III.E, pp. 1009–12.

226 Our data do not show whether newer businesses are trying to overcome congestion or depletion by licensing more desirable, but already claimed, marks from preexisting businesses that have rights in those marks. Such private ordering might limit somewhat the anticompetitive advantages of incumbency. However, we are skeptical that this private ordering is occurring on any significant scale because, as a general matter, existing firms have incentives not to license their marks to producers of competing goods or services. *See* Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121, 129–30 (2017) (observing that, in contrast to the requirement that certification marks be compulsorily licensed to any business meeting the certifier's certification standard, trademarks generally need not be, and for good reason might not be, licensed to third parties).

227 Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 644 (citing Amy Zipkin, *Entrepreneurs Must Choose Their Words with Care*, N.Y. TIMES (Oct. 7, 2004), https://nyti.ms/2hID8VC [https://perma.cc/4HH9-JTLN]). Trademark law typically allows third parties to make descriptive uses of words that others have registered as trademarks. Otherwise, markholders could undercut efficient competition by monopolizing words needed to describe relevant goods or services. *See* 15 U.S.C. § 1115(b)(4) (2012) (providing a statutory fair-use defense against trademark infringement when a defendant uses a term or device "otherwise than as a mark . . . [if the term or device] is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin"); New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 306–08 (9th Cir. 1992); Ramsey, *supra* note 152, at 1126–27; *supra* p. 980.

228 *See* Grinvald, *supra* note 227, at 642–53 (describing the phenomenon of trademark bullying as "the enforcement of an unreasonable interpretation by a large corporation of its trademark rights

In the face of the anticompetitive costs of depletion, two arguments are typically adduced in defense of the conventional wisdom that the supply of trademarks is inexhaustible and thus that depletion should never be a problem. The first is that applicants can always resort to neologisms.[229] We do not, however, see neologisms as a solution to the problem of depletion for three reasons. First, the data show that even the supply of potential neologisms that are at least minimally competitively effective — in that they are short, easily pronounced, and euphonic — is being increasingly depleted.[230] Second, while neologisms may make sense in some economic sectors, they are less effective in others. Particularly when new businesses wish to convey authenticity and familiarity, neologisms are not optimal.[231] Third and perhaps most importantly, developing coined words into meaningful commercial symbols for consumers is significantly more costly than familiarizing consumers with noncoined words.[232] This added cost represents a heavy financial burden on market entrants, particularly when their incumbent competitors might have been able, by virtue of having started their businesses earlier, to choose then-available (noncoined) marks that were and remain cheaper to promote.

A second defense of the conventional wisdom is that even if depletion is continuing (and even if neologisms are not a solution), there is no evidence that depletion has reached any kind of critical stage in which competition is being substantially impaired.[233] After all, new firms are still finding trademarks to register and are still managing to compete. But an insidious quality of depletion is that it proceeds gradually, and even though its pace has quickened in recent years, it remains a chronic rather than acute condition. We should expect no tipping point or moment of crisis in which there are suddenly no trademarks left at all and competition grinds to a halt. Instead, we should expect what the data report: a continuous process in which individual applicants are still able

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against a [vulnerable] small business or individual through the use of intimidation tactics," *id.* at 642, such as economic pressure or coercive persuasion); *see also* William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 453, 485–88 (2012); Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WASH. & LEE L. REV. 585, 589–91 (2008). The prevalence of trademark bullying prompted the Department of Commerce to report to Congress on the issue in 2011. U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS: TRADEMARK LITIGATION TACTICS AND FEDERAL GOVERNMENT SERVICES TO PROTECT TRADEMARKS AND PREVENT COUNTERFEITING 1 (2011), https://www.uspto.gov/sites/default/files/trademarks/notices/TrademarkLitigationStudy.pdf [https://perma.cc/AND4-NVVW].

229 *See supra* notes 1, 82 and accompanying text (elaborating on this conventional wisdom).

230 *See supra* Part III, pp. 977–1012 (presenting the data).

231 *See supra* section I.B.2, pp. 964–70.

232 *See supra* section I.B.2, pp. 964–70.

233 *See supra* section I.B.1, pp. 962–64 (elaborating on this conventional wisdom).

to find usable marks, but at ever-greater cost in pursuit of ever-less benefit.[234] There will no doubt remain counterexamples, particularly in the form of new, superstar brands, that suggest through saliency bias that everything is fine. For example, if our only evidence is anecdotes from the world of ride-sharing apps with apparently highly effective names like UBER and LYFT, then we will remain insensitive to the severity of depletion. Nonetheless, we feel confident extrapolating from the extensive data reported in Part III that the overall population of new marks will continue to decline in effectiveness.

In addition to gradually damaging competition, trademark depletion also increases consumer search costs — and in a similarly gradual way. Consumers' ability to quickly link a mark with the source and qualities it is intended to represent is directly related to how memorable the mark is to consumers.[235] As depletion increases, so does trademark length, complexity, and bulkiness. Consumers must cope with less efficient marks. Furthermore, as an increasing number of similar trademarks occupy the same class of goods or services and registrants fill in whatever unoccupied spaces are left, that class begins to take on the characteristics of a "crowded field"[236] of trademarks — or of a "trademark thicket."[237] In the infringement analysis, courts have long recognized that certain areas of trademark usage are heavily populated with closely

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[234] *See supra* Part III, pp. 977–1012.

[235] *See supra* pp. 954–55 (discussing the role of consumer search costs in trademark law).

[236] *See* 2 MCCARTHY, *supra* note 22, § 11:85, at 11-268 to-73 (discussing "crowded field[s]" in trademark law); *see also* Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc., 856 F.2d 1445, 1449 (9th Cir. 1988) ("We view the beauty pageant industry's marks as a 'crowded field': In a '"crowded" field of similar marks, each member of the crowd is relatively "weak" in its ability to prevent use by others in the crowd.' Simply put, 'a mark which is hemmed in on all sides by similar marks on similar goods cannot be very "distinctive." It is merely one of a crowd of marks.'" (citation omitted) (quoting 1 J. THOMAS MCCARTHY, TRADEMARK AND UNFAIR COMPETITION LAW § 11:26, at 511 (2d ed. 1984))).

[237] A trademark thicket is analogous in some ways to the patent thicket, a crowded area of patent rights, in which rights to the many patents comprising the thicket must be secured for freedom of operation in the space, which can raise cost issues and anticompetitive concerns. *See, e.g.*, Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614–15, 1627, 1694–95 (2003); Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 235–39 (2015); Katherine J. Strandburg et al., *Law and the Science of Networks: An Overview and an Application to the "Patent Explosion*," 21 BERKELEY TECH. L.J. 1293, 1322, 1346–48 (2006); *see also* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998). *But see* Jonathan M. Barnett, *From Patent Thickets to Patent Networks: The Legal Infrastructure of the Digital Economy*, 55 JURIMETRICS J. 1 (2014) (arguing that the patent thicket does not exist).

similar marks.[238] The Trademark Trial and Appeal Board has recognized the same in the section 2(d) analysis.[239] A crowded field tends to militate against a finding of likelihood of confusion because the assumption is that "customers will not likely be confused between any two of the crowd and may have learned to carefully pick out one from the other."[240] This may well be true (or not), but consumers' efforts in this regard represent increased search costs, precisely the kinds of costs that trademark law is designed to minimize, and for good reason.[241] The result of the "crowded field" doctrine is that such fields are allowed to become even more depleted and even more crowded.

A final, albeit more amorphous, cost of trademark depletion is to the noncommercial public domain, and more specifically to the free use of the English language. Three-quarters of our word usage consists of words registered as marks and almost nine-tenths consists of words confusingly similar to registered marks.[242] In such a situation, we use all of our language in the shadow of trademark rights. To be sure, trademark law allows noncommercial, nonconfusing uses of terms claimed by others as trademarks. Fox News, for example, failed when it sought to force Al Franken and his publisher to remove the phrase "fair and balanced" from the book entitled *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right*.[243] But not all defendants are

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[238] *See, e.g.*, Hansen Beverage Co. v. Nat'l Beverage Corp., 493 F.3d 1074, 1079 (9th Cir.) (noting that "'aggressive' graphics and bold accent colors against dark backgrounds . . . are widely employed in the crowded energy drink market and are therefore unlikely to lead to confusion as to source"), *vacated as moot*, 499 F.3d 923 (9th Cir. 2007); Moose Creek, Inc. v. Abercrombie & Fitch Co., 331 F. Supp. 2d 1214, 1225 (C.D. Cal. 2004) (noting that "because Plaintiffs' moose operates in a crowded field, to the extent that the dominant feature of Plaintiffs' marks is actually the picture of a moose or the word 'moose,' those marks are conceptually weak" and finding no infringement); *cf. supra* p. 969 (observing similar suffixes for word marks in the dating-app space).

[239] *See, e.g.*, *In re* The Lucky Co., 209 U.S.P.Q. 422, 423 (T.T.A.B. 1980) ("[T]his complete saturation of the market with somewhat similar stripe and bar designs leave[s] applicant, registrant and all other manufacturers of athletic shoes engaging in such practice with marks that are extremely weak and certainly entitled to only a very narrow and limited scope of protection . . . .").

[240] *Miss World*, 856 F.2d at 1449 (quoting 1 MCCARTHY, *supra* note 236, § 11:26, at 511).

[241] *See* Klink, *supra* note 103, at 5 ("With the purpose of brands being to differentiate one seller's offerings from another, [rising trademark application rates] suggest that creating new brands distinguishable from others is more difficult today than ever." (citation omitted)). *But cf.* Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 86–92 (2012) (analyzing how consumers sometimes prefer or should tolerate increased search costs); Alfred C. Yen, *The Constructive Role of Confusion in Trademark*, 93 N.C. L. REV. 77 (2014) (suggesting that trademark law is willing to tolerate certain degrees of confusion among marks, and by doing so, teaches consumers to distinguish between what might otherwise be confusing marks, thereby keeping their search costs manageable).

[242] *See supra* sections III.B.1–III.B.2, pp. 981–94.

[243] *See* Susan Saulny, *In Courtroom, Laughter at Fox and a Victory for Al Franken*, N.Y. TIMES (Aug. 23, 2003), https://nyti.ms/2j2uTah [https://perma.cc/7QNP-A5NK] (describing a federal court's denial of Fox News's motion for a preliminary injunction blocking publisher Penguin and author Al Franken from using the phrase in the book title).

as well resourced as Franken's publisher and even when they are, they may be unwilling to expend the resources necessary to defend against even the most frivolous suits, such as Fox News's.[244] The result is that trademark law can often be used as a weapon in what amounts to an "assault on cultural expression and free speech."[245] Indeed, this worry appeared to form the basis of the widely negative public reaction to the PTO's recent publication of the trademark application for the word RE-ACT by the YouTube duo creating and distributing videos of different groups of people reacting to anything and everything ranging from old technologies to video games.[246] As more and more commonly used words and expressions are registered as trademarks by more and more owners, we can expect this condition only to worsen.

2. The Costs of Word-Mark Congestion. — The costs of trademark congestion are subtler than the costs of trademark depletion, but no less important. These costs take two forms.

First, parallel uses increase consumer search costs. Even when they do not confuse consumers as to source, parallel uses of the same mark diminish the mark's distinctiveness of source. They do so in the sense that parallel uses blur the link between the mark and any one source. Upon exposure to the mark, consumers who are aware that the same mark comes from multiple sources must at the very least "think for a moment"[247] before linking the mark with one of those multiple sources. In other words, parallel uses cause something akin to "dilution by blurring."[248] Federal trademark law provides a cause of action against conduct that causes dilution by blurring and also lists it as a basis for third parties to oppose the registration of a mark after it has been published.[249] But in both cases, only "famous" marks qualify for antiblurring protection.[250] In this sense, the law's concern with blurring would

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[244] *See supra* note 228 (citing scholarship that examines this type of trademark bullying).

[245] Grinvald, *supra* note 227, at 652 (alteration omitted) (quoting DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 129 (2005)).

[246] *See supra* p. 950.

[247] Posner, *supra* note 87, at 75.

[248] *See* 4 MCCARTHY, *supra* note 22, § 24:69, at 24-209 ("Dilution by blurring consists of a single mark identified by consumers with two different sources. One mark: two sources. Traditional trademark infringement involves mistakenly connecting similar marks with the same source or an affiliate source. Similar marks: one source. The ordinary situation of no dilution and no infringement is: two different marks: two different sources." (footnote omitted)).

[249] *See* 15 U.S.C. § 1125(c)(1) (2012) (providing a cause of action against "dilution by blurring"); *id.* § 1063(a) (establishing "dilution by blurring" as a basis for opposing registration of a mark). At the examination stage of the registration process, the PTO may not refuse registration on the basis that the applied-for mark will dilute an already-registered mark, because section 2 of the Lanham Act provides that registration can be refused on such a basis only under 15 U.S.C. § 1063. *Id.* § 1052(f).

[250] *See id.* § 1125(c)(2)(B) (defining "dilution by blurring" as "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark").

appear to be misdirected. What little empirical evidence we have on the matter suggests that famous marks are so strong as to be immune to blurring.[251] Instead, the harm of parallel uses arguably affects nonfamous marks much more severely. As trademark congestion intensifies, new market entrants that seek to use a mark already in use by others face ever greater difficulties in establishing a link in consumers' minds between their mark and their source. This constitutes a raised barrier to entry. At the same time, consumers faced with an increasingly congested marketplace find it more difficult to disambiguate marks, particularly those that are nonfamous or new. Consider the example of the word mark ACE. In 2016, four new single-word registrations for ACE were issued to four new registrants, each using the mark in a different class.[252] With 126 ACE registrations preceding them, two of which (one for adhesive bandages and another for hardware services) are very well known,[253] these market entrants will face considerable challenges in establishing an effective link in consumers' minds between their marks and their respective sources.[254]

The pharmaceutical sector offers a concrete example of this sort of harm from congestion. For pharmaceutical products, trademark congestion can literally kill. If different drugs with distinct effects have the same name, or names that are too similar, doctors or pharmacists may inadvertently substitute one for the other with potentially lethal consequences.[255] In fact, between eight and twenty-five percent of

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[251] *See, e.g.*, Maureen Morrin & Jacob Jacoby, *Trademark Dilution: Empirical Measures for an Elusive Concept*, 19 J. PUB. POL'Y & MARKETING 265, 274 (2000) ("It appears that very strong brands are immune to dilution because their memory connections are so strong that it is difficult for consumers to alter them or create new ones with the same brand name."); Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel Steckel, The Continuing Search for Evidence of Trademark Dilution: An Experimental Approach (Aug. 14, 2017) (unpublished manuscript) (on file with the Harvard Law School library) (presenting experimental evidence showing no blurring of famous marks after exposing experimental subjects to blurring stimuli).

[252] ACE, Registration No. 5,089,980; ACE, Registration No. 5,033,663; ACE, Registration No. 4,981,322; ACE, Registration No. 4,934,824.

[253] *See supra* p. 1012.

[254] Dilution by blurring is a controversial subject in trademark law. Many commentators doubt that blurring causes any significant increase in consumer search costs for famous marks that tend to have deeply entrenched associations for consumers. *See, e.g.*, Beebe, Germano, Sprigman & Steckel, *supra* note 251; *see also* Tushnet, *supra* note 87, at 536–42. By contrast, our discussion here focuses on nonfamous marks. We suggest that such marks, particularly when used by market entrants, may suffer significant impairment from parallel uses.

[255] FDA, CONTENTS OF A COMPLETE SUBMISSION FOR THE EVALUATION OF PROPRIETARY NAMES: GUIDANCE FOR INDUSTRY 4 (2016) [hereinafter FDA EVALUATION OF PROPRIETARY NAMES], https://www.fda.gov/downloads/Drugs/Guidances/ucm075068.pdf [https://perma.cc/Y4L6-MJFT]; *cf.* Alfacell Corp. v. Anticancer Inc., 71 U.S.P.Q.2d 1301, 1306 (T.T.A.B. 2004) ("[W]here . . . marks are used on pharmaceuticals and confusion as to source can lead to serious consequences, it is extremely important to avoid that which will cause confusion."). The Institute for Safe Medication Practices maintains a nine-page chart of drug names that are easily confused,

medication errors are attributed to name confusion.[256] For example, it is not hard to see how, as one commentator notes, "[p]atients can wind up taking the wrong prescription if a pharmacist mistakes Foradil, which treats bronchitis, for Toradol, which relieves pain from arthritis, or mixes up the blood-thinner Plavix with the antidepressant Paxil."[257] As we discuss further below, the Food and Drug Administration (FDA) has taken important steps to alleviate congestion in drug marks, from which trademark law can more generally learn.[258]

The second cost to the trademark system of parallel uses is more subtle. Consider the example of BLUE LAGOON FASHIONS and FEELING BLUE DESIGNS. Assuming both marks are used in full, their parallel uses of the word BLUE would not likely increase search costs. A consumer can rely on the other words in the marks to establish the link between the marks and their sources. Yet the parallel uses of the word BLUE still impose a cost. This cost takes the form of harm to the distinctiveness of both marks as against all other marks. Their shared use of the word BLUE makes each mark less exceptional. From a marketing perspective, each mark is less unique. And if many entities in the apparel sector begin to incorporate the word BLUE into their marks, the marketing power of all of these marks may be severely diminished.[259]

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All in all, with depletion and congestion happening around them, entrants will seek to choose the best word (or set of words) available to them as a mark. When an entrant's ideal word or words have already

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with tips to disambiguate them and avoid medication error. INST. FOR SAFE MEDICATION PRACTICES, ISMP'S LIST OF CONFUSED DRUG NAMES (2015), http://www.ismp.org/tools/confuseddrugnames.pdf [https://perma.cc/5LMC-7ANE].

256 Amy Nordrum, *Why Do Prescription Drugs Have Such Weird Names? Blame Branding Consultants and the FDA*, INT'L BUS. TIMES (June 24, 2015, 1:33 PM), http://www.ibtimes.com/why-do-prescription-drugs-have-such-weird-names-blame-branding-consultants-fda-1981819 [https://perma.cc/ZG5T-T75S]. Although the PTO's focus in the evaluation of a trademark registration application is consumer confusion, the FDA's focus is medical safety and thus the FDA takes into account doctor and pharmacist confusion in addition to consumer confusion. Deirdre A. Clarke, Comment, *Proprietary Drug Name Approval: Taking the Duel out of the Dual Agency Process*, 12 LOY. J. PUB. INT. L. 433, 441–42 (2011).

257 Nordrum, *supra* note 256.

258 *See infra* notes 310–15 and accompanying text.

259 In many ways, the loss of distinctiveness caused by congestion is comparable to the loss of distinctiveness caused by genericide. Genericide is the process by which a mark loses distinctiveness of a particular source, when it becomes the primary way that consumers and competitors refer to a genus of goods, and to all species of goods within that genus. Marks anywhere along the spectrum of distinctiveness, be they descriptive, suggestive, arbitrary, or fanciful, *see* section I.A.1, pp. 957–58, can become so congested as to become generic. Congestion represents one of the primary processes through which marks lose distinctiveness to such an extent that they become generic. Genericide is congestion taken to its extreme.

been claimed, the entrant is forced either to choose a less desirable word or words (from the same set or another set of words) or to seek to use an already-claimed word in parallel with other entities' usages.[260] Later entrants thus are necessarily disadvantaged compared with earlier ones. Because they arrive on the scene later in time, they are more likely to have to claim less-than-optimal marks: either marks further down on their priority list of unclaimed marks in that trademark space or marks that are already being used in the same trademark space by others but that are permissible to claim in parallel. Neither will be as helpful as an entrant's ideal choice. It will be a less effective signifier, either because it is a less memorable, pronounceable, or meaningful mark for that good or service, or because it will be used in parallel with others using the same mark. Either choice will contribute yet further to depletion or congestion.

B. Adapting Trademark Law

Having illustrated the extraordinary degree of word-mark depletion and congestion in the trademark system and evaluated their costs, we now consider a number of policy levers available in trademark law that may be used to reduce depletion and congestion and minimize their negative effects.[261] We discuss some of our preferred policy levers in depth to exemplify the effects of our suggested changes. We also address how the data we have gathered and analyzed can itself play an important role in adapting trademark law to the challenges posed by depletion and congestion.

Before turning to particular policy levers, however, it is important first to recognize that trademark policymakers may take two alternative overarching approaches to the problem of depletion and congestion. One approach is to adopt across-the-board reforms that apply to all sets of marks and classes of goods and services regardless of their particular degrees of depletion or congestion. A uniform approach would have the benefit of ease of application.[262] Decisionmakers would not be required to determine what kind or degree of depletion or congestion is necessary before particular reforms kick in. A one-size-fits-all approach offers another advantage: it would apply even to areas where there is little to no

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[260] The policies undergirding trademark law might counsel in favor of choosing, as a systematic matter, worsening depletion over worsening congestion, or vice versa. The question is an interesting one but lies beyond this Article's scope.

[261] *Cf.* Tushnet, *supra* note 77, at 927–29 (relying on our findings herein to advocate for declogging the trademark register to improve the trademark system).

[262] *Cf.* Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231, 232–33 (2014) (observing that "[i]ntellectual property systems all over the world are modeled on a one-size-fits-all principle," *id.* at 232, which makes them "easy to administer," *id.* at 233).

depletion or congestion. This could help to forestall the advance of depletion and congestion in areas where they have not yet reached chronic levels. Yet this approach also raises concerns. Uniform policies might prove costly if they result in making more effective marks less available even in non-depleted and uncongested areas, thereby undermining competition and consumer protection.[263]

An alternative approach is to adopt tailored reforms that operate more strictly precisely in those areas that are undergoing depletion or congestion and to the degree that they are doing so. Targeted reforms may involve the same substantive legal changes as those pursued in the uniform approach, but only proportionately to the degree of depletion or congestion in a particular class, subclass, or other area of trademark use.

It is further important to recognize that whatever reforms are adopted, they must take account of the fact that there are already over two million currently active trademark registrations. Reforms must not inefficiently and unfairly benefit incumbent registrants over entrants. Imposing prospective rules that simply make it more difficult to register new marks (or a subset of new marks) could exacerbate depletion and its anticompetitive effects by further raising barriers to entry.[264] For this reason, any package of policy reforms must be directed toward both current registrations and new applications.[265]

With these preliminaries in mind, we now outline a mix of reforms that would help to mitigate depletion and congestion, discussing first reforms directed primarily toward current registrants who wish to maintain their rights in certain marks and then reforms directed toward applicants who wish to claim rights in certain marks. Finally, we consider reforms that bear upon the litigation context.

To alleviate depletion and congestion caused by current registrants, we think it would be beneficial, straightforward, and administrable for the PTO to increase maintenance and renewal fees. These fees are extremely low: $100 per class each decade (though twice in the first decade of registration) to attest to continued use of the trademark and as little as $300 per class each decade to renew the registration.[266] By imposing greater financial — and perhaps also administrative — burdens on registrants to maintain their registrations, increased fees may improve the

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[263] *Cf. id.* at 238 ("This one-size-fits-all approach [in patent and copyright laws] comes at a real cost to society. Specifically, it forces society to pay an excessive price for the production of intellectual assets.").

[264] *See supra* section V.A, pp. 1021–29 (discussing the harms depletion and congestion cause for new entrants, as compared with earlier rightsholders).

[265] *Cf.* Tushnet, *supra* note 77, at 918 ("We should register fewer marks and cancel more.").

[266] 37 C.F.R. § 2.6(a)(5), (12) (2016); *see also Keeping Your Registration Alive*, USPTO, https://www.uspto.gov/trademarks-maintaining-trademark-registration/keeping-your-registration-alive [https://perma.cc/Y58U-CGRY].

likelihood that registered marks will be released back into the wild by registrants who calculate that it is no longer cost-beneficial to maintain certain registrations.[267] Moreover, even when trademark owners choose to pay increased fees and thereby to retain registered rights in their marks, they would be better internalizing the costs their contribution to depletion or congestion is imposing on the trademark system and the public domain.

Current maintenance and renewal fees are uniform regardless of the registrant's and registered mark's characteristics and the degree of depletion or congestion in the mark's class. We think it would be administratively simplest to increase these fees equally across the board. Yet as discussed above, doing so would impose on all mark owners an equally increased financial burden regardless of whether their marks are contributing to depletion or congestion.[268] Still, this burden might nonetheless be justified given how low these fees currently are and the general benefits of raising the probability that good marks are freed up for new entrants. It might also be costly to differentiate between markholders that should pay an increased fee and those that should not.

Alternatively, the PTO could increase fees in a more targeted fashion to force only those firms operating in particularly depleted or congested areas to bear more of the costs that their trademark choices impose on others[269]: the higher the degree of depletion or congestion in a particular area, the higher the fee. Such targeted increases would impose a form of "congestion pricing," sometimes also called "peak pricing,"[270] to ensure that registrants in especially depleted or congested areas internalize

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[267] Analogous proposals have been made with regard to patent maintenance fees as a way to release insufficiently valuable patents into the public domain. *See* Kimberly A. Moore, *Worthless Patents*, 20 BERKELEY TECH. L.J. 1521 (2005) (studying maintenance of patents through relatively heftier maintenance fees, and finding that over half of patents issued in 1991 were allowed to expire when patentees failed to pay these fees, *id.* at 1530); *see also* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 882 (2006) ("By conditioning protection on payment of maintenance fees, the Patent Act forces the patent owner periodically to place an option value on continued protection and to reveal something about that valuation. A patent owner's decision not to pay the relatively modest maintenance fees is a decision to dedicate the invention to the public domain.").

[268] *See supra* p. 1030.

[269] *See supra* p. 1030.

[270] Congestion pricing compels users of a resource to internalize some or all of the negative externalities their use imposes on others. It thereby encourages users to act in ways that may decrease congestion (for example, by shifting their use of a resource to times when it is not congested or by making a more efficient use of the resource). Congestion-pricing schemes have been especially successful in minimizing traffic congestion. *See generally* Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 694–739 (2008) (analyzing the economic advantages of congestion pricing over building new roadways to address road traffic).

some of the costs that they are imposing on the trademark system by adding to that depletion or congestion.[271] Congestion pricing might also dissuade firms from adopting marks that would significantly increase depletion and congestion.[272] The advantage of targeted reform is that, ideally, it intervenes only where necessary. The disadvantage, however, is that it requires a considerable degree of expertise and oversight by policymakers to choose the appropriate threshold conditions for congestion pricing.[273] Another concern for a congestion-pricing scheme is the regressive effect of its imposition of the same level of fees on entities of differing sizes and levels of market power,[274] something particularly

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Congestion pricing makes sense as a means of minimizing both trademark congestion and trademark depletion. The link between congestion pricing and trademark congestion is straightforward. With respect to trademark depletion, the analogy to traffic congestion is that depletion causes increasing numbers of words in particular categories to be used as marks.

There is another important link between congestion pricing for traffic and for trademark registrations. The traditional approach to traffic congestion has involved generating additional roadway capacity, which then tends to become equally or more congested, thereby not solving and sometimes worsening the problem of congestion. Building new roads does not work. *Id.* at 694–704. Similarly, while it is often imagined that a reliance on neologisms will solve the problems of depletion and congestion, we do not see neologisms as an adequate solution, as we explain above. *See supra* p. 1023.

For an economic overview of peak pricing, see W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 447–53 (4th ed. 2005).

271 *Cf.* Charles Komanoff, *Pollution Taxes for Roadway Transportation*, 12 PACE ENVTL. L. REV. 121, 132 (1994) ("The microeconomic rationale [for congestion pricing] is that although drivers endure their own lost time from congestion, they are not charged for the delay costs they create for others. The result . . . is that individual drivers continue to enter a roadway, even when the average total cost of their arrival on the roadway exceeds the average benefit of using it. These delay costs can be enormous." (footnote omitted)); Nash, *supra* note 270, at 725 ("[C]ongestion gives rise to an externality because drivers internalize only their own costs, rather than society's actual costs. Congestion pricing regimes endeavor to remedy this situation by requiring drivers to internalize the costs that otherwise would be externalized." (footnotes omitted)).

272 *Cf.* Nash, *supra* note 270, at 725 (emphasizing that congestion pricing "reduces uneconomic overuse of roads"); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1243–44 (2000) ("Current policy [without congestion pricing] ma[kes] no distinction between those who value[] their time very highly and those with lower valuations — traffic congestion affect[s] all commuters on a road equally, regardless of differentials in how desperately they need[] to reach their destinations. Congestion pricing was a scheme developed . . . to help correct these inefficiencies." (footnotes omitted)).

273 As explained with regard to roadway traffic congestion, "[h]ow much to charge under congestion pricing would depend on the extent to which drivers would respond to the higher price to drive. This would depend on the availability and attractiveness of alternative modes, the value placed on peak-period driving, and how much congestion society wishes to eliminate." Komanoff, *supra* note 271, at 132.

274 *See* Nash, *supra* note 270, at 727 ("An . . . equity-related point is the perceived distributional impact of a congestion-pricing regime. The burden of a congestion pricing regime might be seen to fall heavily on poorer people. In other words, the regime might be characterized as a regressive tax." (footnotes omitted)); *cf.* Strahilevitz, *supra* note 272, at 1245–46 ("If all vehicles of the same type are charged the same tolls during the same periods, these tolls will constitute a more significant impediment to travel for those who have less income to spare." *Id.* at 1245 (footnotes omitted).).

troubling here if the aim is to lower barriers to entry in ways that help competition and consumers, not to raise those barriers further. Generally, there are ways to correct for this effect, such as by using congestion-pricing revenues to pay for services benefiting small- and medium-sized enterprises (SMEs).[275] This approach might be adapted to trademark fees, for example, by setting fees lower for SMEs or by channeling increased revenues toward SME business development.[276]

While closely targeted fee increases would help force entities to internalize some of the costs of conduct contributing to depletion and congestion, it is difficult to imagine, given administrative and political realities, that a finely tuned scheme could work in practice. Policymakers would have to decide how much depletion or congestion is too much, how different degrees of one or the other would correspond to prices, and which types and categories of depletion and congestion (such as for common words or for shorter words) ought to matter. While it is an admirable goal, we are not yet convinced it is practically viable. More realistic might be a form of tiered pricing, with a limited number of tiers painted with a broader brush, for different degrees or categories of depletion and congestion.[277]

Another important policy lever directed toward current registrants that the PTO should adjust is the use requirement in trademark law, which should be tightened and more strictly enforced. As noted above, American trademark law affords protection only to marks that are used in commerce in connection with particular goods or services.[278] The requirement preserves the constitutional basis for Congress's authority

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[275] *Cf.* Strahilevitz, *supra* note 272, at 1246.

[276] Analogously, in its recent trademark fee increases, the European Union has sought to avoid the regressive effect of congestion pricing by keeping prices down for options likely to be chosen by SMEs. *See infra* note 277.

[277] Recently, the European Union increased trademark fees with a tiered approach as a way to accomplish analogous goals. *See* Regulation (EU) 2015/2424, of the European Parliament and of the Council, 2015 O.J. (L 341) 21, 34. It implemented "a fee structure where a separate 'class' fee is paid for each additional product class applied for beyond the first" class (whereas it had previously required an extra fee for each additional product class only beyond the third class). European Commission Press Release MEMO/15/4824, Package to Modernise the European Trade Mark System — Frequently Asked Questions (Apr. 21, 2015), http://europa.eu/rapid/press-release_MEMO-15-4824_en.htm [https://perma.cc/KP3L-TTFL]. The fee increase had multiple goals. First, this change sought to lower registration fees for small- and medium-sized enterprises, which would pay less for application and renewal if registering a mark in only one class. *Id.* ("The agreed changes will allow in particular businesses that seek to prolong protection of their registered European Union trade marks beyond an initial period of 10 years to benefit from savings up to 37%."). More relevantly, by charging applicants differently whether they file for one, two, three, or more classes, the hope has been that "it will help to reduce the potential of congestion of the EU trade mark register by diminishing broad claims for goods and services not really required by the trade mark proprietor, and ensure a more balanced and harmonious trade mark system overall." *Id.*

[278] *See supra* note 32. For a discussion of the precise nature of the use requirement, see Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1675–82 (2007).

to enact trademark law pursuant to the Commerce Clause.[279] It also helps ensure that trademark rights are granted in words or other symbols only when they are affixed or associated with goods or services in a way that will promote the goals of efficient competition and consumer protection.[280]

The PTO has already begun to move in the direction of seeking to declutter the register through the cancellation of marks not in use. In 2012, the PTO instituted a two-year pilot program that randomly audited a sample of trademark registrations to determine if they actually met the statutory requirement of use with respect to all or even any of the goods or services specified in the registration.[281] The PTO justified the program out of concern that the trademark register was cluttered with unused marks that new entrants might otherwise wish to adopt, a concern that aligns with the harms caused by depletion and congestion:

> The accuracy of the trademark register as a reflection of marks that are actually in use in the United States for the goods/services identified in the registration serves an important purpose for the public. The public relies on the register to clear trademarks that they may wish to adopt or are already using. Where a party searching the register uncovers a similar mark, registered for goods or services that may result in confusion of consumers, that party may incur a variety of resulting costs and burdens, such as changing plans to avoid use of the mark, investigative costs to determine how the similar mark is actually used and assess the nature of any conflict, or cancellation proceedings or other litigation to resolve a dispute over the mark. If a registered mark is not actually in use in the United States, or is not in use on all the goods/services recited in the registration, these types of costs and burdens may be incurred unnecessarily. Thus, accuracy and reliability of the trademark register help avoid such needless costs and burdens, and thereby benefit the public.[282]

At the conclusion of the two-year pilot period, the PTO reported the results of the audit program.[283] Of the 500 audited registrations, approximately half could not be verified as being in use as claimed.[284] As

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[279] Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1610–11 (2007) (citing *In re* Trade-Mark Cases, 100 U.S. 82, 94–95 (1879)).

[280] *See id.* at 1613–15; Dogan & Lemley, *supra* note 278, at 1676; *see also* Tushnet, *supra* note 77, at 918–21 (discussing the concerns raised by registered marks that are not truly in use).

[281] Changes in Requirements for Specimens and for Affidavits or Declarations of Continued Use or Excusable Nonuse in Trademark Cases, 77 Fed. Reg. 30,197 (May 22, 2012) (to be codified at 37 C.F.R. pts. 2, 7).

[282] *Id.* at 30,197.

[283] U.S. PATENT & TRADEMARK OFFICE, POST REGISTRATION PROOF OF USE PILOT STATUS REPORT (2014), http://www.uspto.gov/trademarks/notices/Post_Registration_Proof_of_Use.doc [https://perma.cc/VUT5-UGWU].

[284] *Id.* at 1.

a result, 16% of the audited registrations were cancelled and an additional 34% were amended to narrow the registration's specification of the goods or services in connection with which the registered mark was claimed to be used.[285] In light of the significant proportion of "deadwood"[286] registrations that the pilot program revealed, the PTO has recently finalized a rule change that makes its auditing efforts permanent. Under the rule, the PTO will each year randomly audit up to 10% of continuing-use affidavits filed that year "in which the mark is registered for more than one good or service per class."[287]

Our findings very strongly support the continuation and intensification of the PTO's auditing efforts. Indeed, our findings suggest that the PTO should focus its efforts on those areas of the trademark system that are most in need of clearing, namely, areas with high levels of depletion or congestion. Assuming that the pilot sample is representative of the Principal Register, a staggering number of registrations either ought to be removed from the register or are overbroad. Clearing out these unused marks not only helps ensure the register's integrity[288] but also decreases depletion and congestion by making unused — and likely desirable — marks available for reuse by new entrants. In fact, the PTO could make the use requirement more muscular in additional ways. For example, the PTO could provide a streamlined process for third parties to petition the PTO to cancel a mark based on nonuse,[289] something the PTO is currently considering.[290]

Because of the harms that depletion and congestion inflict, we also advocate that the PTO be more cautious, as Rebecca Tushnet otherwise advocates, in granting incontestability to registered marks.[291] Trademark law allows a registered mark in continuous use for five years following registration to become incontestable, so long as certain conditions

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[285] *Id.*

[286] *See* Tushnet, *supra* note 77, at 869.

[287] Changes in Requirements for Affidavits or Declarations of Use, Continued Use, or Excusable Nonuse in Trademark Cases, 82 Fed. Reg. 6,259, 6,262 (Jan. 19, 2017) (to be codified at 37 C.F.R. pts. 2, 7).

[288] Tushnet, *supra* note 77, at 869, 918.

[289] *See* Leonard Robert Seifter III, Note, *Clearing the Brush: The Best Solution for the USPTO's Continued "Deadwood" Problem*, 23 J. INTELL. PROP. L. 143, 163–65 (2015) (analyzing such a proposal, with regard to a similar procedure in place in Canada).

[290] Improving the Accuracy of the Trademark Register: Request for Comments on Possible Streamlined Version of Cancellation Proceedings on Grounds of Abandonment and Nonuse, 82 Fed. Reg. 22,517 (proposed May 16, 2017). For the comment we filed with the PTO in support of a streamlined process, see Barton Beebe & Jeanne Fromer, Comment on Possible Streamlined Version of Cancellation Proceedings on Grounds of Abandonment and Nonuse (Aug. 14, 2017), https://www.uspto.gov/sites/default/files/documents/StreamlinedCancellation_Comment_from_Beebe-Fromer_NewYorkUniversity.pdf [https://perma.cc/DY9D-LUBC].

[291] Rebecca Tushnet, *Fixing Incontestability: The Next Frontier?*, 23 B.U. J. SCI. & TECH. L. 434 (2017). It might also be worthwhile to eliminate the possibility of incontestability, but we recognize that is more radical.

are met, such as the absence of a final decision adverse to the mark's continuing registration.[292] Once a mark achieves incontestable status, it is susceptible to invalidation only on a limited number of grounds.[293] Most importantly, the mark can no longer be invalidated for being descriptive and lacking the requisite secondary meaning.[294] Tushnet presents evidence of marks undeserving of incontestability status that are allowed to claim it.[295] This is troublesome generally and particularly so for descriptive marks. Given the severe costs associated with the depletion of descriptive terms,[296] the Lanham Act should be amended either to limit the availability of incontestable status for descriptive marks or to allow challenges to a descriptive mark's claim of acquired distinctiveness even when that mark is incontestable.

Certain reforms directed toward new applicants may also help to alleviate depletion and congestion by making it tougher to register marks, with benefits and costs similar to those discussed above for existing registrants.[297] For example, registration fees could be increased, perhaps in proportion to the degree of depletion or congestion in a particular area. As for the use requirement, just as the PTO plans to do with current registrants,[298] the PTO could more strictly enforce the use requirement against applicants through an auditing program. Relatedly, the PTO could also tighten the relatively permissive standard allowing the extension of time in which an intent-to-use applicant must file a statement of use.[299] Finally, the PTO might also insist on more robust and direct evidence that applied-for descriptive marks have acquired distinctiveness.[300] Currently, the PTO allows acquired distinctiveness to be established circumstantially, through evidence of advertising expenditures, sales, prior registrations, and long-term use of the mark in commerce.[301] This evidence can often be quite weak.[302] The PTO might either require direct evidence of acquired distinctiveness, likely in the form of survey evidence, or at least establish an adverse inference

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[292] 15 U.S.C. § 1065 (2012).

[293] *Id.* § 1115(b).

[294] Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 196–97 (1985).

[295] Tushnet, *supra* note 291, at 440–49.

[296] *Supra* section III.A, pp. 978–81.

[297] *See supra* pp. 1031–33.

[298] *Supra* pp. 1034–35.

[299] *See* 15 U.S.C. § 1051(d) (establishing a six-month period, extendable upon application for an additional thirty months, in which an intent-to-use applicant must file a statement of use).

[300] *See supra* p. 958 (summarizing the rule of "acquired distinctiveness" for descriptive marks to be protectable).

[301] *See* TMEP, *supra* note 55, §§ 1212, 1212.04–1212.04(e), 1212.05(d), 1212.06–1212.06(b). Some courts similarly accept such circumstantial evidence as proof of secondary meaning. 2 MCCARTHY, *supra* note 22, § 15:30, at 15-61 to -62 & n.6 (citing cases).

[302] Ouellette, *supra* note 126, at 353.

that the lack of such evidence weighs heavily against a finding of acquired distinctiveness.[303]

The reforms we have proposed so far are those that we think are the most administratively feasible and politically viable. They are not, however, the only policy levers that might be adjusted. We consider two additional reforms that are more radical and whose effects on depletion and congestion are more difficult to predict. On balance, we think each is unlikely to result in net benefits to the trademark system.

First, with respect to the geographic extent of exclusive rights, the Lanham Act could cease to grant constructive nationwide priority to registered marks.[304] In other words, registered trademark protection could revert to a common law framework in which the registrant can claim priority in a mark only in the geographic areas in which it is the first to make actual use of the mark, plus any natural zone of expansion.[305] Such a reform could conceivably diminish trademark depletion because different firms could use the same mark in different geographic areas provided that no consumer confusion results. This would represent a significant break from current law, which allows a firm that owns a registered mark it uses only in, say, Hawaii to assert priority rights over the entirety of the United States.[306] There are, however, several problems with this approach. Most significantly, given the development of the internet, many firms can now arguably claim that they use their marks nationally online.[307] There would also be the substantial administrative burden of mapping out which geographic areas belong to which registrants. Finally, such a reform would open the door to multiple parallel uses and trademark congestion on a national scale. As the development of internet technology intensifies even further, and as physical travel increases, a framework of geographically limited parallel uses would become increasingly untenable.

Second, the Lanham Act could be reformed to provide that the PTO would no longer search the register to determine if an applied-for mark is confusingly similar to an already-registered mark. In essence, the

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[303] The PTO's rules emphasize that such evidence is probative of acquired distinctiveness, but they do not currently require or prioritize it. *See* TMEP, *supra* note 55, §§ 1212, 1212.06(d); *see also In re* Olin Corp., 2017 WL 4217176, at *15–16 (T.T.A.B. 2017) (Lykos, J., concurring in part) (calling for a stricter standard for the showing that the acquired distinctiveness of previously registered marks may be transferred to a mark applied for on an intent-to-use basis).

[304] 15 U.S.C. § 1057(c); *supra* p. 962.

[305] *See, e.g.*, Hanginout, Inc. v. Google, Inc., 54 F. Supp. 3d 1109, 1121 (S.D. Cal. 2014) (quoting Optimal Pets, Inc. v. Nutri-Vet, LLC, 877 F. Supp. 2d 953, 958 (C.D. Cal. 2012)).

[306] *See* 15 U.S.C. §§ 1057(c), 1072.

[307] *See* AJ Agrawal, *Ten Reasons Why Businesses Are Going Global*, HUFFINGTON POST (Aug. 14, 2016, 3:51 PM), http://www.huffingtonpost.com/aj-agrawal/ten-reasons-why-businesse_b_11512636.html [https://perma.cc/E7EL-GKHT].

PTO would no longer act as the first filter of incoming trademark applications on the question of confusing similarity; section 2(d) review would be left entirely to current registrants, who would need to become much more vigilant in monitoring applications and filing oppositions. This has long been the approach of European Union trademark law.[308] Here too, however, there are several problems in addition to the obvious problem of shifting more monitoring costs onto current registrants. Applied-for marks that the PTO might previously have refused as confusingly similar might now slip through to registration without attracting the notice of current registrants, thus diminishing the impact of depletion. But this would at the same time result in the registration of confusingly similar marks and leave lurking conflicts unresolved, making them costlier to resolve down the line if they emerge. Furthermore, to the extent that this reform would allow the registration of nonconfusingly similar marks that would formerly have been filtered out by the PTO's review, the result would be an increase in parallel uses and trademark congestion.

There is good reason to expect that changes like those we propose here would significantly inhibit trademark depletion and congestion. FDA rules that suppress trademark congestion for drugs, a harmful situation we discuss above,[309] provide an instructive case. The FDA, tasked with ensuring public safety with regard to drugs, not only regulates which drugs are to be approved for the market but also, in recent years, which marks businesses might use to market and sell drugs once approved.[310] Applicants submit up to two proposed names for evaluation, along with their intended pronunciation, possible derivations, in-

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[308] *See* Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark art. 8, 2017 O.J. (L 154) 1, 9–10. In 2007, the United Kingdom Intellectual Property Office adopted a comparable approach, in which it searches earlier trademarks and notifies the applicant of the existence of conflicting regulations. If the applicant proceeds with the registration, the Office notifies the owners of the conflicting registrations (provided they qualify for notification) and the owners may then oppose the applicant's registration. *See* U.K. INTELL. PROP. OFF., CONSOLIDATED TRADE MARKS RULES § 14 (2017); *see also* Christopher Benson & Oliver Loach, *Abolition of Relative Grounds Examination in the U.K.*, LAW360 (Nov. 26, 2007, 12:00 AM), https://www.law360.com/articles/40873 [https://perma.cc/M582-Y7XX].

[309] *See supra* pp. 1027–28.

[310] *See* Hannah Brennan, *The Cost of Confusion: The Paradox of Trademarked Pharmaceuticals*, 22 MICH. TELECOMM. & TECH. L. REV. 1, 17–18 (2015). A medication may be referred to by one of its three separate names: its chemical name, its generic (nonproprietary) name, and its brand (proprietary) name. *Id.* at 16. As Hannah Brennan notes as an example, "Tylenol[] is the brand name of the drug that has the chemical name N-(4-hydroxyphenyl)acetamide and the generic name acetaminophen." *Id.* Doctors and pharmacists principally use brand names to refer to drugs, FDA EVALUATION OF PROPRIETARY NAMES, *supra* note 255, at 4; Brennan, *supra*, at 18, which is why limiting congestion of these names is important.

tended meaning of any prefixes or suffixes, and pharmacologic category.[311] The FDA uses a rigorous multipronged approach to identify which submitted names are too confusingly similar to an already-existing drug name, including a preliminary screening to identify common errors; a search against already-established stems of drugs and chemicals; a computerized approximate-matching search for orthographic, phonetic, and packaging similarities; searches against drug databases; and prescription simulation studies.[312] Of the 500 names reviewed annually, the FDA rejects "roughly one-third."[313] Owing to this review, which keeps pharmaceutical brand names far apart from one another and from preexisting chemical terms, one commentator notes that "prescription drugs notoriously carry some of the most obscure brand names in business," with recent examples including "Celecoxib, Linezolid and Metaxalone — names that don't exactly roll off the tongue."[314] Not surprisingly, our data show that there is comparatively less congestion and lower rates of section 2(d) rejections in Class 5 (pharmaceuticals) than other classes.[315]

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311 FDA EVALUATION OF PROPRIETARY NAMES, *supra* note 255, at 10–11. Applicants can file proposed names for approval as early as after completion of a product's Phase II clinical trials. *Id.* at 8. If two names are submitted, one is specified as a first choice and the other as an alternate. *Id.* at 10. The alternate name is evaluated only if the first choice "is found to be unacceptable." *Id.*

312 *Id.* at 5–6. Examples of common errors include numbers in the name, which might incorrectly suggest dosing information, or the use of "TID," which is an abbreviation for three times a day. Jacqueline P. Scheib & Brendan Witherell, *The Basics of Drug and Medical Device Naming*, INT'L TRADEMARK ASS'N BULL., No. 15 (Sept. 1, 2011), http://www.inta.org/INTABulletin/Pages/TheBasicsofDrugandMedicalDeviceNaming.aspx [https://perma.cc/XX7D-HGAY]. The FDA's name approval process is distinct from the PTO's trademark registration process. *See* Frances M. Jagla & Boris Umansky, *Naming the Product: The Intersection of FDA and Trademark Law*, IP LITIGATOR, Jan.–Feb. 2009, at 13, 14. The PTO could, in theory, approve a drug mark only to have the FDA reject it, or vice versa. *See id.* The FDA also does not oversee a new drug's chemical or generic name. The International Union of Pure and Applied Chemistry creates the chemical name based on an internal set of rules. Scutti, *supra* note 105. The United States Adopted Name Council assigns a new drug's generic name in accordance with its own rules to avoid confusion with other generic drug names. *Id.*

313 Scheib & Witherell, *supra* note 312.

314 Nordrum, *supra* note 256; *accord* Scutti, *supra* note 105 (observing that recent drug names call to mind "aliens arriving from distant planets"); Luke Timmerman, *Why Are Drugs Getting Such Weird Brand Names?*, XCONOMY (May 9, 2011), http://www.xconomy.com/national/2011/05/09/why-are-drugs-getting-such-weird-brand-names/ [https://perma.cc/HWR6-EZER] ("Check a few of the newly-coined drug names — Incivek, Adcetris, Yervoy, Viibryd, Zytiga, Xgeva. Somewhere, the folks who sell Coca-Cola must be giggling at their friends who went into pharmaceuticals. How are you supposed to create an identity for a product, when people can't even spell or pronounce it, much less have any sense of what it means?").

315 *See supra* sections III.D, pp. 1003–08, & IV.B, pp. 1015–17 (reporting class-by-class section 2(d) refusals and class-by-class results of congestion of frequently used words). Another reason there is less congestion, and also depletion, in Class 5 is that barriers to entry in this space are high. Drug research is expensive, as is the FDA approval process. *See* Hannah Brennan, Amy Kapczynski, Christine H. Monahan & Zain Rizvi, *A Prescription for Excessive Drug Pricing: Leveraging Government Patent Use for Health*, 18 YALE J.L. & TECH. 275, 279, 343 (2016). Fewer entrants mathematically means less opportunity for depletion or congestion. Compare Class 5 with the

It is crucial to note that all of the recommended — and even proposed but rejected — changes set forth above affect only the registration of marks. Comparable reforms should be implemented outside of the context of registration. Most pertinently, federal law also protects unregistered marks.[316] Such marks should be subject to the same heightened requirements for the showing of use in commerce and, when they are descriptive, for the showing of acquired distinctiveness.[317] More generally, in light of the harms of depletion and congestion, courts should feel empowered to adjudicate more permissively the fair use defense, both in its descriptive and normative forms.[318] Relatedly, with respect to the basic test for the likelihood of consumer confusion, courts may increasingly be compelled to strike a difficult balance in which they allow somewhat confusingly similar marks to remain in the marketplace in order to promote competition, even though doing so may impose greater search costs on consumers.[319]

Finally, at a minimum, policymakers, judges, and trademark examiners should take into account depletion and congestion data like those we have gathered here in any future reforms of trademark law. For example, the PTO has recently proposed a new "Merely Informational Matter" examination guide that seeks to tighten current standards on the registration of matter that merely provides information about a good or service and is not perceived by consumers as source denotative.[320] Data like ours not only show the need for this reform but could be used

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relatively higher degrees of depletion and congestion in Class 25 (apparel goods) and Classes 32–33 (beers and other alcoholic beverages), in which the barriers to entry are significantly lower. Maureen Farrell, *How to Set Up a Clothing Retailer: Start-Up Costs*, FORBES (Jan. 9, 2007, 6:00 PM), https://www.forbes.com/2007/01/09/startupcost-inventory-rent-ent-manage-cx_mf_0109fundamentalsretailcosts.html [https://perma.cc/56MK-VV6U]; Steve Nicastro, *How to Start a Craft Brewery*, NERDWALLET (Mar. 11, 2016), https://www.nerdwallet.com/blog/small-business/how-much-does-it-cost-to-start-a-craft-brewery/ [https://perma.cc/3KHN-ZVYD].

316 It currently remains an important open question in trademark law whether unregistered "common law" marks, which the Lanham Act protects, *supra* section I.A.4, pp. 961–62, ought to be held to the same standards specified in the Lanham Act and developed by courts for registered marks. *See* Tushnet, *supra* note 77, at 881–916; *supra* note 77 (discussing Tushnet's work).

317 *See supra* pp. 1036–37.

318 *See, e.g.*, KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004) (noting that the "common law of unfair competition . . . tolerated some degree of confusion," *id.* at 119, and holding that "some possibility of consumer confusion must be compatible with fair use," *id.* at 121).

319 *See* McKenna, *supra* note 241, at 86–92. Another possibility is to enable private actors to do more to allocate trademarks among themselves as a way to ameliorate depletion and possibly congestion. However, trademark law prohibits assignments in gross, which are sales of a trademark divorced from its good will. *See* Topps Co. v. Cadbury Stani S.A.I.C., 526 F.3d 63, 70 (2d Cir. 2008) ("An assignment 'in gross' is a purported transfer of a trademark divorced from its goodwill, and it is generally deemed invalid under U.S. law."). To facilitate a market in trademarks, trademark law could become more permissive about allowing trademark assignments in gross.

320 *See* U.S. PATENT & TRADEMARK OFFICE, EXAMINATION GUIDE 2-17: MERELY INFORMATIONAL MATTER (2017), https://www.uspto.gov/sites/default/files/documents/Merely_Informational_Matter_Exam_Guide_July_2017.doc [https://perma.cc/224T-BYGS].

in the future to aid in determining what matter in particular cases should be deemed merely informational because it is highly congested.

In sum, the depletion and congestion data clearly show that, going forward, trademark policy must address the degree to which depletion and congestion impose significant barriers to entry on nonincumbents and undercut the law's central goals of promoting efficient competition and reducing consumers' search costs. Though we have only sketched out in this section various reforms that may aid in reducing depletion and congestion and mitigating their harms, we are confident that, whether globally or on a case-by-case basis, the incorporation of data like ours into the trademark policymaking and adjudication process will greatly improve, if not preserve, the trademark system.

CONCLUSION

This Article has defined the phenomena of trademark depletion and congestion, developed frameworks for evaluating their severity, and, with respect to word marks, shown through a wide variety of empirical evidence that both depletion and congestion are becoming increasingly serious problems for the trademark system. As we explained above, we do not expect ever to reach a condition in which we have "run out" of trademarks. Firms will likely always be able to find, as they do now, some minimally communicative sign by which to identify and distinguish their goods or services. But as depletion and congestion continue to intensify, firms will find such signs at greater cost and with less benefit. Incumbent advantages will grow as will barriers to entry for nonincumbents. Consumer search costs will continue to increase. More and more of our daily language, both commercial and noncommercial, will operate in the shadow of trademark property rights. What makes trademark depletion and congestion so dangerous is that we may not fully recognize these trends as they continue to mount — and as we continue to try to adapt. Both processes are gradual. But this cannot be an excuse for inaction. We think the reform proposals we have surveyed above are a good place to start.

In the meantime, further work remains to be done to better understand trademark depletion and congestion. Most important but also most challenging will be the study of image mark depletion and congestion. There is already strong anecdotal evidence that both processes have reached chronic levels.[321] A full understanding of depletion and

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[321] *See, e.g.*, Tushnet, *supra* note 77, at 927–29 (discussing, in light of this article's findings, a recent Federal Circuit opinion concerning the PTO's refusal to register a paw print trademark for clothing, which noted the multitude of other paw print designs already registered or in use as trademarks on clothing (citing Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U., 797 F.3d 1363 (Fed. Cir. 2015))).

congestion should also incorporate semantic similarity, such as when a mark like TORNADO for wire fencing precludes the registration of the mark CYLCONE for the same goods.[322] Our results are conservative because we have not included this dimension of similarity. We additionally hope to extend our framework and methods to other trademark systems, most notably the European trademark system, and to other similar naming regimes, such as the Delaware Corporate Registry and financial market stock symbols. Finally, a great deal of work remains to be done on specific trends revealed by the PTO's Case Files Dataset, including trends in applicants' disclaiming of rights in parts of their marks, applicants' reclaiming of marks abandoned by others, trademark licensing practices, and the effects of registrations containing foreign words.

We expect that such work will further amplify the themes we have pursued throughout this Article: that the supply of effective trademarks is not inexhaustible, that the granting of trademark rights is not costless, that the costs of granting such rights have been significantly increasing, and thus that the ecology of the trademark system is undergoing increasing strain. Over the two centuries of its development, the American trademark system has always assumed the existence of an open frontier of unclaimed, competitively effective trademarks. This assumption pervades American trademark law and policy. Yet our data show that this frontier is closing. Our hope is that the data will prompt recognition of and guide adaption to this new condition.

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[322] *See* Hancock v. Am. Steel & Wire Co. of N.J., 203 F.2d 737 (C.C.P.A. 1953) (affirming the PTO's refusal to register CYCLONE for wire fencing because of its semantic similarity with TORNADO for the same goods and noting that "[t]he meaning of these two words is the crux of the case," *id.* at 740).

APPENDIX: INTERNATIONAL SCHEDULE OF CLASSES OF GOODS AND SERVICES (NICE CLASSIFICATION)

Goods

1. Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry.

2. Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; colorants; mordants; raw natural resins; metals in foil and powder form for use in painting, decorating, printing and art.

3. Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; nonmedicated soaps; perfumery, essential oils, nonmedicated cosmetics, nonmedicated hair lotions; nonmedicated dentifrices.

4. Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels (including motor spirit) and illuminants; candles and wicks for lighting.

5. Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for humans and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.

6. Common metals and their alloys, ores; metal materials for building and construction; transportable buildings of metal; nonelectric cables and wires of common metal; small items of metal hardware; metal containers for storage or transport; safes.

7. Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements other than hand-operated; incubators for eggs; automatic vending machines.

8. Hand tools and implements (hand-operated); cutlery; side arms; razors.

9. Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), lifesaving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus.

10. Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; therapeutic and assistive devices adapted for the disabled; massage apparatus; apparatus, devices and articles for nursing infants; sexual activity apparatus, devices and articles.

11. Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes.

12. Vehicles; apparatus for locomotion by land, air or water.

13. Firearms; ammunition and projectiles; explosives; fireworks.

14. Precious metals and their alloys; jewellery, precious and semi-precious stones; horological and chronometric instruments.

15. Musical instruments.

16. Paper and cardboard; printed matter; bookbinding material; photographs; stationery and office requisites, except furniture; adhesives for stationery or household purposes; artists' and drawing materials; paintbrushes; instructional and teaching materials; plastic sheets, films and bags for wrapping and packaging; printers' type, printing blocks.

17. Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials; plastics and resins in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, tubes and hoses, not of metal.

18. Leather and imitations of leather; animal skins and hides; luggage and carrying bags; umbrellas and parasols; walking sticks; whips, harness and saddlery; collars, leashes and clothing for animals.

19. Building materials (nonmetallic); nonmetallic rigid pipes for building; asphalt, pitch and bitumen; nonmetallic transportable buildings; monuments, not of metal.

20. Furniture, mirrors, picture frames; containers, not of metal, for storage or transport; unworked or semi-worked bone, horn, whalebone or mother-of-pearl; shells; meerschaum; yellow amber.

21. Household or kitchen utensils and containers; combs and sponges; brushes, except paintbrushes; brush-making materials; articles for cleaning purposes; unworked or semi-worked glass, except building glass; glassware, porcelain and earthenware.

22. Ropes and string; nets; tents and tarpaulins; awnings of textile or synthetic materials; sails; sacks for the transport and storage of materials in bulk; padding, cushioning and stuffing materials, except of paper, cardboard, rubber or plastics; raw fibrous textile materials and substitutes therefor.

23. Yarns and threads, for textile use.

24. Textiles and substitutes for textiles; household linen; curtains of textile or plastic.

25. Clothing, footwear, headgear.

26. Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; hair decorations; false hair.

27. Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (nontextile).

28. Games, toys and playthings; video game apparatus; gymnastic and sporting articles; decorations for Christmas trees.

29. Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.

30. Coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; edible ices; sugar, honey, treacle; yeast, baking powder; salt; mustard; vinegar, sauces (condiments); spices; ice.

31. Raw and unprocessed agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetables, fresh herbs; natural plants and flowers; bulbs, seedlings and seeds for planting; live animals; foodstuffs and beverages for animals; malt.

32. Beers; mineral and aerated waters and other nonalcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.

33. Alcoholic beverages (except beers).

34. Tobacco; smokers' articles; matches.

Services

35. Advertising; business management; business administration; office functions.

36. Insurance; financial affairs; monetary affairs; real estate affairs.

37. Building construction; repair; installation services.

38. Telecommunications.

39. Transport; packaging and storage of goods; travel arrangement.

40. Treatment of materials.

41. Education; providing of training; entertainment; sporting and cultural activities.

42. Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software.

43. Services for providing food and drink; temporary accommodations.

44. Medical services; veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services.

45. Legal services; security services for the physical protection of tangible property and individuals; personal and social services rendered by others to meet the needs of individuals.

Searching: Traps, Tools and Tricks of the Trade

The search is the single most important step in the life of a trademark – the time when a trademark professional has the opportunity to gauge the potential for risk in adopting a new mark, and craft a plan for using the mark without challenge (if that's possible) and obtaining registration without objection or opposition (if that's possible).

You could write a book about searching (and we have). How to capture the most pressing issues and latest trends in a few pages? Here we highlight:

The issues that can get overlooked in developing the clearance opinion

- ✓ TOP 10 TRAPS
  page 4

The tips and pointers that we think can improve the search process

- ✓ TOP 10 TOOLS & TRICKS OF THE TRADE
  page 9

Introduction:

The search typically begins because a business or organization wants to use a new

- Brand name
- Tagline
- Logo
- Package design
- Trade dress

Today, almost all companies recognize that some sort of clearance search is necessary.

What the client says is:
"Give me an easy-to-understand 'yes' or 'no' answer"

What the client really means is:
"Just give me a 'yes'**...** with no surprises"

What types of surprises could there be? *And what questions do we ask when surprises arise?*

- Another company makes a cease-and-desist demand – involving a mark that wasn't in the search
  Question: Did we not search adequately?

- Another company makes a cease-and-desist demand – involving a mark that was in the search
  Question: Did we not analyze the risk properly?

- The USPTO refuses to register the mark – citing a conflicting third party mark
  Question: Did we fail to anticipate a mark that an examiner was likely to cite?

- The USPTO refuses to register the mark – based on descriptiveness, surname, geographic, failure to use as a mark, or other grounds
  Question: Did we fail to anticipate the objection?

In all these cases, the answer might be that the clearance process wasn't flawed – it's simply a situation in which the cease-and-desist letter or the examiner's rejection really doesn't have merit. After all, every company receives off-the-wall demand letters and refusals, and we can't stop that from happening occasionally.

However, we do want to make sure that the search process identifies the genuine problems that could result in bona fide infringement claims and refusals, and could jeopardize the company's ability to use the mark, or at least to get it registered.

What does it take to avoid these problems?

Proper planning and execution

A good search requires:

- Smart strategies, careful queries
- Enough time to conduct proper investigation

Careful analysis of results

An insightful analysis requires:

- Knowledge of trademark law
- Knowledge of product/service marketplace
- Ability to read between lines of search records
- Good judgment

Good searching isn't easy, and gets tougher every day.
Why? Let us count the ways……

Top 10 Traps:
Pitfalls in Trademark Opinions

Here are things to look out for when you are reviewing the search and crafting your opinion.

1. Assuming your client reads beyond the first paragraph of your opinion

We know that inside counsel have to keep it short, because their clients simply will not read long opinions. Outside counsel tend to write longer opinions. Whether short or long, it really is possible to come to a conclusion in the first paragraph, but it's tough.

Although our clients want "a simple 'yes' or 'no'," it's not that simple, because if a trademark professional looks at a search and asks only 1 question -- Are any of the marks in this search confusingly similar? -- you've missed the boat.

There are at least 5 questions we ask in getting to that simple "yes/no" under U.S. law:

1. Will the new mark infringe?
2. Will the new mark dilute?
3. Is there high risk of challenge (regardless of the merits)?
4. Can the mark be registered?
5. What's the strength of the mark?

2. Equating ability to register with ability to use (and vice versa)

Many marketers think that the ultimate mission is to "get" a trademark -- they tend to think of the goal as getting a registration. And the business client wants no surprises, so if the search reveals potential problems with registration, the opinion should flag that possibility. However, the opinion also needs to distinguish between the ability to use and the ability to register – and in the U.S. and some common law countries, it should explain that getting a registration is desirable but not mandatory.

3. *Not e*quating ability to register with ability to use

Then again, in some countries the inability to get a registration does essentially mean no trademark rights.

To make it even more complicated, in some countries the fact that you can get a registration may not mean that much, because the examiners don't examine your

application for similarity with prior filings. It's all about whether your application gets opposed.

In doing a multinational search, it's important to remember that the ability to register varies in significance from country to country. It's obviously tough to communicate that fact in a simple "yes/no" opinion.

4. Assuming a third party mark is weak because of multiple applications/registrations

Trademark professionals often look at a search and conclude that the new mark can coexist with prior marks because there are already multiple similar federal marks – which suggests that none of them is very distinctive, and that none has very strong rights.

But is that true or an optical illusion?

The search may reveal multiple similar marks in the same field, but how many of them are:

- Old deadwood registrations
- Intent-to-use applications for marks that have not yet been used (and may never be used)
- Section 44 and Madrid Protocol registrations for marks that have never been used in the U.S.

If consumers have never seen these marks, they cannot weaken the distinctiveness of a mark that has actually been used.

5. Assuming a third party has no rights because of disclaimer or Supplemental Registration

Here's another situation where appearances may be deceiving – the prior registrant has disclaimed the exclusive use of a term that's identical to your proposed mark, or your entire proposed mark may already be on the Supplemental Register, signifying that it's descriptive.

Can you disregard it? It's important to look closer. Is it an older registration? Is it the only mark on the register with that phrase? The registrant may surprise you by claiming that it <u>does</u> have trademark rights, because the mark has been used long enough to obtain secondary meaning.

6. Overlooking possibility of initial interest confusion or post-sale confusion

In reviewing the search, our focus is typically on the risk of conventional confusion -- will people who encounter the client's mark mistakenly assume some sort of connection with an existing mark? This is the core concern – mentally applying the Polaroid test, plus what your gut tells you.

But the analysis isn't complete unless we're also thinking about the following types of confusion:

Initial interest confusion: Consider a situation where the purchasers are professionals rather than consumers, the purchasing decision is made after considerable deliberation (not an impulse buy), and the purchase price is high. The professional purchaser would never confuse the origin of the goods/services if presented with a sales presentation -- but that purchaser might be initially confused when a salesman makes a cold call using a similar mark -- and the salesman uses that confusion to get his foot in the door. This is a theory that's not accepted in all circuits, but if the mark will be used nationwide, that doesn't matter.

Post sale confusion: Consider a situation where no one would be confused by the product when it is on the shelf in its packaging (e.g., because the brand names and trade dress are different), but the products look alike when actually used/worn/consumed. Example: someone serves you a bowl of crackers shaped like goldfish, or hoop-shaped hard candies. You don't see the original package, and you assume they are Pepperidge Farm Goldfish or Life Savers (but they aren't).

7. Overlooking possibility of reverse confusion

Also consider the reverse confusion scenario – a big company enters the market with a mark similar to the mark that a little company is already using. No one would reasonably think that the big company's product is associated with the little company -- but people encountering the little company's use might think the little company was licensed by or affiliated with the big company, or is using the big company's technology or ingredients.

In clearing a trademark for a big company, if you don't consider the potential for reverse confusion, you're missing the boat. This type of claim is particularly dangerous, because it creates potential for a situation where:

- The court sympathizes with David vs. Goliath
- The press may view the case the same way
- Exposure for damages could be higher

8. Overestimating or underestimating impact of house mark or trade dress

Will the mark you're clearing be used with a house mark and distinctive trade dress?

- If it's a relatively weak mark, that may clear the path to use, because the overall combination will be very different from what a third party is using – consumers will look to the house mark as the primary indicator of origin, and the products will look very different on the shelf.
  However…
- Is it practical for you to clear the mark with the caveat that it will be used with that house mark and that trade dress? Once the client perceives the mark as having been "cleared", it may decide a year from now to make a very different use of the mark, with the house mark nowhere in sight.

9. Not considering PTO surname or geographic objections

In determining whether a mark can be registered in the U.S., we typically focus on:

- 2(d) third party mark refusal
- 2(e) descriptiveness refusal

We also have to remember that there are other, more obscure reasons why an examiner can refuse registration

- it's a surname
- it has geographic significance

Surname refusals are particularly difficult to deal with, even where the name is obscure, since the PTO can argue that it has the "look and feel" of a surname. An online phone directory is a good place in which to search to see if it's a surname. Then you can search the web to see if it could be something besides a surname -- since the test is whether it's primarily merely a surname.

As for geographic refusals, an Internet search can provide a more realistic picture of the association between a place and a particular product, based on the number of hits and their significance.

10. Failing to compensate for the blind spots.

Three blind spots inherent in searching prevent the search from being absolutely comprehensive.

- Missing data In every search database, there is a lag between the date an application was filed and the date it was entered into the database. How to deal with this gap?

  Solution: Conduct a follow-up search online after delivering the search opinion, but before the final decision is made.

- Section 44 and Section 66 applications Foreign applicants who file in the U.S. based on a home country application can obtain their home country filing date for a U.S. application if the U.S. application is filed within 6 months. During those 6 months, the mark may not appear in a U.S. search.

  Solution: Conduct an online foreign search for identical marks to spot possible future Section 44 and 66 filings.

- Trade dress A limited amount of trade dress is federally registered. There are no easily searchable common law sources. Design patents can cover similar configurations.

  Solution: Search creatively, watch the marketplace, conduct a design patent search.

Top 10 Tools, Tips, and Tricks of the Trade:

1. Guide the client's do-it-yourself efforts.

Today everyone searches the web – including the marketers at your company. That's a change from the past, when trademark professionals controlled access to search data:

Prior to 1980s:
Outside search firm conducts search --
Counsel has no involvement

1980s:
Introduction of on-line resources --
Counsel can now do online screening searches

1990s:
Web and CD-ROM resources increase access --
Counsel can now do extensive online searching

Today:
PTO and web search engines --
Everybody's a searcher!

Your marketers are going to the PTO database and plugging in marks they are considering using.

Is that a good thing?
Yes and no.

If your business has his/her heart set on a mark that someone else is already using for a competing product, and the client can figure that out without incurring counsel fees, that's a good thing.

But it's too easy to get false negatives and false positives.

The more you know about trademark searching, the more you realize how easy it is to miss things, for a long list of reasons, including the following:

- marks that are deliberately misspelled
- coined marks have multiple phonetic variations
- all the other quirks of the English language

Aside from the inherent quirks in searching, the PTO site isn't user-friendly, and is less accurate than commercial databases.

And there's the problem of knowing how to interpret the results:

- Sometimes a mark that at first glance is a dead-on hit can turn out to be deadwood

- A mark that looks innocuous because of a vague description of goods or services can turn out to be a problem

It's easy for clients to get confused or frustrated because what they conclude from their own search may be drastically different from the advice they ultimately get from counsel.

If your clients like the convenience of searching for themselves, it's difficult to tell them "no" -- because everyone thinks they are capable of searching on the web.

The solution – steer them away from the PTO website, and toward web search engines like Google, Bing, or Yahoo. There are several reasons for this:

1. Clients are familiar with search engines, and they're user-friendly, with no learning curve.

2. The web is a great search tool. Now that businesses large and small have web sites, it's chock full of brand names, trade names, and slogans.

3. If the client finds a potential conflict, the client sees the mark in its natural habitat -- what the business really does, what the trade dress looks like. The client can get a gut-level feel for whether its new brand can co-exist in the marketplace, and not just on the trademark register. This can be more instructive than a PTO description drafted by a lawyer in PTO-speak.

4. Clients have realistic expectations about the results -- they know that the web is a vast place, that search engines can't be expected to retrieve everything, and that a lot of what they retrieve will be irrelevant. If they use the PTO database, they don't bring that same skepticism to it. But they do bring built-in skepticism to what they find in a web search.

2. Improve the quality of information the client provides.

The more that a trademark lawyer knows about the client's intentions for the mark, the better. Not just the mark and the goods, but details about the nature of use (including logo and trade dress), the length of time the mark will be used, and the client's "inspiration" for the mark (based on industry term of art? a play on another company's mark?).

3. Calibrate the search to match the potential risk

How do you avoid spending all your budget on a full search on every mark?

Searching is an effort to reduce the risk in adopting a new mark – but different risks are inherent in different situations:

- With most marks, the risk justifies the cost of a full search.
- With some marks, something less comprehensive may be appropriate.
- With some marks, more than a standard full search may be appropriate.

Different levels of searching can be appropriate for different types of marks:

- Multinational brand
- House mark
- Primary brand
- Variety names
- Tag lines
- Short term promotions
- Presumably descriptive terms

Searching can also be calibrated depending on the nature of the use. Some questions to ask:

- How important is the mark in marketing and selling?
- Will the product/service have a high profile?
- How large will the investment in the mark be?
- What logistical problems would result if the mark had to be changed?
- Will the mark be licensed to third parties?

4. Develop your definition of “good faith”.

After considering the factors above, you can develop a plan for how extensively different types of marks will be searched – which will help you show (if you’re ever challenged) that less than a full search supported your claim to have adopted the mark in good faith.

For example, if a mark will only be used on a t-shirt for 2 months, your policy could be not to do a full search on those marks. As long as you do some searching, and develop a relatively consistent policy as to what marks get what level of searching, you should be able to defend that approach as good faith.

5. Take advantage of free search tools.

Use free search tools (with caution) --
the PTO website provides free access to U.S. trademark data for anyone.

6. *But* -- be careful of free search tools.

"You get what you pay for".

- Is the PTO website a good tool for sophisticated TM owners?
- How does it compare with commercial databases from Thomson and Corsearch?
- Is it an appropriate way for counsel to cut search costs? Are we being pennywise but pound-foolish to use it?

There's no such thing as a free lunch – the PTO website:

- is likely to turn up less information than a pay-as-you-go search tool, because commercial data providers add cross-references for unconventional spellings and other quirks
- is less user-friendly to operate than a commercial database, creating a greater potential for error.

The best commercial databases enhance the PTO data and try to catch and cross-reference marks the PTO missed, by having real live humans analyze the marks. If you're running a preliminary search, your results will be less comprehensive on the PTO database than with a commercial database. Thus, if you use PTO web site to do preliminary searches for clients, it's free, but you'll potentially miss things. A commercial search database costs money, but gets you more comprehensive results.

Recommendations:

Consider using PTO database

- if the mark will eventually receive a more comprehensive search
- if phonetic variations and wordplay *seem* limited

Consider using commercial database

- if the client will rely on preliminary search to take next steps
- if the preliminary search is the only federal clearance you do

7. For foreign clearance, look before you leap.

What's an economical solution for international clearance? How can you avoid spending money on multiple foreign counsel opinions?

You can run preliminary foreign searches on your own and give preliminary advice with caveats. The tools include:

- Commercial pay-as-you-go online sources

- Major foreign trademark offices with free online databases

With these preliminary search tools, you can spot the marks that you think are the biggest problems, and consult with foreign counsel in problem countries before running a full search. If no clear obstacles arise, you can then obtain full searches and opinions where warranted.

How to choose which countries for full searches?

Select countries according to:

- Most important markets for this product/service *and/or*
- Largest markets by population or GNP *and/or*
- Markets whose trademark registers are most likely to include unique marks that would not appear in other countries

Keep in mind the fundamental difficulties of clearance outside the U.S.

- Countries without substantive examination
  (multiple identical marks may appear on the register)
- Countries with very broad descriptions of goods/services
  (does an all-class i.d. really block a newcomer's mark on one item in that class?)
- Availability of consents
  (is a consent a sensible tool to get around the two problems above – or is it asking for trouble?)

Still, an economical plan also cannot avoid the fact that, at the end of the day:

- U.S. lawyers are not qualified to make definitive judgments about what's infringing and what's registrable
- U.S. lawyers cannot make judgments about similarity/meaning in a language they don't speak
- U.S. lawyers may have difficulty in making judgments about idioms in non-U.S. English

8. Commercial search databases are not all alike – take a test drive.

Kick the tires:

- Some databases provide the same data as PTO web site, but with a different user interface
- Some enhance the raw data that they get from the PTO

9. Plan your registration strategy as you develop the search opinion.

If you look at a search and ask “Can the mark be registered?” You can also ask the question “What can we do to get this mark registered?”

The search shouldn’t be isolated from the registration process – it should instead instruct us on how we can craft the application to increase chances of registration.

The search is the blueprint for a successful registration strategy, and can influence whether to:

- Register accompanied by house mark
- Register in logo form
- Limit the classes of goods/services to avoid conflict
- Craft the I.D. to avoid conflict
- Volunteer a disclaimer to avoid conflict or refusal

And one final tip….

10. Assume nothing, question everything.

(and enjoy the ride!)

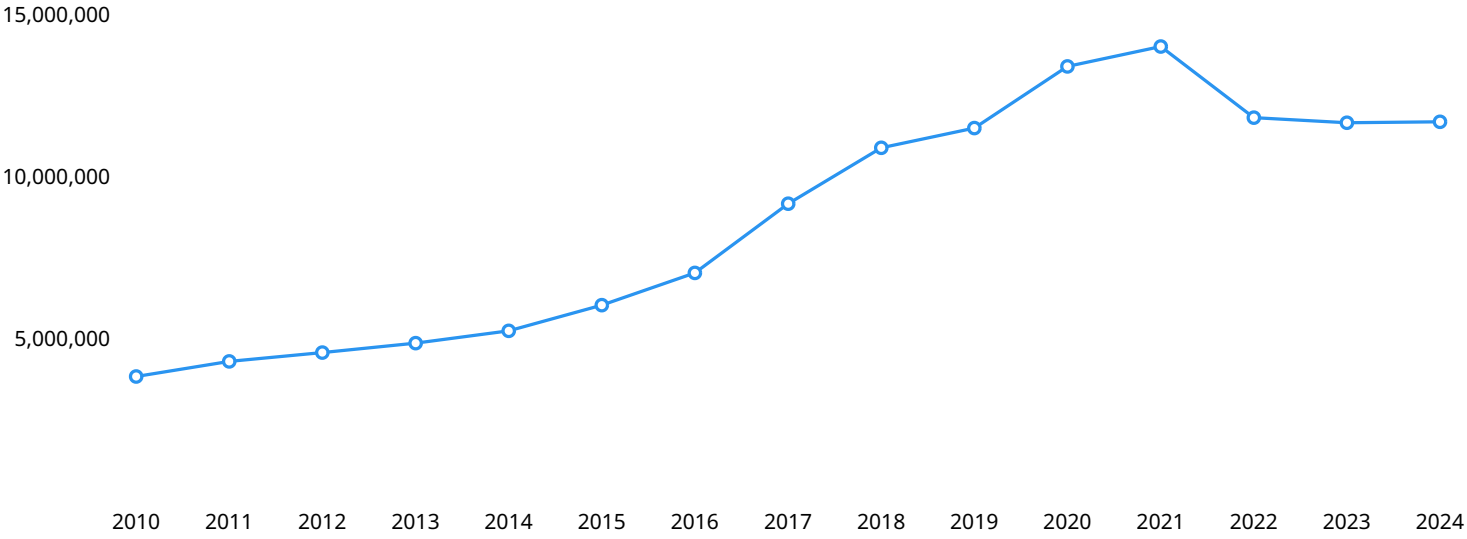
Trademarks highlights

Trademark applications show a marginal recovery in 2024

Global trademark applications experienced a slight uptick in 2024, with an estimated 11.7 million applications filed worldwide – approximately 29,000 more than the previous year. While this represents only a slight growth of 0.3%, it does signal a return to positive territory following two years of declining applications (figure 2.1). This recovery, though modest, contrasts sharply with the dramatic surge in applications seen during the early period of the COVID-19 pandemic. In 2020, trademark applications jumped 16.6% as businesses rushed to protect new goods and services amid rapidly changing market conditions. The steep 15.7% fall in applications in 2022 largely explains why 2024 filings exceed 2019 pre-pandemic numbers by only about 2%. The recent declines in 2022 and 2023 interrupted a remarkable 12-year expansion period that began after the 2009 financial crisis. Despite these decreases, the long-term growth trajectory remains notable – 2024 applications were approximately three times higher than 2010 levels, driven largely by double-digit increases in seven of the past 15 years.

Global trademark applications totaled an estimated 11.7 million in 2024, up by around 29,000 on the previous year

2.1. Trademark applications worldwide, 2010–2024



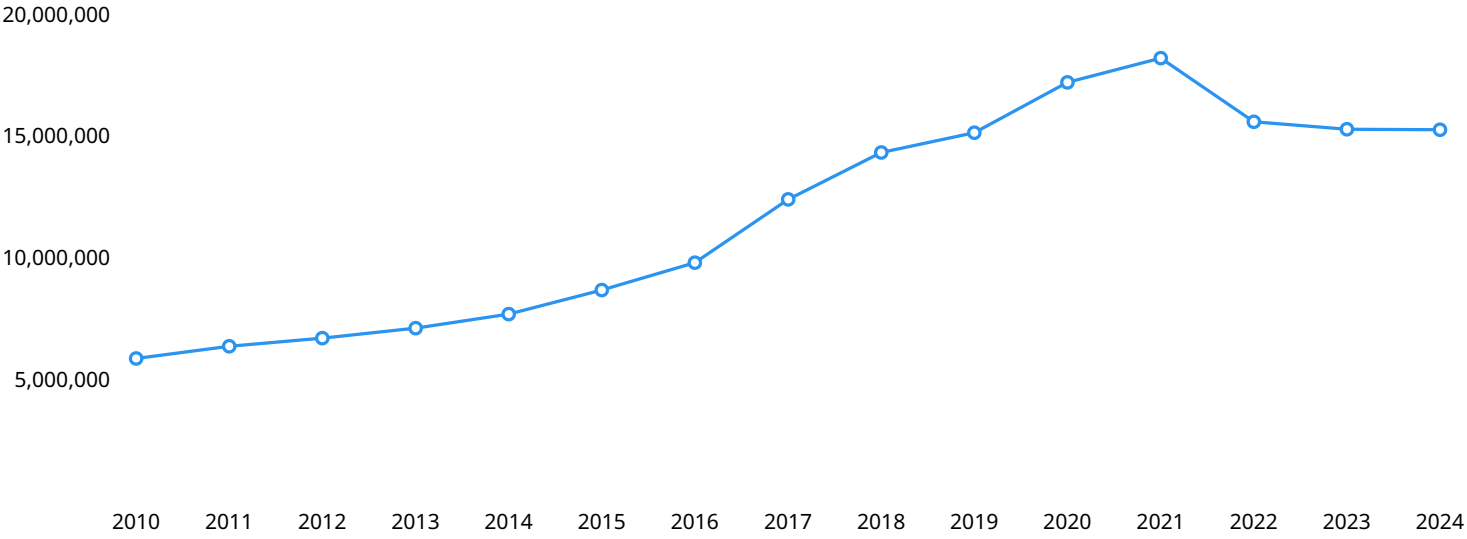
Source: World Intellectual Property Indicators 2025 • Get the data • Embed • Download image

When differences between filing systems across national and regional offices are harmonized based on application class count, 2024 showed a minor on-year decrease in trademark filing of 0.1%. The total number of classes specified in applications – known as the application class count – declined marginally from 15.25 million in 2023 to an estimated 15.23 million in 2024 (figure 2.2). So, although the numbe
increased in 2024, the total number of goods and services classes specified in the

global application class count experienced a steep decline of 14.4% in 2022, followed by a smaller 2% decrease in 2023. Together with the drop in 2024, these three consecutive years of decline are the only period the global application class count has fallen over the past 15 years.

The total number of classes specified in trademark applications declined slightly by 0.1% between 2023 and 2024

2.2. Trademark application class counts worldwide, 2010–2024



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> **Class count**
>
> A trademark application can refer to different classes of goods or services. Many offices use the Nice Classification. This is an international classification of goods and services used for registering trademarks and service marks. Applications received at these offices are classified according to one or more of 45 Nice classes (see www.wipo.int/classifications/nice). Some offices allow only single-class filing, meaning applicants have to file a separate application for each class. Others permit multi-class filing, enabling applicants to file a single application in which a number of classes are specified. To improve international comparison of the number of applications received, it helps to compare class counts across offices. Class counts are also used to make trademark registration internationally comparable. This method for comparing offices began in 2004, the first year for which complete class count data are available.

Offices with the largest volumes of trademark filing

The office of China maintained its position as the world's most active office in terms of trademark filing in 2024, despite experiencing a 2.9% decline compared to the previous year. The office of China's application class count of approximately 7 million was significantly higher than that of the United States of America (US), which had a class count of 795,337 (figure 2.3). These two offices have held the top two positions in trademark filing since the early 2000s, but the gap between them has widened considerably over time. China's remarkable increase in filing becomes clear when comparing relative volumes: what for China was nearly three times the US filing level in 2010 had grown to almost nine times by 2024. This surge stems primarily from applications filed by residents of China. The Russian Federation (567,227), India (5 rounded out the top five filing offices. Combined, these five offices accounted for

filing based on application class counts in 2024. Such a concentration represents a significant increase from a decade earlier in 2014, when the top five offices (then comprising the European Intellectual Property Office (EUIPO), China, France, Japan and the US) received 47.1% of global filing.

Of the top 20 offices, 15 recorded increases in trademark filing in 2024 compared to 2023 (figure B10). This marks a significant turnaround from 2023, when 13 of the top 20 offices experienced an on-year decline. The top offices showing the strongest growth in 2024 were Argentina (+17.4%), Brazil (+9.7%), Indonesia (+9%), Viet Nam (+8.6%) and the US (+7.6%). Growth patterns varied considerably among the top offices. Where both resident and non-resident filing increased, overall growth was primarily driven by higher domestic demand at six offices, with resident filing accounting for the bulk of total growth in each case. For example, resident filing in Argentina contributed 16.5 percentage points of that office's 17.4% total growth, whereas non-resident filing contributed only a 0.9 percentage point to the total. Conversely, at six offices growth came mainly from foreign demand. In the US, for instance, non-resident filing drove 5.4 percentage points of the 7.6% total increase, with resident filing contributing just 2.2 percentage points. The offices of India and Italy presented a unique scenario in which growth in resident filing compensated for a decline in non-resident filing to yield positive overall growth. Unlike the 15 offices that saw a higher volume of trademark filing in 2024 than the previous year, the remaining five top offices recorded an on-year decrease. Canada and the Islamic Republic of Iran experienced the largest declines of 5.5% each, followed by Japan (–4.5%), France (–4.3%) and, as previously mentioned, China (–2.9%). These reductions stemmed primarily from reduced domestic demand with residents filing fewer trademark applications. With the exception of Japan, these other four offices also saw some decline in non-resident filing. However, its impact was considerably smaller than that of the drop in domestic filing.

The top 20 offices in 2024 were distributed across different income levels. Eleven were located in high-income economies, seven in upper middle-income countries (Argentina, Brazil, China, Indonesia, the Islamic Republic of Iran, Mexico and Türkiye) and two in lower middle-income countries (India and Viet Nam). Certain offices from low- and middle-income countries, while not among the top 20, still recorded substantial trademark filing measured in application class counts (figure B11). These included, for example, Thailand (73,552), the Philippines (67,868), Pakistan (59,073), Ukraine (54,742) and Colombia (52,885). Among 20 selected offices in low- and middle-income countries, several achieved a remarkable annual growth rate of 15% or higher: Kazakhstan led with 25.4% growth, followed by Guatemala (+16.8%), Morocco (+15.8%), Mongolia (+15.4%) and Pakistan (+14.7%). Conversely, there were declines at six of the selected offices, with Bangladesh (–7.2%) and Kenya (–3%) recording the largest decreases (figure B12).

At most offices, the majority of applications originated from residents aiming to secure trademark protection within their domestic jurisdiction. In 2024, filing by residents at their home or regional office constituted 84.1% of the global total, with the remaining 15.9% attributable to non-resident filing (figure B3). Historical trends show that domestic filing growth typically exceeded non-resident growth through until 2020. This pattern shifted in 2021 when non-resident filing surged 21.5%, largely outpacing a domestic growth of only 3.3%. However, demand from both residents and non-residents alike declined in 2022 and 2023, contributing to an overall drop in global trademark filing. Filing in 2024 was mixed: non-resident filing rebounded modestly by 0.4%, while resident filing continued falling by 0.2%. This decline in domestic applications was largely driven by a nearly 3% decrease in resident filing in China.

The share of non-resident filing within the global total has declined significantly over the past decade and a half, falling from 26.7% in 2010 to 15.9% in 2024 – a drop of nearly 11 percentage points. This shift primarily reflects the substantial volume of resident trademark applications filed in China. [illegible] the analysis, the decline in non-resident share becomes far more modest, droppi[illegible] percentage points over the period.

Among the top 20 offices, five received more than one-third of applications from non-residents– well above the global non-resident share of 15.9%. The EUIPO (34.5%) and the offices of Australia (44.4%), Canada (65.2%), the United Kingdom (UK) (44.3%) and the US (38%) stand out with the largest shares in this regard (figure B9). At the opposite end of the spectrum, nine top offices recorded particularly low non-resident shares of about 10% or less: namely, Brazil (9.1%), China (2.7%), France (5.2%), Germany (10.4%), India (7.7%), the Islamic Republic of Iran (2.3%), Italy (7.7%), the Russian Federation (7.7%) and Türkiye (8.1%). The low non-resident percentages for EU member state offices France, Germany and Italy reflect the fact that many international applicants seek trademark protection within EU countries through the EUIPO rather than individual EU national offices.

At the EUIPO and the offices of the UK and the US, non-resident applicants comprised about 35% to 44% of overall trademark filing

2.3. Trademark application class counts for the top 10 offices, 2024



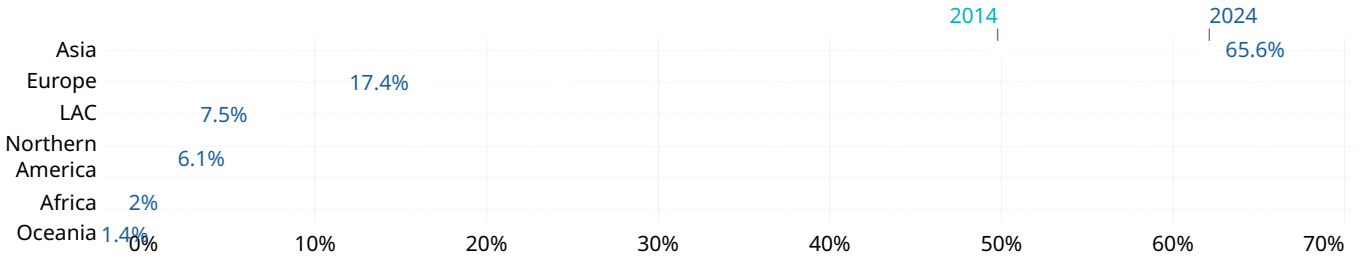
Note: EUIPO is the European Union Intellectual Property Office.
Source: World Intellectual Property Indicators 2025 • Get the data • Embed • Download image

The composition of the top 20 offices in terms of trademark filing remained largely unchanged in 2024, with only one new entrant, Argentina, displacing Switzerland to claim 20th spot (figureB9). However, several offices underwent notable changes in rank within the top 20. Overtaking the EUIPO, Brazil climbed from sixth to fifth position due to a surge in domestic trademark filing. Conversely, Japan and the Islamic Republic of Iran each dropped one position due to a decline in filing activity. Japan fell from the ninth to 10th position, mainly due to a reduced resident filing, while the Islamic Republic of Iran slipped from 10th to 11th spot following decreases in both resident and non-resident filing. The combined effect of declining filing in Japan and the Islamic Republic of Iran, coupled with its own modest on-year growth in trademark filing, elevated the Republic of Korea from 11th to ninth spot.

The top 20 offices in terms of trademark filing in 2024 were distributed across multiple regions. Asia was home to eight offices, Europe six, Latin America and the Caribbean (LAC) three, Northern America two, and Oceania one. Asian offices dominated global trademark filing, accounting for nearly two-thirds (65.6%) of all filing worldwide. This represents a substantial increase from that region's 52.6% share a decade earlier in 2014. This expansion has correspondingly reduced the relative shares of the other five geographical regions (figure 2.4). European offices held the second-largest share at 17.4% of the world total in 2024, followed by LAC offices at 7.5% and those of Northern America at 6.1%. The remaining regions captured smaller portions: Africa accounted for 2% of global filing, while Oceania received 1.4%.

Almost two-thirds (65.6%) of global trademark filing in 2024 occurred at offices located in Asia

2.4. Trademark application class counts by region share of total, 2014 and 2024

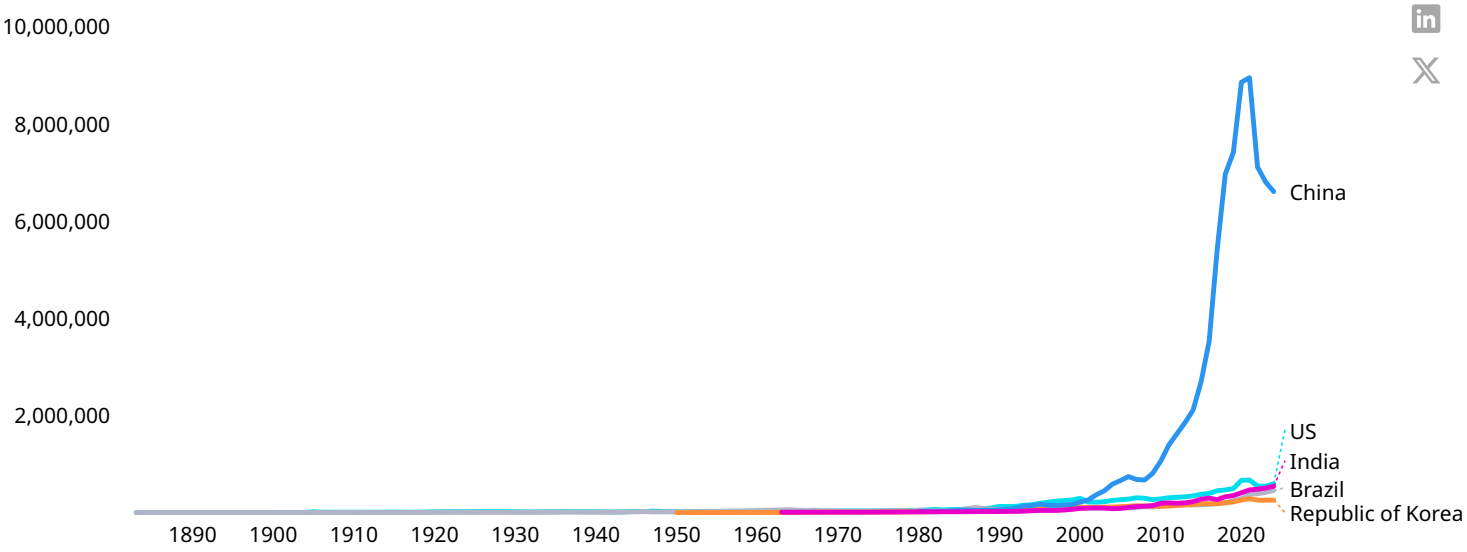


Note: LAC is Latin America and the Caribbean.
Source: World Intellectual Property Indicators 2025 • Get the data • Embed • Download image

Trademark applications filed at selected top offices since 1883

Trademark applications maintained a relatively steady, but modest trajectory until the mid-1980s. The landscape began shifting dramatically in the 1990s when China experienced a surge in filing that continued until 2022, when its numbers began to decline. China overtook the US as the world's largest office in 2001, a position it has maintained since. Despite being surpassed by China, the US office has shown impressive growth. Trademark applications filed in the US have increased more than 2.5-fold since 2001, weathering notable declines during the dot-com collapse (2001–2002), the global financial crisis (2008–2009), and the recent downturn in 2022–2023. Other major offices have also experienced significant expansion. India, which recorded fewer than 100,000 annual applications up until 2006, reached nearly 539,000 applications in 2024. Brazil followed as the fourth-largest office with approximately 454,000 applications, while the Republic of Korea rounded out the top five, with almost 255,000 applications in 2024.

Trend in trademark applications for the top five offices, 1883–2024



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Among top 20 origins, applicants residing in Argen
Brazil (+10.4%) recorded a double-digit growth in fil...g ... 202...

Trademark application statistics can be analyzed from two distinct perspectives. Office data captures all applications received by a particular office by both domestic (resident) and foreign (non-resident) applicants. Origin data, by contrast, tracks applications based on where the applicant resides –encompassing both resident filing (applications filed at an applicant's home or regional office) and abroad filing (applications filed at foreign offices). This section presents trademark statistics from the origin perspective, organizing data by applicants' country of residence to complement the picture of trademark filing worldwide. Data by origin can be calculated based on either absolute count (an application filed at a regional office is counted once) or equivalent count (an application filed at a regional office is counted multiple times). Data reported in this section are based on absolute count.

The highest volume of filing – measured in absolute application class counts – came from applicants based in China, whose combined resident and abroad application class count of 7.3 million, significantly outpaced all other countries of origin. The US (836,457) ranked second, followed by the Russian Federation (559,436), India (532,900) and Brazil (436,291) (figure B17). Filing trends among these top five origins showed mixed results. Brazil demonstrated the strongest growth at 10.4%, driven by increases in both resident and abroad filing. India followed with 7.4% growth, while the Russian Federation posted a more modest increase of 2.9%. However, both India and the Russian Federation's growth came entirely from domestic filing, as abroad filing for applicants of these two origins declined. In contrast, applicants from the two largest countries of origin experienced contractions in 2024. China's overall filing declined 1.5% – despite a substantial 20.5% increase in abroad filing – due to the previously mentioned reduction in resident filing. Conversely, the US saw a similar 1.5% overall decrease, but in this case a 3.4% growth in resident filing was offset by a 7.7% drop in abroad filing.

While 2023 saw decreased filing from 13 of the top 20 countries of origin, 2024 marked a turnaround, with 12 top origins posting increases. In addition to Brazil's high growth of 10.4% and 7.4% for India, two other top origins exhibited considerable increases: Argentina (+19.7%) and Indonesia (+8.4%). Like Brazil, growth for Argentina and Indonesia was driven by increases in both resident and abroad filing. In contrast, trademark filing fell for eight top origins. France recorded the steepest drop at 6%, followed by the Islamic Republic of Iran (–5.2%), Italy (–3.4%) and Japan (–3%).

Distinct patterns are evident in resident versus abroad filing preferences. China-based applicants demonstrated a strong domestic focus in 2024, with 92.9% of their trademark filing taking place within China and only 7.1% destined for protection abroad. This domestic orientation has remained consistent over the past two and a half decades, with China-based applicants regularly directing about 93% or more of filing toward their home market annually. Similar domestically focused patterns emerged among applicants from other middle-income countries that recorded substantial trademark filing. Residents of Argentina, Brazil, India, Indonesia, the Islamic Republic of Iran, Mexico, Türkiye and Viet Nam all directed only about 8% or less of total filing toward seeking protection abroad. Within this group, applicants resident in the Islamic Republic of Iran showed the strongest domestic preference, directing only 0.9% of filing abroad. Other notably low abroad filing shares included Brazil (2.4%), India (3.8%) and Indonesia (2.4%).

Among the top 20 origins, Swiss applicants demonstrated the strongest international focus, directing 73.3% of trademark filing toward foreign jurisdictions. Other leading countries in terms of abroad filing included Australia (33.5%), Germany (35.6%), the UK (42.4%) and the US (41%).

Trademark filing abroad varied considerably among applicants of selected low- and middle-income countries (figure B18). For example, a group of upper middle-income countries showed moderate international filing activity, with abroad filing representing about between 11% and 16% of total filin
(11.9%), Colombia (13.6%), South Africa (10.7%), Thailand (16%) and Ukraine (14.8
from three countries – Belarus (43.9%), the Dominican Republic (31.4%) and Serbia (32.9%) – directed

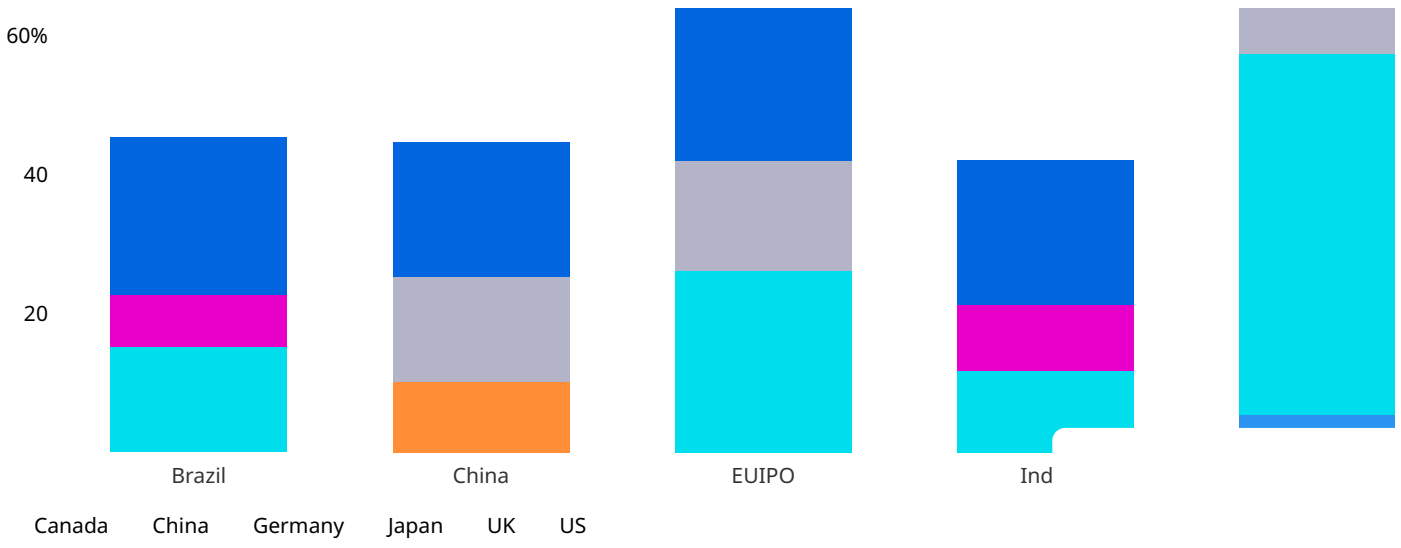
substantial portions of their total trademark filing toward filing abroad. Finally, applicants from seven countries – Kenya, Madagascar, Mongolia, Morocco, Pakistan, Peru and the Philippines – maintained a predominantly domestic focus, with abroad filing accounting for around 5% or less of total trademark filing.

Applicants consider multiple factors when selecting foreign jurisdictions for trademark protection. They include market attractiveness for their goods and services, geographical proximity and historical ties between their home country and the destination country. These strategic considerations are reflected in the filing patterns at major offices in 2024. China received nearly half (44.6%) of its foreign applications from three key sources: the US led, with 19.4% of all non-resident trademark filing, followed by the UK (15.1%) and Japan (10.1%) (figure 2.5). A somewhat reverse pattern emerged in the US, where China-based applicants dominated foreign filing activity, accounting for 52% of all non-resident filing. UK applicants contributed 6.5% and Canadian applicants 5.4%, bringing the combined share for these three origins to 63.9% of total foreign filing in the US. India's foreign application landscape was more balanced, with the top three sources – the US (20.8%), China (11.8%) and Germany (9.4%) – collectively accounting for 42% of non-resident filing in India. Like the US, the EUIPO showed a high concentration of foreign applications from top origins, with 63.8% originating from just three countries: China (26.1%), the US (21.9%) and the UK (15.8%).

Expanding to include the top 20 offices, China-based applicants emerged as the dominant source of foreign trademark filing across the top offices in 2024, leading non-resident filing at 12 of the other 19 top offices. Their non-resident share was particularly strong at several key offices, representing 39.2% of foreign filing in Germany, 27.2% in Japan and, as noted earlier, 26.1% at the EUIPO and over half (52%) of all foreign filing in the US. Applicants based in the US held the leading position among foreign filers at seven of the remaining top offices. Their share of non-resident filing ranged from the aforementioned 19.4% in China to over one-third at the offices of neighboring Canada (36.9%) and Mexico (34.3%). Applicants residing in Germany played a significant role in non-resident filing at the office of Türkiye, accounting for the largest volume at 14.4%, while Swiss applicants ranked as the second largest source of foreign filing in neighboring France (11.9%) and Germany (9.6%).

US-based applicants led foreign trademark filing in Brazil, China and India, while China-based applicants were the primary foreign filers at the EUIPO and in the US

2.5. Share of total non-resident filing by origin at selected offices, 2024



Note: EUIPO is the European Union Intellectual Property Office.
Source: World Intellectual Property Indicators 2025 • Get the data • Embed • Download image

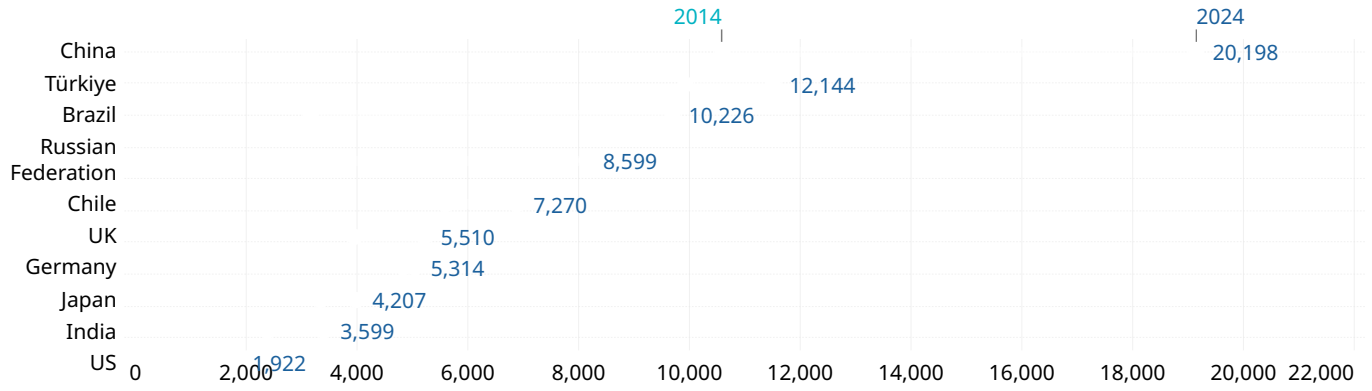
Adjusting for GDP and population

Cross-country variations in trademark filing largely reflect differences in economic size and structure. To account for these dissimilarities, it is informative to examine resident trademark application class counts relative to both gross domestic product (GDP) and population size.

When resident trademark applications are viewed in terms of class counts and adjusted according to GDP, countries with a relatively lower number of classes specified in resident applications, like Brazil and Türkiye, can rank higher than countries, such as India and the US, that have higher class counts. Among selected origins, China (20,198), followed by Türkiye (12,144), Brazil (10,226), the Russian Federation (8,599) and Chile (7,270) exhibited some of the highest ratios of resident application class counts to GDP in 2024 (figure 2.6). This GDP-adjusted perspective highlights the intensity of trademark filing relative to economic output. The decade from 2014 to 2024 saw substantial increases in resident application class counts per unit of GDP for several countries. China experienced the largest increase at 9,030 additional classes per unit of GDP, followed by Brazil (+6,893) and the Russian Federation (+5,210).

Brazil, China and the Russian Federation all significantly increased their resident application class count per unit of GDP between 2014 and 2024

2.6. Resident trademark application class count per USD 100 billion GDP for selected origins, 2014 and 2024



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Examining resident application class count per million population provides another perspective on filing intensity across countries. In 2024, the Republic of Korea, with a population of about 51.8 million, recorded a particularly intensive resident application class count of 5,130 per million population – the highest ratio across all selected countries of origin (figure B31). China, home to 1.4 billion people, also had a relatively high class count per million population ratio of 4,816. Despite having a significantly smaller population of around 5.3 million in 2024, New Zealand displayed a comparatively high ratio of resident application class count per million population at 3,783. The other selected countries of origin are clustered into several distinct groups. In addition to containing New Zealand, a high filing activity tier included Türkiye (4,286), the Russian Federation (3,648), Germany (3,339) and the UK (2,894). A moderate filing activity group encompassed Spain (2,088), Brazil (2,009), Japan (1,939), Argentina (1,836), Uruguay (1,747), the US (1,451) and Botswana (1,
Mexico (1,216) showed similar moderate levels, while India, Indonesia, Morocco a
lowest ratios, ranging between approximately 350 and 730 classes per million population.

Which specific classes and industries attracted the most intensive filing from applicants seeking protection abroad?

Trademarks are registered in relation to particular classes of goods or services. The Nice Classification of goods and services is used in the international trademark system and at certain national and regional offices. Nice classification statistics provide insights into the relative importance of different goods and services. In 2024, goods class 9 – including scientific, photographic, measuring instruments, recording equipment, computers and software – featured in 11.3% of all reported non-resident trademark filing by class (figure B23). Nice class 9 was followed by services class 35 (7.2%), which covers advertising, business management, business administration and office functions, and by services class 42 (5.7%) and goods classes 5 (5.6%) and 3 (5%). Services class 42 includes scientific and technological services, as well as the design and development of computer hardware and software. Goods class 5 relates to pharmaceutical preparations, baby food, dietary supplements for humans and animals, disinfectants, fungicides and herbicides, and goods class 3 covers, among other things, cleaning preparations, soaps, perfumes and cosmetics. Of the 45 total Nice classes, the top five (9, 35, 42, 5 and 3) were specified in more than one-third (34.8%) of all reported non-resident trademark filing worldwide.

Service-related classes represented 28% of all Nice classes specified in applications filed abroad in 2024, despite services comprising only 11 of the 45 total Nice classes (figure B24). This proportion varied significantly across a selection of offices. The lowest service shares appeared at the offices of China, India, Indonesia and Viet Nam, where services classes accounted for about between 28% and 32% of total filing. A middle tier included the EUIPO and the offices of Australia, Canada, Germany, Japan, the Russian Federation, the UK and the US, where services classes were represented approximately between 36% and 42% of applications. Services classes dominated filing at several selected offices, exceeding half of total filing in five: Brazil led with 66.3%,followed by France (51.5%), Türkiye (51.2%), Argentina (50.5%) and Mexico (50.2%) (figure B27).

Grouping the 45 Nice classes into 10 distinct industry sectors offers valuable insights. In 2024, the research and technology sector attracted the largest filing volumes by applicants seeking trademark protection abroad, constituting 19.3% of global reported non-resident trademark filing (figure B25). It was followed by the health (14.1%), clothing and accessories (12.2%) and leisure and education (10.4%) sectors. Trademarks relating to agriculture (10.1%), household equipment (9.3%) and business services (9.1%) accounted for the next largest shares of the total. In contrast, industries linked to chemicals (3.2%), construction (5.4%) and transportation (6.9%)received the smallest proportions of filing abroad.

Research and technology was the sector that attracted the biggest proportion of total filing at the EUIPO (21.4%), as well as at the offices of Japan (18.7%), the UK (20.2%) and the US (18.1%) (figure B26). In China (27.5%), the agricultural sector was the predominant choice, while also accounting for the second largest proportion in India (15.4%), the Republic of Korea (18.4%) and Türkiye (15%), and ranking third in the Russian Federation (12.3%). Business services topped the list of industry sectors in Brazil (26.6%), the Republic of Korea (19.1%) and Türkiye (25.2%), accounting for the largest share of total trademark filing, and was the second top sector in China (13.5%), the Russian Federation (13.4%) and at the EUIPO (12.1%). Clothing and accessories was the sector that garnered the largest share of filing in the Russian Federation (14.8%), whereas it was the third largest sector in the UK (12.6%) and the US (14.5%). Filing for trademarks associated with the health sector constituted the largest proportion of filing in India (23%) and the third largest in China (13.2%). Filing related to leisure and education featured as the second top sector at the offices of Brazil, Japan. the UK and the US. and as third top sector at the EUIPO.

Global trademark registrations reached approximately 8.3 million in 2024

After concluding the examination process, an office may decide to register a trademark. Registration numbers can fluctuate greatly from year to year, due in part not only to a rise or fall in the volume of applications received in any given year, but also to the amount of resources an office is able to dedicate to examining trademark applications. For this reason, it is not possible to accurately compare the number of applications filed at a particular office in any given year with the number of registrations issued by that office in the same year.

The estimated 8.3 million trademark registrations recorded worldwide in 2024 marks a return to growth following two years of decline. At 9.2%, the increase is equivalent to almost 702,000more registrations compared to the previous year (figure B4).

Just as class counts make application filing activity internationally comparable, they also enable a more meaningful comparison of registrations. In 2024, an estimated 11 million classes were specified in the above mentioned 8.3 million trademark registrations, reflecting a 7.2% increase compared to the previous year's total (figure B5). Unlike 2023, when many offices recorded a decline in registrations compared to the previous year, 13 of the top 20 offices recorded growth from 2023 to 2024. Notably, registrations measured in class counts at the office of China rose by 9.1% from 2023 to 2024, representing almost 399,000 more than in the previous year. Similarly, the office of India recorded a registration class count in 2024 that exceeded the level recorded in 2023 by almost 238,500. These two offices contributed most to the global increase in trademark registrations.

China's office registered trademarks in which about 4.8 million classes were specified, with that office accounting for a sizable 43.5% of all trademark registration class counts recorded worldwide in 2024. Following China were the offices of the US (526,123), India (490,896), the EUIPO (412,375) and the office of the UK (330,823) (figure B15). Combined, these four offices accounted for almost 16% of all registration activity.

Apart from China, six additional offices among the top 20 in terms of registration activity experienced increases of greater than 9% in 2024. The most significant increase of 94.5% was observed at the office of India, primarily attributed to expanded staffing for application processing, followed by the offices of Viet Nam (+34.3%), Indonesia (+20.1%), Argentina (+19.2%),the US (+18%) and the Russian Federation (+10.6%). In contrast, four top offices recorded a decline of almost 10% or more compared to the previous year. This group comprised Brazil (–19.8%), the Islamic Republic of Iran (–9.5%), Italy (–12.7%) and the Republic of Korea (–9.7%).

Active trademark registrations grew 6.1% globally in 2024

Unlike most forms of intellectual property (IP), trademarks can be maintained indefinitely through the payment of a renewal fee at defined intervals. In 2024, there were an estimated 93.2 million active trademark registrations across 155 IP offices globally, representing an increase of 6.1% compared to 2023 (figure B34).

Once again, the office of China had by far the highest number of trademark registrations in force in 2024, with a total of almost 49.8 million (figure B35). It was followed by the offices of the US (3.6 million) and India (3 million), and by the offices of Brazil and the UK with approximately 2.6 million each. The EUIPO and the offices of France, Japan, Mexico and the Republic of Korea reported figures ranging from about 1.7 to 2.3 million active trademark registrations. The offices of Argentina (1,017,050) and Germany (1,005,301) reported a comparable stock of trademark registrations in force, while Australia (879,331) and Spain (859

Around 23.8 million trademark registrations in force at 86 offices lend themselves to being distributed according to the year in which they were initially registered. They represent about 62% of a total of approximately 38.5 million trademark registrations recorded at these offices between 2000 and 2024. Almost one-quarter (24.5%) of the trademarks registered in 2000 remained in force in 2024, showcasing the enduring value of marks (figure B36). For trademarks registered in 2018 or later, the percentage consistently surpasses 80%. More than half (53.8%) of the 23.8 million registrations in force were registered relatively recently, dating back no earlier than 2018.

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The New Culture Wars

ARTS INSTITUTIONS AND EXECUTIVE POWER IN THE TRUMP ERA

Since the first Trump Administration, the escalating attacks on the press have become all too familiar. But the Administration's assault on free expression is no longer confined to the newsroom. Increasingly, arts and cultural institutions find themselves in the President's crosshairs and at the forefront of fights over expressive freedom and institutional independence.

This multi-disciplinary panel will look at legal and regulatory frameworks as diverse and wide ranging as tax law, nonprofit board governance, public lands law, separation of powers, and the First Amendment—and how they intersect with the Trump Administration's efforts to re-shape the cultural landscape. Specific topics to be explored include:

- The Kennedy Center, including legal challenges relating to the building and programming;
- The Smithsonian and efforts to reshape the American narrative;
- The policies governing National Endowment for the Arts and National Endowment for the Humanities funding;
- The efforts to reshape the built environment of Washington, D.C., most notably through the Memorial Arch; and
- The threats to arts organizations' 501(c)(3) status.

Panelists:

Carrie Casselman, Partner, Davis Wright Tremaine LLP
Lynette Labinger, Civil Rights Litigator, ACLU
Kevin Roe, Partner, Davis Wright Tremaine LLP
Francesca Zambello, Artistic Director, Washington National Opera
Melissa Zimmerman, Staff Director/Clerk, U.S. Senate Appropriations Subcommittee on the Interior, Environment & Related Agencies

Moderator:

Alexandra Perloff-Giles, Associate, Davis Wright Tremaine LLP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RHODE ISLAND LATINO ARTS, et al., Plaintiffs,	)	
v.	)	C.A. No. 25-79 WES
NATIONAL ENDOWMENT FOR THE ARTS, et al., Defendants.	)	

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Senior District Judge.

Before the Court are Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion"), Dkt. No. 22, and Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Summary Judgment Motion ("Defendants' Motion"), Dkt. No. 24. Plaintiffs are three arts groups that applied for grants from the National Endowment for the Arts ("NEA") and a membership organization that represents such groups. Defendants are the NEA and its Acting Chairperson. Pursuant to an Executive Order, the NEA intends to disfavor grant applications that "promote gender ideology." Plaintiffs allege this practice would violate the First Amendment, the Administrative Procedure Act ("APA"), and the Fifth Amendment. Because the Court agrees with Plaintiffs regarding their First Amendment and APA claims, but not their Fifth Amendment claim,

Plaintiffs' Motion is granted in part and denied in part, and Defendants' Motion is denied in part and granted in part.

Defendants are therefore enjoined from applying a viewpoint-based standard of review to Plaintiffs that disfavors applications deemed "to promote gender ideology," and the Court vacates and sets aside Defendants' current plan to implement the Executive Order.

I. BACKGROUND

A. The NEA's Authorizing Statute

The National Foundation on the Arts and the Humanities Act of 1965 ("NFAHA") declares, as amended, that "[t]he arts . . . belong to all the people of the United States." 20 U.S.C. § 951(1). The NFAHA further provides that "it is necessary . . . for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent." Id. § 951(7). In accordance with these principles, the NFAHA established the NEA, which provides financial assistance to groups and certain individuals "of exceptional talent engaged in or concerned with the arts." Id. § 954(c). Among the priorities identified in the funding program at issue in this case are "projects and productions which have substantial . . . artistic and cultural significance, giving emphasis to American creativity

and cultural diversity," and those with similar significance "that reach, or reflect the culture of, a minority, inner city, rural, or tribal community." Id. § 954(c)(1), (4).

Because the drafters and subsequent amenders of the NFAHA were concerned about the NEA being leveraged as an instrument of "political control of culture," they took several steps to ensure that grants are awarded based on talent alone, irrespective of the artists' viewpoints or the messages conveyed in their works. See Am. Compl. ¶ 18, Dkt. No. 15 (quoting H.R. Rep. No. 89-618, at 21 (1965)); see also id. ¶ 22 ("Congress's intent was to have 'Government assistance, but not intervention[;] . . . support but not control[;] . . . stimulation but not participation.'" (omissions in original) (quoting 111 Cong. Rec. 23963 (1965) (statement of Rep. John S. Monagan))).

One safeguard against political interference is a prohibition against federal supervision or control over the policies, personnel, or operations of grant recipients. 20 U.S.C. § 953(c). Another safeguard is the nested, multilayer review process that underlies each individual grant decision. Working outward from the innermost layer, this process begins with an advisory panel's review of a grant application; the panel is required to "recommend applications . . . solely on the basis of artistic excellence and artistic merit." Id. § 959(c). Notably, the NEA must "ensure

that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Id. § 959(c)(1).

From there, the NEA's National Council on the Arts (the "Council") is required to make recommendations concerning whether to approve applications determined by the advisory panels to have artistic excellence and artistic merit. Id. § 955(f)(1). Just as the composition of the advisory panels ensures a diversity of viewpoints and backgrounds, so too does that of the Council. In selecting a voting member of the Council, the President must "give due regard to equitable representation of women, minorities, and individuals with disabilities who are involved in the arts and shall make such appointments so as to represent equitably all geographical areas in the United States." Id. § 955(b)(1), (1)(C). Each of the Council's eighteen voting members "shall hold office for a term of six years, and the terms of office shall be staggered." Id. § 955(c).

At the outermost layer of review is the Chairperson, who may not approve or disapprove any application until it is recommended for approval by the Council, and who may not approve an application for which the Council has made a negative recommendation. Id. § 955(f)(2); see also id. § 955(b)(1) (requiring the President to

consider equitable representation in appointment of Chairperson). In establishing regulations and procedures for the NEA's funding program, the Chairperson must ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." Id. § 954(d)(1). The NFAHA further provides that "[i]n selecting individuals and groups of exceptional talent as recipients of financial assistance to be provided under [the program at issue here], the Chairperson shall give particular regard to artists and artistic groups that have traditionally been underrepresented." Id. § 954(c). The Chairperson and voting members of the Council are appointed by the President and confirmed by the Senate, id. §§ 954(b)(1), 955(b)(1)(C); and members of the advisory panels are appointed by the Chairperson, id. § 959(c)(6). The Chairperson serves a four-year term and is eligible for reappointment. Id. § 954(b)(2).

This complex statutory framework demonstrates Congress's intent to insulate the NEA from political control and to encourage the freedom of expression. As a Senate committee report on the original version of the NFAHA explained:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist's and humanist's great

> values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths . . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age. Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression. . . . [C]onformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression.

Am. Compl. ¶ 22 (omissions in original) (quoting S. Rep. No. 89-300, at 3-4 (1965)); see also id. (quoting 111 Cong. Rec. 23963 (1965) (statement of Rep. Henry Helstoki) ("The Federal Government will supply the money, but the artists and their organizations will suggest the proposals, select the performances which are to be produced and do all the planning. The Federal Government will be the means, but the end product will be the sole responsibility of the performing artists.")).

B. The Instant Litigation

1. The Executive Order (the "EO")

On January 20, 2025, President Trump signed Executive Order 14168, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." Id. ¶ 48. According to Section 2(f) of the EO:

> "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this

> false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

Exec. Order No. 14168, § 2(f), 90 Fed. Reg. 8615, 8615-16 (Jan. 30, 2025). The EO has multiple substantive provisions, but relevant to this case is Section 3(g), which declares that "[f]ederal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology." Id. § 3(g), 90 Fed. Reg. at 8616.

2. Initial EO Implementation and Lawsuit

The President signed the EO about three weeks ahead of the application deadline for the semiannual Grants for Arts Project ("GAP"), the NEA's premier grant program. Am. Compl. ¶¶ 35, 38. The submission deadline for the current funding cycle was initially set for February 13, 2025. Id. ¶ 38. On February 6, however, the NEA updated its application procedure and pushed the final deadline to March 24, with an intermediate deadline set for March 11. Id. ¶¶ 38, 41. The updated procedure required applicants to confirm that, if selected, they (1) would "comply with all applicable Executive Orders while the award [was] being administered" and (2) "underst[ood] that federal funds shall not be used to promote

gender ideology, pursuant to Executive Order No. 14168." Statement of Undisputed Facts ("PSUF") ¶ 28, Dkt. No. 23.

Plaintiffs are three individual arts groups — Rhode Island Latino Arts ("RILA"), National Queer Theater ("NQT"), and The Theater Offensive ("TTO") — and one member organization, Theatre Communications Group ("TCG"). Id. ¶¶ 45, 76, 102, 119. On March 6, Plaintiffs filed a Complaint alleging the NEA's implementation of the EO violated the First Amendment, APA, and Fifth Amendment; they also moved for a preliminary injunction. Am. Compl. ¶ 6; see Compl. ¶¶ 96-123, Dkt. No. 1.

3. Rescission of EO Implementation and Denial of Preliminary Injunction

After Plaintiffs filed their lawsuit, the NEA rescinded its implementation of the EO, pushed back the application deadline a second time, now to April 7, and announced it would re-implement the EO following a "new evaluation . . . in accordance with the [APA]." PSUF ¶¶ 31-33; Defs.' Resp. Pls.' Mot. Prelim. Inj. Ex. 1, at 70-71, Dkt. No. 11-1. According to the NEA, "[t]his new consideration and evaluation process [would be] complete[d] by April 16, 2025" — nine days after the revised deadline — and the NEA would "implement and make public the final decision resulting from that process by April 30, 2025." Defs.' Resp. Pls.' Mot. Prelim. Inj. Ex. 1, at 71.

Because the NEA had rescinded its implementation of the EO,

Defendants argued that Plaintiffs' claims were nonjusticiable, and they urged the Court to deny Plaintiffs' motion for a preliminary injunction. In a Memorandum and Order entered April 3, the Court found that Plaintiffs' claims were justiciable under the voluntary cessation exception to the mootness doctrine. Mem. & Order 20-23, Dkt. No. 13. Applying this exception, the Court found that if a prohibition on the use of NEA funds to "promote gender ideology" were reinstated, it would likely violate the First Amendment and the APA. Id. at 24-41. The Court nevertheless denied Plaintiffs' motion for a preliminary junction. Id. at 46. Although Plaintiffs demonstrated a likelihood of success on the merits of their claims and showed irreparable harm, the Court found that the balance of the equities and public interest weighed heavily in Defendants' favor, in large part because an injunction would "short circuit" the NEA's then-pending administrative review process. Id. at 42-46.

4. Re-Implementation of EO and Motions for Summary Judgment

As promised, the NEA published its final decision regarding the implementation of the EO (the "Final Notice") on April 30.[1] See Admin. R. ("AR") 207, 215, Dkt. No. 19. The Final Notice

[1] The Court uses the term "Final Notice" because that is the name given to the corresponding file in the Administrative Record. See the drop-down Table of Contents for Admin. R. ("AR"), Dkt. No. 21.

states that the "existing multi-tiered application review process will remain unchanged," and that the Chairperson will implement the EO "by evaluating projects that promote gender ideology based on the existing statutory criteria at the final stage of application review."[2] Id. at 207. In other words, neither when advisory panels determine that certain applications "have artistic excellence and artistic merit," 20 U.S.C. § 955(f)(1), nor when the Council "make[s] recommendations to the Chairperson concerning . . . whether to approve [those] applications," id. § 954(f), (f)(1), will the NEA implement the EO. Rather, the Chairperson will independently assess those applications "for artistic excellence and merit, including whether the proposed project promotes gender ideology," on a "case-by-case" basis. AR 208. If the Chairperson "concludes that a proposed project 'promotes gender ideology," it will not be "denied solely" for that reason, but it "could weigh against the project's final approval." Defs.' Objs. & Resp. Pls.' 1st Set Reqs. Admis. ("Defs.' Admiss.") 2, Dkt. No. 21; see Text Order (June 4, 2025). In no circumstance, however, could it "weigh in favor of the project's final approval."

[2] "The Chair[person's] review of proposed projects follows shortly after the Council has made its recommendations," which traditionally does not happen "until the end of the third week of October." Defs.' Resps. Pls.' Statement Facts & Separate Statement Undisputed Facts ("DSUF") ¶ 4, Dkt. No. 25.

Defs.' Resps. Pls.' Statement Facts & Separate Statement Undisputed Facts ("DSUF") ¶ 40, Dkt. No. 25 (emphasis added).

In their Amended Complaint, Plaintiffs allege that the Final Notice violates the First Amendment, APA, and Fifth Amendment; and they move for summary judgment on all claims. Am. Compl. ¶¶ 112-141; Pls.' Mem. L. Supp. Mot. Summ. J. (Pls.' Mem.") 1-2, Dkt. No. 22-1. Defendants move for summary judgment on all claims as well. Defs.' Mot. 1-3.

II. LEGAL STANDARD

"A grant of summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Viscito v. Nat'l Plan. Corp., 34 F.4th 78, 83 (1st Cir. 2022) (quoting Garcia-Garcia v. Costco Wholesale Corp., 878 F.3d 411, 417 (1st Cir. 2017)). "On cross-motions for summary judgment, each motion is reviewed separately, drawing facts and inferences in favor of the non-moving party." Scottsdale Ins. v. United Rentals (N. Am.), Inc., 977 F.3d 69, 72 (1st Cir. 2020).

In the administrative law context, "a motion for summary judgment is simply a vehicle to tee up a case for judicial review and, thus, an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action" violates the APA. Bos.

Redevelopment Auth. v. Nat'l Park Serv., 838 F.3d 42, 47 (1st Cir. 2016).

III. DISCUSSION

On the First Amendment claim and all three APA claims, the Court grants summary judgment to Plaintiffs; on the Fifth Amendment claim, however, the Court grants summary judgment to Defendants.

A. First Amendment Claim

The Court finds that the NEA's Final Notice violates the First Amendment because it is a viewpoint-based restriction on private speech. A threshold issue is whether NEA-funded art is government speech or private speech. If NEA-funded art is government speech, then restrictions on that speech do not implicate the Free Speech Clause of the First Amendment. Because the Court determines that NEA-funded art is private speech, it next considers whether the Final Notice amounts to a restriction on that speech and, if so, what type of restriction.

With the Final Notice in effect, projects deemed to promote gender ideology are less likely to be approved for NEA funding. The Final Notice is thus a restriction on artists' speech, and one that is viewpoint based, because it assigns negative weight to the expression of certain ideas on the issue of gender identity. The Final Notice is thus presumptively unconstitutional. Because the restriction cannot withstand judicial scrutiny, the Court

concludes that the Final Notice violates the First Amendment.

1. Government or Private Speech

The Court must first determine whether the Free Speech Clause of the First Amendment applies to the NEA's funding program. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009). The line between private speech and government speech "can blur," however, when "the government invites the people to participate in a program." Shurtleff v. City of Boston, 596 U.S. 243, 252 (2022). That is what Congress did when it decided to fund the arts through the NEA. In these situations, a court must assess whether the program is designed to "transmit the government's message" or facilitate private expression. Id.; see id. at 271 (Alito, J., concurring). If the former, then participation in the program is government speech, and the government can restrict the viewpoints expressed in the program without implicating the Free Speech Clause. If the latter, then participation in the program is private speech, and the Free Speech Clause applies.

To determine whether participants in a program are engaged in government speech or private speech, a court considers "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the

extent to which the government has actively shaped or controlled the expression."[3] Id. These considerations have led the Supreme Court to hold that "the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated." Id. (citing Summum, 555 U.S. at 470-73). Similarly, the Supreme Court held that Texas's specialty license plate designs are government speech, even when the designs are proposed by private parties, because license plates "long have communicated messages from the States," the designs "are often closely identified in the public mind with the State," and "Texas maintains direct control over the messages conveyed" on the plates. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 210-13 (2015) (brackets omitted).

On the other hand, the Supreme Court held that "trademarking words or symbols generated by private registrants" were private speech because even though the government "had to approve each proposed mark, it did not exercise sufficient control over the

[3] As the Supreme Court has emphasized, these considerations do not amount to "rigid factors." See Shurtleff v. City of Boston, 596 U.S. 243, 252 (2022); see id. at 261-76 (Alito, J., concurring) (criticizing the majority's "factorized approach" and advocating a method of review in which "government speech occurs if — but only if — a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges speech").

nature and content of those marks to convey a governmental message in so doing." Shurtleff, 596 U.S. at 252-53 (citing Matal v. Tam, 582 U.S. 218 (2017)). And it also held that Boston's flag-raising program, in which the city occasionally let private groups hoist their own flags in place of the Boston flag on one of three flagpoles in front of city hall — the flags of the United States and Massachusetts flew from the other poles — was also private speech. Shurtleff, 596 U.S. at 248. For despite "the historical practice of flag flying at government buildings," the city had no "meaningful involvement in the selection of flags or the crafting of their messages." Id. at 258.

These precedents lead the Court to conclude that NEA-funded art is private speech, not government speech.[4] Indeed, all three considerations discussed above — history, public perception, and

[4] Defendants contend the relevant inquiry is not whether NEA-funded art is government speech, but whether the NEA's decision to fund that art is government speech. Defs.' Reply Supp. Cross-Mot. Summ. J. ("Defs.' Reply") 4-5, Dkt. No. 32. That cannot be right. When the NEA decides to fund certain art, that is an example of "the government invit[ing] the people to participate in a program." Shurtleff, 596 U.S. 243, 252 (2022). The Court must therefore determine whether speakers participating in the program are "exercising a power to speak for [the] government" or speaking for themselves. See id. at 268 (Alito, J., concurring). In this case, the relevant act of participation is the production of art that is funded by the NEA. It is therefore the art — not the NEA's decision to fund the art — that is the proper focus of the Court's government speech inquiry.

control — weigh in favor of Plaintiffs.[5]

a. History

The Court first considers the "history of the expression at issue." Shurtleff, 596 U.S. at 252. The objective here is to determine whether the relevant speech has traditionally been used to "communicate[] messages from the [government]." Walker, 576 U.S. at 210-11.

There is no question that, historically, art has been used as a medium to communicate the government's messages and that often the government has relied on the work of private artists to achieve that goal. Were the Court "to consider only that general history," it would find that the first factor of the government-speech test favors Defendants. Shurtleff, 596 U.S. at 253. But the Court is wary of painting with too broad a brush. Notwithstanding the general history of government involvement in the arts, the history of the specific arts-funding program at issue here suggests that its participants are engaged in private speech.[6]

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[5] The Court takes heed of Justice Alito's warning that, because the government-speech doctrine "is susceptible to dangerous misuse," the Supreme Court "must exercise great caution before extending [its] government-speech precedents." Matal v. Tam, 582 U.S. 218, 235 (2017).

[6] Supreme Court precedent suggests that the general history of the expression involved and the specific history of the program at issue are both relevant to government-speech analysis. See

At its inception, the NEA was designed not as an instrument of political communication but as a vehicle for private expression. That much is clear from the text of the NFAHA, which declares that "[t]he arts . . . belong to all the people of the United States," 20 U.S.C. § 951(1), and moreover directs "the Federal Government to help create and sustain not only a climate encouraging freedom of thought . . . but also the material conditions facilitating the release of this creative talent," id. § 951(7); see also supra Part I.A (discussing structure and legislative history of NFAHA).

Despite this origin story, Defendants suggest that subsequent controversies surrounding the NEA — and amendments to the NFAHA that were passed in response — complicate the historical analysis. See Defs.' Mot. 8-11, 21. In 1990, Congress amended the NFAHA following public controversy over two "provocative works," neither of which received funding directly from the NEA but rather from "organization[s] that received NEA support." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574-75 (1998). The first was a "retrospective of photographer Robert Mapplethorpe's work," which "included homoerotic photographs that several Members of Congress

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Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 210-12 (2015) (considering both histories); see also id. at 218-29 (citing Cornelius v. NAACP Leg. Def. & Educ. Fund, 473 U.S. 788, 804-06 (1985) (discussing history of specific fundraising program involved in that case).

condemned as pornographic," and the second was "Andres Serrano's work Piss Christ, a photograph of a crucifix immersed in urine." Id. at 574. With the help of an independent commission, Congress amended the NFAHA with the provisions now codified at § 954(d), which require the Chairperson to ensure (1) that "general standards of decency and respect for the diverse beliefs and values of the American public" are considered in the distribution of NEA funds, and (2) that projects "determined to be obscene are prohibited from receiving" NEA support. See Pub. L. No. 101-512, § 103, 104 Stat. 1915, 1963 (1990). Defendants also highlight language that was added to the NFAHA's findings and purpose section:

> [T]he Government must be sensitive to the nature of public sponsorship. Public funding of the arts . . . is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.
>
> . . . .
>
> The arts . . . reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

Defs.' Mot. 11 (quoting Pub. L. No. 101-512, § 101, 104 Stat. at 1961 (codified at 20 U.S.C. § 951(5), (6))) (second omission in original).

In the Court's view, none of these additions transformed the

NEA into a means for communicating the government's messages. If anything, the 1990 amendments demonstrate that Congress intended to preserve the NEA as a vehicle for private speech, despite the potential for public controversy. See Finley, 524 U.S. at 582 (quoting 136 Cong. Rec. 28674 (1990) ("If [Congress has] done one important thing in this amendment, it is this. We have maintained the integrity of freedom of expression in the United States.")). As noted in Finley, the independent commission "cautioned Congress against the adoption of distinct viewpoint-based standards for funding" and, consistent with that recommendation, "Congress declined to disallow any particular viewpoints." 524 U.S. at 581-82. Instead, Congress emphasized the importance of respecting the "diverse beliefs" of all Americans while accounting for "general standards of decency"[7] and ensuring that obscenity, which is not

[7] In the Court's view, the "decency" component of 20 U.S.C. § 954(d)(1) is akin to requirements that school libraries take "educational suitability" into account when selecting the books on their shelves. See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998) (citing Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1981)). Such requirements may be permissible. Id. But even if the NEA has some degree of content-based discretion over its funding choices, "that discretion may not be exercised in a narrowly partisan or political manner," because "[o]ur Constitution does not permit the official suppression of ideas." Pico, 457 U.S. at 870-71; see also Matal, 582 U.S. at 243 (noting "some content- and speaker-based restrictions may be allowed" depending on the nature of the forum, but "'viewpoint discrimination' is forbidden." (quoting

protected by the First Amendment, is ineligible for NEA funding. 20 U.S.C. § 954(d)(1), (2); see also United States v. Williams, 553 U.S. 285, 288 (2008) (noting obscenity is unprotected speech). None of these changes suggest that Congress reformed the NEA into a medium for communicating government messages at the expense of other views. Rather, this chapter of the NEA's history reinforces the notion that it was designed to support free expression through the use of public funds, despite the resulting challenges.

As a final note on the history front, Defendants contend that "government patronage of the arts reflects a historical tradition of government speech." Defs.' Mot. 19. Although the Court agrees as a general matter, the cases Defendants cite in support of their argument demonstrate the risks of employing an overly broad reading of history in this context. See id. at 19 n.16. One case involved a public art exhibit organized around specific themes in which the host city not only funded, but also took ownership of, the winning installations and provided the venue for their display. McGriff v. City of Miami Beach, 84 F.4th 1330, 1332-35 (11th Cir. 2023). Another involved the Smithsonian Institution's decisions over which art it chooses to exhibit in the National Portrait Gallery. Raven v. Sajet, 334 F. Supp. 3d 22, 25-26 (D.D.C. 2018). And a

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Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995))).

third involved a congressional art competition in which the works were selected to represent a particular House district, sponsored by the House member for that district, and displayed on the Capitol grounds. Pulphus v. Ayers, 249 F. Supp. 3d 238, 240-41 (D.D.C. 2017).[8]

None of these examples capture the unique history and purpose of the NEA, let alone the NEA's relationship with the art that it funds. To be sure, these considerations are better addressed under the rubrics of public perception and control. But the NEA stands in contrast to the government-funded arts programs discussed in these cases, which in turn undermines Defendants' argument about history. In conclusion, the "history of the expression at issue," defined narrowly as NEA-funded art, supports a finding that such art is private speech. See Shurtleff, 596 U.S. at 252.

b. Public Perception

The Court next considers "whether the public would tend to view the speech at issue as the government's." Id. at 255. Another way of framing the inquiry is whether, in transmitting a message through art using NEA funds, an artist "likely intends to convey

[8] For a discussion of the fourth case that Defendants cite, People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23 (D.C. Cir. 2005), see Mem. & Order 35, Dkt. No. 13. See Defs.' Cross-Mot. Summ. J. & Opp'n Pls.' Summ. J. Mot. ("Defs.' Mot.") 19 n.16, Dkt. No. 24.

to the public that the [government] has endorsed that message." Walker, 576 U.S. at 212. As with the history factor, the public-perception factor supports Plaintiffs' contention that NEA-funded art is private speech.

Unlike the programs involved in the cases Defendants cite above, the NEA does not take ownership of or designate a venue for the works that it funds. Instead, NEA-funded art "is billed as the work of the artists and funded organization[s], not the NEA," DSUF ¶ 21, and must be "supported by other sources of funding" in addition to the NEA, id. ¶ 24; see 20 U.S.C. § 954(e). Moreover, NEA-funded art "is typically performed or exhibited in private venues and galleries, or in public parks and streets not owned by the NEA, but rather other government actors who require separate, distinct approvals." DSUF ¶ 25; contra Raven, 334 F. Supp. 3d at 25-26; Pulphus, 249 F. Supp. 3d at 240-41. And "NEA-funded organizations retain the intellectual property rights in their NEA-funded works." DSUF ¶ 26; contra McGriff, 84 F.4th at 1332-35.

Based on these facts about NEA-funded art, the Court finds it unlikely that members of the public would think that NEA-funded artists speak for anyone but themselves, and certainly not for the government. That is especially true given the diversity of views reflected in the projects that the NEA — even when accounting for

changes in presidential administrations — has decided to fund. See, e.g., Pls.' Mem. 15 n.3 (citing examples in which the NEA has funded projects with conflicting themes and that appear to clash with the relevant administration's policy views). Indeed, if the government is speaking through recipients of NEA funding, then it is "babbling prodigiously and incoherently, saying many unseemly things, and expressing contradictory views." Matal, 582 U.S. at 236 (citation modified).

Notwithstanding the above, Defendants argue that "the public perceives the NEA's seal of approval as the government speaking." Defs.' Mot. 25. True, recipients of NEA funding must acknowledge, "in a prominent manner," that their projects are supported in part by an award from the NEA and display the NEA's logo in materials related to their projects. Id.; see DSUF ¶ 23. But "if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." Matal, 582 U.S. at 235. Furthermore, many artists likely seek NEA support in part because the prestige of receiving a grant could translate to other funding opportunities. See Defs.' Mot. 7 n.5 (citing, inter alia, Decl. Giselle Byrd ¶ 19, Dkt. No. 2-5). In this respect, the NEA's seal of approval functions as an endorsement, and one that signals to prospective funders the artistic merits of a given project. But

the government can endorse a project as good art without further endorsing all the messages or viewpoints it conveys. In short, the government may speak for itself when it approves an artist's work, but that does not mean the artist speaks for the government when it produces that work.

The Court therefore concludes that when it comes to NEA-funded art, "the public's likely perception" is that a private person, not the government, "is speaking." Shurtleff, 596 U.S. at 252.

c. Control

The final consideration is the extent to which the government has "actively controlled" the production of NEA-funded art and "shaped the messages" that the art conveys. Id. at 256. In this context, it matters less that the NEA has final approval authority over each project, see id. at 252-53 (citing Matal, 582 U.S. 218), and that it contributes — by providing partial funding — to the means of production, see id. at 256 (discussing Boston's provision of hand crank for raising flags). Rather, what matters most is the NEA's control over the art's "content and meaning" because "that type of control would indicate that [it] meant to convey the [art's] messages." Id.

This factor weighs decisively in favor of a conclusion that NEA-funded art is private speech. As with the trademarks at issue

in Matal, the NEA "does not dream up" the art that it funds, "and it does not edit [the projects] submitted for [approval]." Matal, 582 U.S. at 235. In fact, when Plaintiffs received NEA funding in the past, the NEA neither "suggested to applicants that they should make substantive changes to their projects" nor "otherwise offered feedback on the substance of a project." DSUF ¶¶ 17-18. Moreover, "[w]hen the NEA has given feedback on proposals, it has been about how to better frame an applicant's pitch to make it a more competitive application, not about changing the project itself." Id. ¶ 19 (emphasis added). And NQT, which hosts an annual theater festival, has received approval for NEA funding in previous cycles before even deciding which plays to include in the relevant year's festival. See Suppl. Decl. Adam Odsess-Rubin ¶ 14, Dkt. No. 22-4. In scenarios like this, the NEA cannot be said to control, or even be aware of, the content or viewpoints of the works that it funds. See Pls.' Opp'n Defs.' Cross-Mot. & Reply Supp. Pls.' Mot. ("Pls.' Reply") 12-13, Dkt. No. 31.

Defendants discredit Plaintiffs' declarations to the extent that Plaintiffs' experiences do not "establish any fact relative" to the NEA in general. See, e.g., DSUF ¶ 18. But Defendants mount no evidence that would allow the Court to look beyond Plaintiffs' experiences and make general findings about the NEA's control over the content and meaning of the art that it funds. Relatedly, the

Final Notice proclaims that "the NEA has historically expressed a preference for certain projects, which often reflect administration priorities." AR 211. But there is no evidence in the record that, prior to this funding cycle, the NEA has solicited applications through its GAP program for projects that espouse specific themes, much less advance the administration's policy preferences. Id. (discussing current funding cycle's "America250" program); see generally DSUF (providing no examples from previous cycles). Contra McGriff, 84 F.4th at 1332-35. Instead, Defendants' control argument rests on the NEA's final approval authority. See Defs.' Mot. 28-30. But for all the reasons above, that is insufficient.

The Court concludes that the history, public perception, and government's control of the expression at issue — NEA-funded art — all demonstrate that such art is not government speech, but private speech.

2. Nature of Speech Restriction

Because NEA-funded art is private speech, the Free Speech Clause of the First Amendment applies to any restrictions that are placed on that speech. The Court must therefore review the Final Notice to determine whether it restricts artist's speech and, if it does, the type of restriction at issue. The latter question is important to the extent this case implicates the Supreme Court's

forum precedents. See Finley, 524 U.S. at 586 (suggesting NEA is not a limited public forum and, by implication, is thus a nonpublic forum); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (describing university's student activities fund as a "metaphysical" limited public forum). Depending on the nature of the forum involved, "some content- and speaker-based restrictions may be allowed." Matal, 582 U.S. at 243. But in all cases, "'viewpoint discrimination' is forbidden." Id. (quoting Rosenberger, 515 U.S. at 831); see also Shurtleff, 596 U.S. at 275-76 (Alito, J., concurring) (noting that if Boston had created a nonpublic forum, it could have restricted use of its flagpole to certain subject matters, but "it could not have employed viewpoint-discriminatory criteria to bar otherwise-eligible speakers from expressing their views on those subjects").

The Court concludes that the Final Notice restricts artists' speech, and that it does so on the basis of viewpoint. As defined in the EO, "gender ideology" "permit[s] the false claim that males can identify as and thus become women and vice versa," and "includes the idea that there is a vast spectrum of genders that are disconnected from one's sex." EO § 2(f), 90 Fed. Reg. at 8615-16. The EO further provides that "[f]ederal funds shall not be used to promote gender ideology," and that "[e]ach agency shall assess grant conditions and grantee preferences [to] ensure grant

funds do not promote gender ideology." Id. § 3(g), 90 Fed. Reg. at 8616.

The Final Notice states that the Chairperson will assess NEA funding applications "for artistic excellence and merit, including whether the proposed project promotes gender ideology," on a "case-by-case" basis. AR 208. It does not further define what it means to "promote gender ideology." But it notes that "[t]he EO requires executive agencies to take all necessary steps, as permitted by law, to ensure that agency funds are not used to promote gender ideology." Id. at 207 (emphasis added).

Defendants concede that if the Chairperson "concludes that a proposed project 'promotes gender ideology,' that factor could weigh against the project's final approval." Defs.' Admiss. 2. To be sure, the Chairperson "will not disqualify a project from consideration solely on [the Chairperson's] conclusion that a proposed project 'promotes gender ideology.'" Id. But in no circumstance could that conclusion "weigh in favor of the project's final approval." DSUF ¶ 40.

From the Court's perspective, these concessions demonstrate that projects deemed to "promote gender ideology" are less likely to receive NEA funding. In other words, the NEA intends to disfavor applications that promote gender ideology precisely because they promote gender ideology. The Final Notice therefore

promises to penalize artists based on their speech. If the NEA restricted all applications that touched on the subject of "gender ideology," or on the relationship between sex and gender more broadly, that would amount to a content-based restriction on artists' speech. See Rosenberger, 515 U.S. at 828-29. Because the Final Notice targets the promotion of specific ideas about these topics, however, the NEA is engaged in viewpoint discrimination, which is "an egregious form of content discrimination." Id. at 829; see also Finley, 524 U.S. at 587 (upholding 20 U.S.C. § 954(d)(1) but noting it "would confront a different case" "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"). Therefore, regardless of whether forum analysis applies to the NEA, the Final Notice is presumptively invalid because it is viewpoint discriminatory. See Cornelius, 473 U.S. at 806; Shurtleff, 596 U.S. at 275-76 (Alito, J., concurring); see also Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 82 (1st Cir. 2004).

3. Application of Judicial Scrutiny

Viewpoint discrimination is traditionally subject to strict scrutiny, which requires the government to prove the restriction is "narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). Defendants make no

effort to argue the Final Notice satisfies any type of judicial scrutiny, let alone strict scrutiny; indeed, Defendants have not even asserted the state interest behind the NEA's new policy, aside from complying with the EO. See generally Defs.' Mot. Therefore, the Court finds that the Final Notice fails judicial scrutiny and thus violates the First Amendment.

B. APA Claims

The Court also finds that the Final Notice violates the APA. The APA requires courts to "hold unlawful and set aside agency action" that, inter alia, is in excess of statutory authority, arbitrary and capricious; or contrary to a constitutional right. 5 U.S.C. § 706(2)(A)-(C). Although the APA "embodies a 'basic presumption of judicial review,'" agency action is not reviewable unless it is "final." Dep't of Com. v. New York, 588 U.S. 752, 771 (2019) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)); see 5 U.S.C. § 704. To satisfy this requirement, the action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citation modified).

1. Final Agency Action and Ripeness

The Court finds that the Final Notice is reviewable as final

agency action because it marked the consummation of the NEA's "consideration and evaluation process" about how to implement the EO and determined that the Chairperson has the right, if not the obligation, to assess NEA grant applications based on viewpoint-discriminatory criteria. See Defs.' Resp. Pls.' Mot. Prelim. Inj. Ex. 1, at 71. And it also stated that the Chairperson would exercise this right when reviewing applications submitted during the current funding cycle. Defendants argue there is no final agency action because Plaintiffs' applications might not advance to the final stage of review, when the Chairperson will exercise this purported right. Defs.' Mot. 33. In any event, Defendants contend, "Plaintiffs undisputedly lack any right" to receive NEA grants, which are competitive. Id. at 34.

Defendants' arguments are unavailing. No application will be approved without first being assessed according to the criteria. The assessment is thus a prerequisite to acceptance and, therefore, all applications are subject to it. By way of an analogy, imagine that an elite college announces that it will assess student applications based on applicants' race, but only during the final stage of review when most applicants are no longer in contention. Just because the admissions policy will be enforced against only some applicants does not change the fact that it applies to all applicants. So too here. Nor do Plaintiffs claim a right to

receive NEA grants. Rather, they claim a right to have their applications assessed according to criteria that are not viewpoint discriminatory, and that the Final Notice violates that right. See Pls.' Reply 18. The Court thus finds that the Final Notice is reviewable under the APA.

Relatedly, the Court finds that Plaintiffs' APA claims are ripe because the issues are fit for judicial review and Plaintiffs will face hardship if the Court withholds consideration. See Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003). Relevant to this inquiry is whether the issues are "purely legal" and whether "further factual development" is necessary. Id. at 812. The issues are fit for judicial review because whether the Chairperson has power to assess applications based on viewpoint-discriminatory criteria is a purely legal question. Furthermore, Plaintiffs will face hardship if the Court withholds consideration of this question, because if it turns out the Chairperson lacks the power asserted, then Plaintiffs' applications will have been assessed according to unlawful criteria.

In summary, the Final Notice is reviewable, and Plaintiffs' APA claims are ripe. The Court therefore considers the merits of Plaintiffs' APA claims.

2. In Excess of Statutory Authority

The Court finds that the Final Notice violates the APA because

the NEA's authorizing statute does not empower the Chairperson to categorically disfavor applications for promoting certain views. See 5 U.S.C. § 706(2)(C). The "command of the APA" is "that 'the reviewing court' — not the agency whose action it reviews — is to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.'" Loper Bright Enters. v. Raimondo, 603 U.S. 369, 398 (2024) (omission in original) (quoting 5 U.S.C. § 706). Therefore, "in deciding whether an agency has acted within its statutory authority," courts "must exercise their independent judgment" and, in doing so, provide no deference to the agency's interpretation. Id. at 392, 412. Here, the relevant question is whether the Final Notice is inconsistent with the NEA's authorizing statute, the NFAHA.

In attempting to reconcile the Final Notice with the NFAHA, the Court can only conclude that "the NEA [has tried] to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." Finley, 524 U.S. at 587. According to the Final Notice, the Chairperson will conduct a "case-by-case review . . . of grant applications for artistic excellence and merit, including whether the proposed project promotes gender ideology." AR 208. This independent assessment will occur during the final stage of the application process — after the advisory panels have determined whether certain

applications "have artistic excellence and artistic merit," and after the Council has "ma[d]e recommendations to the Chairperson concerning . . . whether to approve" those applications. 20 U.S.C. § 955(f), (f)(1); see AR 210-12. During these earlier stages, neither the advisory panels nor the Council will consider whether proposed projects promote gender ideology; only the Chairperson will do that. See Defs.' Mot. 33; AR 207-09, 212-14. If the Chairperson concludes that a proposed project promotes gender ideology, the effect can only be negative. See supra Part III.A.2.

As to what empowers the Chairperson to categorically disfavor projects that promote certain viewpoints, Defendants offer two theories. First, the Final Notice posits that the Chairperson has statutory authority to make an independent assessment of artistic excellence and artistic merit, and that whether a project promotes gender ideology is relevant to that assessment. See AR 210-11. Second, Defendants contend that the NFAHA empowers the Chairperson to consider whether a project aligns with "general standards of decency and respect for the diverse beliefs and values of the American public," with the implication being that a project that promotes gender ideology does not. Defs.' Mot. 35-36 (discussing 20 U.S.C. § 954(d)(1)).

Both theories conflict with the NFAHA. To be sure, the NFAHA affords the Chairperson some discretion over whether to approve

applications that have made it past the first two rounds of review. When exercising that discretion, the Chairperson will be assessing content. See Finley, 524 U.S. at 585-86. Even so, neither the statute's instruction to employ the "subjective criteria" of excellence and merit nor its "vague exhortation" to consider decency and respect for diverse beliefs — i.e., viewpoint diversity — empowers the Chairperson to adopt an explicit policy of viewpoint discrimination. See id. at 583-84, 587.

Although the Chairperson has final approval authority over whether the NEA should fund certain projects, the NFAHA vests most of the substantive power to review those projects in the advisory panels and the Council. And the statute constrains the discretion of those entities as well. The Chairperson must "utilize advisory panels," which are required to recommend applications "solely on the basis of artistic excellence and artistic merit." 20 U.S.C. § 959(c). Those recommendations go to the Council, which in turn "make[s] recommendations to the Chairperson concerning" whether to approve those application and how much funding to provide for each. Id. § 955(f)(1)-(2). The Council cannot recommend applications to the Chairperson that have not been determined by the panels to have artistic excellence and artistic merit. Id. § 955(f)(1). And the Chairperson "may not approve an application with respect to which the Council makes a negative recommendation." Id.

§ 955(f)(2). Therefore, the panels' discretion constrains the Council's discretion, which in turn constrains the Chairperson's.[9]

This multistep review process reflects the NFAHA's stated purpose of "encouraging freedom of thought," id. § 951(7), as well as a broader effort to minimize the influence of politics over the NEA's funding decisions. See supra Part I.A (discussing NFAHA's legislative history). Other features of the statute speak to those intentions as well. The Chairperson is directed to "ensure that all advisory panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." 20 U.S.C. § 959(c)(1). Furthermore, the panels must include "lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and do not belong to arts organizations or artists' organizations. Id. § 959(c)(2). Panel members are appointed by the Chairperson. Id. § 959(c)(6).

As for the Council, its eighteen voting members must be "private citizens" who are widely recognized for their involvement in the arts and include "practicing artists, civic cultural

[9] The statute contains one exception not relevant here, which allows the Council to delegate its authority to the Chairperson for certain applications and with significant limitations. See 20 U.S.C. § 955(f).

leaders, members of the museum profession, and others who are professionally engaged in the arts." Id. § 955(b)(1)(C). Although appointed by the President, the Council's voting members serve staggered, six-year terms and cannot be reappointed for two years after their terms expire. Id. § 955(c). The NFAHA instructs the President to "give due regard" to different types of diversity in making the appointments. Id. § 955(b)(1)(C).

In contrast, the Chairperson has no statutorily prescribed qualifications and serves a four-year term. Id. § 954(b). This lopsidedness in the statutory scheme confirms that the NFAHA is designed to shield the NEA's review process from politics. For one, unlike the final stage of review, which is entrusted to a single person, the first two stages of review are entrusted to multimember deliberative bodies that represent cross sections of the American public. Furthermore, unlike the decision to give the Chairperson a four-year term, the fact that Congress gave the Council's voting members a staggered, six-year term with a two-year bar on reappointment suggests that it meant for them to be insulated from political influence. See Beck v. Tex. Bd. of Dental Exam'rs, 204 F.3d 629, 636 (5th Cir. 2000). And as noted above, when it comes to experience or expertise in the arts, the NFAHA contemplates a marked asymmetry between the Council and advisory panels on one side and the Chairperson on the other. This in turn

suggests that the Chairperson's role in the application review process is designed to be more formal than substantive.

Given these considerations, the Court finds it impossible to square the Final Notice with the NEA's authorizing statute. Although the NFAHA gives the Chairperson the final word over whether to approve applications for NEA grants, the Chairperson cannot use that power to downgrade applications simply because they promote disfavored views. The Court therefore finds that the Final Notice violates the APA because it exceeds the Chairperson's statutory authority under the NFAHA.

3. Arbitrary and Capricious

The Final Notice also violates the APA because it is arbitrary and capricious. See 5 U.S.C. § 706(2)(A). In determining whether final agency action is arbitrary and capricious under the APA, a reviewing court must consider "whether the [agency] examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" Dep't of Com., 588 U.S. at 773 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)). The scope of review is narrow, and a court "may not substitute [its] judgment for that of the [agency]." Id. That said, final agency action may be arbitrary and capricious "if the agency has relied on factors which

Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

The NEA's only explanation for its decision to categorically disfavor applications that promote gender ideology is that it will "serve the public by . . . furthering the current administration's priorities as provided in the [EO]," AR 214, which states that "[f]ederal funds shall not be used to promote gender ideology." EO § 3(g), 90 Fed. Reg. at 8616. The administrative record — which consists of the NFAHA, "a smattering of cases," the EO, the NEA's grant application guidelines, and the Final Notice — is devoid of reasoned policy analysis and is devoted instead to defending the NEA's decision on legal grounds. Pls.' Mem. 22; see generally AR. There is no examination of relevant data, there are no findings of fact, and there is zero explanation of what it means for a project to "promote gender ideology," let alone how that concept relates to artistic merit, artistic excellence, general standards of decency, or respect for the diverse beliefs and values of the American public. In short, the NEA has made no effort to justify its policy on any grounds aside from complying with the EO.

Defendants' basic argument is that the NEA is accountable to the public and the President executes the public's will; therefore, the Final Notice cannot be arbitrary and capricious because it "reflects a policy directive that the President issued." Defs.' Mot. 37. To be sure, "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." Dep't of Com., 588 U.S. at 781. But a "decision supported by no reasoning whatsoever in the record cannot be saved merely because it involves an Executive Order." Louisiana v. Biden, 543 F. Supp. 3d 388, 414 (W.D. La. 2021), vacated and remanded on other grounds, 45 F.4th 841 (5th Cir. 2022). Because the NEA has failed to explain its action outside of complying with the EO, the Court concludes that the Final Notice is arbitrary and capricious in violation of the APA.

4. Contrary to Constitutional Right

Finally, for the reasons discussed in Part III.A, the Final Notice is unlawful under the APA because it violates Plaintiffs' constitutional rights to free speech.

C. Fifth Amendment Claim

The Court finds that Defendants are entitled to summary judgment on Plaintiffs' Fifth Amendment claim. The Fifth Amendment to the U.S. Constitution prohibits deprivations of "life, liberty,

or property, without due process of law." U.S. Const. amend. V. Under the void-for-vagueness doctrine, a law may violate the Fifth Amendment if it (1) does not "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or (2) "may authorize and even encourage arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

"The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depends in part on the nature of the enactment," including the subject matter involved and the penalties at stake. Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498-99 (1982). "In particular, the [Supreme] Court has 'expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.'" Sessions v. Dimaya, 584 U.S. 148, 156 (2018) (quoting Hoffman Ests., 455 U.S. at 498-99). But "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Hoffman Ests., 455 U.S. at 499.

Plaintiffs contend that the Final Notice is void for vagueness

on both notice and enforcement grounds. Regarding notice, they argue that the NEA's failure to explain what it means to "promote gender ideology" has left Plaintiffs uncertain of what exactly the Chairperson intends to disfavor. Pls.' Mem. 25-27. As a result, Plaintiffs have submitted applications that "steer 'far clear' of anything that might be deemed to [promote gender ideology]." Id. at 27 (quoting Finley, 524 U.S. at 588). Regarding enforcement, Plaintiffs argue that the Final Notice "significantly broadens the discretion of one person, the NEA Chair, exacerbating the potential for arbitrary or discriminatory enforcement." Pls.' Reply 26; see Pls.' Mem. 29.

Notwithstanding the substantive merits of Plaintiffs' notice argument, the Court finds it unavailing because the NEA adopted the Final Notice after Plaintiffs had already submitted their grant applications. See supra Part I.B.3-4. Plaintiffs' enforcement argument also fails because the Final Notice does not broaden the Chairperson's discretion; rather, it specifies how the Chairperson intends to use that discretion. To be sure, this use of discretion violates the First Amendment and the APA for the reasons discussed above, see supra Part III.A-B, and the Final Notice promises both arbitrary and discriminatory enforcement. But that does not make the Final Notice unconstitutionally vague. Defendants are thus entitled to summary judgment on Plaintiffs' Fifth Amendment claim.

D. Remedy

The Court declares that the Final Notice is unconstitutional and unlawful; vacates and sets aside the Final Notice, 5 U.S.C. § 706(2); and instructs Plaintiffs to submit an application for fees and other expenses, 28 U.S.C. § 2412(d).

In addition to vacatur of the Final Notice, Plaintiffs seek permanent injunctive relief. Am. Compl. 36-37. The Supreme Court has recently cautioned federal courts to ensure that "injunctions are [no] broader than necessary to provide complete relief to each plaintiff with standing to sue." Trump v. CASA, Inc., 606 U.S. 831, 861 (2025). The Court finds that here, complete relief requires at least that Defendants be permanently enjoined from (1) applying to Plaintiffs — including members of TCG — a viewpoint-based standard of review that disfavors applications deemed "to promote gender ideology," and (2) requiring Plaintiffs — including members of TCG — to comply with the EO when using NEA funds.[10]

[10] The parties dispute whether the NEA has reinstated the "certification requirement" in its "Assurance of Compliance." See Pls.' Opp'n Defs.' Cross-Mot. & Reply Supp. Mot. Summ. J. (Pls.' Reply") 17 n.15; Defs.' Reply 2-3; see also Mem. & Order 17-20. In any event, it follows that if Defendants are enjoined from disfavoring applications for federal funds that "promote gender ideology," they should be enjoined from requiring applicants to comply with an executive order stating that "[f]ederal funds shall not be used to promote gender ideology" should they receive those funds. See Exec. Order No. 14168, § 3(g), 90 Fed. Reg. 8615, 8615-16 (Jan. 30, 2025).

Accordingly, the Court orders (1) and (2). If Plaintiffs believe the injunction as stated falls short of complete relief, the Court instructs them to provide briefing on this issue within fourteen (14) days of the date of this order; Defendants will have seven (7) days to respond; and Plaintiffs will have seven (7) days to reply.

Plaintiffs are entitled to injunctive relief because they have shown "actual success on the merits" of their First Amendment claim, irreparable harm would occur absent such relief, and "the public interest would not be adversely affected by an injunction." Doe v. R.I. Interscholastic League, 137 F.4th 34, 40 (1st Cir. 2025); see Nken v. Holder, 556 U.S. 418, 435 (2009) (noting the third and fourth injunction factors "merge when the Government is the opposing party"); Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). As for the public interest factor, the Court denied Plaintiffs' earlier request for preliminary injunctive relief largely because an injunction at that time would have impeded the NEA's then-pending administrative review process. See Mem. & Order 42-44. Because that process has since concluded, this consideration no longer applies. And the public interest is not on the government's side when it uses a program designed to promote free expression to

squash it instead.

Finally, the scope of the injunction does not affect the broad scope of vacatur under 5 U.S.C. § 706(2). See CASA, 806 U.S. at 847 n.10 (2025) ("Nothing we say today resolves the distinct question whether the [APA] authorizes federal courts to vacate federal agency action.").

IV. CONCLUSION

For the reasons above, Plaintiffs' Motion for Summary Judgment, Dkt. No. 22, is GRANTED IN PART and DENIED IN PART; and Defendants' Cross-Motion for Summary Judgment, Dkt. No. 24, is DENIED IN PART and GRANTED IN PART.

IT IS SO ORDERED.

William E. Smith
Senior District Judge
Date: September 19, 2025

Federal Register
Vol. 91, No. 144
Wednesday, July 29, 2026

Presidential Documents

Title 3—

The President

Executive Order 14416 of July 24, 2026

Restoring Trust in the Smithsonian Institution

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. *Policy.* On March 27, 2025, I issued Executive Order 14253 (Restoring Truth and Sanity to American History). Pursuant to that order, the Domestic Policy Council recently completed a months-long review of the Smithsonian Institution and its National Museum of American History (Museum) and issued its findings in the report entitled *Saving America's Story: How Ideological Capture at the Smithsonian Institution's National Museum of American History Erases Our Heritage* (Report).

The Report demonstrates that the Smithsonian leadership does not present American history as a shared national inheritance to be taught and celebrated, but instead views American history as a ''prime tool'' to advance ideas of social justice and the radical transformation of our society. The Report also overwhelmingly demonstrates that current leadership of both the Smithsonian Institution and the Museum cannot be trusted to tell America's story with honesty and gratitude.

It is therefore the policy of my Administration to take all available steps to ensure that the issues identified in the Report are addressed and to restore trust in the Smithsonian Institution.

Sec. 2. *Restoring Trust in the Smithsonian Institution.* The Secretary of the Interior, the Director of the Office of Management and Budget, the Administrator of General Services, and the Assistant to the President for Domestic Policy shall identify and utilize any and all available authorities to promote the policy of this order and to restore trust in the Smithsonian Institution, including any mechanisms available to encourage correction of the issues identified in the Report and compliance with any applicable statutes, regulations, executive actions, and funding or contract conditions.

Sec. 3. *Warning Visitors About the Ideological Capture at the National Museum of American History.* (a) The Secretary of the Interior, acting through the Director of the National Park Service (NPS) and in coordination with the Assistant to the President for Domestic Policy, shall install temporary signage along the NPS-maintained sisdewalks and walkways used by the public to access the Museum, informing visitors of the findings of the Report and of the policy set forth in section 1 of this order. Such signage shall notify visitors that the Museum exhibits should be renovated consistent with the findings in the Report and direct visitors to locations and resources for accurate information regarding America's history.

(b) Because the Museum has failed to appropriately honor the 56 signers of the Declaration of Independence during this 250th anniversary year of the founding of our country, the Secretary of the Interior, acting through the Director of the NPS and in coordination with the Assistant to the President for Domestic Policy, shall install temporary exhibits or signage on NPS-maintained sidewalks, walkways, and land used by the public that corrects inaccurate information presented in the Museum.

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

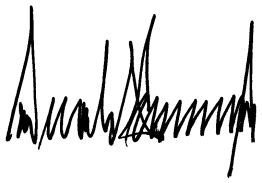
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The costs for publication of this order shall be borne by the Department of the Interior.



THE WHITE HOUSE,
July 24, 2026.

[FR Doc. 2026–15357
Filed 7–28–26; 11:15 am]
Billing code 4310–10–P

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

AMERICAN COUNCIL OF LEARNED SOCIETIES, *et al.*,

Plaintiffs,

25-cv-3657 (CM)

-against-

NATIONAL ENDOWMENT FOR THE HUMANITIES, *et al.*,

Defendants.

x

THE AUTHORS GUILD, *et al.*,

Plaintiffs,

25-cv-3923 (CM)

-against-

NATIONAL ENDOWMENT FOR THE HUMANITIES, *et al.*,

Defendants.

x

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

McMahon, J.:

These consolidated actions challenge the largest mass termination of previously awarded grants in the history of the National Endowment for the Humanities ("NEH") since its establishment in 1965. At issue is the termination, in early April 2025, of more than 1,400 grants, representing over $100 million in congressionally appropriated funds awarded to scholars, writers, research institutions, and other humanities organizations. In one action, the organizational plaintiffs are the American Council of Learned Societies ("ACLS"), the American Historical Association ("AHA"), and the Modern Language Association of America ("MLA") (collectively,

"ACLS Plaintiffs"). In the other, the plaintiffs are The Authors Guild and individual NEH grantees William Goldstein, Elizabeth Kadetsky, Valerie Orlando, Katalin Balog, Benjamin Holtzman, Lee Jasperse, and Nicole Jenkins (collectively, "Authors Guild Plaintiffs") who sue on behalf of themselves and a proposed class of similarly situated grantees.

The defendants are NEH; Adam Wolfson, sued in his official capacity as Acting Chairman of NEH; the United States Department of Government Efficiency Service ("DOGE"); Amy Gleason, sued in her official capacity as Acting Administrator of DOGE; and Nate Cavanaugh and Justin Fox, sued in their official capacities as employees of both DOGE and the General Services Administration ("GSA") (collectively, "Defendants" or the "Government"). The ACLS Plaintiffs allege injury both to themselves and to their members, who have long relied on NEH funding. The Authors Guild Plaintiffs allege that the challenged terminations swept in named individual grantees and at least 1,400 other recipients of NEH grants who received materially identical termination notices between April 1 and April 3, 2025 (the "Mass Termination").

Plaintiffs argue that Defendants (i) engaged in arbitrary and capricious agency action by terminating grants *en masse* without individualized consideration, *see* 5 U.S.C. § 706(2)(A); (ii) acted without statutory authorization and effectively displaced the National Endowment for the Humanities Chair and the grantmaking process Congress prescribed by effectuating terminations outside the statutory scheme set forth in 20 U.S.C. §§ 956(c), 957(f); and (iii) discriminated on the basis of viewpoint and protected characteristics by targeting projects associated with "diversity, equity, and inclusion," "gender ideology," and other subject matter that the Trump Administration regarded as inconsistent with its priorities.

Defendants deny those allegations and contend that the review and terminations were lawful efforts to implement presidential directives, eliminate grants associated with "diversity,

equity, inclusion, and accessibility" ("DEIA"), "diversity, equity, and inclusion" ("DEI"), "environmental justice," and "gender ideology," and reduce discretionary spending in accordance with the priorities of the new administration.

The matter is before the Court on cross-motions for summary judgment and is resolved on the basis of the full record, including contemporaneous emails, spreadsheets, deposition testimony, and the parties' Local Civil Rule 56.1 statements and counterstatements. For the reasons that follow, the Court concludes that Plaintiffs are entitled to judgment as a matter of law on their claims that the Government's Mass Termination of National Endowment for the Humanities grants (i) violated the First Amendment, (ii) violated the equal protection component of the Fifth Amendment, and (iii) was *ultra vires,* because, on the undisputed evidence, DOGE officials exercised decisive authority over the selection and termination of NEH grants without any statutory authority to do so.

I. Background

A. The National Foundation on the Arts and the Humanities Act

Congress created the National Endowment for the Humanities ("NEH") in 1965 as part of the National Foundation on the Arts and the Humanities. 20 U.S.C. §§ 951–960. Congress declared that, "The arts and the humanities belong to all the people of the United States," that federal support for the humanities is "necessary and appropriate," and that such support must be administered with sensitivity to "the nature of public sponsorship." 20 U.S.C. § 951(1), (5).

Congress further found that the humanities "reflect the high place accorded by the American people to the nation's rich cultural heritage" and help foster "mutual respect for the diverse beliefs and values of all persons and groups." 20 U.S.C. § 951(6). It also emphasized that

the Federal Government should help create and sustain "a climate encouraging freedom of thought, imagination, and inquiry." 20 U.S.C. § 951(7).

The statute repeats these themes throughout. Congress found that "national progress and scholarship in the humanities and the arts" are matters of federal concern; that, "Democracy demands wisdom and vision in its citizens"; and that federal support should "complement, assist, and add to" existing programs. 20 U.S.C. § 951(2), (4), (5). Of great significance for this case, the statute stressed that the humanities promote "mutual respect for *the diverse beliefs and values of all persons and groups,*" and announced that federal support should help create both a climate of intellectual freedom and the "material conditions" necessary for creative work. *Id.*, § 951(6), (7) (emphasis added).

Congress also defined the term "humanities" broadly. It includes "the study and interpretation of" language, literature, history, jurisprudence, philosophy, archaeology, comparative religion, and ethics. 20 U.S.C. § 952(a). It also encompasses "those aspects of the social sciences which have humanistic content and employ humanistic methods," as well as the "application of the humanities to the human environment." *Id.* The statutory definition expressly highlights the relevance of the humanities to "our diverse heritage, traditions, and history" and to "current conditions of national life." *Id.*

Within the Foundation, Congress established NEH itself. "There is established within the Foundation the National Endowment for the Humanities." 20 U.S.C. § 956(a). The NEH "shall be headed by a chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate." 20 U.S.C. § 956(b)(1).

Although the Chairperson has ultimate authority to award grants, Congress did not vest that authority in him either alone or without condition. Instead, it authorized the Chairperson,

"with the advice of the National Council on the Humanities," to enter into "contracts, grants, loans, and other forms of assistance" for specified purposes. 20 U.S.C. § 956(c). Those purposes are extensive and varied and reflect Congress's commitment to the fostering of diverse points of view and the exploration of all the varied and diverse aspects of American culture. The Chairperson is authorized to:

> (1) develop and encourage the pursuit of a national policy for the promotion of progress and scholarship in the humanities;
>
> (2) initiate and support research and programs to strengthen the research and teaching potential of the United States in the humanities by making arrangements with individuals or groups to support such activities; any loans made by the Endowment shall be made in accordance with terms and conditions approved by the Secretary of the Treasury;
>
> (3) initiate and support training and workshops in the humanities by making arrangements with institutions or individuals (fellowships awarded to individuals under this authority may be for the purpose of study or research at appropriate nonprofit institutions selected by the recipient of such aid, for stated periods of time);
>
> *(4)* initiate and support programs and research which have substantial scholarly and cultural significance and that reach, *or reflect the diversity and richness of our American cultural heritage, including the culture of, a minority, inner city, rural, or tribal community;*
>
> (5) foster international programs and exchanges;
>
> (6) foster the interchange of information in the humanities;
>
> (7) foster, with groups, education in, and public understanding and appreciation of the humanities;
>
> (8) support the publication of scholarly works in the humanities;
>
> (9) insure that the benefit of its programs will also be available to our citizens where such programs would otherwise be unavailable due to geographic or economic reasons; and
>
> (10) foster programs and projects that provide access to, and preserve materials important to research, education, and public understanding of, the humanities.

20 U.S.C. § 956(c) (emphasis added).

Congress also established the National Council on the Humanities. "There is established in the National Endowment for the Humanities a National Council on the Humanities." 20 U.S.C. § 957(a). The Council consists of the Chairperson and twenty-six private citizens appointed by the President, selected from persons "recognized for their broad knowledge of, expertise in, or commitment to the humanities," with records of "distinguished service" and appointed so as to provide "comprehensive representation" of scholarly, professional, and public viewpoints. 20 U.S.C. § 957(b).

The Council's role is not merely advisory in a general sense; it has specific statutory responsibilities. It "shall advise the Chairperson with respect to policies, programs, and procedures" for carrying out the Chairperson's duties. 20 U.S.C. § 957(f)(1). It must also "review applications for financial support and make recommendations thereon to the Chairperson." *Id.* § 957(f)(2).

The statute then imposes concrete procedural constraints on the Chairperson's authority. The Chairperson "shall not approve or disapprove any such application until the Chairperson has received the recommendation of the Council on such application," unless "the Council fails to make a recommendation thereon within a reasonable time." *Id.* § 957(f). The statute allows the Council to delegate its authority to the Chairperson, but only in cases involving small grants: "In the case of any application involving $30,000, or less, the Chairperson may approve or disapprove such request if such action is taken pursuant to the terms of a delegation of authority from the Council to the Chairperson." Even then, the Chairperson's unilateral action "shall be reviewed by the Council." *Id.* And even then, "the terms of any such delegation of authority shall not permit obligations for expenditure of funds under such delegation for any fiscal year which exceed an

amount equal to 10 per centum of the sums appropriated for that fiscal year," pursuant to 20 U.S.C. § 960(a)(1)(B). *Id.*

Section 957(f) thus does not make the Council's recommendation binding in all respects. Unlike the corresponding provision in the enabling statute for the National Council on the Arts, *see* 20 U.S.C. § 955(f), the Humanities provision does not state that the Chairperson may approve only the amount recommended by the Council, or may not approve an application that receives a negative recommendation. But it does require, absent the statute's narrow exceptions, that the Chairperson receive and consider the Council's recommendation before acting.

The summary-judgment record confirms that NEH historically operated in accordance with this structure. Wolfson testified that proposals typically proceed through peer-review panels, followed by staff recommendations, Council review, and then final action by the Chair. Dkt. No. 248-26, Wolfson Dep., 41:18–25. He explained that, by the time a proposal reaches the Chair, it has already undergone multiple layers of expert evaluation. *Id.*, 42:1–8. In practice, Chairs have accepted the Council's recommendations "more than 90 percent of the time," because they trust "the peer-review process." *Id.*, 42:13–20; 62:4–16.

The statute also addresses post-award compliance and potential termination, but it does so in specific, enumerated ways. It does not authorize the wholesale revocation of grants already awarded simply because a new administration disagrees with the decisions of a previous administration or prefers to redirect funds elsewhere. Section 959 requires recipients of Endowment assistance to submit financial and project reports to the Chairperson, including a financial report containing information necessary to ensure that the assistance was expended "in accordance with the terms and conditions under which it is provided." 20 U.S.C. § 959(f)(2)(A)(i). If the recipient "substantially fails to satisfy the purposes for which such financial assistance is

provided," as determined by the Chairperson, Congress identified particular post-award consequences the Chairperson may impose: the Chairperson may take the results of the post-award evaluation into account in deciding whether to provide future assistance, may prohibit the recipient from using the Endowment's name in connection with the project, and, if the project is published, may require a disclaimer that the views expressed do not reflect those of NEH. *Id.* § 959(f)(3)(A)–(C).[1]

These provisions do not make Council consultation a prerequisite to every post-award enforcement action. But they do show that Congress addressed post-award compliance in grantee-specific, *Chair-centered* terms, tied to compliance with award purposes, statutory criteria, and grant terms – not to a new administration's ideological disagreement with previously awarded projects.

B. The Parties

1. The ACLS Plaintiffs

The organizational plaintiffs in Case No. 25-cv-3657 (the "ACLS Plaintiffs") are three of the nation's leading scholarly associations in the humanities: the American Council of Learned Societies ("ACLS"), the American Historical Association ("AHA"), and the Modern Language Association of America ("MLA"). Dkt. No. 230, ¶¶ 12–14.

Plaintiff ACLS is a nonprofit organization headquartered in New York whose members include 81 scholarly organizations spanning a wide range of disciplines within the humanities.

[1] The statute also contains provisions outlining the consequences for non-compliance with grant awards made to states and their humanities councils pursuant to 20 U.S.C. § 956(f). However, those grants are not at issue in this case. They are the subject of a case pending in the District of Oregon, brought by a state humanities council and related entities to challenge the termination of grants made to States under the "Federal/State Partnership" provisions of the National Foundation on the Arts and the Humanities Act. *See Oregon Council for the Humanities v. United States DOGE Service*, 794 F. Supp. 3d 840 (D. Or. 2025).

Dkt. No. 230, ¶ 12. Founded in 1919, ACLS is dedicated to advancing understanding of human culture and experience through the support and dissemination of scholarship. *Id.* It carries out that mission both by conducting programs directly and by funding research conducted by scholars and institutions. *Id.* ACLS itself has received 144 direct grants from NEH since the agency's founding, and its member organizations have likewise been frequent recipients of NEH funding. *Id.*

Plaintiff AHA is a nonprofit organization founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies. Dkt. No. 230, ¶ 13. Headquartered in Washington, D.C., AHA is the largest membership association of historians in the world, with more than 10,400 members representing a wide range of historical fields and professions. *Id.* AHA alleges that its members have received more than 300 NEH awards in the past five years, and AHA itself has received nearly 50 grants since NEH's founding. *Id.*

Plaintiff MLA is a nonprofit organization founded in 1883 and headquartered in New York. Dkt. No. 230, ¶ 14. MLA serves as a leading professional association for the study and teaching of languages and literature and operates a substantial publishing program in the humanities. *Id.* It has more than 20,000 members and supports them through professional initiatives, including collaborative research networks and institutional partnerships. *Id.* MLA's members have received more than 180 NEH awards in the past three years, and MLA itself has received nearly 50 NEH grants since NEH's founding. *Id.*

These plaintiffs bring claims both on their own behalf and in an associational capacity on behalf of their members, many of whom are current or recent NEH grantees whose awards were affected by the challenged terminations. Dkt. No. 230, ¶¶ 12–14.

2. The Authors Guild Plaintiffs

The plaintiffs in Case No. 25-cv-3923 (the "Authors Guild Plaintiffs") include both an associational plaintiff – the Authors Guild – and a group of individual NEH grant recipients whose awards were terminated in early April 2025. Dkt. No. 240, ¶¶ 11–24.

The Authors Guild is a national nonprofit membership association founded in 1912 and headquartered in New York City. *Id.*, ¶ 11. It represents more than 14,000 professional writers, including historians, biographers, journalists, academics, and other authors of fiction and non-fiction. *Id.* The Guild works to promote the professional and legal interests of authors, including in areas such as copyright, freedom of expression, and fair contracts. *Id.* It alleges that many of its members have received NEH grants, including under programs such as Public Scholars, Fellowships, and Summer Stipends, and that those members were among the recipients of the challenged terminations. *Id.* Unlike the ACLS Plaintiffs, the Authors Guild does not allege that it has itself received NEH funding; it brings this action solely in its associational capacity on behalf of its members. *Id.*

The individual plaintiffs are scholars and writers who received NEH grants for specific research and writing projects and whose awards were terminated before the completion of their funded work. *Id.*, ¶¶ 12–24. In each instance, the award specified a defined "grant period," meaning the fixed period of performance during which the recipient was authorized – and, in some cases, required – to devote time to the funded project in exchange for the grant funds. *Id.*

Plaintiff Elizabeth Kadetsky, a professor in the English Department at Pennsylvania State University, was awarded a $60,000 Public Scholars grant to support a book project examining a 1962 temple theft and the international antiquities trade. Dkt. No. 240, ¶¶ 2, 12. Her grant period was scheduled to run from May 1, 2025 through April 30, 2026, but the award was terminated before it began on April 3, 2025. *Id.*, ¶¶ 2–5.

Plaintiff Valerie Orlando, Head of Department and Professor of French & Francophone Literatures and Cultures at the University of Maryland, College Park, was awarded an NEH Summer Stipend to support research on history and memory in contemporary Algerian literature. *Id.*, ¶¶ 13–14. The stipend, scheduled for disbursement in June 2025 to support concentrated research during a defined period, was terminated before any funds were paid on April 3, 2025. *Id.*

Plaintiff Katalin Balog, a professor of philosophy at Rutgers University–Newark, received a $60,000 NEH Fellowship for a book project on the philosophy of mind and consciousness, with a grant period from January 1, 2025 through December 31, 2025. *Id.*, ¶¶ 15–16. Although she received a portion of the award, the remainder was terminated during her grant period on April 3, 2025. *Id.*

Plaintiff Benjamin Holtzman, an assistant professor of history at Lehman College, was awarded a $60,000 grant under NEH's Awards for Faculty at Hispanic-Serving Institutions program to support a book project examining resistance to white supremacist organizing in the late twentieth century. *Id.*, ¶¶ 17–18. His grant period ran from September 1, 2024 through August 31, 2025, but the award was terminated, before full disbursement, on April 3, 2025. *Id.*

Plaintiff William Goldstein is a writer, editor, and longtime publishing professional who has served in senior editorial roles, including as founding editor of the books website of *The New York Times*. *Id.*, ¶ 19. He was awarded a $60,000 Public Scholars grant to support the writing of a biography of Larry Kramer, the playwright and AIDS activist. *Id.*, ¶ 20. The grant period ran from September 1, 2024 through August 31, 2025. While he received $50,000 of the award, the remaining $10,000 – scheduled for disbursement in July 2025 – was never paid because the grant was terminated on April 3, 2025. *Id.*

Plaintiff Lee Jasperse, a Teaching Fellow in the Department of English Language and Literature at the University of Chicago, was selected for a fellowship at the Massachusetts Historical Society that was contingent on NEH funding in the amount of $30,000. *Id.*, ¶¶ 21–22. That funding was terminated effective April 2, 2025, resulting in the loss of the fellowship itself. *Id.*

Plaintiff Nicole Jenkins, an assistant professor at Howard University and a Visiting Faculty Fellow at Harvard University, was awarded a $60,000 grant to support a book project examining Black women's experiences and social institutions. *Id.*, ¶¶ 23–24. Her grant period was scheduled to run from August 1, 2025 through July 31, 2026, but the award was terminated in April 2025 before any funds were disbursed. *Id.*

These individual plaintiffs allege concrete professional, financial, and scholarly harms resulting from the terminations, including disruption of ongoing research, loss of anticipated funding, and the inability to complete projects within the defined grant periods for which support had been awarded. *Id.*, ¶¶ 12–24. In several instances, the terminations occurred after the grant period had begun and after recipients had undertaken work in reliance on the awards. The complaint alleges that several named plaintiffs structured their employment and professional lives around the grants. For example, Kadetsky alleges that, because her grant was a "full-time" award, she was "required by NEH to take a year-long leave of absence from her employment to work on the project." *Id.*, ¶ 4. Balog similarly alleges that, "As a condition of her grant, she was required to take a leave of absence from her teaching job." *Id.*, ¶ 16. Holtzman alleges that he was "prohibited from teaching or engaging in 'other major activities,' leaving him without other income sources," *id.* ¶ 18, and Jasperse alleges that he "forewent taking on any other major assignments, leaving him almost entirely dependent on the NEH award for income," *id.*, ¶ 22.

Jenkins alleges that she was "approved for leave from Howard University" and "forwent other fellowship, funding, research, and professional development opportunities" in reliance on the award. *Id.*, ¶¶ 23–24.

Collectively, the ACLS Plaintiffs and the Authors Guild Plaintiffs challenge a series of actions undertaken in late March and early April 2025 – culminating in the mass termination of more than 1,400 NEH grants nationwide – following a review process in which DOGE personnel played a central role in identifying and implementing the challenged terminations.

3. Defendants

The defendants are the National Endowment for the Humanities ("NEH"); Adam Wolfson, sued in his official capacity as Acting Chairman of NEH; the United States DOGE Service ("DOGE"); Amy Gleason, sued in her official capacity as Acting Administrator of DOGE; and Nate Cavanaugh and Justin Fox, sued in their official capacities as employees of DOGE or the General Services Administration. Dkt. No. 230, ¶¶ 15–20; Dkt. No. 240, ¶¶ 25–30.

NEH is a federal agency headquartered in Washington, D.C., responsible for administering the grant programs at issue in this litigation. Dkt. No. 240, ¶ 25. Michael McDonald served as Acting Chairman of NEH at the time the termination notices were issued to grantees. *Id.*, ¶ 26.

DOGE is a component of the Executive Office of the President, created in 2025. It was established by Executive Order 14158, *Establishing and Implementing the President's "Department of Government Efficiency*." Cavanaugh and Fox acted on behalf of DOGE at the NEH. Dkt. No. 230, ¶¶ 19–20. Defendant Gleason is the Acting Administrator of DOGE. *Id.*, ¶ 18.

Defendants Cavanaugh and Fox were assigned to operate across federal agencies, including NEH, in connection with DOGE's activities.

C. Historical Practice at NEH

The record reflects that NEH did not historically terminate grants in the manner challenged here. Wolfson testified that, during his previous thirteen- to fourteen-month period as Acting Chair, he did not recall the agency terminating any awarded grant. Dkt. No. 248-26, Wolfson Dep., 45:1–7. Over roughly two decades working at NEH, he could think of only "a couple" of grant terminations, Dkt. No. 248-26, Wolfson Dep., 46:2–11, and the few examples he recalled involved circumstances in which the grantee had failed to comply with the terms of the grant. *Id.*, 46:22–47:21. He further testified that he was not aware of any grants being canceled because "a new administration disagreed with the topic being studied or written about." *Id.*, 48:2–14, 49:5–10. And he confirmed that, throughout his career at NEH, no administration had ever "canceled the vast majority of grants that were already awarded." Dkt. No. 248-26, Wolfson Dep., 63:18–25.

The historical practice at NEH is consistent with Wolfson's testimony about the ordinary review process, as well as with the record evidence showing that NEH's grantmaking was staff-intensive and structured around expert review, program-officer recommendations, and repeated Council involvement. Dkt. No. 248-26, Wolfson Dep., 23:23–24:14, 41:18–42:20.

D. The Executive Orders

The agency review at issue here followed the issuance of several Executive Orders shortly after President Trump took office in January 2025.

On January 20, 2025, the President issued Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*. The Order declared that the prior administration had forced "diversity, equity, and inclusion" ("DEI") into "virtually all aspects of the Federal Government," and directed agency heads to "terminate, to the maximum extent

allowed by law," all DEI, "diversity, equity, inclusion, and accessibility" ("DEIA"), and "environmental justice" offices, programs, grants, and related activities. Exec. Order No. 14151, §§ 1, 2(b)(i), 90 Fed. Reg. 8339, 8339–40 (Jan. 20, 2025). The same Order directed agencies to identify federal grantees that had received funding to provide or advance DEI, DEIA, or environmental justice programs, services, or activities since January 20, 2021. Exec. Order No. 14151, § 2(b)(ii)(C), 90 Fed. Reg. at 8340.

Also on January 20, 2025, the President issued Executive Order 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*. That Order defined "gender ideology," directed agencies to remove messages and policies that "promote or otherwise inculcate gender ideology," and stated that agencies "shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology." Exec. Order No. 14168, §§ 2(f), 3(e), (g), 90 Fed. Reg. 8615, 8615–16 (Jan. 20, 2025).

On February 26, 2025, the President issued Executive Order 14222, *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative*. That Order directed each agency head, "in consultation with the agency's DOGE Team Lead," to "review all existing covered contracts and grants and, where appropriate and consistent with applicable law, terminate or modify . . . such covered contracts and grants to reduce overall Federal spending or reallocate spending to promote efficiency and advance the policies of my Administration." Exec. Order No. 14222, § 3(b), 90 Fed. Reg. 11095, 11095–96 (Feb. 26, 2025). It required that the process "commence immediately" and that it be completed within 30 days. *Id.*

E. NEH's Internal Review and DOGE's Arrival

The events leading to the challenged terminations began with a first stage of internal review undertaken by NEH in response to newly issued Executive Orders in early 2025. That internal

process was soon followed – and ultimately overtaken – by the involvement of personnel associated with the United States DOGE Service.

At the start, NEH staff were directed to conduct a retrospective review of active grants. That review focused on awards issued during the Biden Administration. Dkt. No. 276-4, Wolfson Dep., 87:21–88:4 (describing it as a "historical review of all grants starting" in January 2021). Staff were instructed to evaluate whether those grants implicated the subject areas identified in the Executive Orders – namely, "diversity, equity, and inclusion" ("DEI"), "diversity, equity, inclusion, and accessibility" ("DEIA"), "environmental justice," and "gender ideology." *Id.*, at 86:21–87:4; *see also* Dkt. No. 277 at 8, ¶¶ 25–26; Dkt. No. 276-6 at 1, NEH_AR_000022.

The review resulted in the creation of a spreadsheet compiled by NEH personnel, including Brett Bobley, the NEH's Chief Information Officer. Dkt. No. 276-4, Wolfson Dep., 87:22–88:4. Each grant was assigned a categorical rating – "low," "medium," "high," or "not applicable" – based on its perceived relationship to DEI, DEIA, environmental justice and gender ideology. *Id.* at 88:5–89:19. McDonald, who was at the time the Acting Chairman of the NEH, testified that NEH staff conducted this rating as part of an effort "to identify grants for potential termination." Dkt. No. 248-3, McDonald Dep., 101:7–11; *id.* at 144:6–15.

This initial review did not itself result in any terminations. Rather, it produced an internal inventory of grants organized by subject-matter classifications, which was then passed on to DOGE for further review.

The second stage of the grant termination process began on March 12, 2025, when Justin Fox and Nate Cavanaugh – identified in the record as members of DOGE's "Small Agencies Team" – met with NEH leadership, including McDonald and Wolfson. Dkt. No. 277 at 37–38, ¶¶ 11, 14–15. Both individuals testified that they joined DOGE shortly after the President's

January 2025 inauguration, after being recruited by senior DOGE officials and hired through the General Services Administration ("GSA"), where Fox and Cavanaugh both served as political appointees working on DOGE initiatives. Dkt. No. 248-2, Cavanaugh Dep., 19:1–20:15 (stating that he was recruited by DOGE official Steve Davis); 26:16–27:3; Dkt. No. 248-1, Fox Dep., 44:19–47:19 (stating that he was recruited by DOGE officials Anthony Armstrong and Joshua Gruenbaum). Prior to joining the Trump Administration, neither Fox nor Cavanaugh had any experience in government, public grant administration, private grant administration, or reviewing humanities projects for scholarly merit. Dkt. No. 248-1, Fox Dep., 43:7–44:6; Dkt. No. 248-2, Cavanaugh Dep., 51:1–4. In fact, as both were in their twenties, they did not have much experience in anything at all – certainly not in anything remotely related to the humanities.

Cavanaugh testified that DOGE official Steve Davis – whom he described as "effectively [his] manager" – hired him to lead what was known as the "Small Agencies Team." Dkt. No. 276-1, Cavanaugh Dep., 36:21–37:11. That team, he explained, consisted of DOGE personnel "assigned and detailed from typically GSA to small Federal agencies in the Government, including NEH," and included both Cavanaugh and Fox. *Id.*, 37:14–24. The team operated out of GSA and met regularly as it carried out its work. *Id.*, 38:13–24.

According to Cavanaugh, the purpose of the "Small Agencies Team" was to reduce the spending of "useless small agencies in the Federal Government," with a particular focus on agencies implicated by the Executive Orders. Dkt. No. 244-3, Cavanaugh Dep., 55:18–22, *see also* Dkt. No. 276-1, 38:2–11. In practice, that assignment translated into reviewing congressionally authorized agency programs – including grants – in light of the President's priorities. *Id.*

By the time Fox and Cavanaugh first met with NEH leadership, including McDonald and Wolfson, on March 12, 2025, Fox had already begun independently reviewing NEH grants using keyword searches of grant descriptions, employing terms such as "gay," "BIPOC," "indigenous," "tribal," "melting pot," and "equality," and had created his own spreadsheet, which sorted all NEH grants from the Biden years into categories called "Craziest Grants" and "Other Bad Grants." Dkt. No. 249, at 6, ¶¶ 32–36; Dkt. No. 277, at 37–38, ¶ 12. The spreadsheet included a tab labeled "Detection Codes," listing terms such as "Tribal," "Immigrants," "diversity," "inclusion," "Indigenous," "Native," "Equity," "Equality," "Marginalized," "BIPOC (Black, Indigenous, People of Color)," "Solidarity," "Citizenship," "Melting Pot," "Social Justice," and "Gay." Dkt. No. 248-9, at 25. Fox admitted that the labels "Craziest Grants" and "Other Bad Grants" reflected his and Cavanaugh's own "subjective" views. Dkt. No. 248-1, Fox Dep., 232:18–233:14. Nothing in the record indicates that either Fox or Cavanaugh read NEH's authorizing statute or understood that Congress itself had identified many of the subjects swept up by those search terms as proper objects of NEH support.

Examples from that "Craziest Grants" illustrate the types of projects DOGE was flagging. One "crazy grant" was a joint project between the Henry E. Huntington Library and Art Gallery and the University of Southern California, which was designed to encourage public engagement with themes including "national identities," "the struggle for democracy" from the perspective of California and the West, and "the nation's uneven journey to an equitable and just society." Dkt. No. 248-9, at 3. The period to be studied ran from 1450 to 1850, when California became a state.

Another "Craziest Grants" entry described a funded project that would employ virtual reality so participants could "explor[e] indigenous knowledge, culture, and climate" at Mesa Verde National Park and Wupatki National Monument. Dkt. No. 248-9 at 3. The project's goal was to

allow participants, "guided by voices from Native American descendant communities," to "grow their understanding of these storied landscapes," reflect on their own relationship to changes in the American Southwest, and "challenge stereotypes of Native Americans historically and today." *Id.*

A third "Craziest Grant" funded the writing of a book on the "Legacies of HIV/AIDS prison movements in the US," examining activism surrounding the intersection of incarceration and public health. *Id.* at 11.

The day after the March 12 meeting, Wolfson sent Fox and Cavanaugh the spreadsheet that NEH staff had created. Dkt. No. 277 at 38, ¶ 13; Dkt. No. 276-7, NEH_AR_000005. Fox and Cavanaugh used that spreadsheet "as a starting point," supplemented it with their own identifications of grants they believed implicated the President's executive orders, and circulated a revised spreadsheet back to NEH leadership. Dkt. No. 277 at 38, ¶ 14.

Cavanaugh's testimony establishes how that review was conducted in practice. When asked how they determined which grants to flag, he testified: "We read the description [of the project] in the relevant column [of the NEH spreadsheet]." Dkt. No. 276-1, Cavanaugh Dep., 113:13–16. Their review focused on "the description column, the amount of the grant, and then whether there was [*sic*] still any funds associated with the grant that were outstanding." *Id.*, 114:16–20.

Critically, Cavanaugh confirmed that they did not examine any of the applications or underlying materials that had been submitted when applying for the grants or any materials generated by NEH staff when those applications were reviewed. When asked whether they reviewed grant applications or other external sources, he answered: "We did not." *Id.*, 115:2–4. He likewise testified that they did not consult project websites or other supplementary materials, but limited themselves to the short project descriptions that appeared in the spreadsheet. *Id.*,

114:21–115:20 ("Q: In your view, [the spreadsheet description's] an exhaustive description? A: I think it's a thorough description of what the grant is related to, yes."); *see also id.*, 113:14–16, *id.*, 115:3–4; Dkt. No. 248-1, Fox Dep., 204:20–23; *id.* at 209:25–210:2. Cavanaugh also acknowledged that the resulting categorizations reflected his and Fox's own judgment, testifying that the determinations about which grants to flag were made "in our view." *Id.*, 113:1–7.

Wolfson, who observed the termination process from within NEH, testified that it evolved over time. At the outset, he understood the review to be focused on identifying grants that implicated DEI – which is what NEH staff had done, and provided to DOGE on March 12. But he testified that Fox and Cavanaugh later "made clear at various points that it wasn't just grants related to DEI, but just grants that didn't fit the priorities of the new administration." Dkt. No. 276-4, Wolfson Dep., 85:13–18. Thus, what began as an internal NEH effort to catalogue grants in light of the Executive Orders was overtaken by a DOGE-directed process – led by a DOGE-led "Small Agencies Team," relying on spreadsheet descriptions rather than underlying grant applications, and guided by the team's own assessment about which projects were inconsistent with the administration's priorities. Dkt. No. 276-1, Cavanaugh Dep., 37:1–24; 113:13–16; 114:16–20; 115:2–4; Dkt. No. 276-4, Wolfson Dep., 85:13–18. This process set the stage for the mass terminations that followed.

F. ChatGPT, the "DEI Rationales," and the Final Termination Lists

Fox and Cavanaugh focused their efforts on grants awarded during the Biden Administration. On March 12, 2025 – the same day they first met with NEH leadership – Cavanaugh sent McDonald a spreadsheet identifying 1,295 grants awarded during "President Biden's administration," totaling approximately $322 million in funds "remaining (can presumably be clawed back)." Dkt. No. 249 at 7, ¶ 38; Dkt. No. 248-27, Ex. 27,

NEH_AR_000003. The spreadsheet was titled "Biden Grants." Dkt. No. 248-28, Ex. 28, NEH_AR_000004. McDonald testified that the "presumption was that . . . open grants that were made under the Biden administration needed to be reviewed," and that the objective was to "start afresh" with "a clean slate." Dkt. No. 248-3, McDonald Dep., 372:19–23; *id.* at 226:12–227:1.

Fox began a second stage review of grants that NEH staff had not identified as implicating DEI or related categories – *i.e.*, that were labelled on NEH's spreadsheet "N/A," or not applicable, to the goals outlined in the Executive Order. Fox testified that this review was designed to identify additional grants that could be placed "[o]n the road to termination" and to "isolate" additional grants "to terminate." Dkt. No. 248-1, Fox Dep., 159:2–11; *id.* at 193:20–23. In order to accomplish this goal, Fox used ChatGPT – an artificial-intelligence tool that generates text in response to user prompts – to create what the parties call "DEI rationales" that might arguably pertain to the "N/A" grants. Dkt. No. 249 at 7, ¶ 41; Dkt. No. 277 at 12–13, ¶¶ 40–41; *id.* at 38–39, ¶ 16.

Fox testified that he used ChatGPT "[t]o highlight why [a] grant may relate to DEI" and "to pull out anything related to DEI." Dkt. No. 248-1, Fox Dep., 204:20–23; *id.* at 209:21–210:2. To do so, he submitted each cursory grant description from the NEH spreadsheet to ChatGPT using a standardized prompt: "Does the following relate at all to DEI? Respond factually in less than 120 characters. Begin with 'Yes.' or 'No.' followed by a brief explanation." Dkt. No. 277 at 13, ¶ 41; Dkt. No. 249 at 7, ¶ 41; Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3") at C2–C1163. Fox testified that he did not define "DEI" for ChatGPT and that he did not have the slightest idea how ChatGPT understood the term. Dkt. No. 277 at 13–14, ¶ 43 ("Admitted that Fox did not provide ChatGPT with a definition of "DEI" and that Fox was unsure of ChatGPT's understanding

of the term 'DEI.'"). Nor did Fox ask ChatGPT to factor in the purpose, methodology or scholarly substance of a project – which would have required familiarity with the underlying grant materials.

Because the inquiry was framed only in terms of whether a project "relate[d] at all to DEI" (whatever that might mean to ChatGPT), projects whose abbreviated descriptions contained general references to "history," "culture," or "identity" were frequently identified by ChatGPT as relating to DEI. For example, a project to recover and analyze ancient writings attributed to Moses but excluded from the canonical Hebrew Bible and preserved in fragmentary form (*e.g.*, the Book of Jubilees and the Testament of Moses) was classified as DEI because it claimed to "provide important insight into *Jewish* thought from two thousand years ago, complementary to insight from the Dead Sea Scrolls and the New Testament." Dkt. No. 248-11, at 99, C461–I461 (emphasis added). The project description reflects a highly technical effort involving multispectral imaging, textual reconstruction, and the recovery of deteriorated source materials. *Id.* Yet, the assigned rationale consists of a single sentence linking the project to "Jewish thought," which ChatGPT considered to be aligned with "DEI" goals. *Id.*

Another project, titled "How the City Became Plastic," examines the emergence of a coalition of plastics industry participants who, according to the project description, "pop up in cities all across the country to convince, cajole, or force municipal government officials to overhaul building codes, infrastructure codes, and solid waste programs, to the advantage of plastics." Dkt. No. 248-11 at 235, C1101–I1101. The description explains that, "In the decades between 1950 to 1980, municipal code updates opened the flood gates for new plastic products in buildings and infrastructure, amid simultaneous failed efforts to reduce the torrent of consumer plastics entering the municipal waste stream." *Id.* Drawing on evidence from cities including New York, Los Angeles, Cleveland, and Pittsburgh, the project "demonstrates how shifting power dynamics,

smooth salesmanship, and legal strong-arming produced cities, and a whole world, inundated with plastic." *Id.* The project's actual focus was the historical development of industrial policy and municipal regulation. Nevertheless, ChatGPT classified the project as "DEI," producing the following rationale: "Yes. This description highlights how the plastics industry influenced municipal government officials to favor plastics, impacting waste management and infrastructure codes. #DEI." *Id.*

Another grant supported a study of the Chinese government's persecution of the Uyghur people. As described in the spreadsheet, the project documented surveillance practices, detention facilities, coercive assimilation policies, restrictions on language, religion, and cultural practice, and the effects of those policies on Uyghur communities in China and in the diaspora. In other words, the project concerned state policy, human-rights conditions, and the preservation of cultural and religious identity under conditions of repression by the Chinese government. Yet ChatGPT classified the project as "DEI," Dkt. No. 248-11, at 22, apparently because it concerned the threatened erasure of a particular ethnic and religious group, albeit one located in a foreign country. Disfavoring this grant on "DEI" grounds, or any grounds, is especially difficult to square with the United States' longstanding, bipartisan condemnation of China's treatment of the Uyghurs, including during the first Trump Administration. *See, e.g.*, *Addressing China's Oppression of Uyghurs*, Nat'l Sec. Inst., Geo. Mason Univ. Antonin Scalia L. Sch., (2021) ("Two successive administrations—Republican and Democratic alike—have recognized the oppression of Uyghurs by China as a modern-day genocide and have imposed key sanctions on China and the Chinese Communist Party (CCP).").

Finally, another grant sought to examine the cultural and intellectual experience of American women in Paris from the late nineteenth century through the mid-twentieth century. The

proposal for the grant (which Fox and Cavanaugh admittedly never read) describes a scholarly monograph tracing "the long and tangled love affair between American women and Paris," beginning with "the aspiring artists who flocked to Parisian academies in the 1890s," moving "through World War I and Edith Wharton's reports from the front lines," and into "the myth-saturated 1920s, when Josephine Baker stormed the cabaret stage and sang of her 'deux amours' for her home and Paris," capturing the "conflicted emotions of expatriate American women." Dkt. No. 248-11, at 126, C584–I584. It further explains that, "In the wake of another war, the 1950s saw a resurgent transatlantic exchange of ideas and culture," culminating in "the youth-led revolts of May 1968." *Id.* The proposal situates these narratives within broader developments in artistic production, intellectual exchange, and the evolving political status of women in the United States and France. It was classified by Fox's ChatGPT-driven review as "DEI" – apparently because it related to the interests and cultural accomplishments of women. *Id.*

The record reflects that these ChatGPT determinations were generated without any additional context beyond the cursory spreadsheet descriptions themselves. Given what courts now know about the hallucinatory propensities of ChatGPT and similar generative-AI tools, it would hardly be surprising if ChatGPT inferred, from DOGE's repeated requests, that Fox and Cavanaugh were looking for reasons why grants could be characterized as DEI – and therefore terminable – and supplied "rationales" simply in order to satisfy the user's perceived demand. The utter lack of reasoning behind so many of its "rationales" certainly suggests as much.

Fox incorporated the ChatGPT-generated determinations into the spreadsheets that were used to identify grants for termination – combining NEH's initial ratings ("low," "medium," "high," or N/A) with ChatGPT's output to produce final lists cataloguing grants "by DEI involvement and Division," with each grant marked "Yes" or "No" and accompanied by a brief

explanation, or "DEI Rationale." Dkt. No. 249, at 10, ¶¶ 57–59; Dkt. No. 277, at 12–13, ¶¶ 40–41; Dkt. No. 248-12, Ex. 12, US-000000936; Dkt. No. 248-13, Ex. 13, US-000041372. These lists were then presented to McDonald, the Acting Chairperson of NEH.

McDonald was not told how the termination rationales had been generated. He testified that he did not know ChatGPT had been used and that he did not believe AI was an appropriate tool for identifying grants to terminate. Dkt. No. 249, at 10, ¶¶ 61–62. When shown examples from the final spreadsheet during his deposition, McDonald acknowledged that, in certain instances, the stated rationales were insufficient, irrational, or simply did not make sense. *See* Dkt. No. 248-3, McDonald Dep., 119:3–123:8 ("If it were terminated on that grounds . . . I would say it should not be terminated [as] DEI"), *id.*, 128:21–129:15 ("Q: Do you agree that this grant involved DEI? A: No, I do not."), *id.*, 131:3–131:7 ("I have no basis on which to conclude that the – the grant money would have been used to advance a particular social or political point of view that I would normally associate with DEI[.]"). But, as explained below, McDonald was not the person who decided which NEH grants would be terminated.

There can be no serious dispute that the review process implemented by DOGE did not conform to, or even resemble, NEH's ordinary grant-review process, which itself was designed to comply with the mandates of its authorizing statute. The statutory process contemplates individualized evaluation by subject-matter experts, advisory review, Council involvement, and final action by the Chairperson. *See supra* Sections I(A), (C). And once grants had been awarded, the Act does not authorize a wholesale post-award revocation based on new ideological criteria. Rather, for awards made under § 956(c), the Act provides for post-award evaluation, financial and project reporting, and potential termination only when the Chairperson determines that a recipient

has substantially failed to satisfy the purposes for which the assistance was provided or the applicable statutory criteria. *See* 20 U.S.C. § 959(f)(1)–(3).

DOGE's process, by contrast, rested on abbreviated spreadsheet descriptions and a binary ChatGPT prompt asking whether each project "relate[d] at all to DEI." Fox then folded the ChatGPT-generated rationales into the final spreadsheets used to identify grants for termination, thereby combining DOGE's AI-generated classifications with NEH staff recommendations. *Compare* Dkt. No. 248-12, Ex. 12, US-000000936 (combined list of ChatGPT-generated recommendations and NEH recommendations), *with* Dkt. No. 248-11 (ChatGPT-generated recommendations); *see also* Dkt. No. 248-1, Fox Dep., 204:20–206:8; *id.* at 209:21–210:2; Dkt. No. 248-2, Cavanaugh Dep., 134:14–19 ("The final list that we ended up recommending to Mike and Adam were a combination of both our original list and their employee reviewed list."); *see also* Dkt. No. 248-12, Ex. 12, US-000000936. Nothing in the record suggests that NEH had ever before employed such a process before March 2025. And nothing in the authorizing statute permitted it.

G. DOGE's Final Decisionmaking and the Issuance of Termination Notices

DOGE drove the final push leading up to the grant terminations. Cavanaugh testified that, "The general pacing of DOGE was to try and make decisions and act quickly to avoid Government employees dragging their feet on cancellations," and that he and Fox used "pressure tactics" to execute the terminations quickly. Dkt. No. 248-2, Cavanaugh Dep., 134:24–135:4; 170:3–8; *id.*, 165:16–21 ("[O]ur general operating procedure at DOGE was to try and get this work done quickly. And this had now been dragging out for two or three weeks with NEH. And so we were trying to push Michael on to move faster with agreeing on a plan.").

Fox's internal communications reflect this urgency to terminate previously awarded grants. On March 31, 2025, Fox wrote to McDonald: "We're getting pressure from the top on this and

we'd prefer that you remain on our side but let us know if you're no longer interested." Dkt. No. 248-15, Ex. 15, US-000050717. Cavanaugh testified that, in reality, they did not receive any such "pressure" from the White House, the Executive Office of the President, or the Office of Management and Budget. Dkt. No. 248-2, Cavanaugh Dep., 171:1–5. It was just a "time pressure tactic" on DOGE's part. *Id.*, 170:7–8.

McDonald tried to spare some of the grants from being terminated. In an April 1 email to Fox, he wrote that "wherever the 'DEI Rationale' on the spreadsheet makes clear that there is no DEI component to the project, there is no justification for canceling the project's funding and *you should allow it to continue*." Dkt. No. 248-5, Ex. 5, NEH_AR_000023 (emphasis added). In his deposition, McDonald clarified that this reflected his concern that, in some instances, the proffered ChatGPT-generated "DEI rationales" did not supply a sufficient basis for concluding that a grant implicated DEI, particularly given the limited information on which those rationales were generated. Dkt. No. 248-3, McDonald Dep., 213:9–214:14.

For example, when shown some of the "DEI rationales" during his deposition, McDonald agreed that a ChatGPT-generated rationale evaluating a grant proposal focused on aligning humanities curricula with career outcomes for students at small and mid-sized institutions, including "underserved students," did not identify any DEI component. *Id.*, 119:3–8, 127:16–20; Dkt. No. 248-31, Ex. 31, US-000061583. Fox's use of ChatGPT likewise produced another rationale that identified a proposal seeking "to digitize mid-twentieth-century African-American newspapers from Los Angeles and the Bay Area and contribute them to the National Digital Newspaper Program" as "DEI" because the project "contributes to inclusivity by preserving and sharing underrepresented voices." Dkt. No. 248-31, Ex. 31, US-000061583. McDonald did not believe this grant – which fell comfortably within Congress's express direction that NEH support

programs and research that "reflect the diversity and richness of our American cultural heritage," including the culture of "a minority . . . community," and give "particular regard" to scholars and institutions that have "traditionally been underrepresented," 20 U.S.C. § 956(c)(4); *id.*, § 956(c) – implicated DEI either. Dkt. No. 248-3, McDonald Dep., 121:15–17.

Another proposal described a technical and scholarly initiative to "pilot a process to digitize and display flap books such that their interactive nature is preserved for users," using materials from the Wangensteen Historical Library of Biology and Medicine at the University of Minnesota. Dkt. No. 248-31, Ex. 31, US-000061583. Fox's ChatGPT-generated DEI rationale concluded, in conclusory terms, that the project "aims to address a gap in current digitization practices . . . promoting inclusivity in digitization efforts." *Id.* McDonald agreed that this rationale did not identify any DEI component or support treating the proposal as DEI-related. Dkt. No. 248-3, McDonald Dep., 123:1–8 (stating that it "mischaracterizes the grant").

Nevertheless, in the same April 1 email in which he urged that certain grants not be terminated, McDonald acknowledged, "Either way, as you've made clear, it's *your decision* on whether to discontinue funding any of the projects." Dkt. No. 248-5, Ex. 5, NEH_AR_000023 (emphasis added). In other words, the Acting Chair of NEH recognized that he had no meaningful control over the fate of the grants. The ultimate decision whether to continue or terminate funding for previously awarded grants rested, not with him or with anyone else at NEH, but with DOGE.

McDonald's plea that DOGE spare certain grants was, predictably, ignored. McDonald testified that Fox and Cavanaugh did not follow his recommendations. Dkt. No. 248-3, McDonald Dep., 214:2–6. Cavanaugh testified: "Justin and I both *rejected* [McDonald's] recommendation." Dkt. No. 276-1, Cavanaugh Dep., 181:3–9 (emphasis added). When shown McDonald's statement that "*it's your decision*," Wolfson acknowledged that the statement was "hard to reconcile" with

any suggestion that McDonald was the final decisionmaker – the position the Government has consistently taken in this litigation, despite what the record shows. Dkt. No. 276-4, Wolfson Dep., 255:1–256:16.

Contemporaneous communications from other NEH officials reflect a consistent understanding that DOGE personnel were the ultimate decisionmakers. Brett Bobley, NEH's Chief Information Officer, wrote to one grantee: "DOGE did indeed cancel your award. NEH staff, like myself, didn't realize it was happening." Dkt. No. 248-18, at 1. Christopher Thornton, NEH's Director of the Division of Research Programs, likewise wrote that fellowships had been "terminated by DOGE" and that "this was *not an agency decision*." Dkt. No. 248-19 at 1 (emphasis added).

H. The Termination Notices

The record reflects that Fox executed the bulk of the terminations on April 2, 2025. Dkt. No. 248-22, US-000057526; *see also* Dkt. No. 248-25, Ex. 25, NEH_AR_0000136. On April 3, 2025, Fox informed McDonald that "1,208 of 1,220 grants to organizations were delivered tonight with effective terminations as of April 2, 2025." Dkt. No. 248-25, at 2.

To be sure, the final termination notices were sent out over McDonald's signature. But the record reflects that McDonald's involvement in that process was limited to permitting his name to be used. The notices themselves were drafted and sent by DOGE personnel. *See* Dkt. No. 248-1, Fox Dep., 286:2–9. Wolfson testified that the notices were "drafted by the DOGE folks or others" and sent out under McDonald's name. Dkt. No. 276-4, Wolfson Dep., 234:14–21. McDonald confirmed that the termination notices were sent by DOGE from email addresses outside of NEH's official channels. Dkt. No. 248-3, McDonald Dep., 257:12–13, 260:16–261:14, 262:8–263:2; Dkt. No. 248-1, Fox Dep., 322:8–14 ("Q: And when the notices were sent on April 1 from that [non-

NEH] account, did you send those notices? [Justin Fox's Answer]: Did I send the termination notices? Q: Yes. A: Yes.").

One version of the termination notice, dated April 1, 2025, stated:

> Dear NEH Grantee,
>
> This letter provides notice that the National Endowment for the Humanities (NEH) is terminating your federal grant (Grant Application No. [GrantExternal]) effective April 1, 2025, in accordance with the termination clause in your Grant Agreement.
>
> Your grant no longer effectuates the agency's needs and priorities, materially fails to comply with the terms and conditions of the Grant Agreement, and is subject to termination due to several reasonable causes. For instance, the NEH has reasonable cause to terminate your grant in light of the fact that the NEH is repurposing its funding allocations in a new direction in furtherance of the President's agenda. The President's February 19, 2025 executive order mandates that the NEH eliminate all non-statutorily required activities and functions. *See Commencing the Reduction of the Federal Bureaucracy*, E.O. 14217 (Feb. 19, 2025). Your grant's immediate termination is necessary to safeguard the interests of the federal government, including its fiscal priorities. The termination of your grant represents an urgent priority for the administration, and due to exceptional circumstances, adherence to the traditional notification process is not possible. Therefore, the NEH hereby terminates your grant in its entirety effective April 1, 2025.
>
> Please remember that your obligations under the Grant Agreement continue to apply. Additionally, an audit may be conducted by the NEH after the termination of your grant.
>
> Please contact mcdonaldm@neh.gov with only urgent questions. We wish you well.
>
> Sincerely,
>
> /s/ Michael McDonald
> Michael McDonald
> Acting Chairman, National Endowment for the Humanities
> mcdonaldm@neh.gov
> 400 7th Street S.W., Washington, DC 20506

Dkt. No. 248-20, at 2. The signature appearing on these notices – "/s/ Michael McDonald" – was placed there by DOGE personnel, not by McDonald himself. Dkt. No. 248-3, McDonald Dep.,

262:8–21 ("Q: Did you type in /s/ Michael McDonald? A: No. Q: Okay. Who typed that in? A: Presumably the people at DOGE.").

The DOGE terminations were sweeping. Approximately 1,477 grants were placed on DOGE's "to cancel" lists; only about 40 grants awarded during the Biden Administration were ultimately spared. Dkt. No. 248-14, Ex. 14, US-000061492; Dkt. No. 248-25, Ex. 25, NEH_AR_0000136. The "To Keep" list in the record consists largely of archival projects such as the Papers of George Washington, the Papers of Thomas Jefferson, the Adams Papers, and the Einstein papers. Dkt. No. 248-14, at 1–3.

The undisputed record thus establishes three facts that drive the legal analysis.

First, NEH historically awarded and administered grants through a statutory process centered on expert review, Council involvement, and final action by the Chairperson. And, historically, NEH terminated previously awarded grants only in the rare case involving a grantee's failure to comply with the terms or conditions of the award.

Second, the April 2025 terminations were not made through any comparable grant-specific process and were not based on recipient-specific findings of noncompliance of the sort contemplated by the statute and governing grant-termination regulations.

Third, DOGE personnel did not merely advise NEH about policy priorities. They overtook the agency's post-award administration, directed the termination process, and exercised decisive control over which grants would be terminated, using Biden-era status, DEI classifications, keyword searches, and ChatGPT-generated rationales to select grants for termination.

II. Procedural History

The first action by the ACLS Plaintiffs was filed on May 1, 2025, asserting claims under the APA, the First Amendment, and nonstatutory *ultra vires* theories that challenged both the mass

termination of grants and the broader alleged restructuring of NEH. Dkt. No. 1, ¶¶ 94–99, 178–189. The second action by the Authors Guild Plaintiffs was filed on May 12, 2025, alleging that Defendants indiscriminately terminated the vast majority of the grants through a process that bypassed statutory grantmaking requirements and targeted disfavored subject matter. Dkt. No. 240, ¶¶ 6–8, 100–12.

By Order dated May 14, 2025, the Court consolidated the two lawsuits. Dkt. No. 52. Plaintiffs moved for preliminary injunctive relief, and Defendants moved to dismiss. The Court resolved both motions in a single opinion in *American Council of Learned Societies v. McDonald*, 792 F. Supp. 3d 448 (S.D.N.Y. 2025). That opinion narrowed the issues in the case and granted interim relief.

Specifically, the Court dismissed all claims directed at alleged "institutional dismantling" of NEH – claims based on program closures, staffing reductions, and ostensible impact on future funding of projects – on both standing and justiciability grounds. *Am. Council of Learned Societies*, 792 F. Supp. 3d at 477–79. The Court allowed the case to proceed only on claims tied to the termination of grants that had already been awarded: the Authors Guild Plaintiffs' APA claims, both sets of Plaintiffs' First Amendment claims, and both sets of Plaintiffs' *ultra vires* claims.

As to standing, the Court made specific findings. It held that individual grantees whose awards were terminated suffered a concrete economic injury sufficient to confer Article III standing. *Id.* at 476. It further held that the Authors Guild, ACLS, AHA, and MLA satisfied associational standing requirements, because their members' claims were germane and did not require individualized participation. *Id.* at 476–77. It rejected standing on claims asserting broader institutional harms. *Id.* at 477–79.

The Court granted the motions for preliminary injunctive relief in substantial part. It held that Plaintiffs were likely to succeed on their First Amendment claim because the Mass Termination targeted grants based on the viewpoints expressed in the funded projects and the fact that they were associated with the prior administration. *Id.* at 484–86. It also held, on the record then available (which was limited and included none of the detailed information about DOGE's role in the grant termination process or the use of ChatGPT in connection therewith), that Plaintiffs were likely to succeed on their APA claim to the extent that claim was based on that constitutional violation. *Id.* at 493. But the Court concluded that neither the Authors Guild nor the ACLS Plaintiffs had, prior to the taking of any discovery, demonstrated a likelihood of success on the merits of their claims that DOGE's actions were *ultra vires*. *Id.* at 493–94.

The Court entered a preliminary injunction staying the April 1–3 Mass Termination of grants and prohibiting the re-obligation of funds associated with those grants pending final resolution on the merits. *Id.* at 457. It applied that relief to putative class members because the challenged action operated uniformly and the merits showing did not vary across recipients. *Id.* at 497–98.

After issuing the preliminary injunction, the Court addressed litigation over the scope and content of the administrative record. The Government initially produced 27 documents as the administrative record. The Court readily concluded that this production was not the "whole record" required for review under the APA. *Authors Guild v. Nat'l Endowment for the Humanities*, 2025 WL 3678097, at *4–7 (S.D.N.Y. Dec. 18, 2025). The Court explained that APA review must proceed on "the whole record," meaning "all documents and materials directly or indirectly considered by agency decisionmakers." *Id.* at *4 (quoting *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 77 (D.D.C. 2018)). It further held that where the record produced did not include the materials

that actually informed the agency's decision, "supplementation is not only permissible – it is required." *Id.*

Applying those principles, the Court found that the record "contains no contemporaneous explanation of how grants were selected for termination, who applied any selection criteria, or what information was reviewed in making those determinations," and therefore the proffered administrative record did not permit meaningful judicial review. *Id.* at *6. The Court further explained that review could not proceed on a record that omitted "the contemporaneous reasoning and materials on which the agency relied," because an agency's action must be judged on the basis it invoked and may not be sustained on *post hoc* rationalizations. *Id.* at *5–6.

The Court further held that, in the absence of a record that disclosed the materials and reasoning on which the agency actually relied, it could not assess whether the agency had "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," or instead "entirely failed to consider an important aspect of the problem," as required under *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *Id.* at *4.

The Government's production was woefully incomplete. It consisted only of NEH-generated materials and did not include documents reflecting the role of other actors identified in the record, including DOGE. *Id.* at *6–7. It also contained no materials identifying the criteria used to select grants for termination, no documents reflecting who applied any such criteria, and no materials reflecting the use of keyword screening, automated processes, or generative AI tools in that process. The Court ordered supplementation of the administrative record and permitted discovery to identify and obtain materials considered by all relevant decisionmakers.

The Government thereafter produced approximately 3,700 additional documents and a privilege log. Those materials included, for the first time, documents and testimony describing the criteria and methods used to identify grants for termination, including keyword-based screening and the use of generative AI tools such as ChatGPT, as well as materials reflecting the involvement of actors outside NEH. None of those categories of information appeared in the original administrative record. The production confirmed that the original record was incomplete and that misrepresentations that it was complete had been made to the Court. Indeed, the supplemental production confirmed that the Government had not conducted a good-faith search of all relevant custodians and sources. *See id.* at *5–7.

The full record confirms that the omissions from the original production were anything but insignificant. The original record did not include the materials that actually informed the Mass Termination, including the criteria used to select grants and the methods by which those criteria were applied. Without those materials, the Court could not determine whether the agency's stated justifications reflected its actual decisionmaking.

That is the circumstance in which supplementation is required. The "reasoned explanation" requirement demands "genuine justifications for important decisions" that can be scrutinized by courts and the "interested public," and accepting incomplete or contrived explanations would "defeat the purpose of the enterprise." *Department of Commerce v. New York*, 588 U.S. 752, 785 (2019). The Court is not obliged to proceed on a record that omits the materials that actually informed the decision; to do so would reduce judicial review to the very "empty ritual" the Supreme Court has rejected. *Id.* Supplementation was therefore required, just as in *Department of Commerce*, which likewise found extra-record development warranted where the administrative record did not reflect the agency's real decisionmaking. *Id.*

After discovery concluded, Plaintiffs moved for summary judgment, supported by a Rule 56.1 statement and evidentiary submissions. During the pendency of summary judgment briefing, Plaintiffs amended their pleadings. The ACLS Plaintiffs added a claim under the Equal Protection component of the Fifth Amendment, Dkt. No. 230, ¶ 207, and the Authors Guild Plaintiffs' amended complaint alleged that Defendants identified grants for termination using criteria tied to race, gender, and subject matter, including keyword searches and automated AI tools, and similarly asserted Equal Protection claims on that basis. Dkt. No. 240, ¶¶ 100–12, 174–75.

Defendants opposed the motions for summary judgment and cross-moved for summary judgment dismissing the case. The motions are now fully submitted. The record includes materials that were considered by the relevant agency decisionmakers, directly or indirectly. *Oceana*, 290 F. Supp. 3d at 77; *see also Nat. Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

III. Legal Standards

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Conversely, "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact by "citing to particular parts of materials in the record," including

depositions, documents, and affidavits. Fed. R. Civ. P. 56(c)(1)(A). Once that burden is met, the nonmoving party "must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). If the nonmoving party's evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249–50 (internal citations omitted).

In evaluating a motion for summary judgment, the Court's role is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Matsushita*, 475 U.S. at 599.

Where, as here, the parties have filed cross-motions for summary judgment, the same standard applies. *Morales v. Quintel Ent., Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). The filing of cross-motions does not itself require the Court to enter judgment for either side. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). Rather, "each party's motion must be examined on its own merits," and in each instance "all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales*, 249 F.3d at 121.

IV. Discussion

This case presents a threshold question of jurisdiction and, if jurisdiction lies, a set of merits questions concerning the lawfulness of the Government's mass termination of the previously awarded grants. The Court begins by rejecting Defendants' contention that the Tucker Act deprives it of subject-matter jurisdiction.

A. The Tucker Act Does Not Deprive This Court of Jurisdiction Over Plaintiffs' Constitutional and *Ultra Vires* Claims

Before reaching the merits, the Court must address Defendants' threshold contention that this action falls outside its jurisdiction. That argument implicates two related but distinct principles: sovereign immunity and the allocation of jurisdiction between the district courts and the Court of Federal Claims.

The United States and its agencies are "immune from suit in federal court absent a clear and unequivocal waiver of sovereign immunity." *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, 38 F.4th 1099, 1105 (D.C. Cir. 2022). But that principle is not absolute. Under the *Larson–Dugan* exception, "suits for specific relief against officers of the sovereign" allegedly acting "beyond statutory authority or unconstitutionally" are not barred by sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 693 (1949); *see Dugan v. Rank*, 372 U.S. 609, 621–22 (1963). The logic of the exception is based on the understanding that *ultra vires* action by a federal officer "is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson*, 337 U.S. at 690.

Defendants do not seriously dispute that Plaintiffs' claims – constitutional and *ultra vires* challenges – fall within that exception. Instead, they contend that a separate statute, the Tucker Act, divests this Court of jurisdiction, notwithstanding the availability of that waiver. The Tucker Act provides that the United States Court of Federal Claims "shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). For such claims – particularly those seeking more than $10,000 in damages – that jurisdiction is exclusive and may "impliedly forbid" parallel suits in district court. *Crowley*, 38 F.4th at 1106 (citing *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 618 (D.C. Cir. 2017)).

From that premise, Defendants take a further step. They argue that, because this case arises from the termination of federal grants, it is in substance a contract dispute and therefore belongs in the Court of Federal Claims. They urge that the relief Plaintiffs seek would effectively require the Government to satisfy an obligation to pay money under those grants, bringing the case within the Tucker Act's exclusive domain.

That contention does not withstand scrutiny.

The Court applies the "longstanding test for determining whether a claim falls within the exclusive jurisdiction of the Claims Court pursuant to the Tucker Act," articulated by the D.C. Circuit in *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982). *Crowley*, 38 F.4th at 1106. *Megapulse* rejected the proposition that "any case requiring some reference to or incorporation of a contract is necessarily on the contract and therefore directly within the Tucker Act." 672 F.2d at 967–68. Instead, the inquiry turns on two considerations: (i) "the source of the rights upon which the plaintiff bases its claims," and (ii) "the type of relief sought." *Id.* at 968; *Atterbury v. U.S. Marshals Serv.*, 805 F.3d 398, 406 (2d Cir. 2015). Both considerations must point toward a contract-based claim before the Tucker Act divests a district court of jurisdiction.

Put simply, the Court of Federal Claims has exclusive jurisdiction of an action pursuant to the Tucker Act only if a plaintiff's "asserted right is based in contract" *and* "seeks 'in essence' more than $10,000 in monetary relief from the federal government." *Crowley*, 38 F.4th at 1113. The *Megapulse* test is conjunctive and both conditions must be met. *See id.* Applied here, neither condition is satisfied. Plaintiffs' claims arise from the Constitution, not from any grant agreement, and the relief they seek is equitable, not compensatory.

1. Source of Rights Asserted

"The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). For that reason, the first *Megapulse* factor requires the Court to identify "the source of the rights upon which plaintiff bases its claims." 672 F.2d at 968.

Writing for the D.C. Circuit, Judge Robert Bork explained that the Tucker Act does not displace district court jurisdiction unless the plaintiff's claims themselves fall within its scope – that is, unless they are properly understood as claims founded upon an "express or implied contract" with the United States. *Maryland Dep't of Hum. Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1449 (D.C. Cir. 1985). Where, by contrast, "a plaintiff's substantive claim—apart from the type of relief the complaint seeks—is [not] a claim over which Tucker Act jurisdiction could be invoked," there is "no possibility that the preclusive effects of the Tucker Act . . . can come into play." *Id.*

The Tucker Act does not sweep in claims merely because they arise in the context of a contractual relationship; the question is whether the rights asserted themselves sound in contract. *Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992), *abrogated on other grounds as recognized in Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017) ("[L]itigants may bring statutory and constitutional claims in federal district court even when the claims depend on the existence and terms of a contract with the government."). Courts must therefore avoid giving "an overly expansive scope to the notion of claims 'founded upon' a contract," particularly where a plaintiff invokes independent statutory or constitutional constraints on government action. *Id.* at 611. And where a plaintiff relies on such independent constitutional constraints, the claims rest on "truly independent legal grounds," even if a contractual relationship forms part of the factual background. *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, 38 F.4th

1099, 1107 (D.C. Cir. 2022) (quoting *Megapulse*, 672 F.2d at 970). The Court must "make rational distinctions between actions sounding genuinely in contract and those based on truly independent legal grounds." *Megapulse*, 672 F.2d at 969–70.

Applying these principles, Plaintiffs' claims are not contractual in any meaningful sense. They do not arise from any alleged entitlement to payment under the grant agreements. Plaintiffs do not allege breach of contract, do not seek specific performance according to any contractual provision, and do not ask the Court to interpret the terms of any grant. Instead, they challenge the legality of the Government's conduct – specifically, the asserted authority to select and terminate grants based on viewpoint and protected characteristics. The suit only seeks redress for constitutional violations and *ultra vires* government action, not enforcement of any contractual obligation.

The complaints plead those theories with specificity. *Greenhill v. Spellings*, 482 F.3d 569, 573 (D.C. Cir. 2007) ("Jurisdiction is determined by looking to the complaint."). The ACLS Plaintiffs allege that Defendants – acting through the United States DOGE Service – "used AI searches focused on race, sex, immigration status, and other characteristics to identify grants that must be terminated," and then terminated those grants *en masse*. Dkt. No. 230, Compl., ¶ 5. They further allege that those actions "violate[] the constitutional separation-of-powers," *id.*, ¶ 7, and that DOGE "has no lawful authority to carry out the work of another agency, let alone to dismantle it." *Id.*, ¶ 9.

The Authors Guild Plaintiffs advance parallel claims grounded in the same alleged course of conduct. They assert that Defendants implemented a "blanket campaign to cancel most or all NEH grants," terminating more than 1,400 awards through standardized notices. Dkt. No. 240, Compl., ¶ 6. They further allege that the terminations violated the First Amendment because the

Government "disfavors the grantees' speech based on its assessment of that speech's content and viewpoint," *id.*, ¶ 7, and violated the equal protection component of the Fifth Amendment by selecting grants for termination based on protected characteristics. *Id.*

The causes of action pleaded in the complaints confirm that these claims arise on non-contractual grounds. In the ACLS Plaintiffs' complaint, Plaintiffs assert, among other claims, a First Amendment claim (Count VIII) and an *ultra vires* claim (Count IX), alleging that Defendants acted without statutory authority and in violation of constitutional limits. *See* Dkt. No. 230, ¶¶ 189–200. The Authors Guild Plaintiffs likewise assert a First Amendment claim (Count V) and an *ultra vires* claim (Count VI), each challenging the *legality* of Defendants' conduct rather than any contractual entitlement. *See* Dkt. No. 240, ¶¶ 189–201. As narrowed by this Court's prior ruling on Defendants' motion to dismiss, the claims that remain operative, and inform the Tucker Act analysis, are the ACLS Plaintiffs' First Amendment (Count VIII) and *ultra vires* (Count IX) claims, and the Authors Guild Plaintiffs' First Amendment (Count V) and *ultra vires* (Count VI) claims. None of these claims seeks to enforce a contractual right to payment; each instead challenges the *legality* of Defendants' actions under the Constitution and the National Foundation on the Arts and the Humanities Act, 20 U.S.C. §§ 951 *et seq.*, which defines both the scope of the agency's authority and the limits on the exercise of that authority.

In short, Plaintiffs do not seek to vindicate their contractual rights at all; they allege that Defendants exceeded constitutional and statutory limits on federal power. *See Megapulse*, 672 F.2d at 969 (stating that the Tucker Act "does not necessarily apply where the government defendants are charged with having acted beyond the scope of their statutory authority"). The fact that this case rests on the First Amendment, equal protection principles, and statutory limits on agency authority constitutes "truly independent legal grounds" supporting the exercise of

jurisdiction by this Court. *Crowley*, 38 F.4th at 1107 (quoting *Megapulse*, 672 F.2d at 969–70); *Washington v. United States Dep't of Educ.*, 161 F.4th 1136, 1140 (9th Cir. 2025); *Khalil v. The Trustees of Columbia University in the City of New York*, 2026 WL 775813, at *10–11 (S.D.N.Y. Mar. 19, 2026); *Am. Acad. of Pediatrics v. U.S. Dep't of Health & Hum. Servs.*, 2026 WL 80796, at *11 (D.D.C. Jan. 11, 2026).

Because both conditions must be met, this conclusion alone defeats the Government's Tucker Act argument. *See Crowley*, 38 F.4th at 1113.

2. Nature of the Relief Sought

The second *Megapulse* factor examines "the type of relief sought." 672 F.2d at 968. This inquiry asks whether Plaintiffs seek "money damages" – the hallmark of Tucker Act jurisdiction – or instead seek specific equitable relief directed at allegedly unlawful government action. Plaintiffs may not "disguise[] a money claim as a claim requesting a form of equitable relief." *Kidwell v. Dep't of Army, Bd. for Correction of Mil. Recs.*, 56 F.3d 279, 284 (D.C. Cir. 1995) (internal quotation marks omitted).

The Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) is instructive. There, the Commonwealth of Massachusetts sought review of a federal agency's disallowance of Medicaid reimbursements, challenging the Secretary's determination that certain expenditures were not reimbursable under federal law. *Id.* at 887. The State asked the district court to "set aside" that determination. *Id.* at 887–88. The Court held that such a suit is not one for "money damages," even if prevailing on the merits will lead to the release of funds. *Id.* at 893–95. The State sought not "money in compensation for the losses" caused by the Government's conduct, but "to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900–01. The Court emphasized that the district court's judgment "did not order

that [any] amount . . . be paid," and that any reimbursement was "a mere by-product of that court's primary function of reviewing the Secretary's interpretation of federal law." *Id.* at 909–10.

Thus, the Court drew a clear line between compensatory relief and relief that sets aside unlawful action with financial consequences. "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893. That same reasoning governs here. Plaintiffs do not seek a judgment awarding money past due under their grant agreements. They seek to invalidate the Government's decision to terminate their grants and to enjoin further action taken on allegedly unlawful grounds. Any downstream financial consequences follow from the legal effect of that determination, not from an award of compensatory damages.

Consistent with this distinction, the possibility that funds may ultimately have to be disbursed to Plaintiffs if they prevail does not control the jurisdictional analysis. *See Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed. Cir. 1994) ("That a payment of money may flow from a decision that [an agency] has erroneously interpreted or applied its regulation does not change the nature of the case."). As the Supreme Court has explained elsewhere, "not every claim invoking the Constitution . . . is cognizable under the Tucker Act," because the asserted right "must be one for money damages against the United States." *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (citation omitted). Here, a judgment for Plaintiffs would set aside allegedly unconstitutional government action; it would not itself award compensatory damages or require payment of sums presently due. *Cf. Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2673 (2025) ("[A] mere 'by-product' of APA review does not send a case to the Court of Federal Claims." (Jackson, J., concurring)).

And the Supreme Court's emergency-docket decision in *Department of State v. AIDS Vaccine Advocacy Coalition*, 145 S. Ct. 753, 755–56 (2025) does not suggest otherwise. There, and unlike here, the district court had ordered the Government to "pay all invoices and letter of credit drawdown requests" for completed work – relief requiring the immediate disbursement of funds. Addressing that posture, Justice Alito recognized the critical limiting principle applicable in this case: "after a court sets aside an agency action, a natural consequence may be the release of funds to the plaintiff down the road." *Id.* at 756. That observation reinforces the same distinction drawn in *Bowen*: relief that directly compels the payment of money falls within the Tucker Act, but relief that merely sets aside unlawful agency action – while it may have downstream financial consequences – does not. Here, Plaintiffs seek only the latter. *Compare Sustainability Inst. v. Trump*, 165 F.4th 817, 828–29 (4th Cir. 2026) (concluding that the district court lacked jurisdiction to adjudicate plaintiff's APA claims because it had "directed the Government to restore Plaintiffs' access to their grant funds immediately" (citation modified)), *with Widakuswara v. Lake*, 2025 WL 1288817, at *10–13 (D.C. Cir. May 3, 2025) (Pillard, J., dissenting) (criticizing the majority's "restrictive" interpretation of the district court's jurisdiction over plaintiff's constitutional and *ultra vires* claims, particularly when plaintiffs did not seek monetary damages and concluding that "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages'" (citing *Bowen*, 487 U.S. at 893)), *on reconsideration en banc*, 2025 WL 1521355, at *1 (D.C. Cir. May 28, 2025) (vacating the panel majority's grant of the government's motion for a stay pending appeal for "substantially . . . the reasons explained by Judge Pillard" in her dissenting opinion).

This Court has jurisdiction to grant the purely equitable relief Plaintiffs seek. *See also Council for Opportunity in Educ. v. U.S. Dep't of Educ.*, 2026 WL 120984, at *7 (D.D.C. Jan. 16,

2026). To the extent any additional relief would require the Government to disburse funds in a manner that amounts to enforcing a payment obligation, the Tucker Act might well require a separate suit in the Court of Federal Claims rather than this Court. But that possibility does not defeat this Court's jurisdiction over the constitutional and *ultra vires* claims properly before it.

The Supreme Court recognizes that litigation against the United States may need to be resolved in multiple forums, depending on the nature of the right asserted and the particular type of relief sought. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 314 (2011). *Tohono* interpreted 28 U.S.C. § 1500, which bars the Court of Federal Claims from exercising jurisdiction over a claim when the plaintiff has another suit pending "for or in respect to" the same claim. *Id.* at 311–12. In that context, two suits are the same "claim" when they are based on "substantially the same operative facts," even if they seek different forms of relief. *Id.* at 317. Applying that rule, the Court held that the Court of Federal Claims lacked jurisdiction over the plaintiff's suit while a factually overlapping action remained pending in federal district court.

The Supreme Court in *Tohono* was clear-eyed about the practical consequence of its holding: plaintiffs may be required "to choose between partial remedies available in different courts." *Id.* at 316; *see also id.* at 323 (recognizing that "The jurisdictional scheme governing actions against the United States often requires other plaintiffs to file two actions in different courts to obtain complete relief in connection with one set of facts." (Sotomayor, J., concurring)). Assuming, as Defendants contend, that Plaintiffs' constitutional challenges to the mass termination of grants arise from the same underlying conduct that could support claims for monetary relief in the Court of Federal Claims, that factual overlap, at most, means that Plaintiffs may have to pursue distinct claims in different forums and decide which claims they seek to pursue first.

Plaintiffs here have already made that choice. They have asserted their constitutional claims, not contract claims, in this Court. The Court must respect that selection. As Justice Barrett observed in her controlling concurrence in *National Institutes of Health v. American Public Health Association*, "the statutory scheme puts plaintiffs to precisely this choice." 145 S. Ct. 2658, 2662 (2025) (citing *Tohono*, 563 U.S. at 316–17). If the Government is dissatisfied with that arrangement, it is "free to direct [its] complaints to Congress." *Tohono*, 563 U.S. at 317. But far from undermining jurisdiction here, that congressionally mandated choice confirms that this Court is the proper forum for the particular equitable relief Plaintiffs have chosen to pursue here. *See California*, 604 U.S. at 651.

Moreover, the Government's position – that all claims arising from the challenged grant terminations must be brought, if at all, in the Court of Federal Claims – would raise a "serious constitutional question" identified by the Supreme Court in *Webster v. Doe*, 486 U.S. 592 (1988). There, the Supreme Court held that any intent by Congress to preclude judicial review of constitutional claims, its "intent to do so must be clear," in part to avoid the "serious constitutional question" that would arise if a statute were construed to deny "any judicial forum for a colorable constitutional claim." *Id.* at 603. Adopting the Government's reading of the Tucker Act would have exactly that effect.

Unlike the district courts, the Court of Federal Claims "has no general power to provide equitable relief against the Government or its officers." *Tohono*, 563 U.S. at 313; *see also Bowen*, 487 U.S. at 905 ("[T]he Court of Claims has no power to grant equitable relief."). Throughout its entire history, "the only judgments which the Court of Claims [has been] authorized to render against the government . . . are judgments for money found due from the government to the petitioner." *United States v. Alire*, 73 U.S. 573, 575 (1867). The Court of Federal Claims lacks

jurisdiction over constitutional claims under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments. *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983). So if Plaintiffs cannot obtain equitable relief in the Court of Federal Claims – and if we accept, as the Government contends, not in this Court either – where could they?

The Supreme Court has rejected the jurisdictional limbo the Government's position would create. In *United States v. King*, 395 U.S. 1, 1–2 (1969), a retired Army officer sought to recover money from the Government on the theory that he had been improperly classified for retirement purposes. But the Court explained that his claim could not be heard in the Court of Claims because it depended on first establishing that the Government's underlying decision was unlawful. As the Court put it, the plaintiff's "claim is not limited to actual, presently due money damages from the United States." *King*, 395 U.S. at 3. Instead, "Before he is entitled to such a judgment he must establish in some court that his retirement by the Secretary of the Army for longevity was legally wrong and that he is entitled to a declaration of his right to have his military records changed to show that he was retired for disability." *Id.* That relief, the Court held, "is essentially equitable of a kind that the Court of Claims has held throughout its history . . . that it does not have the power to grant." *Id.* As then-Judge Scalia explained for the D.C. Circuit, suits seeking "only equitable relief from allegedly unlawful" government action – rather than money damages – have historically proceeded in the district courts, not the Court of Federal Claims. *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

The same rule applies here. In this Court, Plaintiffs do not seek payment of the money that they claim is presently due under their grant agreements. Rather, they challenge the *legality* of the

Government's decision to terminate their grants. As in *King*, any potential monetary consequences are contingent on first establishing that the Government's underlying conduct was unlawful. The relief Plaintiffs seek thus has "'considerable value' independent of . . . any monetary recovery [Plaintiffs] may ultimately attain in other proceedings." *Crowley*, 38 F.4th at 1102, 1107–08 (quoting *Kidwell*, 56 F.3d at 284). The threshold determination of whether Defendants acted in violation of the Constitution or without statutory authority is not "money-mandating" and is "essentially equitable" in nature. *King*, 395 U.S. at 2. Plaintiffs' constitutional and statutory claims lie beyond the jurisdiction of the Court of Federal Claims.

Channeling Plaintiffs' claims to that court would therefore repeat the very problem identified in *King*. It would require a plaintiff to seek relief in a forum that lacks authority to decide the predicate legal question on which any entitlement to money ultimately depends. Construing the Tucker Act to require dismissal of Plaintiffs' constitutional claims – where the Court of Federal Claims lacks jurisdiction over non-money-mandating constitutional claims and cannot grant the predicate equitable relief necessary to establish any entitlement to payment – would preclude judicial review of constitutional claims entirely. Such a result would effectively foreclose any forum capable of adjudicating Plaintiffs' constitutional claims and thus implicates the "serious constitutional question" identified by the Supreme Court in *Webster v. Doe*, 486 U.S. 592, 603 (1988). Under *Webster*, such a construction may not be adopted absent a clear statement from Congress. 486 U.S. at 603; *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (stating that equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"). Nothing in the Tucker Act reflects the clear congressional command required to justify such a reading. Instead, constitutional challenges enjoy a strong presumption of reviewability. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is

established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

In sum, the Tucker Act has nothing to do with this case. Plaintiffs' claims rest on "truly independent legal grounds," not on any contractual entitlement to money damages. *See Megapulse*, 672 F.2d at 970. Because the source of the rights asserted is constitutional and statutory – not contractual – the Government cannot satisfy either of the two *Megapulse* factors.

3. The Supreme Court's Recent Emergency Orders Do Not Displace Settled Jurisdictional Principles

The Government relies principally on two Supreme Court orders issued on its emergency docket – *Department of Education v. California*, 604 U.S. 650 (2025), and *National Institutes of Health v. American Public Health Association*, 145 S. Ct. 2658 (2025). Those decisions warrant careful consideration. Properly understood, however, they do not control the jurisdictional question presented here.

In *California*, the district court – proceeding under the Administrative Procedure Act ("APA") – entered relief that not only enjoined grant terminations but also required the Government to "pay out past-due grant obligations and to continue paying obligations as they accrue." *See* 604 U.S. at 650–51. The Supreme Court stayed that order, explaining that the APA's waiver of sovereign immunity does not extend to claims seeking to enforce "a contractual obligation to pay money." 604 U.S. at 651 (citing 28 U.S.C. § 1491(a)(1)). The Court acknowledged that "a district court's jurisdiction 'is not barred by the possibility' that an order setting aside an agency's action may result in the disbursement of funds." *Id.* (quoting *Bowen*, 487 U.S. at 910). The decision thus reflects a majority disposition addressing a specific and narrow question: whether an APA-based order that directly compels the Government to satisfy asserted payment obligations may proceed in district court. It does not purport to resolve – much less

foreclose – jurisdiction over the claims presented here, which arise under the Constitution and seek only declaratory and injunctive relief invalidating unlawful executive action, rather than an order requiring the Government to pay a sum certain.

National Institutes of Health v. American Public Health Association arose in a related but materially more complex posture. The Court granted a stay in part and denied it in part – staying the district court's order setting aside the Government's decision to terminate certain grants while leaving undisturbed the order setting aside the internal agency guidance used in making those determinations. 145 S. Ct. at 2659, 2661 (Barrett, J., concurring). The Court divided 4–1–4 on whether to stay each component of the district court's relief. Although a majority formed as to the disposition of each component, no single rationale commanded a majority. Justice Barrett provided the controlling vote, staying the relief as to the grant terminations themselves but declining to disturb the relief as to the agency guidance. *Id.* at 2661.

Justice Barrett concluded that the district court likely lacked jurisdiction over the challenges to the grant terminations, but likely possessed jurisdiction over the APA challenge to the agency guidance. *Id.* at 2661–62 (Barrett, J., concurring). In doing so, she emphasized that "[t]he claims are legally distinct," that courts must attend to the legal character of each claim, and that plaintiffs may be required to "choose between partial remedies available in different courts," proceeding "sequentially rather than simultaneously" where necessary. *Id.* (citing *Tohono*, 563 U.S. at 316–17).

A separate opinion by the Chief Justice, joined by Justices Sotomayor, Kagan, and Jackson, would have denied the application in full. In their view, "if the District Court had jurisdiction to vacate the directives, it also had jurisdiction to vacate the 'Resulting Grant Terminations,'" and is "not 'required . . . to split [the case] into two parts.'" *NIH*, 145 S. Ct. at 2662–63 (Roberts, C.J.,

concurring in part and dissenting in part) (citing *Bowen*, 487 U.S. at 911). That disagreement reflects an unresolved question about the proper forum and scope of relief for challenges to grant terminations and related agency action, and further underscores that no single rationale commanded a majority of the Court to guide lower courts on this issue.

Justice Gorsuch, joined by Justice Kavanaugh, concurred in the judgment in part and dissented in part, emphasizing that lower courts must adhere to the Supreme Court's precedents and criticizing what he viewed as the failure of lower courts to respect principles of "vertical *stare decisis*" following *California*. *Id.* at 2663–65 (Gorsuch, J.). This Court certainly agrees with that premise. Lower courts are not free to disregard controlling Supreme Court decisions, even if only interim and on an emergency basis. But lower courts must follow what the Supreme Court has actually held – not extend emergency interim orders beyond their facts. *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) ("Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion *in like cases*." (emphasis added)).

Justice Jackson's dissent in *NIH* emphasized that the case arose under the APA and that monetary consequences may arise as a "by-product" of setting aside unlawful agency action without converting the claim into one for money damages. *Id.* at 2673. That observation aligns with the principle articulated in *Bowen* and reinforces the distinction between relief that compels payment and relief that merely invalidates unlawful action.

Taken together, these various opinions confirm that *NIH* does not establish a single, controlling rationale in support of the sweeping jurisdictional rule the Government advances. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on

the narrowest grounds.'" Here, the narrowest grounds are those articulated by Justice Barrett, which turn on the distinct legal character of different claims – not on any rule requiring all disputes arising from grant terminations to be brought in the Court of Federal Claims. *Accord Council for Opportunity in Educ.*, 2026 WL 120984, at *7 (D.D.C. Jan. 16, 2026) ("[T]he Court did not go so far as to suggest that the Tucker Act precludes federal district court jurisdiction over all claims relating to grant terminations.").

What is more, Justice Barrett's analysis appears to presuppose the continued availability of district courts to hear non-contractual claims. *NIH*, 145 S. Ct. at 2662 (recognizing that "[t]wo-track litigation results from '[t]he jurisdictional scheme governing actions against the United States,' which 'often requires . . . plaintiffs to file two actions in different courts to obtain complete relief in connection with one set of facts." (citing *Tohono*, 563 U.S. at 323)). That reasoning supports the exercise of jurisdiction here, because Plaintiffs assert constitutional and *ultra vires* claims arising from independent constitutional constraints on governmental action – not from any asserted entitlement to payment under a contract. Grantees seeking to enforce contractual rights to payment must proceed in the Court of Federal Claims, while parties asserting non-contractual constitutional claims that are not cognizable there must proceed in district courts. "Each forum has the authority to fully adjudicate the claims over which it has jurisdiction." *Id.* at 2662 n.1 (Barrett, J.).

Recent district court decisions addressing materially similar grant-termination challenges confirm that such claims do not fall within the Tucker Act's exclusive domain. In *American Bar Association v. U.S. Department of Justice*, 783 F. Supp. 3d 236, 239–40 (D.D.C. 2025), a First Amendment retaliation challenge to the termination of federal grants, the court held that the Tucker Act did not divest jurisdiction because the claim "springs from the First Amendment to the

Constitution, not the relevant grant agreements." Likewise, in *City of Saint Paul, Minnesota v. Wright*, 2026 WL 88193, at 3 (D.D.C. Jan. 12, 2026) (quoting *Transohio*, 967 F.2d at 610), a constitutional challenge to federal grant terminations from the United States Department of Energy, the court reaffirmed that "litigants may bring statutory and constitutional claims for specific relief in federal district court," even where "the claims depend on the existence and terms of a contract" and even where "the relief sought is an order forcing the government to obey the terms of a contract." The court further emphasized that "[t]he fact that a favorable outcome might require the payment of money is no impediment to jurisdiction." *Id.* (citation omitted).

In *Southern Education Foundation v. United States Department of Education*, 784 F. Supp. 3d 50, 64 (D.D.C. 2025), a constitutional and statutory challenge to the termination of a federal grant brought by a nonprofit advancing fair education policies for students from low-income families in the South, the court likewise exercised jurisdiction and rejected the government's argument that the suit belonged in the Court of Federal Claims because plaintiff only sought "equitable relief vindicating its rights under federal statutes and the Constitution." And, finally, in *Vera Institute of Justice v. U.S. Department of Justice*, 805 F. Supp. 3d 12 (D.D.C. 2025), a challenge to the Department of Justice's Office of Justice Programs' mass termination of more than 370 multi-year grants and cooperative agreements totaling over $820 million, the court squarely rejected the contention that such claims sound in contract for purposes of the Tucker Act. The plaintiffs – nonprofit organizations whose grants funded, among other things, community violence prevention, anti-trafficking initiatives, and public safety programs – asserted constitutional and *ultra vires* claims and sought declaratory and injunctive relief restoring their awards. Applying *Megapulse*, the court held that where "the source of the rights upon which the plaintiff bases its claims" is constitutional or statutory, such claims "belong in federal district

court," even when they arise in the context of government grants. *Vera Inst. of Just.*, 805 F. Supp. at 24–25 (quoting *Megapulse*, 672 F.2d at 968).

These decisions confirm that claims such as those presented here – grounded in the Constitution and in limits on statutory authority – remain within the jurisdiction of the district courts even when they arise in the context of federal grant agreements. *See also Pacito v. Trump*, 169 F.4th 895, 929 (9th Cir. 2026) (holding that district court properly exercised jurisdiction where, "[u]nlike the grantees in *Department of Education* and [*NIH*], Plaintiffs do not seek backpay of funds or a guarantee of continued funding").

Finally, the emergency stay posture of *California* and *NIH* bears emphasis. Both decisions were rendered on applications for emergency relief, without full merits briefing or argument. As Justice Kagan observed in *California*, such orders are issued with "barebones briefing, no argument, and scarce time for reflection." 604 U.S. at 653 (Kagan, J., dissenting). This Court accords those orders the appropriate degree of respect. But, at the same time, lower courts are not tasked with divining the Supreme Court's unstated intentions about how each of the Justices might rule in the future. To read *NIH* and *California* as silently displacing *Bowen* and *Megapulse* would require the Court to conclude that the Supreme Court has overruled longstanding precedent *sub silentio* – an inference this Court declines to draw, especially in light of the fractured emergency (and interim) order in *NIH* and the unresolved questions it leaves regarding the proper forum and scope of relief for challenges to grant terminations. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("The Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

In fact, the Supreme Court has instructed lower courts to do precisely the opposite: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in

some other line of decisions," lower courts must "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Consistent with that command, this Court looks first to the governing principles set forth in the Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) – and then to the settled body of subsequent authority applying those principles, including *Megapulse* and *Crowley*. Speculation about potential shifts on this otherwise well-settled jurisdictional question is not a substitute for longstanding precedent, and this Court will not treat it as one. *See Urb. Sustainability Directors Network v. United States Dep't of Agric.*, 2025 WL 2374528, at *14 (D.D.C. Aug. 14, 2025) (recognizing the "paucity of clear reasoning" to apply from *California*).

The Supreme Court expressed incredulity nearly four decades ago "that Congress intended judicial review of these complex questions of [constitutional law] to be reviewed in a specialized forum such as the Court of Claims." *Bowen*, 487 U.S. at 908. That observation remains as true today as when it was written.

* * *

In sum, the Government's reliance on *California* and *NIH* rests on a category error – they conflate claims seeking to compel the Government to satisfy alleged payment obligations under federal grant agreements with claims challenging the legality of executive action under the Constitution. As explained above, *see* Section IV(A)(1)–(2), Plaintiffs' claims arise from independent constitutional limits on governmental authority, not from any contractual entitlement, and the relief they seek is equitable in nature rather than compensatory. Neither the source of the right nor the nature of the relief brings this action within the Tucker Act.

Absent a clear command to the contrary, this Court must exercise the jurisdiction Congress has conferred. Federal courts have "a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (citation omitted).

Because Plaintiffs ultimately prevail on their constitutional and *ultra vires* claims, and because the same equitable relief is available on those claims, the Court does not reach the issue of whether any claim under the Administrative Procedure Act could be adjudicated by this Court after *Department of Education v. California*, 604 U.S. 650 (2025), and *National Institutes of Health v. American Public Health Association*, 145 S. Ct. 2658 (2025). The Authors Guild Plaintiffs acknowledge that "the cases the Government cites appear to foreclose this Court's jurisdiction over their APA claims," while "expressly preserv[ing] this issue for appeal or in the event there is an intervening change of law." Dkt. No. 283, Pls.' Mem. L. Opp'n to Defs.' Cross-Mot. for Summ. J., at 11 n.1. Given that no additional relief would turn on resolution of Plaintiffs' APA claims, the Court will await a Supreme Court decision on the merits before deciding them.

B. The Mass Termination Was *Ultra Vires*

1. Nonstatutory *Ultra Vires* Review

"Literally translated, the Latin phrase '*ultra vires*' means 'beyond the powers (of),' and as a legal term, the phrase means 'unauthorized' or 'beyond the scope of power allowed or granted by law.'" *Adamski v. McHugh*, 304 F. Supp. 3d 227, 236 (D.D.C. 2015) (citation modified) (quoting *Black's Law Dictionary* 1755 (10th ed. 2014)). Federal courts have long exercised equitable authority to restrain executive action that exceeds the scope of statutory limits. The Supreme Court has explained that the principle that the conduct of officials of the Executive Branch is subject to judicial review is well established, and that such review extends to claims that an officer acted in excess of his delegated powers. *Dalton v. Specter*, 511 U.S. 462, 472 (1994);

Larson, 337 U.S. at 691. "If an agency action is unauthorized by the statute under which the agency assumes to act, the agency has violated the law and the courts generally have jurisdiction to grant relief." *Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022) (citation modified).

But *ultra vires* review outside an express statutory cause of action – that is, so-called "nonstatutory *ultra vires* review" – is narrow. In *Nuclear Regulatory Commission v. Texas*, 605 U.S. 665, 681 (2025), the Supreme Court emphasized that, "Because *ultra vires* review could become an easy end-run around" statutory limits on judicial review, the Court's cases have "strictly limited" its availability. Such review applies only where an agency has acted "in excess of its delegated powers and contrary to a specific prohibition" in the governing statute. *Id.* (internal quotation marks omitted).

Where, as here, the Government acts in the complete absence of *any* statutory authority, the case does not implicate any argument that the government misapplied delegated power, *see id.* at 682 (cautioning that parties may not "dress up a typical statutory-authority argument as an ultra vires claim"); instead, it involves the exercise of power that Congress never conferred at all. And "If no statute confers authority to a federal agency, it has none." *Rotenberg Educ. Ctr., Inc. v. United States Food & Drug Admin.*, 3 F.4th 390, 399 (D.C. Cir. 2021); *see also Arlington v. F.C.C.*, 569 U.S. 290, 297 (2013) ("Both [a government entity's] power to act and how [it is] to act is authoritatively prescribed by Congress, so that when [it] act[s] improperly, no less than when they act beyond [its] jurisdiction, what [it] do[es] is ultra vires."). In such circumstances, courts have the equitable power to restrain *ultra vires* action. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

To prevail on a nonstatutory *ultra vires* claim, a plaintiff must show that "(i) there is no express statutory preclusion of all judicial review; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Fed. Express Corp.*, 39 F.4th at 763 (citation modified); *Yale New Haven Hosp. v. Becerra*, 56 F.4th 9, 26–27 (2d Cir. 2022).

Each of these requirements ensures that *ultra vires* review remains confined to its proper role of enforcing the limits of delegated authority, not reweighing policy judgments. *First,* the absence of express statutory preclusion ensures that *ultra vires* review operates only where Congress does not foreclose all judicial review, while still permitting courts to compare agency action with "plain statutory commands." *Fed. Express Corp.*, 39 F.4th at 765 (citation omitted). *Second,* the requirement that no adequate alternative remedy exist demands that plaintiffs be "wholly deprived of a meaningful and adequate means of vindicating their alleged statutory rights." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1264–65 (D.C. Cir. 2006) (citation modified) (quoting *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)); *see also Leedom v. Kyne*, 358 U.S. 184, 190 (1958). *Third*, the requirement that the agency have plainly exceeded its authority imposes a stringent merits threshold. The agency must have "plainly and openly crossed a congressionally drawn line in the sand." *Fed. Express Corp.*, 39 F.4th at 765.

That demanding standard reflects constitutional separation-of-powers concerns. Courts do not use *ultra vires* review to second-guess judgments committed to agency discretion, or to recast ordinary statutory disputes as free-standing equitable claims. *See id.*; *Masroor v. Noem*, 2025 WL 2439176, at *2–3 (D.D.C. Aug. 25, 2025). Rather, the question is whether the challenged action

falls within the authority Congress actually conferred. An agency's power to act on the President's behalf "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). After all, an agency is a creature of statute; it "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Thus, this case presents the antecedent question whether the officials who caused these grant terminations possessed the statutory authority to do so, and whether they acted on grounds permitted by the governing statute. If not, the action is *ultra vires* and must be declared unlawful and of no legal force or effect. *See Larson*, 337 U.S. at 689; *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.").

2. Application to the Challenged Terminations

a) No Express Statutory Preclusion of Review

Plaintiffs readily satisfy the first requirement. There is no statute that expressly precludes judicial review of whether Defendants acted beyond the authority Congress conferred. The National Foundation on the Arts and the Humanities Act, 20 U.S.C. §§ 951–960, contains no provision insulating the challenged conduct (involving post-award grant terminations) from review. "When Congress intends to bar judicial review altogether," it knows how to say so by "employ[ing] . . . unambiguous and comprehensive" language. *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 779–80 (1985). For example, 26 U.S.C. § 7421(a) states, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." Such language bars judicial review in unmistakable terms. *See Summerour v.*

Internal Revenue Serv., 2024 WL 3443604, at *4–5 (D.D.C. July 16, 2024). Congress included no comparable language here. That silence matters.

Moreover, courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986). Absent an express statutory command to the contrary – of which there is none here – courts retain authority to review whether executive officials have exceeded the limits Congress imposed.

Nor does the absence of a private right of action under 5 U.S.C. § 3161 – which authorizes the creation and staffing of "temporary organizations" within the federal government for limited-duration projects, including the temporary entity invoked by DOGE here – alter that conclusion. As the D.C. Circuit has stated, it has "never held that a lack of a statutory cause of action is *per se* a bar to judicial review." *Chamber of Com. of U.S.*, 74 F.3d at 1328. The first requirement is satisfied.

b) No Adequate Alternative Avenue for Review

Plaintiffs also satisfy the second requirement. There is no "alternative procedure for review" of the claim asserted here. *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 722 (D.C. Cir. 2022).

First, the Court disabuses any notion that Plaintiffs' *ultra vires* claim is precluded based on any supposed availability of the Court of Federal Claims as a forum pursuant to the Tucker Act. As discussed, *see* Section IV(A)(2), the Court of Federal Claims, as that court itself has recognized, "may not provide equitable relief." *Larkin v. United States*, 177 Fed. Cl. 17, 22 (2025); *see also Bowen*, 487 U.S. at 905 ("[T]he Court of Claims has no power to grant equitable relief."). Because

Plaintiffs' claims do not fall within the bounds of the Tucker Act, the Court of Federal Claims does not provide an adequate alternative forum in which Plaintiffs can obtain the equitable relief they seek, and its potential jurisdiction therefore does not displace this Court's authority to adjudicate Plaintiffs' *ultra vires* claim.

Second, any suggestion that Plaintiffs in this case might proceed against the agencies under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, is equally unavailing. Plaintiffs' claims are directed, not at ordinary agency action by the NEH, but at conduct undertaken by DOGE and by officials acting under color of DOGE authority. The President's Executive Order establishes DOGE "in the Executive Office of the President." Exec. Order No. 14158, *Establishing and Implementing the President's "Department of Government Efficiency"*, § 3(a), 90 Fed. Reg. 8441, 8441 (Jan. 20, 2025). And the same Order expressly *excludes* the Executive Office of the President and its components from the incorporated APA definition of "agency": "'Agency' has the meaning given to it in section 551 of title 5, United States Code, except that such term does not include the Executive Office of the President or *any components thereof*." *Id.* § 2(a), 90 Fed. Reg. at 8441 (emphasis added). DOGE, as a component of the Executive Office of the President, is therefore, according to the Government and the terms of the Order, exempted from APA review. *See id.*, §§ 2(a), 3(a), 90 Fed. Reg. at 8441; *see also Nat'l Tr. for Historic Pres. in the United States v. Nat'l Park Serv.*, 2026 WL 533420, at *6 (D.D.C. Feb. 26, 2026) ("As a general matter, the Executive Office of the President is not an "agency" under the APA." (citation omitted)).[2]

[2] Because Plaintiffs are not seeking relief pursuant to the APA on their summary judgment motions, this Court need not, and does not, decide whether DOGE is an "agency" for purposes of the APA. *See* 5 U.S.C. § 701(b)(1).

Moreover, APA review applies only to "agenc[ies]," 5 U.S.C. § 701(b)(1), and its availability therefore turns on whether DOGE constitutes an "authority of the Government of the United States." *Id.* § 551(1). That question, which is unsettled, has "flummoxed many a court." *Groce v. Rodriguez*, 743 F. Supp. 3d 244, 250 (D.D.C. 2024). The Government, for its part, does not meaningfully address in its submissions whether DOGE qualifies as an "agency" within the meaning of the APA. This itself underscores that the availability of APA review is, at best, uncertain.

In another DOGE-related action, *American Federation of Labor and Congress of Industrial Organizations v. Department of Labor*, 766 F. Supp. 3d 105 (D.D.C. 2025), the Government adopted a contradictory and self-serving position on DOGE's "agency" status. There, plaintiffs challenged the legality of DOGE personnel accessing agency records from the Department of Labor, the Department of Health and Human Services, and the Consumer Financial Protection Bureau, arguing that DOGE was not an "agency" capable of lawfully detailing employees under the Economy Act. The Government responded by asserting that DOGE was an "agency" for purposes of the Economy Act – thereby authorizing its personnel to operate within other agencies – while declining to take the position that DOGE qualified as an "agency" under statutes such as FOIA, the Privacy Act, or the APA, which would have subjected it to disclosure obligations, statutory constraints, and judicial review. *See Am. Fed'n of Lab. & Cong. of Indus. Orgs.*, 766 F. Supp. 3d at 112–13. The court aptly described that position as one in which DOGE is "not an agency when it is burdensome but an agency when it is convenient." *Id.* at 112–13.

That same issue arose in parallel Freedom of Information Act litigation brought by Citizens for Responsibility and Ethics in Washington ("CREW"), which sought records from DOGE. There, the Government refused to process CREW's FOIA requests on the ground that DOGE is

not an "agency." The district court rejected that position at the preliminary stage and later authorized limited expedited discovery to determine whether DOGE "wield[s] substantial authority independently of the President" or instead merely "advise[s] and assist[s] the President." *Citizens for Resp. & Ethics in Washington v. U.S. DOGE Serv.*, 349 F.R.D. 1, 4–6 (D.D.C. 2025). The court explained that the "structure of USDS and the scope of its authority are critical" to that inquiry and that the existing record was "unclear," warranting discovery into USDS's operations and recommendations. *Id.* at 6–7.

The Government sought mandamus in the D.C. Circuit to halt that discovery, arguing that such inquiry impermissibly intruded on a presidential advisory body. The D.C. Circuit denied relief, concluding that the "agency" determination turns on a "functional analysis" that depends on the "practical realities of the entity's role," including whether it exercises "substantial independent authority" or merely "advise[s] and assist[s] the President." *In re U.S. DOGE Serv.*, 2025 WL 1393222, at *1 (D.C. Cir. May 14, 2025).

Before the Supreme Court, however, the Government both sought emergency relief and asked that the Court treat its application as a petition for a writ of certiorari, which the Court granted. In its application for a stay of the district court's orders, the United States Solicitor General D. John Sauer emphasized that DOGE is a "presidential advisory body within the Executive Office of the President" that "has no organic statute and is not created by Congress," and whose role is limited to making "recommendations to [the President] and to federal agencies." Appl. to Stay Pending Certiorari or Mandamus at 5, *In re U.S. DOGE Serv.*, No. 24A1122. The Government further asserted that "*USDS is exempt from the Freedom of Information Act . . .* as a matter of law" because it performs only advisory functions. *Id.* at 2 (emphasis added). In its reply, the Government reiterated that "presidential advisory bodies are *not 'agenc[ies]' subject to the*

Freedom of Information Act when they are responsible for making recommendations, not exercising significant independent powers of their own." Reply in Supp. of Stay, at 1 (emphasis added).

Moreover, the Government's position in *U.S. Doge Service v. Citizens for Responsibility and Ethics in Washington*, 145 S. Ct. 1981 (2025) fairly implies that APA review of DOGE's conduct would not be available. The Freedom of Information Act "incorporates and expands on the APA's definition of agency," such that an entity excluded from FOIA's definition of "agency" necessarily falls outside the APA's as well. *Am. Oversight v. Biden*, 2021 WL 4355576, at *6 n.6 (D.D.C. Sept. 24, 2021). Thus, if DOGE is not an "agency" for purposes of FOIA – as the Government repeatedly insists – it is, *a fortiori*, not an "agency" whose actions could be reviewed under the APA. That is precisely why nonstatutory *ultra vires* review is necessary here. The Government cannot simultaneously deny that DOGE is subject to APA review and then invoke the supposed availability of APA review as a reason to foreclose equitable review of DOGE's allegedly *ultra vires* conduct.

More broadly, the Supreme Court's recent emergency-docket orders underscore that the availability of district-court review under the APA remains unsettled, particularly in cases involving federal grant terminations where the requested relief may have financial consequences. *See Dep't of Educ. v. California*, 604 U.S. 650 (2025); *Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658 (2025). Both interim orders indicate that, in at least some circumstances, the Tucker Act may divest the district court of jurisdiction over APA claims that implicate the payment of funds, even if only indirectly.[3]

[3] But the Supreme Court's emergency orders do not establish a clear rule, and they certainly do not resolve how that principle applies to constitutional and *ultra vires* claims such as those asserted here. *See supra* Section IV(A)(3). This Court has, in any event, declined to exercise jurisdiction over Plaintiffs' APA claims.

Taken together, these considerations establish that the APA does not provide Plaintiffs with an adequate alternative avenue of relief for challenging DOGE's authority to undertake the actions at issue in this suit.

First, if DOGE is not an "agency," the APA does not apply.

Second, if courts cannot examine the implementation of its recommendations, *see U.S. Doge Serv. v. Citizens for Resp. & Ethics in Washington*, 145 S. Ct. 1981 (2025), then DOGE's agency status cannot be meaningfully tested in practice.

Third, if Tucker Act principles displace jurisdiction in cases implicating federal funds *in toto*, APA review may be unavailable regardless of whether DOGE qualifies as an agency. Taken together, these considerations establish – and at least strongly suggest – that the APA is foreclosed as an adequate alternative for review of DOGE action. Accordingly, APA review is, at best, uncertain and, at worst, unavailable, and therefore cannot preclude Plaintiffs' *ultra vires* claim.

Absent review here, Plaintiffs would be "wholly deprived of a meaningful and adequate means of vindicating [their] statutory rights." *Nat'l Air Traffic Controllers Ass'n AFL-CIO*, 437 F.3d at 1264–65 (citation modified) (quoting *MCorp*, 502 U.S. at 43). That is the circumstance in which nonstatutory review remains available to avoid "'a sacrifice or obliteration of a right which Congress' has given." *MCorp*, 502 U.S. at 43 (quoting *Kyne*, 358 U.S. at 190). The right implicated here is the right not to be subjected to executive action that exceeds the authority Congress has conferred. *See Kyne*, 358 U.S. at 188–89 (exercising jurisdiction where agency action was "in excess of its delegated powers and contrary to a specific prohibition in the Act" and "deprived [affected parties] of a 'right' assured to them by Congress").

c) DOGE Acted Without Statutory Authority

The third requirement is also satisfied. DOGE had no statutory authority to terminate NEH grants. And on the undisputed evidence, DOGE – not the NEH Chairperson or anyone else at NEH – effectuated the terminations at issue here.

This is not a case involving a routine disagreement over how to interpret a statute. Nonstatutory *ultra vires* claims are reserved for extraordinary cases in which "the agency action go[es] beyond mere legal or factual error and amount[s] to a clear departure by the [agency] from its statutory mandate." *Fed. Express Corp.*, 39 F.4th at 764 (quoting *Oestereich v. Selective Serv. Sys. Loc. Board No. 11*, 393 U.S. 233, 238 (1968)). They require a showing that the agency "plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Id.* at 763 (quoting *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)).

This case presents something more basic. It is not that DOGE misconstrued a statutory provision conferring authority on it; it is that Congress conferred no authority on DOGE at all with respect to the awarding, continuation, or termination of NEH grants. *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Dep't of Lab.*, 778 F. Supp. 3d 56, 89 (D.D.C. 2025) (concluding that plaintiffs were not required to plead a specific statutory provision where they alleged that DOGE acted in complete absence of any lawful authority).[4]

The Constitution allocates the power to create offices and governmental entities to Congress, *Myers v. United States*, 272 U.S. 52, 130 (1926). Executive power exercised on the President's behalf "must stem either from an act of Congress or from the Constitution itself."

[4] Fox and Cavanaugh's formal GSA employment does not change the analysis. They were recruited and hired by senior DOGE officials, Dkt. No. 277, Defs.' 56.1 Statement of Undisputed Material Fact, ¶¶ 12–13, and "belonged to DOGE's 'Small Agencies Team,'" *id.*, ¶ 15.

Youngstown, 343 U.S. at 585. That principle reflects both a structural limit on executive power and the constitutional command – one of Article II's most fundamental commands – that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Youngstown illustrates the force of that limitation. The case did not arise in ordinary circumstances. It arose during the Korean War, after failed efforts to resolve a nationwide labor dispute in the steel industry, and on the eve of a threatened strike that President Truman believed would jeopardize the Nation's defense. *See Youngstown*, 343 U.S. at 582–83. Hours before the strike was to begin, the President issued Executive Order 10340, directing the Secretary of Commerce to take possession of privately owned steel mills in order to "assure the continued availability of steel." *Id.* at 583. The Government defended the seizure as necessary to avert a national catastrophe and as an exercise of the President's authority as Chief Executive and Commander in Chief. *Id.* at 582–84.

The Supreme Court rejected that argument. President Truman lacked statutory authority because "there is no statute that expressly authorizes the President to take possession of property as he did here," and no act of Congress from which such authority "can fairly be implied." *Id.* at 585. Nor could the seizure be sustained as an exercise of the President's Article II powers. The Court rejected the proposition that the Take Care Clause authorizes the President to make law, explaining that, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587.

If the President could not act beyond statutory or constitutional authority even to seize steel mills that he deemed indispensable to national defense during an ongoing armed conflict, then he cannot do so to implement domestic policy priorities that Congress has not enacted. *Youngstown*'s holding does not turn on the President's unilateral assessment of the importance of his objective.

It turns on the source of legal authority on which he acts. The President may execute congressional policy, but he may not replace it with his own. As *Youngstown* put it, the problem with the President's seizure order was that it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588.

The same reasoning applies here. The Executive Orders and DOGE-directed termination process did not carry out the NEH grantmaking scheme Congress prescribed by law in a duly enacted statute. They displaced it. Congress vested funding authority in the NEH Chairperson. DOGE substituted a presidential policy judgment for a statute duly enacted by Congress. That is not faithful execution of law; it is executive lawmaking in precisely the sense *Youngstown* forbids. *See id.* at 589 ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.").

This same constraint on executive power applies with equal force to executive actors operating through subordinate entities or advisory bodies. As the Supreme Court has explained, "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). An agency – or any entity acting with or through it – may not exercise binding authority affecting private rights or federal programs unless it possesses powers that Congress confers upon it. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

These principles foreclose the possibility that executive action can be justified solely by reference to an Executive Order. An Executive Order can organize the Executive Branch and direct the exercise of *existing* authority, but it cannot create new authority where none exists. *See Youngstown*, 343 U.S. at 585. And the statutory structure governing the National Endowment for the Humanities confirms the limits of the President's authority here.

Congress established NEH as an independent federal agency within the National Foundation on the Arts and the Humanities. 20 U.S.C. § 956(a). The NEH "shall be headed by a chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate," *id.*, § 956(b)(1). But the fact that the Chairperson is appointed by the President does not enlarge the substantive authority of the Executive Branch. Congress, which created NEH and appropriates the funds that it grants, was quite specific about who could exercise NEH's funding authority and the conditions under which that authority was to be exercised. The Chairperson "is authorized to enter into arrangements, including contracts, grants, loans, and other forms of assistance," and even that authority must be exercised "with the advice of the National Council on the Humanities." *Id.*, § 956(c). Congress further required that the Council "review applications for financial assistance . . . and make recommendations to the Chairperson," and directed that, "The Chairperson shall not approve or disapprove any such application until the Chairperson has received the recommendation of the Council." *Id.*, § 957(f). Admittedly, those provisions address the award of grants, not their termination. But they identify the statutory decisionmaker Congress empowered: the Chairperson, acting within the limits and procedures Congress prescribed – not DOGE, and not officials operating under an Executive Order.

The statute's post-award provisions governing potential termination point in the same direction. They do not authorize anyone, let alone DOGE, to revisit already awarded NEH grants

en masse based on ideological criteria found nowhere in the statute. Rather, they tie post-award consequences to grantee-specific compliance findings made by the Chairperson. Section 959 requires recipients of Endowment assistance to submit financial and project reports, including a financial report sufficient to ensure that federal funds are expended "in accordance with the terms and conditions under which" the assistance was provided. 20 U.S.C. § 959(f)(2)(A)(i). And where a recipient "substantially fails to satisfy the purposes for which such financial assistance is provided," Congress identified particular consequences that the *Chairperson* may impose. *Id.*, § 959(f)(3). Congress was more explicit as to state humanities grants: if the Chairperson, "after reasonable notice and opportunity for hearing," finds substantial noncompliance or diversion of funds, the Chairperson may halt further grants until the default is cured or improperly expended funds are repaid or repayment is arranged. *Id.*, § 956(f)(7).

These provisions confirm that Congress addressed post-award compliance in specific, limited, and Chair-centered terms. They leave no room for DOGE to cancel previously awarded grants wholesale based on nonstatutory criteria Congress never enacted. The President's duty is to execute the laws Congress has enacted, not to rewrite them or replace them. *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 525 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."); *see also Reich*, 74 F.3d at 1332. The Government's position would permit the President, acting through an entity with no statutory authority over NEH grants, to bypass the limits Congress imposed on the administration of federal funds. The Court rejects that position.

Nor does any regulatory authority cited by the Government fill the gap. Section 200.340(a)(4) provides that a federal award may be terminated "[b]y the Federal agency or pass-

through entity pursuant to the terms and conditions of the Federal award," including, "*to the extent authorized by law*," where "an award no longer effectuates the program goals or agency priorities." 2 C.F.R. § 200.340(a)(4) (emphasis added). The limiting phrase matters. The regulation does not authorize anyone to terminate a federal award except "*to the extent authorized by law*," and it certainly does not confer termination authority on DOGE. Nor does it permit the Executive Branch to define "program goals or agency priorities" in a manner that contradicts the statute Congress enacted. Whatever authority § 200.340(a) may give an agency head to terminate an award in appropriate circumstances, it does not permit DOGE to cancel already awarded NEH grants wholesale based on nonstatutory criteria that Congress never adopted and that, in significant respects, treat as disqualifying the very subjects Congress made relevant to NEH's mission. As explained below, DOGE selected grants for termination in a manner that was not only unauthorized by law, but contrary to law – violating both the First Amendment and the equal-protection component of the Fifth Amendment. Actions that violate the Constitution – the "supreme Law of the Land" – can never be "authorized by law." *See* U.S. Const. art. VI, cl. 2.

The relevant point is not that the Chairperson is appointed by the President, but that neither the NEH statute nor § 200.340(a) confers on DOGE any authority to terminate NEH grants – least of all by applying criteria that Congress did not enact, that in significant respects contradict the authorizing statute, and that, as explained below, violate the Constitution.

This conclusion is reinforced by the statute's text. Congress did not merely omit the anti-"DEI" criterion DOGE applied; it affirmatively instructed NEH to support programs and research that "reflect the diversity and richness of our American cultural heritage," including the culture of "a minority, inner city, rural, or tribal community," and to give "particular regard" to scholars and institutions "that have traditionally been underrepresented." 20 U.S.C. § 956(c)(4). Congress also

defined the humanities to include work undertaken "with particular attention to reflecting our diverse heritage, traditions, and history and to the relevance of the humanities to the current conditions of national life." *Id.*, § 952(a). The Executive Branch is not allowed to ignore, and treat as disqualifying, Congress's statutory directives. *Cf. City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) ("Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.").

DOGE, a self-described advisory body within the Executive Office of the President, is "subject to the limitations" Congress imposed on this statutory scheme. *Chrysler Corp.*, 441 U.S. at 302. It may not assume authority that Congress vested elsewhere, nor may it disregard the conditions Congress attached to that authority. *See Youngstown*, 343 U.S. at 585. Indeed, even where Congress has enacted a comprehensive statutory scheme, an agency "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress," and may not rely on generalized statutory purposes or "overarching authority" to expand its power beyond those limits. *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

That principle applies with greater force to DOGE. As the Solicitor General represented to the Supreme Court, "USDS is a presidential advisory body within the Executive Office of the President" and "*USDS has no organic statute and is not created by Congress*." Appl. to Stay Pending Certiorari or Mandamus and Request for Immediate Administrative Stay at 5, 21, *In re U.S. DOGE Serv.*, No. 24A1122 (emphasis added). If DOGE "has no organic statute and is not created by Congress," then it necessarily lacks any statutory delegation of authority to terminate NEH grants. And it certainly cannot exercise such authority in derogation of the very purposes that Congress wrote into the agency's authorizing statute.

When the President acts contrary to Congress's expressed or implied will, "his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). That is this case. DOGE lacked statutory authority to decide which NEH grants would be terminated or to devise the criteria used to effect those terminations. And the Government's reliance on the DOGE Executive Orders to compensate for that lack of authority is, therefore, unavailing for two reasons.

First, an Executive Order cannot supply authority that Congress withheld or vested in a different statutory decisionmaker. Just as Congress may not intrude upon powers the Constitution commits to the President, the President and his subordinates may not use an Executive Order to set aside the laws Congress has passed. As then-Judge Garland put it for the D.C. Circuit, "the President is without authority to set aside congressional legislation by executive order." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). That principle applies with particular force here because this case concerns the termination of grants already awarded. The governing regulation permits termination only by the "Federal agency or pass-through entity," and only in specified circumstances – including when the recipient fails to comply with the award's terms and conditions, 2 C.F.R. § 200.340(a)(1), or, "to the extent authorized by law," when the award no longer effectuates program goals or agency priorities, *id.* § 200.340(a)(4). It also requires the agency to specify termination provisions in the award terms and preserves the recipient's opportunity to object or challenge certain termination decisions. *Id.* § 200.340(b), (c)(1); *see also id.* § 200.342. DOGE did not examine whether recipients had failed to comply with their grant terms, did not make grantee-specific compliance findings, and did not follow a process designed to test whether particular awards were lawfully terminable. Instead, DOGE imposed nonstatutory criteria – Biden-era status and perceived association with DEI, environmental justice, gender ideology, or other ideas disfavored by the Administration – and

selected grants for termination on that basis. The President cannot override the statutory and regulatory scheme governing NEH funding and grant termination by Executive Order, and DOGE cannot do so in the President's name.

Second, the Executive Orders, read on their own terms, confirm the absence of any operative grant-termination authority in DOGE. Executive Order 14158, *Establishing and Implementing the President's "Department of Government Efficiency,"* first creates the principal DOGE entity by renaming the United States Digital Service as the "United States DOGE Service (USDS)" and providing that it "shall be established in the Executive Office of the President." Exec. Order No. 14158 § 3(a), 90 Fed. Reg. at 8441. It then separately creates, "within USDS," a "temporary organization known as 'the U.S. DOGE Service Temporary Organization'" and states that this temporary organization is created "in accordance with section 3161 of title 5, United States Code." *Id.*, § 3(b), 90 Fed. Reg. at 8441. But the only reference to a statute in the Order – to 5 U.S.C. § 3161 – attaches to the temporary organization, not to the principal DOGE entity.

Section 3161 itself does not confer any substantive policymaking power on DOGE. It defines a "temporary organization" as an organization "established by law or Executive order for a specific period not in excess of three years for the purpose of performing a specific study or other project," and grants personnel, detail, compensation, and travel authority to staff such an organization. 5 U.S.C. § 3161(a)–(e). Nothing in that provision authorizes DOGE to exercise independent executive power, direct the functioning of a federal agency, terminate grants, halt payments, or impose binding decisions on statutory officers. At most, it permits the creation and staffing of a temporary body for a "specific study or other project." *Id.*, § 3161(a). The Government's reliance on § 3161 thus does not support the authority DOGE exercised here.

Executive Order 14158 itself confirms the same point. The temporary organization is "dedicated to advancing the President's 18-month DOGE agenda," Executive Order 14158 § 3(b), 90 Fed. Reg. at 8441, but the Order does not give DOGE any independent decisionmaking authority. Instead, section 3(c) provides that, "In consultation with USDS, each Agency Head shall establish" a DOGE Team within the agency, and that those teams shall "*advise* their respective Agency Heads on implementing the President's DOGE Agenda." *Id.*, § 3(c), 90 Fed. Reg. at 8441 (emphasis added). Section 4(a) directs that "The USDS Administrator shall commence a Software Modernization Initiative." *Id.*, § 4(a), 90 Fed. Reg. at 8441–42. Section 4(b) further provides that "Agency Heads shall take all necessary steps, in coordination with the USDS Administrator and to the maximum extent consistent with law, to ensure USDS has full and prompt access to all unclassified agency records, software systems, and IT systems." *Id.*, § 4(b), 90 Fed. Reg. at 8442. Thus, the operative legal authority remains with agency heads. DOGE Teams – including those in which individuals such as Justin Fox or Nate Cavanaugh serve – are expressly created "within" agencies and function to "advise" agency heads – not to exercise independent decisionmaking authority. *Id.*, § 3(c).

Other DOGE-related Executive Orders confirm the same distinction between advice and decisionmaking. Executive Order 14218, *Ending Taxpayer Subsidization of Open Borders*, directs that "the Director of the Office of Management and Budget and the Administrator of the United States DOGE Service" shall "identify all other sources of Federal funding for illegal aliens" and "*recommend* additional agency actions." Exec. Order No. 14218 § 2(b), 90 Fed. Reg. 10581, 10581 (Feb. 19, 2025) (emphasis added). Executive Order 14219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, directs that "Agency heads shall, in coordination with their DOGE Team Leads,"

undertake regulatory review. Exec. Order No. 14219 § 2(a), 90 Fed. Reg. 10583, 10583 (Feb. 19, 2025). Executive Order 14210, *Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative*, similarly provides that agency hiring decisions shall be made "*in consultation* with the agency's DOGE Team Lead, consistent with applicable law." Exec. Order No. 14210 § 3(b)(i), 90 Fed. Reg. 9669, 9670 (Feb. 11, 2025) (emphasis added). And Executive Order 14222, *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative*, provides that "Each Agency Head, *in consultation* with the agency's DOGE Team Lead, shall review all existing . . . covered contracts and grants and, where appropriate and consistent with applicable law, terminate or modify" them. Exec. Order No. 14222 § 3(b), 90 Fed. Reg. 11095, 11095–96 (Feb. 26, 2025) (emphasis added). In every instance, operative authority is supposed to remain with agency heads; DOGE's role is expressly advisory.

The Executive Orders thus do not help the Government. They underscore the problem. The Government has itself described the President's executive orders in exactly those "purely advisory" terms. In its Supreme Court stay application, the Solicitor General represented that the relevant executive orders only "place *advisory* responsibilities on USDS or its administrator." Appl. to Stay Pending Certiorari or Mandamus and Request for Immediate Administrative Stay at 5, *In re U.S. DOGE Serv.*, No. 24A1122 (emphasis added). The Solicitor General further represented that "USDS is obviously not an 'agency' for FOIA purposes, because its authority is *purely advisory*." *Id.* at 15 (emphasis added). But the record here demonstrates that DOGE's role was anything but advisory. DOGE made the decisions for NEH.

Any suggestion that DOGE merely advised NEH is belied by the undisputed record. They did not simply provide policy advice for NEH leadership to accept or reject after their review. Before ever meeting with NEH leadership, Fox had already begun reviewing NEH grants using

keyword searches and DOGE-generated categories to identify grants he considered objectionable. DOGE then used ChatGPT-generated "DEI" rationales, combined those classifications with NEH staff ratings, and generated the final spreadsheets used to identify grants for termination. *See supra* Sections I(E)–(G). Cavanaugh and Fox then "both *rejected* [the NEH Chair's] recommendation" to continue funding certain grants, Dkt. No. 276-1, Cavanaugh Dep., 181:3–9, and added still more grants for termination – grants that NEH staff had identified as "N/A" – on the eve of the April 2, 2025 mass termination, Dkt. No. 248-32, US-000041206. The appearance of Chairperson McDonald's name on the termination letters does not alter the substance of what occurred. Fox, not McDonald, drafted and sent the termination notices under McDonald's name.

Just days before the Mass Termination, Fox told McDonald, "We need a game plan for effectuating . . . final grant terminations and contract cancellations by tomorrow AM. We will carry these plans out before the end of the week. We're getting pressure from the top on this and we'd prefer that you remain on our side but *let us know if you're no longer interested.*" Dkt. No. 248-15, Ex. 15, US-000050717 (emphasis added). That is not the language of an adviser awaiting a decision from the statutory decisionmaker. Fox told McDonald that "we" (*i.e.*, Fox and Cavanaugh) would carry the terminations out, invoked "pressure from the top" (*i.e.*, the White House), and framed McDonald's participation as simply optional. *See* Dkt. No. 248-1, Fox Dep., 305:8–17. His reference to whether McDonald was "no longer interested" makes clear that DOGE understood the terminations would proceed with or without him. No reasonable factfinder could read that communication as evidence of a "purely advisory" role. Fox's message leaves no serious doubt about who was directing the process.

This DOGE-directed process displaced the statutory official responsible for NEH's post-award administration, applied nonstatutory criteria, and selected grants for termination without the

recipient-specific compliance findings contemplated by the statute. That is not giving advice. It is exercising termination authority over NEH's grant program – authority Congress vested elsewhere and never conferred on DOGE.

Among the grants DOGE added to the slate of grants to be terminated was a proposal by the National Catholic Center for Holocaust Education at Seton Hall University to provide educational programming about the Holocaust. Dkt. No. 248-32, US-000041206, at 130; Dkt. No. 248-3, McDonald Dep., 225:7–226:19. McDonald was not the one who selected that grant for termination, and he did not believe it implicated DEI. *See* Dkt. No. 248-3, McDonald Dep., 226:6–11 ("Q: And in your view, does this grant relate to DEI? A: No. Q: Would you consider this to be wasteful spend[ing]? A: I would not, no."). It was DOGE personnel – specifically Justin Fox – who sent McDonald and Wolfson the final list of all grants "to cancel" and all grants "to keep." Dkt. No. 248-5, Ex. 5, NEH_AR_000022; Dkt. No. 248-32, Ex. 32, US-000041206.

McDonald testified that "Justin [Fox] prepared the list" of all grants "to cancel," and it was Fox "who put [] particular grant[s] on the list for termination." Dkt. No. 248-3, McDonald Dep., 229:9–10 ("Justin [Fox] prepared the list, yes."). Although McDonald claims *post hoc* that he "was the final decider," *id.*, 229:22, the contemporaneous record and his own testimony undermine that claim. *Id.*, 227:8–13 ("Q: But just to clarify, notwithstanding your answer a moment ago, it was Justin Fox who placed this grant on this list to terminate it, right? THE DEPONENT: I'd say it's likely that Justin developed the list, so yes."); *id.*, 229:12–15 ("Q: Michael McDonald never said, I'd really like to terminate the grant about Jewish female slave labor during the Holocaust. A: That's correct.").

Whatever formal role McDonald now claims he had, the record shows that he could not, and did not, make authoritative decisions on his own during the grant termination process. *See*

Woodman v. WWOR-TV, Inc., 411 F.3d 69, 84 (2d Cir. 2005) (stating that district courts are entitled to draw upon their "common sense" and are "not required to operate in an experiential vacuum"). McDonald could recommend that particular grants be spared, but he could not overrule DOGE's contrary determinations.

McDonald, for his part, admits that many of the DOGE terminations "did not reflect well" on NEH. *Id.*, 227:2–7. Despite his claim that he "was the final decider," McDonald could not explain the criteria DOGE used to distinguish between grants "to keep" and those "to cancel." *See, e.g.*, Dkt. No. 248-3, McDonald Dep., 248:5–19 (stating that he did not know why a project proposing to study "Council of Jewish Federation records dating 1916 to 1999" was kept). When asked why a grant to add 200 entries to the Encyclopedia Virginia about the Revolutionary Era was kept, McDonald did not know either. *Id.*, 253:23–255:11 ("Q: So sitting here today, you have no idea why this grant was kept while others that related to inclusiveness were terminated? A: No."). That testimony is telling. A "decisionmaker" who cannot explain why grants were spared while others were cancelled plainly is not one who exercises meaningful decisionmaking authority.

But in the end, McDonald himself admitted the truth: "Either way, as you've made clear, *it's your decision on whether to discontinue funding any of the projects on this list*." Dkt. No. 248-5, Ex. 5, NEH_AR_000023 (emphasis added). That admission is incompatible with any claim that DOGE was merely acting in an advisory capacity. It is the language of an agency head acknowledging that the authority Congress vested exclusively in him had, in practical effect, been taken out of his hands.

The record admits of only one conclusion. DOGE was calling the shots. DOGE controlled the lists, DOGE rejected McDonald's suggestions, DOGE added additional grants for termination, DOGE drafted and sent the notices, and DOGE dictated which previously awarded grants would

live or die. McDonald's one and only decision – to allow his name to appear at the bottom of the termination letters – alters none of that. His signature did not transform DOGE's decision into an NEH decision; his name was simply a fig leaf designed to make it appear like the official authorized by law to terminate grants was the official who had done so. If DOGE were in fact limited to an advisory role, Fox and Cavanaugh could not have directed NEH to terminate specific grants over the objections of its Chair. But they did. And they did so, without any statutory delegation of power. The challenged conduct cannot be reconciled with the National Foundation on the Arts and the Humanities Act or the constitutional requirement that executive action be grounded in lawful authority. It cannot stand.

Ironically, this conclusion is reinforced by the text of the executive orders the Government invokes. Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, provides that agencies shall act only "to the maximum extent allowed by law." Exec. Order No. 14151 § 2(b)(i), 90 Fed. Reg. 8339, 8339–40 (Jan. 20, 2025). Executive Order 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, likewise directs that agencies act "as permitted by law." Exec. Order No. 14168 § 3(e), 90 Fed. Reg. 8615, 8616 (Jan. 20, 2025). And Executive Order 14222, *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative*, conditions termination authority on action by "Each Agency Head" and only "consistent with applicable law." Exec. Order No. 14222 § 3(b), 90 Fed. Reg. 11095, 11095–96 (Feb. 26, 2025). These provisions confirm that the Executive Orders do not themselves purport to supply independent authority; they presuppose that any action must already be authorized by law.

In sum, the challenged DOGE conduct cannot be traced to any lawful source of authority. As the Supreme Court explained in *American School of Magnetic Healing v. McAnnulty*, 187 U.S.

94, 108, 110 (1902), executive action "must be justified by some law," because otherwise "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer." That is precisely the situation presented, where DOGE exercised unbounded authority without any statutory source and imposed binding consequences on Plaintiffs without lawful constraint. Fox and Cavanaugh, as members of DOGE's "Small Agencies Team," were the *de facto* ultimate decisionmakers – not McDonald or anyone at NEH. They selected the grants using their own ChatGPT-derived methodology (which they admit they did not understand), overruled the NEH Chair's express objections to terminating certain grants, and were the ones who ultimately drafted and sent out the termination notices. NEH's Director of Research Programs Christopher Thornton communicated to affected grantees that their fellowships were "terminated by DOGE." Dkt. No. 248-19, Ex. 19, US-000065114. And NEH's Chief Information Officer, Brett Bobley, admitted to a grantee that "DOGE did indeed cancel your award" and that "NEH staff, like myself, *didn't realize it was happening.*" Dkt. No. 248-18, US-000064982 (emphasis added). These admissions accord with the undisputed record evidence and confirm what the contemporaneous evidence already demonstrates. DOGE, not the NEH Chair, exercised decisive control over which grants would be terminated.

McDonald's *post hoc* assertion that he "was the final decider" rings hollow. The evidence shows that McDonald was powerless. Fox and Cavanaugh dictated the termination decisions, rejected McDonald's suggestions, and used his signature to execute decisions they had already made. Testimony to the contrary is not enough to create a genuine dispute of material fact when documentary evidence clearly, and overwhelmingly, indicates the opposite. *See Bentley v. AutoZoners, LLC*, 935 F.3d 76, 86 (2d Cir. 2019) (explaining that self-serving testimony need not be credited when it is "so compromised and contradicted" by the record). The DOGE conduct at

issue is not the execution of lawful authority. It is action "unauthorized by any law." *McAnnulty*, 187 U.S. at 110.

* * *

Plaintiffs have satisfied each element of *ultra vires* review. No statute expressly precludes judicial review; the Government certainly identifies none. No alternative procedure appears capable of adjudicating DOGE's conduct. And the challenged actions reflect a plain excess of lawful authority. Indeed, the record demonstrates a complete absence of statutory authorization for DOGE's conduct.

The National Foundation on the Arts and the Humanities Act does not authorize DOGE to do what it did. The President's Executive Orders do not authorize DOGE to do what it did. And even if the Executive Orders purported to do so, they could not supply the authority that Congress withheld. The President cannot confer upon an executive entity legal authority that neither Congress nor the Constitution has conferred. Where, as here, "there is no statute that expressly authorizes" DOGE's conduct, and no basis from which such authority "can fairly be implied," DOGE cannot act. *Youngstown*, 343 U.S. at 585.

Because Congress vested NEH funding authority in the Chairperson and addressed post-award consequences through specific, Chair-centered mechanisms, DOGE had no power to identify, select, or direct the termination of NEH grants; no power to override the statutory decisionmaker; and no power to substitute its own criteria for those Congress prescribed. DOGE's determination of which NEH grants would be terminated was therefore *ultra vires*, unlawful, and without legal effect.

C. The Mass Termination Violated the First Amendment

1. Governing Principles

The First Amendment, applicable to the federal government through the Fifth Amendment, prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. At its core, the Amendment bars the government from regulating or penalizing expression based on the ideas or viewpoints it conveys. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). When the government targets "particular views taken by speakers on a subject," the violation is "all the more blatant." *Id.* at 829.

This prohibition extends beyond direct regulation of speech. The government may not accomplish indirectly – through the allocation or withdrawal of benefits – what it is forbidden to do directly. Thus, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Namely, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* That principle – often described as the doctrine of unconstitutional conditions – applies with particular force where the government conditions funding decisions on the expression or suppression of ideas. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

At the same time, the Supreme Court has recognized that the government possesses some latitude in administering programs that involve the distribution of public funds. Where the government itself is speaking – or using private actors to convey its own message – it may define that message and fund speech that advances its chosen objectives. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld restrictions on federally funded family-planning projects, explaining

that the government may "selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. In that circumstance, the government is not regulating private speech, but ensuring that public funds are used to convey the government's own policy message. Likewise, Congress may decide not to subsidize particular activities without thereby infringing the First Amendment. *See Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 549 (1983).

But that discretion does not apply when the government creates and funds a program that is expressly designed to facilitate private expression. The constitutionality of public funding decisions turns on whether the government is itself speaking, or is instead facilitating private speech. When the government speaks for itself, it "is entitled to say what it wishes," *Rosenberger*, 515 U.S. at 833 (citation omitted); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). But when it creates a program that facilitates private speech, it "may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828.

For example, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), Congress had created a program to fund legal representation for indigent clients in civil cases, directing that recipients provide "legal assistance to eligible clients." 42 U.S.C. § 2996f(a)(1). The Court held that attorneys in this program do not speak on behalf of the government, but instead speak on behalf of their clients. *Velazquez*, 531 U.S. at 542. Because the program was "designed to facilitate private speech," *id.* at 541–42, it depended on the "traditional role of the attorney as an independent professional," advancing client-directed arguments within the judicial process. *Id.* at 545. The restriction at issue – prohibiting challenges to existing welfare laws – therefore imposed a viewpoint-based limitation on that private advocacy, forbidding attorneys from advancing certain arguments on behalf of their clients. The Court reasoned that this limitation "distort[ed] the legal system" by excluding disfavored viewpoints and "insulat[ing]" governmental policies from

judicial review. *Id.* at 544. In doing so, it "prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

Conversely, in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998), the Court rejected a facial challenge to statutory criteria requiring the NEA Chairperson to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants. The Court emphasized that the statute did not "inherently interfere[] with First Amendment rights" and did not, on its face, impose viewpoint-based exclusions on private speech. *Id.* at 571, 587. But the Court cautioned that funding decisions would raise serious constitutional concerns if applied in a manner that penalizes or excludes speech based on viewpoint. *Id.* at 587–88. Thus, *Finley* confirms that, while Congress may confer some discretion in administering grant programs, that discretion does not extend to viewpoint discrimination.

In sum, while the government retains some discretion in administering grant programs, that discretion is bounded by the First Amendment. It may define programmatic objectives and allocate resources accordingly, but it may not deny or withdraw funding because it disagrees with the ideas expressed. "[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional[.]" *Rosenberger*, 515 U.S. at 830. Where, as here, the government funds a program that facilitates private expression, it may not act where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829.

2. Application

a) NEH Grants Fund Private Expression, Not Government Speech

The Court first addresses whether NEH-funded work is government speech or private speech. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

When the government invites private parties to participate in a public funding program, the line between government and private speech "can blur." *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 252 (2022). Courts therefore consider "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* All three considerations confirm that NEH grants fund private expression, not government speech.

"[T]he history of the expression at issue" confirms that, from the outset, Congress designed NEH to support independent, private expression rather than to convey a governmental message. *Id.* Since its inception, the statute has reflected a deliberate choice to foster, not control, intellectual and cultural production. Congress declared that, "The arts and the humanities belong to all the people of the United States," 20 U.S.C. § 951(1), and that federal support should "complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations," *id.*, § 951(5). Most tellingly, Congress recognized that, "While no government can call a great artist or scholar into existence," it can foster "a climate encouraging freedom of thought, imagination, and inquiry" and provide "the material conditions facilitating the release of this creative talent." *Id.*, § 951(7).

These founding declarations of purpose define the program's historical character. NEH was not created as a vehicle for government expression. It was created to support the intellectual and cultural work of private citizens, scholars, teachers, writers, and institutions. This history alone forecloses any argument that NEH-funded work constitutes government speech.

"[T]he public's likely perception as to who (the government or a private person) is speaking" likewise confirms the private nature of NEH-funded work. *Shurtleff*, 596 U.S. at 252. Congress expressly contemplated that NEH-funded works would not be attributed to the

Government. It authorized disclaimers that "the opinions, findings, conclusions, and recommendations expressed herein *do not reflect the views of the National Endowment for the Arts or the National Endowment for the Humanities*." 20 U.S.C. § 959(c)(3)(C) (emphasis added). NEH's own grant terms implement that directive, requiring acknowledgment of federal support while making clear that "[a]ny views, findings, conclusions, or recommendations expressed in this (publication) (program) (exhibition) (website) do not necessarily represent those of the National Endowment for the Humanities." Nat'l Endowment for the Humanities, *General Terms and Conditions for Awards to Organizations* 11–12 (for grants and cooperative agreements issued between Jan. 1, 2022, and Sept. 30, 2024), https://perma.cc/H9TB-L78T.

These disclaimers reinforce the understanding that NEH-funded work is the product of the grantee, not the government. Members of the public encountering a book, article, archive, documentary, or educational program supported by NEH funding would reasonably attribute its content to its author or sponsoring institution, not to NEH. *See Rhode Island Latino Arts v. Nat'l Endowment for the Arts*, 800 F. Supp. 3d 351, 366 (D.R.I. 2025) (finding it "unlikely that members of the public would think that NEA-funded artists speak for anyone but themselves, and certainly not for the government").

Finally, "the extent to which the government has actively shaped or controlled the expression" confirms that NEH does not exercise the type of editorial or expressive control characteristic of government speech. *Shurtleff*, 596 U.S. at 252. NEH's terms provide that "title to intangible property acquired under the award belongs to the recipient or subrecipient," and that the recipient "may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under the award." Nat'l Endowment for the Humanities, *General Terms and Conditions for Awards to Organizations* 35 (for grants and cooperative agreements issued

between Jan. 1, 2022, and Sept. 30, 2024), https://perma.cc/H9TB-L78T; *see also* Nat'l Endowment for the Humanities, *General Terms and Conditions for Awards to Organizations* 34 (for awards issued Oct. 1, 2024, or later), https://perma.cc/GZH2-R92G. NEH retains only "a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes," not the right to control its content. *Id.*; *see also* Dkt. No. 253, Declaration of Jason Rhody, ¶ 2 ("NEH-funded projects are the work of the funded individuals and institutions, not NEH.").

Taken together, these considerations establish that NEH grants fund private expression, not government speech. The Government therefore cannot avoid First Amendment scrutiny by recasting privately authored scholarship, writing, teaching, and cultural work as its own message. When private expression is involved, the First Amendment forbids "the government from tilting public debate in a preferred direction," and "that is so even when those actors possess enviable vehicles for expression." *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024) (citation modified).

b) The Terminations Constitute Unconstitutional Viewpoint Discrimination

i. DEI-Based Viewpoint Discrimination

This case presents a textbook example of unconstitutional viewpoint discrimination.

DEI is, of course, a viewpoint. It "inherently convey[s] the viewpoint that the exclusion of historically disadvantaged groups is undesirable." *Thakur*, 163 F.4th at 1206; *see also diversity, equity and inclusion*, Merriam-Webster, https://perma.cc/84ZW-7JSR ("a set of values and related policies and practices focused on establishing a group culture of equitable and inclusive treatment and on attracting and retaining a diverse group of participants, including people who have historically been excluded or discriminated against"); *see also diversity, equity and inclusion*, Cambridge English Dictionary, https://perma.cc/M2GS-L4UT ("the idea that all people should

have equal rights and treatment and be welcomed and included, so that they do not experience any disadvantage because of belonging to a particular group, and that each person should be given the same opportunities as others according to their needs"). The only remaining question is whether "the specific motivating ideology or the opinion or perspective of" the grantees "[was] the rationale for the restriction." *Rosenberger*, 515 U.S. at 830. It was.

The record establishes that the termination decisions were driven by an expressly ideological method of classification. There can be no genuine dispute about this point. Indeed, the Government has all but admitted as much. *Accord Thakur v. Trump*, 163 F.4th 1198, 1206 (9th Cir. 2025) ("The government does not dispute that it terminated the subject grants because they promoted DEI, DEIA, or environmental justice.").

During the first stage of grant review, NEH staff "reviewed all awards made over the preceding four years and rated them 'high, medium, low' in terms of promoting DEI." Dkt. No. 277, ¶ 26 (Defendants' response: "Admitted."); *see also* Dkt. No. 248-5, Ex. 5, NEH_AR_000022. That DEI rating was reflected in a spreadsheet identifying whether each grant was "related to DEI" and recorded a corresponding "Rationale." *Id.*, ¶¶ 45, 47, 48, 50–53 (Defendants admitting that "ChatGPT responded 'Yes' to the question of whether the referenced grant was related to DEI, and that the quoted text appears in the 'Rationale' column of the cited spreadsheet"). The "Rationale" column did not describe neutral, statutorily required review criteria; it captured the perceived ideological content of the funded work based on its relation to "DEI." One need not look any further than the titles and columns of the spreadsheets themselves. They are labeled "DEI Grant Summary," and include a "Yes / No DEI?" column for each grant slated for termination, alongside a "DEI Rationale" column explaining why the grant is related to DEI – even if, as is true

in many cases, it was not. *See, e.g.*, Dkt. No. 248-12, Ex. 12; Dkt. No. 248-13, Ex. 13; Dkt. No. 284-1, Ex. 44, US-000061323.

During the second stage of grant review, after NEH handed over its "Yes / No DEI?" spreadsheets, DOGE continued to review grants for perceived affiliation with DEI. Fox conducted this review by using ChatGPT. He entered each grant's description into ChatGPT, with the following prompt: "Does the following relate at all to DEI? Respond factually in less than 120 characters. Begin with 'Yes.' or 'No.' followed by a brief explanation." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at C2–C1163. Fox testified that he used ChatGPT in this way "[t]o highlight why this grant may relate to DEI," Dkt. No. 248-1, Fox Dep., 204:20–23, and "to pull out anything related to DEI," *id.*, 209:21–210:6. Asking whether a grant "relate[s] at all to DEI" reflects a purely ideological filter that has no other purpose than to identify disfavored viewpoints the Government wants to suppress.

Some of these AI outputs identify subject matter that, in a broad sense, could be associated with themes commonly discussed under the rubric of "DEI" – which is to say, subject matter expressing the view that "the exclusion of historically disadvantaged groups is undesirable." Others plainly do not. In either case, the classification – and the resulting termination decision – turned on DOGE's perception that the grantee was expressing a DEI-related viewpoint, not on any neutral, statutorily grounded criterion. *See Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016).

The record illustrates the constitutional infirmity of the termination process. For example, the Government, using ChatGPT, classified as DEI an anthology titled *In the Shadow of the Holocaust: Short Fiction by Jewish Writers from the Soviet Union*. The stated rationale was that the project "explores Jewish writers' engagement with the Holocaust in the USSR, highlighting

themes of witnessing, memory, and resilience." Dkt. No. 248-11 at 69, H316. The project reflects a scholarly effort to recover suppressed literature, confront the legacy of the Holocaust, and examine how communities reckon with the trauma of mass violence. The work sought to address "how to witness and provide testimony, how to remember victims, and how to live on in the face of overwhelming destruction." *Id.* at 69, C316. Revoking a federal grant solely because it discusses and illuminates historical injustice against a minority group is plainly viewpoint discrimination. But, according to the Government, the project was "#DEI" because it "explores Jewish writers" and "highlight[s] themes of witnessing, memory, and resilience." *Id.* at 69, I316.

The Government, again using ChatGPT, also classified as DEI a project examining graphic narratives created by Jewish women survivors of Nazi persecution in the immediate aftermath of the Holocaust. The project reflects a scholarly effort to recover "overlooked works in which survivors documented their experiences of persecution" that "sought to counter perpetrator and liberator sources and represent their own histories of Jewish suffering." Dkt. No. 248-11, at 235, C1098. Because the project "highlights the overlooked graphic narratives by Jewish women survivors, revealing diverse, gendered ways of experiencing and representing the Holocaust," it was deemed "#DEI," apparently on both "Jewish" and "woman" grounds. Dkt. No. 248-11, at 235, H1098.

Third example: the Government, using ChatGPT, classified as DEI a documentary project titled *My Underground Mother*, which explores "the untold story of Jewish women's slave labor during the Holocaust" through survivor testimony, personal archives, and a daughter's effort to reconstruct her mother's past. Dkt. No. 248-11 at 4, C16. The project endeavors to recover suppressed histories of violence against women during the Holocaust. But the project was classified by DOGE as "DEI" because it "addresses gender-based violence and overlooked

histories" and "amplif[ies] marginalized voices." *Id.* That classification, once again, does not identify any deficiency in statutory eligibility or scholarly merit. It identifies a perspective – one that seeks to document persecution, recover the long overlooked voices of Jewish women, which illuminate the human experience of violence and survival – and treats that viewpoint as a basis for termination.

The Government suggests that there is no real constitutional problem here because any viewpoint-based classification was ChatGPT's doing, rather than the Government's. *See* Dkt. No. 278, Defs.' Mem. L. Opp'n to Pls.' Mot. for Summ. J., at 38–40 ("Fox only used ChatGPT '[t]o look at the . . . full grant descriptions and bring out the context of which a DEI grant may relate' and to 'inform DEI rationale.'"). That argument brings to mind, for someone of my generation, the great comedian Flip Wilson, whose character "Geraldine Jones" would excuse her behavior by saying, "The devil made me do it." That excuse did not work for Geraldine Jones, and it does not work for the Government. There is no distinction to be drawn here between the Government and ChatGPT. ChatGPT was the Government's chosen instrument for purposes of this project, and DOGE's use of AI to identify DEI-related material neither excuses presumptively unconstitutional conduct nor gives the Government *carte blanche* to engage in it.

Here, DOGE selected the AI tool, formulated the prompt, and defined the operative viewpoint-based criterion: whether a grant "relate[s] at all to DEI." DOGE adopted the classifications and supporting rationales that were generated by ChatGPT to justify terminating grant after grant. The Government actors who made the decisions here – DOGE personnel – followed the classifications and rationales produced by the process they created. There is not a scintilla of evidence that Fox or Cavanaugh, having obtained a "DEI" rationale from ChatGPT, undertook any meaningful review of whether that rationale made sense. Although Fox

states that ChatGPT's answers were just an "intermediary step," neither Fox nor the Government has identified a single example where Fox reviewed ChatGPT's DEI rationale, disagreed with its assessment, and chose not to terminate a particular grant. Dkt. No. 248-1, Fox Dep., 210:25. DOGE simply adopted ChatGPT's rationales wholesale as their own.

Therefore, one cannot treat ChatGPT and the Government as distinct actors for constitutional purposes. Any argument to the contrary is unworthy of representatives of the Department of Justice. Every lawyer who has been called out and sanctioned for incorporating into briefs hallucinated case citations that were generated by AI could have said the same: "It wasn't me; it was ChatGPT." That those lawyers have, for the most part, thrown themselves at the mercy of the deluded court and accepted their punishment demonstrates the absurdity of the Government's argument.

In any event, as Fox testified, the DOGE representatives agreed with ChatGPT's "recommendations." He averred that ChatGPT properly classified the grant to study Jewish slave labor because it "is related to DEI." Dkt. No. 248-1, Fox Dep., 190:15. DOGE slated it for termination because it was "specifically focused on Jewish cultures and amplifying the marginalized voices of the females in that culture." *Id.* at 191:5–9. "It's inherently related to DEI" because it is about "marginalized female voices during the Holocaust[.]" *Id.* at 191:8–12. Put simply, the Government terminated the grant because the grant sought to empower and amplify the voices of Jewish women who were victims of Nazi persecution. The Government may have its reasons for disfavoring that perspective, but the First Amendment does not permit it to divest someone of a government benefit.

Yet another example: the Government, acting through DOGE, classified as DEI a scholarly project titled *A Lethal Education*, which examined boarding schools maintained by the

Government to educate Indigenous youth between 1819 and 1934 – a period when the federal government "took guardianship of Native American youth and sent them to schools established to 'civilize' them." Dkt. No. 248-11, at 513, C638. The project "sheds light on the dark history of Native American boarding schools," "uncovers that the schools were far more lethal than previously known," and "mak[es] visible lives erased by unscrupulous bureaucrats." *Id.* As with the prior examples, DOGE identified the project as "DEI" because it concerned the historical mistreatment of Indigenous children by the federal government and sought to educate the public about that injustice. Disfavoring that perspective because it brings to light historical injustice is viewpoint discrimination.

At least these aforementioned grants bore some logical relationship to themes disfavored by the current administration. The record reflects countless other grants identified by ChatGPT as "DEI" that bore no discernible relationship to any coherent definition or understanding of that term. Nonetheless, they were terminated, based solely on Fox and Cavanaugh's perception that they implicated disfavored DEI-related ideas. A few examples to illustrate the incoherence of DOGE's classifications:

- DOGE flagged as DEI a grant to the Whaling Museum & Education Center, which sought funds to support the museum's "site interpretation about whaling history and [to] design a visitor-responsive, inclusive, inquiry-based and impactful experience in a new 1300-square foot pavilion housing a full-size whale skeleton." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D1015. According to DOGE, the program was "DEI" because it seeks to "create an inclusive and impactful experience, which is aligned with DEI principles." *Id.* This must represent the first time in history that an exhibit about the whaling industry – a cornerstone of New England's economy during the 19th and early 20th centuries – has been thought to fall under the banner of "diversity, equity and inclusion" – unless the whales' status as a species endangered by the whalers places them in a "marginalized" status.

- DOGE flagged as DEI a grant to the Philosophy and Literature Circle, a lifelong learning public humanities program in Texas. The funded program

offered a reading, discussion, and writing program involving "celebrated works in philosophy and literature in order to develop capacities in critical thinking." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D1040. According to DOGE, the program was "DEI" because it aims "to engage and exchange ideas [and] develop critical thinking." *Id.* It is an unfortunate sign of the times if promoting critical thought is politically disfavored.

- DOGE flagged as DEI a grant to the Historic Albany Foundation which sought funds to restore and rehabilitate the Van Ostrande-Radliff House, the oldest building in Albany, New York that is extant from the Dutch colonial period. According to DOGE, the restoration of the house "relates to DEI by preserving and celebrating the historic architecture and culture of Dutch colonial period in Albany." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D19. Architecture has not historically been thought to implicate diversity, equity, or inclusion principles or to deal with historically marginalized groups – and the Dutch settlers in colonial Albany were most assuredly not a historically marginalized group.

- DOGE flagged as DEI a grant that sought to "produce the first comprehensive, accurate, scholarly, and freely-available edition of all surviving inscribed legislation from classical Rome," and would have "double[d] the amount of Latin and Greek text contained in the last major work" in the fields of Roman history and Roman law. Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D247. This was "DEI" because it "contributes to understanding Roman history and law" – which is ironic, since many well-known opponents of DEI-related programs would applaud a project devoted to classical Western (*i.e.*, Greek and Roman) languages, law, and history.

- DOGE flagged as DEI a grant to the Boston Symphony Orchestra that sought to digitize at-risk audio reels representing radio broadcasts of live Boston Pops concerts between 1958 and 1979 – a period covering the last 20 years of the great and beloved Arthur Fiedler's tenure as the Pops conductor. According to DOGE, "Preserving and making accessible historical recordings promotes diversity, equity, and inclusion by sharing valuable cultural heritage." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D434. This surely represents an unwarranted expansion of any definition of DEI, since ChatGPT utterly failed to explain why preserving Boston Pops broadcasts from the Fiedler era had anything to do with advancing the interests of any historically disfavored group, though many a professional musician might well feel marginalized. In fact, the "valuable cultural heritage" that would be shared by preserving these

broadcasts includes innumerable performances of John Philip Sousa's patriotic marches, played regularly to enthusiastic audiences.[5]

- DOGE flagged as DEI a grant to the National Ornamental Metal Museum in Memphis, Tennessee, which would have used the funds "for the preservation, promotion, and advancement of the field of fine metalwork." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D120. According to DOGE, "The Metal Museum's commitment to educating and contextualizing the roles and history of metalwork aligns with DEI principles by promoting understanding and inclusivity in the field." *Id.* Neither DOGE nor ChatGPT identified what possible DEI concern there could be about any aspect of fine metalwork.

- Finally, DOGE flagged as DEI a grant to Georgetown University to implement a new Medical Humanities Minor featuring cross-campus programming with the University's medical school. It sought to "contribute to scholarship in the field of medical humanities [and] change the patient/clinician encounter from a grassroots level, by shaping the training of health care professionals." According to DOGE, this was DEI because it would have "enhanc[ed] [the] well-being of pre-health students." Dkt. No. 248-11, Ex. 11, US-000062485 (tab "Sheet3"), at D476. It is simply impossible to know what to say about this one.

Regardless of whether DOGE's classifications were coherent (obviously, many of them were not), what matters is that it deliberately sought to single out and eliminate grants based on its perception that they implicated disfavored ideas. *See* Dkt. No. 248-17, Ex. 17, NEH_AR_000013 ("[W]e have only excluded [from termination] the ones that seem not to conflict with the Administration's priorities[.]"). The Government's actions cannot stand. It may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (*per curiam*). Yet, 1,057 grants[6] were identified as related to

[5] This project would also have ensured the preservation of the live broadcast of the Pops' historic Bicentennial Concert, broadcast live from Boston's Esplanade on the evening of July 4, 1976 – which ended with the bells of all of Boston's historic churches ringing to celebrate the 200th anniversary of the signing of the Declaration of Independence, while fireworks exploded and Fiedler conducted the climactic ending of Tchaikovsky's *1812 Overture*. It was a terrific and patriotic musical moment.

[6] The awardees of these grants, except for those held by ACLS Plaintiffs or their members, are part of the Authors Guild Plaintiffs' proposed DEI Subclass. *See infra* Section IV(F).

DEI in this manner and were terminated on that basis and that basis alone. *See* Dkt. No. 248-25, Ex. 25, NEH_AR_0000136; Dkt. No. 248-3, Ex. 3, McDonald Dep., 144:6–15 (agreeing that the result of this DEI-based flagging process "was specifically to identify grants for potential termination").

The Government, for its part, has never claimed that these grants were reviewed for their humanistic merit or that they were terminated for any reason other than the DOGE decisionmakers' perception that they espoused, reflected, or related to the disfavored "DEI" viewpoint. To the contrary, the Government admits that these grants were terminated because they were deemed to promote DEI. *See, e.g.*, Dkt. No. 248-2, Ex. 2, Cavanaugh Dep., 202:18–20 ("Q: [I]f a grant related to DEI, it couldn't be on the 'keep' list, right? A: That's correct."). DOGE itself publicly characterized the terminations as "DEI," posting from its official account on X (formerly Twitter) that "During the previous administration, the National Endowment for the Humanities (NEH) awarded the following grants to spend taxpayer dollars, all of which have been cancelled ($163M in overall savings). NEH grants will be merit-based and awarded to *non-DEI*, pro-America causes." Post, DOGE (@DOGE), X (May 20, 2025, 3:45 PM), https://x.com/doge/status/1924944059153670530 (emphasis added). The Government's own public statements confirm what the record otherwise makes clear: DEI, the disfavored viewpoint, was the reason why the majority of Plaintiffs' grants were terminated. The Government engaged in blatant viewpoint discrimination.

The Government cannot avoid that conclusion by invoking the familiar principle that it need not subsidize every form of protected expression. *See, e.g., Rust*, 500 U.S. at 194 (rejecting the proposition that "if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights"). That principle has its place. Congress may define the subjects and

activities that federal funds will support, and an agency acting pursuant to statutory authority may implement those limits. But that is not what happened here. This case involves DOGE's post-award cancellation of grants that had already been approved under NEH's statutory program, based on nonstatutory criteria that Congress did not enact – indeed, that are antithetical to what Congress did enact – and that targeted projects because they were perceived to express a disfavored viewpoint.

Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), illustrates the difference. There, a nonprofit corporation, Taxation With Representation of Washington, sought § 501(c)(3) status so that it could use tax-deductible contributions to support substantial lobbying activities. *Id.* at 542–44. The Internal Revenue Service denied the application because "a substantial part of TWR's activities would consist of attempting to influence legislation," which § 501(c)(3) did not permit. *Id.* at 542; *see* 26 U.S.C. § 501(c)(3). The Supreme Court upheld that statutory scheme, because "Congress has merely refused to pay for the lobbying out of public monies," *Regan*, 461 U.S. at 545, and because TWR remained free to lobby through a § 501(c)(4) affiliate using non-deductible contributions, *id.* at 544–46. As the Court put it, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity"; it had "simply chosen not to pay for TWR's lobbying." *Id.* at 546.

Regan thus involved a statutory funding limitation imposed by Congress, the entity that, under our Constitution, decides how to spend taxpayer money. It did not involve the Executive Branch imposing its own preferred funding limitation after Congress had authorized something else. Nor did it involve the suppression of disfavored ideas. Indeed, the Court emphasized that the case would have been different if Congress had "discriminate[d] invidiously in its subsidies in

such a way as to 'aim[] at the suppression of dangerous ideas.'" *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The same is true of *Rust v. Sullivan*, 500 U.S. 173 (1991). There, Congress enacted Title X, which explicitly authorized the United States Secretary of Health and Human Services to "make grants to and enter into contracts with public or nonprofit private entities" for voluntary family-planning projects, 42 U.S.C. § 300(a), and provided that such grants and contracts must "be made in accordance with such regulations as the Secretary may promulgate," *id.* § 300a-4(a). *Rust*, 500 U.S. at 178. Congress also enacted an express funding limitation: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 178–79 (quoting 42 U.S.C. § 300a-6). The challenged regulations implemented that statutory limitation by defining the permissible scope of Title X projects. *Id.* at 179–81. In that context, the Court held that the Government had not discriminated on the basis of viewpoint; it had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193.

The distinction is not that Title X grant applicants faced no funding consequences under *Rust*. They plainly did. The distinction is that *Rust* involved a facial, pre-enforcement challenge to prospective regulations, promulgated by the statutorily authorized official, defining the permissible scope of a federal program pursuant to an express statutory funding restriction. *See id.* at 181–83. The Supreme Court emphasized that the Government was "not denying a benefit to anyone," but was "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. The regulations governed the scope of the federally funded Title X project and left grantees "unfettered" in their other activities. *Id.*

Here, the Government's analogy to *Rust* and *Regan* fails twice over.

First, Congress enacted no comparable statutory limitation for DOGE – or anyone else – to implement. Congress did not provide that NEH funds could not be used for programs concerning DEI, race, gender, religion, minority communities, historical injustice, or any comparable category. To the contrary, Congress created NEH to support private humanistic inquiry, including scholarship and programs reflecting "*the diversity and richness of our American cultural heritage.*" 20 U.S.C. § 956(c)(4) (emphasis added). Congress expressly authorized NEH to support "programs and research which have substantial scholarly and cultural significance and that reach, or reflect the diversity and richness of our American cultural heritage, *including the culture of, a minority, inner city, rural, or tribal community,*" *id.* § 956(c)(4), and directed that, "[i]n selecting individuals and groups of exceptional talent as recipients of financial assistance," the Chairperson "shall give particular regard to scholars, and educational and cultural institutions, that have *traditionally been underrepresented*," *id.* § 956(c) (emphasis added). "Particular regard" to groups that have been traditionally "underrepresented" is, of course, the hallmark of DEI. Congress made those considerations directly relevant; DOGE treated them as disqualifying.

Second, DOGE was not the official or agency to which Congress delegated authority to define the scope of NEH's program or to award or terminate NEH grants. *See supra* Section IV(B)(2)(c). DOGE was therefore not insisting that NEH funds be spent for the purposes Congress authorized; the Government does not even attempt to argue as much. It cancelled grants because the funded projects were perceived to implicate subjects and viewpoints that Congress not only did not prohibit, but, in many instances, expressly made relevant to NEH's mission. Congress never authorized DOGE to impose new ideological criteria, redefine NEH's statutory purposes, or terminate already-awarded grants because DOGE perceived them to implicate DEI.

Thus, for both reasons, this case bears no resemblance to either *Rust* or *Regan*.

Agency for International Development v. Alliance for Open Society International, Inc. ("*AOSI*"), 570 U.S. 205 (2013), is of no help to the Government either. *AOSI* recognizes that the Government can impose funding limits to ensure that federal funds are used for the purposes Congress authorized. *See id.* at 213. But it also makes clear that the Government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Id.* at 214 (citation omitted). There, Congress had authorized federal funds to support nongovernmental organizations combating HIV/AIDS overseas, while imposing two conditions: (1) funds could not be used to "promote or advocate the legalization or practice of prostitution or sex trafficking," and (2) recipients had to maintain "a policy explicitly opposing prostitution and sex trafficking." *Id.* at 208, 210. The Supreme Court drew a constitutional line between those two conditions. The first permissibly governed the use of federal funds within the program. The second, the Court held, impermissibly required recipients themselves to affirm the government's preferred view as their own. *Id.* at 213. The relevant distinction is between permissible conditions that define the limits of a government spending program and impermissible conditions that "seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15. The latter category is implicated here.

DOGE did not show up at the NEH and "advise" the agency on what kinds of projects to fund. It reexamined grants that had already been awarded, identified projects that expressed or reflected certain viewpoints, principally viewpoints associated with DEI, and terminated the grants already awarded for that reason. Like the policy requirement in *AOSI*, DOGE's termination criterion did not keep federal funds within the boundaries of a congressionally defined program. It used funding leverage to penalize private speakers for failing to conform to the Government's

preferred ideological position – here, the Administration's anti-DEI stance – even though that stance, as applied here, contradicts the statutory priorities Congress enacted.

National Public Radio v. Trump, 2026 WL 877434, at *1 (D.D.C. Mar. 31, 2026), is instructive. There, the challenged Executive Order – Executive Order 14290, titled "*Ending Taxpayer Subsidization of Biased Media*" – announced that NPR and PBS did not, in the President's view, "present[] a fair, accurate, or unbiased portrayal of current events," and instructed federal agencies to end "direct or indirect [federal] funding of NPR and PBS." *Nat'l Pub. Radio*, 2026 WL 877434, at *1. The accompanying Fact Sheet made the viewpoint-based rationale explicit, asserting that "NPR and PBS have fueled partisanship and left-wing propaganda with taxpayer dollars" and that such funding was "highly inappropriate and an improper use of taxpayers' money." *Id.*

The Executive Order was sweeping. It instructed the Corporation for Public Broadcasting to "cease direct funding to NPR and PBS" and to "cancel existing direct funding to the maximum extent allowed by law and [to] decline to provide future funding." *Id.* at *7. It also directed all federal agencies to "identify and terminate, to the maximum extent consistent with applicable law, any direct or indirect funding of NPR and PBS." *Id.* The court held that this crossed the constitutional line because the Order did not "define or regulate the content of government speech or ensure compliance with a federal program," and did not "set neutral and germane criteria that apply to all applicants for a federal grant program." *Id.* at *1. Instead, it singled out particular speakers "on the basis of their speech" and barred them from federal funding. *Id.*

The same line was crossed here. As in *National Public Radio*, the Government did not merely define neutral program criteria or ensure compliance with statutory grant conditions. It identified funded private expression it disfavored – there, speech deemed "biased"; here,

scholarship and humanities projects deemed "DEI" – and used federal funding authority to terminate or deny support on that basis. The label differs, but the constitutional infirmity is the same. The Government used the power of the purse "to punish or suppress disfavored expression." *Id.* at *1. That is exactly what happened here.

DOGE did not adopt neutral, prospective, germane criteria governing the use of NEH funds pursuant to any statutory limitation enacted by Congress. Unlike in *Regan* and *Rust*, there was no express congressional funding restriction for DOGE to effectuate. Instead, DOGE identified already-awarded grants as objectionable because they were perceived to relate to DEI; generated "DEI Rationales" to explain why those projects implicated that disfavored viewpoint; and then clawed back funding on that basis. That is neither a *Regan*-style refusal by Congress to subsidize a category of activity nor a *Rust*-style definition of program scope by a statutorily authorized agency implementing an express statutory funding limitation. It is the imposition of a nonstatutory penalty by a nonstatutory entity on disfavored private expression – precisely the sort of funding-based viewpoint discrimination that *AOSI* forbids.

In sum, every aspect of the termination process – the NEH DEI ratings, DOGE's DEI-based ChatGPT filter, and the spreadsheet sorting grants by "DEI Rationale" – reflects a single, unconstitutional purpose: to drive a particular disfavored viewpoint from the marketplace of humanistic inquiry. *Accord Thakur*, 163 F.4th at 1207 ("[T]he current record suggests that the government aimed at the suppression of speech that views DEI, DEIA, and environmental justice favorably.").

There are a "few historic and traditional categories of expression" where content-based restrictions on speech will not automatically trigger strict scrutiny – categories that include fraud, defamation, and "fighting words." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality

opinion) (citation modified). Suffice it to say, none of the grants discussed in the preceding pages, and none of the other grants that were terminated on the same basis, threaten to incite an "immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). The Government has engaged in viewpoint discrimination in its most "blatant" form. *Rosenberger*, 515 U.S. at 829–30. Such discrimination is presumptively unconstitutional. *Id.* at 830.

ii. Political-Association Discrimination

The Government likewise violated the First Amendment when it terminated grants based on their perceived association with the Biden Administration.

The government may not "leverage its power to award [or deny] subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Finley*, 524 U.S. at 587. Even where the government is not obligated to confer a benefit, "there are some reasons upon which the government may not rely" in denying the benefit. *Perry*, 408 U.S. at 597. For example, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* Political association is one of those protected interests. *See Buckley*, 424 U.S. at 15; *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973). Accordingly, the Government may not condition the receipt or retention of a public benefit – including a federal grant – on political affiliation, non-affiliation, or perceived political alignment.

As Justice Harlan explained in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." The Supreme Court has repeatedly applied that principle in the political context: "There can no longer be any doubt that freedom to associate

with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper*, 414 U.S. at 56–57 (citation omitted). And "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Id.* at 57. For this reason, "The First Amendment protects political association as well as political expression." *Buckley*, 424 U.S. at 15.

When the government funds private speech, it must do so in a viewpoint-neutral manner and may not skew the marketplace of ideas by penalizing disfavored political associations. *See id.* at 48–49. After all, the First Amendment was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). But DOGE crossed that constitutional line. DOGE specifically sought to terminate grants because they were "Biden-era" grants.

The record makes this abundantly clear. When NEH's Chief Information Officer first directed NEH staff to start reviewing grants, he directed them to review only grants issued since "the start of the Biden administration." Dkt. No. 248-26, Ex. 26, Wolfson Dep., 87:21–88:4; Dkt. No. 248-4, Ex. 4, NEH_AR_000001; *see also* Dkt. No. 248-8, Ex. 8, NEH_AR_000005 (Wolfson describing "historical review of NEH's grants since January 2021"). And as soon as DOGE arrived at NEH, Cavanaugh sent McDonald "a list of grants that were awarded during President Biden's administration" and suggested that all funds awarded during President Biden's administration that had yet to be distributed "can presumably be clawed back." Dkt. No. 248-27, Ex. 27, NEH_AR_000003. McDonald testified to his "understanding" from interactions with DOGE that "the presumption was that . . . open grants that were made under the Biden administration needed to be reviewed." Dkt. No. 248-3, McDonald Dep., 372:19–23.

As McDonald laid bare, "Basically, we were looking at the last four years of open grants from the Biden administration. My understanding was we wanted to start afresh, a . . . clean slate . . . as much as possible." *Id.*, 226:12–227:1. Again, the Government makes no attempt to argue that these grants were terminated based on their humanistic merit or statutory criteria. The reality is that they were uniformly flagged for termination because they were "Biden Grants." *See, e.g.*, Dkt. No. 248-28, Ex. 28, NEH_AR_000004.

Such grants were treated as suspect because they were associated with the prior administration and so were presumed to not "align[] with the [Trump] Administration." Dkt. No. 248-2, Cavanaugh Dep., 155:11–13; *see also* Dkt. No. 248-29, Ex. 29, US-000064703 (McDonald's talking points stating that "the President does not like" the terminated grants).

That is not a permissible funding criterion. It is discrimination based on perceived political association. The First Amendment does not permit the Government to terminate grants previously awarded because they are associated, or perceived to be associated, with a political opponent. *See Perry*, 408 U.S. at 597; *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016). To allow the Government to make "selections among recipients of public subsidies that favor and strengthen those friendly to the government's message while placing at a disadvantage and thus weakening the opponents and skeptics" is to permit it to dictate which voices may remain in the public discourse – precisely what the First Amendment forbids. *Alliance for Open Soc'y Int'l, Inc. v. USAID*, 430 F. Supp. 2d 222, 258 (S.D.N.Y. 2006).

There can be no genuine dispute that the Government's rationale was "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Far be it for this Court to deny the Government its right to advocate for its own policies and establish lawful prospective priorities. *See Regan*, 461 U.S. at 542–46. But what the Government

may not do is weaponize public funding to penalize disfavored political associations. *Rosenberger*, 515 U.S. at 828; *Perry*, 408 U.S. at 597.

* * *

In sum, the perceived relationship of a grant to DEI or to the Biden Administration was the very *raison d'être* for the challenged terminations. Taken together, the DEI-based terminations and the Biden-era terminations reflect the same fundamental constitutional error, though they do so in distinct ways. The former penalized grants because they were perceived to express or reflect disfavored viewpoints; the latter penalized grants because they were perceived to be associated with a disfavored administration. The First Amendment forbids both.

The Government may believe that its policy choices are urgent, prudent, and necessary to advance the priorities of the Administration. That is its prerogative. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187–88 (2024). The Court is under no illusion that a new administration may prefer, on a going-forward basis, to fund certain kinds of scholarly programs over others. But lawful priority-setting is one thing; depriving someone of a benefit previously conferred based on viewpoint and perceived political association is something else entirely. Consistent with *Regan* and *Rust*, a new administration may pursue lawful funding priorities within the bounds of the NEH statute and the Constitution. But it has no license to suppress disfavored ideas. *See Rosenberger*, 515 U.S. at 830. Nor do *Regan* or *Rust* permit the Executive Branch to disregard the statute Congress enacted and substitute its own funding criteria in its place.

The conclusion follows from first principles. "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics[.]" *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) ("In this Nation, no official—'high or petty'—may

command our tongues or silence our voices."). That command admits of no exception for the distribution of public funds that subsidize private speech. *See Perry*, 408 U.S. at 597. Viewpoint discrimination is "an egregious form of content regulation" from which "governments in this country must nearly always abstain." *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (citation modified).

At bottom, "the First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, *not as the government demands*." *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023) (emphasis added). That promise is no less vital in the humanities, where the work of scholarship, writing, preservation, and independent inquiry depends on freedom from state-imposed ideological conformity and from the uncertain whims of those who happen to hold power at a given moment. Because DOGE's decision to terminate these grants would deny that constitutional promise, it cannot stand.

D. The Mass Termination Violated the Equal Protection Component of the Fifth Amendment

The Due Process Clause of the Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although the Fifth Amendment does not contain an Equal Protection Clause, the Supreme Court has long held that its Due Process Clause incorporates an equal protection component applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). Our approach to Fifth Amendment equal protection claims "has always been precisely the same as to equal protection claims under the Fourteenth Amendment," *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975), and precedents decided under the latter are controlling when considering claims under the former. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

The Government can violate the Equal Protection Clause in several ways, including by (1) expressly classifying individuals based on their race, *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712, 716, 720 (2007); (2) applying facially neutral policies in an intentionally discriminatory manner, *see Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); or (3) adopting policies that have a disparate impact and are motivated by discriminatory purpose. *Adarand*, 515 U.S. at 213. This case implicates the first category of explicit classifications.

The equal protection component of the Fifth Amendment "prohibit[s] the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976). In particular, drawing distinctions between citizens solely because of their race or ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Here, the Government has done more. In all, it employed explicit classifications based on race, ethnicity, national origin, religion, sex, and sexual orientation.

When the government uses race to create a classification for purposes of official action, the government must satisfy strict scrutiny. *Adarand*, 515 U.S. at 227. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Racial classifications are constitutional "only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The government's exact "motives" to classify based on race do not "affect the strict scrutiny analysis." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741–42 (2007). Rather, courts "apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool." *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (quotations omitted).

The same demanding test governs classifications based on ethnicity, national origin, and religion, which likewise trigger strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365 (1971) (alienage, nationality, and race); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (religion). Classifications based on sex are subject to intermediate scrutiny, under which the Government must show that the classification "serves important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives." *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (citation modified). And the Second Circuit, where this Court sits, applies heightened scrutiny to classifications based on sexual orientation. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013).

The record demonstrates that the Government expressly employed all of the above classifications to identify grants for placement on the termination list. After being deployed from DOGE to NEH, Justin Fox used search terms, which he labeled as "Detection Codes," to identify grants that he dubbed the "Craziest Grants" and "Other Bad Grants." Dkt. No. 248-9, Ex. 9, US-000016154 ("Detection List" tab). The search terms included, among other terms, "BIPOC (Black, Indigenous, People of Color)," "Minorities," "Native," "Tribal," "Indigenous," "Immigrant," "LGBTQ," "Homosexual," and "Gay." Dkt. No. 248-9, Ex. 9, US-000016154; Dkt. No. 248-1, Fox Dep., 236:22–237:10. When Fox was asked whether he "r[a]n this list of words through every grant description" he received from NEH, he confirmed, "yes." Dkt. No. 248-1, Fox Dep., 276:16–277:2. In this way, Fox constructed and applied explicit classifications based on protected characteristics and used them as the operative criteria for revoking federal grants.

That classification scheme was then layered on top of another layer of classification, albeit through unconventional means. Fox introduced additional classifications through his use of

ChatGPT. Although he directed ChatGPT to identify grants involving DEI, he did not instruct it to avoid reliance on protected characteristics. Dkt. No. 248-1, Ex. 1, Fox Dep. at 207:11–214:21. As a result, the ChatGPT-generated "DEI Rationales" repeatedly classified grants as DEI precisely because they involved specific races, ethnicities, religions, or genders. As described, ChatGPT provided a "DEI Rationale" that explained why it answered "Yes" for each particular grant involving DEI.

In hundreds of instances in the record, the resulting DEI Rationale makes clear that ChatGPT made the classification solely because a grant involved a particular race, gender, or other protected trait. For example, one grant would have funded a documentary about the Colfax Massacre, "the single greatest incidence of anti-Black violence during Reconstruction." Dkt. No. 248-11, at 2, C4. ChatGPT classified that grant as DEI because "The documentary explores a historical event that significantly impacted Black civil rights." *Id.* This classification rests solely on the project's focus on a particular race, and it became the operative rationale for the grant's termination.

The same pattern appears throughout the record. The Government relied on ChatGPT to generate rationales such as:

- "This biography explores the life and accomplishments of . . . a Black lawyer and jurist."
- "The documentary explores a historical event that significantly impacted Black civil rights."
- "This project analyzes the experiences and contributions of Black children in the Atlantic world, shedding light on their perspectives and resistance to slavery."
- "The Kansas City workshop highlights diverse histories, including Black and Latinx communities, in the Jazz Age and Great Depression."
- "This proposal aims to expand understanding of Black life and geography during slavery."

- "This project focuses on the history and experiences of a Black community."
- "The book explores a Black-led project."
- "The SNCC discussion series engages historically marginalized communities and highlights Black history and activism."
- "The project uses historical research and Augmented Reality to showcase a demolished Chinatown, inviting reflection on the Asian American experience."
- "This anthology explores Jewish writers' engagement with the Holocaust in the USSR."
- "This project aims to restore the legacy of a marginalized woman writer."

Dkt. No. 248-21, Ex. 21, NEH_AR_000024 (Rows 346, 130, 298, 205, 417, 267, 255, 156, 158, 258, 260, respectively). The full list of grants awarded to ACLS Plaintiffs and their members subject to these improper classifications, and for which ACLS Plaintiffs assert equal protection violations, is set out in Exhibit 24. *See* Dkt. No. 248-24.

The record reflects systematic disparities in how the Government treated projects involving different national origins and genders. The Government terminated grants involving countries in Africa, Asia, or South America, while retaining grants involving Western European subjects, including "Victorian poets," a "German theologian," a "German philosopher," "British philosophers," an "English philosopher and mathematician," and an "Italian composer." Dkt. No. 248-14, Ex. 14, US-000061492. The Government likewise appears to have terminated every grant relating to Indigenous Americans; none remained on the "To Keep" list. *See id.*

When asked about the grant funding a project on Jewish women subjected to slave labor during the Holocaust, *see supra* Section IV(C)(2)(b)(i), Fox testified that ChatGPT properly classified the grant as involving DEI, and thus correctly slated it for termination, because it was "specifically focused on Jewish cultures" and the "voices of the *females* in that culture." Dkt. No.

248-1, Fox Dep., at 191:5–9 (emphasis added). That testimony is chilling. At a time when the specter of antisemitism has reemerged from the shadows, for our Government to deem a project about Jewish women disfavored because it centered on "Jewish cultures" and "female" voices is deeply troubling.

Nor is it any easier to reconcile DOGE's wholesale elimination of grants dedicated to African American history with any legitimate determination that scholarship about Black life, culture, exclusion, achievement, or the civil-rights struggle is unworthy of federal funding. What mattered to DOGE was not whether a grant lacked scholarly merit, failed to comply with its terms, or fell outside NEH's statutory purposes. What mattered was that the grant concerned a "minority group." *See id.* at 183:14–16, 191:19–192:2 ("Q: So how did you go about determining what was a minority [. . .]? A: Inherently focused on any ethnicity, culture, gender[.]"). DOGE blatantly used protected characteristics as criteria for grant termination.

The point is underscored by the Colfax Massacre grant. Although McDonald testified that he disagreed with Fox's determination that the grant implicated DEI, the race-based rationale generated by ChatGPT and adopted by Fox was carried through to termination anyway. *Id.* at 129:11–20. This is because Fox affirmatively endorsed ChatGPT's race-based classifications. *See, e.g.*, Dkt. No. 248-1, Ex. 1, Fox Dep., 220:8–12, ("Q: Do you agree with ChatGPT's assessment here that the document is DEI if it explores historical events that significantly impacted Black civil rights? A: Yes. Q: Why would that be DEI? A: *It's focused on a singular race.*" (emphasis added)). Fox testified that the Colfax Massacre grant was properly labeled as DEI because "[i]t focuses on . . . a specific race, here being Black." *Id.*, at 220:16–18. Fox affirmatively endorsed and adopted ChatGPT's race-based classifications. On this record, the Government cannot satisfy strict scrutiny – or any level of scrutiny – to justify these terminations.

The Government's response is that rational basis review, rather than strict scrutiny, applies because, in its view, the "grants were [not] terminated through classifications based on protected characteristics." Dkt. No. 278, Defs.' Mem. L. Supp. Cross-Mot. for Summ. J., at 34. Until now, it had not been the Court's experience that the United States Attorney's Office in this district would advance an argument that was so blatantly contradicted by the evidence – but it certainly has done so here. The record establishes, beyond any dispute, that the Government used protected characteristics as criteria for identifying grants for termination. DOGE swept in race and ethnicity – including grants concerning Black, Asian, Latino, and Indigenous communities – as well as national origin and immigration status; religion and religious identity (including Jewish, Christian, and Muslim subjects); sex; and sexual orientation, as criteria for grant termination. Rational basis review does not apply to the racial, ethnic, national-origin, or religious classifications; strict scrutiny does. Nor does rational basis review apply to sex-based classifications, which require an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 524 (1996).

The Supreme Court's most recent discussion of race-based governmental decisionmaking makes the Government's position difficult to sustain. In *Louisiana v. Callais*, No. 24–109, 2026 WL 1153054 (U.S. Apr. 29, 2026), Louisiana invoked compliance with the Voting Rights Act – a federal civil-rights statute enacted under Congress's Reconstruction Amendment enforcement authority – as a justification for race-conscious districting. Even then, Justice Alito, writing for the Court, began from the premise that "the Constitution almost never permits the Federal Government or a State to discriminate on the basis of race," and that "Such discrimination triggers strict scrutiny." *Id*. at *10. The Court further emphasized that "Our acceptance of race-based state action has been rare for a reason." *Id.* If strict scrutiny applies with such force to race-conscious

districting undertaken in purported compliance with the Voting Rights Act – that is, to an effort designed by Congress to preserve equal electoral opportunity and prevent racial exclusion from the political process – then it must apply with at least equal if not more force here, where race was used to exclude disfavored scholarship about historically marginalized groups from public support.

Unlike the asserted VRA-compliance rationale in *Callais*, DOGE's use of race was not designed to open public institutions to equal participation. DOGE's use of race was certainly not remedial. It was punitive. DOGE, relying on ChatGPT and on Fox's and Cavanaugh's understanding of the Administration's hostility to "DEI," treated race as a criterion for disqualification. The Government's asserted interests for terminating grants – administrative convenience, merit, and waste reduction – do not justify making race, ethnicity, national origin, religion, sex, or sexual orientation the determinative grounds for terminating previously awarded grants.

The Government does not come close to satisfying strict scrutiny or heightened scrutiny, and it makes no serious attempt to do so. Unable to explain away its crude "Detection Codes," including "Tribal," "Black," and "Gay," the Government still maintains that its classifications should nevertheless be upheld as rationally related to a clearly legitimate governmental interest. But DOGE's actions fail even under rational basis review.

The Government argues that the rational bases for terminating the grants clawed back by DOGE include "administering federal programs consistent with goals set by a democratically elected political branch," "prioritizing merit," "eliminating preferential treatment," and "reducing wasteful spending." Dkt. No. 278, at 35. Those interests may well be legitimate in the abstract. But the "mere recitation of a 'benign' or legitimate purpose[s] for a racial classification is entitled to little or no weight." *City of Richmond, Virginia v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

As explained in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), the ordinary rational-basis rule "gives way" when the Government "classifies by race, alienage, or national origin" because "[t]hese factors are *so seldom relevant to the achievement of any legitimate state interest* that laws grounded in such considerations are deemed to reflect *prejudice and antipathy*—a view that those in the burdened class are not as worthy or deserving as others."

That principle makes easy work of the Government's "merit" and "waste" arguments. Race, ethnicity, national origin, religion, and sex do not measure humanistic merit. And they do not measure waste either. Treating Black civil-rights history, Jewish testimony about the Holocaust testimony, the oft-forgotten Asian American experience, the shameful treatment of the children of Native tribes, or the mere mention of a woman as a marker of lack of merit or wastefulness is not lawful.

Two examples are illustrative. DOGE terminated a grant for an English translation of the works of Anne de Graville, a French Renaissance poet, because she "had an enduring impact on the literary and social women's movements, which relates to DEI." Dkt. No. 248-11, at 96, C445. DOGE also terminated a grant for the preparation of a critical edition of Harriet Beecher Stowe's religious writings for Oxford University Press. *Id.*, at 126, C739. Stowe, as the author of the bestselling anti-slavery novel *Uncle Tom's Cabin* (1852), viewed slavery as a "dishonor to Christianity" and wrote extensively on religious topics and on the Christian obligation of self-sacrificing love for the most marginalized members of society. DOGE terminated this grant because it "focus[es] on women and female religious experience." *Id.*

It could not be more obvious that DOGE used the mere presence of particular, protected characteristics to disqualify grants from continued funding. Whatever lawful priorities the Executive Branch may pursue in administering federal grants, it may not implement those

priorities by making race, ethnicity, national origin, religion, or sex the determinative factor for its termination decisions.

Nor is there any evidence in this record that "prioritizing merit" or "eliminating preferential treatment" played any meaningful role in DOGE's grant-termination process. There is no evidence that more meritorious applicants lost out to Plaintiffs when the grants were awarded. There is no evidence that any Plaintiff received preferential treatment over an equally worthy applicant on any prohibited basis. And there is no evidence that DOGE undertook any comparative assessment of merit before deciding which grants to terminate. Rather, DOGE appears to have presumed that grants funding projects that mention race, ethnicity, national origin, religion, gender, sexuality – or even subjects bearing no plausible connection to any protected characteristic – were suspect because they were awarded during the Biden Administration or because DOGE associated them with "DEI." But DOGE did not review the underlying grant applications. And it did not identify any applicant who had been displaced by DEI-based preferential treatment. On this record, the Government cannot credibly maintain that cancelling these particular grants either promoted merit or eliminated preferential treatment.

The Government's reliance on *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 59 (1983) proves too much. As the Government notes, Justice Rehnquist stated, in his concurring and dissenting opinion, that a "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Id.* But, of course, when the Court issues a majority decision, a justice's opinion concurring in part and dissenting in part is not binding precedent. *See United States v. Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Justices who

join the majority may of course express additional thoughts in a concurrence, but concurrences do not bind lower courts in cases where there is a majority opinion."). And, second, a "reappraisal of the costs and benefits" of programs and regulations does not confer on the Government a blank check to sort grant recipients by race and other protected characteristics.

Justice Rehnquist's own formulation is immediately followed by an obvious caveat, which the Government all too conveniently omits. "[I]n light of the philosophy of the administration," an agency may reassess records and priorities, "[a]s long as the agency remains *within the bounds established by Congress*." 463 U.S. at 59 (Rehnquist, J.) (emphasis added). The words "within the bounds established by Congress" go to the heart of this case. Congress did not define NEH's mission in a manner that permits the Executive to treat projects involving diversity, underrepresentation, minority communities, tribal communities, multicultural heritage, or freedom of inquiry as vices and unworthy of funding. Congress did precisely the opposite.

Congress authorized NEH to support "programs and research which have substantial scholarly and cultural significance and that reach, or reflect the diversity and richness of our American cultural heritage, including the culture of, a minority, inner city, rural, or tribal community." 20 U.S.C. § 956(c)(4). And Congress directed that, "In selecting individuals and groups of exceptional talent as recipients of financial assistance," the Chairperson "shall give particular regard to scholars, and educational and cultural institutions, that have traditionally been underrepresented." *Id.*, § 956(c).

Therefore, the Government has it altogether backwards. The very subjects DOGE treated as markers of waste, lack of merit, or ideological contamination are the subjects that Congress made expressly germane to NEH's mission. There is no question that an administration may pursue whatever lawful policy goals it wishes. But it may not invoke a change in administration

to disregard the priorities Congress enacted, or use protected characteristics as criteria for terminating public benefits in violation of the Constitution.

The same point defeats the Government's asserted interest in reducing wasteful spending. As the Supreme Court held in *Cleburne*, "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." 473 U.S. at 446. Here, the relationship is not merely attenuated; it is *nonexistent*. A grant funding the study of the civil rights movement is not wasteful because it concerns Black people. A grant funding the study of the experience of Jewish women during the Holocaust is not wasteful because it concerns Jewish women. A grant studying the treatment of indigenous children at Government-run boarding schools is not wasteful because it concerns Native Americans. And a grant commemorating the military service of Asian American veterans is not wasteful because it concerns Asian Americans. Yet that is precisely how DOGE treated them – deeming grants wasteful because they related to Blacks, women, Jews, Asian Americans, and Indigenous people.

The record makes the point concrete. DOGE flagged as DEI – and the Government ultimately terminated – a grant to the WWII Chinese American GI Project for a series of discussions titled "War Heroes: Chinese American Experiences." Dkt. No. 248-11, at 97, C449. The project would have explored "Chinese American veteran experiences in WWII, the Korean War, the Vietnam War, Gulf and Afghanistan Wars" and "recognize[d] their service and contributions to America." *Id.*, at 97, C451. ChatGPT classified the project as DEI because "[t]his collaboration aims to uplift and recognize the contributions and experiences of Chinese American veterans, which is in line with the principles of DEI." *Id.*, at 97, I451.

By contrast, DOGE did not flag as DEI a grant involving "[v]eterans, active military, and (in separate forums) the West Texas community," who would "engage in war-themed literature,"

including graphic novels, comics, poems, non-fiction, and fiction, with a focus on the Vietnam War and the wars in Iraq and Afghanistan. *Id.* ChatGPT answered "No" as to that project because "[t]his initiative focuses on veterans." *Id.*

Both projects were about veterans. But the project recognizing Chinese American veterans for their service during a global conflagration was marked for termination, while the project involving veterans who lived in a West Texas community was not. The difference was not waste. And it was not any difference in the merit of the veterans' service. It was the fact that one grant planned to explore the experience of Asian American veterans. That is not a rational basis for terminating a federal humanities grant. It is precisely the sort of race-based distinction the Equal Protection Clause forbids. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013). "[R]acial characteristics so seldom provide a relevant basis for disparate treatment." *City of Richmond*, 488 U.S. at 505.

City of Saint Paul confirms the point in the closely analogous context of federal grant terminations. There, the government asserted a legitimate interest in "administering grant programs consistent with the agency's priorities," but the court rejected that asserted justification because there was "no reason to believe" that terminating grants to recipients in disfavored democratic-leaning states furthered the agency's stated priorities more than terminating comparable grants elsewhere. *City of Saint Paul*, 816 F. Supp. 3d 65, 72 (D.D.C. 2026). That reasoning applies with even greater force here. The challenged classification in *City of Saint Paul* was based on political geography. The challenged classifications, here, are of a different order; they are based on race, ethnicity, national origin, religion, and sex – criteria that are not merely irrational proxies for merit, waste, or program alignment, but constitutionally suspect grounds for any governmental decisionmaking. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)

(Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

The Government's argument under rational basis review also ignores what *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), and *Palmore v. Sidoti*, 466 U.S. 429 (1984) teach about impermissible governmental purposes. Even under rational basis review, "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *Cleburne*, 473 U.S. at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). *Romer* applied that principle to invalidate an amendment to Colorado's state constitution, which excluded gay and lesbian persons from the protections of the state's anti-discrimination laws, explaining that the Equal Protection Clause embodies "a commitment to the law's neutrality where the rights of persons are at stake." *Romer v. Evans*, 517 U.S. 620, 623 (1996). And *Palmore* held that the existence of private racial prejudice cannot inform a court's assessment of "the best interests" of a child, because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433. Those principles are as applicable today as when they were first articulated.

Finally, the Government invokes *Heller v. Doe by Doe*, 509 U.S. 312 (1993), to argue that rational basis review does not permit courts to "judge the wisdom, fairness, or logic of [the Executive's] choices." Dkt. No. 278, at 34 (quoting *Heller*, 509 U.S. at 319). That principle applies to "legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller*, 509 U.S. at 319 (emphasis added). But this case is not *Heller*. There, the Court reviewed Kentucky's different rules for involuntary commitment proceedings involving persons with intellectual disabilities – a classification the Court had already

held was neither suspect nor quasi-suspect. *See Heller*, 509 U.S. at 314–18, 321; *Cleburne*, 473 U.S. at 442–47. This case, by contrast, proceeds along traditionally recognized "suspect lines" and burdens fundamental First Amendment interests. The Court is therefore not sitting as a "superlegislature" or second-guessing the wisdom of ordinary policy choices. It is simply identifying the "odious" criteria the Executive Branch chose to use in furtherance of its policies. *Hirabayashi*, 320 U.S. at 100.

Accordingly, the Government's asserted interests fail twice over. It does not satisfy strict scrutiny or heightened scrutiny because it identifies no compelling or important governmental objective served by using protected characteristics as criteria for termination, and no tailoring – narrow, substantial, or otherwise – connecting those classifications to any lawful objective. And, even if rational basis review applied, the terminations would still fail because the relationship between the classifications used and the interests asserted is, at best, "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

The Government cannot escape liability for DOGE's work by scapegoating ChatGPT. Fox copy-and-pasted ChatGPT's "DEI Rationales" *verbatim* into his spreadsheets listing which grants purportedly involved DEI, and Fox included those same DEI Rationales in spreadsheets throughout the process of selecting grants to terminate. These spreadsheets, which discriminated on the basis of protected characteristics, formed the basis of the final list Fox sent to McDonald for his purported review in the final days before the Mass Termination. *See, e.g.*, Dkt. No. 284-46, Ex. 46, US-000009583; Dkt. No. 248-12, Ex. 12, US-000000936 ("NEH Grant Detail" tab); *see also* Dkt. No. 248-3, McDonald Dep., 126:21–127:11 ("Q: And so you would agree based on that, that it appears to be the case that Mr. Fox copied the results produced in this spreadsheet over to that spreadsheet that he sent to you [. . .]? A: Yes."). According to McDonald's testimony,

"*Justin [Fox]* prepared the list" of all grants "to cancel," and it was Fox "who put [] particular grant[s] on the list for termination." Dkt. No. 248-3, McDonald Dep., 229:5–231:24; *id.*, McDonald Dep., 229:9–10 ("Justin [Fox] prepared the list, yes."). For all practical purposes, DOGE made ChatGPT's classifications its own classifications.

The Government cannot treat AI output as the act of some independent, intervening actor. The constitutional injury lies in the Government's use of those AI-generated classifications to decide which grants would be terminated. When the Government adopts AI-generated classifications as part of its official actions, those classifications are the Government's own for constitutional purposes. And here, DOGE made no effort to ensure that the classifications it adopted would avoid discrimination on the basis of race. Dkt. No. 248-1, Fox Dep., 207:16 ("Q: Did you do anything to ensure that ChatGPT's conception of DEI in this task wouldn't discriminate on the basis of race? A: No.").

* * *

"[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 229–30. Although the Government is free to reappraise priorities, administer grant programs, and reduce waste consistent with lawful policy objectives, it may not do so by making race, ethnicity, religion, sex, or sexual orientation the basis for terminating public benefits. There is no federal-funding exception to the Equal Protection Clause.

E. Spoliation Sanctions

The ACLS Plaintiffs move for spoliation sanctions pursuant to Federal Rule of Civil Procedure 37(e), based on alleged failures to preserve Signal messages and other electronic

communications used by Michael McDonald, Nate Cavanaugh, and Justin Fox during the period leading up to the Mass Termination. Dkt. No. 220.

Spoliation involves "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Federal Rule of Civil Procedure 37(e) governs claims of spoliation from the loss of electronically stored information ("ESI").

Rule 37(e) applies only where (i) "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it," and (ii) the information "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). If those requirements are satisfied, a court may award sanctions in accordance with subsections (1) or (2). The two subsections read as follows:

> (1) upon finding prejudice to another party from loss of the information, [the Court] may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation[, the Court] may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Id. Thus, whether to impose sanctions under Rule 37(e) involves a three-part inquiry:

> The first is to decide if the rule applies at all—that is, if a party failed to take "reasonable steps" to preserve electronically stored information "that should have been preserved in the anticipation or conduct of litigation." Fed. R. Civ. P. 37(e). If so, then the second step is to decide if there has been "prejudice to another party from loss of the information," in which case the Court "may order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). Lastly, the third step to consider—regardless of prejudice to any other party—is whether the destroying party "acted with the intent to deprive another party of the information's use in the litigation," in which event a court may consider whether to impose the

> most severe of measures such as mandatory presumptions or instructions that the lost information was unfavorable or the entry of default judgment.

Karsch v. Blink Health Ltd., 2019 WL 2708125, at *13 (S.D.N.Y. June 20, 2019) (citation omitted). The moving party bears the burden of establishing the Rule 37(e) requirements by a preponderance of the evidence. *See Hoffer v. Tellone*, 128 F.4th 433, 439 (2d Cir. 2025). And the Court has broad discretion in deciding whether to impose sanctions. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *see Lore v. City of Syracuse*, 670 F.3d 127, 175 (2d Cir. 2012).

For purposes of this motion, the Court assumes without deciding that Rule 37(e)'s threshold requirements are satisfied – that is, that some electronically stored information should have been preserved, was lost because reasonable steps were not taken, and cannot now be restored or replaced through additional discovery. Even on that assumption, the motion fails. Plaintiffs have not shown prejudice from the loss of any information, and they have not shown by a preponderance of the evidence that Defendants acted with the intent to deprive Plaintiffs of the information's use in this litigation.

1. ACLS Plaintiffs Have Not Shown Prejudice

"[A] court should never impose spoliation sanctions of any sort unless there has been a showing—inferential or otherwise—that the movant has suffered prejudice." *GenOn Mid–Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 353 (S.D.N.Y. 2012). That requirement is not satisfied by speculation that the missing materials might have been helpful. The movant must identify some concrete way in which the loss of information impaired its ability to prove its claims, respond to its adversary's defenses, or obtain relief.

That showing is absent here. The theory of prejudice advanced by the ACLS Plaintiffs is that deleted Signal or text messages might have corroborated their principal merits

theories – namely, that DOGE drove the terminations, that grants were selected based on perceived DEI affiliation and other impermissible criteria, and that the process was not genuinely controlled by NEH's statutory decisionmaker. But Plaintiffs have already prevailed on those very theories on the current summary judgment record. The record contains contemporaneous emails, spreadsheets, deposition testimony, termination notices, and DOGE/NEH materials sufficient to establish the constitutional and *ultra vires* violations identified above. Whatever additional Signal messages may once have existed, their absence did not prevent Plaintiffs from prevailing on their claims or obtaining merits relief. Therefore, ACLS Plaintiffs cannot demonstrate that they suffered prejudice. Absent such a showing, there is no basis for the Court to impose any curative or punitive measures.

The record also does not support Plaintiffs' assertion that the deleted messages likely contained material evidence unavailable elsewhere. Cavanaugh testified that he used Signal for only limited updates to DOGE leadership, including updates that he had first forwarded from his GSA email account, meaning copies were preserved in email and produced. *See* Dkt. No. 237-1, Declaration of Rachael Doud ("Doud Decl."), Ex. A, Cavanaugh Dep., 80:13–81:10. Cavanaugh also testified that he did not otherwise have substantive discussions with DOGE official Steve Davis about NEH via Signal, did not consult with anyone other than Fox, McDonald, and NEH personnel in determining which grants to recommend for termination, and did not communicate with McDonald through Signal. *Id.*, 303:23–306:11, 307:10–15.

The same is true as to Fox and McDonald. Fox testified that "Signal was used to coordinate where we were" and that "[t]he real work about each of these agencies was done over e-mail or our GSA phones." Dkt. No. 237-2, Fox Dep., 101:18–25. He also testified that he did not have substantive discussions about NEH grant terminations via Signal. *Id.* McDonald, for his part,

used Signal primarily to communicate with members of the National Council on the Humanities, who, as the Government concedes, "were not involved in the grant terminations." Dkt. No. 237-3, McDonald Dep., 81:15–24; 152:23–153:12; Dkt. No. 236, McDonald Decl., ¶¶ 14–15; Dkt. No. 235, Defs.' Mem. L. Opp'n to Pls.' Mot. for Spoliation Sanctions. In the Government's own words, "Defendants do not dispute that NEH grants were terminated based on their perceived relation to DEI–indeed, grants were explicitly identified for termination on that basis pursuant to an Executive Order." Dkt. No. 235, Defs.' Mem. L. Opp'n to Pls.' Mot. for Spoliation Sanctions. The ACLS Plaintiffs cannot demonstrate prejudice when the Government has all but conceded the material issues of fact.

Because Plaintiffs have not shown prejudice from the loss of any ESI, no curative measures are warranted under Rule 37(e)(1). For the same reason, Plaintiffs are not entitled to fees or costs. Rule 37(e)(1) permits measures no greater than necessary to cure prejudice. Where there is no prejudice to cure, there is no basis for imposing a monetary sanction.

2. ACLS Plaintiffs Have Not Shown Intent to Deprive

In *Hoffer v. Tellone*, 128 F.4th 433 (2d Cir. 2025), the Second Circuit clarified the "intent to deprive" standard. It held that "to impose sanctions pursuant to Rule 37(e)(2), a district court or a jury must find, by a preponderance of the evidence, that a party acted with an 'intent to deprive' another party of the lost information." *Id.* at 435. *Hoffer* further held that "the lesser 'culpable state of mind' standard, which includes negligence, *see Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), does not apply to the imposition of sanctions under Rule 37(e)(2)." *Id.* Thus, after the 2015 Amendment to Rule 37(e), negligence, gross negligence, or even knowing loss of ESI is insufficient to support the sanctions enumerated in Rule 37(e)(2). The moving party must prove by a preponderance of the evidence an "intent to deprive."

That showing has not been made. The record supports criticism of the Government's preservation practices. Government officials conducting official business on Signal or through personal devices during reasonably foreseeable litigation invites exactly the sort of dispute presented here. But Rule 37(e)(2) requires more than poor judgment, negligence, or even a serious preservation failure. It requires proof that the relevant actors caused the loss of ESI for the purpose of depriving Plaintiffs of its use in this litigation. The record does not establish that purpose.

As to McDonald, Plaintiffs rely on his use of Signal and his statement that he wanted communications to be "protected." Dkt. No. 222-4, McDonald Dep., 366:13–19. But McDonald testified that, although he was generally familiar with the Federal Records Act, he was not aware of any obligation to preserve personal text messages. *Id.*, 352:12–20. Further, McDonald states that he does not recall having substantive discussions about grant terminations through Signal. Dkt. No. 236, McDonald Decl., ¶ 14–15. These facts do not excuse McDonald's failure to preserve records, but they do not prove that McDonald used Signal or deleted messages with the specific intent to deprive Plaintiffs of evidence in this case.

The same conclusion follows as to Cavanaugh and Fox. They both used Signal because other DOGE-affiliated personnel had chosen to communicate that way, not because they personally selected the platform to shield NEH-related communications from discovery. Dkt. No. 237-1, Cavanaugh Dep., 249:15–24; Dkt. No. 237-2, Fox Dep., 32:10–20. Fox testified that substantive work concerning agencies occurred over email or GSA phones, and that Signal was used to coordinate logistics. Dkt. No. 237-2, Fox Dep., 101:18–25. Cavanaugh testified that Signal was used for limited updates to DOGE leadership and that at least some of the materials sent by Signal were also preserved through email. Dkt. No. 237-1, Cavanaugh Dep., 80:13–81:7;

96:9–25. This record does not establish, by a preponderance of the evidence, that either Fox or Cavanaugh intended to deprive Plaintiffs of evidence concerning the NEH grant terminations.

Plaintiffs' contrary inference rests largely on the nature of Signal itself and the fact that messages were auto-deleted. But *Hoffer* forecloses any rule under which the mere loss of ESI, or even the knowing use of a deletion function, automatically supplies the intent required by Rule 37(e)(2). *See* 128 F.4th at 438; *see also* Fed. R. Civ. P. 37(e)(2) advisory committee's note to 2015 amendment ("Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation."). The required intent is not simply the intent to use a platform with disappearing messages; it is the intent to deprive another party of information for use in litigation. On this record, the Court cannot make that finding.

Plaintiffs ask the Court to infer that the deleted messages would have corroborated their core allegations. They may well be right. But the Court does not need the deleted messages to resolve Plaintiffs' claims on the merits. The existing record is damning enough without the deleted Signal messages. The requested adverse inference would not cure an evidentiary imbalance; it would add an unnecessary and speculative gloss to a record that already supports judgment for Plaintiffs.

Because Plaintiffs have shown neither prejudice nor intent to deprive, sanctions are not warranted under Rule 37(e). Accordingly, the ACLS Plaintiffs' motion for spoliation sanctions is DENIED.

F. Class Certification

The Authors Guild Plaintiffs move pursuant to Federal Rule of Civil Procedure 23 to certify a class and two subclasses of National Endowment for the Humanities grant recipients whose

awards were terminated as part of the Mass Termination. They also seek appointment of the named plaintiffs as class representatives and Fairmark Partners, LLP as class counsel pursuant to Rule 23(g).

The proposed class is defined as follows:

> All National Endowment for the Humanities grant recipients whose grants were awarded on or after January 20, 2021 and terminated as part of the Mass Termination.

For purposes of that definition, "Mass Termination" refers to the conduct described in Part IV(C) of the Authors Guild Plaintiffs' second amended complaint, Dkt. No. 240, ¶ 96–126, which was implemented through termination notices sent on April 1 through April 3, 2025. The definition excludes American Council of Learned Societies and its members; American Historical Association and its members; and Modern Language Association and its members.

Plaintiffs also seek certification of two subclasses:

> DEI Subclass: All class members whose grants were marked by Defendants for termination as "DEI."
>
> Biden-Era Subclass: All class members whose grants were terminated without being marked as "DEI."

"A party seeking class certification must affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A district court may certify a class only after determining that the proposed class satisfies the requirements of Federal Rule of Civil Procedure 23(a). *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015). Those requirements are that: (1) "the class is so numerous that joinder of all members is impracticable"; (2) "there are questions of law and fact common to the class"; (3) "the claims or defenses of the representative parties are typical of those of the class"; and (4) "the representative parties will fairly and adequately protect the interests of the class." *Id.* (quoting Fed. R. Civ. P. 23(a)).

Additionally, the district court must ensure that the proposed class is appropriate under at least one subsection of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). At issue here, Rule 23(b)(2) provides for certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class," such that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Court conducts the required "rigorous analysis," *Wal-Mart*, 564 U.S. at 350–51, addressing numerosity, commonality, typicality, and adequacy under Rule 23(a), before turning to Rule 23(b)(2), the proposed subclasses, and appointment of class counsel.

1. Rule 23(a) Factors

a) Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." That requirement is satisfied here. Plaintiffs' proposed class consists of NEH grant recipients whose awards were terminated as part of the Mass Termination. The record reflects that the challenged action affected approximately 1,400 grantees. Joinder of all such entities in a single action would be impracticable. The Second Circuit has made clear that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). "Impracticable does not mean impossible," but only that joinder would be difficult or inconvenient. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

Defendants do not meaningfully dispute that the proposed class is sufficiently numerous. To the extent they argue that the class definition excludes certain grantees or may require refinement, that contention goes to the scope of the class, not to whether joinder is impracticable. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006). Accordingly, Rule 23(a)(1) is satisfied.

b) Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Commonality requires more than the mere recitation of common questions; it requires the capacity to generate "common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. What matters, in other words, is not simply that class members have all suffered a violation of the same law, but that their claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Id.* A contention is capable of classwide resolution where "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* That requirement is satisfied here.

This case does not involve a series of individualized determinations made by different decisionmakers exercising local discretion. *Cf. Wal-Mart*, 564 U.S. at 355 (finding no commonality where employment decisions were "left to the discretion of local supervisors"). Unlike the discretionary decisionmaking at issue there, where "dissimilarities within the proposed class" precluded common answers, *id.* at 350, Plaintiffs challenge a single, top-down policy applied uniformly across the class. The alleged constitutional injury does not depend on how discretion was exercised in individual cases; it flows from the existence and execution of the Mass Termination itself. The Mass Termination arose from a single, centralized course of conduct, directed by the same actors, implemented through materially identical procedures, carried out in a matter of days, and undertaken without any meaningful individualized review.

Plaintiffs' claims turn on common questions that are susceptible to classwide resolution, including whether Defendants' Mass Termination violated the First Amendment, whether it constituted impermissible viewpoint discrimination, whether it unlawfully discriminated based on political association, and whether DOGE possessed lawful authority to direct or effectuate the

termination of NEH grants. Each of those questions presents a "common contention" within the meaning of *Wal-Mart*. Their answers do not depend on the individualized characteristics of particular grantees or the particular content of individual grants; they depend on the legality of Defendants' common course of conduct.

The extensive record before the Court confirms the existence of the necessary "glue." Plaintiffs have proffered evidence that the challenged terminations were the product of a centralized review process, conducted using common criteria, and implemented through a uniform set of termination decisions and notices. The alleged constitutional violations – whether framed as viewpoint discrimination, political-association discrimination, or *ultra vires* action – derive from that same process. That determination "will resolve an issue that is central to the validity" of every class member's claim "in one stroke." *Id.* at 350.

Defendants' arguments to the contrary are unpersuasive. They contend that individualized inquiries would be required to determine whether particular grants were properly characterized as "DEI" or whether particular terminations were justified on other grounds.

But Plaintiffs' theory does not require the Court to assess the objective merits or characteristics of each grant. The relevant question is whether Defendants acted on impermissible grounds (*i.e.*, whether they terminated grants because of their perceived association with disfavored viewpoints or political actors). That question is common across the class. *See Heffernan v. City of Paterson, New Jersey*, 578 U.S. 266, 272 (2016). Nor do purported differences among grants "impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350 (citation omitted). Even if grants varied in subject matter, the legality of terminating them pursuant to a single policy turns on Defendants' conduct, not on grant-specific facts.

It is particularly specious for the Government to insist that individualized inquiries are necessary to determine whether particular grants were properly characterized as DEI. Of course many grants were improperly characterized as DEI. *See supra* Section IB(C)(2)(b)(i). But that only underscores why individualized merits review is beside the point. It did not matter whether the characterization was correct. What mattered was that someone – DOGE, ChatGPT, or DOGE using ChatGPT – identified the grant as having DEI implications. Once that label attached, the grant was marked for termination. The challenged injury therefore flows from a common process and a common criterion, not from the actual content or merit of any individual grant.

To the extent different rationales are implicated – DEI-based classification and "Biden-era" targeting – those differences are addressed through the proposed subclasses. Rule 23(c)(5) expressly permits such an approach. The existence of subclasses does not defeat commonality; it confirms that Plaintiffs have identified coherent groups bound together by common contentions capable of classwide resolution. That the claims of the proposed class "stem from the same alleged unconstitutional conduct of the defendants" demonstrates the presence of common questions of law or fact. *Daniels v. City of New York*, 198 F.R.D. 409, 417 (S.D.N.Y. 2001). Accordingly, Rule 23(a)(2) is satisfied.[7]

c) Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is satisfied when each class member's claim

[7] The Court notes that the proposed class is already limited to grants awarded on or after January 20, 2021. The proposed "Biden-Era Subclass" is therefore something of a misnomer. It consists, not of all Biden-era grants in the class, but of those class members whose grants were terminated without being marked as "DEI." In substance, the proposed subclasses separate DEI-marked grants from non-DEI-marked grants within an already Biden-era class. That nomenclature issue is immaterial to certification, because both subclasses are defined by common features of the Mass Termination and both theories are susceptible to classwide proof.

"arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux*, 987 F.2d at 936. Commonality and typicality "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

That requirement is met here. The named plaintiffs' claims arise from the same Mass Termination challenged by the class. They allege that their grants were terminated through the same centralized process, pursuant to the same criteria, and in violation of the same constitutional and statutory constraints. Their claims do not depend on individualized proof; they depend on the legality of Defendants' uniform course of conduct. For grants awarded during the Biden Administration – which appears to include all grants at issue here – the relevant fact is not the particular subject matter of any individual grant, but that the grant was selected for termination because it was a Biden-era award. For grants terminated because they were perceived to implicate disfavored speech or viewpoints – including DEI, gender, environmental justice, or similar targeted subjects – the relevant fact is likewise not whether that characterization was accurate, but that Defendants treated the perceived association as a ground for termination.

This is a paradigmatic case of typicality. Each plaintiff was subjected to the same challenged action and advances the same theory of liability. To the extent Defendants argue that differences among grants defeat typicality, that argument fails for the same reasons it fails under commonality. Differences in the characteristics of particular grants "do not mandate a finding of a lack of typicality, as long as the claims arise out of the same legal or remedial theory." *Escobar Molina v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 3d 1, 59 (D.D.C. 2025). And here, the actual nature of the grants is beside the point. Accordingly, Rule 23(a)(3) is satisfied.

d) Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement is satisfied where (1) the class representatives do not have interests antagonistic to those of the class, and (2) class counsel is qualified, experienced, and able to conduct the litigation. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

There is no indication of any conflict between the named plaintiffs and absent class members. All seek the same relief: a declaration that the Mass Termination was unlawful and injunctive relief preventing its enforcement. Class counsel is also adequate. Plaintiffs seek appointment of Fairmark Partners, LLP, which has investigated the claims, litigated this action, and demonstrated familiarity with the applicable law. Fairmark Partners further confirms that counsel is "prepared and equipped to commit the professionals and resources necessary to litigate this class action through judgment and any appeal(s) that may arise." Dkt. No. 245, Declaration of Jamie Crooks, ¶ 6. Accordingly, Rule 23(a)(4) is satisfied.

2. Rule 23(b)(2) Requirements

Certification under Rule 23(b)(2) is appropriate. Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (internal quotation marks omitted).

That standard is met here. Plaintiffs challenge a single course of conduct – the Mass Termination – that was applied uniformly to the proposed class. The relief sought is declaratory and injunctive, not individualized damages. *See supra* Section IV(A). Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. *See Wal-Mart*, 564 U.S. at 365. Here, Plaintiffs do not seek classwide monetary relief, and the Court does not award any damages. The relief ordered is exclusively equitable in nature.

And the Court's equitable ruling on the legality of the Mass Termination is a question capable of resolution "in one stroke," the answer to which applies equally to all class members alike. There is no possibility of class member–specific variation in the remedy. Further, as the Supreme Court has recognized, Rule 23(b)(2) is particularly appropriate in cases seeking to remedy uniform conduct violating civil rights. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples."); *see also DL v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) ("Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief."). Accordingly, certification under Rule 23(b)(2) is warranted.

Rule 23(c)(5) provides that "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." The proposed subclasses are appropriate. The DEI Subclass and the Biden-Era Subclass reflect distinct, though related, theories of liability arising from the same course of conduct. The subclasses promote clarity by aligning particular groups of class members with the specific bases on which Plaintiffs challenge the Mass Termination. Each

subclass independently satisfies the requirements of Rule 23(a) and Rule 23(b)(2) for the reasons set forth above.

Rule 23(g) requires the Court to appoint class counsel. In doing so, the Court considers counsel's work in identifying and investigating the claims, counsel's experience in handling class actions and complex litigation, counsel's knowledge of the applicable law, and the resources counsel will commit. For the reasons stated above, the named plaintiffs are appropriate class representatives, and Fairmark Partners, LLP is appointed as class counsel.

The Authors Guild Plaintiffs' motion for class certification is GRANTED. The Court certifies the proposed class, the DEI Subclass, and the Biden-Era Subclass under Rule 23(b)(2); appoints the named Authors Guild Plaintiffs as class representatives; and appoints Fairmark Partners, LLP as class counsel pursuant to Rule 23(g).

G. Permanent Injunction

Both sets of plaintiffs seek injunctive relief. A permanent injunction is governed by the traditional four-factor test. A plaintiff seeking such relief must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The decision whether to grant permanent injunctive relief lies within the Court's equitable discretion. *See id.* These requirements are satisfied.

First, Plaintiffs have prevailed on the merits. As explained above, the Mass Termination violated the First Amendment and the equal protection component of the Fifth Amendment, and

was carried out by DOGE officials who lacked statutory authority to effectuate those terminations. Plaintiffs have established actual success on the merits.

Second, Plaintiffs have suffered irreparable injury for which legal remedies are inadequate. As of the date of this Opinion and Order, the challenged terminations remain in effect. Plaintiffs continue to be deprived of grants that were awarded to support time-sensitive scholarly, literary, archival, educational, and public-humanities projects. The injury is not limited to the loss of money; it includes the disruption of protected expression, the interruption of ongoing research and publication, the cancellation or suspension of humanities programming, and the chilling effect caused by the Government's use of viewpoint-based and unauthorized criteria to terminate federal grants. Monetary damages would not adequately remedy these harms. *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (stating that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Nor would damages cure the continuing legal effect of termination notices that were issued without authority and on unconstitutional grounds.

Third, the balance of hardships favors Plaintiffs. Plaintiffs face the continued loss of grant support, disruption of their work, and impairment of protected expression. The Government, by contrast, has no cognizable interest in enforcing grant terminations that were unauthorized by statute and infected by viewpoint discrimination. *N.S. v. Hughes*, 335 F.R.D. 337, 355 (D.D.C. 2020) ("[T]he government has no legitimate interest in acting unlawfully."). The injunction does not prevent NEH from administering its grant programs, enforcing lawful grant conditions, or taking future action on lawful and individualized grounds. It simply prevents Defendants from giving effect to the Mass Termination challenged and adjudicated in this action.

Fourth, the public interest favors permanent relief. The public has a strong interest in ensuring that federal officials act within the bounds set by Congress and the Constitution. *See Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994); *see also Hughes*, 335 F.R.D. at 355 ("The public has a clear interest in seeing that government officials do not exceed their statutory authority."). That interest is especially acute where the challenged action involved the mass cancellation of congressionally authorized humanities grants based on perceived viewpoint and protected expression. *Media Matters for Am. v. Paxton*, 138 F.4th 563, 585 (D.C. Cir. 2025) ("[T]here is always a strong public interest in the exercise of free speech rights otherwise abridged by an unconstitutional government action." (internal quotation and citation omitted)). Nor is the public interest served by permitting unauthorized officials to displace the statutory decisionmaker Congress selected, or by allowing the Government to enforce viewpoint-based terminations of public grants.

Defendants' conduct also presents a sufficient basis for prospective relief. This is not a case in which Plaintiffs rely solely on a past wrong or a speculative fear of recurrence. The terminations remain in effect, and Defendants have not disavowed the authority to take the same action again on the same grounds. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) therefore does not bar injunctive relief. *Lyons*, 461 U.S. at 102 (1983) (requiring an injury that is "real and immediate," not "conjectural" or "hypothetical"). Unlike in *Lyons*, where the plaintiff's future injury depended on a speculative chain of events involving a future police encounter, Plaintiffs here challenge an ongoing legal consequence of Defendants' completed action: the continued enforcement of termination notices that remain operative today. Prospective relief is therefore appropriate.

Accordingly, Defendants are permanently enjoined from enforcing or giving effect to the Mass Termination of NEH grants at issue in this action. Defendants shall rescind the termination notices issued pursuant to the Mass Termination and shall treat those notices as without legal effect. Defendants shall not reallocate, obligate, or otherwise dispose of funds associated with those awards on the basis of the Mass Termination or the unlawful grounds adjudicated in this Opinion and Order. For the avoidance of doubt, nothing in this injunction or in the Court's prior preliminary relief requires the immediate payment of grant funds, adjudicates any contractual entitlement to money, or prevents NEH from administering grants prospectively in accordance with lawful statutory authority, applicable grant terms, and the Constitution.

Because the Court has certified the class and subclasses, *see* Section IV(F), this relief applies to Plaintiffs and to the certified class and subclasses. The challenged action was undertaken pursuant to a uniform process and affected grant recipients in the same legally relevant manner. Uniform relief is therefore appropriate to redress the constitutional violations and *ultra vires* action identified in this Opinion and Order.

Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment is GRANTED, and the Government's cross-motion for summary judgment is DENIED.

It is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. Declaratory Judgment. The Mass Termination is DECLARED unlawful, unconstitutional, *ultra vires*, and without legal effect. The termination of National Endowment for the Humanities grants challenged in this action was unlawful because it was undertaken in violation of the First Amendment, in violation of the equal protection component of the Fifth Amendment, and without statutory authority. The Court further DECLARES that DOGE officials lacked statutory authority to identify, select, or direct the termination of NEH grants, and that the resulting terminations were *ultra vires*.

2. Injunctive Relief. The Government, along with its officers, agents, servants, employees, and all persons acting in concert with them, is PERMANENTLY ENJOINED from enforcing, implementing, or giving any effect to the Mass Termination. This injunction applies to all termination notices issued as part of the Mass Termination, including all grants identified in Plaintiffs' Exhibit 12, NEH_AR_0000136. The Government is further PERMANENTLY ENJOINED from terminating those grants on the same or substantially similar impermissible bases identified in this Opinion and Order.

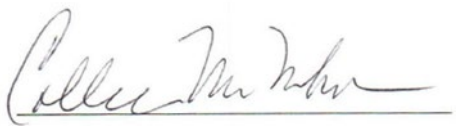
3. The Government shall provide written notice of this Opinion and Order to all affected grant recipients whose awards were terminated as part of the Mass Termination.

4. This Court shall retain jurisdiction to enforce this Opinion and Order.

The Clerk of Court is respectfully directed to terminate the motions at Docket Numbers 220, 242, 246, and 275 in *American Council of Learned Societies v. National Endowment for the Humanities*, No. 25-cv-3657 and Docket Numbers 134 and 162 in *The Authors Guild v. National Endowment for the Humanities*, No. 25-cv-3923; to enter judgment in favor of Plaintiffs; and to close the file.

This constitutes the decision and order of the Court. It is a written decision.

Dated: May 7, 2026
New York, New York



U.S.D.J.

BEATTY v. TRUMP et al Doc. 50

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOYCE BEATTY, Plaintiff, v. **DONALD J. TRUMP** *et al.*, Defendants.	Case No. 25-cv-4480 (CRC)

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MEMORANDUM OPINION

In November 1962, President John F. Kennedy and First Lady Jacqueline Kennedy presided over "An American Pageant of the Arts," a televised fundraiser for what was then known as the National Cultural Center. The event boasted an impressive slate of performers, including poet Robert Frost, singer Harry Belafonte, and a seven-year-old cellist by the name of Yo-Yo Ma, among other famed (or soon-to-be-famous) artists. Addressing the gathering, President Kennedy expounded:

> [A]rt knows no national boundaries. Genius can speak in any tongue, and the entire world will hear it and listen. Behind the storm of daily conflict and crisis, the dramatic confrontations, the tumult of political struggle, the poet, the artist, the musician continues the quiet work of centuries, building bridges and experience between peoples, reminding man of the universality of his feelings and desires and despairs, and reminding him that the forces that unite are deeper than those that divide . . . I am certain that after the dust of centuries has passed over our cities, we, too, will be remembered, not for victories or defeats in battle or in politics but for our contribution to the human spirit.[1]

Congress chose to honor President Kennedy's commitment to the arts—reflected in his lyrical remarks at the American Pageant—following his assassination a year later. It enacted legislation that formally designated the National Cultural Center as the "John F. Kennedy Center for the Performing Arts." Congress made clear that the Kennedy Center would serve as both the nation's premier performing arts center and a living memorial, the sole one dedicated to the late President in the Washington, D.C. area. The Center has played those roles for over five decades.

Early last year, however, rumblings of change reverberated through the Kennedy Center. In February 2025, President Donald Trump replaced several trustees on the Center's Board of

[1] See The Trump Kennedy Center, Creating the National Cultural Center, https://www.kennedy-center.org/memorial/jfk/highlights/national-cultural-center/ (last visited May 7, 2026); The Trump Kennedy Center, An American Pageant of the Arts, at 6:10–7:45 (YouTube, May 29, 2020), https://www.youtube.com/watch?v=pCIg6fTPA5U&t=51s [https://perma.cc/PHZ9-9LGE].

Trustees and appointed himself as a trustee, too. The newly-reconstituted Board then elected him chair and, under his direction, replaced the Center's president. In May, the Board amended the governing bylaws, stripping *ex officio* trustees of their right to vote on board matters. In December, the Board decided to rename the institution the "Trump Kennedy Center," and new lettering was affixed to the Center's front portico the next day. On February 1 of this year, with no advance warning, President Trump announced that the Kennedy Center would close for two years pending "Construction, Revitalization, and Complete Rebuilding." The Board voted to approve the closure six weeks later.

Ohio Congresswoman Joyce Beatty, an *ex officio* member of the Kennedy Center Board of Trustees, has sued to block several of these Board actions. Relevant here, she has moved for partial summary judgment on the name change and for a preliminary injunction ("PI") to halt the imminent closure. The Defendants—who include the Kennedy Center, the Board, President Trump in his capacity as a trustee, and scores of its general and *ex officio* trustees—oppose Beatty's motion for preliminary relief and have cross-moved for summary judgment on her claims for relief.

Having considered the parties' briefs and the factual record before it, the Court reaches several distinct conclusions.

First, Representative Beatty is entitled to summary judgment on the renaming issue. The Kennedy Center's organic statute makes crystal clear that the Center is to be named for President Kennedy, and it cannot bear any other formal name or public memorial based on the Board's unilateral say-so. Congress gave the Kennedy Center its name, and only Congress can change it.

Next, Beatty is entitled to summary judgment on the voting rights issue. The Center's organic statute makes no distinction between the powers of general and *ex officio* trustees.

Nothing in the statute permits the Board to discriminate categorically between the two as to fundamental trustee rights. And stripping *ex officio* trustees of their voting rights runs afoul of common-law trust principles incorporated into the statute, principles which presumptively place trustees on equal footing when it comes to participating in the trust's administration.

Finally, Beatty is likely to succeed on her claim that the Board violated its fiduciary duty in voting to close the Kennedy Center, "one of the more consequential decisions in the institution's lifespan." Beatty v. Trump, No. 25-cv-4480 (CRC), 2026 WL 712814, at *10 (D.D.C. Mar. 14, 2026). The Center's organic statute vests the Board with several overarching responsibilities. It must maintain the Center in good working order. It must also operate the Center as a performing arts venue and as a memorial to President Kennedy. As stewards of property held in trust for the American people, Board members must go about fulfilling these duties consistent with common-law standards of prudence. The preliminary factual record before the Court reveals that, in ratifying President Trump's closure announcement, the Board was derelict in discharging the full range of its responsibilities to the Center. More specifically, the Board based its decision on an insufficient, one-sided presentation of information and neglected to consider the full range of its statutory obligations and potential adverse consequences of closure on programming and memorial functions. The deficiencies in the Board's decision-making thus "fall[] below even a forgiving standard of prudence." Id. at *10.

Because Congresswoman Beatty has identified several irreparable harms that will flow from a two-year closure, and those harms outweigh any countervailing prejudice to the Defendants or the public, the Court will preliminarily enjoin the Defendants from effectuating the closure decision made at the March 16 Board meeting. However, the preliminary injunction will not prevent the Center from moving forward with the capital repair work it has planned,

which the record demonstrates is sorely needed. Nor will it categorically prohibit the Board from closing the Center should it come to this decision anew after independently balancing its multiple obligations to the Center in a prudent fashion.

I. Background

A. Institutional Background

The John F. Kennedy Center for the Performing Arts is a multifaceted institution. It is both the nation's preeminent performing arts venue and a memorial to President Kennedy. It is a trust instrumentality of the United States that not only plans artistic programming, but also formulates arts-related policy and engages in community outreach. Physically, the Center is more than just a grand marble building overlooking the Potomac River. In addition to its famed theaters, concert halls, and Grand Foyer, the Center occupies a campus of seventeen acres, replete with a presidential grove, several smaller theaters and performance spaces, plazas and pavilions, offices, commemorative exhibits, classrooms, restaurants, and shops. See generally The Trump Kennedy Center, Explore Our Spaces, https://www.kennedy-center.org/visit/exploring-our-spaces/ (last visited May 6, 2026).

As the Court explained in its earlier ruling on Congresswoman Beatty's request for a temporary restraining order ("TRO"), "[t]he notion of a national cultural center in Washington, D.C. dates back to the mid-1950s when President Eisenhower formed a commission to consider creating a public auditorium in the country's capital." Beatty, 2026 WL 712814, at *1. "Both the idea—and the necessary fundraising—stalled for a few years, until President Kennedy resuscitated the effort in the early 1960s." Id. Then, after Kennedy's assassination, "Congress enacted a statute authorizing the federal government to provide millions of dollars to match private donations to the new institution," which would be named for and in honor of the late

president. Id. Congress originally conceptualized the Center as a "bureau" in the Smithsonian Institution, see National Cultural Center Act, Pub. L. No. 85-874, § 2(a), 72 Stat. 1698, 1698 (1958), and it continues to operate as such today, see 20 U.S.C. § 76h(a)(1).

Designed by architect Edward Durell Stone, the Kennedy Center opened for its first performance in 1971. See PI Mot., ECF No. 13-4, Ex. B ("Board of Trustees Handbook") at 10. In its early years of life, the Center was jointly administered by its Board of Trustees, which was responsible for artistic activities, and the National Park Service ("NPS"), which kept up the facilities and grounds. See, e.g., U.S. Gov't Accountability Off., GAO-03-823, Kennedy Center: Improvements Needed to Strengthen the Management and Oversight of the Construction Process 4 (Sep. 2003), https://www.gao.gov/assets/gao-03-823.pdf [https://perma.cc/2W7S-Q7UF]. But over time, that bifurcated arrangement proved difficult. As a result, in 1994, Congress passed the John F. Kennedy Center Act Amendments, which consolidated arts programming, presidential memorial activities, and overall facilities management in the hands of the Kennedy Center Board. See id.; see also The Kennedy Center, Fiscal Year 2026 Congressional Budget Justification, at 6-3 https://www.kennedy-center.org/globalassets/our-story/mission/kennedy-center-fy26-budget-justification-to-congress.pdf [https://perma.cc/94QC-29JC].[2]

Today, the Center "is one of the few performing arts centers in the world to house every major artform under one roof." Board of Trustees Handbook at 14. Until recently, it had artistic affiliations with both the Washington National Opera and the National Symphony Orchestra, and it still oversees "[m]arquee" awards programming like the Kennedy Center Honors and the Mark Twain Prize for American Humor. Id. at 15–16. "Mandated by Congress to serve as a leader for

[2] The Court takes judicial notice of this official document, which is cited in one of Representative Beatty's supporting declarations. See PI Mot., ECF No. 13-20 ¶ 16.

arts education," the Center additionally offers arts programming for students and educators, school districts, online users, and young artists. Id. at 17–18.

B. Statutory Background

The Kennedy Center is, at base, a creature of statute. As noted, Congress organized the Center as a "bureau" within the Smithsonian Institution, directed by a Board of Trustees "whose duty it shall be to maintain and administer" the Center and "site thereof as . . . a living memorial to John Fitzgerald Kennedy, and to execute such other functions as are vested" in it. 20 U.S.C. § 76h(a)(1). The Board is composed of *ex officio* members who occupy positions in federal and D.C. government, as well as general trustees who are appointed by the President to serve six-year terms. Id. § 76h(a)(2), (b). Aside from their mode of appointment and term lengths, the statute does not distinguish between these two types of Board members in any way.

Congress has assigned the Board several duties. One set might be termed its programming obligations. The Board "shall . . . present" a variety of performing arts from the United States and other countries; serve as a leader in developing national performing arts education, policy, and programming; and offer "facilities for other civic activities[.]" Id. § 76j(a)(1)(A)–(D). Another set might be regarded as the Board's memorial obligations. The Board "shall . . . provide within the [Kennedy Center] a suitable memorial in honor of the late President," id. § 76j(a)(1)(E), and must also maintain the Hall of Nations, Hall of States, and Grand Foyer "in a manner that is suitable to a national performing arts center that is operated as a Presidential memorial and in a manner consistent with other national Presidential memorials," id. § 76j(a)(2)(E). Finally, the Board has general maintenance obligations. "[W]ith respect to the building and site" of the Center, the Board "shall . . . plan, design, and construct each capital repair, replacement, improvement, rehabilitation, alteration, or modification necessary to

maintain the functionality of the building and site at current standards of life, safety, security and accessibility." Id. § 76j(a)(1)(G). And it must provide "all necessary maintenance, repair, and alteration of, and all janitorial, security, and other services and equipment necessary for the operations of, the building and site, in a manner consistent with requirements for high quality operations." Id. § 76j(a)(1)(H)(ii).

To satisfy these tripartite statutory obligations, Congress has empowered the Board to do the kinds of things boards typically do: negotiate contracts, prepare budgets, employ personnel, solicit and accept gifts, transfer property, bargain with employees, procure insurance, and issue annual reports. Id. §§ 76j(a)(2)(A)–(D); 76k(a)–(d), (f); 76*l*(c), (e). The statute further provides that the Board "shall have all the usual powers and obligations of a trustee in respect of all trust funds administered by it." Id. § 76*l*(b). Moreover, the Board is "authorized . . . to make such bylaws, rules, and regulations, as it deems necessary for the administration of its functions . . . including, among other matters, bylaws, rules, and regulations relating to the administration of its trust funds and [its own] organization and procedure[.]" Id. § 76*l*(a).

Congress has also imposed some guardrails on the Board's conduct. In a nod to the Center's prior institutional arrangement with NPS, "[n]o change in the management and operation of the grounds may be made without the express approval of Congress and of the Secretary of the Interior." Id. § 76j(a)(2)(F). In addition, "actions of the Board relating to performing arts and to payments made or directed to be made by the Board from any trust funds shall not be subject to review by any officer or agency other than a court of law." Id. § 76k(e). Furthermore, although the Board may "function notwithstanding vacancies," "twelve members of the Board shall constitute a quorum for the transaction of business." Id. § 76*l*(a). In other words, the Board needs at least a quorum to conduct its core "business."

A few final points underscore the Center's role not just as a national institution for the performing arts, but as a presidential memorial. Both the building and the institution are "designated" as the "John F. Kennedy Center for the Performing Arts." See id. §§ 76h(a)(1), 76i(a). Congress commanded that the Center be "the sole national memorial" to President Kennedy "within the city of Washington and its environs," id. § 76q, and that it be a "living" memorial, id. § 76h(a)(1). With a handful of exceptions not relevant here, see id. § 76j(b)(2), "no additional memorials or plaques in the nature of memorials shall be designated or installed in the public areas" of the Center. Id. § 76j(b)(1).

C. Factual Background

Joyce Beatty is a member of the House of Representatives from Ohio's third congressional district, encompassing part of Columbus and its northeastern suburbs. First Am. Complaint, ECF No. 12 ("FAC") ¶ 13. By virtue of that position, Representative Beatty serves as an *ex officio* trustee on the Kennedy Center Board. Id. According to Beatty, prior to 2025, "the Board of Trustees conducted its affairs in a manner consistent with the Kennedy Center's statutory mission: to maintain and administer the Center as a living memorial to President John F. Kennedy and as a premier performing arts institution for all Americans." See PI Mot., ECF No. 13-2 ("Beatty Decl.") ¶ 3.

In Beatty's telling, things changed in 2025. In February of that year, President Trump fired the Board's longtime chair and replaced several of its general trustees. Id. ¶ 4. He also appointed himself as a general trustee, and the Board promptly elected him as its new chair. Id. ¶ 5. Under President Trump's direction, the Board sacked the Center's president and replaced her with Richard Grenell. Id. Matthew Floca, who joined the Kennedy Center in 2024 as a facilities-focused vice president, recently replaced Mr. Grenell as Executive Director and Chief

Operating Officer of the Center, making him the institution's seniormost employee. See Pl.'s Resp. to Defs.' Stmt. of Facts ("Pl.'s Resp. to SMF"), ECF No. 38-1 ¶¶ 18–19.

1. May 2025 Bylaw Amendment

Following this initial upheaval, the reconstituted Board convened in May 2025. It voted to amend the Center's bylaws, rendering *ex officio* trustees "non-voting members" of the body and general trustees "voting members." Beatty Decl. ¶ 8. The parties disagree whether this bylaw amendment reaffirmed or departed from the Board's prior practice. Compare Beatty Decl. ¶ 6 and Pl.'s Reply in Supp. of TRO Mot., ECF No. 20-3 ¶¶ 4–6 (declaration averring that *ex officio* and general trustees have shared the same voting rights in the past), with Opp. to TRO Mot., ECF No. 19-2 ¶ 2 (declaration averring that *ex officio* members have not counted toward a voting quorum in the past). In recently-filed tax forms, the Center indicated that it has 59 "voting" members and noted no "material differences in voting rights" between board members. See Not. of Suppl. Auth., ECF No. 22-1, at 6, 47–48.

2. Renaming

Whatever the Board's past practice, Congresswoman Beatty was not permitted to vote after the bylaw amendment was adopted. On December 18, 2025, she logged on to a remote Board meeting convened at the residence of Defendant and general trustee Andrea Wynn. Beatty Decl. ¶¶ 9–10; Defs.' Resp. to Pl.'s Stmt. of Mat. Facts, ECF No. 33-1 ("Defs.' Resp. to SMF") ¶ 10. To Beatty's purported surprise, it was announced at the end of the meeting that the Board would vote on whether to add Trump's name to the Kennedy Center title. Beatty Decl. ¶ 11. Renaming was not on the agenda for that meeting. Defs.' Resp. to SMF ¶ 11. Beatty tried to voice her opposition to the proposal, but found herself involuntarily muted. Beatty Decl. ¶ 12. It is undisputed that "[n]o discussion" took place "about the potential risks or consequences of

the renaming." Defs.' Resp. to SMF ¶ 16. Nor is there any indication in the available record that the Center's counsel advised the Board on the statutory implications of the renaming. The Board voted and declared the result "unanimous." Beatty Decl. ¶ 13. The Center would be renamed.

The next day, President Trump's name was affixed on the Center's front portico above President Kennedy's. Defs.' Resp. to SMF ¶ 19. The parties agree that "[g]iven the speed with which the signage was installed," it was "prepared and/or purchased prior to the Board's vote the day before." Id. ¶ 20. They also agree that the website was promptly updated to refer to the institution as the "Trump Kennedy Center," and that promotional materials and subscriber communications were sent out under that tag, as well. Id. ¶¶ 22, 23. On March 3 of this year, the Kennedy Center filed for a trademark with the U.S. Patent and Trademark Office, which shows the name "The Trump Kennedy Center" under a rendering of the main building. Id. ¶ 25.

Ticket sales at the Center had already slowed over the course of 2025, according to media reports. See, e.g., PI Mot., ECF No. 13-9, Ex. B (Washington Post report on declining ticket sales). But in the immediate wake of the renaming, numerous additional artists canceled performances. Defs.' Resp. to SMF ¶ 34; see also Am. Amicus Br., ECF No. 35-1, at 15–16. At the beginning of this year, the Washington National Opera, "the Kennedy Center's resident company since 1971," announced that it would part ways with the Center and find a new home. Defs.' Resp. to SMF ¶ 35. And "[a]n analysis of ticket sales reported by the Wall Street Journal showed a 70% drop in a week's worth of 2026 sales compared to the three prior years." Id. ¶ 36.

On December 22, 2025, Beatty filed this lawsuit, challenging the name change as unlawful under 28 U.S.C. § 76*l* and the common law of trusts and as *ultra vires*.

3. Closure

Fast forward to the more recent present. On February 1, 2026, President Trump took to Truth Social to announce that the Kennedy Center would close for two years, starting in July:

> After a one year review of The Trump Kennedy Center, that has taken place with Contractors, Musical Experts, Art Institutions, and other Advisors and Consultants, deciding between either Construction with Closure and Re-Opening or, Partial Construction while continuing Entertainment Operations through a much longer period of time . . . I have determined that The Trump Kennedy Center, if temporarily closed for Construction, Revitalization, and Complete Rebuilding, can be, without question, the finest Performing Arts Facility of its kind, anywhere in the World. . . .
>
> Based on these findings, and totally subject to Board approval, I have determined that the fastest way to bring The Trump Kennedy Center to the highest level of Success, Beauty, and Grandeur, is to cease Entertainment Operations for an approximately two year period of time . . .
>
> Therefore, The Trump Kennedy Center will close on July 4th, 2026, in honor of the 250th Anniversary of our Country, whereupon we will simultaneously begin Construction of the new and spectacular Entertainment Complex. Financing is completed, and fully in place! This important decision, based on input from many Highly Respected Experts, will take a tired, broken, and dilapidated Center . . . and turn it into a World Class Bastion of Arts, Music, and Entertainment, far better than it has ever been before. America will be very proud of its new and beautiful Landmark for many generations to come. Thank you for your attention to this matter!

PI Mot., ECF No. 13-12, Ex. E ("Truth Social Post") at 2–3.

Beatty again reports being taken aback. She was "aware that the Board had previously discussed plans for various capital improvements to the Center—including improvements funded by Congress's recent $257 million appropriation, which the Board was informed were already underway—but to [her] knowledge the Board had never discussed" an extended closure. Beatty Decl. ¶ 18. With the benefit of additional record evidence submitted by both sides, the story of the Kennedy Center's abrupt closure comes into slightly clearer focus.

a. The Need for Capital Repairs at the Kennedy Center

For years, the Kennedy Center Board has understood that the facilities are in need of some major capital repairs. In 2021 and 2022, the Board issued successive Comprehensive Building Plans ("CBPs"), which followed "a complete survey of the facility and its systems" by "outside consultants." See Pl.'s Suppl. Br. in Support of PI Mot. ("Pl.'s First Suppl. Br."), ECF No. 29-15, Ex. X ("2022 CBP") at 8.[3] The CBPs outlined the need for fire alarm system replacement, overhang roof work, and waterproofing, and also indicated that certain piping, chillers, and boilers were approaching or had reached the end of their engineered service lives. See, e.g., 2022 CBP at 39, 79, 88–90, 94; see also Pl.'s First Suppl. Br., ECF No. 29-3, Ex. L ("Second Floca Decl.") ¶ 9. External consultant reports from 2022 (concerning a displaced soffit panel) and 2024 (concerning water intrusion at exterior column bases and main electrical vaults) further substantiated the need for repair work. Second Floca Decl. ¶ 9; see also Pl.'s First Suppl. Br., ECF No. 29-17, Ex. Z ("2022 Soffit Report"); ECF No. 29-18, Ex. AA ("2024 Leak Investigation Report Part 1"); ECF No. 29-19, Ex. BB ("2024 Leak Investigation Report Part 2"); ECF No. 29-20, Ex. CC ("2024 Leak Investigation Report Part 3").

The Center has not developed a new CBP since 2021. See DC Preservation League v. Board of Trustees of the John F. Kennedy Center for the Performing Arts, No. 26-cv-981 (CRC), Prelim. Inj. Hr'g Tr., ECF No. 39, at 35:23–36:7 ("DCPL Hr'g Tr.").[4] And it is not clear from

[3] The survey was part of an ongoing program since the early 1990s to "safeguard against a recurrence of the severe deterioration" that occurred in the campus's "first 24 years," during which time building conditions were apparently "not evaluated" and "deficiencies were not addressed in a coordinated manner." 2022 CBP at 8. Congress formalized the Board's duty to regularly update the CBP in 1994. See 20 U.S.C. § 76j(a)(1)(F).

[4] The Court may take judicial notice of evidence adduced in DCPL that is "not subject to reasonable dispute," as the two cases are closely related, and the parties have cross-cited liberally due to the overlap between them. See Fain v. Islamic Republic of Iran, 856 F. Supp. 2d 109, 115 (D.D.C. 2012) (citing Fed. R. Evid. 201(b)). In addition, the Defendants made the DCPL PI

the record how many of the recommended projects from 2021 to 2024, if any, have been started or completed, given the years that have elapsed since the reports were generated.

Although the CBPs and external reports recommended an assortment of renovation projects, none called for the complete closure of the Center in order to accomplish the repairs. See, e.g., 2022 CBP at 130 ("In formulating this plan, projects were prioritized in terms of need. Projects have been scheduled in such a way as to keep the facility operating to the maximum extent, with efforts phased over the multi-year period."); 2024 Leak Investigation Report Part 1 at 82 (explaining that the next steps in addressing waterproofing and leak issues would be to consider "phasing, impacts to Kennedy Center operations, costs, and relative urgency classifications"). Indeed, according to Mr. Floca's recent testimony, the CBPs contemplated that any necessary renovations would be done while the building remained open. In his words, "[t]he schedules in the [CBPs] ha[d] always been phased." DCPL Hr'g Tr. at 89:8–9.

b. The Big Beautiful Bill Appropriation

In July 2025, Congress passed the One Big Beautiful Bill Act ("OBBBA"). The statute appropriated, through September 30, 2029, roughly $257 million "for necessary expenses for capital repair, restoration, maintenance backlog, and security structures of the building and site of the John F. Kennedy Center for the Performing Arts." See OBBBA, Pub. L. No. 119-21, § 60025, 139 Stat. 72, 157 (2025). Though Congress's cash infusion would accelerate repairs, there was still no suggestion that the Center might need to shut down fully during renovations.

To the contrary, the Kennedy Center's annual budget justification submission for fiscal year 2026 represented that "as major capital projects necessitate disruptions in date availability

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hearing transcript a formal part of the record in this case by filing it with their post-hearing supplemental brief. See generally Defs.' Suppl. Br., ECF No. 45-1, Ex. A (DCPL Hr'g Tr.).

in certain theaters, these disruptions need to be carefully planned and coordinated to not materially affect important programming initiatives." The Kennedy Center, Fiscal Year 2026 Congressional Budget Justification, at 6-3. And in then-President Grenell's opening remarks at a September 2025 Board meeting, he looked forward to future performances and other events, describing his "excitement about ticket sales and noting that the Center ha[d] raised the ticket prices for Honors, because the demand was so high," and "[t]ickets [were] selling out." Pl.'s First Suppl. Br., ECF No. 29-22, Ex. DD ("September 2025 Board Meeting Minutes") at 4. Grenell added that "America 250 [was] coming up" and promised that "the Center [would] be one of the premiere spots" for celebrating the occasion. Id.

Serving in his facilities role, Mr. Floca also took the floor at the September Board meeting. He "presented a slide show" that addressed how the OBBBA appropriation would be allotted. Id. Floca would aim to "reduc[e] maintenance backlog (electrical system and plumbing systems)," "improv[e] security systems," and engage in some "marble and granite restoration and structural repair." Id. More specifically, he explained that the "building has had some problems for some time," citing the water intrusion; the need to restore seats, paint, and carpeting in various theater spaces; and the required infrastructure projects, which included HVAC, central plant, and plumbing upgrades. Id. at 4–5. Floca closed by "stat[ing] that they are moving quickly on everything." Id. at 5.

At the September 2025 Board meeting, then, there was no hint that the Center might close pending OBBBA-funded renovations. Floca admits that he "tr[ied] for a long time to phase th[e]" work and to "look at exactly how" various spaces on the campus could remain open while addressing necessary repairs. DCPL Hr'g Tr. at 99:1–6. And there is likewise no suggestion that the December 2025 Board meeting involved any discussion of a wholesale shuttering,

despite the fact that some capital repair work had already begun. See Pl.'s First Suppl. Br., ECF No. 29-23, Ex. EE (December 2025 Board meeting agenda) at 2 (noting that Floca would provide a report on the "Kennedy Center Renovation"); see also Beatty Decl. ¶ 18 ("I am aware that the Board had previously discussed plans for various capital improvements to the Center . . . but to my knowledge the Board had never discussed, deliberated upon, or voted to approve a closure of the Center for an extended period[.]").

c. The Closure Recommendation

The record indicates that the Board learned of the plan to close the Kennedy Center at the same time the public did: on February 1, when President Trump announced it on Truth Social. Beatty Decl. ¶ 20. Though the President trumpeted a "one year review . . . that ha[d] taken place with Contractors, Musical Experts, Art Institutions, and other Advisors and Consultants, deciding between either Construction with Closure and Re-Opening or, Partial Construction while continuing Entertainment Operations through a much longer period of time," Truth Social Post at 2, the evidence of any such review is nil.

Instead, the idea of full closure apparently came from Mr. Floca, who at some point changed his mind about the propriety and feasibility of carrying out the Center's needed repairs while it remained open to the public. Floca testified that he came to that conclusion "[p]robably four months" before the Truth Social post, DCPL Hr'g Tr. at 80:17, after having "engaged" in a "review of the Center's infrastructure needs" since his arrival at the Center in 2024, Second Floca Decl. ¶ 6. No evidence in the record substantiates that timing.

In Floca's words, he realized that closure was necessary after "an extensive analysis of expert evidence and internal operational data," including the 2021 and 2022 CBPs, the external consultant reports from 2022 and 2024, and consultation with certain members of the Center's

operations, facilities, and contracting staff. Id. ¶¶ 7, 9, 11.[5] He acknowledges that there were "no other reports sourced from experts or advisors during the period from February 1, 2025 to February 1, 2026," coinciding with President Trump's purported "one year review," and "to the best of [his] knowledge, no other experts or advisors who provided input on [his] review of the Center's infrastructure needs" during the same period. Id. ¶¶ 6, 10, 12. Floca says he "analyze[d] . . . different options" with a "team," "constantly . . . trying to figure out contracting mechanisms and solutions to partially operat[e] the building," but ultimately concluded that it would be "irresponsible to do anything other than holistic fixes." DCPL Hr'g Tr. at 99:8–14. There are no reports or other evidence in the record apart from Floca's own testimony to confirm the details of his "extensive analysis."

In late January, Mr. Floca recounts speaking with President Trump several times and suggesting to the Chairman that "a singular, concentrated 24-month closure [would be] the most cost-effective and efficient path for addressing the Center's acute infrastructure needs," tackling "the facility's critical infrastructure failures while eliminating the hidden costs and safety risks inherent in a multi-year, phased renovation." Second Floca Decl. ¶ 7. In Floca's view, "there [were] very clear efficiencies, both from a cost standpoint and a schedule standpoint, to not have to work around thousands of patrons moving throughout the campus." DCPL Hr'g Tr. at 73:3–6; see also id. at 74:6–10 ("There are clear efficiencies, cost efficiencies in doing the work in an unoccupied building. Just looking at the labor itself, working second shifts overnight, that's a 20- to 25-percent increase in just the labor costs. So there's clear efficiencies."). Floca admits that his analysis was based on cost schedules from a years-old set of CBPs; in his estimation,

[5] Floca attests that he consulted "Stagehand Daniel Yannantuono." Second Floca Decl. ¶ 11. Mr. Yannantuono appears to be the only arts-oriented Kennedy Center staff member consulted about the closure. Id.

there was "no need to" commission studies to compare the cost of phased versus full-closure construction. DCPL Hr'g Tr. at 89:14–90:5.

Ultimately, Floca's analysis was focused on closure "for the needs of the building." Id. at 91:5–6. He conceded—when pressed—that doing the renovations with the Center open was possible, though, in his view, "irresponsible." Id. at 91:8–17. [6] He also acknowledged that he made no effort to quantify the costs of closure in terms of lost revenue or goodwill, see id. at 93:25–94:9, nor did he have any "information" related to those costs "in front of" him while developing his recommendation, id. at 94:23–24. Though Floca insisted that he was "not oblivious to what's happening on the programming side" and did not "make the [closure] decision in a vacuum," he conceptualized the Center's programming and facilities needs as entirely separate, with the former "not a factor in deciding . . . what we need to do" on the latter. Id. at 95:3–4, 5–7, 19–20, 23–24. He added that "[t]here's always been one team trying to shut the building down and one team trying to keep it open[.]" Id. at 100:5–7. The two had been at "odds" for decades. Id. Presented with a "unique" opportunity given the lapse in programming, the OBBBA appropriation, and "a leadership team that [would] prioritize" the renovation, Floca considered the next two years a "perfect time to do this work." Id. at 75:10–17.

d. Operationalizing the Closure Decision

Once President Trump took to Truth Social on February 1 to announce the Kennedy Center's closure, plans for the shutdown began to take shape.

[6] Beatty has submitted a declaration by a licensed architect confirming that "the work identified in the 2021, 2022, and 2024 assessment documents can be performed while maintaining operations in the [] Center through phased sequencing of the work," and that a "complete two-year closure . . . is not required to accomplish the deferred maintenance[.]" Pl.'s First Suppl. Br., ECF No. 29-24 ¶ 4.

Roughly two weeks after the social media post, Mr. Floca developed a set of talking points to support the closure proposal. See Second Floca Decl. ¶ 8; Pl.'s First Suppl. Br., ECF No. 29-4, Ex. M ("Floca Talking Points"). "The Trump Kennedy Center should implement a full facility closure to execute the required mechanical overhauls and the invasive nature of the needed structural repairs," his notes read. Floca Talking Points at 2. "Framing the project as a singular, concentrated event, rather than a multi-year series of patchwork repairs, is the most efficient and cost-effective path forward." Id. The talking points elaborated that, "[w]hile a phased approach may be considered," several "critical issues suggest[ed] that an occupied renovation would be unsafe and logistically impractical": work on the structural steel and concrete deck defects would render the "primary public access points unusable"; performing the electrical vault waterproofing and parking garage fireproofing would create "significant liability and safety concerns"; operating the building during the requisite mechanical and electrical shutdowns would not be "feasible"; and "[b]y opting for a full closure, teams avoid the hidden costs of phased construction, such as temporary life-safety systems, after-hours labor premiums, and the constant disruption of the patron experience." Id.

By mid-February, a high-level budget had been prepared, outlining several generic categories of work slated for the two-year closure (*i.e.*, "Shell & Site Infrastructure," "Public & Support Spaces," "Performance Venue Revitalization," and "Safety & Building Systems"). Pl.'s First Suppl. Br., ECF No. 29-11, Ex. T (project budget document) at 2. The budget alludes to various discrete projects within those categories, such as "Rock Creek Parkway Stabilization," "Front of House Renewal," "Sanitary & Domestic Piping" improvements, and "Electrical System Upgrades." Id. at 3, 6, 10. But it includes no additional information about these sub-

projects, and Mr. Floca has since testified that there is no "one deliverable" that outlines the entirety of the work planned for the Kennedy Center. DCPL Hr'g Tr. at 83:18–19.

Nevertheless, by March 2, Floca was ready to present his recommendation to the Board's Building and Grounds Committee. See Pl.'s First Suppl. Br., ECF No. 29-7, Ex. P ("Building and Grounds Committee Meeting Minutes"). Four committee members were present, along with Floca and two staff members. Id. at 2. The meeting minutes reflect that "[m]anagement presented the rationale for a full main-building closure rather than a phased approach," the latter of which "would take longer, cost more, and create operational inefficiencies." Id. at 3. The minutes continue, "Major infrastructure needs include HVAC and chilled water systems, electrical infrastructure, structural and concrete deficiencies, service tunnel conditions, waterproofing, roof and steel degradation, and life-safety systems." Id. Under the topic "continuity of mission during closure," Floca advised the Committee that "portions of" the Center's expansion campus, known as the REACH, "*may* remain active," "the Skylight Pavilion *may* be used to maintain the memorial experience, and campus grounds *may* remain accessible when construction permits." Id. (cleaned up) (emphasis added). Some rehearsal studios might remain open. And "[e]xternal venue options, including Strathmore and Wolf Trap, remain under review." Id. Floca said that 75 to 175 of roughly 300 employees at the Center would be affected by the closure. Id. Regarding "next steps," proposals for the project apparently had already "been received," with "mobilization by July 6 . . . essential." Id. (cleaned up). The motivation to shutter the Center by that particular date is not clear, aside from the fact that President Trump had already announced that closure would take place around Independence Day. There was no discussion of how the closure might implicate the Board's other trust obligations.

On March 16, 2026, the Board met to vote on the closure proposal. See Defs.' Cross-Mot. for Summ. J. ("Defs.' Cross-Mot."), ECF No. 34-5 ("Mar. 16 Board Meeting Minutes"), at 3–11. Based on the record before the Court, the trustees not on the Building and Grounds Committee had received no plans or details about the closure—at least until, two days before the meeting, this Court granted Congresswoman Beatty's TRO seeking further information about the planned work. See generally Beatty, 2026 WL 712814, at *9–10. President Trump confirmed that the Board meeting was somewhat of a formality. In a wide-ranging press conference immediately preceding the Board vote, he remarked:

> As I announced in February after a one year review based on input from highly-respected experts and subject to board approval today, we determined—*it's a little late for the board because we've already announced it, but these are . . . minor details* . . . I think everybody agrees, but subject to board approval, we determined that the fastest way to bring the Trump Kennedy Center to the highest level of success, beauty, and grandeur is to cease the entertainment operations for a two-year period of time as we complete high-quality, really high-quality construction. And we've already purchased seating . . . We've already purchased a lot of the marbles and some of the things that are hard to get . . . [T]his temporary closure will enable us to complete the work much faster and . . . of a much higher quality.

Pl.'s Reply in Supp. of PI Mot. ("PI Mot. Reply"), ECF No. 37-3 ("Mar. 16 Press Conf. Tr."), at 15–16 (emphasis added) (cleaned up).

After President Trump addressed the press, Mr. Floca presented a slide deck on the need for capital improvements at the Center and explained why a full shutdown would facilitate the "big undertaking." Mar. 16 Board Meeting Minutes at 6–7. Although the Center's General and Associate General Counsel were in attendance, they do not appear to have offered legal guidance on the closure, at the meeting or otherwise. Id. at 1, 3. Representative Beatty then spoke, relaying her opposition to the closure vote while maintaining that "she had no opposition [to] the need for repair." Id. at 7. Other trustees raised issues about the state of the premises, including asbestos remediation and potential liability from allowing public access during renovations, and

expressed their support for the closure. Id. at 7–8. After some discussion, the Board ratified President Trump's motion "to conduct an orderly wind-down of programming activities through the Spring of 2026, and close [the Center's] doors entirely effective July 6, 2026, for such a time as is required to complete the repair and restoration funded" by the OBBBA. Id. at 8–9. The meeting was brought to a close, having lasted 34 minutes in total. Id. at 5, 9.

e. Latest Developments

Though the Kennedy Center's full closure is not scheduled to take effect until July, the "wind-down" has begun. The closure will affect several existing performance contracts. See Pl.'s First Suppl. Br., ECF No. 29-5, Ex. N (list of performance contracts impacted by closure). The Center has laid off at least two tranches of staff members, including various programming personnel. See generally PI Mot. Reply, ECF No. 37-5, Ex. PP (Washington Post reporting); ECF No. 37-6, Ex. QQ (additional Washington Post reporting). Mr. Floca reports that just ten members of the programming staff remain. DCPL Hr'g Tr. at 92:24–25, 93:6–10.

At the same time, the details of the planned work and scope of the shutdown remain murky—perhaps because there is no up-to-date document that outlines construction plans with any specificity. Mr. Floca has attested that "[n]o new structure or building will be erected on the campus"; the "exterior of the Center's main building will not be materially affected"; and "the planned construction, renovation, and renewal efforts will not tear down the Center to its structural steel and rebuild a new structure from those foundations." DCPL, Defs.' Opp. to PI Mot., ECF No. 27-2, Ex. A ("Fourth Floca Decl.") ¶ 6. Yet structures inside the building—for instance, various stages and seats—will be demolished and rebuilt; structural steel will be "reconfigur[ed]"; and historic marble will be replaced, among other changes. See Defs.' Cross-

Mot., ECF No. 34-4 ("Third Floca Decl.") ¶¶ 7, 10; see also Mar. 16 Press Conf. Tr. at 16 ("[W]e've already purchased the seating . . . We've already purchased a lot of the marble . . .").

As for scope, Mr. Floca has confirmed that "[t]he majority of the grounds directly around the building will be behind a construction fence[.]" DCPL Hr'g Tr. at 69:10–12. Material from President Kennedy's memorial exhibit will be moved to REACH, and the Skylight Pavilion will serve as the "temporary home of the memorial[.]" Id. at 69:16–23. "[S]ome" of the Center's "education functions" will "continue" at the REACH. Id. at 69:13–14; 72:5–9. Plans for continued artistic programming are more tentative. See, e.g., id. at 71:7–13 ("[W]e are . . . looking at how we maintain some of our duty to present in the REACH.").

D. Procedural History

Representative Beatty originally filed this lawsuit in December 2025, following the Kennedy Center's renaming, and amended her complaint to include claims challenging the Center's imminent closure in early March 2026. She promptly moved for a TRO, asking the Court to direct the Defendants to provide her with information about the planned renovation and to allow her to participate in and vote during the March 16, 2026 Board meeting. The Court granted the TRO in part and denied it in part, concluding that she was entitled to certain information and owed the right to participate in Board meetings as a trustee of the Kennedy Center, but that she was not entitled to vote at the upcoming meeting because the TRO factors did not weigh decisively in her favor. See Mar. 14, 2026 Mem. Op. and Order.

Beatty also moved for a PI barring the Kennedy Center's imminent closure. After the March 16 Board vote, she supplemented her PI motion with an additional brief supported by hundreds of pages of documents she was given in response to the Court's TRO order, which shed some light on the planned work. She has also since filed a motion for partial summary judgment

on the issue of the Center's renaming. The Defendants have responded by not only opposing Beatty's PI and summary judgment motions, but also cross-moving for summary judgment on the claims in Beatty's FAC. Beatty has opposed the Defendants' cross-motion and requested summary judgment on the voting issue, though she did not formally so move. Individual former members of the Kennedy Center Board, the President's Advisory Committee on the Arts, and the President's Committee on the Arts and the Humanities, along with the Committee for the First Amendment, have filed an amicus brief in support of Beatty's request for injunctive relief.

The Court held a hearing on all the pending motions in this case on April 28. It also held a hearing the following day on a PI motion in the related DCPL case, during which Mr. Floca testified. Although only the plaintiffs in the DCPL case requested Floca's testimony, the Court allowed Beatty's counsel to briefly cross-examine him at the hearing. The Court also permitted the parties in both cases to submit simultaneous post-hearing supplemental briefs addressing the impact of Mr. Floca's testimony. The pending motions in this case are now ripe for adjudication.

II. Legal Standards

A. Summary Judgment

A court "shall grant summary judgment" to a particular party on a particular claim "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if "a dispute over it might affect the outcome of a suit under governing law." Mayorga v. Merdon, 928 F.3d 84, 89 (D.C. Cir. 2019) (quoting Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006)). And a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (quoting Holcomb, 433 F.3d at 895).

"In considering a motion for summary judgment, judges must ask themselves not whether they think the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Stoe v. Barr, 960 F.3d 627, 638 (D.C. Cir. 2020) (cleaned up). "And in viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in [its] favor, the court's role is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. (cleaned up). "In short, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are not the functions of the court. These are matters for a jury if the court determines that there is a genuine issue for trial." Id. (cleaned up). Furthermore, "[a]lthough a moving party may not be required to support its motion with affidavits, it is still clear that summary judgment should only be granted in cases when whatever [evidence] is before the district court demonstrates that the standard for the entry of summary judgment . . . is satisfied." AFL-CIO v. Chavez-DeRemer, 789 F. Supp. 3d 66, 80 (D.D.C. 2025) (cleaned up).

B. Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). To secure a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 20. "The movant has the burden to show that all four factors, taken together, weigh in favor of the injunction." Abdullah v. Obama, 753 F.3d 193, 197 (D.C. Cir. 2014) (cleaned up). And if the movant carries her burden, "[c]rafting a preliminary injunction" remains "an exercise of discretion and judgment, often dependent as

much on the equities of a given case as the substance of the legal issues it presents." Trump v. Int'l Refugee Assistance Proj., 582 U.S. 571, 579 (2017).

III. Analysis

Representative Beatty challenges three actions by her fellow trustees on the Kennedy Center Board: (1) their renaming the institution after President Trump; (2) their stripping *ex officio* Board members of the right to vote; and (3) their decision to close the Center for at least two years pending what all agree to be at least a substantial renovation of the premises. The Court tackles each of the three issues—renaming, voting, and closure—in turn.

Before diving into the fray, however, some verbiage from the Kennedy Center's organic statute requires upfront attention because its interpretation will lay the groundwork for the Article III standing and cause-of-action analyses to come. Section 76*l*(b) of the statute affords the Board "all the usual powers and obligations of a trustee in respect of all trust funds administered by it." 20 U.S.C. § 76*l*(b). The Board, in turn, is "composed of" *ex officio* and general trustees. Id. § 76h(a)(2). The Court thus reads the statute to confer "all the usual" trustee "powers and obligations" on the Board's members. Beatty, 2026 WL 712814, at *6.

As at the TRO stage, the parties appear to agree that this choice of statutory language indicates that "Congress intended to legislate against the backdrop of common-law trust principles." Id. After all, it referred to "*all the usual* powers and obligations" that a trustee has. Id. (emphasis added). Moreover, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981); see also Jazz Pharms., Inc. v. Kennedy, 141 F.4th 254, 261 (D.C. Cir. 2025) (explaining that the "words of a statute must be read in their context

and with a view to their place in the overall statutory scheme," and with an eye toward "statutory history," and, in appropriate circumstances, "considerations of incorporation and the old-soil canon") (cleaned up)); cf. Cent. States, Se. and Sw. Areas Pension Fund, Inc. v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) (explaining that in the ERISA context, "rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility").

What to make of the last clause in the sub-section, which vests trustees with the usual powers and obligations "in respect of all the trust funds" they "administer[]"? In a late-breaking development, the Defendants suggest that, in light of testimony from Mr. Floca at the motions hearing, the statute's reference to "trust funds" means that trustees only have the "usual" common-law powers and obligations with respect to "private donations and revenues from performances." Defs.' Suppl. Br., ECF No. 45, at 2.[7] But the statute does not expressly define the term "trust funds." To the extent the Kennedy Center's officers interpret the phrase in a specific way in their day-to-day management of the institution, see id., the Court owes that interpretation no deference when it comes to parsing statutory meaning. Cf. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400–01 (2024).

The Court looks elsewhere for guidance. One pertinent source of authority is the common law, given the backdrop against which the organic statute must be read. Cf. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 320–21 (2012) ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."). In common-law parlance, "trust funds" is not so much a special term of art as it is a straightforward

[7] The Court might not have bothered to address this eleventh-hour argument, which was raised in a post-hearing supplemental brief to which Beatty had no meaningful opportunity to respond, except that the Defendants have styled it as a potential jurisdictional issue.

way of referring to the "funds" that belong to the "trust." See, e.g., Restatement (First) of Trusts § 179 cmt. b (A.L.I. 1935) ("It is the duty of the trustee not to mingle trust funds with his own funds."); Restatement (Second) of Trusts § 181 cmt. c. (A.L.I. 1959) ("The trustee is liable if he fails to invest trust funds which it is his duty to invest . . .").

Another pertinent source is the rest of the Kennedy Center's organic statute, which uses the term "trust funds" several other times. The statute does indicate that the term encompasses "gifts, bequests, or devises of money, securities, or other property of whatsoever character," which "the Board is authorized to sell or exchange and to invest or reinvest." 20 U.S.C. § 76k(a). But it would be unnatural to read "trust funds" to include only private gifts and donations. When the statute was first enacted in 1958, Congress contemplated that the Kennedy Center might receive funds from different places, requiring the Boad to submit to the Smithsonian "an annual report of its operations under this Act, including a detailed statement of all public and private moneys received and disbursed by it." National Cultural Center Act § 6(c). Following President Kennedy's assassination, Congress appropriated up to $15.5 million in federal funds matching private donations to encourage the Center's development. Pub. L. No. 88-260, § 8, 78 Stat. 4, 4 (1964). Starting in 1994, Congress began authorizing regular appropriations directly to the Kennedy Center for its maintenance, repair, and security needs, at the same time transferring relevant pieces of "property, liabilities, contracts, records, and unexpended balances of appropriations, authorizations, allocations, and other funds" from the Secretary of the Interior to the Kennedy Center. John F. Kennedy Center Act Amendments of 1994, Pub. L. No. 103-279, §§ 4, 7, 108 Stat. 1409, 1411, 1415–16 (1994).

If "trust funds" refers only to private gifts, as the Defendants now suggest, the Board's trustees would lack the "usual powers and obligations" to administer *any* of the other substantial

funds the Center has or may receive. There is nothing in the text or structure of the statute to require that odd result. The Defendants' proposed interpretation would also require an unduly cramped construction of the Board's power to make "bylaws, rules, and regulations relating to the administration of its trust funds." 20 U.S.C. § 76*l*(a). It cannot be that the Board may make bylaws relating to the administration of private funds, but is powerless to do so with respect to the Center's administration of public dollars. Such a reading also runs headlong into the Defendants' assertion that "Congress *affirmatively* conferred on the Board *broad* authority to manage its own affairs." See Defs.' Opp. to TRO Mot., ECF No. 19, at 9 (emphasis added) (citing 20 U.S.C. § 76*l*(a)). Finally, this interpretation of "trust funds" would seemingly leave any "actions of the Board relating to . . . payments made or directed to be made by the Board from any" *non*-private funds "subject to review" by any number of other "officer[s]" and "agenc[ies]." 20 U.S.C. § 76k(e). The Defendants have argued precisely the opposite elsewhere in their briefing in this case and DCPL. See Defs.' Cross-Mot. at 28–29 (asserting that § 76k(e) of the organic statute "grant[s] the Center its independence from" *any* "external review," not solely with respect to decisions about private funds); see also DCPL, Defs.' Opp. to PI Mot. at 19 ("The Board's actions 'relating to' its expenditure of funds appropriate by Congress for capital repair and restoration fall squarely within the plain text of the limitation in § 76k(e).").

In short, the Defendants' last-minute attempt to cabin the scope of Section 76*l*(b) to the administration of private funds is unavailing. Their construction would impose an illogical restriction on the Board's inherent powers, one unsupported by the common law and the structure of the statute, not to mention Defendants' *own* statutory constructions advanced elsewhere in this litigation and related litigation. The Court declines to adopt such a disruptive

read over the far more sensible understanding that "all the trust funds" encompasses "all" funds belonging to the Kennedy Center trust.[8]

In any event, even if the Court were to endorse the Defendants' awkward understanding of "trust funds" as denoting only private funds, it would not materially change the scope of Representative Beatty's powers and obligations as a trustee with respect to the claims in *this* case. The Center's renaming implicates private funding because Defendants' use of the "Trump Kennedy Center" name has evidently had an impact on private donations and revenue generation. See Am. Amicus Br. at 15–16; see also Defs.' Resp. to SMF ¶ 34. The categorical right of *ex officio* members to vote bears on the use of private funds insofar as the Board is often called to vote on matters involving their use. And according to the record, the Center's imminent closure is poised to affect the Center's privately-funded arts programming and reduce revenue generation for two years, if not far longer. See PI Mot., ECF No. 13-19 ("Borda Decl.") ¶¶ 7–15; ECF No. 13-20 ("Taylor Decl.") ¶¶ 6–13; ECF No. 13-21 ("Borenstein Decl.") ¶¶ 11–25; ECF No. 13-22 ("Miller Decl.") ¶¶ 11–17; see also Am. Amicus Br. at 8–13.

In assessing Representative Beatty's claims, then, the Court understands that the Center's trustees must discharge their relevant duties in a manner consistent with the common law of trusts. And having cleared that brush, it is time to embark on an admittedly lengthy trek through the many claims and issues raised by the competing motions before the Court. Let's begin with the Center's renaming.

[8] To be clear, this conclusion does not mean that the Center's private and public funds are somehow interchangeable. It is entirely appropriate that the privately-generated funds, which Mr. Floca refers to as "trust funds," see DCPL Hr'g Tr. at 84:21–25, are kept separately from appropriated funds because the statute prohibits appropriations from being "used for any direct expense incurred" on the programming side, 20 U.S.C. § 76r, and uniquely subjects appropriated funds to Inspector General oversight, id. § 76*l*(d).

A. Renaming

The parties have cross-moved for summary judgment on the lawfulness of the Kennedy Center's renaming. In resolving the cross-motions, the Court first considers Representative Beatty's Article III standing to challenge the renaming, then discusses her asserted causes of action and their merits, and finally addresses the appropriate remedy.

1. Article III Standing

Under Article III of the Constitution, federal courts have jurisdiction to adjudicate "Cases" and "Controversies." § 2, cl. 1. "For a lawsuit to constitute a case within the meaning of Article III, the plaintiff must have standing to sue," and "[t]o demonstrate standing, plaintiffs must answer a basic question—What's it to you?" Diamond Alt. Energy, LLC v. EPA, 606 U.S. 100, 110 (2025) (cleaned up). "In other words, plaintiffs must show that they possess a personal stake in the dispute and are not mere bystanders." Id. at 110–11 (cleaned up). "When determining whether a plaintiff has Article III standing, the court must assume that [the plaintiff] will prevail on the merits." Comm. On Judiciary of U.S. House of Reps. v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020) (en banc). At the summary judgment stage, plaintiffs must generally substantiate standing "by affidavit or other evidence." Ass'n of Flight Attendants-CWA, AFL-CIO v. Dep't of Transp., 564 F.3d 462, 465 (D.C. Cir. 2009) (cleaned up).

Standing has three elements: injury-in-fact, causation, and redressability. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). "The first requirement, injury in fact, requires the plaintiff to demonstrate an injury that is concrete, particularized, and actual or imminent, not speculative." Diamond Alt. Energy, 606 U.S. at 111 (cleaned up). "The second and third requirements, causation and redressability, are usually flip sides of the same coin." Id. (cleaned

up). Causation entails a showing that the plaintiff's injury was likely caused by the defendant, whereas redressability requires that the injury would be redressed by judicial relief. Id.

The parties' standing dispute here centers on whether the Congresswoman has experienced a concrete injury-in-fact. Beatty contends that she has suffered a concrete and particularized injury because "[s]he is a fiduciary charged with protecting the Center," and "as a direct result of her co-trustee[s'] unlawful actions, [she] cannot fulfill and is in breach" of her fiduciary duties. See Pl.'s Mot. for Part. Summ. J. ("Pl.'s PSJ Mot."), ECF No. 30-1, at 19–20. The Defendants disagree, arguing mainly that Beatty has already fulfilled any fiduciary duty she owes by registering her dissent to the renaming and filing this lawsuit. Defs.' Cross-Mot. at 17.

Representative Beatty has the better of the argument. In fact, her injury-in-fact is not nearly as "complicated" as the Defendants make it out "to be," Bost v. Ill. State Bd. of Elec., 607 U.S. 71, 73 (2026) (cleaned up), but given the considerable ink spilled on the subject in the parties' briefs, the Court will elaborate in perhaps greater-than-necessary detail.

a. Beatty's Legal Obligations as a Trustee

It is plain that, as a trustee, Beatty bears certain fiduciary duties to the Kennedy Center. One of her elemental duties is to "administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." Restatement (Third) of Trusts § 76(1). That duty applies equally to private and charitable trustees. See G. Bogert *et al.*, Bogert's The Law of Trusts and Trustees § 394 (May 2025 Update) ("Bogert's Law of Trusts") ("[A] charitable trustee has the same duty as a private trustee to administer the trust according to its terms and applicable law."). And a subcomponent of that duty is to "protect[] trust property." Restatement (Third) of Trusts § 76(2)(b).

Beatty has another legal obligation, as well. She must "use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress." Restatement (Third) of Trusts § 81(1)–(2); see also Restatement (Second) of Trusts § 224 (explaining that a trustee is liable to a beneficiary if he "neglects to take proper steps to compel his co-trustee to redress a breach of trust"). The Defendants insist that D.C. trust law governs here. See, e.g., Defs.' Cross-Mot. at 34. Assuming they are right, the District's Uniform Trust Code imposes a similar responsibility, unless the terms of the trust provide otherwise, see D.C. Code § 19-1307.03(g) ("[E]ach trustee shall exercise reasonable care to: (1) Prevent a cotrustee from committing a serious breach of trust; and (2) Compel a cotrustee to redress a serious breach of trust"). Notably, this duty of reasonable care attaches even where the trustee "does not join in" her co-trustee's conduct and thus is not otherwise "liable for the action." Id. § 19-1307.03(f). And it, too, applies with equal force in the charitable context. Id. § 19-1301.02 ("This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.").

If Beatty is right that changing the Center's name directly contravenes its organic statute, the renaming prevents her from fulfilling her fiduciary duty to administer the trust according to its terms and governing law, and more specifically to protect the trust *res*. See FAC ¶¶ 13–14, 74–76 (attesting that Beatty is harmed by the Defendants' actions because they "prevent her from fulfilling her statutory duties to maintain the Center as a living memorial to John F. Kennedy" and explaining, specifically, that the renaming violates the Kennedy Center's trust terms).[9] The renaming decision constitutes an alleged breach of trust that Beatty must take "reasonable

[9] Beatty's amended complaint is verified, see FAC at 37, which means that "it has the same evidentiary value as a plaintiff's affidavit or sworn declaration," Grimes v. District of Columbia, 794 F.3d 83, 94 n.5 (D.C. Cir. 2015).

care"—and is perhaps even obligated—to redress. In other words, as a trustee, Beatty has "standing to commence" legal proceedings to "secure compliance with [fiduciary] duties or otherwise to enforce the trust." Bogert's Law of Trusts § 394.

The Defendants insist that Beatty has "discharged" all pertinent fiduciary duties by "noting her dissent, seeking to convince her co-trustees not to proceed, and declining to join in the Center's renaming." Defs.' Cross-Mot. at 17. This assertion rests on shaky ground. For one thing, the parties agree that Beatty was not permitted to vote—or even speak—at the meeting where the Board voted to rename the Center. See Defs.' Resp. to SMF ¶ 15. So, she had no formal opportunity to dissent or persuade her colleagues to vote differently.

For another, even if Beatty *had* registered her dissent at the renaming meeting, she would not have fully discharged her legal duties. As previously noted, if Beatty is right on the merits, the renaming prevents her from administering the trust in accordance with its terms and governing statute. Common-law trust principles require a trustee to do more than merely oppose a breach of fiduciary duty by her colleagues; after the breach transpires, she must also "use reasonable care . . . to obtain redress," Restatement (Third) § 81(1)–(2). Framed another way, she must act to "[c]ompel a cotrustee to redress a serious breach." D.C. Code § 19-1307.03(g); see also Bogert's Law on Trusts § 584 ("[E]ven co-trustees who dissent have a duty to prevent their co-trustees from committing serious breaches of trust, and to require a co-trustee who does commit a serious breach to redress the breach." (citing Unif. Trust Code § 703(g))). Dissenting from a board decision may be enough to discharge a duty to take reasonable care to *prevent* a breach, but once the breach occurs, something more is required.

Beatty insists that "something more" necessarily entails an affirmative lawsuit. See PI Mot. Reply at 6. Common-law authority gestures in that direction—one wonders how else, aside

from a lawsuit, a trustee would be able to "compel" or "require" her co-trustees to redress a serious breach.[10] Yet the Court need not definitively resolve that question to find that Beatty has been injured. Even though she did not lead the charge to rename the Center or support the decision, she has suffered a harm because, due to her colleagues' alleged misfeasance, she cannot fulfill her duty to administer the trust in accordance with its terms and protect the trust *res* in the manner contemplated by the Kennedy Center's governing statute. And whether a lawsuit is the *only* way for a minority trustee to discharge her duty of reasonable care, assuming Beatty is right on the merits, she will satisfy her administrative duty if she prevails on her renaming claim. The satisfaction of that duty is a benefit that gives her a "personal stake" in this dispute. Bost, 607 U.S. at 76 (quoting FDA v. All. for Hipp. Med., 602 U.S. 367, 379 (2024)).[11]

[10] The Defendants suggested, at the motions hearing, that on Beatty's framing of her Article III injury, she entirely discharged her duty merely by *filing* the present lawsuit. As a result, they suggested the case may already be moot. See Mot. Hr'g Tr., ECF No. 44, at 51:10–18 ("[I]f the theory is she must sue to extinguish her liability, then we don't know why she would be entitled to anything more. Right? By . . . coming to federal court and opposing in that way, we think that's [in tension] with the idea that standing needs to remain throughout the case . . . Because if the idea is you have to file a lawsuit or else I'm going to potentially be sued, well the congresswoman filed a lawsuit."). This line of argument ignores Beatty's more fundamental obligation to administer the trust in accordance with its terms and protect the trust *res*. Playing courthouse "ding dong ditch" can hardly be said to satisfy these legal obligations.

[11] At the motions hearing, Defendants contended that if the crux of Beatty's theory of injury is a fear of future liability, that fear is too "speculative" to amount to an Article III injury. See Mot. Hr'g Tr. at 52:3–7; cf. Khalid v. TSA, 172 F.4th 866, 872 (D.C. Cir. 2026) (holding that speculative allegations of future possible injury do not satisfy Article III's requirements). But Beatty's theory of Article III harm does not strictly rely on some hypothetical lawsuit—though, as she points out, the possibility is far from fanciful, see PI Mot. Reply at 4 ("[A]t the last meeting of the Kennedy Center's Board, President Trump even raised the specter of suing past trustees for allegedly breaching their duties."); see also DCPL, No. 26-cv-981 (CRC) (in which the Board has been sued for allegedly violating its statutory obligations). Her principal theory of injury rests on the fact that she has been effectively induced to breach her duty to administer the trust and protect the *res*. Assuming she is right on the merits, that induced breach has already occurred, regardless of the likelihood of a suit against her in the future or the merits of her defense to any such suit.

b. Supreme Court Authority

Supreme Court precedent also lends clear support to the notion that trustees have Article III standing to enforce the terms of a trust and prevent or redress breach. Consider, first, Sprint Commc'ns Co., L.P. v. APCC Servs., which held that "an assignee of a legal claim for money owed has standing to pursue that claim in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor." 554 U.S. 269, 271 (2008) ("Sprint"). It was of no moment that the sought-after relief would ultimately run to the assignor, as "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit." Id. at 287. After all, the majority reasoned, "*[t]rustees bring suits to benefit their trusts*; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth." Id. at 287–88 (emphasis added).

The dissent, for its part, agreed that these types of suits fell well within Article III's bounds, albeit for more specific reasons. "Trustees hold legal title to the assets in the trust estate and have an independent fiduciary obligation to sue to preserve those assets," Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, explained. Id. at 305 n.2 (Roberts, C.J., dissenting). He elaborated that "[t]he trustee's discharge of its legal obligation is an independent, personal benefit that supports the trustee's standing to sue in federal court." Id. True, this observation is dicta in a dissent. But the majority likewise recognized that, "[t]o the extent that trustees, guardians ad litem, and the like have some sort of 'obligation' to the parties whose interest they vindicate through litigation, the same [was] true in respect to the [assignees]" in Sprint, who had a contractual obligation to litigate on behalf of the assignors and had standing by virtue of needing to fulfill that obligation. Id. at 288 (quoting the dissent at 305 n.2).

Both the majority and dissent in Sprint thus support Beatty's theory of Article III injury. As explored above, she owes fiduciary duties to the trust *res* and its beneficiaries, and she is required to fulfill them. Her discharge of those duties redounds to her advantage, representing an "independent personal benefit that supports [her] standing to sue in federal court." Id. at 305 n.2 (Roberts, C.J., dissenting). Even more fundamentally, as both the majority and dissent recognize, a trustee has a unique legal relationship with the trust *res*. She does not just represent the trust in court, as a lead plaintiff in a collective action might represent a broader class of individuals or an associational plaintiff might represent its members. She is not merely a "nominal party" standing in for some other "real party in interest." Id. at 305 n.2 (Roberts, C.J., dissenting). She is a steward of the *res*, holding a legal interest in it that is "subject to an equitable obligation to keep or use that interest for the" American public. Bogert's Law on Trusts § 1. And the legal rights she seeks to vindicate are "first-party, not third-party" ones. Sprint, 554 U.S. at 290.

Next, consider Thole v. U.S. Bank N.A., which concluded that beneficiaries of a defined-benefit retirement plan lacked Article III standing to sue under the Employee Retirement Income Security Act ("ERISA") because they would be entitled to the same monthly benefit payments whether they won or lost the lawsuit and thus had "no concrete stake" in the dispute. 590 U.S. 538, 541 (2020). The Defendants submit that Thole precludes Beatty's suit because she, too, has no stake in the dispute, as the harms stemming from renaming flow to the Kennedy Center and not to her personally.

Thole presents no such obstacle to Beatty's suit; like Sprint, it supports her theory of standing. The Thole plaintiffs were retirement plan beneficiaries who "possess[ed] no equitable or property interest in the plan." Id. at 538. Unlike the plaintiffs in Sprint, they had not been

"legally or contractually assigned" any other party's right to sue. Id. at 543. And unlike "guardians, receivers, and executors," the plaintiffs had not been "legally or contractually appointed to represent the plan." Id. at 544.

Trustees, by contrast, fall squarely into this latter bucket. Thole points out that, within the "regulatory phalanx" of actors who police trusts, "fiduciaries (including trustees who are fiduciaries) can sue other fiduciaries—and they would have good reason to sue if [as alleged in that case] one fiduciary were using the plan's assets as a 'personal piggybank.'" Id. at 545. Nowhere does Thole suggest, as the government insinuates in its papers, that "trustees may sue in federal court *only* to pursue financial claims for contribution or indemnity." Defs.' Cross-Mot. Reply, ECF No. 39, at 6 (emphasis added) (citing Thole). Case in point: one co-trustee suing another to prevent him from "using the plan's assets as a 'personal piggybank'" does not stand to gain financially from the suit. Instead, the first trustee does so to protect the trust property from being raided, to fulfill her legal responsibility as a fiduciary, and to protect herself from potential liability. She need not wait until a lawsuit is on the horizon to act.

Perhaps recognizing that Sprint and Thole are hard to reconcile with the notion that trustees lack standing to pursue claims for anything other than "contribution or indemnity," the Defendants retreated from this hardline position at the motions hearing. They acknowledged that a private trustee "has a legal interest, a property right" in the trust *res* and may sue to "vindicate" that interest and right when, for instance, the trust's assets have been depleted. Mot. Hr'g Tr., ECF No. 44, at 48:14–16. In the Defendants' view, such would be "an ordinary case" involving a "normal injury" that one would "see in federal court" "quite often." Id. at 48:17–20, 50:9–12. The case at bar is different, they maintained, because Beatty "is proceeding in a representational

capacity on behalf of the public," and enforcement of any such public interest is reserved for the "Executive Branch and not . . . any one individual." Id. at 48:21–49:3.

This distinction does not take the Defendants far, at least for Article III standing purposes. No one disputes that Congresswoman Beatty is the trustee of a charitable government trust, not a private trust. "The powers, duties, and liabilities of trustees of a charitable trust are, with only a few exceptions, the same as the powers, duties[,] and liabilities of private trusts." Bogert's Law of Trusts § 391. And a "charitable trustee has the same duty as a private trustee to administer the trust according to its terms and applicable law." Id. § 394. The charitable nature of the Kennedy Center trust does not magically relieve Beatty of the fiduciary duties that she would discharge by pursuing and prevailing in this lawsuit.

Nor does the Bogert treatise's description of the charitable trustee as proceeding in a "representational capacity" suggest that Beatty is somehow divested of the powers and duties of her private counterpart. See Mot. Hr'g Tr. at 48:21–49:3. As a prefatory matter, all trustees—whether private or charitable—are understood to "represent" the interests of the trust beneficiaries in some sense. Cf. Trustee, Black's Law Dictionary (12th ed. 2024) (defining "trustee" as "[s]omeone who *stands* in a fiduciary or confidential *relation to another*; esp., one who, having legal title to property, holds it in trust *for the benefit of another*" (emphasis added)).[12] More to the point, Beatty is justified in exercising her trustee powers precisely

[12] See also G.G. Bogert, Handbook of the Law of Trusts (1st ed. 1921) § 91 ("The trustee [generally] has implied authority to represent the cestui que trust in all actions respecting the trust estate . . ."); Corcoran v. Chesapeake & O. Canal Co., 94 U.S. 741, 745 (1876) (noting that a trustee has a "duty" to "represent and protect" the *cestui que trust*); Kerrison v. Stewart, 93 U.S. 155, 160 (1876) (explaining that under appropriate circumstances, a duly-appointed trustee "may represent his beneficiaries in all things relating to their common interest in the trust property" and "is in court for and on behalf of the beneficiaries").

because she "hold[s] a fiduciary interest that distinguishes" her from the public, Bogert's Law of Trusts § 413, so her grievances are anything but "generalized," Defs.' Cross-Mot. at 11–12.[13]

Relatedly, the Defendants seemed to imply at the hearing that Beatty's "property right" in the trust *res* is diminished because she is a charitable trustee. Mot. Hr'g Tr. at 50:11. If the Court correctly understands the Defendants' position, it would mean that Beatty could not sue to redress a co-trustee's hypothetical embezzlement from the trust's funds,[14] a rather surprising proposition. In any case, that position lacks a basis in trust law. The "hallmark of a charitable trust" is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for a charitable purpose." He Depu v. Yahoo! Inc., 950 F.3d 897, 903 (D.C. Cir. 2020) (quoting Restatement (Second) of Trusts § 348). To suggest that a charitable trustee lacks a property interest in the trust *res* would be to hamstring the former in both day-to-day trust management and larger administrative decisions. One wonders, for instance, how a charitable board of trustees could vote to authorize renovations to a trust property without a legal right to administer the trust *res* how they see fit.

[13] To the extent the Defendants suggest that the Attorney General has an acknowledged role in enforcing charitable trusts too, that point goes to Beatty's cause of action and "is distinct from Article III standing." He Depu v. Yahoo! Inc., 950 F.3d 897, 905 & n.11 (D.C. Cir. 2020).

[14] See Mot. Hr'g Tr. at 49:22–50:12 ("THE COURT: So I was going to ask you to respond to the hypothetical of . . . a two-trustee trust. One is embezzling from the trust. The other objects to it. Can't do anything about it and so sues to enforce the trust. Your position would be that that . . . plaintiff may well have standing, but that is not this case because the interest would be on behalf of the American people, even if the American people are losing the money that is being embezzled? MR. MAYERS: Yes, Your Honor, we think there is a difference. So the Marshall case [the plaintiff] point[s] to from the Northern District of Illinois and also the Sprint and Thole cases we discussed are all in those . . . asset depletion cases where the trustee would have this . . . property interest, this legal right. That's a much more normal injury that Your Honor would see quite often.").

To sum up, Representative Beatty's Article III standing is entirely consistent with dicta in Sprint and Thole confirming the ability of trustees to sue on another for violations of their fiduciary duties. The fact that she is a charitable trustee, rather than a private trustee, does not diminish the relevance of these on-point Supreme Court authorities.

c. History and Tradition

If the foregoing analysis were not enough, "history and tradition" confirm that Beatty's is the "type[] of case that Article III empowers federal courts to consider." TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021) (quoting Sprint, 554 U.S. at 274). It is "[un]dispute[d]" that "suits by trustees . . . make up a settled continuous practice 'of the sort traditionally amenable to, and resolved by, the judicial process.'" Sprint, 554 U.S. at 305 n.2 (Roberts, C.J., dissenting); see also Restatement (First) of Trusts § 200, cmt. d ("If there are several trustees, one or more of them can maintain a suit against another to . . . compel him to redress a breach of trust committed by him."). Charitable trusts, in particular, "have *long been* enforceable . . . by co-trustees[.]" Bogert's Law of Trusts § 967; see also Restatement (First) of Trusts § 391 cmt. b.

Prominent historical treatises underscore that courts regularly entertained suits between trustees. For instance, Justice Story's well-known 1844 treatise on equity jurisprudence described that "one trustee" may sue "another to compel to replace the trust stock," and in such an instance, "the *cestuis que trust* need not be made parties" for the action to be valid. Joseph Story, Commentaries on Equity Pleadings and the Incidents Thereof According to the Practice of the Courts of Equity, of England and America 245–47 (3rd ed. 1844); see also id. at 94–95 n.2 (explaining that "[i]n cases concerning trust property, . . . the *cestuis que trust* are always the persons interested in the subject of the suit, and yet they are very frequently not to be introduced

among the parties," "[w]here[as], for instance, there are trustees to sell an estate, receive the purchase money, and pay it to particular individuals . . .").[15]

The Defendants point out that it is not enough that "traditionally, trustees may bring actions to compel co-trustees in common-law courts"—it is the underlying *harm* that must be analogous, not the cause of action. Defs.' Cross-Mot. at 15–16. To be sure, cases like TransUnion and Spokeo hold that Congress cannot legislate an Article III injury into existence. But the history-and-tradition analysis asks whether the present injury is analogous to a harm "traditionally recognized as providing a basis for lawsuit in American courts." TransUnion, 594 U.S. at 427. Here, the answer to that question is undoubtedly yes. In the distant and more recent past, courts have routinely considered suits brought by trustees against current or former co-trustees accused of having engaged in improper conduct or breach of fiduciary duty. See, e.g., Elmendorf v. Lansing, 4 Johns. Ch. 562 (N.Y. Ch. Ct. 1820); Marshall v. Caldwell, 125 Mass. 435 (Mass. 1878); Laroe v. Douglass, 13 N.J. Eq. 308, 1861 WL 1979 (N.J. Ch. Ct. 1861); Crane

[15] Other treatises suggested that haling a scofflaw co-trustee into court was not just an option, but an obligation. "It is the *duty* of one trustee," an 1845 commentator on trusts wrote, "to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him (*a*), and if, the wrongful act has been already committed, to take measures by suit or otherwise to compel the restitution of the property and its application in the manner required by the trust (*b*)." James Hill, A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities 314 (1st ed. 1845) (emphasis added); see also James Hill, A Practical Treatise on the Law Relating to Trustees 433 (2nd ed. 1854) ("When more than one trustee is appointed, and all have accepted the trust, it is the duty of each one to protect the trust property from the acts of his colleagues."); Jairus W. Perry, A Treatise on the Law of Trusts and Trustees 530–31 (4th ed. 1889) ("In all cases, if a trustee becomes aware of any fact tending to show that his cotrustee is committing a breach of trust, or if he learns any fact endangering the trust fund, he must communicate it to his cotrustees or make application to the court, and take active measures to protect the fund, or he will be personally liable for its loss."); Bogert, Handbook of the Law of Trusts § 120 at 490 (similar). Although trust law has understandably evolved to limit liability for trustees who refuse to participate in their co-trustees' misconduct, historical commentators recognized that "a trustee is not absolutely and under all circumstances free from liability with respect to his co-trustees." John Pomeroy, Treatise on Equity Jurisprudence 2488–89 (4th ed. 1918–1919).

v. Hearn, 26 N.J. Eq. 378 (N.J. Ch. Ct. 1875); Morville v. Fowle, 144 Mass. 109 (Mass. 1887); Eastman v. Allard, 149 Mass. 154 (Mass. 1889); Crawford v. Nies, 220 Mass. 61 (Mass. 1914); Skinnell v. Mahoney, 197 A.D. 808 (N.Y. Sup. Ct. App. Div. 1921); Tracy v. Cent. Tr. Co., 327 Pa. 77 (Pa. 1937); Equitable Tr. Co. v. Schwebel, 32 F. Supp. 241 (E.D. Pa. 1940); Gilbert v. McLeod Infirmary, 219 S.C. 174 (S.C. 1951); see also Richards v. Midkiff, 48 Haw. 32 (Haw. 1964); Holt v. Coll. of Osteopathic Physicians & Surgeons, 61 Cal. 2d 750 (Cal. 1964).

Implicitly or explicitly, the basis for such suits is the trustee's need to protect the trust *res* and discharge her legal duty as a fiduciary. See, e.g., Crane, 26 N.J. Eq. at 381–82 (explaining that it was trustee's "duty" to "file[] his bill in this cause to restrain" his co-trustee from "expending" trust assets); Richards, 48 Haw. at 42 (basis for trustee's suit against co-trustees was trustee's common-law duty to compel co-trustees to redress their alleged breach).[16]

Thus, co-trustee actions to redress misconduct or breaches of trust have not just been categorically available for centuries, but also regularly litigated, without concern that the injury in question was somehow insufficiently personal to the trustee plaintiff. The historical evidence quiets any doubt that Beatty has established an injury-in-fact. Trustees have been suing each other for at least two centuries to enforce trust terms and fulfill their own legal obligations.

* * *

[16] See also Smith v. Pettigrew, 34 N.J. Eq. 216, 218 (N.J. Prerog. Ct. 1881) ("It is the duty of one trustee to protect the trust estate from any misfeasance by his co-trustee . . . and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property and its application in the manner required by the trust."); cf. Bartlett v. Hatch, 17 Abb. Pr. 461 (N.Y. Sup. Ct. 1864) ("I have . . . no doubt that a trustee may, in case of a threatened breach of trust by his colleague, institute an action for the purpose of restraining the threatened act, and it may be his duty to do this for his own protection and the protection of the property as it is the duty of every trustee to protect the trust property and faithfully execute the trust; and if he cannot do these without the aid of the court, I see no reason why he may not resort to the court for such purpose.").

With the injury-in-fact element of standing out of the way, the Court straightforwardly concludes that the causation and redressability requirements are satisfied. If Representative Beatty is right that the renaming violates the Kennedy Center's organic statute, and she has a cognizable personal injury stemming from the Board's failure to administer the trust in accordance with its governing terms, her injury is directly traceable to the renaming decision. And an order enjoining the renaming of the Kennedy Center without Congressional authorization would redress that injury.

Summing up, one of the questions posed by the Article III standing inquiry is whether the plaintiff has "anything to gain from this lawsuit." Fox v. McCormick, 20 F. Supp. 3d 133, 141 (D.D.C. 2013). The answer here is "a lot." The Congresswoman is one of a select group of individuals who possess a fiduciary duty to administer the Kennedy Center trust. If she is right on the merits and prevails on her renaming claim, she will have fulfilled her personal legal obligation to ensure that the Kennedy Center retains its original identity—meaning that she does not seek relief on some generalized ground or solely based on harm to a third-party. See Hollingsworth v. Perry, 570 U.S. 693, 708 (2013); see also Sprint, 554 U.S. at 290. The benefit of discharging that legal duty, coupled with guiding Supreme Court precedent and a strong historical foundation, is more than enough to satisfy the injury-in-fact element of the standing inquiry. The consequences of holding otherwise would ripple through the administration of all variety of trusts, potentially upending centuries of settled trust law in the process.[17]

[17] The Court also notes that the Defendants make no effort to distinguish contemporary case law confirming that trustee-against-trustee suits do not raise serious Article III hang-ups. See, e.g., Marshall as co-trustee of 4-M River Farm Tr. v. Munder, No. 23-cv-1985, 2023 WL 7325935, at *3 (N.D. Ill. Nov. 7, 2023); see also Cook v. Marshall, 126 F.4th 1031 (5th Cir. 2025); Brown v. Brown-Thill, 762 F.3d 814 (8th Cir. 2014); Grede v. Bank of N.Y. Mellon, 598 F.3d 899 (7th Cir. 2010); Monahan v. Holmes, 139 F. Supp. 2d 253 (D. Conn. 2001).

2. Section 76l(b) Renaming Claim

Reassured that Representative Beatty has Article III standing to challenge the renaming, the Court turns to the contents of her challenge.

a. Cause of Action

First, does Beatty have a cause of action? Section 76*l*(b) of the organic statute—coupled with Section 76k(e), which expressly contemplates judicial review of Board actions related to performing arts and the payment of trust funds—authorizes Beatty to sue her co-trustees to enforce the terms of the trust and to prevent or rectify a breach of trust. See Beatty, 2026 WL 712814, at *6–7. At the risk of repetition, the statute's language expressly bestows all the "usual powers and obligations" on trustees.[18] In so legislating, "Congress intended to impose on trustees traditional fiduciary duties," especially as the statute includes no "unequivocal[] express[ion]" of an "intent to the contrary." Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting NLRB v. Amax Coal Co., 453 U.S. at 330). "[M]uch as the Supreme Court has regularly turned to the Restatement and other authorities to construe trust responsibilities, it is appropriate for the district court to consult similar sources." Id. Such authorities confirm that the Kennedy Center trustees' "usual powers and obligations" include the ability to sue to enforce the terms of the trust.[19]

[18] Congress's unequivocal word choice distinguishes the Kennedy Center trust from other government trust relationships in which applicable treaties, statutes, or regulations have been held not to create judicially-enforceable fiduciary duties. See, e.g., Arizona v. Navajo Nation, 599 U.S. 555, 564 (2023); Power v. McDonough, 163 F.4th 1162, 1190–91 (9th Cir. 2025).

[19] See, e.g., Restatement (Second) of Trusts § 184 ("If there are several trustees, each trustee is under a duty to the beneficiary to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust."); id. § 391, cmt. b ("A suit for the enforcement of a charitable trust can be maintained by one or more of several trustees against the other trustees."); Restatement (Third) of Trusts § 81 ("Each trustee . . . has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain

The Defendants' principal rejoinder is that Beatty's asserted cause of action is foreclosed under D.C. law. See Defs.' Cross-Mot. at 33–34. In this jurisdiction, they point out, "the traditional rule has been that only a public officer, usually the state Attorney General" may "bring an action to enforce the terms of [a charitable] trust." Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990). "An exception to th[is] general rule . . . exists where an individual seeking enforcement of the trust has a 'special interest' in continued performance of the trust distinguishable from that of the public at large." Id. In order to proceed under the "special interest" exception, a plaintiff must demonstrate that she belongs to a "particular," "sharply defined," and "limited" class of potential beneficiaries and that she challenges more than "an ordinary exercise of discretion on a matter expressly committed to the trustees." Id. at 614–15. The Defendants contend that Beatty lacks a "special interest" and thus cannot maintain this suit.

Assuming the Defendants are correct that D.C. trust law governs here, which is not patently obvious, the Court stands by its rejection of the Defendants' argument in its TRO ruling: Hooker, its underlying rationale, and its progeny do not "restrict the availability" of a trustee's cause of action against her co-trustees. Beatty, 2026 WL 712814, at *8. For one thing, both statutory and common-law authorities that govern in the District acknowledge a co-trustee's ability to challenge a colleague's misconduct. Again, D.C.'s Uniform Trust Code provides both

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redress."); id. § 94(2), cmt. c (authorizing "suit for the enforcement" of charitable trust by co-trustee); see also Bogert's Law of Trusts § 394 (explaining that a co-trustee may "commence" legal "proceedings to enforce charitable trust); id. § 413 ("In certain instances, standard trust doctrine allows trustees or successor trustees to sue cotrustees or trustees of the same trust."); id. § 871 ("The action to obtain relief for a breach of trust may be brought on behalf of the beneficiary . . . by a co-trustee[.]"); Scott and Ascher on Trusts § 37.3.10 (6th ed. 2023) ("Although it is frequently said that only the Attorney General has the power to enforce charitable trusts, this is not strictly true. When there are several trustees, any one or more of them may maintain an action against the others to enforce the trust or to compel redress of a breach of trust.").

that trustees "shall exercise reasonable care" to "[p]revent a cotrustee from committing a serious breach of trust" and "[c]ompel a cotrustee to redress a serious breach of trust." D.C. Code § 19-1307.03(g). It further provides that the settlor "of a charitable trust, *among others*, may maintain a proceeding to enforce the trust." Id. § 19-1304.05(c) (emphasis added).

For another, local case law bolsters Beatty's position. In 2002, the D.C. Court of Appeals considered whether the directors of a local charitable corporation known as the Washington City Orphan Asylum could sue to challenge the institution's board of trustees' breach of fiduciary duty, among other alleged torts. See Bd. of Dirs. Of the Wash. City Orphan Asylum v. Bd. of Trs. of the Wash. City Orphan Asylum, 798 A.2d 1068 (D.C. 2002). The directors sued in their capacity either as "co-trustees or sub-trustees, or as persons holding a special interest in a charitable trust under" the Restatement and Hooker. Id. at 1075. The Court of Appeals concluded that the directors had "made colorable arguments regarding their status as persons who have a special interest in the enforcement of a trust or as intermediate beneficiaries of a trust sufficient to give them standing," but did not address whether the directors could independently sue as trustees. Id.

A subsequent Court of Appeals decision—Family Fed'n for World Peace and Unification Int'l v. Hyun Jin Moon—clarified that even though charitable corporation directors enjoy special interest standing, they *also* "fall within the definition of 'among others' in D.C. Code § 19-304.05 . . . for enforcement of charitable trusts" and therefore may maintain a proceeding to enforce the trust, separate and apart from their special interest standing. 129 A.3d 234, 244 n.16 (D.C. 2015) ("Moon I"). Ten years later, the case made its way back to the Court of Appeals, which again applied the special interest standing test as a "prerequisite for certain private plaintiffs who wish to challenge the actions of a 'charitable trust[.]'" Family Fed'n for World

Peace and Unification Int'l v. Hyun Jin Moon, 338 A.3d 10, 27 (D.C. 2025) ("Moon II"). But the Court of Appeals was careful to note once more that "[s]ome private plaintiffs do not need to establish special interest standing where their standing is established by statute." Id. at 27 n.7.

The Court thus remains persuaded that Beatty's cause of action hews to D.C. trust law. To be sure, public officers have unique common-law standing to enforce the terms of a charitable trust. See, e.g., Mount Vernon Mortg. Corp. v. U.S. by Att'y. Gen., 236 F.2d 724, 725 (D.C. Cir. 1956) (recognizing the Attorney General's special capacity to "sue to prevent" a charitable trust's property "from being diverted to private profit"). And "the traditional rule" has been that others do not have that same standing. Hooker, 579 A.2d at 612. Otherwise, a risk exists that "any and all" *beneficiaries* of a charitable trust—who are a "large and constantly shifting" class—might engage in "vexatious litigation" and place "recurring burdens on the trust res." Id. at 611–12 (quoting, in part, G. G. Bogert, The Law of Trusts and Trustees § 411 (2d ed. 1977)).

Allowing trustees to sue pursuant to the D.C. Code's "reasonable care" provision does not upset this careful balance. D.C. Code § 19-1307.03(g). The statute carves out a sharply defined and limited group—trustees—who are specially positioned to challenge trust-related misconduct. And consistent with Moon I and II, trustees fall within the category of "others" who, alongside settlors and directors, may "maintain a proceeding to enforce a trust." Id. § 19-1304.05(c). Read in parallel with the Restatement and the Bogert treatise's embrace of trustee-against-trustee suits, cf. He Depu, 950 F.3d at 901 n.2 (recognizing these sources as "authoritative"), D.C. trust law does not foreclose Beatty's cause of action.[20]

[20] What's more, permitting trustees to sue to protect trust property strikes the Court as entirely sensible. The Attorney General "serves as a potential surrogate who is able to represent the public interest," and thus represents a "*supplement* to, rather than a *replacement* for, the trustees acting in the name of [a charitable trust] to vindicate [the trust's] rights." In re Bos. Reg'l Med. Ctr., Inc., 328 F. Supp. 2d 130, 147 (D.D.C. 2004) (emphasis added). It is crucial

b. Merits

With that threshold issue out of the way, it is time to get down to brass tacks. May the John F. Kennedy Center for the Performing Arts be renamed absent Congressional authorization? The answer, plain from the face of the statute, is no. Nor can any other individual be memorialized on the front portico of the building. There are no genuine disputes of material fact on this score, so Beatty is entitled to summary judgment on her renaming claim.

To start, the statute instructs the Board to "construct for the Smithsonian Institution . . . a building *to be designated as* the John F. Kennedy Center for the Performing Arts," built on a particular parcel of land in the District overlooking the Potomac River and nested between Rock Creek Parkway, the Potomac River Freeway, and the Roosevelt Bridge. 20 U.S.C. § 76i(a) (emphasis added). The verb "designate" possesses a particular meaning. Around the time of the Kennedy Center's naming, Black's Law Dictionary tells us it meant to "indicate or set apart for a purpose or duty," Designate, Black's Law Dictionary (4th rev. ed. 1968); today's edition defines it as "represent[ing] or referr[ing] to (something) using a particular symbol, sign, name, etc.," , Designate, Black's Law Dictionary (12th ed. 2024). Congress intended the Kennedy Center, so "*designated* by [the] subchapter," to be "the sole national memorial to the late John Fitzgerald Kennedy within the city of Washington and its environs." 20 U.S.C. § 76q (emphasis added).

The evolution of the organic statute over time is also telling. The Center was originally known as the "National Cultural Center." National Cultural Center Act § 2(a). In 1964, Congress amended the statute to "renam[e] the National Cultural Center as the John F. Kennedy

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that a sovereign have the power to step in to enforce a charitable trust where the trustees have been derelict. But all else equal, a "charity's own representative has at least as much interest in preserving the charitable funds as does the Attorney General who represents the general public. The cotrustee is also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention." Holt, 61 Cal. 2d 750, 756 (citation omitted).

Center for the Performing Arts," which entailed "striking out" the former name "each place that it appear[ed]" in the original act and replacing it with the latter. Pub. L. No. 88-260, 78 Stat. at 4. It is hard to imagine a more intentional legislative effort to call the Center by its chosen name.

There is more. Congress honored the fallen president not just with a building, but an entire institution. According to the statute,

> [t]here is established in the Smithsonian a *bureau*, which shall be directed by a board to be known as the Trustees of the *John F. Kennedy Center for the Performing Arts* . . . whose duty it shall be to maintain and administer the *John F. Kennedy Center for the Performing Arts and site thereof* as the National Center for the Performing Arts, a *living memorial* to *John Fitzgerald Kennedy*[.]

20 U.S.C. § 76h(a)(1) (emphasis added). The law refers to the institution as the "John F. Kennedy Center for the Performing Arts" no fewer than two dozen times. There can be no confusion about the name Congress gave it.[21]

The organic statute also takes pains to ensure that the Kennedy Center's public spaces honor President Kennedy and President Kennedy alone. With a handful of enumerated exceptions that do not apply here,[22] "the Board shall assure that after December 2, 1983, no

[21] The Defendants contend that even if the "building" is to be named the Kennedy Center, the name of the complex more broadly—including the building and the "site thereof"—is in fact the "National Center for the Performing Arts." See Defs.' Cross-Mot. Reply at 17 n.6. That contention is beside the point—even if Congress gave the Center some *third* name, it certainly has not authorized the Board to rename the institution after President Trump. The Defendants' contention is wrong in any event. Properly read, the cited language reflects Congress's directive that the Board of Trustees should "maintain and administer" the Kennedy Center and site thereof "*as* the National Center for the Performing Arts," just as it should administer the institution *as* "a living memorial to John Fitzgerald Kennedy." 20 U.S.C. § 76h. Defendants are therefore hard-pressed to argue that the institution has been the "National Center for the Performing Arts" this whole time.

[22] The statute permits "any plaque acknowledging a gift from a foreign country"; "any plaque on a theater chair or a theater box acknowledging the gift of such chair or box"; and "any inscription on the marble walls in the north or south galleries, the Hall of States, or the Hall of Nations acknowledging a major contribution," "which plaque or inscription is permitted under policies of the Board in effect on December 2, 1983." 20 U.S.C. § 76j(b)(2).

additional memorials or plaques in the nature of memorials shall be designated or installed in the public areas of the John F. Kennedy Center for the Performing Arts." Id. § 76j(b)(1). The prohibition is unambiguous, and the narrow exceptions only serve to reinforce the breadth of the bar on public memorials and plaques. Indeed, Congress was so wary of diluting the power of the public dedication to the slain president that, when it authorized the REACH expansion in 2012, it noted that the Board could "acknowledge private contributions" that made the expansion possible, but only "in the interior of the project" and not "on the exterior[.]" Id. § 76i(c)(3).

Taken together, these citations establish that the Kennedy Center must be named for, and is meant to honor, President Kennedy alone. The Defendants have identified no statutory sources that empower the Board to change the name or designate new memorials in the public areas of the Center without Congressional approval. To the contrary, Congress has definitively established the Center's name and prohibited the installation of any "memorials or plaques in the nature of memorials," aside from a few minor carveouts not relevant here.

Accordingly, in voting to formally rename the Center after President Trump and allowing his name to be mounted alongside President Kennedy's on the front portico of the main building, the Board has violated the terms of the trust and governing statute. Cf. Restatement (Third) of Trusts §§ 70 (trustee's powers "limited by statute or terms of trust"); 76 (requiring trustees to administer the trust "in accordance with the terms of the trust and applicable law").

The Defendants do not contest that the Center must be named for President Kennedy. Nor do they deny that memorials in public spaces of the Center are generally verboten or suggest that the new lettering falls into one of § 76j(b)'s enumerated exceptions. They instead submit that everything is not what it seems. This decision was not a renaming, insist the Defendants, and President Trump's name on the front portico is not a "memorial." Not so fast.

On the first point, Defendants posit that the "Trump Kennedy Center" is merely a "secondary name." See Defs.' Cross-Mot. at 31–32. That convenient reframing is too cute by half—and belied by the record. According to White House Press Secretary Karoline Leavitt, the Board formally "voted" to "*rename* the Kennedy Center to the Trump-Kennedy Center" on December 18, 2025. Defs.' Resp. to SMF ¶ 18 (emphasis added). The next day, President Trump's name was affixed to the front portico of the main Kennedy Center building—*above* President Kennedy's, to boot. Id. ¶ 19. The joint name has since been featured on the Center's official website, email communications, letterhead, and logo. Id. ¶¶ 22–24, 26–28. The Center even filed a trademark application with the institution's new name and logo. Id. ¶ 25. These official changes reflect far more than an innocuous nicknaming.

The rechristening is not, as Defendants suggest, like calling the "Bureau of Consumer Financial Protection" the "Consumer Financial Protection Bureau," which is merely a clerical rearrangement. Nor is it akin to calling the Federal National Mortgage Association "Fannie Mae," which, as even the Defendants admit, is simply a "play on the pronunciation of its acronym." The administration's efforts to alter the names of other institutions—calling the Department of Defense the "Department of War," for example—are beside the point. Most fundamentally, none of these examples implicate a presidential memorial that was legislatively intended to honor a specific public figure. The "Trump Kennedy Center" label adds an entirely new name to the Center's formal title and relegates President Kennedy's name to second place. If that is not a renaming, what is?

On the second point, Defendants suggest that physical addition of President Trump's name to the face of the building is not a "memorial" or "plaque in the nature of" a memorial under § 76j(b). That suggestion is risible, both in light of the record evidence and as a matter of

common sense. The lettering literally reads: "The Donald J. Trump and John F. Kennedy *Memorial* Center for the Performing Arts." Defs.' Resp. to SMF ¶ 17 (emphasis added). When Press Secretary Leavitt announced the Board's vote to change the Kennedy Center's name, she explained that the decision was taken "because of the unbelievable work President Trump ha[d] done over the last year in saving the building," "[n]ot only from the standpoint of its reconstruction, but also financially, and its reputation." Pl.'s PSJ Mot., ECF No. 30-7, Ex. HH ("Leavitt X Post") at 1. "Congratulations to President Donald J. Trump," her social media post continued, "and likewise, congratulations to President Kennedy, because this will be a truly great team long into the future! The building will no doubt attain new levels of success and grandeur." Id. Similarly, the Center's vice president of public relations Roma Daravi told Fox News that the vote "recognizes that the current Chairman saved the institution from financial ruin and physical destruction." PI Mot. Reply, ECF No. 37-2, Ex. MM (Fox News reporting) at 2. Absent any contrary evidence from the Defendants, the Court cannot but conclude that the renaming was meant to honor President Trump's work on the Center. And no wonder—why add an individual's name to the very title of an institution if not to commemorate him?

The Defendants also quibble with the terms of Congress's clear proscription, arguing, for instance, that the lettering on the front portico is permissible because a "memorial" can only honor some "past impression" of a person or entity, and Mr. Trump is the sitting president. This is more than a stretch. Defs.' Cross-Mot. at 33–34. As a textual matter, Congress has not just banned public "memorials" at the site, but "plaques *in the nature of* memorials." 20 U.S.C. § 76j(b)(1). In any event, according to the Press Secretary, the "Trump Kennedy Center" name recognized the "unbelievable work President Trump" *had already done* to "salvag[e]" the

building during the first year of his second term. See Leavitt X Post at 1. The renaming was thus an effort to ensure that future visitors would be aware of the President's "past" work.

At the motions hearing, the Defendants pressed that the "best" way to read 20 U.S.C. § 76j(b) was as a prohibition on memorializing "deceased" individuals, based on a passing reference to a piece of legislative history that they did not cite in their briefs. See Mot. Hr'g Tr. at 63:4–64:21. But nothing in the plain text of the statute endorses such a constricted reading. And nothing in the ordinary meaning of "memorial" suggests that the word *necessarily* denotes posthumous commemoration, even by the Defendants' own cited dictionary definition. Cf. Scalia & Garner, Reading Law 69–72 (describing the ordinary-meaning canon).

In sum, the Board clearly violated the Kennedy Center's organic statute—and the terms of the trust—when it formally renamed the Center after President Trump and memorialized him on the face of the building. There is no genuine dispute of material fact on this point, just a lackluster attempt to recast the renaming as something it was not: a casual nicknaming. Beatty is therefore entitled to summary judgment on Count One of her FAC.

3. Ultra Vires Claim

In the event that Section 76*l*(b) does not establish a cause of action by which the Congresswoman may challenge the unlawful conduct of her colleagues, her fall-back *ultra vires* claim embedded in Count Four of the FAC would do the trick. Such a claim is available when a government entity or official acts "outside of the authority Congress granted." Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv., 26 F.4th 960, 970 (D.C. Cir. 2022). "To prevail on an ultra vires claim, the plaintiff must establish that (1) review is not expressly precluded by statute, (2) there is no alternative procedure for review of the statutory claim, and (3) the challenged action is plainly in excess of the agency's delegated powers and contrary to a specific prohibition

in the statute that is clear and mandatory." Glob. Health Council v. Trump, 153 F.4th 1, 20 (D.C. Cir. 2025) (cleaned up). The third requirement means that "[o]nly error that is patently a misconstruction of the [relevant statute], that disregards a specific and unambiguous statutory directive, or that violates some specific command of a statute will support relief." Fed. Express Corp. v. U.S. Dep't of Commerce, 39 F.4th 756, 764 (D.C. Cir. 2022) (cleaned up) ("FedEx"); see also Changji Esquel Textile Co. Ltd. v. Raimondo, 40 F.4th 716, 722 (D.C. Cir. 2022).

As *ultra vires* review "could become an easy end-run around the limitations" of judicial review statutes, the Supreme Court has "strictly limited" its scope. Nuclear Reg. Comm'n v. Texas, 605 U.S. 665, 681 (2025). The exception does not apply "simply because" an administrative action "does not comport with law." Id. (cleaned up). Rather, the challenged conduct must be patently "unauthorized by any law and in violation of the rights of the individual." Id. (cleaned up). Due to these stringent requirements, an *ultra vires* claim is often characterized as a "Hail Mary pass." Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009). Still, "it is not insurmountable." Nat'l Trust for Hist. Pres. v. Nat'l Park Serv., No. 25-cv-4316 (RJL), 2026 WL 877779, at *6 (D.D.C. Mar. 31, 2026) (referencing successful *ultra vires* claim in lower court decisions leading to Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026), as well as Nat'l Ass'n of Postal Supervisors, 26 F.4th at 972 and Chamber of Comm. of U.S. v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996)), op. clarified, 2026 WL 1027744 (D.D.C. Apr. 16, 2026).

If the Section 76*l*(b) claim is not available to Congresswoman Beatty, the three *ultra vires* criteria are satisfied here. *First*, judicial review is not expressly precluded by the Kennedy Center's organic statute. Again, review is specifically contemplated by 20 U.S.C. § 76k(e), which provides that the "actions of the Board relating to performing arts and to payments made

or directed to be made by the Board from any trust funds shall not be subject to review by any officer or agency *other than a court of law*" (emphasis added).

Second, if a cause of action under Section 76*l*(b) were unavailable, there would be no alternative procedure for review of Beatty's claim because the Kennedy Center does not qualify as an "agency" under the APA. Cf. Dong v. Smithsonian Inst., 125 F.3d 877, 882 (D.C. Cir. 1997) (holding that the Smithsonian does not qualify as an "agency" for APA purposes).

And *third*, as the Court has just concluded, the Kennedy Center statute makes abundantly clear that the Center is to be named after John F. Kennedy alone. As a result, the Center's renaming plainly "disregards a specific and unambiguous statutory directive" and "violates [a] specific command of a statute." FedEx, 39 F.4th at 764. Placing President Trump's name on the front portico of the building further contravenes the organic statute's unequivocal prohibition on additional memorials in the Center's public areas. The Defendants cite, and the Court can find, no authority allowing the Board to formally and unilaterally change the institutional name Congress has chosen. Moreover, the violation infringes on Beatty's individual right to "carry out the terms and purposes of the trust" consistent with her fiduciary duties. See Restatement (Third) of Trusts § 70; see also 20 U.S.C. § 76*l*(b).

The Court thus finds that, if the renaming claim is found not to be actionable under Section 76*l*(b), this case presents one of the rare situations in which the "Hail Mary" pass of an *ultra vires* claim finds the hands of a receiver in the end zone. Staubach to Pearson, indeed.

4. Remedy

Representative Beatty requests both declaratory and permanent injunctive relief. In light of the merits analysis above, the Court will enter summary judgment in Beatty's favor on Count One of the FAC, declaring that Congress has named the John F. Kennedy Center for the

Performing Arts in honor of President Kennedy and that the formal renaming of the Center as the "Trump Kennedy Center" (in that or any related permutation) without Congressional authorization is unlawful and unenforceable.

As for the requested injunctive relief, "[a] plaintiff seeking a permanent injunction 'must satisfy a four-factor test before a court may grant such relief.'" Anatol Zukerman & Charles Krause Reporting, LLC v. USPS, 64 F.4th 1354, 1364 (D.C. Cir. 2023) (quoting eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)). She must demonstrate that (1) she has "suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "that the public interest would not be disserved by a permanent injunction." Id. (quoting eBay, 547 U.S. at 391).

The Defendants' arguments against a permanent injunction on renaming largely echo their challenges to Beatty's Article III standing, which the Court has already rejected. Beatty's inability to administer the trust in accordance with its governing statute is an irreparable injury that the Court cannot fix by awarding money damages or remedies available at law; only an injunction prohibiting the Board from continuing to effectuate its unlawful decision will place Beatty in good stead as to her statutory and fiduciary duties.[23]

[23] The Court also acknowledges the apparent damage that the renaming has caused to the trust *res* that Beatty is charged with protecting. The parties agree that "[f]ollowing the renaming," many artists canceled upcoming performances, alluding to their discomfort with the changes that the Kennedy Center's new leadership had wrought. See Defs.' Resp. to SMF ¶ 34; see also Am. Amicus Br. at 15–16. A few weeks after the renaming, the Washington National Opera, the Kennedy Center's resident company since 1971, announced it would part ways with the institution. Defs.' Resp. to SMF ¶ 35. Ticket sales in early 2026 experienced a precipitous drop as compared to prior years, as did viewership of the Kennedy Center Honors broadcast which took place a few days after the renaming. Id. ¶ 36; see also Am. Amicus Br. at 15.

The balance of hardships also strongly favors the Congresswoman. The cost of removing the "Trump Kennedy" name from the Center's façade, website, and official materials are *de minimis* and, of course, stem from the Board's own unlawful decision.[24] The Defendants have pointed to no "public interest" that would be "disserved" by permanently enjoining the renaming. And "[t]here is generally no public interest" in the "perpetuation" of "unlawful" governmental action. League of Women Voters of the U.S. v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016).

In sum, the Court rules that Representative Beatty is entitled to a permanent injunction prohibiting the Defendants from effectuating the formal renaming of the Kennedy Center in honor of President Trump unless they receive Congress's approval to do so. And because the Defendants are currently in violation of Congress's express statutory direction, the Court will order that they remove President Trump's name from the institution's title, as represented on the façade of the Center, any other physical or digital signage, and official materials.

B. Voting

Moving along, the Defendants have cross-moved for summary judgment on Beatty's claim that she has a legal right to vote as an *ex officio* Board member. Although Beatty did not

[24] In another last-ditch effort, the Defendants have moved for leave to file a supplemental declaration by Mr. Floca, which posits that enjoining the Center's name change would cause irreparable harm to the Kennedy Center. According to Floca, removing President Trump's name would "sever[]" his connection to "vital fundraising" and thereby impair artistic programming and render the "continuation of . . . operations financially nonviable." See Defs.' Mot. for Leave to File Suppl. Decl., ECF No. 47.

The Court will deny the motion given the unexplained and unjustified delay in its filing. The declaration has zero evidentiary value in any case. First, it lacks a factual basis and is grounded on Floca's unsupported opinion alone. There is no proof that current or future donations hinge on President Trump's name being on the building. Second, the declaration is internally inconsistent in suggesting that the Center has already amassed millions in contributions yet would be in financial ruin if Trump's name were excised from the title. Third, it is contradicted by the record, including Mr. Grenell's rosy assessment of fundraising prior to the name change. In short, there is no competent evidence that removing the Trump name would prevent the Center from fulfilling its artistic mission, as it has done for the last sixty years.

move for partial summary judgment on this issue initially, she responded to the Defendants' cross-motion by requesting that the Court grant summary judgment in her favor on this issue, noting that "district courts possess the authority to enter summary judgment against a party *sua sponte*" as long as "the losing party was on notice that she had to come forward with all her evidence." Athridge v. Rivas, 141 F.3d 357, 361 (D.C. Cir. 1998) (cleaned up). Both parties have now had a full opportunity to argue and present evidence on the voting question, and neither opposes treating the issue as one on which each side has effectively cross-moved for summary judgment.

1. Article III Standing

Article III "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." TransUnion, 594 U.S. at 431. Here, as the government recognizes, see Defs.' Cross-Mot. at 11 n.2, Beatty has standing to challenge the Board's decision to strip her of her right to vote on trust matters—which, if she is correct on the merits, is a right that belongs to her personally. Being deprived of the right to vote is a concrete and particularized injury, which is causally related to the challenged bylaw amendments and would be redressed by an order enjoining the implementation of the amendments to the extent they prevent Beatty from voting.

2. Section 76l(b) Voting Claim

a. Cause of Action

For the reasons laid out above, Beatty has a valid cause of action under Section 76*l*(b), as she has challenged the Board's bylaw amendments as inconsistent with the organic statute and governing terms of the trust, see FAC ¶ 87. The Court approaches the availability of an alternative *ultra vires* cause of action with more skepticism. The organic statute does not

expressly state whether all trustees have the right to vote. And it expressly "authorize[s]" the Board "to make such bylaws, rules, and regulations, as it deems necessary for the administration of its functions . . . including, among other matters, bylaws, rules, and regulations relating to the administration of its trust funds and [its own] organization and procedure[.]" 20 U.S.C. § 76(a). Because the requisite statutory interpretation on this claim is more involved, the Court reviews Beatty's right to vote through her Section 76*l*(b) claim alone.

b. Merits

Turning to the merits of that claim, the Court observes that there remains a factual dispute as to whether the Board has historically let *ex officio* members vote. Were that dispute material, summary judgment for either party would be premature. But the parties have now apparently converged on the understanding that the voting rights of *ex officio* Board members is a question of statute, not historical practice. See Defs.' Cross-Mot. at 35–36; PI Mot. Reply at 19–23. The Court agrees and therefore will not defer a summary judgment ruling.

The Court starts by re-treading some old analytical ground. See Beatty, 2026 WL 712814, at *12. Once again, the Kennedy Center statute confers "the usual powers and obligations of a trustee" on the Board's individual members. 20 U.S.C. § 76*l*(b). Each trustee has a "duty and the right to participate in the administration of the trust," except "as otherwise provided by the terms of the trust." Restatement (Third) of Trusts § 81(1). Said another way, trustees have both an obligation and an opportunity to participate in trust decision-making, whether or not that takes the precise form of casting a vote. Cf. id. § 39, cmt. a ("[W]hen feasible all trustees must be consulted before decisions are made.").

This default rule is entirely sensible; after all, if an individual joins a deliberative body, but is then entirely "wall[ed] . . . off" from its operations, her membership is "render[ed] . . .

essentially meaningless." Cummock v. Gore, 180 F.3d 282, 291 (D.C. Cir. 1999). To render Representative Beatty's Kennedy Board membership "meaningless" would not only contravene common-law trust principles, but also by extension, Congress's chosen language. Still, it remains unclear whether a trustee must be able to *vote* in order to participate meaningfully in the trust's affairs. For guidance, the Court turns back to the organic statute.

Congress has delineated in granular detail whom the Board "shall be composed of." See 20 U.S.C. § 76h(a)(2). It has permitted the Board to "function notwithstanding vacancies and twelve members of the Board shall constitute a quorum for the transaction of business." See id. § 76*l*(a). Furthermore, the Board is "authorized . . . to make such bylaws, rules, and regulations, as it deems necessary for the administration of its functions under this subchapter, including, among other matters, bylaws, rules, and regulations relating to the administration of its trust funds" and, relevant here, "the organization and procedure of the Board." Id. (emphasis added).

But the statute says nothing explicit about which members may or may not vote. How are we to read that silence, in light of the other provisions just mentioned? Though somewhat of a close question, the Court remains persuaded that each Board member identified in § 76h(a)(2) is entitled to vote at Board meetings.

First, since the time of the organic statute's first enactment, the term *ex officio* has denoted a position, power, or privilege that is held by virtue of a particular office. See Ex officio, Webster's New Dictionary of the American Language (1957) (defining the term as "by virtue of one's office, or position"); see also Ex officio, Black's Law Dictionary (4th ed. rev. 1968) (defining the term as "[f]rom office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office"). In the trust context, the phrase does not inherently connote that a trusteeship is merely honorary. In fact, though "[t]he

term is often misused as a synonym for 'nonvoting,'" "an ex officio member is a voting member unless the applicable governing document provides otherwise." Ex officio, Black's Law Dictionary (12th ed. 2024).

Next, the Center's organic statute does not distinguish between general trustees and *ex officio* members in any way, other than to identify who they are, spell out how they are appointed, and specify the term length for general trustees. See 20 U.S.C. § 76h(a)(2). Coupled with the fact that trustees possess "all the usual powers and obligations . . . in respect of all trust funds" they collectively administer, id. § 76*l*(b), the lack of any meaningful distinction between general and *ex officio* trustees reinforces a baseline presumption that they possess identical "powers and obligations" under trust law.[25] That presumption is further bolstered by the 1994 amendments to the Kennedy Center statute, which added several new *ex officio* members to the Board. In a corresponding House Report, legislators explained that "[a]lthough these trustees are ex officio, they are permitted to vote." H.R. Rep. No. 103-453, pt. 1, at 11 (1994). Though this language did not make it into the text of the statute, it offers at least some indication that Congress did not intend to preclude *ex officio* trustees from voting in Board proceedings.

If trustees presumptively possess the right to vote, what, if anything, authorizes the Board to unilaterally strip certain trustees of voting rights? The body may, of course, make "bylaws,

[25] Both sides have proffered a laundry list of U.S. Code provisions dealing with the voting status of other federal board or commission members. See PI Mot. at 13–16 (collecting citations); Defs.' Cross-Mot. at 35–36 (same). Congress has, in other contexts, specified that such are non-voting or voting. And it has sometimes specified that non-voting members are to participate in an "advisory capacity." See, e.g., 15 U.S.C. § 657u(b)(2); 12 U.S.C. § 5321(b)(2). But this variety of citations, none of which appear to deal with a trust instrumentality, is not especially helpful in elucidating what Congress meant when it conferred the "usual powers and obligations" on Kennedy Center trustees. The Court thus stands by its conclusion that the lack of distinction between general and *ex officio* board members, coupled with the "usual powers and obligations" language, places trustees on a default level playing field when it comes to voting.

rules, and regulations" as "it deems necessary for the administration of its functions," "including among other matters, bylaws, rules, and regulations relating to the administration of its trust funds and the organization and procedure of the Board." 20 U.S.C. § 76*l*(a). But this provision is not a catch-all allowing the Board to regulate any subject not expressly mentioned in the statute. Where possible, courts are to give "effect" to "every clause and part of a statute." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (citation omitted). The phrase "necessary for the administration of [the Board's] functions" must be doing some work here, limiting the scope of the Board's otherwise broad power to make its own procedural rules.

Stripping trustees of their right to vote in *any* Board matter does not strike the Court as "necessary" for "administrati[ve]," "organization[al]," or "procedur[al]" purposes. The right to vote implicates and shapes a trustee's core fiduciary duties. It differentiates trustees with decision-making authority from those who merely advise. Of course, not all trustees vote on all trust business. In the normal course, the chairperson, secretary, and treasurer handle housekeeping matters. Some decision-making power is duly delegated to committees, sub-committees, and agents. Officers, executives, and staff handle quotidian management issues. Notwithstanding this ordinary dispersion of authority, however, a trustee's *categorial* right to vote is substantive—rather than organizational or procedural—in nature. And the Court discerns nothing in the statutory terms of the Kennedy Center trust that empowers the Board to deprive trustees of their right to vote altogether.

As a practical matter, adopting the Defendants' construction of the organic statute could lead to very strange outcomes. The most explicit textual guardrail on the Board's administrative function is that a quorum of twelve members is required to "transact[]" its "business." 20 U.S.C.

§ 76*l*(a). On the Defendants' reading of the statute, the Board could decide to strip all but twelve arbitrary members of the right to vote. Or it could decide to vest voting rights in *ex officio* members alone, leaving general trustees powerless. Such a result is hard to square with a statute that affords trustees the "usual" common-law "powers and obligations," without regard to their *ex officio* or general status.

The Defendants suggest in their final reply brief that the statute's generic distinction between *ex officio* and general trustees itself "provides a meaningful bulwark" against the absurd results noted above. Defs.' Cross-Mot. Reply at 20–21. But they backtracked on that stance at the motions hearing when confronted with the following hypothetical. Say that after some future presidential election but before inauguration, the Center's general trustees—who have been appointed by the now-lame-duck president—vote to strip the voting rights of all general trustees moving forward because they worry that future general trustees will lead the trust in a disagreeable direction. Such a move, the Defendants said, would *not* "violate [Section] 76*l*." Mot. Hr'g Tr. at 67:18–25. But "perhaps" it could present "a problem under general trust principles." Id. at 68:3–5.

That last caveat proves too much. In what has become a familiar refrain, the Kennedy Center statute confers the "usual powers and obligations" on trustees in their administration of the trust *res*. If voting rights gamesmanship is inconsistent with "general trust principles," then it is in direct tension with the statute, which again reflects no distinction between general and *ex officio* trustees aside from their mode and length of appointment.

To recap, the Kennedy Center's organic statute does not expressly prohibit *ex officio* members from voting, nor does it say that all trustees must be able to vote in quite so many words. In the face of some ambiguity, the Court has parsed the specific text of the statute and its

structure and is persuaded that Congress did not mean for general trustees and *ex officio* trustees to have fundamentally different voting powers. Accordingly, to the extent the May 2025 bylaw amendments categorically strip *ex officio* members of the right to vote, those amendments are inconsistent with the organic statute.

3. Remedy

As to remedy, the Court again finds that the permanent injunction factors weigh in the Congresswoman's favor. She is irreparably harmed by the offending portion of the bylaw amendments because she has been rendered an advisory Board member without a concrete say in its activity. The Defendants cannot remediate that harm with monetary damages. And Beatty's inability to exercise voting power outweighs any harm to the Defendants, who have not, in this latest round of briefing, identified any prejudice associated with allowing *ex officio* members to vote, either to the Center or the public at large. Though not dispositive of the balancing of the equities, it is worth noting that general trustees significantly outnumber *ex officio* trustees. To the extent that general trustees have acted "unanimously" in the recent past, see, e.g., Leavitt X Post at 1, voiding the unlawful provision of the bylaw amendments is unlikely to change the Board's current balance of power, cf. Defs.' Opp. to TRO Mot. at 17 ("Plaintiff has provided no evidence that her participation in the May 2025 amendment, December 2025 vote, or upcoming March 2026 vote would have changed or will change any of those votes' outcomes.").[26]

In sum, Representative Beatty is entitled to summary judgment on her voting rights claim in Count Three of the FAC. Absent Congressional authorization, the Board may not deprive a duly-appointed Kennedy Center trustee of her right to vote on Board matters on which all other

[26] The Court acknowledges that it balanced the equities differently at the TRO stage, when the emergency relief requested and the exigencies and compressed briefing schedule demanded a different calculus. The circumstances have changed since then.

trustees are entitled to vote. The May 2025 bylaw amendment stripping Beatty and other *ex officio* members of their voting rights is thus void and unenforceable. The Board is enjoined from enforcing the bylaw amendments to the extent that the Court has deemed them unlawful.

C. Closure

The last issue before the Court is the proposed closure of the Kennedy Center, which is slated to take effect this July. Representative Beatty initially sought a PI "preventing Defendants from undertaking further irreparable steps toward effectuating the Center's closure . . . or any steps toward tearing down or 'rebuilding' the structure, before this Court has the opportunity to reach a final resolution in this case." PI Mot. at 3. The Defendants have cross-moved for summary judgment, maintaining that the Center's closure is plainly lawful, and that no genuine dispute of material fact exists on the subject. Defs.' Cross-Mot. at 18.

The Court analyzes the closure in the preliminary injunction posture. As explained below, the Congresswoman is likely to succeed on her claim that the Board violated its fiduciary duty in approving the closure plan at the March 16 Board meeting, so summary judgment in the Defendants' favor is not warranted. Because the other preliminary injunction factors also counsel in Beatty's favor, the Court will grant her motion for preliminary relief in part.

1. Likelihood of Success on the Merits

a. Article III Standing

A plaintiff must "demonstrate [Article III] standing for each claim [s]he seeks to press and for each form of relief that is sought." Town of Chester, N.Y. v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017) (cleaned up). The fact that Representative Beatty has standing to raise her renaming and voting claims does not automatically mean she has standing to challenge the Center's closure. However, the same theory of Article III injury-in-fact accepted above would

seem to apply here. Assuming Beatty is right on the merits, "[a]ny closure and 'rebuilding' of the Kennedy Center without proper and meaningful Board deliberation, without the required regulatory approvals, and in violation of applicable law . . . frustrate[s]" her "ability to fulfill [her] fiduciary duties." Beatty Decl. ¶ 26. These include her duty to administer the trust in accordance with its terms, her duty (and right) to participate in the administration of the trust, and her duty to "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Beatty, 2026 WL 712814, at *7 (quoting Restatement (Third) of Trusts § 77(1)). This last duty of prudence, in turn, necessitates the "exercise of reasonable care, skill, and caution," which entails, among other things, using "reasonable effort and diligence" in planning and decision-making and "obtaining relevant information." See Restatement (Third) of Trusts § 77(2); id. cmt. b.

As the Defendants point out, Representative Beatty was permitted to register her dissent on the closure question at the March 16 Board meeting, pursuant to this Court's TRO Order. That lodged opposition greatly reduces the likelihood that she would be found personally liable for a breach of fiduciary duty in some future lawsuit. But as explored above, her dissent did not instantaneously satisfy all of her applicable trustee duties. If the Center may not close without Congressional approval, or instead may not close absent some modicum of prudent analysis, Beatty will satisfy her pertinent fiduciary duties by obtaining an injunction against an unlawful closure. Because the purportedly unlawful decision to close the Center for two years prevents Beatty from fulfilling her fiduciary duties, and an injunction prohibiting that unlawful closure would allow her to discharge those duties, the causation and redressability elements of Article III standing are satisfied.

b. Section 76*l*(b) Closure Claim

i. Cause of Action

The Court is once again reassured that Representative Beatty's Section 76*l*(b) claim is viable for the reasons set forth in Section III.A.2.a. However, it is unlikely that Beatty can pursue an *ultra vires* claim in the alternative. Again, in order to "prevail on an ultra vires claim, the plaintiff must establish that . . . the challenged action is plainly in excess of the agency's delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." Glob. Health Council, 153 F.4th at 20. At this stage, Beatty has neither established that the closure is *per se* or patently "unauthorized by any law," nor that it violates any specific statutory prohibition. Nuclear Reg. Comm'n, 605 U.S. at 681. Thus, even if the Board's closure vote "does not comport with law" for some other reason, that unlawfulness alone likely does not sustain an *ultra vires* action. Id. The Court will therefore consider the merits of Beatty's Section 76*l*(b) claim—*i.e.* Count Two of the FAC—only.

ii. Merits

Recall that Congress has appropriated $257 million for repairs to the Kennedy Center. In assessing whether Congresswoman Beatty is likely to succeed on her claim that the Board violated its governing statute by voting to close the Center for at least two years to accomplish the necessary construction work, the Court considers three "257 million dollar" questions.

The Scope of Construction Work. The threshold question: What exactly *is* the scope of the construction work planned for the Kennedy Center? The President's February 1 social media post suggested that the Center would be entirely remade, describing the project as "Construction, Revitalization, and Complete Rebuilding." Truth Social Post at 1. A February 24 email from the Center to potential donors described the project as a "massive, much-needed revitalization" that

would "revolutionize the building[.]" See PI Mot., ECF No. 13-14, Ex. G (Kennedy Center donation email) at 1. Especially after the demolition of the East Wing of the White House—which occurred out of the blue a few months after President Trump pledged that construction would not "interfere with" and would "pay[] total respect to the existing building"—there has been understandable concern that the Kennedy Center may be the next target of the wrecking ball. See, e.g., PI Mot. Reply, ECF No. 37-7, Ex. RR (New York Times reporting) at 2.

On February 2, President Trump clarified to news outlets that he was not "ripping [the Center] down," but would be "using the steel," the "structure," and "some of the marble," with "some of the marble com[ing] down." PI Mot., ECF No. 13-13, Ex. F (Politico reporting) at 2. "[W]hen it's open, it'll be brand new and really beautiful," he continued. Id. Another White House official informed the press that the project would entail a "pretty significant renovation," but not a "whole scale tear down." Id.

The evidence amassed since early February suggests a more modest, albeit still substantial, scope of work. According to Mr. Floca's testimony in DCPL and the documentary record in this case, the renovation project will generally entail mechanical overhauls and structural repairs. More specific plans include systematic waterproofing; fireproofing; the replacement of boilers, chillers, and pipes; restroom and elevator modernization; employee office renovation; various technical restorations of performance spaces; carpeting and seating replacement; and site and landscaping improvements.

The evidence before the Court does not demonstrate that the Center is poised for wholesale destruction and rebuilding, à la the East Wing. Mr. Floca, who is overseeing the project, has credibly testified to that effect, see Fourth Floca Decl. ¶ 6; DCPL Hr'g Tr. at 78:6–15—though indications are that he could be fired on a dime should his work prove

unsatisfactory, see Mar. 16 Press Conf. Tr. at 9 ("But if I don't think he will do a good job, I'll say, Matt, you're fired, I'm getting somebody else. So you're under no pressure, Matt. OK?).[27]

But by no means will the work be minor or unintrusive. For instance, Floca avers that the "precision-tuned acoustics of the Concert Hall and Opera House cannot be maintained while demolition and structural steel reconfiguration occur elsewhere in the Center." Third Floca Decl. ¶ 7. He relatedly notes that the "total replacement of stage lifts and rigging systems" in the Concert Hall "involves the demolition of stage floors and the reconfiguration of overhead structural steel." Id. ¶ 10. To address water intrusion in the main Kennedy Center building, its top will be "excavat[ed]," and the area "where the patrons enter" the Hall of States will be "t[orn] up." Mar. 16 Board Meeting Minutes at 6. Historic marble will be replaced, and so will the seating in one or more of the Center's performance spaces; in fact, the marble and seats have apparently already been purchased. See Mar. 16 Press Conf. Tr. at 16.

Based on the record before it, the Court concludes that the Kennedy Center is poised to undergo a set of serious renovations, which may involve demolition and reconfiguration of component parts of the building. It is not persuaded that the building will be razed to the ground or stripped to its studs and reconstructed, as initially feared by some, and it will proceed with the preliminary injunction analysis on that understanding.

The Center's Statutory and Regulatory Obligations. Against that factual backdrop, here's the second question: Is Representative Beatty likely to prevail on her contention that the Kennedy Center's closure for substantial renovation violates its organic statute or another

[27] President Trump likely lacks the power to fire Mr. Floca unilaterally. But given that the President seems to view the Board's approval as a "minor detail[]," Mar. 16 Press Conf. Tr. at 15–16, and a majority of Kennedy Center trustees have green-lit his recent decisions without question, his warning carries significant weight.

applicable statutory command? To answer that question, the Court marches through the roster of statutory provisions that Beatty claims have been violated.

First, Congress has mandated that the Board "maintain and administer" the Kennedy Center as a "living memorial" to its namesake, 20 U.S.C. § 76h(a)(1), which involves "present[ing] classical and contemporary music, opera, drama, dance, and other performing arts," spearheading performing arts "policy" and "programs," "provid[ing] facilities for other civic activities" at the Center, and "provid[ing] within" the Center "a suitable memorial in honor of the late President." 20 U.S.C. 76j(a)(1). In her opening brief, Beatty leaned heavily on this language to suggest that closure, which would "render the Kennedy Center a lifeless husk," necessarily "breaches the trust terms." PI Mot. at 22–23.

It would be a stretch to interpret either the amorphous "living memorial" language or the Center's "programming" and "memorial" obligations as requiring the Center building and site to remain open at all times. Even Beatty does not suggest that the Center must be open to the public for 24 hours a day, seven days a week, or that it could not close on an emergency basis. Cf. PI Mot. at 22 (implying that an "emergency" might "prevent Defendants from requesting the necessary congressional approval"). That, coupled with the textual reality that there is no express prohibition on a temporary closure of the Center, leaves Beatty hard-pressed to argue that the cited language strips the Board of *any* unilateral authority to close the Center for certain periods of time or for certain justified purposes. The extent of that authority presents a line-drawing problem with which Beatty's briefing does not grapple.

At the same time, Beatty is surely right that—notwithstanding the Board's clear duty to carry out "necessary" capital repairs and ensure that the Kennedy Center site is kept in "safe[]," "secur[e]," "accessib[le]," and "high quality" condition—the Board bears an affirmative duty to

carry out the Center's programming and maintain a memorial to President Kennedy. It may not simply stop putting on shows altogether or close the presidential memorial permanently—just as it is not at liberty to let the Center fall into complete disrepair, given its statutory responsibility for upkeep and maintenance. In other words, the Center may not sacrifice one statutory duty at the altar of another.

If it were clear that the Kennedy Center will cease all operations for two years, as the Board's March 16 meeting minutes suggest, Beatty might have a better claim that the Board has violated its legislative obligations. In the wake of Mr. Floca's live testimony, however, the factual record is now mixed. There are at least some plans to carry out Kennedy Center programming—including rehearsals, performances, and educational programming—at the REACH expansion and off-site, if needed. Floca also indicates that a temporary memorial to President Kennedy will be set up in the REACH, as well. These plans have not been set down in writing and strike the Court as somewhat of an afterthought, which only bolsters its forthcoming conclusion that the Board did not consider the full panoply of its statutory duties before ratifying the closure. Still, the Court struggles to conclude on this record that Center will eschew its programming and memorial duties altogether, come July. Beatty therefore has not established that a potential future failure to sponsor any programming or memorialize President Kennedy during the two-year closure yet constitutes a statutory violation.

Beatty also points to a few statutory commands elsewhere in the U.S. Code, contending that the Board's failure to obtain regulatory approvals from the National Capital Planning Commission ("NCPC"), the Commission of Fine Arts ("CFA"), and the Advisory Council on Historic Preservation ("ACHP") violates its statutory planning obligations. According to Mr. Floca's sworn declaration, the Center has been engaging with the NCPC and CFA on a voluntary

basis. See Third Floca Decl. ¶ 8. Defendants therefore argue that even if the Center was required to submit its plans to those entities for review, "any injunctive relief available to Plaintiff" would be "limited" to what the Center has already begun to do. Defs.' Cross-Mot. at 25. That argument misses the mark, as the NCPC and CFA planning processes require more rigorous engagement than voluntary, *ad hoc* staff meetings. But Beatty does not press the NCPC and CFA points in her reply. See PI Mot. Reply at 30 ("[A]lthough Defendants dispute that they are subject to the regulatory requirements of the NCPC and CFA, the Court need not even decide that issue for the purposes of Plaintiff's PI motion, because Defendants concede that they are engaging in these processes.").[28]

The Court instead focuses on the more active conflict over the Kennedy Center's obligation to consult with the ACHP under Section 106 of the National Historic Preservation Act ("NHPA"). The NHPA provides that the

> head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . , prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

50 U.S.C. § 306108. This is known in historic-preservation circles as the "Section 106" process.

The work planned for the Kennedy Center would likely be subject to the Section 106 process if the Center were an agency, as the "undertaking" is funded by federal dollars and will materially affect structures within a historically salient building. But the NHPA defines "Federal

[28] The Court engages with these points more fully in its concurrent opinion in DCPL. That opinion also grapples with the organic statute's prohibition on a change in the "management and operations of the [Kennedy Center] grounds" without approval from Congress and the Secretary of the Interior. See 20 U.S.C. § 76j(a)(2)(F). Beatty's briefing does not digest this provision in any detail.

agency" the same way that term is defined under the APA, so per Dong v. Smithsonian Inst., the Smithsonian—and therefore the Kennedy Center—would seem not to be covered.

Apparently recognizing this oversight, Congress enacted the Smithsonian Facilities Authorization Act ("SFAA") in 2003, which provides that

> in carrying out other projects in the District of Columbia *which are subject to the review and approval of the National Capital Planning Commission in accordance with section 16 of the Act of June 20, 1938 (sec. 6–641.15, D.C. Official Code),* the Smithsonian Institution shall be deemed to be an agency for purposes of compliance with regulations promulgated by the Advisory Council on Historic Preservation pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

Pub. L. No. 108-72, § 3(c)(2), 117 Stat. 888, 889 (2003) (emphasis added). D.C. Code § 6-641.15, in turn, provides that "in order to ensure the orderly development of the national capital, the location, height, bulk, number of stories, and size of federal public buildings in the District of Columbia and the provision for open space in and around the same will be subject to the approval of the [NCPC]."

Quilting together this patchwork of planning statutes, the Court understands the SFAA to require the following: When the Smithsonian constructs or alters federal public buildings in a manner that will affect their location, height, bulk, number of stories, size, and surrounding open space, it must seek NCPC approval and is accordingly subject to compliance with Section 106. Even though the Kennedy Center is in some ways institutionally independent from the Smithsonian, see 20 U.S.C. §§ 42, 76k(e), the Court sees no reason why a newly built or significantly rebuilt structure on the Kennedy Center's campus would not trigger the historic preservation review process, as well. After all, the Kennedy Center has been a "bureau" of the Smithsonian since its creation. See id. § 76h(a)(1). The Defendants fail to explain why a

component part of a federal instrumentality is presumptively exempt from any regulatory regime that applies to its parent.[29]

The problem for Representative Beatty is that she has not established that the proposed renovations will change the Kennedy Center's ultimate location, height, bulk, number of stories, size, and surrounding open space, assuming the scope of the project will remain as Mr. Floca described it in his testimony. The Court appreciates that even interior upgrades and repairs to the Center's facilities may implicate certain of its historic features. As elaborated in the companion opinion in DCPL, the gaps in the Section 106 regulatory regime could lead to concerning consequences. But the Court struggles to discern how, as a textual matter, the SFAA obligates Section 106 review when it comes to the renovation plans that have crystallized here.

Representative Beatty insists that the Kennedy Center Board's decision to close its doors pending substantial renovations violates both the Center's organic statute and an array of D.C.

[29] Defendants also contend that the Kennedy Center is not subject to any of the relevant planning statutes because 20 U.S.C. § 76k(e), which provides that the "actions of the Board relating to performing arts and to payments made or directed to be made by the Board from any trust funds shall not be subject to review by any officer or agency other than a court of law." Whatever actions this provision insulates from external review—*i.e.*, whether it applies to any action relating to trust fund payments or only those actions related to performing arts *and* trust fund payments, given the conjunctive connector—the Court is not persuaded that § 76k(e) supersedes external planning requirements. There are, after all, several sections of the organic statute that impose external agency review on Board conduct. See, e.g., 20 U.S.C. § 76i(a) (requiring that the Kennedy Center building be constructed "in accordance with plans and specifications approved by the Commission of Fine Arts"); id. § 76j(a)(2)(F) ("No change in the management and operation of the grounds may be made without the express approval of Congress and of the Secretary of the Interior"); id. § 76k(g) (making "plans" and "projects to improve pedestrian and vehicular access" "[s]ubject to the approval of the Secretary of the Interior"); id. § 76*l*(d) (subjecting the "functions of the Board funded by [appropriated] funds" to the oversight of the Inspector General of the Smithsonian). Section 76k(e) is thus no answer to a later-enacted and more specific statute subjecting the Smithsonian—and by extension, the Kennedy Center—to historic preservation review.

planning laws. The Court is not convinced, and given that she must show a likelihood of success at this stage, she has not carried her burden on this theory of her closure claim.

The Board's Alleged Breach of Fiduciary Duty. The final big-money question raised by Representative Beatty's challenge to the closure is whether the decision to shutter the Center pending major renovation constitutes a violation of the Board members' fiduciary duties. Particularly relevant are the duties of participation and prudence, the latter of which requires a trustee to "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust," Restatement (Third) of Trusts § 77(1), and with the requisite information to make decisions, see id. § 77, cmt. b; Bogert's The Law of Trusts § 584. Beatty insists the answer is yes; the gist of Defendants' response is that the Board's decision was a reasonable one, within the bounds of its discretion, that the Court should not second-guess.

The scope of a court's review of board of trustee decisions is limited. So long as "a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." Restatement (Third) of Trusts § 87. Framed differently, a court may not freely substitute its judgment for that of a fiduciary acting within the scope of her discretion. The court must instead assess whether the fiduciary was derelict in her duties, acted beyond the scope of her authority or in bad faith, or otherwise abused her discretion. See Shelton v. King, 229 U.S. 90, 94–95 (1913); see also Olds v. Rollins Coll., 173 F.2d 639, 641–42, 642 n.7 (D.C. Cir. 1949).

Even accepting, for the purpose of this final sub-inquiry, that the Board has the discretion to close the Kennedy Center for *some* period of time without Congressional or other regulatory approval, the evidence in the record strongly suggests that the Board's decision to do so here was an abuse of discretion. The Court reaches this conclusion for three interrelated reasons.

First, there is no evidence that the Board took account of its full range of statutory obligations in determining that a wholesale shuttering of the Kennedy Center was appropriate. As just explained, the organic statute does not give the Board the latitude to pick and choose which legal duties it will satisfy. So even if the Board has the discretion to close the Center for some period of time for renovations, it does *not* have leeway to disregard its obligations to present programming and maintain a presidential memorial site.

The Defendants resist this conclusion by suggesting that the Board did, in fact, consider its broader duties. It points to Mr. Floca's discussion of "continuity of mission" during his March 2 presentation to the Building and Grounds Committee. See, e.g., Defs.' Cross-Mot. at 23 n.6. Floca informed the committee that "portions of the REACH campus *may* remain active"; "[t]he Skylight Pavilion *may* be used to maintain the memorial experience"; and "campus grounds *may* remain accessible when construction permits." Building and Grounds Committee Meeting Minutes at 2 (emphasis added). But the mere mention of these possibilities does not reflect *bona fide* consideration of the Board's codified duties.

Moreover, there is no indication in the minutes that the Committee discussed, let alone weighed, the negative consequences of closure on the Board's programming or memorial-related responsibility—which should come as no surprise given the "Building and Grounds" Committee's presumed focus on the construction aspects of the project. That task falls to the full Board, not a subset of trustees, and the concept of "continuity of mission" was not raised at the March 16 Board meeting at which the vote to close the Center was taken. In short, there is *no* evidence before the Court that the Kennedy Center Board of Trustees considered how it would accomplish its full legislative mandate during the closure period.

As an important aside, the exercise of the Board's statutory duties involves *legal* questions, complex ones at that. Which naturally raises the question: Where were the lawyers? The answer appears to be "nowhere." The Center's General Counsel and Associate General Counsel were present at the March 16 Board Meeting but, according to the minutes, did not speak. There is, further, nothing in the record to indicate that the Board relied on any legal advice in reaching the closure decision. It goes without saying that, for all his background in project management and construction, Mr. Floca is no legal expert.

Second, the Board appears to have founded its March 16 closure vote on woefully insufficient information. There was no "one year review of the Trump Kennedy Center, that has taken place with Contractors, Musical Experts, Art Institutions, and other Advisors and Consultants, deciding between" complete and partial closure, as President Trump claimed. Truth Social Post at 1. The Defendants insist that the Board acted based on Mr. Floca's recommendation. Though they are no doubt correct that the Board is not obligated to "create a detailed administrative record" of its decision, Defs.' Suppl. Br. at 7, the Court can only evaluate the Board's decision-making for abuse of discretion against the evidence the parties have provided to it.

What does that evidence reveal? A concededly one-sided justification for full closure. Consider, for instance, the basis on which Mr. Floca reached his closure recommendation. The materials he reviewed were years old and reflected "longstanding" problems with the building, but nevertheless contemplated that the Kennedy Center would remain open while those problems were remediated. See DCPL Hr'g Tr. at 88:10–11, 89:3–9. Floca's contrary recommendation in favor of closure focused on the time and cost "efficiencies" of performing the renovation work while the Center was closed, as well as concerns about patron safety and experience. His

assessment may ultimately prove sound. The needed renovations are extensive, and the Court accepts that there are potential safety and liability concerns associated with phased construction. But by his own admission, Floca was focused *solely* on the "needs of the building"; arts programming was simply "not a factor." He considered only the benefits of full closure and none of the costs. And mothballing the nation's preeminent performing arts center for several years surely comes with ascertainable downsides—including, according to sworn testimony in the record, lost ticket and tourist revenue; chronic challenges in audience retention; reputational damage that could far outlast the closure; potentially permanent loss of highly-specialized arts professionals; and long-term attrition of donors. See Borda Decl. ¶¶ 7–15; Taylor Decl. ¶¶ 5–13; Borenstein Decl. ¶¶ 9–25.

Consider, too, the information before the Board (or lack thereof) by the time March 16 rolled around. Until the Court ordered the disclosure of certain documents and information in response to Representative Beatty's TRO request, the record shows that most Board members had received *no* document, plan, or even the vaguest of explanations for the proposed closure. The documents disclosed to Beatty filled in some detail, but they focused largely on the renovation work that the Board was already aware would take place, not the need to shutter the Kennedy Center.[30]

[30] The Court here notes that, according to Beatty's declarants, "[a] governing board charged with stewardship of an institution like the Kennedy Center would expect to receive, before approving a closure of this kind, a comprehensive package of planning materials: an overall architectural concept, identification of the major professional consultants who will lead the project, timelines, budgets, and supporting analysis from each of the relevant specialists." Borda Decl. ¶ 18; see also Taylor Decl. ¶ 15 ("If a closure is truly necessary, by the time it is announced, the governing body should already have in hand extensive reports, cost analyses, construction plans, and third-party validated budgets[.]"); Am. Amicus Br. at 4–8. Here, Board members received, two days before the closure vote, a handful of vague documents penned by Mr. Floca, a light-on-details budget document, and a few years-old CBPs and consultant reports.

Just before the vote occurred, Mr. Floca briefly outlined the merits of a two-year closure, and there were a few minutes of group discussion. Again, Floca's high-level recommendation presented all the advantages and none of the drawbacks. Faced with such a stacked deck and having received no other information about the effects that closure might have on the institution as a whole, a prudent trustee would have at least tried to understand the full consequences of the proposal. Cf. Bogert's The Law of Trusts § 558 (noting that courts have held a trustee's conduct to be arbitrary where she has "gone through the formality of exercising . . . discretion without deliberately considering the circumstances"). The Defendants point to a few comments from trustees about asbestos remediation and air conditioning to suggest that the Board duly considered the pros and cons of the decision before voting. See Mar. 16 Board Meeting Minutes at 7–8. But these stray remarks do not reflect a meaningful effort to confirm the wisdom of a recommendation that could adversely affect the Center in numerous ways for years to come.[31]

[31] The Court does not pull this conclusion out of thin air. Both industry experts and alumni of the Kennedy Center Board of Trustees and the President's Advisory Committee on the Arts submit that the Board's "rushed decision . . . flies in the face of industry best practices." Am. Amicus Br. at 3. The Center's own history of renovation, as well as those of its peer institutions like Lincoln Center, demonstrate that "[c]losure of any one . . . performance space[], if determined to be necessary, would be done with precision to minimize impact on the institution overall," and "[t]he documents disclosed in this case make clear that no meaningful assessment or planning supports" the closure of the Kennedy Center in its entirety. Id. at 7–8. In view of the record, any remotely prudent trustee would have wanted to know whether the work could be phased. See DCPL Hr'g Tr. at 91:8–17 (Floca admitting phased construction would be possible). In amici's words, "complete venue closure" should be considered a "last resort." Am. Amicus Br. at 3 (cleaned up). The Defendants do not attempt to rebut Beatty's expert evidence or the amici's arguments.

The Court lays out this evidence not to prescribe precisely what information the Board should have considered. A board of trustees may act within the bounds of reasonable discretion without necessarily following the same approach taken by similar institutions. But a failure to consider *any* conceivable downside of such a weighty institutional decision reflects a dereliction of the trustees' duty of prudence.

Recall, finally, that Mr. Floca was not ideating on a blank slate. His (and President Trump's) views about the necessity of wholesale closure represented a 180-degree change in plans because, until February 1, the Board was made to think that the OBBBA-funded renovations would be phased. The Kennedy Center's annual budget justification document for fiscal year 2026 advised Congress that the "disruptions" stemming from "major capital projects" in "certain theaters" would need to be "carefully planned and coordinated to not materially affect important programming initiatives."[32] Congress's OBBBA appropriation does not authorize a two-year shutdown of the institution during construction. Floca testified that he worked "constantly," and well into autumn, to identify "solutions" that would allow him to "partially operat[e] the building." DCPL Hr'g Tr. at 80:17–19, 99:9–12. And his representations at the September and December 2025 Board meetings would have left trustees with the impression that the plans for renovation were proceeding in a phased manner. Cf. Mot. Hr'g at 71:13–25 ("THE COURT: Is there anything in the record that would suggest [that] before [February 1] anyone at the center or in Congress or anywhere else contemplated closure to pursue the renovations . . . ? MR. MAYERS: Not that I know of, Your Honor[.]").

Faced with evidence of these serious informational deficits, the Defendants retort that the Board was entitled to rely on Mr. Floca's analysis as an expert adviser. See Defs.' Suppl. Br. at 4–7. The Court does not doubt Floca's expertise in facilities and project management. And the Board is undoubtedly entitled to rely on that expertise without "flyspecking" his work. Id. at 5. But the one-sidedness of Floca's approach and resulting presentation to the Board are plain. Whatever "analysis" Floca undertook in advance of February—evidence of which is nonexistent

[32] Mr. Floca's attempt to explain this representation away by casting it as a "clerical error," DCPL Hr'g Tr. at 97:17–18, is unconvincing at best.

apart from his own description—entirely sidelined programming concerns. And critically, he is no expert in arts management. He had served in the role of Kennedy Center Executive Director for all of a few minutes before suggesting that the institution be shut down for years. "Reliance on relevant professional advice does not afford a complete defense to allegations of breach of trust, for that protection should not apply, for example, if the trustee acted unreasonably in following the advice or in procuring it[.]" Restatement (Third) of Trusts § 93, cmt. c. The evidence before the Court contradicts a conclusion that the Board's reliance on Floca's recommendation alone was reasonable under the circumstances.

The Board's decisional shortcomings are perhaps reflective of a *third* problem with the March 16 closure vote: that the record and timing of relevant events strongly suggest that the Board lacked *any* meaningful say in this matter because the closure decision was foreordained. Note, for example, some conspicuous oddities in Mr. Floca's story, notwithstanding his credible testimony on the need for repairs at the Kennedy Center. He says that he realized it would be "irresponsible" not to close the Center about four months before President Trump announced the closure on February 1. Timing-wise, that means Floca had already begun to plan for a complete closure by October of November of 2025. He had access to all the information that he says he needed to arrive at that conclusion well before the end of the year—yet, as noted above, did not even allude to the possibility of closure around the time of the OBBBA appropriation or at the September or December 2025 Board meetings. Former Kennedy Center President Grenell emphasized that the Center would be one of the "premiere spots" for America's 250th celebration—quite a concerning idea if the Center is as dangerous as the Defendants now represent. If Floca decided that closure was necessary sometime in the fall of 2025, it is curious that the Kennedy Center's leaders were mum on the matter until February 1.

Whatever happened during that purported four-month incubation period, Board input was, most evidently, an afterthought. Trustees learned about the plan to close the Center at the same time as the general public, by social media post. Deprived of time and information, they had no meaningful opportunity to consider perhaps the most momentous decision in the Center's lifetime since it opened in 1971.[33] Although boards may ratify past institutional actions after *bona fide* consideration, President Trump's assurance that closure would be "totally subject to Board approval" rings hollow, as he himself later admitted that it was "a little late for the board" to weigh in because the plan had already been "announced." To him, Board approval was just a "minor detail[]."[34] Mar. 16 Press Conf. Tr. at 15–16.

* * *

The Court appreciates that, in both the charitable and corporate spheres, board meetings are often scripted affairs. Staff, management, and board committees have ideally laid the groundwork for large-scale projects well before they are brought to a board vote. Objections and concerns have typically been aired and resolved by the time such proposals reach the full board. And board members naturally rely on findings, analysis, and recommendations developed by experts and other qualified personnel. The Court should not be heard to suggest that trustees

[33] According to experts in arts management, renovations of performing arts spaces are highly "complex[]" endeavors. See Borda Decl. ¶ 17. As the former director of the New York Philharmonic attests, when the Philharmonic and Lincoln Center "undertook the renovation of David Geffen Hall" a few years ago, "the joint boards of both institutions met for at least two to three years reviewing the renovation plans, and in fact made significant changes to those plans over the course of that review process. The boards met five times a year on a regular schedule; the executive committee engaged more frequently; and a dedicated building committee met as often as every week." Id.

[34] Congresswoman Beatty posits that the decision to close the Kennedy Center was a pretextual maneuver meant to "hide the . . . fact that the (unlawful) name-change has led patrons and artists to flee the Center." PI Mot. at 26. The Court need not consider this possibility to conclude that the Board's decision fell short of its trust duties.

must scrutinize every piece of prefatory work that has been done, or labor through the night debating the relative merits of their decisions in order to discharge their fiduciary duties—especially where, as here, a board is large and comprised of members who may not be well-schooled in the subject matter before them.

The problem with this particular board vote, judging from the available record, is that it consummated a process that seems to have fallen grossly short of prudent decision-making. The closure proposal reflected an under-informed reversal that would surely have come out of nowhere to the Board. Mr. Floca's recommendation was premised on a cursory, one-sided accounting of the benefits and drawbacks of full closure. No countervailing cost-benefit analysis of the closure was provided to the Board, or even prepared. And neither the Kennedy Center's leadership nor the trustees appear to have given *any* serious thought to how the closure would square with the Board's range of statutory obligations.

To be clear, assuming that long-term closure of the Kennedy Center is within the Board's discretion and does not require Congressional authorization, this Court is not to substitute its judgment for the Board's as to whether a temporary but long-term closure is, all things considered, a good idea. The Court takes no position on that question. Instead, it concludes that in ratifying the already-announced decision to close the Center, the Board appears to have been derelict in its duty to "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust" and exercise adequate "care, skill, and caution" in decision-making. Restatement (Third) of Trusts § 77(1)–(2).

2. Irreparable Harm

Having concluded that Beatty is likely to succeed in establishing that the Board breached its trust obligations in voting on March 16 to close the Kennedy Center, the Court weighs the

remaining preliminary injunction factors. The D.C. Circuit "has set a high standard" for irreparable harm. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury must "be both certain and great," and "actual and not theoretical." Id. (cleaned up). It must also be imminent and beyond remediation even if "adequate compensatory or other corrective relief" becomes "available at a later date." Id. (cleaned up).

The Board's likely imprudent decision to shutter the Kennedy Center has caused, and will continue to cause, ongoing irreparable harm to Beatty and the trust property she and her colleagues are charged with protecting. *None* of the Board members had sufficient information in advance of the March 16 meeting to make a well-considered decision to close the Center. Beatty could not meaningfully participate in the administration of the trust then, and her ability to do so will continue to be undermined each day that vote is implemented. As of this writing, she lacks any up-to-date construction plan, an accounting of the closure's short- and long-term costs to the institution, and concrete details about how the Center will continue to fulfill its statutory missions during the closure period. Remaining performances have been or will be cancelled, and staff are being laid off *en masse*, meaning that most of the Center's operations will come to a halt by July. Letting the defective March 16 Board vote take effect will thus hobble the Center as an arts institution, while trustees like Beatty are forced to stand idly by.

In essence, Representative Beatty cannot do her job as a *bona fide* trustee so long as the Center remains closed on the basis of the March 16 Board vote. And being "deprived of the ability to perform [her] statutory functions and fulfill [her] statutory obligations" to the trust *res* is neither a minor or theoretical injury, nor the kind that can be remediated with corrective relief down the line. Dellinger v. Bessent, 766 F. Supp. 3d 57, 72 (D.D.C. 2025). A judgment rendered in Beatty's favor at the end of this case, whenever that may be, will not make up for an

unlawful closure during which time she has been rendered a powerless token and the Kennedy Center has likely alienated performers, audiences, staff, and donors alike.[35] A preliminary injunction, by contrast, would place Beatty and her colleagues in the *status quo ante*, and if, with adequate information and planning, they decide that closure is still the optimal course, they may very well be able to contain its fallout.

The Court thus concludes Beatty has carried her burden of establishing that, absent preliminary relief, she will suffer irreparable harm as a result of the Board's March 16 vote to close the Center.

[35] Beatty's declarants and amici identify a number of lasting consequences stemming from the derelict manner in which the closure was carried out. *First*, the abrupt decision could "prevent the Kennedy Center from returning to the touring schedules of the world's leading performers" because it indicates the institution's willingness to cancel contracts on a whim. Borda Decl. ¶¶ 7, 10. "When artists and their management weigh whether to book a tour stop or an engagement, institutional reliability is paramount," id. ¶ 10, and performers will be wary of "commit[ting] to an institution that has treated their schedules so capriciously," Am. Amicus Br. at 9. *Second*, even if the Court were to order the Kennedy Center to reopen at some future point, many hyper-specialized staff will likely have "secured employment elsewhere" in the arts world "and will not return." Borda Decl. ¶ 11; Taylor Decl. ¶¶ 6–7. The speed and erratic character of this closure decision have undoubtedly accelerated this process. *Third*, the nature of the Board's decision will likely fray the Center's goodwill with specific donors, which may be impossible to recover. A rapid decision to close the institution's doors for two years does not inspire confidence, especially where the Center's fundraising "depends on deeply personal relationships that development staff have cultivated with individual donors over many years." Borda Decl. ¶ 12. "If that contact stops," especially with no substantial explanation or justification, "donors will not simply wait" but "will redirect their philanthropic support to other institutions." Id. More specifically, "[t]he manner in which this closure has been announced compounds the harm to the relationship with donors." Borenstein Decl. ¶ 20. "[A] closure of this significance" typically "requires extensive advance planning and communication," including an explanation to donors as to why complete closure rather than partial operation is necessary. Id. "Abruptly closing the Center," by contrast, "alienate[s] donors," id., and "donors who disengage will not re-engage," id. ¶ 25. The Defendants offer no countervailing evidence to this raft of well-informed opinions.

3. Balance of Equities/Public Interest

Lastly, the Court considers whether prejudice to the Defendants and the public interest outweigh the irreparable harms that Beatty has identified. The answer is no. At the outset, the Court stresses that it will not enjoin the Defendants from undertaking the capital repair and restoration activities that Congress has authorized through the OBBBA. Instead, the preliminary injunction will only temporarily prevent the Board from effectuating its March 16 vote. So a carefully tailored injunction would not "prevent the Board from" carrying out "capital repair and restoration activities that directly fulfill its statutory duties," which seems to be the Defendants' primary concern. Defs.' Cross-Mot. at 44.

The Defendants also press that a preliminary injunction would threaten the Center's ability to complete its planned work by September 2029, when the OBBBA funding expires, and "put the entire project in jeopardy." Defs.' Suppl. Br. at 8. That assertion falls flat. Mr. Floca has testified that renovations are still very much in planning mode—again, no official, up-to-date building plan or master construction schedule yet exists. And until a few months ago, the Board understood that it was moving full steam ahead on a phased renovation project, not a full closure. Any hypothetical delay in breaking ground would seem to be self-inflicted, stemming from the Defendants' own about-face.

As for the potential safety risks associated with doing renovation work while the Center is open, no one disputes that the construction must be undertaken safely. And the Court does not understand Beatty to be challenging limited closures of spaces in and around the remedial work, which would seem to be inherent in the construction plans laid out in the CBPs. See Pl.'s Second Suppl. Br., ECF No. 46, at 9 n.4 (Beatty "does not seek to enjoin 'routine maintenance, repairs, and operations that are contemplated by the Kennedy Center's existing Comprehensive

Building Plan.'"). But again, up until February 1, the Center was planning to proceed apace with some form of phased construction and cited no safety concerns about that plan. Returning to the *status quo* does not strike the Court as substantially prejudicial.

Finally, the Defendants argue that a preliminary injunction would interfere with its discretionary decision-making. Yet the Court's preliminary relief does not dictate any particular decision-making outcome. It simply enjoins the implementation of a single decision that was reached without the requisite fiduciary caution, without dictating how the Board might proceed from there. What's more, "[t]here is generally no public interest" in the "perpetuation" of "unlawful" governmental action. Newby, 838 F.3d at 12.

The Court is persuaded that the irreparable injury to Representative Beatty outweighs the comparatively lesser harms associated with returning the Board to its pre-February 1 position. It will therefore grant Beatty's request for a preliminary injunction in part, consistent with the parameters laid out below.

4. Preliminary Relief

Crafting preliminary relief is more of an art than a science, as it requires "an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Int'l Refugee Assistance Proj., 582 U.S. at 579. And "because preliminary injunctions are a significant measure, any injunction that the court issues must be carefully circumscribed and tailored to remedy the harm shown by the facts." North. Am. Bldg. Trades Unions v. DOD, 783 F. Supp. 3d 290, 301 (D.D.C. 2025) (cleaned up).

In light of the preliminary injunction factors above, the Court is persuaded that Beatty is entitled to a preliminary injunction that prohibits the Board from implementing its March 16 decision to "conduct an orderly wind-down of programming activities through the Spring of

2026, and close [the Center's] doors entirely effective July 6, 2026." Mar. 16 Board Meeting Minutes at 8–9. On the record before the Court, that decision was taken in dereliction of the trustees' duty of prudence, as imposed on them by the Center's governing statute, and is thus unenforceable for the pendency of this action.

However, the Court carefully circumscribes its ruling in two ways. *First*, as just mentioned, this preliminary relief should not be understood to enjoin the necessary maintenance and repair work that Congress authorized last June through its OBBBA appropriation. That work may move forward, as Beatty has not demonstrated, at this juncture, that the renovations run afoul of any particular statutory command. *Second*, although the Board may not take steps to operationalize the March 16 decision, this ruling does not mean that it is necessarily barred from closing the Kennedy Center while renovations take place. Beatty has only shown a likelihood of success on her claim that the Board acted imprudently in reaching a closure decision based on the circumstances of *that* vote. The Court is not persuaded that the closure is categorically unwarranted or impermissible under the U.S. Code. The Court's preliminary injunction thus does not bar the Board from reconsidering the closure issue in a prudent manner.

Should it choose to chart that course, the Board will be expected to prepare itself with sufficient information to make a considered, independent decision, taking account of its obligation to both maintain *and operate* a premiere arts venue and its solemn duty to memorialize a fallen President. The Court declines to dictate what specific information and analysis is required, or what form they should take, echoing its colleague overseeing the East Wing litigation that it has "no desire or intention to be dragooned into the role of construction manager"—or, for that matter, board counsel. Nat'l Trust for His. Pres. v. Nat'l Park Serv., No. 25-cv-4316 (RJL), 2026 WL 1027744, at *5 (D.D.C. Apr. 16, 2026). But this opinion (and the

age-old trust principles on which it rests) should at least provide a helpful guide. The Court would expect an informed Board to insist on receiving input from the Center's programing and fundraising experts, in addition to Mr. Floca. The Center's lawyers, who appear to have exited stage left, would also have a role to play; the duties discussed throughout this opinion are legal ones, after all. The upshot is tailored preliminary relief that is responsive to the theory of liability on which Congresswoman Beatty is likely to prevail and respectful of the discretion vested in the Board to fulfill its important duties.

The Court further notes that the Defendants have not sought a bond in the event that the Congresswoman prevailed on her preliminary injunction. Federal Rule of Civil Procedure 65(c) requires that a PI movant "give[] security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Defendants may have forfeited the issue, but because of the mandatory language of the rule, the Court considers the question *sua sponte* out of an abundance of caution.

"Rule 65(c) gives this court broad discretion to determine the appropriate amount of an injunction bond," which may include imposing "no bond at all." North. Am. Bldg. Trades Unions, 783 F. Supp. 3d at 315 (cleaned up); see also P.J.E.S. by and through Escobar Francisco v. Wolf, 502 F. Supp. 3d 492, 520 (D.D.C. 2020); Simms v. Dist. of Columbia, 872 F. Supp. 2d 90, 107 (D.D.C. 2012). The Defendants have generally argued that enjoining the closure would be prejudicial, but they have not pinpointed "quantifiable costs" they would "incur as a result of being temporarily restrained from enforcing" the March 16 vote, especially given the careful contours of the injunction. North. Am. Bldg. Trades Unions, 783 F. Supp. 3d at 315. Moreover, the Court has not been provided with any evidence to confirm the extent to which some phased or shortened construction would be more expensive than the full shutdown, nor has it been

provided with any master construction plan with up-to-date cost schedules, which the Defendants are still preparing. On this basis, the Court has no way of knowing whether the costs of complying with its PI are more than hypothetical, and it will not speculate on a figure given a return to the *status quo* of just a few months ago. In light of all this, and the cautious scope of the PI itself, the Court finds that a nominal bond of $1.00 is appropriate. Cf. Endocrine Soc'y v. FTC, No. 26-cv-512 (JEB), 2026 WL 1257289, at *15 (D.D.C. May 7, 2026) (finding a nominal $1.00 bond sufficient).

IV. Conclusion

In the words of President Kennedy, artists do the "quiet work of centuries" behind the "storm of daily conflict and crisis." They entertain, educate, and move us. They sustain us through oncoming tides of joy and despair. And so the institutions that nurture and empower artists are nothing short of integral to our social fabric. The Kennedy Center is one of the foremost of those institutions.

At some point, the lofty heights of artistic performance collide with the gritty realities of arts and facilities management. The Kennedy Center is, legally speaking, a trust instrumentality belonging to the American people, governed by a Board of Trustees. Congress has imbued Board members with all the "usual powers and obligations" of common-law trustees, as they work collectively to fulfill various statutory directives related to arts programming, education, policy, community outreach, and memorializing the slain president. The Board must also maintain the Kennedy Center in good repair.

The Kennedy Center Board has wide discretion to steward the institution in service of its various responsibilities. But that discretion is not boundless; it is circumscribed by legislatively imposed guardrails, which include core common-law trust principles that Congress imported into

the Center's organic statute. As a result, when the Board veers beyond what the governing statute and the common law of trusts permit, redress can be sought.

The Court has concluded that the Board overstepped its statutory bounds by unilaterally renaming the Kennedy Center after President Trump. In 1964, Congress deliberately rechristened the "National Cultural Center" the "John F. Kennedy Center for the Performing Arts." The text, structure, and evolution of the organic statute makes the institution's name abundantly clear. Congress likewise took pains to ensure that no other memorial-like dedication would grace the Center's public spaces. As a result, the Kennedy Center Board's decision to rename the Center, along with its decision to affix President Trump's name to the building's façade, violate Congress's unequivocal mandate. As stated at the outset, Congress gave the Kennedy Center its name, and only Congress can change it.

The Board also overstepped its statutory bounds by unilaterally stripping *ex officio* trustees of any right to vote on trust matters. The relevant provision of the May 2025 bylaw amendments finds no support in the statute, as Congress hinted at no qualitative difference between general and *ex officio* trustees, and the common law presumptively places them on equal footing. Moreover, a trustee's categorical right to vote is not a mere "organizational" or "procedural" housekeeping matter appropriately left to the Board's discretion.

Finally, the Court is preliminarily persuaded that the Board's March 16 vote to close the Kennedy Center pending a years-long renovation represents a dereliction of its common-law-derived duty of prudence. The current record reveals that the Board rendered this ill-informed and seemingly preordained decision without regard for how it would accomplish its full array of statutory responsibilities. The trustees might have assessed the propriety of closure in a number of prudent ways. This was not one.

In closing, the Court recognizes that there is a longstanding—and bipartisan—Washington, D.C. tradition of appointing political supporters and personal acquaintances to public boards and commissions. These appointees should ideally have some subject-matter expertise, but for better or worse, it is often neither required nor demanded. For that reason, and others rooted in the common law's general endorsement of judicial deference to reasonably wielded trustee discretion, board members are entitled to rely on committees, staff, legal counsel, and other experts to inform their decision-making. But, while public board service may be an honor, board members are not mere figureheads. They are still duty-bound to fulfill their roles with due care and some modicum of independence. That tenet holds especially true for board members tasked by Congress with managing property held in trust for the enjoyment of the American people.

By way of this opinion, the Court does not purport to dictate how the Center should be run, nor does it prescribe any particular plan for the institution—construction, closure, or otherwise—moving forward. It simply holds the Kennedy Center Board to certain minimum requirements imposed by law. Beyond that, the Court will let the parties play on.

For the foregoing reasons, the Court will **GRANT** Plaintiff's Motion for Partial Summary Judgment on Count One of her FAC (Section 76*l*(b) renaming claim). It will *sua sponte* **GRANT** partial summary judgment to Plaintiff on the voting rights prong of Count Three (Section 76*l*(b) trustee rights claim). As to these two claims, the Court will also **GRANT** Plaintiff the declaratory relief sought in Count Five. And consistent with the rationale laid out in this opinion, the Court will **GRANT in part** Plaintiff's Motion for Preliminary Injunction on Count Two (Section 76*l*(b) closure claim).

The Court will accordingly **DENY** Defendants' Cross-Motion for Summary Judgment as to Counts One, Two, Three, and Five. It will reserve judgment on Count Four, the Plaintiff's multi-part *ultra vires* claim, and Count Seven, the Plaintiff's mandamus claim, until any motions for reconsideration or interlocutory appeals have been resolved. However, the Court will **GRANT** Defendants' Cross-Motion for Summary Judgment as to Count Six of the FAC alleging an APA claim. As the Court has explained, neither the Kennedy Center nor its parent institution, the Smithsonian, is subject to the APA per Dong v. Smithsonian, 125 F.3d 877 (D.C. Cir. 1997).

A separate Order shall accompany this Memorandum Opinion.

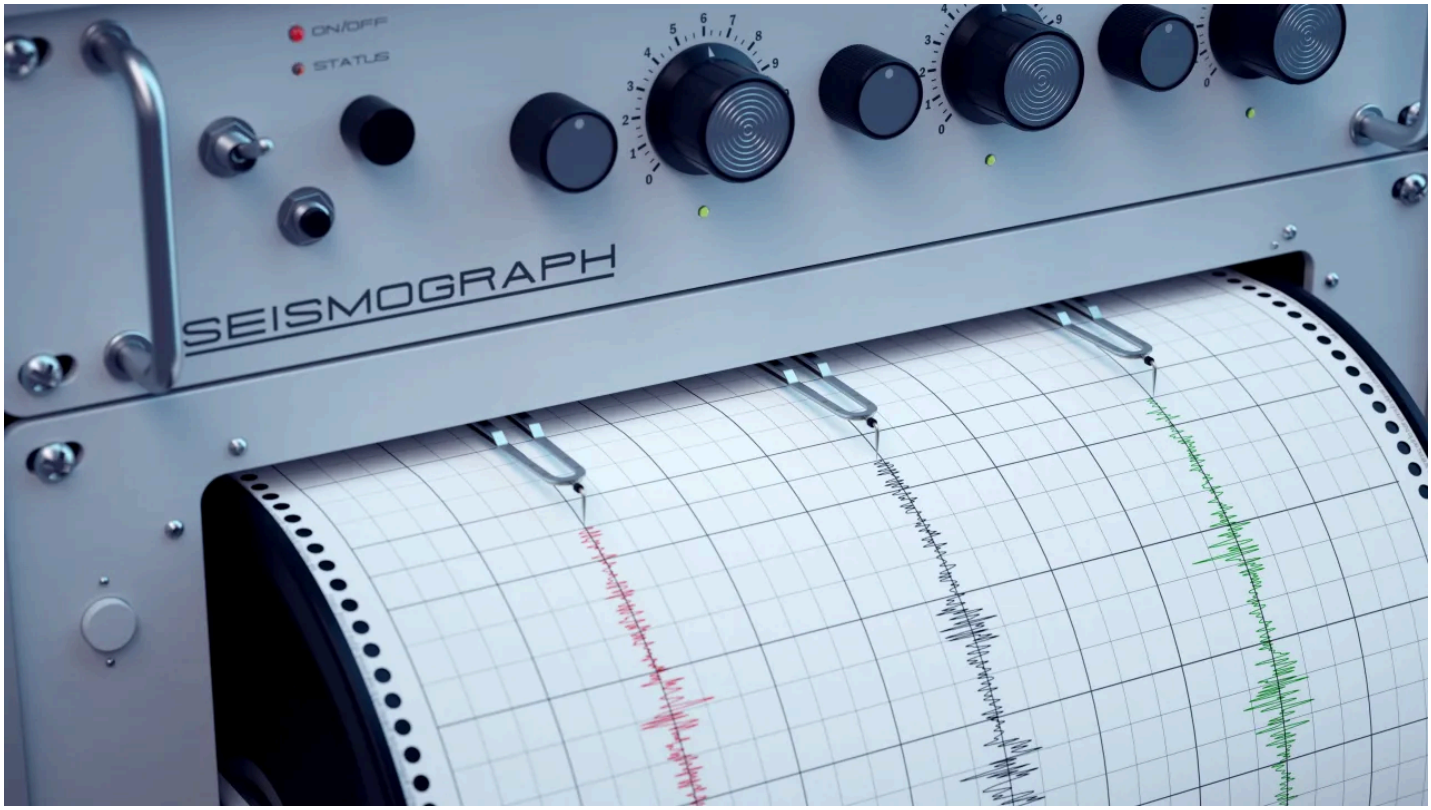
CHRISTOPHER R. COOPER
United States District Judge

Date: May 29, 2026

CENTER FOR THE FUTURE OF MUSEUMS BLOG

EO Impact: Is There an Existential Threat to Nonprofit Status?

Posted on Jun 26, 2025



Seismograph predicting earthquakes with precision. By Negro Elkha

Elizabeth Merritt

Charitable giving may fluctuate year to year, tourism ebbs and flows, your museum's endowment will perform better some years than others. That's normal and expected, and nonprofits have traditionally cobbled together a diverse set of income streams to buffer themselves from the vagaries of any one source. Bundled together, the four pillars of income—government, earned, charitable, and investment—create a stable base for museum operations, with one picking up the slack when another falters. However, these pillars rest on the bedrock of nonprofit status. But foresight—our early warning system for potential disruptions—suggests that growing pressure could lead to a seismic event that fractures that foundation. What are those pressures, what would the fallout look like, and how might museums prepare for such an event?

This is the final installment of a four-part series looking at the impacts of recent executive orders and actions on museum income streams. In the first three posts I looked at the direct and indirect effects of these actions on government funding, earned income, and charitable contributions and investment income. In this finale, I examine emerging threats to nonprofit and tax-exempt status—the legal structures that underpin the financial strategies of our field.

Some Context

Historically, American nonprofits have taken responsibility for many of the functions performed by government elsewhere in the world, from providing a social safety net to fostering art and culture. While the government provides critical support for this work, via grants and contracts, much of it is funded by private contributions, incentivized by charitable tax deductions. Through the Internal Revenue Code, the US has established over thirty categories of tax-exempt nonprofit organizations. The largest of these categories is 501(c)3 public benefit charity (often referred to as private nonprofits), and contains 77 percent of US museums (Museum Board Leadership: A National Report 2024, AAM).

It is hard to overstate the influence of the independent sector, as it is known, on US society, the economy, and the health of our communities. Roughly two million nonprofit organizations were registered with the IRS in 2023, and contributed more than $1.4 trillion to the US economy. As of 2022, the nonprofit workforce was nearly 12.8 million, constituting nearly 10% of all non-government employment.

The executive orders and actions of the current administration not only are damaging the financial stability of this critical sector—directly, through the cancellation of grants and contracts, and indirectly, through the impact on the economy, charitable giving, travel and tourism, etc.—there are some indications that federal policy is shifting to restrict the ability to qualify for nonprofit status or erode the financial benefits of being a nonprofit at all.

Some Signals of Change

Nonprofits have historically been secure in their tax-exempt status as long as they don't violate any of six basic rules (helpfully outlined in the IRS publication "How to lose your 501(c)(3) tax-exempt status (without really trying)." However, it's more common to lose nonprofit status for failing to file the basic paperwork—in 2010, the IRS removed over 275,000 nonprofits from the rolls of tax-exempt organizations, most of which, by all evidence, had simply ceased to do business.

But recently, proposals to eliminate or restrict nonprofit status have accelerated, for a combination of budgetary and policy reasons. Here are a few of these recent signals of change:

- In June 2024, the Tax Foundation published a paper titled "Reining in America's $3.3 Trillion Tax-Exempt Economy" in which their president emeritus, Scott Hodge, proposed a rule that would require an organization to receive at least 80 percent of its income from private individuals and grants from charitable foundations in order to qualify for nonprofit status. (Currently, museums receive an average of 30 percent of their income from these sources.)

Hodge also endorsed applying the 21 percent corporate income tax rate to all "program service revenue." (For museums, that would include admissions and program fees, space rentals, etc.)

- In 2024, the House passed the Stop Terror-Financing and Tax Penalties on American Hostages Act, which would give the Treasury Secretary broad authority to designate nonprofit organizations as supporters of terrorism and revoke their tax-exempt status. (A coalition of nonprofit associations published a letter opposing the bill, pointing out how such authority could be abused.) That bill passed the House in 2024, but then died in the Senate. In 2025, the House Ways and Means Committee included a similar provision in its budget reconciliation bill, but it was removed before the legislation passed the House.
- In January, the House Ways and Means Committee prepared a report identifying various ways to pay for the tax cuts proposed in the current budgets. One item in that long list was "eliminate nonprofit status for hospitals," yielding an estimated $260 billion in savings over ten years.
- In June, the House Committee on Homeland Security launched a probe of over two hundred nonprofit organizations that assist migrants and refugees, requiring them to disclose any aid (legal or translation services, housing, shelter, etc.) they had provided to "illegal immigrants or unaccompanied alien children."
- Also in June, the U.S Treasury confirmed it was considering changing rules in order to allow the IRS to revoke tax-exempt status for colleges that take race into account in student admissions, scholarships, and other areas. This change could be implemented without congressional approval.

There have also been escalating attacks on specific parts of the nonprofit sector, notably nonprofit hospitals (see proposal above) and higher education. While these began with reputational attacks, they have escalated to concrete actions. The most prominent cases right now are the administration's attacks on Columbia and Harvard Universities, using leverage ranging from cancellation of funding to banning foreign students to compel these institutions to comply with the EO banning "illegal DEI" and to foster "viewpoint diversity." (Interesting side note: this strategy is not without precedent—in 1983 the Supreme Court ruled that the IRS was within its rights to revoke the tax exempt status of Bob Jones University for engaging in racial discrimination, which the court ruled was "contrary to a compelling government policy.")

Even prior to 2024, there were weak signals suggesting the potential erosion of nonprofit status. In 2011 I published a summary of how various states were beginning to look to nonprofits as a source of additional income. In 2016, I drew attention to Senator Orrin Hatch's investigation into the nonprofit status of some museums founded by individual living collectors. In 2018 I worked with a small group of museum people to develop a scenario, titled Wild Times, describing one version of 2040 in which almost all American arts and culture organizations have lost their nonprofit status due to the combined disruptions of a global pandemic, a financial crisis, and the election of a conservative president. This story was possible, if unlikely, seven years ago. Now, as the Cone of Plausibility expands into the Hemisphere of Who the Heck Knows, it is becoming more likely, in part because attacks on nonprofits are being used as a political tactic by the current administration.

What is driving this trend?

Republicans need to find money to balance the tax cuts they want to provide to wealthy Americans, businesses, and large corporations. According to one recent estimate, that totals $4.2 trillion. Why look to nonprofits as a source for those funds? As Willy Sutton said, when asked why he robbed banks, "that's where the money is." (Or at least some of the money, in this case.) As I noted in part three of this series, 346 of the largest charitable foundations in the US collectively hold $900 billion in assets. Harvard's endowment alone was worth $52.2 billion in 2024; the combined value of the ten largest universities in the US is about $340 billion, and in 2021 the collective endowments of all US colleges and universities was about $927 billion.

But this focus on nonprofit endowments and operations is also driven by a political agenda—the belief held by some that philanthropy and higher education are both predominantly left-leaning and growing in their power and influence. The influence of foundations has soared in the past thirty years, reflected in the fact that they now comprise one third of charitable giving, compared to less than 7 percent in 1992 (Philanthropy 1992-2022, Dorothy A. Johnson Center for Philanthropy). Vice President Vance has characterized foundations as "social-justice hedge funds" and called the Gates and Ford Foundations "cancers upon society." So when he proposed forcing wealthy foundations to use 20 percent of their assets each year, it was because he wanted to them to spend themselves out of existence and sunset their agendas.

Bright Spot

As the National Council of Nonprofits has pointed out, the executive branch lacks the authority to target the nonprofit status of specific organizations. The courts have blocked the administration's efforts to interfere with Harvard's ability to accept international students, and sixteen Republican-led states have backed Harvard's lawsuit challenging the federal freeze on billions of dollars in funding.

Also, it has become clear in recent months that the president is attuned to public opinion. And public opinion is firmly on the side of museums:

- 97% of US adults believe that museums are educational assets for their communities.
- 89% believe that museums contribute important economic benefits to their communities.
- 96% would think positively of their elected officials taking legislative action to support museums.
- 96% want federal funding to be maintained or increased.

(Data from Museums & Public Opinion, Wilkening Consulting, American Alliance of Museums, 2018)

The president is particularly open to feedback from business leaders. In April, Trump backed down on his threats to fire Federal Reserve Chair Powell after the CEOs of major retailers warned him of the dire economic consequences of that action. What would be the "dire economic consequences" of a Wild Times scenario, in which a majority of NGOs lose their nonprofit status? When we worked on

the scenario in 2018, I asked a small group of researchers, academics, and financially savvy folks to estimate the impact. They came back with some broad extrapolations:

- ~250,000 NGOs closed (that would be about 8 percent of the current nonprofit sector)
- ~8 million direct layoffs (60 percent of the NGO workforce)
- ~8 million for-profit jobs destroyed (5 percent of the for-profit workforce)
- Estimated economic damage between $20-200 billion

(To benchmark that against what is already happening, the Nonprofit Times has estimated that as of May, only four months into the new administration, over 14,000 nonprofits in the US were at risk of exhausting their cash within three months, if they lost their federal grant funding, endangering nearly 2.8 million jobs.)

Museums might consider who in their orbit—board members, donors, influential community members—might make the case to the president that the consequences of effectively dismantling the nonprofit sector would be economically unsustainable.

Something to Watch

If nonprofit status itself comes under attack, then what? Some organizations are exploring options. One provision of the Meet The Moment Pledge, is to "Explore funding beyond the conventional 501c3 structures, such as LLCs, 501c4s, fiscally sponsored organizations, mutual aid networks, and donor circles. If you have partners that are particularly vulnerable to targeting, support them in identifying fiscal sponsorship or other alternative structures that can provide them with greater protection from potential threats." Essentially, the Trust-based Philanthropy Project (parent of the pledge) is admitting that in coming years, nonprofit governance may, in and of itself, become a risk factor, requiring nonprofits to look for alternate structures to shield their funds.

Ending on an Up Note

I promised when I launched this series that if you stayed with me, I would offer some words of hope in conclusion. I admit that's a challenging promise to keep: the bad news often seems overwhelming, the bright spots few and far between. The president has issued 165 executive orders (up from 139, when I delivered this talk in May) the National Council of Nonprofits continues to tally the effect the orders are having on nonprofits. Many of the most damaging actions are being challenged, thanks to nonprofit advocates (including museums), though it will take a long time for the issues to wind their ways through the courts. We also are waiting to see whether the administration will comply with the final rulings. Even successful challenges to executive orders and actions will leave in their wake damage that is difficult to repair. How, in the face of these forces, can ordinary citizens, our organizations, the nonprofit sector, make a difference?

It may be no surprise that I found my answer to that challenge in data, research, and a little math.

In 2011, Harvard researchers Erica Chenoweth and Maria Stephan published a study of non-violent civil resistance campaigns from 1990-2006. They found that every campaign that mobilized at least 3.5 percent of the population in sustained protest was successful. (I highly recommend this TEDx talk from 2011 in which Dr. Chenoweth talks about the "3.5 percent rule" and what she has learned about successful civil protest.)

When I read that research, I brought up my web browser, whipped out my calculator, and ran some numbers. It turns out that there are:

About 12.8 million NGO workers in the US

Out of a total US population of 340 million

12.8 million ¸ 340 million = **3.7%**

Per Chenoweth's rule, if museum people join with all their nonprofit brethren, and speak with a united voice, we are an unstoppable force.

If we focus on the things we agree on—that the nonprofit sector is the essential backbone of the nation, that we provide nonpartisan support to all communities across the country, that we make America healthier, happier, and better educated—we can prevail.

WE GOT THIS, PEOPLE.

Yours in optimism and solidarity,

Elizabeth

Elizabeth Merritt, VP Strategic Foresight and Founding Director, Center for the Future of Museums, American Alliance of Museums

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Elizabeth Merritt



The original Star-Spangled Banner, seen in 1969 at what was then the National Museum of History and Technology, now called the Smithsonian's National Museum of American History SMITHSONIAN INSTITUTION ARCHIVES

A Closer Look

How the Smithsonian Became the Latest Front in Trump's Culture War



by Alec MacGillis

September 24, 2026, 5:04 am

ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up to receive our biggest stories as soon as they're published.

Reporting Highlights

- **Too "Woke"?** Trump tried to fire one Smithsonian official and, after finding "ideological capture," plans to install anti-woke warning signs outside the history museum.
- **Is This History?** One exhibit speculated that Ben Franklin may have shocked enslaved people in electric experiments. Another displayed a "crotch harness" used for sadomasochistic sex.
- **A Longstanding Debate:** As early as 1999, one critic argued that the history museum lacked focus, examining oppression rather than the central figures and episodes of U.S. history.

These highlights were written by the reporters and editors who worked on this story.

In November 2021, the Smithsonian's National Museum of American History opened an exhibit called "The Electric Dr. Franklin," describing "Benjamin Franklin's pioneering contributions to electrical science." The exhibit explained that, prior to becoming an abolitionist, he had enslaved people in his household. "Benjamin Franklin's remarkable scientific accomplishments were, in part, enabled by slavery," it declared.

The exhibit speculated that Franklin may have used enslaved people in his electrical research. "Franklin wrote about experiments in which he took shocks and used family and friends in these ways, although he seldom identified who in particular assisted him," stated the exhibit, which closed in 2025 but can still be found online. "Indentured servants and enslaved people in his household could also have been used, although we may never know for certain."

It was an eye-catching conjecture: one of the most revered of the Founding Fathers subjecting people held against their will to possibly painful shocks. And it was one of many details singled out for criticism in a blistering 162-page White House report released in July that argued that the museum had fallen victim to an "ideological capture" that "moved the Museum's mission away from straightforward historical education and scholarship toward an extreme political activism that seeks to transform our country."

and Space Museum's planned 1995 exhibit of the Enola Gay, the B-29 that dropped the first atomic bomb on Hiroshima. By and large, though, the institution maintained bipartisan support as the guardian of America's history, ingenuity and natural heritage, even as political polarization spread and culture wars raged.

ADVERTISEMENT

But that institutional exceptionalism is now imperiled as never before. In March 2025, President Donald Trump signed an executive order declaring that the Smithsonian had succumbed to "divisive, race-centered ideology." This July 4, timed to coincide with the 250th anniversary of the Declaration of Independence, came the White House report. Later in July, two House committees held back-to-back hearings on the report, where Republican members took turns lambasting the museum's director, Anthea Hartig, and forcing her to answer questions about exhibit items such as a "chrome and rubber crotch harness" designed for sadomasochistic sex. That week, Trump signed an executive order instructing the Department of the Interior to erect signs outside the museum "warning visitors about the ideological capture" on display there. The signs have yet to go up, but in late August, Interior Secretary Doug Burgum sent a letter to the Smithsonian's Board of Regents declaring that other federal agencies "cannot in good conscience continue to support the Smithsonian under current leadership."

The Smithsonian is independent of the executive branch, governed by a 17-member board led by the chief justice of the Supreme Court and with six members of Congress, three from each party, serving with nine private citizens and the vice president. But it depends on the federal government for 62% of its funding, receiving more than $1 billion per year, and warnings of deep budget cuts have grown ever louder. Finally, on Sept. 8, Smithsonian secretary Lonnie Bunch, the first African American person to lead the institution, announced he was stepping down at age 73, saying "it has been stressful."

Seen from one vantage, the battle over the Smithsonian is but another example of Trump attempting with characteristic bombast to put his stamp on Washington institutions, alongside shuttering the Kennedy Center, replacing the East Wing of the White House with a huge ballroom and planning a 250-foot arch near Arlington National Cemetery.



The Smithsonian's National Museum of American History in Washington, D.C. ELIZABETH FRANTZ FOR PROPUBLICA

But unlike some conflicts initiated by Trump, this one has been festering for years, independent of him, with complaints lodged by board members before he returned to office. The American history museum, the main focus of the administration's ire, has wrestled for years with how, or even whether, it should present a unifying national narrative, an ambivalence that left it susceptible to the administration's broadside. Meanwhile, the Smithsonian underwent a political awakening during the 2020 upheaval over the COVID-19 pandemic and murder of George Floyd that echoed responses in academia and other progressive realms.

This left it exposed to a new administration that viewed itself as a corrective against perceived woke excesses. "I said over and over again that there's going to be a day of reckoning," recalled Garret Graves, a Republican former congressman from Louisiana who served on the Smithsonian board in 2023 and 2024, in an interview. "You can either participate in it, help guide the Smithsonian back to something that makes more sense, or you can have an abrupt shift. I didn't realize my words would ring as true as quickly as they did."

Now, in the year that was supposed to be a crowning celebration of the nation's 250th anniversary, the Smithsonian is instead in Trump's crosshairs. And the question of how the country's premier history museum should tell the nation's story is suddenly up for grabs.

The National Museum of History and Technology opened on the National Mall in 1964. Its mission, said former assistant secretary of the Smithsonian Remington Kellogg that year, was to "awaken" a "clear understanding of the inspiring story of the United States — its origins, struggles, development, traditions, strength." As the name reflected, the museum contained duelling missions from the start, showcasing American technological advances and telling a more general historical story.



A 1974 exhibit depicted the evolution of American fashion. ALFRED HARRELL/SMITHSONIAN INSTITUTION ARCHIVES

In 1980, it was renamed the National Museum of American History, but the tension lingered. “It started out as a technology museum, and even now it has a lot of equipment, and to move from that to American history, that’s a huge change,” said Ivan Selin, a former chair of the museum’s board. “Unless you’re going to throw everything out and start over again, you’re going to have a very incoherent thing. Unless you have a clear strategy, you’re going to have some apples and oranges.”

Two decades after the name change, the lack of a unified approach had become an issue. In 1999, David Brooks wrote a scathing critique in the Weekly Standard, lamenting that the museum had so little on display about the nation’s defining moments (the Constitutional Convention, the Lewis and Clark Expedition, the Great Depression, etc.) and prominent figures who shaped them (Thomas Jefferson, Abraham Lincoln, Martin Luther King Jr., etc.). “It ignores or virtually ignores most of the major events in American history,” he wrote. “This is a museum of multicultural grievance, which simply passes over any subject, individual, or idea, no matter how vital to American history, that does not have to do with the oppression of some ethnic outgroup or disfavored gender.”

In 2001, in response to such critiques, the Smithsonian convened a blue-ribbon commission of historians and others led by Richard Darman, a former top aide in Republican White Houses. In 2002, the commission released its report, declaring that the museum “requires what its own leadership has described as a ‘transformation.’ It lacks aesthetic appeal, organizational coherence, and the perception of substantive balance.” The report recommended, among other things, a chronological introductory exhibit that contains “central theme lines for the examination and interpretation of American history” and that “should celebrate America’s remarkable strengths and achievements while also treating fairly and responsibly the ways in which America may have failed to meet the high standards it has proclaimed for itself.”

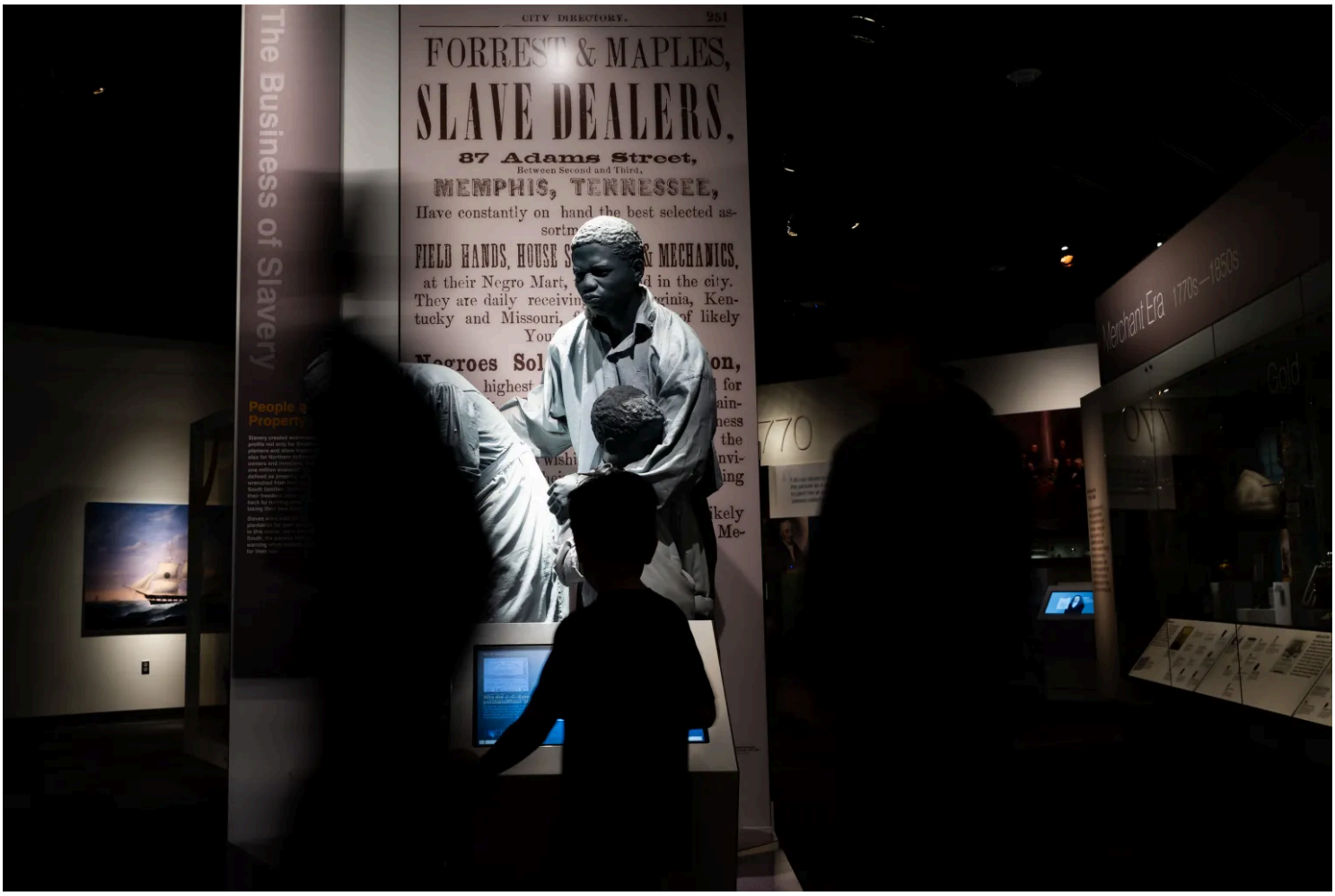
This would prove easier said than done. For one thing, the museum’s physical structure itself has never been coherent — “an awkward attempt to marry the classical and the modern, the building is legitimately neither,” wrote New York Times architecture critic Ada Louise Huxtable at its opening. “It’s a challenging space,” Brent Glass, who became director shortly after the blue-ribbon report in 2002, told ProPublica.

Above all, though, the commission’s recommendations faced resistance among the museum’s curators to the sort of great-man-of-history approach that Brooks and others were hankering for. There had been a trend in museum science away from this, and away from straight chronology. “There was this whole museum movement to get away from a march through time, to a more episodic or specific sort of story,” John Gray, who succeeded Glass in 2012, told ProPublica. “It wasn’t done to get away from the story; it was finding a way to get people interested.”

In addition, the museum's curators tended to be specialized in material culture — collecting and studying the museum's several million objects and artifacts — rather than in conceptual storytelling. To make up for this, Gray's team tried to enlist several leading academic historians to instill more of an overarching narrative structure. But they declined, saying they were concerned that such an approach could seem triumphalist and provide fodder for an America-first agenda. "We tried to organize [the museum] around ideas and ideals, ideals that were aspirational," Gray said. "And we failed many times."

The museum's eventual solution was to divide the national story into subject areas, each represented by a standing exhibit: "American Enterprise" on business and innovation, "American Democracy" on politics," "Many Voices, One Nation" on immigration, "The American Presidency," "The Price of Freedom" on the nation's wars, "Entertainment Nation" on culture, "America on the Move" on transportation.

Developing these required extensive debate, said the former directors. Some donors supporting the enterprise exhibit were upset that it devoted so much space to the role of slavery in American business. In crafting "The Price of Freedom," the museum consulted with veterans' groups to try to avoid a backlash like the one that arose on the Enola Gay. This effort succeeded, Glass said, despite the exhibit's candor about the darker elements of the nation's military history. "People can handle complexity," he said. "They don't feel bad about the country when told the whole story, and they're grateful that they have access to the information."



The museum's "American Enterprise" exhibit includes an advertisement for slave traders. ELIZABETH FRANTZ FOR PROPUBLICA

Scattered throughout the museum are countless highlights: the desk on which Jefferson drafted the Declaration of Independence; the top hat Lincoln wore to Ford's Theatre on the last night of his life; the actual lunch counter from the 1960 Greensboro, North Carolina, Civil Rights sit-in; and, in a recent addition, a gunboat sunk during the Revolutionary War that is being restored on-site. But the overall effect can be disjointed and disorienting. And, with the museum's dim lighting, dated technology and underutilized areas, it can feel at times as if one is wandering in a past-its-prime shopping mall or in the forgotten corner of an airport terminal.

National Museum of the American Indian, which opened in 2004, have the advantage of a more focused subject, leaving it even less clear what remains for the American history museum, where attendance has declined in recent years. "You can find nowhere in any Smithsonian document a theory of what should be in the American history museum or the more particular museums or how many of these particular museums there should be," Selin said. "There's no charter whatsoever that says how they fit together."

In March 2020, the Smithsonian shuttered its museums for the pandemic. A few months after that, Washington and other cities erupted in protests over Floyd's murder in Minneapolis. Bunch, who became secretary of the Smithsonian in 2019, and other top officials embarked on a push to rethink the institution's priorities, as reflected in the minutes of the Board of Regents meetings, which were now being held online. Bunch "briefed the Regents on his efforts to navigate the dual pandemics caused by the Coronavirus and issues surrounding race, racism, and racial identity," the minutes of the June 2020 meeting stated. He announced the launch of "Smithsonian Cares," a digital resource that would "provide tools and guidance to empower and inspire conversations about diversity, equity, access and inclusion."

That October, the board discussed "the potential creation of a Chief Diversity Officer position, a review of organizational processes and policies that may have inadvertently created barriers to inclusivity, integrating and standardizing DEAI training across the organization, strengthening supervisory DEAI skillsets, increasing senior leadership's focus on inclusivity, and identifying funding and resourcing strategies to implement DEAI efforts across the Institution's functions and operations." In February 2021, Bunch told the board that the Smithsonian's five strategic priorities would include positioning it as a "trusted source for critical conversations and helping the nation grapple with important issues like race and identity."

As the meeting minutes show, the institution's elevation of identity was being encouraged by the newly installed Biden administration. In October 2021, the Smithsonian's Office of Government Relations reported that the Smithsonian had "brought objects from the National Museum of American History to the White House for a temporary display recognizing Lesbian, Gay, Bisexual, Transgender, and Queer Pride Month." Three months later, the office stated that it "continues to work closely" with the White House on "diversity, accessibility, access and inclusion efforts." The Smithsonian noted plans for exhibits at the White House to mark "Black History Month in February, Women's History Month in March, Asian-American and Pacific Islander Heritage Month in May, LGBTQ in June and Hispanic History Heritage Month in September."

The post-2020 shift extended to the various museums, which started to reopen to visitors in spring 2021. To cite just one example, the National Portrait Gallery revised the signage for a portrait of Henry Laurens, South Carolina's delegate to the Continental Congress, to reflect that he had made his wealth through chattel slavery. "When Floyd was killed, everyone acknowledged that now is the time to ask: What are the stories that we're telling and were we being honest and fair in recounting those stories? We all looked at it through this lens," Kim Sajet, who became the director of the Portrait Gallery in 2013, told ProPublica. "Everyone felt energized by that. We can't change the past, but we need to acknowledge what happened in order not to repeat it in the future."

But the new direction caused misgivings for some conservative supporters of the institution, such as Graves, who joined the regents as one of the three Republican congressional appointees in 2023. Graves told ProPublica that he had high regard for Bunch — "his accomplishment with the African American museum was remarkable" — but that he became worried that the Smithsonian was operating within a bubble. Its staff were living in a metro area that had voted overwhelmingly against Trump (and museum employees are generally among the most left-leaning of any profession), yet they were charged with presenting exhibits to visitors from all over the country and the world, a disconnect that the institution seemed insufficiently aware of.

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Many board meetings would kick off with tours of a certain museum, and Graves and a fellow Republican appointee, Adrian Smith of Nebraska, would often be taken aback by what they saw. "Seventy-five percent of the time Adrian and I would be walking around and say, 'Are you kidding me?'" Graves said. "It wasn't interpreting science or history. It seemed to have an agenda, and that's not what a museum should be." What was missing, he said, was a sense of the nation's achievements. "This country is a remarkable experiment," he said. "We've had some grave sins, but my gosh, America is a net victory for the world. It's unbelievable what happened here in 250 years and it's worth celebrating."

Graves retired from Congress at the end of 2024. In his farewell address to the regents that October, he warned against allowing the Smithsonian to become seen as affiliated with one party or ideological bent. "I felt like they were causing sustainability problems for the institution," he said.

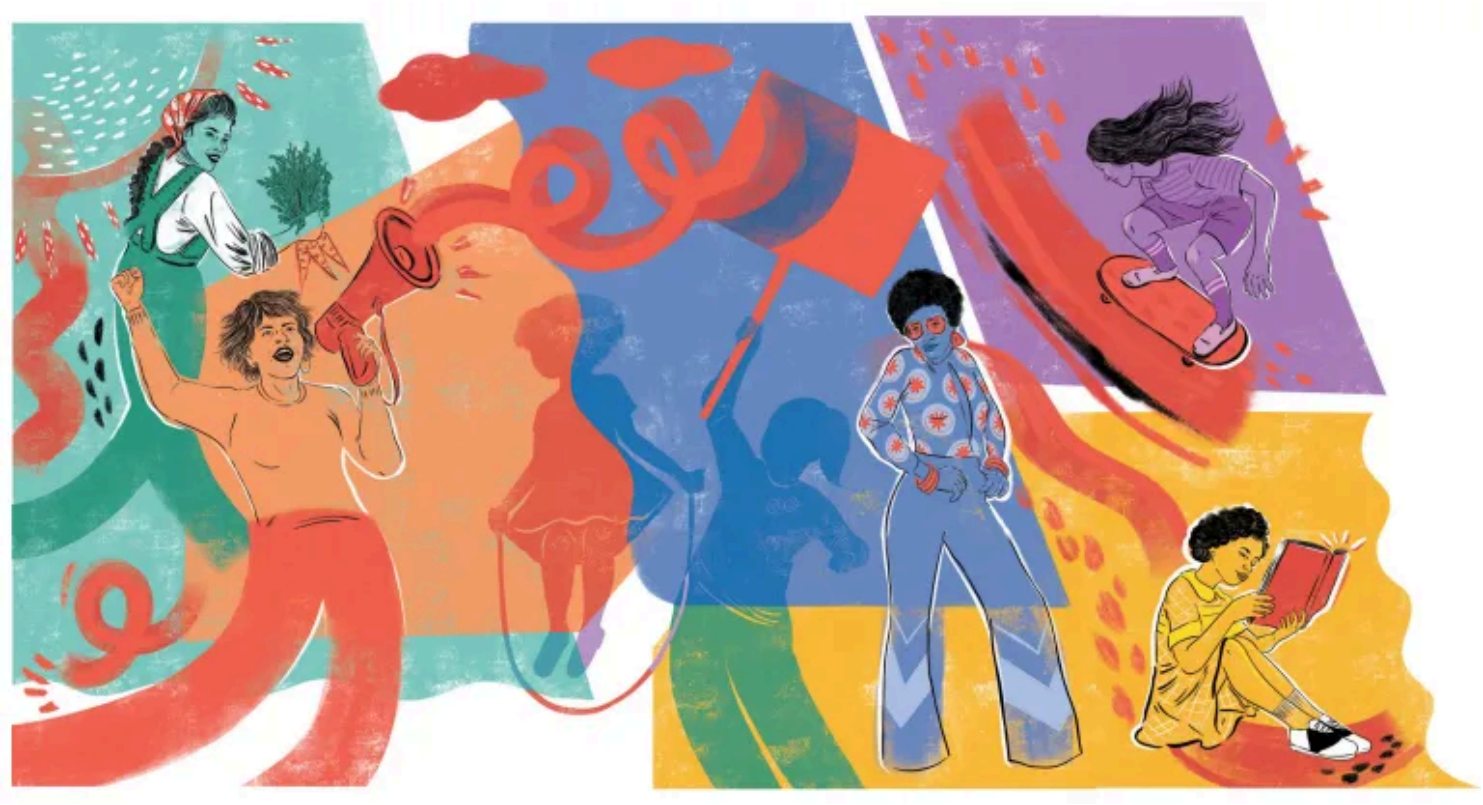
One week later, Trump won the election to return to the White House.

In his first term, Trump largely ignored the Smithsonian. In 2017, Bunch gave him a tour of the new African American museum, which Bunch recounted later in his memoir: "The president paused in front of the exhibit that discussed the role of the Dutch in the slave trade. As he pondered the label I felt that maybe he was paying attention to the work of the museum. He quickly proved me wrong. As he turned from the display he said to me, 'You know, they love me in the Netherlands.' All I could say was let's continue walking."

It took little time for Trump to make clear that, as on other fronts in his second term, things would be different this time around. First came the March 2025 executive order, which directed Vice President J.D. Vance to rid the Smithsonian of "improper ideology." Two months later, Trump said that he was firing Sajet at the Portrait Gallery, calling her "a highly partisan person, and a strong supporter of DEI, which is totally inappropriate for her position." The Smithsonian noted that Trump did not have the authority to remove Sajet, but she left anyway, hoping to spare the institution.

In August 2025, the White House issued a 120-day ultimatum to replace "divisive or ideologically driven language with unifying, historically accurate and constructive descriptions," but with little follow-up, and for nearly a year, it looked as if the storm may in fact have passed. Then came the White House report on the American history museum, with such an exhaustive litany against Hartig, its director since 2018, and Bunch that it made plain the authors had been scouring their public statements and the museum. (Through a spokesperson, Bunch declined to be interviewed. Museum representatives did not respond to requests to speak to Hartig.)

In addition to citing the Franklin exhibit, the report noted that an exhibit called "Girlhood (It's Complicated)" had included "the pages of a 6-year-old girl's diary where she expresses fear about 'getting boobs' and wishes for her nonexistent 'penis to grow.'" Another exhibit, on gay history, had "included a two-piece chrome and rubber crotch harness designed for sadomasochism."



An image from "Girlhood (It's Complicated)," a Smithsonian exhibit that drew complaints from Republican lawmakers for its explicit comments about gender identity KRYSTAL QUILES

It criticized the museum for having trained staff using the "Museums as a Site for Social Action Toolkit," a 200-plus-page roadmap on how to "truly transform the museum space," which is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions."

presents the facts of history — what actually happened — as accurately as possible with minimal present-day bias," the report stated. "It should tell the *whole* story of a nation, including the good and the bad, so Museum visitors can understand the development that led our nation to where it is today."

For years, the Smithsonian had avoided major conflagrations partly by engaging in what one former official called the "care and feeding" of members of Congress on the two committees with purview over it, Appropriations and House Administration. If there was a potentially controversial exhibit, the museum would bring members over for a preview tour, so they had some context for complaints they might receive. But these efforts were on hold for a while because of the pandemic closures, and the Smithsonian's government relations office experienced heavy turnover, as one of its directors had cancer and another died suddenly.

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This context, combined with the fuel provided by the White House report, helped explain the level of vitriol that Hartig faced when she appeared at the two hearings in late July. Even by the standards of today's decorum-less Congress, the hearings were wild affairs. At the first, held by the House Oversight Subcommittee on Delivering on Government Efficiency, Chair Tim Burchett, a Tennessee Republican, kicked things off by playing a lengthy string of video clips of Hartig offering tribal land acknowledgements at the start of her speeches. "I'm wondering, have you ever planned on deeding any of your personal property or property of the Smithsonian to any of these tribes?" he asked Hartig.

She adopted a conciliatory tone, saying the Smithsonian "takes the concerns raised in the White House Domestic Policy Council's report seriously" but that "it does not fairly or accurately characterize the full body of work at the museum." She assured the committee, "I love the United States of America. I consider it the privilege of my career to help preserve its treasures and serve the American people."

This did not assuage committee Republicans. Burchett displayed museum images including the crotch harness and the diary mention of the 6-year-old girl wishing for a penis. "Ma'am, I mean, you have pictures of bondage. You have some overtly sexual things up there," he said. "I'm not a fan." Rep. Nancy Mace, a South Carolina Republican, pressed the point: "Are images of sexual fetishes appropriate for children? Yes or no?" Rep. Brandon Gill, a Texas Republican, noted that the toolkit that the museum used for staff training had referred to "politeness" as a feature of "white supremacy culture."



U.S. Rep. Tim Burchett, a Tennessee Republican, poses questions to Anthea Hartig, director of the history museum, in July. TOM WILLIAMS/CQ-ROLL CALL, INC VIA GETTY IMAGES

Those defending Hartig were hardly less outspoken. David Blight, a Yale historian also testifying, compared the White House's attacks on the Smithsonian to the German Third Reich, saying "their model may indeed be Joseph Goebbels' committee on enlightenment, which is what the Nazis called their committee that tried to control museums." Rep. Jasmine Crockett, a Texas Democrat, opened her remarks by saying, "Welcome to the White Pride Committee." Rep. Kweisi Mfume, a Maryland Democrat, vowed to sacrifice his life for the Smithsonian. "We will not let you destroy that museum," he said. "No matter how long it takes, how many battles are required, how much effort is needed, we will not allow that to happen unless you find a way to kill all of us and walk over our bodies to change history."

The next day's hearing, before the House Administration Committee, was more of the same. The bipartisan consensus around the Smithsonian appeared to lie in tatters.

On a recent Sunday, a group of visitors made their way into the centerpiece exhibit at the National Mall entry to the history museum, the giant Star-Spangled Banner that was flying over Fort McHenry in 1814 and inspired Francis Scott Key to write what became the national anthem. For safe-keeping, the flag is displayed in very low light, giving the chamber a sacred feel, like a cathedral crypt. "Oh my god, it's huge," said one woman. "I am shivering," said another. "It's insane," said a third.

Every day, the museum, for all its imperfections, still makes a strong impression on many visitors. But its longstanding search for identity helped make it a target for an administration looking for weak spots, and now its future and that of the entire Smithsonian hangs in the balance. Three of the nine citizen slots on the Board of Regents are vacant, and three more will be next month. Whoever the remaining members of the board — which include Vance — select to fill those slots will help determine who is chosen to replace Bunch as secretary, and the institution's future course. Much will depend on how much Chief Justice John Roberts, at the head of the board, decides to engage.

Any large institution can benefit from reassessment, and the Smithsonian and the American history museum in particular may well be overdue, especially as yet another focus area is about to be cleaved off, for the National Museum of the American Latino, scheduled to open early next decade.

"There will be a moment," Sajet said, "when the American people will have to stand up and decide, is this what they want?"



Alec MacGillis

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Plaintiffs,	)	Case No. 1:26-cv-00544-TSC
v.	)	
DONALD J. TRUMP *et al.*,	)	
Defendants.	)	

BRIEF OF MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF *AMICI CURIAE*

Amici curiae are Members of the United States House of Representatives and United States Senate who serve as Ranking Members on committees or subcommittees with jurisdiction over the construction of monuments in the Nation's Capital, Washington, D.C.[1] In particular, the *amici* are:

House of Representatives

- Representative Jared Huffman, who represents the Second Congressional District in California, serves as the Ranking Member on the House Committee on Natural Resources.
- Representative Yassamin Ansari, who represents the Third Congressional District in Arizona, serves as the Ranking Member of the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources.
- Representative Maxine Dexter, who represents the Third Congressional District in Oregon, serves as the Ranking Member of the Subcommittee on Oversight and Investigations of the House Committee on Natural Resources.

Senate

- Senator Martin Heinrich, who represents New Mexico, serves as Ranking Member on the U.S. Senate Committee on Energy and Natural Resources.
- Senator Angus King, who represents Maine, serves as the Ranking Member of the Subcommittee on National Parks of the U.S. Senate Energy and Natural Resources Committee.
- Senator Jeff Merkley, who represents Oregon, serves as the Ranking Member of the Subcommittee on Interior, Environment, and Related Agencies of the U.S. Senate Committee on Appropriations.

[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Congress has enacted multiple statutes—in particular, the Commemorative Works Act, 40 U.S.C. § 8901 *et seq.*, and 40 U.S.C. § 8106—to protect its exclusive control over commemorative works on federal land in the Nation's Capital. Congress and its members have an institutional interest in preventing unilateral executive action, such as the President's apparent plan to build the Independence Arch, that would bypass or nullify that statutory framework and undermine the separation of powers.[2]

BACKGROUND AND SUMMARY OF ARGUMENT

Congress has long specified that only it has the authority to approve the placement of monuments and memorials on federal land in the District of Columbia. This has been true since at least 1912, when Congress enacted the law now codified at 40 U.S.C. § 8106. Section 8106 could not be more plain: It prevents any "building or structure" from being "erected on any reservation, park, or public grounds of the Federal Government in the District of Columbia without express authority of Congress."

As the number of proposed monuments proliferated throughout the 20th century, Congress sought to make the process for approving new monuments or memorials more rigorous and structured. The Commemorative Works Act (CWA), Pub. L. No. 99-652, 100 Stat. 3650 (1986), *codified at* 40 U.S.C. §§ 8901–8909, enacted

[2] *Amici*'s focus in this brief is on the process by which President Trump has proceeded; *amici* take no position on the appropriateness of the Independence Arch on aesthetic or other grounds—all of which should appropriately be addressed through the comprehensive, reticulated process Congress has created for the review of commemorative works.

in 1986, does just that. It reaffirms congressional primacy through statutory authorization requirements, consultation mandates, and siting restrictions. And it ensures that new commemorative works are the product of deliberation, consensus, and accountability through the legislative process—just the opposite of President Trump's impulsive, unilateral decision to erect an "Independence Arch" in Memorial Circle.

Permitting that Arch to be built without appropriate congressional authorization and review could lead to the unchecked proliferation of monuments, the erosion of public space, and serious constraints on future generations' ability to memorialize their own losses and achievements. These are precisely the problems Congress enacted the CWA to prevent. Even more importantly, permitting the Executive to bypass the statutory approval processes would effectively nullify the CWA and Section 8106, undermining the rule of law and the separation of powers.

ARGUMENT

I. The Plain Text Of The Commemorative Works Act And 40 U.S.C. § 8106 Require Congressional Authorization For The Erection Of An "Independence Arch" In Memorial Circle.

Washington D.C. is not the President's backyard to renovate, relandscape, and build in as he sees fit. Title 40 of the United States Code governs "Public Buildings, Property, and Works," and contains a host of provisions designed to protect the urban landscape of Washington D.C.—ranging from a prohibition on advertising in or around the Washington Monument, 40 U.S.C. § 8107, to a requirement that applications to erect or alter buildings near certain public buildings or parks, in a

manner that implicates their exterior appearance, be reviewed by the Commission of Fine Arts, *id.* § 8104(b).

Two Sections or Subchapters of Title 40 expressly prevent the construction of new monuments like the Independence Arch without specific legislative approval. The Commemorative Works Act and 40 U.S.C. § 8106 each make clear that the ultimate authority to decide what monuments and memorials shall be erected on federal lands in the District of Columbia—and where to construct those monuments—lies with Congress, not the Executive. Absent express congressional approval, construction of a permanent commemorative structure, like the arch President Trump plans to erect, flouts these laws and the separation of powers principles that they embody. Moreover, the CWA imposes especially stringent requirements on those seeking to erect monuments in the so-called "Area I" of Washington, D.C., where the risk of overcrowding of monuments is especially pronounced. President Trump's decision to site the arch in Memorial Circle, within Area I, is thus especially an affront to the CWA. Any project for an Independence Arch or other monument at Memorial Circle cannot legally proceed without congressional approval and without adherence to the standards and procedural requirements set forth in the CWA.

A. The Commemorative Works Act

Congress explained the purposes of the CWA in the statute itself: "(1) to preserve the integrity of the comprehensive design of the L'Enfant and McMillan plans for the Nation's Capital; (2) to ensure the continued public use and enjoyment of open space in the District of Columbia and its environs, and to encourage the

location of commemorative works within the urban fabric of the District of Columbia; (3) to preserve, protect and maintain the limited amount of open space available to residents of, and visitors to, the Nation's Capital; and (4) to ensure that future commemorative works in areas administered by the National Park Service and the Administrator of General Services in the District of Columbia and its environs—(A) are appropriately designed, constructed, and located; and (B) reflect a consensus of the lasting national significance of the subjects involved." 40 U.S.C. § 8901.

To those ends, the CWA provides that "[c]ommemorative works" may be erected in the District of Columbia and its environs "only as specifically authorized by law" and "subject to" the other provisions of the CWA. 40 U.S.C. § 8903(a). In other words, the CWA prohibits the construction of new "commemorative works" "in areas administered by the National Park Service and the Administrator of General Services in the District of Columbia and its environs" without Congress passing a statute giving express authorization for the commemorative work. *Id.* §§ 8901(4), 8903(a)(1).[3] A partial list of over 40 commemorative works authorized by specific statutory enactment pursuant to the CWA is attached as an Appendix to this brief.

The CWA defines a "commemorative work" as "any statue, monument, sculpture, memorial, plaque, inscription, or other structure or landscape feature . . .

[3] *See also, e.g.*, *Hearing before the United States Senate Committee on Energy and Natural Resources' Subcommittee on Public Lands, Reserved Water and Resource Conservation on S. 2522 and H.R. 4378*, 99th Cong. (June 24, 1986) (1986 Congressional Hearing Report), at 33 (CWA "would prohibit the establishment of commemorative works in designated areas referred to on a map unless specifically authorized by Act of Congress") (statement of Manus J. Fish, Reg'l Dir., Nat'l Park Serv.).

designed to perpetuate in a permanent manner the memory of an individual, group, event or other significant element of American history . . . ." 40 U.S.C. § 8902(a)(1). And it defines the geographic scope of the CWA as "those lands and properties administered by the National Park Service [NPS] and the General Services Administration [GSA] located in the Reserve, Area I, and Area II as depicted on the map entitled 'Commemorative Areas Washington, DC and Environs,' numbered 869/86501 B, and dated June 24, 2003" (CWA Map). 40 U.S.C. § 8902(a)(2).[4]

In addition to the fundamental requirement of congressional authorization, the CWA also sets forth more-detailed requirements before any commemorative work can be built. Before Congress may enact legislation authorizing any specific commemorative work, "the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate" must solicit the views of the National Capital Memorial Advisory Commission, *id.* § 8903(d)—an advisory body comprised of: "(1) the Director of the National Park Service; (2) the Architect of the Capitol; (3) the Chairman of the American Battle

[4] The Reserve is "the great cross-axis of the Mall, which generally extends from the United States Capitol to the Lincoln Memorial, and from the White House to the Jefferson Memorial." 40 U.S.C. § 8902(a)(3). New commemorative works are prohibited within the Reserve to preserve the integrity of the area. *See* Jacob R. Straus, *Commemorative Works Act: Siting Memorials in the District of Columbia*, CRS In Focus IF11937, at 1 (Cong. Rsch. Serv., updated Sept. 23, 2024). Area I extends slightly beyond the Reserve to include, for example, the United States Holocaust Museum, the National Archives, and other areas adjacent to but not within the Mall—as well as Columbia Island and Theodore Roosevelt Island in the Potomac, which are technically part of the District of Columbia. *See id.* "Area II encompasses all sections of the District of Columbia and its environs not part of the Reserve or Area I." *Id.* Memorial Circle is in Lady Bird Johnson Park, which is on Columbia Island and is part of Area I.

Monuments Commission; (4) the Chairman of the Commission of Fine Arts; (5) the Chairman of the National Capital Planning Commission; (6) the Mayor of the District of Columbia; (7) the Commissioner of the Public Buildings Service of the General Services Administration; and (8) the Secretary of Defense," *id.*§ 8904(a). With the benefit of that input, Congress may then vote to approve the new commemorative work.

In authorizing a commemorative work in the District of Columbia or its environs, Congress designates an individual, group, organization, or public entity to be the "sponsor" of that project. *Id.* § 8902(a)(4). Once the sponsor is congressionally authorized to establish a commemorative work, that "sponsor must consult with the National Capital Memorial Advisory Commission regarding the selection of alternative sites and design concepts for the commemorative work," and then submit, via the Secretary of the Interior or the Administrator of General Services, "site and design proposals to the Commission of Fine Arts[5] and the National Capital Planning Commission[6] for their approval." *Id.* § 8905(a). After the Commission of Fine Arts and

[5] The Commission of Fine Arts, established by Congress in 1910, is comprised of seven members appointed by the President, each of whom serves a four-year term. *See* U.S. Comm'n of Fine Arts, *Who We Are*, https://www.cfa.gov/about-cfa/who-we-are (last visited Mar. 3, 2026).

[6] The National Capital Planning Commission, established by Congress in 1924, is comprised of 12 members, including three members appointed by the President, two members appointed by the Mayor of the District of Columbia, and seven *ex officio* members such as the Secretary of the Interior, the Administrator of General Services, and the Mayor of the District of Columbia. *See* Nat'l Cap. Planning Comm'n, *About NCPC*, https://www.ncpc.gov/about/ (last visited Mar. 3, 2026); Nat'l Cap. Planning Comm'n, *About the Commission*, https://www.ncpc.gov/about/commission/ (last visited Mar. 3, 2026).

the National Capital Planning Commission have approved the site and design, the Secretary of the Interior or Administrator of General Services must then ensure that the project is "structural[ly] sound[]" and "durab[le]" and "meets high professional standards," that all required contractual documents have been submitted, and that the sponsor has sufficient funds for construction and perpetual maintenance of the work, before issuing a construction permit. *Id.* § 8906(a)(1)-(4), (b)(1).

Additionally, commemorative works within Area I are subject to especially "stringent restrictions." 1986 Congressional Hearing Record at 41 (statement of George M. White, Architect of the Capitol); *see also, e.g.*, *id.* at 42 (statement of Robert E. Gresham, Assistant Exec. Dir. for Operations, Nat'l Cap. Planning Comm'n) (noting that the CWA seeks to "limit[] monuments or memorials on lands within area I of the National Capital region"). In particular, the Secretary of the Interior or the Administrator of General Services must "seek[] the advice of the National Capital Memorial Advisory Commission" and assess whether "the subject of the commemorative work is of preeminent historical and lasting significance to the United States." 40 U.S.C. § 8908(b)(1). If the Secretary or Administrator believes a commemorative work qualifies, he or she may "recommend the location of a commemorative work in Area I" and must notify the National Capital Memorial Advisory Commission, the House Committee on Natural Resources, and the Senate Committee on Energy and Natural Resources in writing of that recommendation. *Id.* The location of a commemorative work in Area I "is deemed to be authorized only if the recommendation is approved by law not later than 150 calendar days after the

notification." *Id.* In other words, any monument must be approved *a second time* by Congress in order to be sited in Area I.[7] *See, e.g.*, Straus, *Commemorative Works Act: Siting Memorials in the District of Columbia*, at 1 ("If that recommendation [by the Secretary or Administrator] occurs, Congress may choose whether to enact legislation to authorize placement in Area I."). These procedures "allow for a fully considered determination of the significance of the commemorative subject prior to its assignment in area I." 1986 Congressional Hearing Record at 99 (statement of Robert W. Good, Chairman, Comm. on the Nat'l Cap., Am. Soc'y of Landscape Architects).

The planned Independence Arch is subject to the CWA: It is a "monument" or "structure" "designed to perpetuate in a permanent manner" the Nation's 250th anniversary. 40 U.S.C. § 8902(a)(1); *see, e.g.*, Dan Diamond et al., *Trump wants to build a 250-foot-tall arch, dwarfing the Lincoln Memorial*, Wash. Post (Jan. 31, 2026), https://www.washingtonpost.com/politics/2026/01/31/trump-arch-memorial-circle/. It is slated to be located in Memorial Circle, within Lady Bird Johnson Park, which is administered by the NPS. *See id.*; Nat'l Park Serv., *Lady Bird Johnson Park Cultural Landscape*, https://www.nps.gov/articles/600245.htm#4/31.80/-78.13 (last visited Mar. 3, 2026). And it is within the District of Columbia and its environs. *See* Jacob R. Straus, *Commemorative Works in the District of Columbia: Background and Practice*,

[7] "Should the Secretary or Administrator not recommend placement in Area I or Congress not act upon the recommendation, the [previously congressionally approved] memorial can be placed in Area II without further action." Jacob R. Straus, *Monuments and Memorials in the District of Columbia: Analysis and Options for Proposed Exemptions to the Commemorative Works Act*, CRS Report R43241, at 4 (Cong. Rsch. Serv., updated May 8, 2023) (citing 40 U.S.C. § 8908(b)(2)).

CRS Report R41658, at 30 (Cong. Rsch. Serv., updated May 8, 2023). Independence Arch thus requires congressional authorization and the statutorily prescribed consultations and committee approvals. 40 U.S.C. § 8903(a)(1).

Moreover, because the planned Independence Arch is within Area I, it requires a formal determination by the Secretary or Administrator that the subject—the 250th anniversary of the Nation's founding—"is of preeminent historical and lasting significance to the United States," and additional congressional approval for siting at that location. 40 U.S.C. § 8908(b)(1).

Defendants' failure to seek congressional approval runs afoul of the CWA.

B. 40 U.S.C. § 8106

The planned Independence Arch also violates 40 U.S.C. § 8106. Section 8106 could scarce be more clear: "A building or structure shall not be erected on any reservation, park, or public grounds of the Federal Government in the District of Columbia without express authority of Congress." 40 U.S.C. § 8106. Independence Arch is a permanent structure that would be located in Lady Bird Johnson Park, a park run by the National Park Service. *See* Nat'l Park Serv., *Lady Bird Johnson Park*, *supra*. Section 8106 therefore applies too and, like the CWA, requires express congressional authorization for the erection of the Independence Arch.

II. The History Of Monument Construction In The District And Legislative Intent Of The CWA Confirm The Illegality Of The Planned Independence Arch.

The plain text of the relevant statutes leaves little doubt that congressional approval is required. But lest there be any question, the long history and tradition of Congress exercising oversight over the erection of all monuments or memorials on

federal land in the District of Columbia and its environs underscores the illegality of President Trump's effort to exercise unilateral authority. Furthermore, the legislative history of the CWA reveals that the law was designed precisely to prevent impulsive constructions like the planned Arch and shows the risks of bypassing the congressional review process.

A. Congress has long exercised oversight over the placement of monuments and memorials on federal land in the District of Columbia.

Congressional approval over the erection of new monuments reaches back to the Founding. On May 6, 1783, Arthur Lee, a Virginia delegate to the Confederation Congress, introduced a resolution to erect an equestrian statute to George Washington. *See* Straus, *Commemorative Works in the District of Columbia*, at 1 n.1 (citing Worthington C. Ford et al., eds., *Journals of the Continental Congress, 1774-1789* vol. 25, at 963 (May 6, 1783)). The Continental Congress unanimously agreed. *Id.*[8] Since then, Congress has authorized over 100 memorials for placement on federal land in the District of Columbia. *Id.*, at 1 (citing S. Comm. on Energy & Nat. Res., *The Placement of Commemorative Works on Federal Lands in the District of Columbia and its Environs*, Report to accompany H.R. 4378, 99th Cong., 2nd Sess., S. Rep. 99-421 at 4 (Aug. 15, 1986)). Congress expressly approved, for example, the Andrew

[8] It was not until 1853 that Congress appropriated funds and commissioned a sculptor to build the statute. Straus, *Commemorative Works in the District of Columbia*, at 1 n.1 (citing James M. Goode, *Washington Sculpture: A Cultural History of Outdoor Sculpture in the Nation's Capital* 480 (2008)).

Jackson Memorial in 1848,[9] the Benjamin Franklin Memorial in 1888,[10] the Daniel Webster Memorial in 1898,[11] the Ulysses S. Grant Memorial in 1901,[12] the Christopher Columbus Memorial in 1907,[13] the Lincoln Memorial in 1911,[14] the Jefferson Memorial in 1926,[15] the Theodore Roosevelt Memorial in 1932,[16] the Franklin Delano Roosevelt Memorial in 1955,[17] and the Signing of the Declaration of Independence Memorial in 1978.[18]

"While Congress has long been responsible for authorizing memorials on federal land," over time it sought to impose structure and uniformity on what had

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[9] *See* Joint Res. of Aug. 11, 1848, No. 25, 9 Stat. 340.

[10] *See* Joint Res. of July 19, 1888, No. 31, 25 Stat. 627.

[11] *See* Pub. L. No. 55-546, 30 Stat. 625 (1898).

[12] *See* Pub. L. No. 56-469, 31 Stat. 803 (1901).

[13] *See* Pub. L. No. 59-267, 34 Stat. 1413 (1907).

[14] *See* Pub. L. No. 61-346, 36 Stat. 898 (1911).

[15] *See* Joint Res. of June 26, 1926, No. 763, 48 Stat. 1243.

[16] The Theodore Roosevelt Memorial involved a number of Acts of Congress, including to create a memorial and to authorize expenditure of federal funds for its construction. *See* Pub. L. No. 72-146, 47 Stat. 163 (1932); Pub. L. No. 86-764, 47 Stat. 164 (1960).

[17] The Franklin Delano Roosevelt Memorial likewise involved a number of Acts of Congress, including to establish the FDR Memorial Commission, to reserve a site in West Potomac Park, to authorize the Secretary of the Interior to participate in the planning and design of the memorial, to allocate funds, and to approve the design of the Memorial. *See* Pub. L. No. 84-372, 69 Stat. 694 (1955); Pub. L. No. 86-214, 73 Stat. 445 (1959); Pub. L. No. 87-842, 76 Stat. 1079 (1962); Pub. L. No. 89-305, 79 Stat. 1126 (1965); Pub. L. No. 91-398, 84 Stat. 837 (1970); Pub. L. No. 92-332, 86 Stat. 401 (1972); Pub. L. No. 97-224, 96 Stat. 243 (1982).

[18] *See* Pub. L. No. 95-260, 92 Stat. 197 (1978).

been a "historically haphazard" system. Straus, *Commemorative Works in the District of Columbia*, Summary.

In 1910, Congress created the Commission of Fine Arts to "advise upon the location of statues, fountains, and monuments in the public squares, streets, and parks in the District of Columbia." Pub. L. No. 61-181, 36 Stat. 371 (1910).

In 1912, Congress enacted the law now codified at 40 U.S.C. § 8106, to give Congress express control over development in federal areas in the District: "Hereinafter, there shall not be erected on any reservation, park, or public grounds, of the United States within the District of Columbia, any building or structure without express authority of Congress." Pub. L. No. 62-302, 37 Stat. 444 (1912).[19]

In 1952, Congress created the National Capital Planning Commission "as the central planning agency for . . . the appropriate and orderly development and redevelopment of the National Capital and the conservation of the important natural and historical features thereof." Pub. L. No. 82-592 § 2(a), 66 Stat. 781, 782 (1952) (codified as amended at 40 U.S.C. § 8711(a)).

Finally, in 1986, Congress enacted the CWA to prevent too many monuments and memorials from being built. With its detailed procedural requirements, the CWA

[19] The current version of this law, 40 U.S.C. § 8106, was created as part of the codification of Title 40 in 2002. *See* Pub. L. No. 107-212, 116 Stat. 1062, 1206 (2002) ("A building or structure shall not be erected on any reservation, park, or public grounds of the Federal Government in the District of Columbia without express authority of Congress."). The current version is ordered differently but materially identical to the law enacted in 1912.

ensures that no monuments will be built without rigorous deliberation, public transparency, expert input, and accountability in the form of congressional approval.

The World War II Memorial, for example, illustrates how the CWA was designed to work. On December 10, 1987, Representative Marcy Kaptur introduced legislation to authorize a World War II Memorial in the District of Columbia or its environs. *See* Pub. L. No. 103-32, 107 Stat. 90 (1993); Friends of the National WWII Memorial, *Chronology*, https://www.wwiimemorialfriends.org/chronology (last visited Mar. 3, 2026). That legislation was passed and signed into law by President Clinton, who then appointed an advisory board to advise on site selection and design. *Id.* In October 1994, the House and Senate passed Joint Resolution 227 approving the location of the World War II Memorial in Area I. *See* Pub. L. No. 103-422, 108 Stat. 4356 (1994); Friends of the National WWII Memorial, *Chronology*, *supra.*[20] President Clinton then signed that Resolution into law on October 25, 1994. *Id.* Representatives of the Commission of Fine Arts, the National Capital Planning Commission, the National Capital Memorial Commission, the National Park Service, and the U.S. Army Corps of Engineers then considered a number of potential sites within Area I—and the National Capital Planning Commission held public hearings on certain potential sites—before ultimately selecting the Rainbow Pool site. *Id.* After the various commissions approved the design, a construction permit was issued by the

[20] The World War II Memorial is now in the area known as the Reserve, but that designation was enacted in 2003, in the Commemorative Works Clarification and Revision Act of 2003—as was the concomitant ban on new memorial structures in the Reserve. *See* Pub. L. No. 108-126, Tit. II, 117 Stat. 1348, 1349 (Nov. 17, 2003).

National Park Service in 2001. *Id.*[21] On April 29, 2004, the National World War II Memorial opened to the public. *Id.*

In short, the World War II Memorial reflects the deliberative and collaborative process that the CWA contemplates—a process that "requires that Congress act twice in order for a memorial to be placed in Area I." 1986 Congressional Hearing Report, at 110 (statement of T. Paul Imse, Jr., Sec'y & Gen. Counsel of the Francis Scott Key Park Found. Inc.). Defendants are not free to circumvent that process—and Congress's central role within it—in the name of expediency.

B. The legislative history of the CWA confirms Congress's intent to prevent rash construction projects and preserve congressional primacy.

The legislative history of the CWA also confirms Congress's intent to retain and exercise control over the construction of new monuments. At the time the CWA was being considered, Congress "ha[d] before it *18 proposals* to establish memorials and monuments on Federal land in the District of Columbia—an unprecedented number." 1986 Congressional Hearing Report at 23 (opening statement of Sen. Malcolm Wallop) (emphasis added).[22] Congress thus recognized "a clear need for legislative standards" to "assure that Federal lands in Washington, D.C. will continue

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[21] The House and Senate passed *additional* legislation in 2001 intended to expedite the construction of the World War II memorial at the Rainbow Pool. *See* Pub. L. No. 107-11, 115 Stat. 19 (2001).

[22] These included a memorial for "members of the armed forces of the United States who served in the Korean War," a memorial for Black Revolutionary War Patriots, a memorial for "all women who have served in or with the armed services," and a memorial to "the armored force," to name just a few. *See* 1986 Congressional Hearing Report, at 97 (statement of Rep. Mary Rose Oakar).

to be available for a variety of activities, and that there will be sites remaining for future generations to honor their own." *Id.* at 23–24 (opening statement of Sen. Wallop).

As Senator Wallop, chair of the Senate Subcommittee on Public Lands, Reserved Water and Resources Conservation, explained at the June 24, 1986 hearing on the CWA: "There now remains but a limited number of sites for additional memorials, and yet an infinite number of proposals to establish them. If we are to protect the concept of open space and dignity which contributes so much to the beauty of the Nation's Capital, we must be selective not only in what we choose to commemorate, but we must demand high standards in design and construction." *Id.* at 1–2 (opening statement of Sen. Wallop). Later in the hearing, Senator Wallop observed: "[G]enerations that are going to come in after ours will have significant achievers, and they will probably be called on to save their Nation as our generation was, and a number of other things. That is a hell of a note to come back and say, sorry, boys, history outdid you. You cannot be memorialized. . . . [T]here is a responsibility to the future as well as the past. . . ." *Id.* at 92–93.

Other speakers at the hearing likewise invoked concerns about overcrowding of monuments. For example:

- "[I]t is obvious that we are fast approaching the time when memorials will be consuming what little open space we have left in the District. . . . I recognize that we need to limit the number of memorials in order to preserve the quality of the existing ones." 1986 Congressional Hearing Report at 25 (statement of Sen. Frank Murkowski).
- "The situation we are now facing is one of limited land space in the District for erecting such commemorative works and an ever-increasing number of such proposals. The National Park Service estimates that

only 50 appropriate sites remain on which to locate these monuments." *Id.* at 26 (statement of Sen. Dale Bumpers).

- "Because of their significance, availability and visibility, these spaces are increasingly sought for the commemoration of a diverse spectrum of persons, groups or events. There can be no question that, as these spaces become filled with such fractionalized uses and interests they will lose the essential character, dignity and unity of spirit that has become a part of the lives and memories of generations of Americans and visitors to our country." *Id.* at 102 (statement of Robert W. Good, Chairman, Comm. on the Nat'l Cap., Am. Soc'y of Landscape Architects).

The legislative history also reflects a recognition of the need to preserve certain visual axes, including the axis formed by Lincoln Memorial and Arlington Cemetery, which is the sightline implicated by the contemplated placement of an Independence Arch at Memorial Circle:

- "We particularly emphasize the importance of Area I and the need to ensure lasting protection of the historic visual axes, radials and grounds of the Hall, the Washington Monument, the White House, Jefferson and Lincoln Memorials, and Arlington Cemetery." *Id.* at 103 (statement of Robert W. Good, Chairman, Comm. on the Nat'l Cap., Am. Soc'y of Landscape Architects).

Finally, the legislative history reflects the clear understanding that *Congress* had and would retain the authority to decide what new monuments are built. Ralph Spencer—the Vice Chairman of the American Veterans Committee, Inc.—for example, testified at the 1986 Congressional Hearing that "the American people have vested in the Congress the responsibility of authorizing appropriate memorials" and urged that the eventual legislation "make loud and clear that the Congress has the full responsibility for making the choices." 1986 Congressional Hearing Report at 58 (statement of Ralph Spencer, Vice Chairman, Am. Veterans Comm., Inc.). Congresswoman Mary Rose Oakar went further, criticizing the Senate version of the

CWA for granting to the Executive (through the Secretary or Administrator) even the limited role of determining that the subject of a commemorative work is of "preeminent historical and lasting significance to the Nation as a whole" and making a *recommendation* to Congress as to the placement of an approved commemorative work in Area I.[23] She testified:

> Mr. Chairman, we are abdicating our responsibility as representatives of this country if we allow the Executive Branch to acquire jurisdiction of what has always been thoroughly accomplished by the Congress of this United States. In the Senate Version, the establishment and placement of future memorials in Area I will be approved by the Executive Branch – Congress will give up its authorization, and in essence become a rubber stamp to the Executive Branch.

See id. at 98 (statement of Rep. Oakar).

[23] The Senate version of the bill provided: "[N]o commemorative work may be located in Area I unless the Secretary or Administrator (as appropriate), after consultation with the National Capital Memorial Commission, finds that the subject of the commemorative work is of preeminent historical and lasting significance to the Nation. The Secretary or Administrator shall notify the Congress of his determination that a commemorative work should be located within Area I. Unless the Congress enacts a joint resolution approving such determination within ninety days of such notification, the determination shall be deemed disapproved." 1986 Congressional Hearing Report at 6–7. The House version of the bill provided: "[N]o commemorative work may be located at a site in Area I unless the Congress finds that the subject of the commemorative work is of such major historical and lasting significance to the Nation as a whole that placement of the commemorative work in any other site would be appropriate." 1986 Congressional Hearing Report at 15–16. Congresswoman Oakar preferred the House version, but others felt that the Senate bill more clearly "ensure[d] participation by the agencies having expertise in planning, esthetics, and in the management of the memorials." *Id.* at 42 (statement of Robert E. Gresham, Assistant Exec. Dir. for Operations, Nat'l Cap. Planning Comm'n). As noted, the final language of 40 U.S.C. § 8908 largely adopts the formulation of the Senate bill, but gives Congress 150 days to approve the location of a commemorative work in Area I.

Of course, Congresswoman Oakar was being hyperbolic when she suggested that Congress would "abdicat[e] [its] responsibility" and "give up its authorization" if the Secretary or Administrator was empowered simply to recommend approval to Congress. At the end of the day, the final text of the statute, as described above, gives Congress the right to approve (or disapprove) the establishment of any new monuments generally and their placement in Area I specifically. *See, e.g.*, Congressional Hearing Report at 34 (statement of Manus J. Fish, Reg'l Dir., Nat'l Park Serv.) ("We note that the effect of this provision of S. 2522 is to require statutory determination of significance by the Congress for commemorative works in Area I."); *id.* at 40 (statement of Neil H. Porterfield, Vice Chairman, Comm'n of Fine Arts) ("We also note the clear spelling out [in the Senate version] of the fact that all commemorative works in Area I and Area II must be authorized by Congress."). And Congress has exercised that authority repeatedly and carefully. *See* Appendix. Construction of the Independence Arch cannot proceed without similar congressional approval. But Defendants have not sought or obtained such approval—or even the "rubber stamp" version of it that Congresswoman Oakar worried, to date without reason, might become Congress's limited role.

CONCLUSION

This Court should grant Plaintiff's preliminary injunction motion.

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Respectfully submitted,

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APPENDIX: PARTIAL LIST OF COMMEMORATIVE WORKS AUTHORIZED BY STATUTE PURSUANT TO THE COMMEMORATIVE WORKS ACT

The following is a list of 44 commemorative works authorized by statute pursuant to the CWA, noting those statutory authorizations. It is copied from the statutory notes to the official version of 40 U.S.C. § 8903 at uscode.house.gov, available at https://perma.cc/D7E4-H25N. The number of commemorative works authorized under the CWA is in fact somewhat greater,[24] but this is the best list of which *amici* are aware.

- Adams Memorial.—Pub. L. 107–62, Nov. 5, 2001, 115 Stat. 411; Pub. L. 107–315, Dec. 2, 2002, 116 Stat. 2763; Pub. L. 108–7, div. F, title I, §142, Feb. 20, 2003, 117 Stat. 244; Pub. L. 111–169, §1, May 24, 2010, 124 Stat. 1192; Pub. L. 113–291, div. B, title XXX, §3094, Dec. 19, 2014, 128 Stat. 3880; Pub. L. 116–9, title II, §2406, Mar. 12, 2019, 133 Stat. 748.
- African-Americans Civil War Union Memorial.—Pub. L. 102–412, Oct. 14, 1992, 106 Stat. 2104.
- Air Force Memorial.—Pub. L. 103–163, Dec. 2, 1993, 107 Stat. 1973; Pub. L. 106–302, Oct. 13, 2000, 114 Stat. 1062; Pub. L. 107–107, div. B, title XXVIII, §2863(a)–(e), Dec. 28, 2001, 115 Stat. 1330–1332; Pub. L. 118–31, div. B, title XXVIII, §2884, Dec. 22, 2023, 137 Stat. 782.
- American Armored Force Memorial.—Pub. L. 99–620, Nov. 6, 1986, 100 Stat. 3493.
- Armed Forces Members Killed in Attack on Hamid Karzai International Airport, Kabul, Afghanistan, on Aug. 26, 2021, Commemorative Work.—Pub. L. 117–81, div. A, title X, §1087, Dec. 27, 2021, 135 Stat. 1924; Pub. L. 117–263, div. A, title X, §1084, Dec. 23, 2022, 136 Stat. 2800.

[24] *See* Jacob R. Straus, *Monuments and Memorials Authorized and Completed Under the Commemorative Works Act in the District of Columbia*, CRS Report R43743, at 1 (Cong. Rsch. Serv., updated October 2, 2024) (asserting that "48 memorials have been authorized for placement in the District of Columbia" pursuant to the CWA as of October 2, 2024). In addition to the monuments listed, Congress approved the Women's Suffrage National Monument on January 4, 2025. *See* Pub. L. No. 118-226, 138 Stat. 2819 (2025).

- Benjamin Banneker Memorial.—Pub. L. 105–355, title V, §512, Nov. 6, 1998, 112 Stat. 3266.
- Black Revolutionary War Patriots Memorial.—Pub. L. 99–500, §101(h) [title I, §118], Oct. 18, 1986, 100 Stat. 1783–242, 1783-266, and Pub. L. 99–591, §101(h) [title I, §118], Oct. 30, 1986, 100 Stat. 3341–242, 3341-266; Pub. L. 99–558, Oct. 27, 1986, 100 Stat. 3144, repealed by Pub. L. 112–239, div. B, title XXVIII, §2860(f), Jan. 2, 2013, 126 Stat. 2165; Pub. L. 99–590, title VIII, §§801, 802, Oct. 30, 1986, 100 Stat. 3339; Pub. L. 100–265, Mar. 25, 1988, 102 Stat. 39, repealed by Pub. L. 112–239, div. B, title XXVIII, §2860(f), Jan. 2, 2013, 126 Stat. 2165; Pub. L. 103–321, §1(a)(1), Aug. 26, 1994, 108 Stat. 1793; Pub. L. 104–333, div. I, title V, §506, Nov. 12, 1996, 110 Stat. 4155; Pub. L. 105–345, §1, Nov. 2, 1998, 112 Stat. 3205; Pub. L. 106–442, Nov. 6, 2000, 114 Stat. 1926; Pub. L. 112–239, div. B, title XXVIII, §2860, Jan. 2, 2013, 126 Stat. 2164; Pub. L. 113–176, Sept. 26, 2014, 128 Stat. 1910; Pub. L. 117–328, div. DD, title VII, §703, Dec. 29, 2022, 136 Stat. 5618.
- Brigadier General Francis Marion Commemorative Work.—Pub. L. 110–229, title III, §331, May 8, 2008, 122 Stat. 781; Pub. L. 114–92, div. B, title XXVIII, §2852, Nov. 25, 2015, 129 Stat. 1184.
- Disabled Veterans' LIFE Memorial.—Pub. L. 106–348, Oct. 24, 2000, 114 Stat. 1358; Pub. L. 109–396, title II, §201, Dec. 15, 2006, 120 Stat. 2713; Pub. L. 110–106, §1, Oct. 25, 2007, 121 Stat. 1022.
- Dwight D. Eisenhower Memorial.—Pub. L. 106–79, title VIII, §8162, Oct. 25, 1999, 113 Stat. 1274; Pub. L. 107–117, div. A, title VIII, §8120(a), (b), Jan. 10, 2002, 115 Stat. 2273, 2274; Pub. L. 109–220, May 5, 2006, 120 Stat. 335; Pub. L. 110–229, title III, §332, May 8, 2008, 122 Stat. 782; Pub. L. 112–74, div. E, title III, Dec. 23, 2011, 125 Stat. 1036; Pub. L. 113–6, div. F, title IV, §1413, Mar. 26, 2013, 127 Stat. 421; Pub. L. 113–76, div. G, title IV, §437(a), Jan. 17, 2014, 128 Stat. 347; Pub. L. 113–235, div. F, title IV, §423(a), Dec. 16, 2014, 128 Stat. 2449; Pub. L. 114–113, div. G, title IV, §419(a), Dec. 18, 2015, 129 Stat. 2579; Pub. L. 115–31, div. G, title IV, §419, May 5, 2017, 131 Stat. 498.
- Enslaved Individuals Who Endured the Middle Passage Commemorative Work.—Pub. L. 117–328, div. DD, title VII, §707, Dec. 29, 2022, 136 Stat. 5620.
- Every Word We Utter Commemorative Work.—Pub. L. 116–217, Dec. 17, 2020, 134 Stat. 1052; Pub. L. 118–226, Jan. 4, 2025, 138 Stat. 2819.
- Fallen Journalists Memorial.—Pub. L. 116–253, Dec. 23, 2020, 134 Stat. 1135; Pub. L. 117–328, div. DD, title VII, §708, Dec. 29, 2022, 136 Stat. 5620.
- First Division Monument.—Pub. L. 116–283, div. A, title X, §1083, Jan. 1, 2021, 134 Stat. 3875.
- Francis Scott Key Memorial.—Pub. L. 99–531, Oct. 27, 1986, 100 Stat. 3022.

- Frederick Douglass Memorial and Gardens.—Pub. L. 106–479, Nov. 9, 2000, 114 Stat. 2184.
- George Mason Memorial.—Pub. L. 101–358, Aug. 10, 1990, 104 Stat. 419; Pub. L. 102–277, Apr. 28, 1992, 106 Stat. 127; Pub. L. 105–182, §1, June 19, 1998, 112 Stat. 516.
- Gold Star Mothers Commemorative Work.—Pub. L. 112–239, div. B, title XXVIII, §2859, Jan. 2, 2013, 126 Stat. 2164.
- Heroic Deeds and Sacrifices of Service Animals and Handlers of Service Animals Commemorative Work.—Pub. L. 117–328, div. DD, title VII, §704, Dec. 29, 2022, 136 Stat. 5618.
- Japanese American Patriotism in World War II Memorial.—Pub. L. 102–502, Oct. 24, 1992, 106 Stat. 3273; Pub. L. 104–333, div. I, title V, §514, Nov. 12, 1996, 110 Stat. 4165.
- Jean Monnet Commemorative Work.—Pub. L. 117–328, div. DD, title VII, §705, Dec. 29, 2022, 136 Stat. 5619.
- Korean War Veterans Memorial.—Pub. L. 99–572, Oct. 28, 1986, 100 Stat. 3226; Pub. L. 100–202, §101(f) [title II, §§1, 2], Dec. 22, 1987, 101 Stat. 1329–195, 1329-196; Pub. L. 100–230, §§1, 2, Jan. 5, 1988, 101 Stat. 1563; Pub. L. 100–267, Mar. 28, 1988, 102 Stat. 41; Pub. L. 105–262, title VIII, §8122, Oct. 17, 1998, 112 Stat. 2332.
- Korean War Veterans Memorial Wall of Remembrance.—Pub. L. 114–230, Oct. 7, 2016, 130 Stat. 947.
- Lincoln Memorial, "I Have a Dream Speech" Commemorative Plaque.—Pub. L. 106–365, Oct. 27, 2000, 114 Stat. 1409; Pub. L. 108–352, §4, Oct. 21, 2004, 118 Stat. 1395.
- Mahatma Gandhi Memorial.—Pub. L. 105–284, §1, Oct. 26, 1998, 112 Stat. 2701.
- Martin Luther King, Jr., Memorial.—Pub. L. 104–333, div. I, title V, §508, Nov. 12, 1996, 110 Stat. 4157; Pub. L. 105–201, §1, July 16, 1998, 112 Stat. 675; Pub. L. 106–176, title I, §108, Mar. 10, 2000, 114 Stat. 26; Pub. L. 108–125, §1, Nov. 11, 2003, 117 Stat. 1347; Pub. L. 109–54, title I, §134(c), Aug. 2, 2005, 119 Stat. 527; Pub. L. 110–453, title III, §301, Dec. 2, 2008, 122 Stat. 5034; Pub. L. 111–88, div. A, title I, §129, Oct. 30, 2009, 123 Stat. 2933.
- Medal of Honor Recipients Commemorative Work.—Pub. L. 117–80, Dec. 27, 2021, 135 Stat. 1539.
- National Desert Storm and Desert Shield Memorial.—Pub. L. 113–291, div. B, title XXX, §3093, Dec. 19, 2014, 128 Stat. 3879; Pub. L. 115–18, Mar. 31, 2017, 131 Stat. 82.
- National Emergency Medical Services Memorial.—Pub. L. 115–275, §1, Nov. 3, 2018, 132 Stat. 4164.

- National Global War on Terrorism Memorial.—Pub. L. 115–51, Aug. 18, 2017, 131 Stat. 1003; Pub. L. 117–81, div. F, title LXVI, §6605, Dec. 27, 2021, 135 Stat. 2442.
- National Peace Garden.—Pub. L. 100–63, June 30, 1987, 101 Stat. 379; Pub. L. 103–321, §1(a)(3), (b), Aug. 26, 1994, 108 Stat. 1793; Pub. L. 105–202, July 16, 1998, 112 Stat. 676.
- Peace Corps Memorial.—Pub. L. 113–78, §1, Jan. 24, 2014, 128 Stat. 647; Pub. L. 116–318, Jan. 5, 2021, 134 Stat. 5069.
- Republic of Texas Legation Memorial.—Pub. L. 116–248, Dec. 22, 2020, 134 Stat. 1124.
- Second Division Memorial.—Act Mar. 3, 1931, ch. 451, 46 Stat. 1515; Pub. L. 115–91, div. A, title III, §352, Dec. 12, 2017, 131 Stat. 1367; Pub. L. 115–141, div. G, title I, §121(a)(1) [div. B, title VII, §7130], Mar. 23, 2018, 132 Stat. 661, 1225A-3.
- Thomas Paine Commemorative Work.—Pub. L. 117–328, div. DD, title VII, §709, Dec. 29, 2022, 136 Stat. 5621.
- Thomas Paine Memorial.—Pub. L. 102–407, Oct. 13, 1992, 106 Stat. 1991; Pub. L. 102–459, Oct. 23, 1992, 106 Stat. 2268; Pub. L. 103–422, Oct. 25, 1994, 108 Stat. 4356; Pub. L. 106–113, div. B, §1000(a)(3) [title I, §142], Nov. 29, 1999, 113 Stat. 1535, 1501A-171.
- Tomas G. Masaryk Memorial.—Pub. L. 107–61, Nov. 5, 2001, 115 Stat. 410.
- Ukrainian Famine-Genocide Victims Memorial.—Pub. L. 109–340, Oct. 13, 2006, 120 Stat. 1864.
- Victims of Communism Memorial.—Pub. L. 103–199, title IX, §905, Dec. 17, 1993, 107 Stat. 2331; Pub. L. 105–277, div. A, §101(e) [title III, §326], Oct. 21, 1998, 112 Stat. 2681–231, 2681-291.
- Vietnam Women's Memorial.—Pub. L. 100–660, Nov. 15, 1988, 102 Stat. 3922; Pub. L. 101–187, Nov. 28, 1989, 103 Stat. 1350.
- Women in Military Service for America Memorial.—Pub. L. 99–500, §101(h) [title I, §117], Oct. 18, 1986, 100 Stat. 1783–242, 1783-266, and Pub. L. 99–591, §101(h) [title I, §117], Oct. 30, 1986, 100 Stat. 3341–242, 3341-266; Pub. L. 99–590, title IX, §§901, 902, Oct. 30, 1986, 100 Stat. 3339; Pub. L. 99–610, Nov. 6, 1986, 100 Stat. 3477; Pub. L. 103–321, §1(a)(2), Aug. 26, 1994, 108 Stat. 1793; Pub. L. 103–337, div. B, title XXVIII, §2855, Oct. 5, 1994, 108 Stat. 3073; Pub. L. 116–92, div. B, title XXVIII, §2834(e)(3)(B), Dec. 20, 2019, 133 Stat. 1894.
- Women Who Worked on the Home Front Commemorative Work.—Pub. L. 117–328, div. DD, title VII, §702, Dec. 29, 2022, 136 Stat. 5617.

- World War II Memorial.—Pub. L. 103–32, May 25, 1993, 107 Stat. 90; Pub. L. 103–422, Oct. 25, 1994, 108 Stat. 4356; Pub. L. 106–58, title VI, §652, Sept. 29, 1999, 113 Stat. 480; Pub. L. 106–117, title VI, §601(b), Nov. 30, 1999, 113 Stat. 1578; Pub. L. 107–11, May 28, 2001, 115 Stat. 19.
- World War II Memorial Prayer Plaque.—Pub. L. 113–123, June 30, 2014, 128 Stat. 1377.

CERTIFICATE OF SERVICE

On March 5, 2026, this brief was served via ECF on all registered counsel and transmitted to the Clerk of the Court. Because Defendants have not yet entered an appearance in the case, I also served this brief on Michael Sawyer, Senior Attorney, Natural Resources Section, Environment & Natural Resources Division, U.S. Department of Justice—who we have confirmed represents the Defendants in the litigation—via email to michael.sawyer@usdoj.gov.

/s/ David M. Gossett
David M. Gossett

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation in Local Civil Rule 7(o)(4) because the body of the brief is 19 pages long, and the formatting requirements of Local Civil Rule 5.1.

/s/ David M. Gossett
David M. Gossett

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL LEMMON,

SHAUN BYRNES,

JON GUNDERSEN,

and

CALDER LOTH,

Plaintiffs,[1]

v.

DONALD J. TRUMP, in his official capacity as President of the United States,
1600 Pennsylvania Avenue NW
Washington, DC 20500,

VINCE HALEY, in his official capacity as Director of the Domestic Policy Council,
1600 Pennsylvania Avenue NW
Washington, DC 20500,

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES,
1600 Pennsylvania Avenue NW
Washington, DC 20500,

and

NATIONAL PARK SERVICE,
1849 C Street NW
Washington, DC 20240

Defendants.

Civil Action No. 26-544

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[1] Plaintiffs' addresses are being filed under seal by notice pursuant to Local Rule 5.1(c)(1).

INTRODUCTION

1. Plaintiffs Michael Lemmon, Shaun Byrnes, Jon Gundersen, and Calder Loth bring this action against Defendants President Donald J. Trump, Domestic Policy Council Director Vince Haley, the Executive Office of the President of the United States, and the National Park Service, seeking declaratory and injunctive relief to bar Defendants' erection of a monumental arch in Memorial Circle, Washington, DC, without authorization from Congress and without complying with the statutorily required procedures to construct such a monument.

2. President Trump has "announced plans for a new Independence Arch in Washington, D.C. to coincide with the 250th anniversary" of the United States on July 4, 2026.[2] The Arch is planned to be as tall as 250 feet—more than double the size of the Lincoln Memorial and the equivalent of a twenty-five-story office building. Its location on Memorial Circle would situate the monument on an axis between the Lincoln Memorial and Arlington National Cemetery, obstructing a line of sight that was designed to represent the unification of the Nation following the Civil War and that has existed for nearly a century.

3. By statute, congressional approval is required for construction of symbolic and commemorative works in the Nation's capital. Furthermore, a host of other statutes impose procedural requirements that must be satisfied before erecting a monument on Memorial Circle.

4. Defendants plan to construct the Arch prior to July 4, 2026, without securing congressional approval or satisfying other procedural requirements. Doing so is in violation of the President's duty to take care that the laws are faithfully executed and is ultra vires. This Court

[2] The White House, *Fact Sheet: President Donald J. Trump Celebrates American Greatness with the Freedom 250 Grand Prix of Washington, D.C.* (Jan. 30, 2026), https://www.whitehouse.gov/fact-sheets/2026/01/fact-sheet-president-donald-j-trump-celebrates-american-greatness-with-the-freedom-250-grand-prix-of-washington-d-c/ [hereinafter *White House Fact Sheet*].

should declare it unlawful and enjoin construction of the Arch unless and until all statutory prerequisites—including congressional approval—are satisfied.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. § 1331.

6. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (e).

PARTIES

7. Plaintiff Michael Lemmon is a resident of Washington, DC. He is a veteran of the U.S. Army, served in the Vietnam War, and served as the United States' Ambassador to Armenia. He regularly drives across Memorial Bridge, on Memorial Avenue, and around Memorial Circle, and visits Arlington National Cemetery to honor the service of his many comrades-in-arms who are buried there. Mr. Lemmon also hopes to be interred at Arlington National Cemetery. Mr. Lemmon has personal and aesthetic interests in the solemn, unobstructed view between Arlington National Cemetery and the Lincoln Memorial.

8. Plaintiff Shaun Byrnes is a resident of Falls Church, Virginia. He is a veteran of the U.S. Navy, served in the Vietnam War, and served as a Senior Foreign Service Officer and Chief of the U.S. Kosovo Diplomatic Observer Mission during the Kosovo War. He regularly drives across Memorial Bridge, on Memorial Avenue, and around Memorial Circle, and visits Arlington National Cemetery to honor the service of his many comrades-in-arms who are buried there. Mr. Byrnes also hopes to be interred at Arlington National Cemetery. Mr. Byrnes has personal and aesthetic interests in the solemn and unobstructed view between Arlington National Cemetery and the Lincoln Memorial.

9. Plaintiff Jon Gundersen is a resident of South Carolina. He is a veteran of the U.S. Army, served in the Vietnam War, and served as the Chargé d'Affaires ad interim United States

to Ukraine, Estonia, Iceland, and Norway. Once or twice a year, he visits Washington, DC, and visits Arlington National Cemetery to honor the service of his many comrades-in-arms who are buried there. Mr. Gundersen has personal and aesthetic interests in the unobstructed and inspiring view between Arlington National Cemetery and the Lincoln Memorial.

10. Plaintiff Calder Loth is a resident of Richmond, Virginia. He is the retired Senior Architectural Historian for the Virginia Department of Historic Resources and serves as a member of the Advisory Council of the Institute of Classical Architecture and Art, a nonprofit organization committed to promoting and preserving the practice, understanding, and appreciation of classical design. Mr. Loth has lectured on classical and traditional architecture and led tours of Washington's national architecture, including the monuments. He regularly drives across Memorial Bridge, on Memorial Avenue, and around Memorial Circle, and visits the historic and cultural institutions in the Nation's capital and its environs, including Arlington National Cemetery and the Lincoln Memorial. He has aesthetic and professional interests in the preservation and protection of historic and cultural resources in Virginia and Washington, DC, including the historically significant and symbolic view between Arlington National Cemetery and the Lincoln Memorial.

11. Defendant Donald J. Trump is the President of the United States. Upon information and belief, President Trump has planned and directed the building of the Arch, including its design and location on Memorial Circle. President Trump is sued in his official capacity.

12. Defendant Vince Haley is the Director of the White House Domestic Policy Council, a department in the White House, and is overseeing the project to construct the Arch. He is sued in his official capacity.

13. Defendant Executive Office of the President of the United States is a federal entity headquartered in Washington, DC. Upon information and belief, the Executive Office of the President is directing or administering the plan to construct the Arch.

14. Defendant National Park Service is an agency within the U.S. Department of the Interior and was established by statute to "promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[3] National Park Service is responsible for administering and maintaining the land on Memorial Circle, which is located in Lady Bird Johnson Park.

FACTUAL BACKGROUND

The Careful Configuration of Monuments around Memorial Circle

15. Since the 18th century, the placement of monuments in the Nation's capital has been the subject of careful and deliberate design, with attention given to the symbolic significance of the unobstructed views linking those structures.

16. In his 1791 plan for the design of the Nation's capital, Pierre Charles L'Enfant emphasized the importance of reciprocal views of the monuments in the District of Columbia. L'Enfant identified an east-west axis extending from Congress House (now, the U.S. Capitol) to the Washington Monument along a "Grand Avenue" flanked by significant landmarks that would be reciprocally visible to one another. That Grand Avenue became the National Mall. In addition, L'Enfant linked the President's House (now, the White House) and Congress House on a north-

[3] 54 U.S.C. § 100101.

west axis, symbolically connecting the Executive and Legislative branches along what is now Pennsylvania Avenue.[4]

17. In 1901, the U.S. Senate established a Park Commission, also known as the McMillan Commission, to develop a plan for the monumental core and park system of the District of Columbia. Among other things, the Commission proposed the creation of a national monument to honor President Abraham Lincoln. "Expanding on the views and vistas created by the 1791 L'Enfant Plan," the Commission sited the Lincoln Memorial as "the western anchor along the [capital's] major east-west vista—in line with the Washington Monument and the U.S. Capitol."[5]

18. The Commission proposed a bridge linking the Lincoln Memorial with Arlington National Cemetery. That bridge, named Arlington Memorial Bridge, was designed to create an axial vista from the Lincoln Memorial directly to the Robert E. Lee Memorial in Arlington National Cemetery, known as Arlington House. The unobstructed, reciprocal view between the Lincoln Memorial and Arlington House was designed to symbolize the unification of the country after the Civil War, and the bridge was "[s]ymbolically … designed to show the strength of a united nation by joining a memorial on the north side of the Potomac River (the Lincoln Memorial) with one on the south (Arlington House, the Robert E. Lee Memorial)."[6]

19. Arlington Memorial Bridge holds further symbolic meaning as the connection between Washington, DC, and Arlington National Cemetery, our Nation's most hallowed ground

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[4] *See* Francis Fukuyama, *L'Enfant's Washington*, The American Interest (May 1, 2007), https://www.the-american-interest.com/2007/05/01/lenfants-washington/; *Views and Vistas of the Lincoln Memorial Cultural Landscape*, National Park Service (last updated Oct. 10, 2024), https://www.nps.gov/articles/000/lincoln-memorial-cultural-landscape-views-and-vistas.htm.

[5] *Views and Vistas*, *supra* note 4.

[6] *Arlington Memorial Bridge & Avenue*, National Park Service, https://www.nps.gov/gwmp/planyourvisit/memorialave.htm (last updated Apr. 15, 2023).

and, today, the final resting place for more than 400,000 active-duty service members, veterans, and their family members. Arlington Memorial Bridge provides a ceremonial entrance to the District of Columbia from Virginia, and a ceremonial entrance from the District to Arlington National Cemetery.

20. Memorial Circle, a traffic circle on Lady Bird Johnson National Park, connects Arlington Memorial Bridge to Memorial Avenue, providing a ceremonial gateway to Arlington National Cemetery. Seven memorials line Memorial Avenue, conceived as an "Avenue of Heroes," including the Women in Military Service for America Memorial. Together, Arlington Memorial Bridge, Memorial Circle, Memorial Avenue, and the entrance to Arlington National Cemetery are called "Memorial Avenue Corridor" and are "a major element of … the monumental core of Washington D.C."[7]

Statutorily Required Process for New Monuments

21. Congress enacted the Commemorative Works Act of 1986 "to preserve the integrity of the comprehensive design of the L'Enfant and McMillan plans for the Nation's Capital"; to preserve and ensure public enjoyment of the limited open space in the District of Columbia and its environs; and to ensure that future monuments, sculptures, or memorials in the District of Columbia and its environs "are appropriately designed, constructed, and located" and "reflect a consensus of the lasting national significance of the subjects involved." 40 U.S.C. § 8901.

22. The Act specifies a detailed, multi-step process for authorizing, designing, and siting commemorative works—including any monument, sculpture, or memorial—situated in the District of Columbia on property administered by the National Park Service or the General

[7] *Memorial Avenue Corridor Cultural Landscape*, National Park Service, https://www.nps.gov/articles/600247.htm#4/31.80/-78.13 (last updated Oct. 7, 2021).

Services Administration. As a starting point, the Act provides that any such work must be "specifically authorized" by Congress. *Id.* § 8903(a)(1). When Congress passes such authorization, it designates a "sponsor" responsible for establishing the work. *See id.* § 8902(4).

23. The congressionally authorized sponsor may receive a construction permit to build the commemorative work only after it: (1) consults with the National Capital Memorial Advisory Commission; (2) submits the site and design proposal for review by the Commission of Fine Arts and National Capital Planning Commission; (3) receives approvals for the site and design by the Secretary of Interior or Administrator of General Services, National Capital Planning Commission, and Commission of Fine Arts; and (4) consults with "knowledgeable individuals qualified in the field of preservation and maintenance," among other requirements. *See id.* §§ 8905–06.

24. For commemorative works sited in a designated zone of the capital known as "Area I," the Act imposes additional review and consultation requirements, including a specific congressional notification and authorization process, and a determination by the Secretary of the Interior or Administrator of General Services that "the subject of the commemorative work is of preeminent historical and lasting significance to the United States." *Id.* § 8908(b)(1).

25. Between 1986 and 2024, Congress, by enacting legislation, authorized 48 commemorative works to be placed in the District of Columbia or its environs. Twenty-four of those works have been completed and dedicated: Women in Military Service for America (P.L. 99-610, 100 Stat. 3477 (1986)); Francis Scott Key (P.L. 99-531, 100 Stat. 3022 (1986)); Korean War Veterans (P.L. 99-572, 100 Stat. 3226 (1986)); American Armored Force (P.L. 99-620, 100 Stat. 3493 (1986)); Vietnam Women's Memorial (P.L. 100-660, 102 Stat. 3922 (1988)); George Mason (P.L. 101-358, 104 Stat. 419 (1990)); African-American Civil War-Union Soldiers/Sailors (P.L. 102-412, 106 Stat. 2104 (1992)); Japanese American Patriotism in World War II (P.L. 102-

502, 106 Stat. 3273 (1992)); World War II (P.L. 103-32, 107 Stat. 90 (1993)); Victims of Communism (P.L. 103-199, Title IX, § 905, 107 Stat. 2331 (1993)); Dr. Martin Luther King, Jr. (P.L. 104-333, Div. I, Title V, § 508, 110 Stat. 4157 (1996)); Mahatma Gandhi (P.L. 105-284, 112 Stat. 2701 (1998)); Veterans Who Died as a Result of Service in the Vietnam War (P.L. 106-214, 114 Stat. 335 (2000)); American Veterans Disabled for Life (P.L. 106-348, 114 Stat. 1358 (2000)); Lincoln Memorial "I Have a Dream" Speech (P.L. 106-365, 114 Stat. 1409 (2000)); Tomas G. Masaryk (P.L. 107-61, 115 Stat. 410 (2001)); Dwight D. Eisenhower (P.L. 107-117, § 8120, 115 Stat. 2273 (2002)); Victims of Ukrainian Manmade Famine of 1932–1933 (P.L. 109-340, 120 Stat. 1864 (2006)); Senator Robert J. Dole Plaque (P.L. 111-88, §128, 123 Stat. 2933 (2009)); World War II D-Day Prayer Plaque (P.L. 113-123, 128 Stat. 1377 (2014)); World War I (P.L. 113-291, § 3091(b), 128 Stat. 3858 (2014)); Korean War Memorial Wall of Remembrance (P.L. 114-230, 130 Stat. 947 (2016)); First Division Monument Modifications (P.L. 116-283, Title X, § 1083, 134 Stat. 3875 (2021)). The other 24 works are in progress or congressional authorization has lapsed or been repealed.[8]

26. In 2002, Congress reinforced its oversight over federal grounds in the District of Columbia by passing a statutory prohibition on constructing any "building or structure"—whether or not a commemorative work—"on any reservation, park, or public grounds of the Federal Government in the District of Columbia without express authority of Congress." 40 U.S.C. § 8106.

27. Plans to construct monuments in the District of Columbia are subject to numerous other statutory consultation and review requirements. For example, section 106 of the National Historic Preservation Act of 1966 requires agency review of the impact that any federal

[8] Jacob R. Straus, *Monuments and Memorials Authorized and Completed Under the Commemorative Works Act in the District of Columbia*, Congressional Research Service (Oct. 2, 2024), https://www.congress.gov/crs-product/R43743.

undertaking will have on certain historic properties. *See* 54 U.S.C. § 306108. The National Environmental Policy Act of 1970 (NEPA) requires any "major Federal action[]" that "significantly affect[s] the quality of the human environment" to be accompanied by a "detailed statement" about the action's environmental impact. 42 U.S.C. § 4332(2)(C). And other statutory provisions subject plans to construct monuments in the District of Columbia to consultation and review by the National Capital Planning Commission and the Commission of Fine Arts. *See* 40 U.S.C. § 8722 (National Capital Planning Commission); *id*. § 9102 (Commission of Fine Arts).

28. In addition, Congress has specified in law that National Park System areas—which includes Lady Bird Johnson Park, the park that would house the planned Arch—may not be impaired or administered in derogation of the "high public value and integrity of the [National Park] System … except as directly and specifically provided by Congress." 54 U.S.C. § 100101(b)(2).

President Trump's Plan to Construct a Monumental Arch

29. In mid-October 2025, President Trump announced the plan to build a new monument on Memorial Circle to commemorate the Nation's 250th anniversary. The White House has named the planned monument the Independence Arch.[9]

30. On October 11, 2025, President Trump posted on his Truth Social account a watercolor design of a monumental arch in Memorial Circle. That watercolor design had earlier been posted on social media by Nicolas Leo Charbonneau, an architect at the firm Harrison Design. In his post, Mr. Charbonneau stated that it was "[a] proposal for a triumphal arch in DC … in the traffic circle in front of Arlington National Cemetery. America needs a triumphal arch!"[10]

[9] *White House Fact Sheet*, *supra* note 2.

[10] Donald J. Trump (@realDonaldTrump), Truth Social (Oct. 11, 2025, 12:27 AM), https://truthsocial.com/@realDonaldTrump/posts/115353640080693628; Nicolas Leo

31. At an October 15, 2025, press conference in the Oval Office, President Trump reportedly displayed on the Resolute Desk a model of the Arch on Memorial Circle. When a reporter asked President Trump what the model arch was, President Trump stated, "It's going to be built … an arc[h]" and told the reporter to "take a look at the location." When the reporter asked who the arch was for, President Trump replied: "Me."[11]

32. That evening, President Trump hosted a dinner for corporate executives who had donated funds to construct a ballroom for the White House. At that dinner, President Trump displayed models and diagrams of the planned Arch.[12] The diagrams that President Trump displayed bore the caption "Independence Arch" and showed arches of three sizes.[13] President Trump stated that the planned arch models were "small, medium, and large"—123 feet high, 165 feet high, and 250 feet high, respectively—but that he thought "the large by far looks the best."[14] All of the diagrams situated the Arch on Memorial Circle.[15]

33. At a White House holiday party in December, President Trump confirmed: "We're building an arc like the Arc de Triomphe [in Paris], and we're building it by the Arlington bridge

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Charbonneau (@nic_charbonneau), X (Sept. 4, 2025, 10:01 AM), https://x.com/nic_charbonneau/status/1963603279658602674.

[11] CBS News (@cbsnews) and Ed O'Keefe (@edokeefcbs), Instagram (Oct. 15, 2022), https://www.instagram.com/p/DP2WDAiEa4X/?utm_source=ig_embed&utm_campaign.

[12] Zolan Kanno-Youngs, *Trump Hosts Dinner for Wealthy Donors to White House Ballroom*, New York Times (Oct. 15, 2025), https://www.nytimes.com/2025/10/15/us/politics/trump-white-house-dinner-ballroom-donors.html.

[13] Callum Sutherland, *The 'Arc de Trump': President Shows Off Plans For His Latest Grandiose D.C. Construction Project*, Time (Oct. 16, 2025), https://time.com/7326081/trump-president-arch-washington-project-construction/.

[14] *See* Sutherland, *supra* note 13; Dan Diamond et al., *Trump wants to build a 250-foot-tall arch, dwarfing the Lincoln Memorial*, Washington Post (Jan. 31, 2026), https://www.washingtonpost.com/politics/2026/01/31/trump-arch-memorial-circle/.

[15] Sutherland, *supra* note 13.

… opposite the Lincoln Memorial."[16] In addition, he stated that he had put Vince Haley, Director of the White House Domestic Policy Council, "in charge of the triumphal arc[h]," and that building the Arch was "a policy thing" and Director Haley's "primary thing."[17]

34. President Trump reportedly stated in late December that construction of the Arch was expected to begin "sometime in the next two months."[18]

35. On January 23, 2026, President Trump posted on Truth Social an image with three renderings of the planned Arch on Memorial Circle.[19] According to the images, the Arch will be called "The Independence Arch."[20]

36. On January 30, 2026, the White House released a Fact Sheet stating that President Trump has "announced plans for a new Independence Arch in Washington, D.C. to coincide with the 250th anniversary" of the United States.[21]

37. The White House has retained Nicolas Leo Charbonneau from Harrison Design to work on the Arch.[22]

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[16] Rapid Response 47, X (Dec. 14, 2025, 1:33 PM), https://x.com/RapidResponse47/status/2000273037867040872.

[17] Robert Mackey, *Trump says building DC triumphal arch is domestic policy chief's 'primary thing'*, The Guardian (Dec. 14, 2025, 5:46 PM), https://www.theguardian.com/us-news/2025/dec/14/trump-arch-washington-dc-policy-chief.

[18] Sophia Cai, *Trump says construction of the 'Triumphal Arch' to begin in '2 months'*, Politico (Dec. 31, 2025, 11:53 AM), https://www.politico.com/news/2025/12/31/trump-arch-washington-dc-america-250-00708590.

[19] Donald J. Trump (@realDonaldTrump), Truth Social (Jan. 23, 2026, 12:00 PM), https://truthsocial.com/@realDonaldTrump/posts/115945478685595236.

[20] Trump, *supra* note 19.

[21] *White House Fact Sheet*, *supra* note 2.

[22] Diamond et al., *supra* note 14.

38. President Trump has reportedly stated that he plans for the monument to be 165 feet wide and 250 feet tall—a 165-foot arch on top of a 25-foot pedestal, topped by a "massive 60-foot gilt bronze Lady Liberty sculpture."[23] Sources familiar with the plans have stated that President Trump is "dead-set on building this huge arch"[24] and that President Trump favored a 250-foot arch to commemorate the United States' 250th anniversary because "'250 for 250' makes the most sense," with one foot for every year of the anniversary.[25]

39. A 250-foot structure is the equivalent of a twenty-five-story office block. At 250 feet, the planned Arch will be roughly half the size of the Washington Monument (555 feet tall), more than double the size of the Lincoln Memorial (99 feet tall), and the largest monumental arch in the world.[26]

40. A White House spokesman stated that the Arch will be "one of the most iconic landmarks not only in Washington, D.C., but throughout the world" and that "President Trump's bold vision will be imprinted upon the fabric of America and be felt by generations to come."[27]

41. President Trump has stated that he would use donations from private donors to pay for the Arch,[28] including funds that had been donated to construct the White House ballroom.[29]

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[23] Betsy Klein et al., *Trump forges ahead with plans for 250-foot arch despite concerns on the ground and in the air*, CNN (Feb. 10, 2026), https://www.cnn.com/2026/02/10/politics/independence-arch-dc-concerns-vis.

[24] Klein et al., *supra* note 23.

[25] Diamond et al., *supra* note 14.

[26] Klein et al., *supra* note 23.

[27] Diamond et al., *supra* note 14.

[28] Joey Garrison, *Trump floats three designs for his 'Independence Arch' in DC*, USA Today (Jan. 23, 2026, 3:06 PM), https://www.usatoday.com/story/news/politics/2026/01/23/donald-trump-designs-independence-arch-250-anniversary/88320719007/.

[29] Nardine Saad & Kwasi Gyamfi Asiedu, *What we know about White House plans for an 'Arc de Trump'*, BBC (Oct. 16, 2025), https://www.bbc.com/news/articles/cy7e8lv176go.

42. President Trump has announced the creation of a group called Freedom 250.[30] Freedom 250, a company created by and housed inside the National Park Foundation, is amassing private donations for the construction of the Arch, as well as other projects to commemorate the nation's 250th birthday.[31] The National Park Foundation is the "official charity of America's national parks and the nonprofit partner to the National Park Service.[32] Donors who give at least $1 million to Freedom 250 reportedly will get access to President Trump and other perks.[33]

43. Memorial Circle, the planned site for the Arch, sits within a National Park Service park in the District of Columbia and is in Area I under the Commemorative Works Act.

44. The Arch is planned to be erected directly on the axis between Arlington House and the Lincoln Memorial. It will block historically significant reciprocal views between those two memorials that were consciously designed and that have existed for nearly a century. It will dominate the views of and the relationship between the surrounding memorials. With the erection of the Arch, Arlington House will no longer be visible from the Lincoln Memorial, and the view of the Lincoln Memorial from Arlington House will be obscured, disrupting the historic and symbolic link between the two.[34]

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[30] Kenneth P. Vogel et al., *For $1 Million. Donors to U.S.A. Birthday Group Offered Access to Trump*, New York Times (Feb 8, 2026), https://www.nytimes.com/2026/02/08/us/politics/freedom-250-trump-donors.html.

[31] Vogel et al., *supra* note 30.

[32] *National Park Foundation*, National Park Service, https://www.nps.gov/subjects/partnerships/national-park-foundation.htm (last updated Dec. 30, 2025).

[33] Vogel et al., *supra* note 30.

[34] Klein et al., *supra* note 23.

45. In addition, the Arch could pose a hazard to air travel at nearby Reagan National Airport.[35] Although the height of the Arch would make it an "obstruction to air navigation," 14 C.F.R. § 77.17, requiring notice to the Federal Aviation Administration (FAA), *id.* § 77.9, "[i]t appears nothing about the arch project has been submitted to the FAA's Obstruction Evaluation/Airport Airspace Analysis site."[36]

46. Erecting the Arch likely will increase traffic at Memorial Circle, further detracting from Plaintiffs' experience and enjoyment. Memorial Circle "is heavily used by motorists, cyclists, and pedestrians both for recreation and for commuting (or other local travel),"[37] and it is also often part of the funeral procession route to Arlington National Cemetery.[38] The National Park Service has previously stated in an environmental assessment for Memorial Circle that "[t]he heavy use of the roads, bridges, trails, and sidewalks within the … area contribute to a number of safety concerns."[39]

47. Congress has not authorized the construction of the Arch.

48. Upon information and belief, no environmental review has been conducted for the planned Arch, and plans for the Arch have not been submitted to the National Capital Planning Commission or the Commission of Fine Arts.

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[35] Klein et al., *supra* note 23.

[36] Kathryn Watson, *Trump says he wants proposed arch to be world's "biggest,"* CBS News, https://www.cbsnews.com/news/trump-arch-dca-airport-flight-path/ (last updated Feb. 5, 2026, 11:21 AM).

[37] *Memorial Circle Transportation Plan and Environmental Assessment*, National Park Service, https://parkplanning.nps.gov/projectHome.cfm?ProjectID=51448 (last visited Feb. 17, 2026).

[38] *Memorial Circle Transportation Plan and Environmental Assessment*, *supra* note 37.

[39] *Memorial Circle Transportation Plan and Environmental Assessment*, *supra* note 37.

49. Upon information and belief, Defendants intend to proceed with construction of the Arch before July 4, 2026, and without congressional authorization.

Injury to Plaintiffs

50. Plaintiffs Lemmon, Gundersen, and Byrnes have significant personal and aesthetic interests in the unobstructed view between the Lincoln Memorial and Arlington House. Each has visited and intends to continue in the future visiting Arlington National Cemetery and driving around Memorial Avenue Corridor, including Memorial Circle. They believe that the planned Arch, by obstructing the symbolic and inspiring view from Arlington National Cemetery to the Lincoln Memorial, would dishonor their military and foreign service and the legacy of their comrades and other veterans buried at Arlington National Cemetery, and would degrade their personal experience when visiting Arlington Cemetery or traveling around Memorial Circle and on the Memorial Avenue Corridor.

51. Plaintiff Loth has aesthetic and professional interests in the monuments in the Nation's capital and its environs and the relationship between those monuments, including the historic and symbolic viewshed between Arlington National Cemetery and the Lincoln Memorial. He has visited and intends to continue in the future visiting Arlington National Cemetery and driving around Memorial Avenue Corridor, including Memorial Circle. By obstructing the views of the monuments, the Arch would harm his aesthetic, historical, and professional interests in Arlington National Cemetery, the Lincoln Memorial, Memorial Circle, and the monuments in the Nation's capital and its environs, and his experience of them.

CLAIMS FOR RELIEF

First Cause of Action
(Against All Defendants)

52. Plaintiffs have a non-statutory cause of action to enjoin and declare unlawful official executive action that is ultra vires and in excess of legal authority.

53. The Commemorative Works Act and 40 U.S.C. § 8106 forbid the construction of Defendants' planned Arch absent congressional authorization.

54. Congress has not authorized construction of the Arch.

55. Additional statutes—including, but not limited to, the National Historic Preservation Act of 1966 and NEPA—impose procedural requirements that must be satisfied before federal projects such as the construction of Defendants' planned Arch may be executed.

56. Defendants intend to imminently begin construction of the Arch without complying with these statutory requirements.

57. Defendants' construction of the Arch without congressional approval and without satisfaction of procedural prerequisites is in excess of the powers that Congress has delegated to Defendants and is contrary to specific statutory requirements.

58. Absent ultra vires review, Plaintiff has no meaningful and adequate opportunity for judicial review.

59. No statutory scheme forecloses judicial review of Defendants' actions in constructing the Arch.

Second Cause of Action
(Against Defendant Trump)

60. Plaintiffs have a non-statutory right of action to declare unlawful official action that is unconstitutional or ultra vires.

61. The President of the United States has only those powers conferred on him by Article II of the Constitution and federal statutes. Under the Constitution, the President has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

62. The Take Care Clause limits the President's power and ensures that he will faithfully execute Congress's laws.

63. Under the Constitution, the President lacks the authority to direct federal officers or agencies to act in derogation of a federal statute.

64. Accordingly, the President's directive to plan and construct an arch on Memorial Circle by July 4, 2026, without congressional authorization and designation by Congress of a sponsor, and without complying with the numerous statutory requirements, including those imposed by NEPA and National Historic Preservation Act, impinges on the separation of powers and violates the Take Care Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

A. Declare construction of the Arch without congressional authorization and without satisfying statutory procedural requirements to be unlawful;

B. Enter a preliminary and permanent injunction prohibiting Director Haley and the Executive Office of the President from taking any steps to construct the Arch absent congressional authorization, designation by Congress of a sponsor, and compliance with all statutory requirements;

C. Enter a preliminary and permanent injunction prohibiting the National Park Service from authorizing or permitting construction of the Arch on Memorial Circle (including by expending funds provided through the National Park Foundation and/or Freedom 250), absent

congressional authorization, designation by Congress of a sponsor, and compliance with all statutory requirements;

D. Award Plaintiffs their reasonable costs and attorneys' fees; and

E. Grant such other relief as this Court may deem just and proper.

Dated: February 19, 2026

Respectfully submitted,

/s/ *Wendy Liu*

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Opera Company Sues to Collect $17 Million From the Kennedy Center

The Washington National Opera, which left the center amid the Trump administration's takeover, says its efforts to retrieve its endowment and other assets have been blocked.

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By Julia Jacobs

June 12, 2026

The Washington National Opera, which recently severed its longstanding relationship with the John F. Kennedy Center for the Performing Arts, has filed a lawsuit that demands more than $17 million from the center that the opera company estimates it is owed.

The suit, filed Thursday, says that since the opera company struck out on its own this year, Kennedy Center officials have refused to release the money, which the court papers say includes endowment funds, other donations and income that was collected for the company's benefit.

"W.N.O. reluctantly files this case to preserve its future and to protect its donors and artists," lawyers for the opera said in court papers, which identify the funds as donor gifts received over years that are "critical" to its operations.

In a statement responding to the lawsuit, Roma Daravi, a spokeswoman for the center, said that the relationship with the opera company "financially burdened" the center for more than a decade. The statement noted that taking into account

the company's endowment, an external accounting firm had calculated that the company had "accumulated a $72 million deficit to the center" between 2011 and 2026, the years it was an affiliate of the institution.

"The center has acted transparently and in the best interests of the public throughout this process," Ms. Daravi said. "This lawsuit is meritless, and we plan to pursue a countersuit to defend the institution."

The opera left the center in January, nearly a year after President Trump's takeover of the Kennedy Center led to an exodus of audiences, artists and donors. Officials at the center said then that they had decided to part ways with the opera, which had played there since 1971, "due to a financially challenging relationship."

The legal dispute comes as the Kennedy Center remains mired in uncertainty. In response to a separate lawsuit, a federal judge ordered the president's name removed from the center and temporarily blocked his plan to close the institution for two years of renovations. Lawyers for the center and Mr. Trump, who is chairman of the board, appealed the decision on Thursday.

The opera's lawsuit, filed in the United States Court of Federal Claims, details the tensions that arose before the company's departure. It lists the federal government as the defendant because the center was established by Congress.

The lawsuit says that the day before the separation announcement, Donna Arduin, the Kennedy Center's chief financial officer, told leaders of the opera company that money in a fund containing bequests and other contributions to the opera had been used as collateral for a line of credit.

The suit says Ms. Arduin asserted that those funds belonged to the center, but the opera company contends they were expressly reserved for its benefit. The suit did not specify how much money was said to have been used as collateral.

For about 15 years, the opera company was an affiliate of the Kennedy Center, meaning that the center oversaw its operations and funding, and the company performed in its 2,364-seat Opera House. But its close relationship faltered after Mr. Trump installed his allies as its leaders.

Richard Grenell, Mr. Trump's handpicked president of the center, accused previous leadership of financial mismanagement and sought to require that programming be revenue neutral, meaning shows would need to take in as much money in ticket sales and sponsorships upfront as they cost to mount. That expectation ran up against the realities of American opera companies, which typically operate with deficits that are backfilled by donations.

The lawsuit says that by the fall of last year, leaders at the Washington National Opera had "lost all visibility" into its financial accounts, which were managed by the center.

"For months, W.N.O. repeatedly tried to address these issues with the Kennedy Center, including through written requests, requests for meetings, and meetings with Kennedy Center leadership," the suit says. "Those efforts were met with indifference."

The request for more than $17 million relies on the opera company's own estimate of its finances; the suit does not make clear how much of the figure is made up of endowment funds.

After Mr. Grenell suggested an "amicable" separation between the two organizations, the suit noted, the opera's leaders — who were increasingly concerned about the trajectory of ticket sales and donations — agreed. When the decision was announced, public statements on both sides were cordial. But behind the scenes, conflict was building.

The suit says that Kennedy Center officials engaged a third-party accounting firm to calculate what the opera company might be owed, but that there has been no stated commitment to actually transfer any money.

Ms. Daravi, the spokeswoman for the center, said the opera company had "failed to engage in good-faith discussions" amid the financial dispute, despite "multiple proposals."

In recent months, the opera company has been preparing for a new season at venues in and around Washington, relying on funding reserves and emergency fund-raising. The season starting in the fall includes a new production of Puccini's "Madama Butterfly," staged at DAR Constitution Hall, and John Adams's "Nixon in China," starring Renée Fleming and Thomas Hampson.

Julia Jacobs is an arts and culture reporter who often covers legal issues for The Times.

A version of this article appears in print on , Section C, Page 4 of the New York edition with the headline: Troupe Sues Over Kennedy Center Funds

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PRESIDENTIAL ACTIONS

RESTORING TRUTH AND SANITY TO AMERICAN HISTORY

Executive Orders

March 27, 2025

EXECUTIVE ORDER 14253

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose and Policy. Over the past decade, Americans have witnessed a concerted and widespread effort to rewrite our Nation's history, replacing objective facts with a distorted narrative driven by ideology rather than truth. This revisionist movement seeks to undermine the remarkable achievements of the United States by casting its founding principles and historical milestones in a negative light. Under this historical revision, our Nation's unparalleled legacy of advancing liberty, individual rights, and human happiness is reconstructed as inherently racist, sexist, oppressive, or otherwise irredeemably flawed. Rather than fostering unity and a deeper understanding of our shared past, the widespread effort to rewrite history deepens societal divides and fosters a sense of national shame, disregarding the progress America has made and the ideals that continue to inspire millions around the globe.

The prior administration advanced this corrosive ideology. At Independence National Historical Park in Philadelphia, Pennsylvania — where our Nation declared that all men are created equal — the prior administration sponsored training by an organization that advocates dismantling "Western foundations" and "interrogating institutional racism" and pressured National Historical Park rangers that their racial identity should dictate how they convey history [illegible]s because America is purportedly racist.

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Once widely respected as a symbol of American excellence and a global icon of cultural achievement, the Smithsonian Institution has, in recent years, come under the influence of a divisive, race-centered ideology. This shift has promoted narratives that portray American and Western values as inherently harmful and oppressive. For example, the Smithsonian American Art Museum today features "The Shape of Power: Stories of Race and American Sculpture," an exhibit representing that "[s]ocieties including the United States have used race to establish and maintain systems of power, privilege, and disenfranchisement." The exhibit further claims that "sculpture has been a powerful tool in promoting scientific racism" and promotes the view that race is not a biological reality but a social construct, stating "Race is a human invention."

The National Museum of African American History and Culture has proclaimed that "hard work," "individualism," and "the nuclear family" are aspects of "White culture." The forthcoming Smithsonian American Women's History Museum plans on celebrating the exploits of male athletes participating in women's sports. These are just a few examples.

It is the policy of my Administration to restore Federal sites dedicated to history, including parks and museums, to solemn and uplifting public monuments that remind Americans of our extraordinary heritage, consistent progress toward becoming a more perfect Union, and unmatched record of advancing liberty, prosperity, and human flourishing. Museums in our Nation's capital should be places where individuals go to learn — not to be subjected to ideological indoctrination or divisive narratives that distort our shared history.

To advance this policy, we will restore the Smithsonian Institution to its rightful place as a symbol of inspiration and American greatness –- igniting the imagination of young minds, honoring the richness of American history and innovation, and instilling pride in the hearts of all Americans.

Sec. 2. Saving Our Smithsonian. (a) The Vice President, in consultation with the Assistant to the President for Domestic Policy and the Special Assistant to the President and Senior Associate Staff Secretary, Lindsey Halligan, Esq., shall work to effectuate the policies of this order through his role on the Smithsonian Board of Regents with respect to the Smithsonian Institution and its museums, education and research centers, and the National Zoo, including by seeking to remove improper ideology from such properties, and shall recommend to the President any additional actions necessary to fully effectuate such policies.

(b) The Vice President and the Director of the Office of Management and Budget shall work with the Congress to ensure that future appropriations to the Smithsonian Institution:

(i) prohibit expenditure on exhibits or programs that degrade shared American values, divide Americans based on race, or promote programs or ideologies inconsistent with Federal law and policy; and

(ii) celebrate the achievements of women in the American Women's History Museum and do not recognize men as women in any respect in the Museum.

(c) The Director of the Office of Management and Budget and the Secretar

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take any other measures within their authority to promote the policy of this order.

(d) As appropriate, the Vice President shall, in consultation with the Assistant to the President for Domestic Policy and Special Assistant to the President and Senior Associate Staff Secretary, Lindsey Halligan, Esq., work with the Speaker of the House of Representatives and the Senate Majority Leader, to seek the appointment of citizen members to the Smithsonian Board of Regents committed to advancing the policy of this order.

Sec. 3. Restoring Independence Hall. The Secretary of the Interior shall provide sufficient funding, as available, to improve the infrastructure of Independence National Historical Park, which shall be complete by July 4, 2026, the 250th anniversary of the signing of the Declaration of Independence.

Sec. 4. Restoring Truth in American History.

(a) The Secretary of the Interior shall:

(i) determine whether, since January 1, 2020, public monuments, memorials, statues, markers, or similar properties within the Department of the Interior's jurisdiction have been removed or changed to perpetuate a false reconstruction of American history, inappropriately minimize the value of certain historical events or figures, or include any other improper partisan ideology;

(ii) take action to reinstate the pre-existing monuments, memorials, statues, markers, or similar properties, as appropriate and consistent with 43 U.S.C. 1451 *et seq.*, 54 U.S.C. 100101 *et seq.*,and other applicable law; and

(iii) take action, as appropriate and consistent with applicable law, to ensure that all public monuments, memorials, statues, markers, or similar properties within the Department of the Interior's jurisdiction do not contain descriptions, depictions, or other content that inappropriately disparage Americans past or living (including persons living in colonial times), and instead focus on the greatness of the achievements and progress of the American people or, with respect to natural features, the beauty, abundance, and grandeur of the American landscape.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

March 27, 2025.

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Presidential Documents

Executive Order 14253 of March 27, 2025

Restoring Truth and Sanity to American History

By the authority vested in me as President by the Constitution and th laws of the United States of America, it is hereby ordered:

Section 1. *Purpose and Policy*. Over the past decade, Americans have wi nessed a concerted and widespread effort to rewrite our Nation's histor replacing objective facts with a distorted narrative driven by ideology rath than truth. This revisionist movement seeks to undermine the remarkab achievements of the United States by casting its founding principles an historical milestones in a negative light. Under this historical revision, ou Nation's unparalleled legacy of advancing liberty, individual rights, an human happiness is reconstructed as inherently racist, sexist, oppressiv or otherwise irredeemably flawed. Rather than fostering unity and a deep understanding of our shared past, the widespread effort to rewrite histo deepens societal divides and fosters a sense of national shame, disregardi the progress America has made and the ideals that continue to inspi millions around the globe.

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SAVING AMERICA'S STORY

How Ideological Capture at the Smithsonian Institution's National Museum of American History Erases Our Heritage

DOMESTIC POLICY COUNCIL

THE WHITE HOUSE

Report by the Domestic Policy Council following President Trump's March 27, 2026, Executive Order 14253 ("Restoring Truth and Sanity to American History"), and the ongoing review of the Smithsonian Institution.

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Report by the Domestic Policy Council following President Trump's March 27, 2026, Executive Order 14253 ("Restoring Truth and Sanity to American History"), and the ongoing review of the Smithsonian Institution

Executive Summary

The Smithsonian Institution is one of the Nation's greatest civic treasures: a place where parents bring their children and tourists from across the country and around the world come to learn about America. At the Smithsonian's National Museum of American History (NMAH), visitors young and old should encounter the story of the United States told with honesty, seriousness, and pride. In particular, it should help the American people understand where America came from, what makes it distinctive, and why it is worth preserving.

In making their case to Congress in 1953, Smithsonian leadership argued that one of the "main reasons" NMAH should be created is "[t]o place before millions who visit the Nation's Capital each year a stimulating permanent exposition that commemorates our heritage of freedom and highlights the basic elements of our way of life."[1]

In 1955, then-Smithsonian Secretary Leon Carmichael testified to Congress that, if authorized, the Museum would "tell the story of American national progress" and "cement America's progress for citizen and foreign visitors alike."[2] As he put it, "The museum we envision…is planned to instill in each citizen a deepened faith in our country's destiny as champion of individual dignity and enterprise. Equally, it is conceived to instill in each foreign visitor admiration and respect for our ever-expanding social and technological horizons."[3] Two months later, based on that promise, Congress authorized the Museum's construction and allocated $36 million to cover the costs.[4]

Then-Director of the U.S. National Museum, Remington Kellogg, noted at the Museum's opening in 1964 that the new museum was intended "to awaken in citizen and foreigner alike a clear understanding of the inspiring story of the United States—its origins, struggles, development, traditions, strength."[5] One NMAH curator who worked at the Museum for nearly four decades before retiring in 2016 noted that the Museum's founding goal "was more than simply the increase and diffusion of general knowledge"; NMAH was intended to be "proudly patriotic."[6]

Speaking at the Museum's dedication ceremony in January 1964, President Lyndon B. Johnson explained his hope and belief that the Museum's "iconic artifacts should be used to foster patriotism."[7] He stated:

> I would hope that there will come to this building the children of the nation. For here is

> recorded, as William Faulkner expressed it, the agony and the sweat of the human spirit, the victory of freedom and genius of our country. Here, young children see, with their own eyes, yes, even to touch with their own hands, the ripe fruit of America's historical harvest. Whitney's cotton gin, Singer's sewing machine, McCormick's reaper, Edison's phonograph, Bell's telephone—they are all here, a part of this treasure-house of our inheritance. The more we understand the meaning of the past, the more we appreciate the winning of the future. If this Museum did nothing more than illuminate our heritage so that others could see a little better our legacy, however so small the glimpse, it would fulfill a noble purpose.[8]

This report by the Domestic Policy Council demonstrates that NMAH fails in the basic task of illuminating our heritage. Our central finding is not that the Museum has simply added overlooked stories, corrected perceived errors, or broadened its historical scope. Rather, it is that Museum leadership has explicitly adopted an ideological framework that no longer treats the American story as a shared national inheritance to be taught or celebrated, but as a political instrument to divide, dispirit, and discourage our citizens.

As this report shows, confirmed in the words of Museum leadership, this ideological capture has moved the Museum's mission away from straightforward historical education and scholarship toward an extreme political activism that seeks to transform our country.

That shift from history to activism is clearly documented in this report. Anthea Hartig, NMAH's director since 2019, has explicitly stated that she sees history as a "prime tool of social justice"[9] and one of her roles as connecting "research and scholarship to activism and advocacy."[10] Hartig has also stated that "we work to reframe the traditional celebratory narrative of U.S. history for visitors."[11] She claims to have had a personal head start "propped up as I was and I am by the cushions of whiteness and the pillows of the bourgeoisie."[12] Hartig believes the museum profession has "to figure out" how "we're going to" "problematize" the "250th Anniversary of the signing of the Declaration of Independence in 2026,"[13] that "loving America is very complicated,"[14] and that objects in the Museum's collection should be used to move attention away from an "Anglo-centric" focus on the American Founding.[15] These are not the words of an objective historian, but rather those of an activist advancing an ideological agenda contradictory to the Museum's founding purpose of fostering patriotism.

At the heart of our concern is a simple question: what should a national museum of American history do? Our conviction—like that of Secretary Carmichael, Director Kellogg, and President Johnson—is that such a museum should tell the American story clearly and fairly. It should explain the rise of the original thirteen colonies, the struggle for independence, the principles of the Declaration of Independence and the U.S. Constitution, and the role these documents have played in securing Americans' most basic freedoms. It should document and share the achievements and failures of the Nation and the extraordinary men and women of every color and creed who shaped its course. It should tell the truth, including of the Nation's mistakes and injustices, but it should do so within a coherent account of a people striving, often imperfectly but more often nobly, to live up to our founding principles of liberty and equality under a republican form of government. It should especially teach the history of an American nation that is worthy of our affections and worth passing along to future generations.

Any proper telling of American history should—as the Reverend Dr. Martin Luther King Jr. noted—explain that "the goal of America is freedom" and bring "our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence."[16]

According to the findings from our monthslong investigation, that is no longer what visitors encounter. Instead, the Museum confronts visitors with materials intended to undermine faith in American institutions and the longstanding shared ideals of the American people.

As this report shows, the Museum purposely presents America as a problematic country irredeemably conceived, founded by deeply flawed men, and still operating today as an instrument of systemic racism and oppression. In the Museum's current telling, the country is, above all, defined by white supremacy, slavery, conquest, exclusion, hierarchy, racism, xenophobia, misogyny, and systemic injustice.

The report identifies a broad pattern: the Founders are minimized, if not entirely excluded; traditional patriotic narratives are treated with suspicion, if not outright contempt; and the basic symbols and stories that once helped unify Americans are presented not as reasons for gratitude and inspiration, but as objects to be inherently questioned, dismantled, "problematized,"[17] and reinterpreted to achieve ideological ends.

To the extent that there is a story told at the Smithsonian's National Museum of American History, it is not one of "the victory of freedom and genius of our country" but one of regret, tragedy, and shame.

Key Findings

1. NMAH Fails to Substantively Present America's Founders and Founding

One of the most significant findings in this report concerns what is missing. It notes that a visitor to the Museum today will find no major exhibit dedicated to America's Founding era, George Washington, Thomas Jefferson, other Founding Fathers, the Continental Congress, the Pilgrims, the Puritans, or major moments of the American Revolution, such as Washington's crossing of the Delaware. Instead, visitors will find Founders, such as Benjamin Franklin, introduced chiefly through their connection to slavery while their decisive roles in building the Republic and their anti-slavery efforts are minimized or ignored.[18] George Washington and Abraham Lincoln appear in didactics that say next to nothing about who they are, let alone why they matter.[19] The Pledge of Allegiance is treated as a tool for instilling nationalism without serious engagement with its rich meaning.[20] And the Declaration of Independence and U.S. Constitution are quoted selectively in ways that mute their claims about equality, ordered liberty, natural rights, and the divine source of those inalienable rights.[21] Museum materials repeatedly suggest that Christianity functioned principally as an instrument of conquest, exclusion, or cultural erasure, while the constructive role of Christian belief and Christian institutions in shaping the Nation and its freedoms receives scant, if any, attention.[22] White, male, and Christian Americans are regularly denigrated as the alleged embodiment of oppressive power structures.[23] Exhibits frame the

Pilgrims mainly as colonial oppressors,[24] Thanksgiving as a "National Day of Mourning,"[25] and the European settlement of the continent chiefly as a great "unsettling."[26]

2. NMAH Has "Problematized" the 250th Anniversary of America's Founding

At a time when the Nation is marking the 250th anniversary of its Founding, the report shows that these omissions and inversions are not accidental. It documents how Museum leadership has openly stated that the 250th anniversary should be "problematized"[27]—invoking a popular term-of-art to "Critical Social Justice" theorists that refers to the process of highlighting alleged "oppressions" within a given subject to "deconstruct," disqualify, and discredit the prevailing narrative on that subject.[28] NMAH's goal of "problematizing" America's Founding explains why Museum leadership has also stated that the alleged "gaps" surrounding the Declaration should be emphasized[29] and that American history should be reframed away from an "America First mentality"[30] and an "Anglo-centric" focus on the American Founding.[31] It also explains why the Museum's special *In Pursuit of Life, Liberty, and Happiness* programming for America's 250th anniversary fails to actually celebrate America's Founders or Founding, and why Independence Day itself went unmarked by any special programming at NMAH in 2025 and 2026, despite the Museum being open.[32] Taken together, these choices reinforce the conclusion that the Museum is not merely neglecting America's central story. It is intentionally withholding and subverting it.

3. NMAH Removed "American History" from Its Mission Statement to "Get Out of the 'America First' Mentality"

The report places special emphasis on the Museum's change in its mission statement under current leadership, which replaced the phrases "infinite richness" and "American history" with language about empowering people to create "a more just and compassionate future" by exploring "the complexity of our past."[33] In the words of Director Hartig, this was done in order to "get out of the 'America First' mentality" when telling history.[34]

4. NMAH Has Abandoned Historical Scholarship for Political Activism

The report demonstrates that the Museum has shifted from scholarship to activism, pointing to Museum leadership's own public statements tying "research and scholarship to activism and advocacy,"[35] dismantling inherited narratives,[36] using history as a "prime tool of social justice,"[37] calling for American history to be "reframed,"[38] and describing museum work in terms of "reparations,"[39] "restorative history,"[40] "systemic intervention,"[41] "decolonization,"[42] and "social justice."[43]

NMAH's Activist "Interpretive Plan"

The report notes that the Museum's Interpretive Plan directs staff to, "whatever the topic," tie exhibits back to a set of seven "core issues of our time"—specifically, race/identity, gender/sexuality, climate change, immigration/migrations, economic inequality, technological change, and nationalism/globalism—as part of its "commitment to relevance."[44] The result is that visitors encounter the same ideological storyline over and over again, whether the subject is democracy, entertainment, immigration, childhood, women's labor, sports, or early American

settlement. The complaint is not that these subjects should never be discussed, but that they are increasingly presented through one dominant worldview—one that assumes America's institutions are chiefly instruments of oppression and that the Museum's duty is to provoke visitors into activist forms of political resistance to that alleged oppression.

NMAH's Anti-White Activism

The report also describes a longstanding staff reading group devoted to "Museums as a Site for Social Action Toolkit," a framework that explicitly treats museums as engines for anti-oppression activism, frames objectivity, individualism, a sense of urgency, and "worship of the written word" as oppressive character traits of "whiteness" and "white supremacy culture," and calls for institutional anti-white transformation rather than neutral stewardship.[45] It reveals how Smithsonian and Museum leadership have elevated individuals who view the current portrayal of American history as too "white" to positions of educational leadership, in addition to creating special Smithsonian-wide hiring practices and programming for every major demographic—including "Non-US Residents" and "Non-English Speakers"—except whites, Christians, males, and Americans.[46]

NMAH's Illegal Alien Activism

The report reveals how the Museum's Center for Restorative History cast illegal alien political activism in heroic terms,[47] partnered with and interviewed deported illegal aliens,[48] and designed official materials that included signs advocating for the abolition of the "287g" program, which allows local law enforcement to partner with federal law enforcement to identify and deport *criminal illegal aliens*.[49]

NMAH's Transgender Activism

The report also catalogs how moral and biological truths established in reason, faith, and tradition are being set aside in favor of ideological, anti-scientific claims. It cites examples in which Museum exhibits and educational materials present gender as fluid, treat biological males as girls or women, and fold contemporary advocacy for transgenderism into the Museum's treatment of female childhood development, women's history, and women's sports.[50] The report notes that some of this material is situated in youth-facing exhibits and accompanied by sexually explicit or sexually suggestive content that many parents would find deeply inappropriate for children, who are frequent visitors and a target audience of the Museum.[51]

5. The Smithsonian Has Not Met Its Obligations to the American People

Underlying all of this is a larger institutional concern. The Smithsonian is not just another private cultural nonprofit. It is a federally connected trust instrumentality of the United States, overseen by a Board of Regents currently led by the Chief Justice of the United States Supreme Court, and supported heavily by taxpayer funding to the tune of over one billion dollars per year. That means the public has a right to expect that it will operate as a faithful steward of the Nation's historic and cultural heritage, not as a vehicle for ideological campaigns.

Conclusion: Ideological Capture at the Museum

We must be committed to restoring truth and sanity in how American history is presented and taught. President Trump's Executive Order of March 2025 notes that the Smithsonian's effort "to rewrite history deepens societal divides and fosters a sense of national shame, disregarding the progress America has made and the ideals that continue to inspire millions around the globe."[52] As a result, to restore the truth of America's story as it regards the Smithsonian Institution, EO 14253 directs the Vice President (as Regent of the Smithsonian) to work with the Assistant to the President for Domestic Policy "to remove improper ideology from such properties, and shall recommend to the President any additional actions necessary to fully effectuate such policies" and with the Director of the Office of Management and Budget to "prohibit expenditure on exhibits or programs that degrade shared American values, divide Americans based on race, or promote programs or ideologies inconsistent with Federal law and policy."[53]

Rather than part of a national trust for the diffusion of knowledge, dedicated to explaining the "infinite richness and complexity of American history,"[54] the National Museum of American History has become an instrument—a "prime tool," as Director Hartig has put it—for a radical, activist cohort dedicated to reframing the American story to serve its ideological ends.[55]

In both theory and practice, NMAH is a clear and institutionalized example of intersectional critical theory—an intellectual framework rooted in Marxism that seeks to radically transform society by revealing and challenging alleged "overlapping systems of oppression"—applied to American history. It fails "to provide America's young people access to what is genuinely inspiring and unifying in our history, as well as to the lessons imparted by the American experience of overcoming great national challenges"—stories and lessons that make "possible the informed and honest patriotism that is essential for a successful republic."[56] Its message does not seek to instill an "American education grounded in the principles of our founding that is accurate, honest, unifying, inspiring, and ennobling," but rather seeks to teach disdain and inspire disgust of our great country.[57]

Today, the Museum fails to "place before millions who visit the Nation's Capital each year a stimulating permanent exposition that commemorates our heritage of freedom and highlights the basic elements of our way of life."[58] It has strayed far from Secretary Carmichael's original vision of a place that "instill[s] in each citizen a deepened faith in our country's destiny as champion of individual dignity and enterprise" and "in each foreign visitor admiration and respect for our ever-expanding social and technological horizons."[59] It has fallen far short of Director Kellogg's hope that it would "awaken in citizen and foreigner alike a clear understanding of the inspiring story of the United States—its origins, struggles, development, traditions, strength."[60] And it has failed to live up to President Johnson's dream that it would record "as William Faulkner expressed it, the agony and the sweat of the human spirit, the victory of freedom and genius of our country" and "the ripe fruit of America's historical harvest" for the children of the Nation.[61] In short, NMAH has failed to maintain the "treasure-house of our inheritance" because it no longer seeks to "illuminate our heritage."[62]

As our nation celebrates its 250th anniversary, NMAH has refused to celebrate the Nation and its history. It has not created any exhibit dedicated to presenting a general narrative of American

history or telling the story of any of our Founding Fathers, the Second Continental Congress, the Declaration of Independence, the American Revolutionary War, or the achievement of independence and the establishment of the constitutional rule of law—even in the 250th anniversary of the first of those pivotal events.

The serious concerns raised in this report are not about a few exhibits or a few controversial labels. They concern whether America's premier history museum still presents America as a coherent nation and heritage worth teaching with gratitude and honesty. The Museum can broaden the story without dissolving the story. It can and should acknowledge slavery, injustice, mistreatment of Native peoples, and other grave wrongs without encouraging citizens to view their country mainly through suspicion, resentment, and division. But that is not what the National Museum of American History is doing. As it stands today, it would benefit most Americans, especially parents bringing their children for a tour, if the Smithsonian's flagship history museum had a label at every entrance that reads: "Warning: the exhibits in this museum were prepared by people who don't want you to love your country."

The findings of this report matter beyond the museum world. Not all Americans follow academic theories or curatorial fashions, but they do understand when a revered public institution has traded settled truths and basic history for political activism and division. They do notice when the heroes, principles, and events that formed the country are pushed to the margins. They notice when their children are introduced to inappropriate sexual and ideological content under the guise of civic education. And they object when their children and grandchildren are being indoctrinated to regard their country primarily as a source of oppression and unresolved grievance.

The report concludes that the Smithsonian Institution, and the National Museum of American History in particular, under its current leadership and current interpretive ideology, cannot be trusted to tell America's story honestly and in a way that is inspiring, unifying, and worthy of our great republic. By the intention and at the direction of current Museum and Smithsonian leadership, NMAH has become subject to institutional capture by a radical, activist ideology that is fundamentally opposed to telling the noble, honest story of the great country we know and love.

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Chapter I. Introduction

1. The Smithsonian's Fiduciary Responsibilities

The Smithsonian Institution was created by an act of Congress on August 10, 1846, to carry out the terms of the will of British scientist James Smithson (1765-1829), who in 1826 bequeathed his entire estate to the United States "to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men."[63]

Today, the Smithsonian Institution is the world's largest museum and research complex and includes twenty-one museums and galleries, the National Zoo, and research facilities in several states. The Smithsonian Institution is not a private institution or an independent trust but is a "trust instrumentality of the United States" by which it carries out the institutional mission of the trust on behalf of the United States Government.[64]

The charter of the Smithsonian Institution is codified in federal law, and the Federal Government oversees the Institution through a Board of Regents heavily controlled by Congress, which appoints and approves fifteen of its seventeen members.[65] The Board's membership consists of the Chief Justice of the United States, the Vice President of the United States, three members of the Senate appointed by the Vice President, three members of the House of Representatives appointed by the Speaker of the House, and nine citizen members appointed by a Joint Resolution of Congress. The head of the Smithsonian is the Secretary, who is appointed by the Board of Regents. The Smithsonian executes no direct government program or policy beyond the regulation of its buildings and property of the United States that has been assigned to it.

The Smithsonian makes an annual budget request to Congress, and the Smithsonian receives an annual budget appropriation that over the past two decades amounts to about two-thirds of its annual expenditures. This amounted to $1,080,500,000 in appropriations for Fiscal Year 2026. Some of these expenditures pay for the employment of staff, and those staff are considered federal employees; when the government shuts down, so does the Smithsonian Institution. The Smithsonian also has separate funding streams from proceeds received through grants, gifts, bequests, commercial revenue-generating activities, and investments, which the Smithsonian refers to as "trust funds." Those resources also fund some activities, including employment of nonfederal, "trust employees." All moneys "recovered by and accruing to" the Smithsonian are paid into the Treasury of the United States, where they are accredited to a Smithsonian account. In addition to annual budget submissions and various periodic reports to Congress, the Smithsonian files an accounting of resources as a tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

While the Smithsonian is not an "agency" within the meaning of the Administrative Procedure Act or the Federal Advisory Committee Act, and not a "federal agency" as the term is used in the Privacy Act or the Freedom of Information Act, the Attorney General concluded in 1988 that the Smithsonian is an "independent establishment in the executive branch" and is therefore an "executive agency" for purposes of the Federal Property and Administrative Services Act.[66] The Attorney General also concluded in 1997 that the Smithsonian is "so closely connected to the

Government that the two cannot realistically be viewed as separate entities."[67] Nevertheless, the Smithsonian ultimately reports to its Board and to Congress, is organizationally separate from the executive branch, and is not subject to many laws designed strictly for executive branch agencies.[68] This is why, "[u]nlike most federal agencies, the Smithsonian is authorized to accept gifts and to generate revenue outside of the federal appropriations process."[69]

In light of its federal status and the fact that it receives over one billion dollars in federal funding from the American taxpayer every year, the President has a duty and obligation to seek reforms of the Smithsonian, and to urge the Chief Justice of the United States, as the Chancellor of the Smithsonian, as well as the Vice President, as a Regent of the Smithsonian and as President of the Senate, and the Speaker of the House, to take appropriate action to restore the integrity of the National Museum of American History.

On March 27, 2025, President Trump issued Executive Order 14253, "Restoring Truth and Sanity to American History," which found that "Over the past decade, Americans have witnessed a concerted and widespread effort to rewrite our Nation's history, replacing objective facts with a distorted narrative driven by ideology rather than truth" and reconstructing "our Nation's unparalleled legacy of advancing liberty, individual rights, and human happiness" as "inherently racist, sexist, oppressive, or otherwise irredeemably flawed."[70]

2. The National Museum of American History's Responsibility to Tell the American Story

The Smithsonian Institution in general, and the National Museum of American History in particular, should be "a symbol of inspiration and American greatness—igniting the imagination of young minds, honoring the richness of American history and innovation, and instilling pride in the hearts of all Americans."[71] As NMAH noted in its 2018 Master Plan, a *national* museum of *American* history should explore, celebrate, and tell the American national story.[72]

That story should be a basic consensus view that is not ideological or politicized, but presents the facts of history—what actually happened—as accurately as possible with minimal present-day bias.[73] It should explain the circumstances and conditions that gave rise to thirteen self-governing colonies in North America, how those colonies united to oppose British misrule, and came to declare their independence and fight a war before forming a new nation. It should tell the story of how the Founders, inspired largely by the Ancient Greek democracies and republican-era Rome, undertook to create a new form of government that would reflect the will of the people, constrained by civic virtue, the separation of powers, and checks and balances, and supported by religion and morality. It should focus on what makes America distinctive—the ideas that define the Nation, the key individuals that have shaped its course, and the great accomplishments and progress America has made. It should explain the Nation's guiding principles and institutional form in the Declaration of Independence and the Constitution, as well as America's rise, expansion, and growth as a continental nation.

It should tell the *whole* story of a nation, including the good and the bad, so Museum visitors can understand the development that led our nation to where it is today. In doing so, it should tell a story of a people driven to overcome injustice and live up to its promise—a story of imperfection but also extraordinary accomplishment, of tragedies but also great triumphs, and hardship but

also noble heroism. In short, it should focus on "Americanism—the people, principles, and progress that define our nation."[74]

It should tell the story of how the colonies inherited slavery from both global and European slaving practices, but also how the words, actions, and ideas of America's Founders helped spark a worldwide movement that ultimately ended slavery. It should tell the story of how at least eight American colonies passed or attempted to pass laws to either tax or severely limit the importation of slaves before the Revolutionary War, only to be forced by the British Crown to continue it. It should tell the story of how 750,000 Americans died in the Civil War. It should tell the story of how Americans came to reject Jim Crow and segregation, backing a colorblind standard derived from America's founding documents. In short, it should tell the story of the birth of America and how the United States, because of the principles enshrined in the Declaration of Independence and upheld in the Constitution, has done more to advance and secure fundamental rights than any other nation in the world.

It should also tell of the enormous technological, scientific, and economic progress America has bequeathed to the world, from the lightning rod, to the telephone, to the light bulb, to the assembly-line-produced car, the airplane, the moon landing, the cell phone, the personal computer, the internet, and much more.

It should tell the story of America's contributions to global freedom, from saving Europe from multiple tyrannies, to illustrating the virtues of a market economy and a free people—leading nations around the world to continue to attempt to emulate the United States and enjoy a comparably high standard of living.

Walking through the Museum today, you will find no exhibits dedicated to presenting a general narrative of American history or telling the story of any of our Founding Fathers, the Second Continental Congress, the Mayflower, the Pilgrims, the Puritans, or Washington crossing the Delaware. In early 2026, seventy-five percent of the advertising boards placed on sidewalks around the museum showcased exhibits dedicated to peoples and cultural traditions foreign to the United States.[75]

3. Key Findings

Our ongoing review of the Smithsonian has revealed numerous areas that demonstrate how current Museum leadership has failed to tell America's story and adheres to a radical, activist ideology:

1. The leadership of the Smithsonian's NMAH has made it a stated goal to "reframe the traditional celebratory narrative of U.S. history" (pg. 21) and "transform[] the national historical narrative" (pg. 27) away from America's Founding and the Founders and towards a narrative of a deeply flawed creation of the country and an ongoing oppression of peoples by systemically racist governing institutions.

   The Smithsonian is approaching its task of reframing American history in several ways, including by:

a. Failing to dedicate a single (new or current) exhibit on display at NMAH to George Washington, Thomas Jefferson, other Founders, or pivotal events of the American Revolution, including Washington's crossing of the Delaware, during the 250th anniversary of these events (pg. 11). Instead, in two of its major exhibits, the Museum only includes the following minor acknowledgements:

    i. A didactic in NMAH's *American Democracy* exhibit entitled "Abraham Lincoln in the Classroom," which provides no information about the accomplishments of the two great American heroes it cites—Lincoln and Washington—noting only that both were presidents and that Americans have used images of them in an attempt to "instill patriotic values and reinforce the idea of a shared national heritage" (pg. 100);

    ii. A didactic in *American Democracy* entitled, "What are the Rights and Responsibilities of Citizens?" which fails to mention the Founders by name or even refer to them by their traditional collective title ("Founders" or "Founding Fathers"), simply highlighting that a "founding generation of American political leaders asserted that the independent nation would be based on the ideal that its citizens had the right to 'Life, Liberty, and the Pursuit of Happiness,' and that the government under the Constitution was designed to 'promote the general Welfare and secure the Blessings of Liberty'"—failing to include the Preamble's essential context proving that our Founders truly did believe that there are "self-evident," objective truths about human beings, that one of those truths is that "*all men are created equal*," and that those universal rights of "Life, Liberty and the pursuit of Happiness" are *endowed by our Creator*, not men (pgs. 100-101); and

    iii. One reference to Benjamin Franklin in the entirety of NMAH's *Many Voices, One Nation* exhibit, not as one of our most important Founding Fathers, but simply as a "Philadelphian," an alleged racist, and someone who allegedly had an "ambivalent view" of immigrants and "worried that they introduced an 'alien' element to the colony" (pg. 48).

b. Highlighting that some Founders, like Alexander Hamilton and Benjamin Franklin, owned slaves while downplaying or completely excluding information about their abolitionist efforts (or their pivotal roles in American history) in NMAH exhibits—including:

    i. A didactic about the Broadway musical *Hamilton* in NMAH's *Entertainment Nation* exhibit that simply called Alexander Hamilton an "influential and flawed founding father" likely, in part, because he owned slaves while providing no information about his key roles in America's Founding and early development. It failed to mention that he was a vocal critic of slavery and helped found the anti-slavery New York

Manumission Society in 1785, which worked to end the slave trade, supported and lobbied for the "ultimate extermination" of slavery, "connected black people with resources such as legal representation, helped protect them from kidnapping from slave dealers, put on anti-slavery lectures and readings," and founded seven African Free Schools that "educat[ed] more than 1,400 students by the time they started becoming part of the New York City public school system in the 1830s" (pg. 102); and

ii. An exhibit dedicated to "the women, indentured servants, and enslaved people" whose "labor enabled" Benjamin Franklin's electrical research that baselessly asked museum visitors to ponder whether Franklin's scientific experiments, including those related to "electric shocks," ever involved "an indentured servant or an enslaved person," despite admitting that there is no evidence that they did (pg. 103).

c. Stating that America's 250th anniversary should be "problematize[d]" and the "gaps" surrounding the Declaration of Independence magnified (pg. 126);

d. Failing to celebrate America's Founders in its special *In Pursuit of Life, Liberty, and Happiness* programming allegedly "celebrating" the 250th anniversary of America's Founding (pg. 114);

e. Failing to hold any Independence Day programming on July 4, 2025, despite the museum being open, and failing to schedule or hold any special Independence Day events celebrating America's 250th anniversary on July 4, 2026 (pgs. 125-126);

f. No longer holding patriotic Star-Spangled Banner flag-folding ceremonies celebrating America's flag, or any other special programming, to celebrate Flag Day (pgs. 124-125);

g. Stating that "loving America is very complicated" (pg. 38) and showcasing the statement of a Smithsonian employee who stated that it will be nice when the U.S. "exists in hindsight" in its 2023 annual DEI report (pg. 127);

h. Directing NMAH staff to remove the phrases "infinite richness" *and* "American history" from the mission statement of the *National Museum of American History*—rewriting it to only focus on "the complexity of our past" (pgs. 22, 24);

i. Working to "get out of the 'America First' mentality" and focus on "the entirety of the Americas, not just our part of North America," which it views as a "big challenge, especially going into 2026, which will be the 250th anniversary of the signing of the Declaration of Independence" (pg. 22);

j. Stating that a particular object in NMAH's collections is a "favorite thing" because the object powerfully served to reframe history away from an "Anglo-centric narrative" that would focus the world's attention on the American Revolution and "especially…the United States' founding" (pg. 23);

k. Framing America's Founding in an exhibit as a fundamentally oppressive and genocidal effort to take Native Americans' land and oppress their culture and peoples (pg. 108-110);

l. Framing Christopher Columbus's landing and exploration of the New World as a murderous genocide and "unsettling" of the continent to be lamented, not celebrated, including:

    i. Calling Christopher Columbus a "murderer," "slaver," "killer," and "thief," urging the abolition of Columbus Day (pg. 104); and

    ii. Creating NMAH's *Many Voices, One Nation* exhibit, which portrays the European settling of America as a "profound unsettling of the continent" with a section entitled "Unsettling the Continent, 1492-1776" that states that "Our world today grows out of that unsettling history" (pg. 104).

m. Creating an *Upending 1620* exhibit that explicitly reframes the Christian Pilgrims as colonizers, *not* "founders of the U.S. nation," seeks to "demonstrate that not every passenger aboard the Mayflower was fleeing religious persecution," reframes Thanksgiving as a "National Day of Mourning," and "urges audiences to reexamine these stories" and challenge their "preconceptions" because Plymouth "is cemented in many minds as the birthplace of the United States and central to its founding events," and therefore contradicts the narrative of America that NMAH seeks to tell (pgs. 109-110);

n. Insisting that the Smithsonian "legitimize" and "support the *New York Times*' 1619 Project" which, "in the words of the *Times*, set out to 'reframe the country's history, understanding 1619 as our true founding'" (pg. 104);

o. Claiming that America is not an enormous force for good but is rather an oppressive, imperialist nation that was "founded on the backs of African and…Indian slavery and genocide" (pg. 104), built on stolen land (pg. 105), and is irredeemably infected with "systemic racism" (pgs. 55, 113);

p. Endorsing the American Association for State and Local History's *Reframing History* project, which notes that "historical narratives that center white men as the 'neutral,' depoliticized American history that should be taught in schools (for example, learning about the Founding Fathers)" are "a way of perpetuating dominant groups' power" and "reinforce white supremacist logic," with NMAH's Director calling the project's final report a "blueprint for us to expand the power of our own engagement to then ignite civic engagement" (pgs. 106-107);

q. Including in NMAH's *American Democracy* exhibit a wall featuring large lettering with the words "PRIVILEGE," "SLAVERY," and "RIGHTS OF WOMAN" while terms like "FREE PRESS," "CITIZENSHIP," and "RIGHTS OF MAN" are much smaller, and a didactic asking visitors "if there were to be common beliefs and a national narrative that expressed the values of the nation, what should be included?" without providing an answer (pg. 97).

2. The Smithsonian's NMAH leadership has made it a stated goal to make history "a prime tool of social justice" (pgs. 21-22), "be an agent of social change" (pgs. 64, 70), and connect "research and scholarship to activism and advocacy" (pg. 21), including by:

    a. Creating an Interpretive Plan whose prime directive is to, "whatever the topic," tie everything to "the core issues of our time," namely, "race and identity," "gender and sexuality," "environmental change," "immigration and migrations," "economic inequality," "technological change," and "nationalism and globalism," stating that "To do anything less is to shirk our commitment to relevance" (pg. 80, cleaned up);

    b. Launching a *Center for Restorative History* to "encourage systemic change" within the Smithsonian for the purpose of "transforming the national historical narrative, restructuring institutional priorities, and privileging knowledge production in the communities that have been silenced or overlooked by museums and other educational institutions," which include "BIPOC people (Black, Indigenous, and other people of color); LGBTQ+ people (who identify as lesbian, gay, bisexual, transgender, queer, and more)," and "people who have intersecting identities within these communities"—that is, "privileging," "partnering with," and "spotlight[ing] the people and stories" of virtually every group but straight, white Americans (pg. 27);

    c. Commissioning the drafting of a museum-wide "Decolonization/Restorative History Plan" (pgs. 25-27);

    d. Holding regular meetings "for NMAH staff members to meet, discuss and read" the "Museums as a Site for Social Action" Toolkit, a 200+ page, three-year roadmap (co-authored by half a dozen current/former Smithsonian employees) on how to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions" (pgs. 64-65);

    e. Utilizing its National Youth Summits on issues ranging from "Teen Resistance to Racism, and Gender Equity" to "Elections and Politics" to invite Democratic Party operatives to speak about, "How can young people engage in political action and influence elections?" (pg. 56);

f. Creating exhibits and educational materials asserting that there are more than two genders, biological males can become "girls" and "women," and men should be allowed to compete in women's sports, including:

   i. Describing a biological male as "a girl trapped inside a boy's body" in a youth-oriented exhibit (pg. 82);

   ii. Stating "girls can be assigned male at birth" in a youth-oriented exhibit (pg. 82);

   iii. Defining and discussing the terms "gender fluidity," "[g]ender-fluid children," "gender identity," "gender nonconforming," "gender normative," and "gender role" in its Glossary of Terms for its *Becoming US* educational curriculum, including:

      1. Stating that "a child may feel they are a girl some days and a boy on others, or possibly feel that neither term describes them accurately" so it "is best to ask people who are gender fluid which pronouns they prefer" (pg. 81);

      2. Defining "gender identity" as "[o]ne's internal, deeply held sense of one's gender" that "does not [always] fit neatly into" the male or female categories (pg. 81);

      3. Instructing educators to "avoid" the "[o]utdated" term "Gender Identity Disorder" (pg. 81);

      4. Noting that "[p]eople who step out of their socially assigned gender roles are sometimes referred to as transgender" but that "[s]imply being transgender does not make someone gender non-conforming," and therefore it "is best to ask gender non-conforming people which pronouns they prefer" (pg. 81); and

      5. Claiming that "[o]ur culture recognizes two basic gender roles: masculine (having the qualities attributed to males) and feminine (having the qualities attributed to females)" but "[o]ther cultures have three or more gender roles" (pg. 81).

   iv. Alleging that "transgender, nonbinary, and cisgender female athletes" continue to struggle for and "demand equality" in sports (pg. 86).

g. Putting inappropriate material in a *Girlhood (It's Complicated)* exhibit designed for young children, including the pages of a 6-year-old girl's diary where she expresses fear about "getting boobs" and wishes for her nonexistent "penis to grow" (pg. 89);

h. Putting sexually suggestive materials inappropriate for young children in its exhibits, including drag queens, magazine covers featuring photos of nude young women, and a two-piece chrome and rubber crotch harness designed for sadomasochism (S&M) sexual activity (pg. 90);

i. Creating an *All Work, No Pay* exhibit portraying homemaking as oppressive to all women, but particularly to "African Americans, Latinas and other women of color" (pg. 78);

j. Taking a firm stance in favor of abortion, publicly criticizing the Supreme Court's *Dobbs v. Jackson* decision, and encouraging Museum visitors to do the same (pg. 91);

k. Incorporating anti-gun activism into youth-oriented exhibits (pgs. 92-95);

l. Creating exhibits and educational materials designed to convince America's children to defy authority, including teachers, parents, and religion (pg. 63); and

m. Lionizing Angela Davis, a prominent Marxist and former vice-presidential candidate of the U.S. Communist Party who has called for the abolition of police, jails, prisons, and immigrant enforcement (pg. 78).

3. The Smithsonian's NMAH has extensively advocated for millions of illegal aliens to be granted U.S. citizenship and voting rights, including by:

a. Creating a *Becoming US* educational curriculum that instructs high school teachers to avoid using the terms "illegal alien," "illegal immigrant," "illegal, illegals" (pgs. 41-42) and teach the next generation of American voters that illegal aliens are essential to America's culture, economy, and society, and therefore should become U.S. citizens—stating, (a) "There is no single American culture, language, or narrative"; (b) "Migrants have both been active citizens and have been denied access to the benefits and responsibilities of citizenship throughout American history"; and (c) "Xenophobia, forced migration, and deportation have affected individuals' participation in democracy" (pgs. 40-41);

b. Creating an *Undocumented Organizing Collecting Initiative* where NMAH's Center for Restorative History staff traveled across the country and Mexico to celebrate, interview, and partner with *deported illegal aliens* and other illegal alien activists who worked to "swing an election" to oust a North Carolina sheriff from office because he helped Immigration and Customs Enforcement (ICE) deport nearly 300 criminal illegal aliens (including drunk drivers, rapists, heroin traffickers, and pedophiles) in 2017 (pgs. 29-31);

c. Creating *Tell Me What Democracy Looks Like*, "a digital space" where middle and high school students can "meet five undocumented organizers and learn what

democracy looks like from their perspectives," and an accompanying video that repeatedly highlighted illegal alien activists who demanded that ICE be abolished and illegal aliens be granted U.S. citizenship (pgs. 32-33); and

d. Stating that "contextualizing" the "modern debate" over whether illegal aliens should be granted U.S. citizenship "through history's lens is one of the key things that we do" at NMAH (pg. 24).

4. The Smithsonian's NMAH and leadership have consistently denigrated and displaced whites, males, Christians, and Americans in educational materials and programming, failing to highlight how Christians and Christian principles also have contributed to America's Founding and flourishing, and focusing on race in areas where it has little to no historical relevance. Examples include:

a. Studying a "White Supremacy Culture" document that alleges that "objectivity," "individualism," a "sense of urgency," "worship of the written word," and other traits are characteristics of "white supremacy" (pgs. 73-78).

b. Prioritizing hiring and special programming for "Non-US Residents" and "Non-English Speakers" across the Smithsonian Institution (pgs. 68);

c. Complaining that "the whole construct [of history taught in K-12 schools] was primarily white" and that teaching a single narrative that centers white people stunts "our imaginations" and is "dangerous" (pg. 55);

d. Alleging that "white audiences" have an "empathy gap" which "makes it difficult for [them] to relate to and subsequently want to see stories that center Black people," and that closing that gap must be part of its educational programming (pg. 56);

e. Promoting materials from the anti-white Southern Poverty Law Center in its "educational" programming for high school students and teachers (pgs. 55-56); and

f. Supporting the transfer of American land and power back to Indigenous peoples and recommending that individuals read an article by an author who advocates for such changes on the basis that "the museum [is] an imperial structure that is intimately tied to systemic whiteness" (pg. 53); and

5. The Smithsonian's NMAH has developed and promoted a national education curriculum that presents a radical view of American history and elevated individuals to positions of leadership to advance that radical view through educational programming that has reached tens of millions of individuals (and up to 80% of history teachers) in recent years. Examples include:

a. Creating a *Becoming US* educational curriculum that—in addition to pushing for citizenship for illegal aliens—fails to focus on the Founding Fathers or the American Founding, but rather on the peoples, cultures, and languages that were present "long before the founding of the United States" despite being centered around the question "How did we become US?" (pg. 48);

b. Promoting an individual to the position of "Head of PreK-12 Learning" at NMAH after he (i) warned of the "Danger of A Single Story in Storytelling Today" that focuses on white people; (ii) argued that white people have an "empathy gap" preventing them from wanting to "see stories that center black people"; (iii) criticized America's "system of law" because it involves a neutral judge presiding over an adversarial process that "makes one party the 'bad guy'" and includes "coercion or punishment" and "force" as "a consideration" rather than focus on "problem-solving"; (iv) criticized the "logic" of western civilization because it "privileges order, organization, and taxonomy" and "situates non-white and non-western as inferior"; (v) argued that the U.S. should go further than "decolonization" and "move towards reMaorification or reindigenosation" (which involves "the repatriation of…*all* of the land" to Indigenous Peoples and "a full-scale re-ordering of the world through political, economic, and social processes"); (vi) noted that he made his ninth-grade classroom a place that was "informed by thinking that confronts coloniality"; and (vii) co-led NMAH's "Decolonization Working Group" (pgs. 51-54); and

c. Partnering with the Southern Poverty Law Center (SPLC), including recommending that high school teachers prepare to teach the *Becoming US* curriculum by exploring the website of SPLC's *Teaching Tolerance* program and using SPLC's *Let's Talk* guide, which (i) frames classroom discussion around themes of "injustice," "identity and power," and systems that "privilege some at the expense of others," (ii) discusses how to "not reinforce hierarchies, but to correct for them," and (iii) highlights a toolkit entitled "Confronting White Nationalism in Schools" (pgs. 54-55).

Our interim findings also reveal that both the Smithsonian and NMAH, much like the broader museum profession,[76] engage in discriminatory and likely illegal behaviors and practices, and are funded in part by large endowments that advocate for discriminatory practices, such as the Mellon Foundation, America's largest funder of the humanities,[77] and others.[78]

Chapter II. The National Museum of American History and Its Radical Ideology

NMAH was created in 1957 and opened in 1964 as the Museum of History and Technology within the United States National Museum.[79] It became the National Museum of History and Technology in 1969, and in 1980 its "name was changed to the National Museum of American History to better represent its basic mission—the collection, care, and study of objects that reflect the experience of the American people."[80]

As a Blue Ribbon Commission on the National Museum of American History noted in 2002, "NMAH enjoys one of the most desirable locations in America. It is at the heart of the national mall, in dramatic proximity to the Washington Monument, with direct views of the Smithsonian castle and the Lincoln Memorial."[81] Each year, millions of visitors from across the country and around the world visit NMAH and participate in its public programs, educational activities, collections, and research facilities on its approximately 750,000 square foot property, which includes "a basement, three main exhibition levels, two office collection levels, and a mechanical penthouse on the roof."[82] And each year, "Millions more make virtual visits to the museum's website."[83]

In fact, the Smithsonian recently described NMAH in its official budget request to Congress as "the Smithsonian's flagship history museum."[84] NMAH is "America's only *national* museum of American history" and "America's largest history museum," with "about 200,000 square feet of exhibition floor space" and "more than three million objects" in its collections, "which occupy an additional 265,000 square feet of storage space" and "amount to a unique and irreplaceable representation of America's social, cultural, scientific and technological history."[85] It is rightly described as a "national treasure."[86]

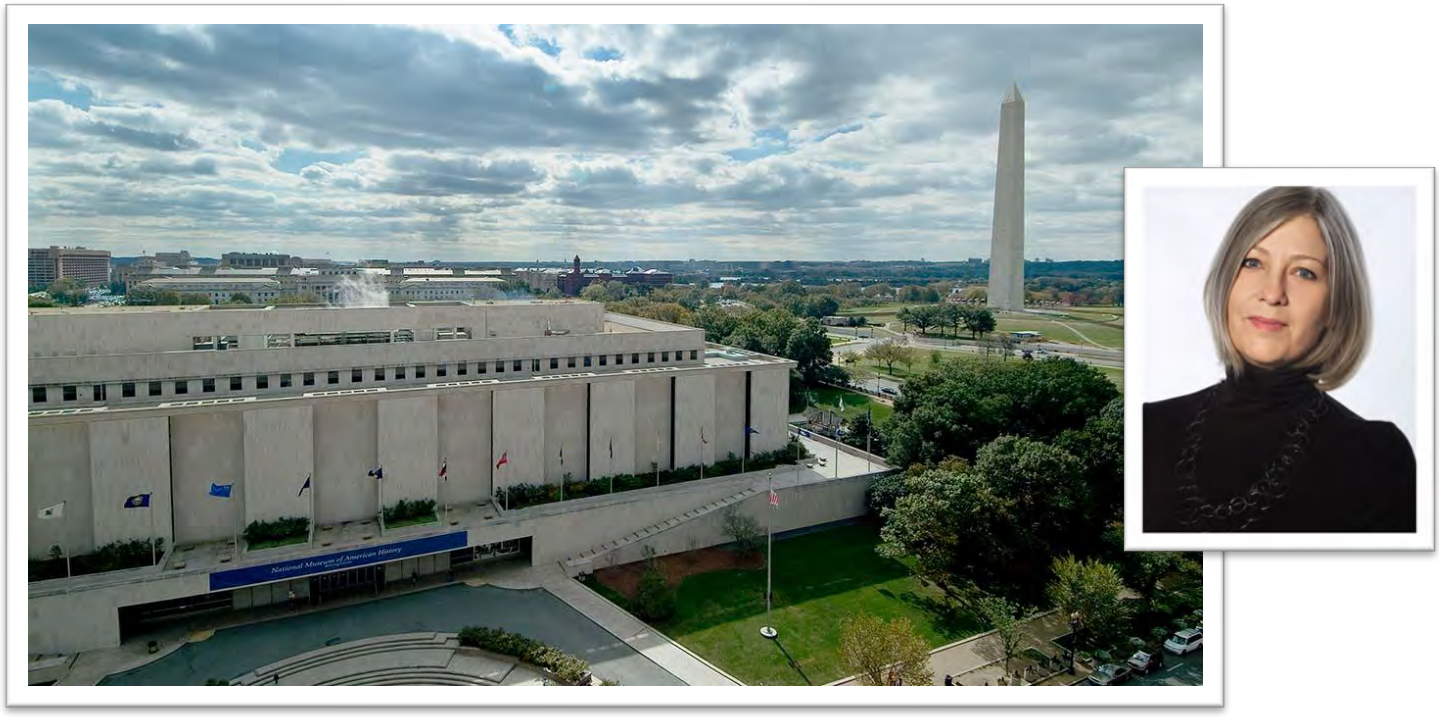


Photo of the Smithsonian's National Museum of American History (https://americanhistory.si.edu/visit) and Director Anthea M. Hartig (https://www.si.edu/about/bios/anthea-m-hartig).

1. NMAH's Self-Proclaimed Activist Leadership

The Director of NMAH is appointed by the Secretary of the Smithsonian, in consultation with the Board of Regents, which serves as the governing body of the Institution. The current Director, Anthea M. Hartig, was appointed in December 2018 and took over the position in February 2019 with a starting salary of $300,000.[87] The Director reports to the Secretary of the Smithsonian Institution, Lonnie Bunch, who is appointed by the Board of Regents. In this role, he is responsible for the operations of all Smithsonian Institution entities, and receives over $989,000 in annual compensation.[88]

There have long been indications that Dr. Hartig is more interested in political activism than historical scholarship. Dr. Hartig explained her self-understanding early in her tenure at NMAH: "I will always be in a state of becoming an historian, and I know what a head start I had propped up as I was and I am by the cushions of whiteness and the pillows of the bourgeoisie. Throughout my career, one of my roles, as I now understand it, is to address the often lack of continuity and discourse between academic scholarship and research and public interpretation, commemoration, and not to mention connecting that research and scholarship to activism and advocacy."[89]

Dr. Hartig's objective as Director of NMAH was also made clear in a statement she published on the Museum's website in 2020, within a week of George Floyd's death: "The nation was founded on the great paradox of a dynamic form of republican democracy based on the supremacy of white, landed men and the institution of chattel slavery. What then is our task? . . . At the National Museum of American History, we work to reframe the traditional celebratory narrative of U.S. history for visitors to our museum and digital spaces. Hosting and facilitating dynamic public programming and national reckonings is critical for us to help all Americans make sense of these tragically difficult times."[90]

In a 2022 presentation entitled, *Challenging the Narrative Landscape of the Past to Create a More Just Future at the Smithsonian*, Hartig explained that under her leadership, NMAH is working with other Smithsonian museums to "dismantle" the "narrative lockdown that many of us have inherited."[91] In June 2024, Hartig put it simply: "History as a practice...is for me a prime tool of social justice."[92]

2. NMAH's New Mission of Social and Political Activism

Shortly after becoming Director, Hartig also gave NMAH a new goal: become "the most accessible, inclusive, relevant, and sustainable public history museum in the nation."[93] To achieve this goal, Director Hartig and Smithsonian leadership directed NMAH staff to write a new mission statement and Strategic Plan for the museum.

Previously, NMAH's mission had been the following: "Through incomparable collections, rigorous research, and dynamic public outreach, we explore the infinite richness and complexity of American history. We help people understand the past in order to make sense of the present and shape a more humane future."[94] However, after Hartig became Director, NMAH rewrote its

mission to simply read: "Empowering people to create a more just and compassionate future by exploring, preserving, and sharing the complexity of our past."[95]

As "the infinite richness" of American history was dropped to leave only "complexity," and "American history" was replaced by "our past," the new objective became empowerment for the sake of social and political activism, not learning for the sake of understanding. Rather than presenting American history to understand the past, NMAH now seeks to use the complexities of history to encourage societal change,[96] aligning with Hartig's goal of making history "a prime tool of social justice."[97]



Screenshot of Director Hartig outlining NMAH's new mission, available at https://youtu.be/QxKVJ1pYcEw?t=2578.

3. NMAH's Attempt to Push Museum Visitors Away from an "America First Mentality"

In a June 2024 presentation to undergraduate and graduate history students, Hartig explained that NMAH made this change in order to help people "get out of the 'America First' mentality," adding that "it's a big challenge, especially going into 2026, which will be the 250th anniversary of the signing of the Declaration of Independence."[98] She stated:

> It's hard to get out of the 'America First' mentality, and that's—we didn't talk much about that, but we wrestle—I wrestle—with that all the time. It's just that, and why we changed our mission when I first came, you know, to be very future-facing but also to really think, you know, kind of what does it mean to show that full and rich complexity of the past. I think it's a big challenge, especially going into 2026, which will be the 250th anniversary of the signing of the Declaration of Independence, the 25th year since 9/11, the fifth year since January 6th.[99]

As part of getting "out of the 'America First' mentality," Hartig explained that she believes that "the scope of U.S. history" and the term "America" should really include "the entirety of the Americas, not just our part of North America."[100]

In a 2022 presentation entitled *Doing Our Work in a Time of Multiple Pandemics and Cascading Crises*, Hartig put this belief into practice, sharing a list of her "favorite things" from NMAH's national collection of 1.8 million objects, which in many cases explicitly directed attention away from America, Americans, and American history towards non-American individuals, countries, and ethnic groups.[101] Hartig noted that the selected items "encapsulate" her "learning path as a historian" and "the importance of conserving and sharing the materiality of our past as a useful tool to create a more just and informed and compassionate future," reflecting NMAH's new mission statement.[102]

One of the first objects Hartig highlighted was a cane belonging to Toussaint L'Ouverture, a military and political leader in the 1804 Haitian Revolution, because it "disrupts and complicates and re-centers global revolutions and kind of moves it away from a relatively ethno- and Anglo-centric narrative, especially of the United States' founding."[103] In other words, Hartig stated that she liked the Haitian cane because it reframed history away from America, particularly America's "Anglo" (white) Founding Fathers, which is the Museum's intent under its current leadership.

Other items on Hartig's list of "favorite things" within NMAH's collections include:

1. The "outfits worn by childbearing servants in Hulu's adaptation of Margaret Atwood's *The Handmaid's Tale*" because the "costumes have been worn by activists in several high-profile demonstrations, including those for women's reproductive rights";[104]

2. The "homemade and hand-painted butterfly wings…collected from a young Nebraskan activist who was marching on Capitol Hill in 2018" because "Monarch wings are an important symbol to undocumented organizers as their annual journey across the North American continent speaks to the migration, survival, and transformation of many immigrants";[105]

3. Billie Jean King's tennis outfit because she was a "social justice pioneer" who defeated a man in "the battle of the sexes tennis match";[106] and

4. A statue created by "agricultural activists" depicting Lady Liberty as a Hispanic immigrant worker carrying a basket of tomatoes.[107]



Screenshot of Hartig highlighting NMAH's "DACA Wings" as one of her favorite things because she says they "are an important symbol to undocumented organizers," https://youtu.be/HERz54an_-c?t=1816.

After singling out the "DACA Wings" as one of her favorite objects in NMAH's collections, Hartig explained that NMAH decided to feature them in a new exhibit dedicated to "Girlhood," because "DACA is part of an ongoing debate that's lasted now for centuries over who gets to be a citizen, who gets to be educated. Contextualizing that modern debate through history's lens is one of the key things that we do [at NMAH] and especially that we do in *Girlhood*."[108]



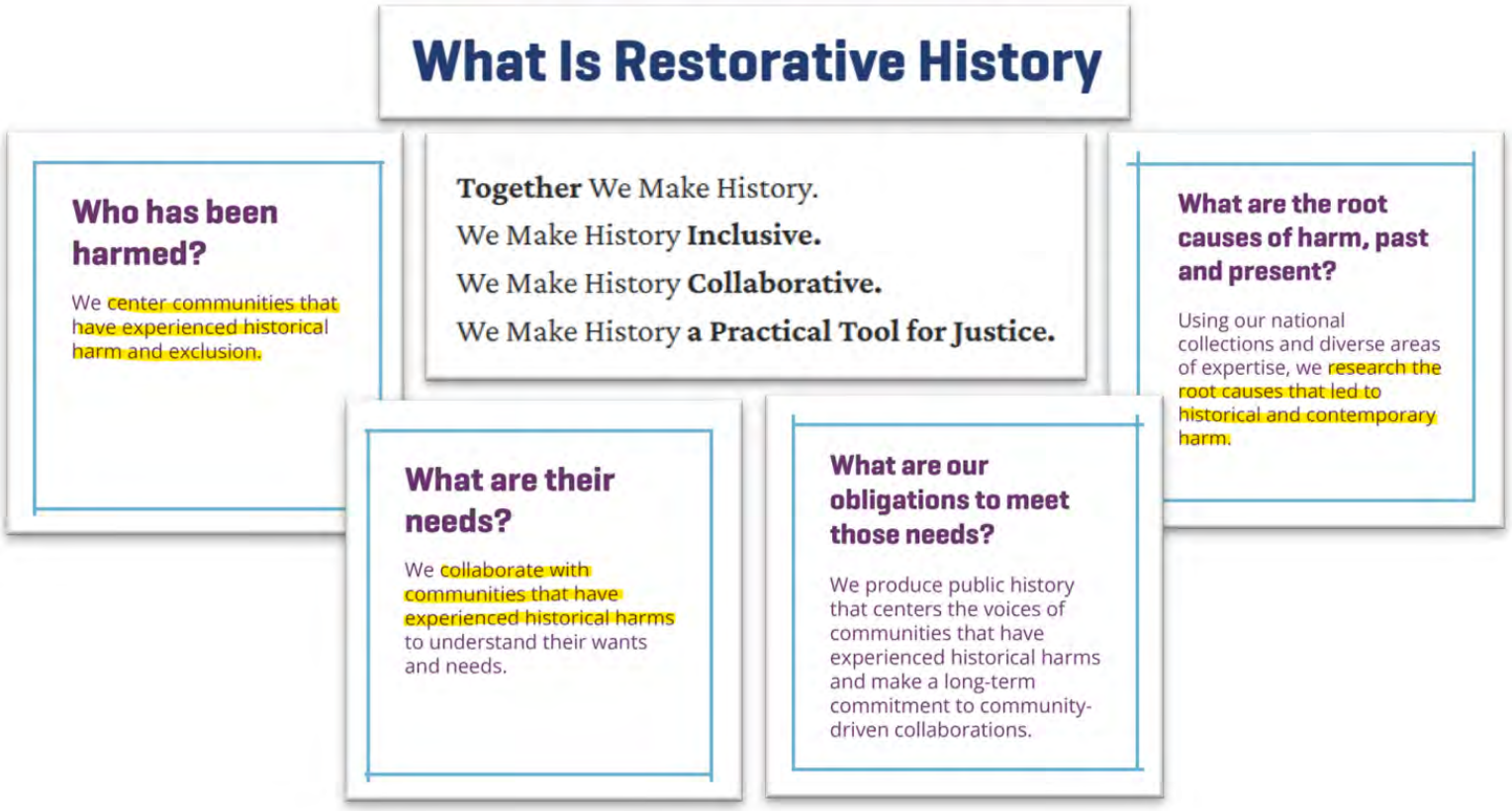
Screenshots of Director Hartig explaining that NMAH has incorporated the DACA Wings into its "Girlhood (It's Complicated)" exhibit to push for citizenship for illegal aliens, https://youtu.be/HERz54an_-c?t=1892.

NMAH's Interpretative Plan explains how NMAH's new mission, Strategic Plan, and "contextualiz[ation]" of "modern debate" works in practice, stating that the focus on "the complexity of our past" creates an opportunity for a new collective community: "We share the complexity of the past for a purpose: our statement looks to the future and envisions empowerment, justice, and compassion."[109] By focusing on "cross-cultural encounters,

revolutions and resistances, turning points and points that failed to turn," the Museum will create new experiences so that visitors "will recognize themselves as change-makers and connect to each other as a public. They will be empowered to pursue a 'just and compassionate future.'"[110] In other words, Hartig made it clear from the beginning that her leadership of NMAH would be social justice activism under the guise of historical commemoration. And, on that promise, she has been delivering.

4. NMAH's Center for Restorative History

The institutionalization of this stated purpose can be seen in the establishment of NMAH's Center for Restorative History (CRH), which Dr. Hartig launched the same year she became NMAH Director with the stated goal of fundamentally changing how the Smithsonian taught history. In 2021, Hartig noted, "We're launching the Center for Restorative History, which aims to…address the harm that we've done as the Smithsonian."[111]



Screenshots available at https://americanhistory.si.edu/about/centers/restorative-history. Highlights added.

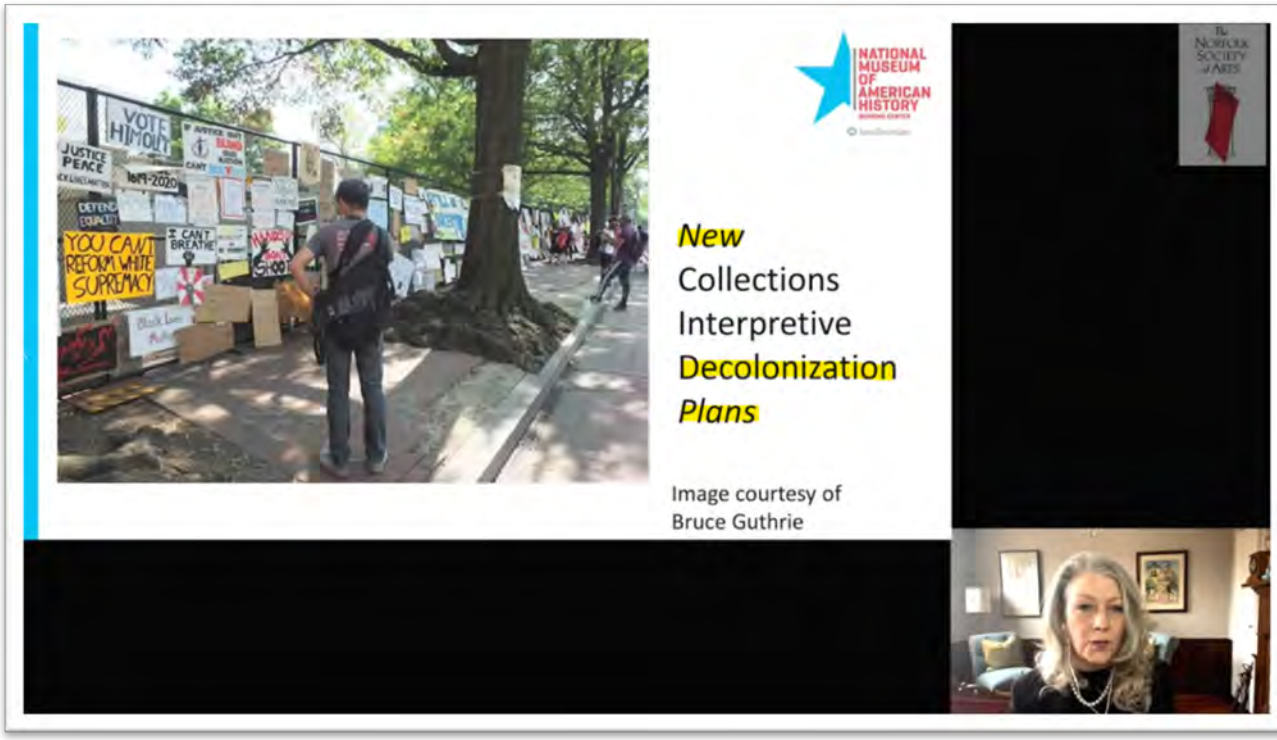
To ensure that the Center would be deeply integrated into the Museum's broader work, Director Hartig also commissioned the drafting of a museum-wide "Decolonization/Restorative History Plan,"[112] which the Smithsonian now states does not exist[113]—even though NMAH's Collections Plan refers to the Decolonization Plan as if it exists and Director Hartig gave a presentation in 2022, which included a slide devoted to explaining NMAH's "New Collections," "Interpretive," and "Decolonization Plans."[114]

That "why" is central to making real the promise of the institution's driving aspirations as expressed in our Strategic Plan:

We can't achieve the ambitions of the Strategic Plan without addressing our collections. As we pursue accessibility, inclusivity, relevance, and sustainability, we must recognize that our collections carry legacies on each of these fronts, inheritances that we must confront to move forward. As well, our collections carry extraordinary potential to advance our distinctiveness and impact in the ways that the Strategic Plan envisions.

Likewise, collections are central to the Interpretive Plan's call to explore intersections, crossroads, and encounters in history and to the Decolonization Plan's pursuit of restorative justice through history. Collections, then, do far more than drive "best practices" duties and generate resource claims: they become tools that reveal the full potential and power of NMAH.

Screenshots of the NMAH Collections Plan, available at https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 5. Highlights added.



Screenshot of a 2022 video in which Director Hartig presents a slide explaining how NMAH developed a new "decolonization" plan, available at https://www.youtube.com/watch?v=HERz54an_-c&t=3023s. Highlights added.

In 2022, Hartig explained that the "hopes that we had to create a true Decolonization Plan have grown" and "beautifully come into another being…in the form of the emergent Center for Restorative History," co-founded by NMAH's Tsione Wolde-Michael and Nancy Bercaw.[115]

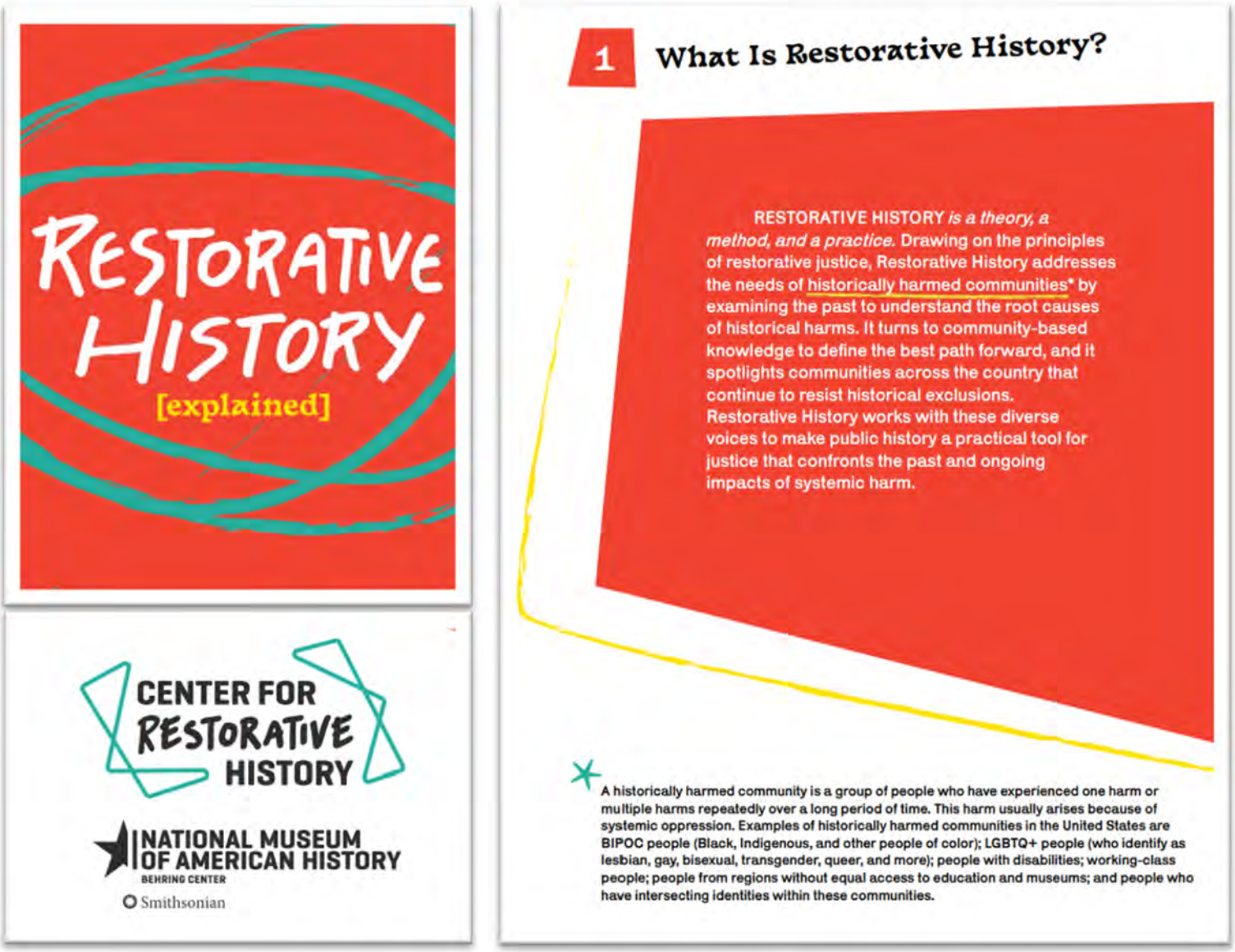


Screenshot of NMAH Director Hartig giving a talk entitled, "Challenging the Narrative Landscape of the Past to Create a More Just Future at the Smithsonian," highlighting how CRH seeks to "DECOLONIZE THIS MUSEUM," available at https://youtu.be/CVpbfZnBNu4?t=988.https://youtu.be/CVpbfZnBNu4?t=988.

According to the Center's explanatory document, Restorative History draws "on the principles of restorative justice [and] addresses the needs of historically harmed communities by examining the past to understand the root causes of historical harms."[116] The document explains: "Examples of historically harmed communities in the United States are BIPOC people (Black, Indigenous, and other people of color); LGBTQ+ people (who identify as lesbian, gay, bisexual, transgender, queer, and more); people with disabilities; working-class people; people from regions without equal access to education and museums; and people who have intersecting identities within these communities."[117] According to NMAH, the root cause of these harms is "systemic oppression."[118]

Restorative History, therefore, "encourages systemic change within an organization" and is a "systemic intervention" for the purpose of "transforming the national historical narrative, restructuring institutional priorities, and privileging knowledge production in the communities that have been silenced or overlooked by museums and other educational institutions."[119]

And, as the Center's explanatory document notes, the key to "transforming the national historical narrative" was systemic change at NMAH: "Working out of a national museum was an important intervention, as the museum is an institution that has perpetuated harm through its histories of collecting and display."[120]



Screenshots of CRH's explanatory document "RESTORATIVE HISTORY [explained]" on NMAH's website, available at https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf.

As CRH explains on NMAH's website, to redress that harm, the Center "spotlight[s] the people and stories that have been excluded from our national narrative using the principles of restorative justice. We do this by partnering with communities across the country that continue to resist these exclusions."[121]

Chapter III. Examples of Ideological Purpose at the National Museum of American History

1. *NMAH's Extensive Partnerships with, and Advocacy for Extending Citizenship to, Illegal Aliens*

One such partnership came via CRH's Undocumented Organizing Collective Initiative (UOCI)—now scrubbed from NMAH's website—which framed illegal alien activists lobbying the U.S. Government, on behalf of the 11 million+ illegal aliens nationwide who legally should not be in the country, as heirs to the emancipation of American slaves and the Civil Rights Movement.[122]



Screenshot of the message visitors receive when they attempt to visit NMAH's Undocumented Organizing Collecting Initiative website, available at https://americanhistory.si.edu/about/centers/restorative-history/projects/uoci. See archived link below.

"There are only a handful of moments in our nation's history when people without citizenship or voting rights have changed government policy. It happened during emancipation, woman suffrage, and civil rights, and it's happening again right now with undocumented immigrant organizing," reads the opening lines of UOCI's since-deleted page on NMAH's website.[123]

Under the banner of UOCI, NMAH staff (Nancy Bercaw, Patricia Arteaga, and José Centeno-Meléndez) traveled to six different locations across the country and locations in Mexico to interview illegal alien "activists" who were demanding U.S. citizenship.[124] This included traveling to Mexico City to interview *deported* illegal aliens, and to North Carolina to interview illegal alien activists who *worked to "swing an election"* against a local sheriff because he worked with Immigration and Customs Enforcement (ICE) to deport almost 300 criminal illegal aliens, including drunk drivers, rapists, heroin traffickers, and pedophiles, in 2017.[125]



Screenshots from an archived version of NMAH's since-deleted webpage highlighting CRH's UOCI, available at https://web.archive.org/web/20240724012024/https://americanhistory.si.edu/about/centers/restorative-history/projects/uoci. Notice the posters showing Monarch butterflies and the words "HERE TO STAY."

2. *NMAH's Partnership with Illegal Alien Activists Who Campaigned to Oust a North Carolina Sheriff from Office*

After traveling across the continent to document the stories and efforts of these illegal alien activists, including some who ousted a sheriff for helping ICE deport some of the worst criminals, CRH staff sat down for an interview with the *Smithsonian magazine* to recount their efforts.[126] The article noted:

> Mayra Stefania Arteaga of Charlotte, North Carolina, spoke with Centeno-Meléndez [a Smithsonian Latino Museum Studies Program fellow, who was then leading the oral history effort to record interviews] for nearly four hours, touching on what brought her

> family to the United States from El Salvador, her experience as a Temporary Protected Status holder and how she became a community organizer. Her oral history documents the campaign against the re-election of Sheriff Irwin Carmichael in Mecklenburg County. Carmichael's department participated in a program run by U.S. Immigration and Customs Enforcement that deported almost 300 [criminal illegal] immigrants in 2017. Immigrant activists including Mayra Stefania Arteaga worked to frame the 2018 sheriff's election as a referendum on the policy. Working in solidarity with other organizations, like the Southeast Asian Coalition and Charlotte Uprising, attending steering committee meetings, putting pressure on Carmichael through social media, among other tactics, made their campaign successful. Carmichael's loss demonstrated the persuasion of activists who lacked the power to vote.[127]

In a 2020 article entitled *Redefining 'American,'* UOCI co-leads Nancy Bercaw and Patricia Arteaga describe the initiative as way to "give voice to undocumented immigrant activism," "collaborat[e] with at-risk communities whose members are facing deportation," and help create "a new recognition of what citizenship can look like."[128]

These political efforts from the museum and its staff glorify illegal aliens who violated U.S. law and continue to do so by remaining in the U.S. These products are written and structured to convince the American public that illegal aliens should be simply given amnesty and U.S. citizenship.

In their article, the two NMAH curators also refer to UOCI by another title: "Transformative Politics: Undocumented Immigrant Activism 2000 to Present" and describe how they "were witnessing civically engaged activists who—without citizenship or the power to vote—were successfully engaging in politics on many levels. They were influencing national policy, shaping public opinion, challenging local governments, and galvanizing Congress to act on their behalf."[129]

Bercaw and Arteaga conclude their article by posing a series of "key questions" revealing that UOCI's true goal was to prompt societal change and, as their article's title suggests, redefine "what it means to be an 'American,'" adding that these questions guide the work that they do "every day" at NMAH "and with this project":

> Through this project, we hope to record not just a moment in time or how a new political voice emerged, but also how this movement asks key questions:
>
> - How can we civically engage within our own communities to address policies that are detrimental to people's livelihoods?
>
> - How can we change our future when lives are inextricably rooted in systems of oppression?
>
> - Who gets to define what it means to be an 'American'?
>
> - Who belongs?

> Those are the questions we are posing every day in our work at the National Museum of American History and with this project.[130]

The existence of NMAH's CRH and UOCI demonstrate that the Museum is creating programming centered on *non-American groups* that it believes have been oppressed by Americans and their representatives in government.

For example, in their *Redefining 'American'* article, Bercaw and Arteaga ask: "How can the people we work with in their communities trust us as a federal institution? How do we build trust in order to redress past Smithsonian practices? Or how do we introduce the museum to those who are unfamiliar with the Smithsonian or with museum-going more generally? A key component is the partnerships we have with undocumented organizers. They are trusted figures within the sites where we are working, and they consult with us."[131]

3. NMAH's Efforts to Indoctrinate Middle and High School Students into Opposing the Enforcement of Federal Immigration Law

Through NMAH's UOCI, NMAH also created *Tell Me What Democracy Looks Like*, "a digital space" where middle and high school students can "meet five undocumented organizers and learn what democracy looks like from their perspectives," an initiative which Director Hartig boasted about to donors in the Museum's annual *Highlights Report* in 2021.[132]

As with UOCI, NMAH deleted the page on its website devoted to this initiative.[133] However, an archived version reveals that it was divided into multiple sections with headings ranging from the "Problem of Citizenship" and "Intersectional Organizing" to "Criminalizing Immigration" and "History in Real Time: Undocumented Organizing."[134]

The official graphic NMAH created for *Tell Me What Democracy Looks Like* depicts illegal aliens wearing shirts with phrases like:

- "Immigration is a BLACK issue";
- NO "287g" (referring to the primary program that allows local law enforcement to partner with ICE to identify and deport criminal illegal aliens);
- "UNDOCUMENTED AND UNAFRAID";
- "DEFEND DACA"; and
- "CITIZENSHIP FOR ALL"[135]

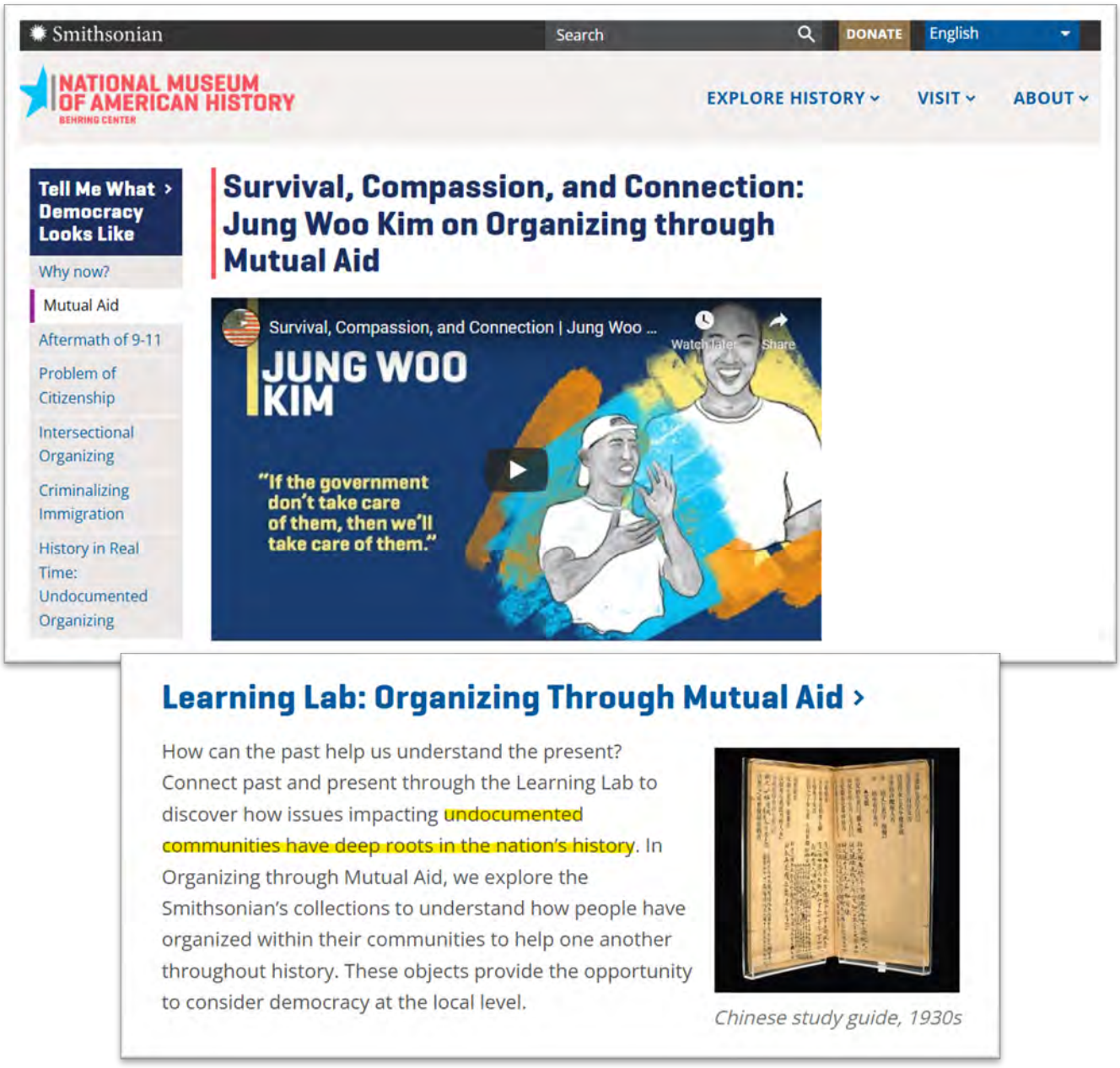


Screenshot of NMAH's "Tell Me What Democracy Looks Like" graphic, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like.

UOCI staff also created a page on the Smithsonian Learning Lab's website entitled, *Tell Me What Democracy Looks Like: Learning from Undocumented Organizers*, which reads: "Welcome to Tell Me What Democracy Looks Like—a digital space where you can meet undocumented organizers and learn firsthand what democracy looks like to them. Through their stories, these organizers invite us to look beyond the headlines and the issues often associated with undocumented immigrants, from DACA (Deferred Action for Childhood Arrivals) to the DREAMers. In the process, they stretch our imagination by offering fresh approaches to familiar topics such as community, citizenship, belonging, and even identity itself."[136]

4. NMAH Created a Video Highlighting Protestors Demanding to "Abolish ICE"

In its since-deleted *Tell Me What Democracy Looks Like* page on its website, NMAH created a video highlighting how Jung Woo Kim, an "undocumented organizer" in the Washington, DC area who runs the National Korean American Service & Education Consortium (NAKASEC), is engaged in "organizing through mutual aid."[137] One text box invited visitors to "discover how issues impacting undocumented communities have deep roots in the nation's history."[138]



Screenshots available at https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim. The YouTube video has since been made private. See https://www.youtube.com/watch?v=bkT-NKqF3-8.

The *Tell Me What Democracy Looks Like* video itself repeatedly showed NAKASEC activists holding banners and wearing shirts calling for "CITIZENSHIP FOR ALL" and to "ABOLISH ICE."[139]

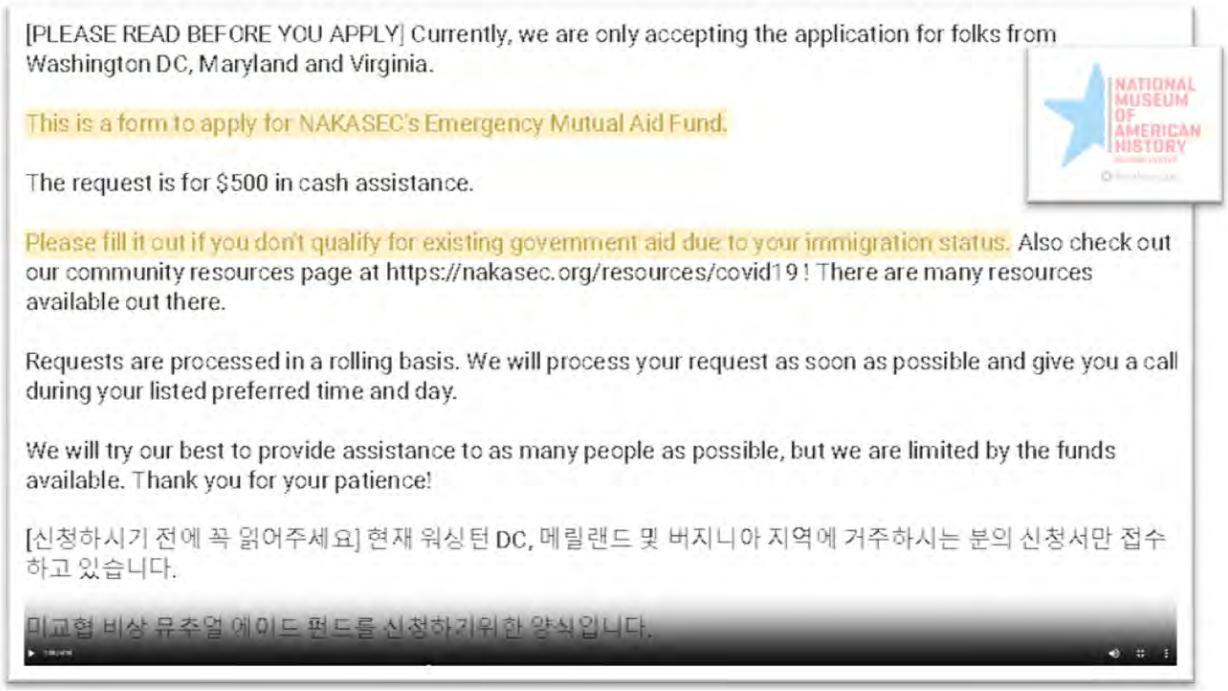


Screenshots available at https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim.



Screenshots available at https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim.

The video also highlighted how Jung Woo Kim's NAKASEC, an illegal alien activist group, set up an "Emergency Mutual Aid Fund" to give "$500 in cash assistance" to those who "don't qualify for existing government aid due to [their] immigration status" in Washington, DC, Maryland, and Virginia during COVID-19.[140]



Screenshots available at https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim. Highlights in original video.

5. *The Smithsonian's Belief that America Is Unjust and Therefore Its Story Must Be Challenged*

NMAH engaged in all these efforts with the explicit goal of challenging the traditional telling of America's story. NMAH's current Collections Plan makes this clear, stating that NMAH's "strategic plan compels and inspires us to collect from underrepresented communities (so as to challenge traditionally exclusionary historical narratives)" and to "do so in a spirit of collaboration, building relationships and trust."[141]

Indeed, these initiatives fit within the current Smithsonian leadership's broader view that "the American story" needs to be challenged, questioned, and undermined because it believes America was founded on, and remains rooted in, "injustice."

In Hartig's 2022 slideshow presentation entitled, *Challenging the Narrative Landscape of the Past to Create a More Just Future at the Smithsonian*, one slide presents NMAH's UOCI as a way to bring about "narrative change" and then depicts precisely what the Smithsonian believes that narrative change should be.[142]

Like NMAH's *Tell Me What Democracy Looks Like* graphic, the slide is covered with illegal alien activists wearing shirts with the same pro-illegal alien slogans: "Immigration is a BLACK issue," NO "287g" (again, referring to the primary program that allows local law enforcement to partner with ICE to identify and deport criminal illegal aliens), "UNDOCUMENTED AND UNAFRAID," "DEFEND DACA," and "CITIZENSHIP FOR ALL."[143]



Screenshot of a slide in NMAH Director Hartig's presentation entitled, "Challenging the Narrative Landscape of the Past to Create a More Just Future at the Smithsonian," noting that CRH seeks "narrative change." See https://youtu.be/CVpbfZnBNu4?t=1315.

This is what the Smithsonian believes, and it is why Anthea Hartig, the Director of America's History Museum, openly admitted that she finds it difficult to love America, stating in a 2022 presentation that "loving America is very complicated."[144]



Screenshot of the opening slide NMAH Director Anthea Hartig used for an NMAH presentation in September 2022, where she stated "loving America is very complicated," available at https://youtu.be/CVpbfZnBNu4?t=411.

6. NMAH's Role in the Smithsonian's "Pan-Institutional" Effort to Reframe American History "Through the Lens of Migration and Immigration"

NMAH's CRH, UOCI, and *Tell Me What Democracy Looks Like* are simply three manifestations of NMAH's core values, which include pro-illegal alien activism. Indeed, in a 2022 presentation, Hartig explained the four core values that NMAH seeks to embody "daily" as a museum: Accountability, Care, Collaboration, and Courage.[145] In a slide outlining those four values, Hartig revealed their common theme by including a picture of a Monarch butterfly, which, as explained above, is one of Hartig's "favorite things" at NMAH[146] and a well-known symbol in the illegal alien activist community, symbolizing illegal aliens crossing the border from Mexico into the U.S. (mirroring the migration patterns of Monarch butterflies across North America), the fight to grant illegal aliens U.S. citizenship, and President Obama's Deferred Action for Childhood Arrivals (DACA) program—which was designed to protect millions of illegal aliens from deportation.[147]



Screenshot of NMAH Director Hartig's presentation entitled, "Challenging the Narrative Landscape of the Past to Create a More Just Future at the Smithsonian," available at https://youtu.be/CVpbfZnBNu4?t=572.

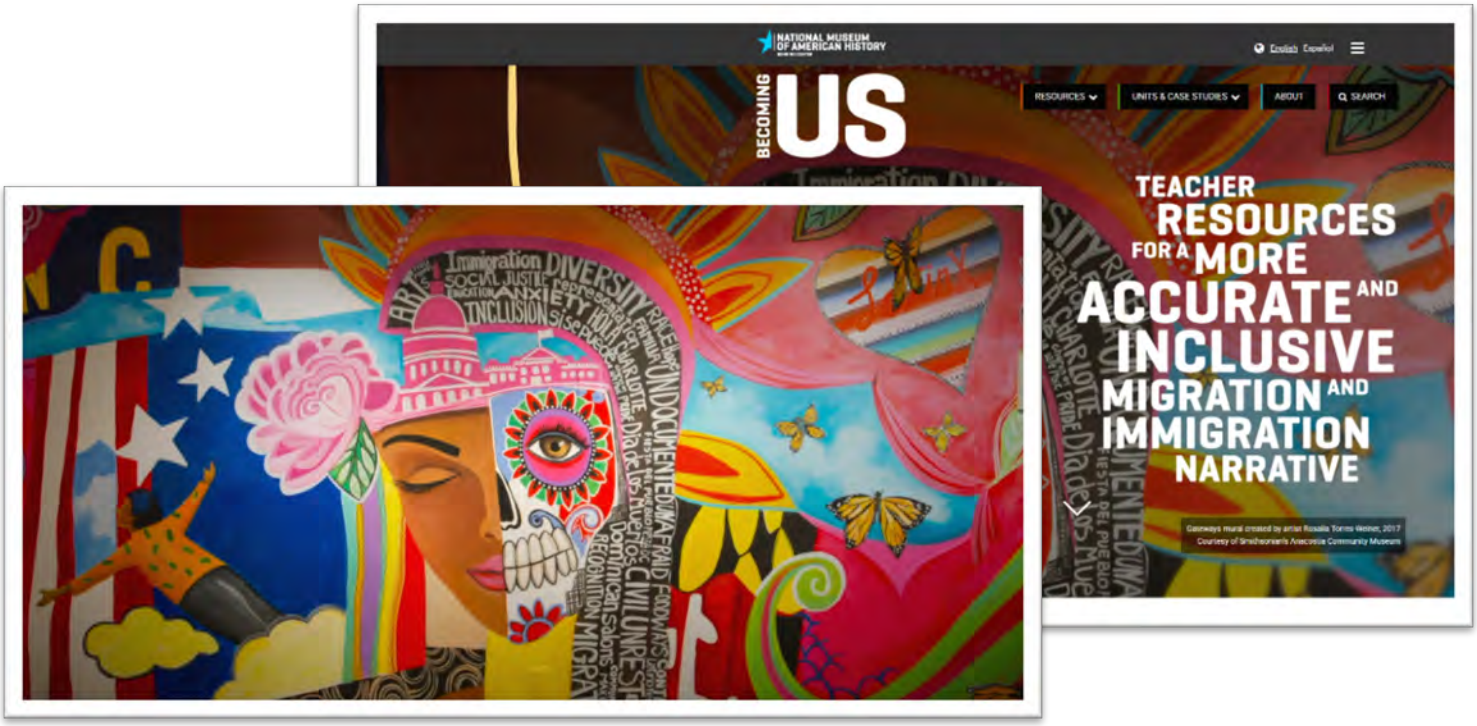
In line with these core values, in November 2019, under Director Hartig's leadership, NMAH launched the *Becoming US: Teaching Immigration and Migration History in the 21st Century* "educational framework" to "change how migration and immigration are learned" in high schools across America and focus people's attention on the peoples, cultures, and languages that were present "long before the founding of the United States[.]"[148] NMAH's website explains how the framework was developed by NMAH staff and curators and represents the Smithsonian's half-decade "pan-institutional" effort to reframe American history "through the lens of migration and immigration," stating:

> In 2014 the museum embarked on a pan-institutional journey to research, document, interpret, and present the history of the United States through the lens of migration and immigration. This effort resulted in an exhibition in the museum's The Nation We Build Together wing called *Many Voices, One Nation*; the scholarly book *Many Voices, One Nation: Material Culture Reflections on Race and Migration in the United States*; and *Becoming US*, the national education curricula.[149]

When NMAH uses its educational reach to advance a particular political ideology, it undermines its core mission of historical education and erodes the public's trust in the institution. NMAH's *Becoming US* "educational" framework instructs hundreds of thousands of high school teachers across America to teach the next generation of American voters that illegal aliens are essential to America's culture, economy, and society. Therefore, the curriculum implies all aliens, legal or illegal, should be granted U.S. citizenship and allowed to vote. In fact, according to NMAH, it would be *unjust* to do otherwise.

The framework's *Essential Understandings* section instructs teachers to "include experiences" for their students that (a) "provide for the study of how people living in the land that is now the United States create, interact with, and change structures of power, authority, and governance"

and (b) "provide for the study of the ideals, principles, and practices of citizenship in relationship to migrants and migrant policy," noting that "[u]nderstanding migration plays a central role in understanding enslavement and liberation."[150]



Screenshots of image on the "Becoming US" homepage, depicting multiple monarch butterflies symbolizing illegal aliens' fight for U.S. citizenship, and phrases like "UNDOCUMENTED AND UNAFRAID" and "SOCIAL JUSTICE," available at https://americanhistory.si.edu/becoming-us/ and https://americanhistory.si.edu/becoming-us/about.

7. NMAH's Claim That "There Is No Single American Culture, Language, or Narrative"

NMAH's *Becoming US* framework also directs America's teachers to instruct students that:

- "There is no single American culture, language, or narrative";
- "The U.S. economy depends on an influx of migrants to augment the workforce in a number of industries";
- "Understanding the connections forged between science, technology, and society over time in the United States requires a migrant perspective";
- "Since Europeans arrived on what we now consider U.S. land, people—whether forcibly or freely—have arrived from different places in the world";
- "The U.S.-Mexico border was created as a result of a war by which the United States acquired extensive land and incorporated the people who lived on that land. Those circumstances have contemporary relevance"; and

- "Migrants have both been active citizens and have been denied access to the benefits and responsibilities of citizenship throughout American history."[151]

One *Key Concepts* section encourages students to "resist anti-democratic practices" and implies that deporting illegal aliens harms their "participation in democracy" and is oppressive, exclusive, and unequal:

- "Changes in immigration policy have affected who is considered a citizen and how and when migrants could exercise their rights and civic responsibilities."

- "American history has been propelled by the power of individuals and groups who have resisted anti-democratic practices."

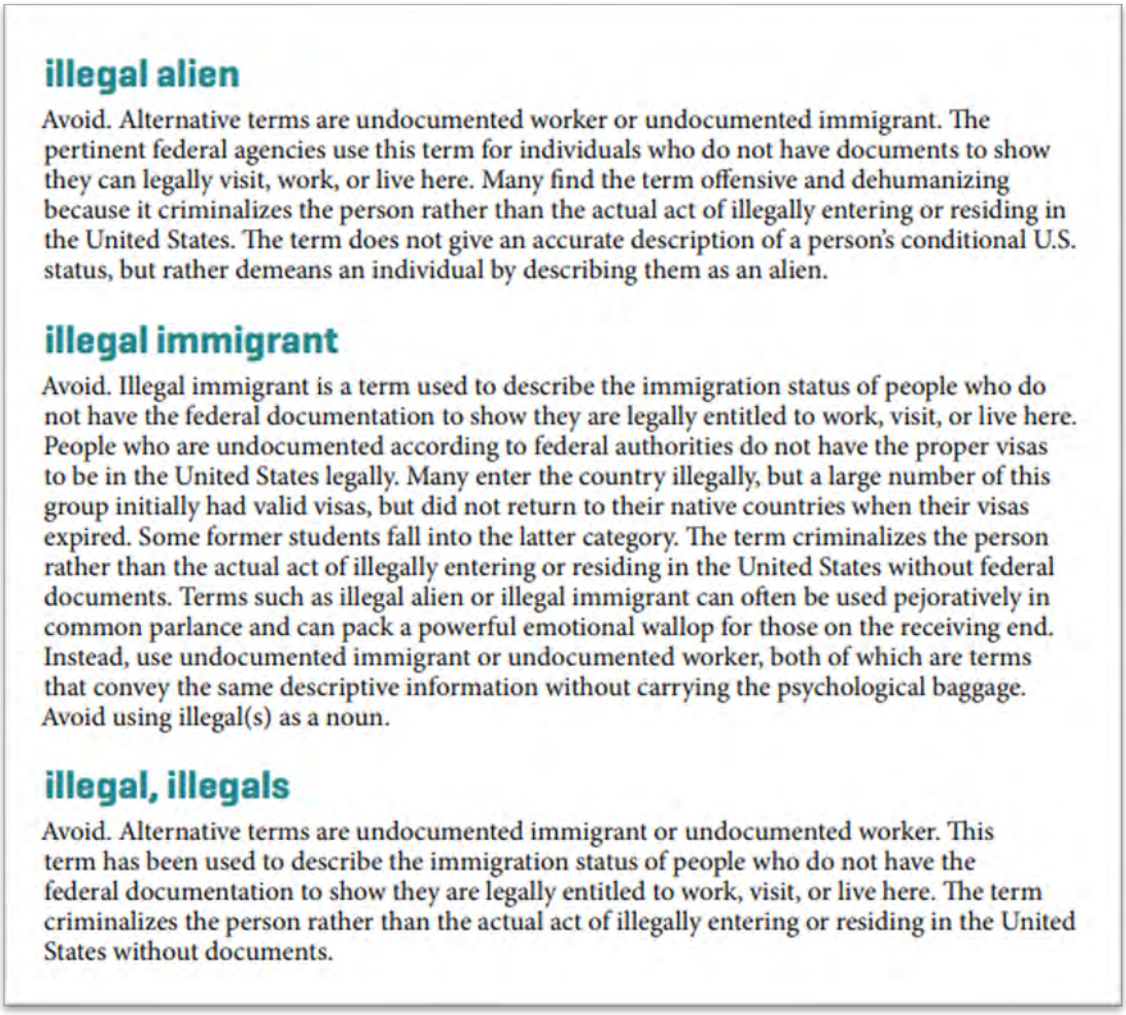
- "Xenophobia, forced migration, and deportation have affected individuals' participation in democracy."

"Americans have grappled with questions of freedom, inclusion, and equality since the nation's founding. They have struggled to answer these questions in the face of differing, sometimes competing, visions for the country."[152]

8. NMAH's Attempt to Manipulate Language to Downplay the Illegality of Illegal Immigration

NMAH's *Becoming US* educational curriculum also instructs high school teachers to avoid using the terms "illegal alien," "illegal immigrant," "illegal, illegals" when teaching students.[153]

Instead, NMAH tells high school teachers to use the terms "undocumented worker" or "undocumented immigrant," alleging that the other terms "criminalize[] the person rather than the actual act of illegally entering or residing in the United States" and carry "psychological baggage."[154]



illegal alien

Avoid. Alternative terms are undocumented worker or undocumented immigrant. The pertinent federal agencies use this term for individuals who do not have documents to show they can legally visit, work, or live here. Many find the term offensive and dehumanizing because it criminalizes the person rather than the actual act of illegally entering or residing in the United States. The term does not give an accurate description of a person's conditional U.S. status, but rather demeans an individual by describing them as an alien.

illegal immigrant

Avoid. Illegal immigrant is a term used to describe the immigration status of people who do not have the federal documentation to show they are legally entitled to work, visit, or live here. People who are undocumented according to federal authorities do not have the proper visas to be in the United States legally. Many enter the country illegally, but a large number of this group initially had valid visas, but did not return to their native countries when their visas expired. Some former students fall into the latter category. The term criminalizes the person rather than the actual act of illegally entering or residing in the United States without federal documents. Terms such as illegal alien or illegal immigrant can often be used pejoratively in common parlance and can pack a powerful emotional wallop for those on the receiving end. Instead, use undocumented immigrant or undocumented worker, both of which are terms that convey the same descriptive information without carrying the psychological baggage. Avoid using illegal(s) as a noun.

illegal, illegals

Avoid. Alternative terms are undocumented immigrant or undocumented worker. This term has been used to describe the immigration status of people who do not have the federal documentation to show they are legally entitled to work, visit, or live here. The term criminalizes the person rather than the actual act of illegally entering or residing in the United States without documents.

Screenshot of NMAH's "Becoming US" illegal immigration-related Glossary of Terms, available at https://americanhistory.si.edu/becoming-us/sites/default/files/downloads/NMAH_Becoming%20Us_Glossary.pdf.

In reality, for decades, both Republican and Democratic presidents have used the term "illegal alien" to describe an individual's legal status before the law.[155] Indeed, since at least the 1980s, "illegal alien" has been a foundational term in U.S. federal law to describe any person who is not a citizen or national of the United States that is present or entered the country without legal authorization.[156] In fact, 100 years ago, the *New York Times* used the term "illegal alien" to describe the arrest of a man from Ireland who rode a bicycle across the U.S. border in 1926.[157]

9. NMAH's Efforts to Turn American High Schools into Law Clinics for Illegal Aliens

In advancing its pro-illegal alien agenda, NMAH regularly employs sophisticated framing techniques that selectively highlight or omit information, bypass deliberate, analytical thinking, and tap into rapid, emotion-driven decision-making to lead its audiences to preferred conclusions.

A "case study" for teachers using NMAH's *Becoming US* educational framework entitled, *A Dream Deferred*, seeks to build empathy for illegal aliens, framing President Obama's DACA

policy as an ideal pathway for illegal aliens to eventually become citizens and recommends that educators teach students "about DREAMers" and "the long-fought battle to preserve those protections."[158]

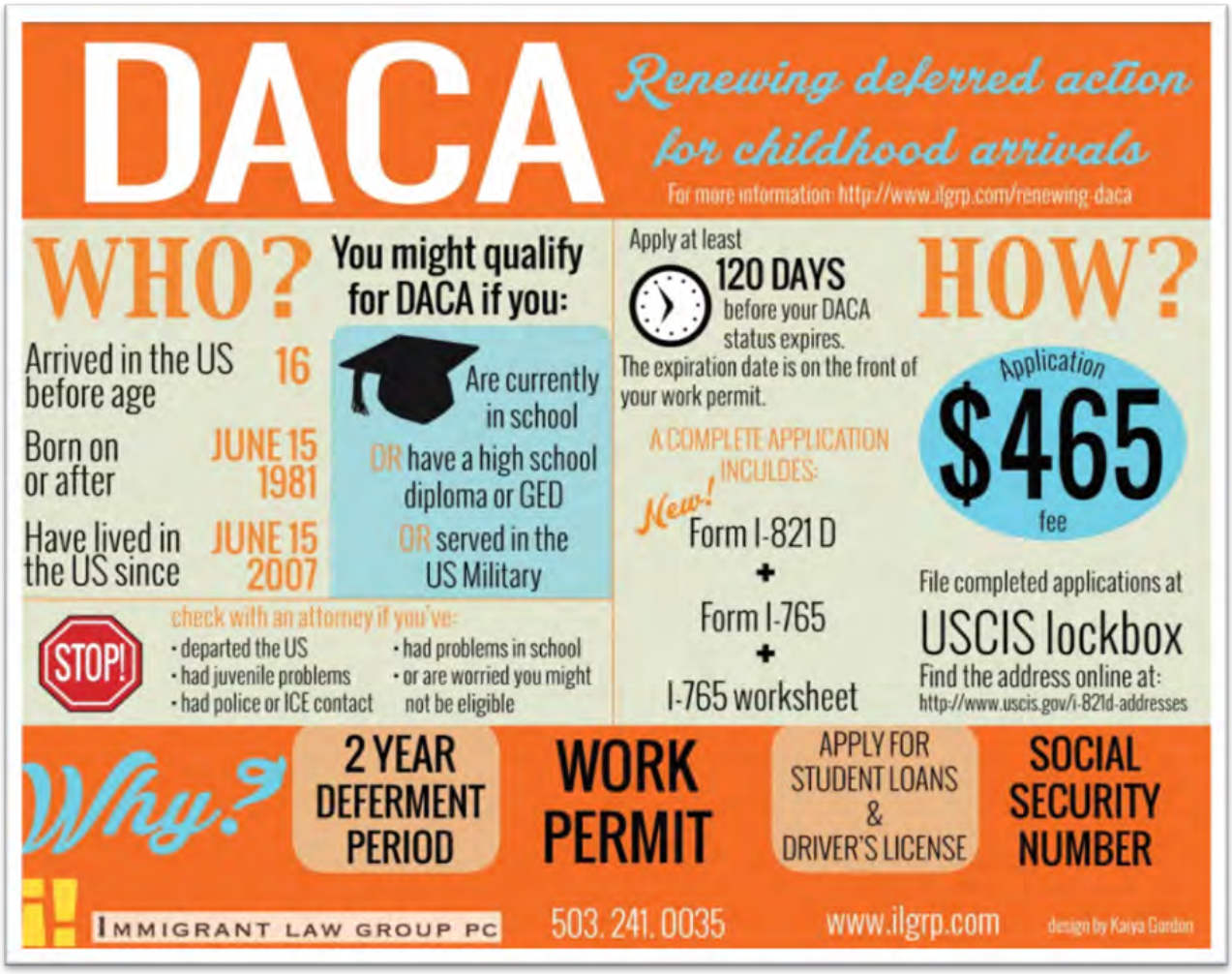
The lesson "Warm Up" encourages students to emotionally put themselves into the shoes of illegal aliens, asking: "What are some of your dreams? What could prevent your dreams from coming true? What are three things that cause people's dreams to be deferred?"[159] Teachers are encouraged to instruct students "that executive actions, including executive orders are not permanent and can be undone by future presidents" and "Ask students if they've heard of the DREAM Act or DACA."[160]

After hearing the students' responses to the "Warm Up" lesson, NMAH instructs teachers to "provide students with the following background":

> The terms DACA and 'dreamers' are often used interchangeably. DREAMers got their name from the DREAM Act, a bill first proposed in 2001 and then again in 2009, 2010, and 2011. The bill, which never passed, would allow the children of undocumented immigrants to remain in the United States as temporary residents and, after meeting a series of requirements, as permanent residents who could ultimately earn U.S. citizenship. However, after Congress failed to pass the DREAM Act three times, President Obama used his power of executive action to protect this group of immigrants by allowing DREAMers to remain in the country temporarily. That executive action is known as DACA (Deferred Action for Childhood Arrivals).[161]

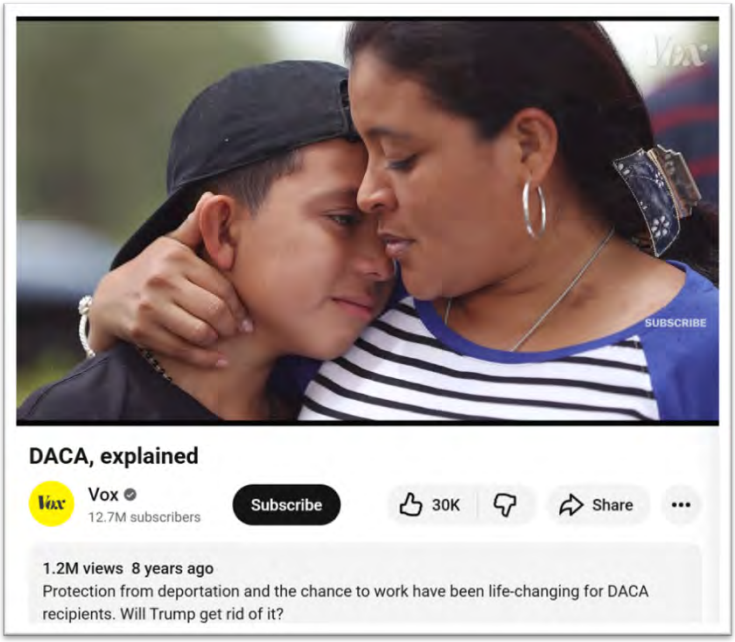
After providing this background, NMAH encourages teachers to go further and "[h]elp students learn more about the policy details of DACA, the chronology of its evolution, and the political context that surrounds it. Begin by distributing copies of this infographic for students to reference."[162] It is apparent that NMAH's true goal is not education or even advocacy, but facilitating illegal aliens' enrollment in the DACA program.

The infographic that NMAH directs teachers to distribute to students (shown below) notes that it was created by "Immigrant Law Group PC," a for-profit law firm founded by Stephen Manning,[163] and explains how students "might qualify for DACA," instructs students how to apply, and even provides the names of, and deadlines for submitting, necessary forms. The infographic then promises prospective DACA applicants that if they enroll, they can get a "2 year deferment period," "work permit," "apply for student loans and driver's license," and a Social Security number.[164]



Created by "Immigrant Law Group PC," NMAH encourage high school teachers to pass out this infographic explaining how students "might qualify for DACA" and how they can apply to maximize their chances of staying in the U.S. See https://web.archive.org/web/20240727121953/https://www.riohondo.edu/dreamers/wp-content/uploads/sites/71/2016/11/DACA-infographic-copy-4-low-low-res-1024x791.jpg.

NMAH then recommends that teachers "show and discuss this short 'DACA, Explained' video" created by Vox.[165] The video begins with an emotional story of a child learning for the first time that he is "undocumented" and could be deported at any time and then proceeds to discuss how President Obama heroically created DACA in 2012, how President Trump rescinded it, and how DACA has helped "young undocumented immigrants" get a job with better pay, open their first bank account, buy their first car, and pursue educational opportunities they previously could not.[166] There is zero discussion about how DACA affects Americans, their economics, educational opportunities, or why this should be considered core "American history."[167]



Screenshot of the pro-DACA YouTube video that NMAH recommends high school teachers across America play for their students in the classroom, available at https://youtu.be/UzYDqQDNFzc?t=297.

After showing students the pro-DACA video, NMAH instructs teachers to "project and talk through this interactive timeline," which catalogs how the DREAM Act was first introduced in Congress in 2001 with "bipartisan support," how President Obama issued an executive order creating DACA in 2012, how Obama expanded DACA in 2014 to include the "undocumented parents of children who are U.S. citizens or legal permanent residents," how a federal district and appellate court ruled against Obama's 2014 actions, how the Supreme Court's 2016 ruling left in place the lower court's ruling, and how that ruling harmed "5 million undocumented immigrants."[168] The timeline also features an interview with an illegal alien who "crossed illegally into the United States" in 2003 and is now a "DACA recipient."[169]



Photo from the interactive timeline NMAH instructs high school teachers across America to share with students, available at https://www.kqed.org/lowdown/28184/how-we-got-here-the-rise-and-demise-of-daca-with-lesson-plan.

NMAH then instructs teachers to "assign students to read and take notes on this 'DACA Time Bomb' article about the fate of 800,000 DREAMers after President Trump rescinded DACA in September of 2017."[170] The article, also published by Vox, prominently features a photo of a woman crying and states that President Trump's action "marks the beginning of six months of existential anxiety, as hundreds of thousands of immigrants struggle to go on with their lives without knowing whether they'll be accepted as inhabitants of the United States by April — or whether the only certainty they'll get at the end of six months is knowing the date on which they'll lose their ability to work in the US legally and gain the constant threat of deportation."[171]

As if this was not enough, NMAH further instructs teachers that, "Once students have a working understanding of DACA as policy, [they should] spend time learning about the very real and personal impact it has on its recipients, the DREAMers, [using] multimedia narratives to provide students with more than a single story about DREAMers":

- "What Dreamers Gained from DACA, and Stand to Lose"
- "Living Undocumented"
- "Interview with Dalia Nava"
- "10 Dreamers You Should Know"
- "Student Activism"[172]

NMAH then encourages teachers to enter into discussion "by providing students with readings that illustrate a range of ideological positions on the issue of undocumented immigrants."

- "Right and Left on Trump's DACA Decision"
- "The Conservative Case Against the DREAM Act"
- "The Case for Keeping DACA"
- "10 Reasons We Need The DREAM Act"[173]

NMAH then directs teachers to have students "synthesize their reading and analyze the debate in an essay that addresses one of these three questions (adapted from the unit's essential questions)":

- *"How does the debate over DACA reflect ideas about belonging and citizenship?"*
- *"Are claims made in the debate over the DREAMers that favor the protection of some groups over others?"*
- *"How do the positions held reflect or contradict American values and liberal traditions?"*[174]

All of this is done to instill a clear political message within the next generation of American voters: Unless DACA is defended and illegal aliens are allowed to stay, America's reputation as a welcoming, loving country is at stake. This is not only a corruption of NMAH's intended purpose, but a factually false dichotomy. NMAH advances it regardless.

10. NMAH's Pro-Illegal Alien Activism Shaped a Flagship Exhibit About America

According to NMAH, the Museum's *Becoming US* "educational" framework "resulted in an exhibition . . . called *Many Voices, One Nation*."[175] NMAH's *Many Voices, One Nation* exhibit is a physical manifestation of its *Becoming US* framework. For example, the exhibit includes in its didactics many of the same statements included in the framework.[176]

Given that the framework underpinning the exhibit states that "[t]here is no single American culture, language, or narrative,"[177] it should not come as a surprise to learn that NMAH's *Many Voices, One Nation* exhibit provides no coherent narrative of American history. Instead, it pieces together alleged examples of Americans oppressing immigrants and other groups while claiming to "take visitors on a chronological and thematic journey that maps the cultural geography of the unique and complex stories that animate the Latin emblem on the country's Great Seal and the national ideal: *E pluribus unum*, Out of many, one."[178]

While NMAH claims that our "national ideal" is unity when it serves its divisive, activist purposes, it refuses to present, and states that there is not, a single, unified American culture, language, or narrative, likely because doing so would not serve its activist purposes.

Like the *Becoming US* framework, the ultimate goal of *Many Voices, One Nation* is to convince visitors that illegal aliens are entitled to citizenship, voting rights, and "belonging" in America. This explains why America's motto, *E Pluribus Unum*, is criticized throughout the exhibit for lacking inclusivity. One didactic reads: "In a desire to unify the colonies, the first U.S. Congress chose the motto *E Pluribus Unum*—Out of Many, One. It took generations for those ineligible for citizenship in the new nation—including Native Americans, people of African descent, and women—to negotiate their place as part of the 'One.'"[179]

There are several problems with this didactic. First, it is factually wrong about who chose the motto and why it was chosen. "E Pluribus Unum" was first proposed by a committee that included Benjamin Franklin, Thomas Jefferson, and John Adams as part of an early national seal design.[180] It was the Continental Congress—not "the first U.S. Congress"—that formally adopted the motto on June 20, 1782, as part of the Great Seal of the United States.[181] According to Charles Thomson, who presented the design, the motto served as "a textual representation" of the states united under a central Congress—a reference to the union of states, not an aspirational promise of civic inclusion.[182]

Second, at the time of America's Founding, women were not "ineligible for citizenship"; they simply lacked the full rights of citizenship, along with a massive portion of the male population—many of whom were white. In fact, in the early republic, up to half of all white men were unable to vote because they did not meet the strict property-ownership or tax-paying requirements in their states—a system the American colonies inherited from Great Britain and which was "widely used in many nations around the world until the 1800s."[183] But NMAH intentionally leaves these facts out.

Third, framing these groups as outside the "One" for generations erases their foundational presence in America. Enslaved people, Native Americans, and women were not absent from

America's formation, but were active agents within it. To declare these groups outside the "One" is not just historically inaccurate; it retroactively strips them of the belonging they had always claimed and exercised, recasting their identity as contingent on legal recognition rather than rooted in the land, labor, and culture they had long shaped.

Unfortunately, these inaccuracies, distortions, and omissions are par for the course for NMAH. When one understands NMAH's activist goal of pushing for citizenship for illegal aliens, it makes sense why the only reference to Benjamin Franklin in the entire *Many Voices, One Nation* exhibit is about his "ambivalent view" of immigrants, seeking to paint him as racist or exclusionary: "Philadelphian Benjamin Franklin expressed an ambivalent view of these immigrants. He admired their industry but worried that they introduced an 'alien' element to the colony."[184] Notice the only descriptor for Benjamin Franklin is where he was from, not the pivotal role he played in American history or the fact that he was the only founder to sign all four of America's key founding documents: the Declaration of Independence, Treaty of Alliance with France, Treaty of Paris, and U.S. Constitution.

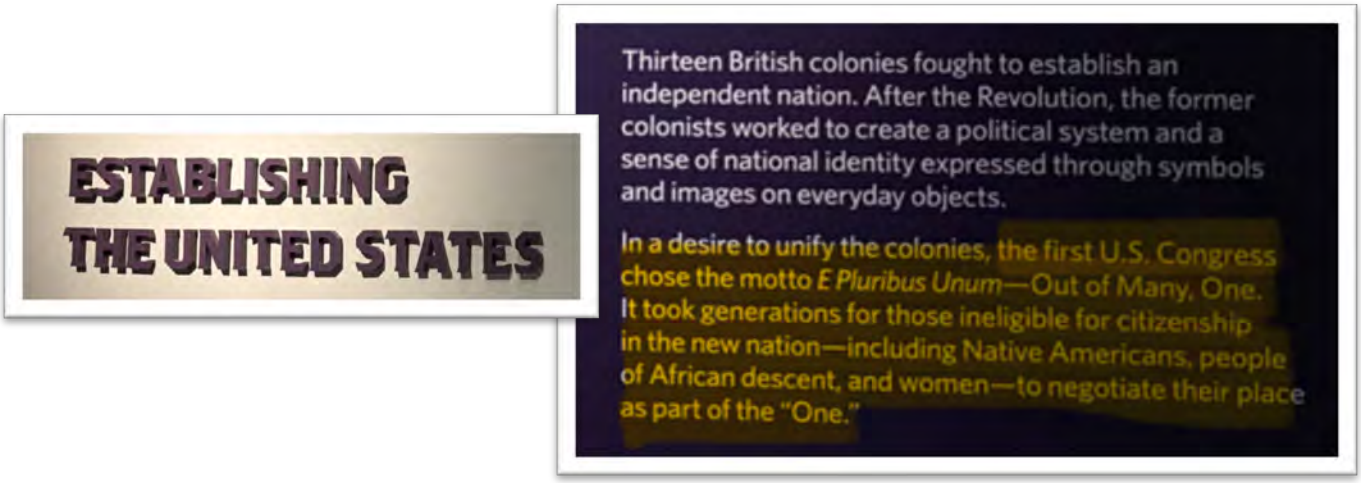


Photo of "Establishing the United States?" didactic in NMAH's "Many Voices, One Nation" exhibit. Highlights added.

NMAH's pro-illegal immigration activism is also why the first display greeting visitors reframes American history to be largely about the peoples and groups oppressed by Americans, with four statements answering the question, "How did we become US?": "Some of Us Were Already Here"—referring to Native Americans; "Some of Us Came Here Voluntarily"—referring to the American colonists; "Some of Us Were Forcibly Brought Here"—referring to African slaves; and "Some of Us Remained In Place as the United States Expanded to Our Land"—referring to Native Americans and implicitly alleging that the U.S. stole their land. This sets the tone that visitors should understand that, according to NMAH, America has a long history of being an oppressive country.

The exhibit then invites visitors to "Discover How Diverse Peoples Built A Nation Together"—seeking to reframe America's story from being focused on (a) Christopher Columbus, who discovered America, (b) the Pilgrims who founded the first self-governing American colony in 1620, and (c) the Founding Fathers who fought to create the nation in 1776 and designed its enduring constitutional structure in 1787 (e.g., George Washington, John Adams, Thomas

Jefferson, James Madison, Alexander Hamilton, Benjamin Franklin, and John Jay) and towards political activism and modern-day grievances.[185]

Understanding NMAH's ultimate activist goal—citizenship for millions of illegal aliens—also explains why the exhibit repeatedly emphasizes that non-Americans "from many cultures" and "different languages" used to live in the land now called the United States "long before the founding of the United States, even before European contact" and why it frames being American as a "negotiation [that] continues," implying that some individuals that should be Americans are not yet.[186]

Recognizing NMAH's true motives also reveals why the introductory didactic in the exhibit argues that, "In creating the new nation, early leaders envisioned a country that promised opportunity and freedom—but only for some" and that "the people who lived in the United States" had to "negotiate, or work out, what it means to be American," a "negotiation" that "continues" today—implying that what it means to be American is unsettled and still needs to be changed or "work[ed] out."[187]

In fact, throughout the entire *Many Voices, One Nation* exhibit, the only time that NMAH mentions the term "founders" is in reference to their alleged "acceptance" of slavery.[188] In a didactic entitled, "Negotiating Freedom," the exhibit states that, "[t]he importation of enslaved African peoples and slavery's acceptance by founders of the new nation bound the country to an institution at odds with its ideals of equality, liberty, and freedom."[189]



Photos of the adult-sized renderings of the Statue of Liberty (and its Greco-Roman-inspired forerunner, Columbia) in NMAH's "Many Voices, One Nation" exhibit, including one depicting an immigrant worker as Lady Liberty.[190]

Never mind the fact that Abraham Lincoln, the Great Emancipator himself, asserted in 1858 that, "a vast portion of the American people" and "the framers of the Constitution itself" viewed slavery as "a vast moral evil" and "have rested in the belief that slavery was in course of ultimate extinction."[191] As Lincoln put it, "Why did those old men, about the time of the adoption of the Constitution, decree that Slavery should not go into the new territory, where it had not already gone? Why declare that within twenty years the African Slave Trade, by which slaves are

supplied, might be cut off by Congress? Why were all these acts? I might enumerate more of these acts—but enough. What were they but a clear indication that the framers of the Constitution intended and expected the ultimate extinction of that institution[?]"[192]

Like other inconvenient truths, NMAH ignores this history because it completely undercuts its core narrative and instead attempts to instill within visitors its belief that migration and immigration, including the granting of citizenship to illegal aliens, is a defining modern-day civil rights and human liberty issue. This is why the exhibit features *three* different sculpted renderings of the Statue of Liberty (or its Greco-Roman-inspired forerunner, Columbia) in *three* separate locations through the exhibit, including one depicting Lady Liberty as an immigrant farm worker.

Despite the fact that NMAH's *Becoming US* "educational" curriculum fails to include any information about George Washington,[193] Thomas Jefferson,[194] the other Founding Fathers,[195] the Declaration of Independence[196] or the U.S. Constitution,[197] NMAH chose to highlight the curriculum in a video highlighting its efforts to "mark the 250th anniversary of the Declaration of Independence."[198]



Screenshot of NMAH's "Celebrate the Nation's 250th in 2026" page on its website, where a video highlights its "Becoming US" curriculum as one way the Museum will "mark the 250th anniversary of the Declaration of Independence," available at https://americanhistory.si.edu/explore/projects/celebrate-the-nations-250th-in-2026.

11. NMAH's Head of PreK-12 Learning Helped Develop Its "Educational" Curriculum Advocating for Citizenship for Illegal Aliens

According to official Smithsonian data, the Smithsonian's educational programs and publications have reached tens of millions of individuals in recent years, with NMAH's educational efforts alone reaching over 8 million since FY 2022.[199] In fact, it is estimated that, "More than 80% of history teachers use materials from federal museums such as the Smithsonian."[200] Given the

Smithsonian and NMAH's significant influence over American classrooms, it is important to understand the beliefs of the individuals responsible for developing its educational materials.

Dr. Orlando R. Serrano, Jr. is the current "Head of PreK-12 Learning" at NMAH, where he has led the development of the Museum's educational programs, teacher professional development, and curriculum content since May 2024.[201] Prior to serving as Head of PreK-12 Learning,

Serrano was NMAH's Manager of PreK-12 Learning and before that NMAH's Manager of Youth and Teacher Programs (his first role at NMAH after joining in July 2017), where he "manage[d] the museum's programs and resources for PK-12 audiences" and "support[ed] and develop[ed] informal educational and leadership experiences for students, professional development workshops for educators, and curriculum content."[202]

In those capacities, Dr. Serrano stated that he has developed "original public programming for local and national K-12 teacher and student audiences" with the goal of shifting "pedagogic focus from object-based learning to civic education and engagement, direct democratic practice."[203] In a 2022 article published in the *Smithsonian magazine* entitled, "To Reimagine the Future, Start by Expanding the Stories of Our Past," Dr. Serrano and Megan Linehan, another NMAH educational staffer, explained that historical education should be used to "open up imaginative possibilities for what the U.S. could be and become."[204]

Dr. Serrano's stated goal of using history to drive "anti-racist" societal change mirrors Director Hartig's statement in 2024 that history should be all about "redress" and "reparations." As she put it, "Redress, in the form of reparations, goes beyond acknowledgment of wrongdoing; it should involve taking responsibility and considering acts of correction as we pursue restorative justice—what, for us, is restorative justice through history."[205]

Like Director Hartig, Dr. Serrano has delivered on his promise of activism. On his LinkedIn page, Serrano notes that he was behind NMAH's pro-illegal alien *Becoming US* "educational" curriculum,[206] which instructs high school teachers to teach American students that illegal aliens are entitled to U.S. citizenship and that "deportation [has] affected individuals' participation in democracy,"[207] despite the fact that they do not have a right to be here.

Dr. Serrano similarly describes how he led NMAH's "Decolonization Working Group under the direction of the Center for Restorative History (CRH)" and sat "on CRH leadership team as Facilitator of Learning and Practice as well as member of the Research Committee."[208]

NMAH leadership has repeatedly empowered Dr. Serrano, allowing him to serve as key manager of the Museum's educational initiatives *for over eight years*, placing him on the Center for Restorative History's "leadership team," making him a "Co-Lead" of its "Decolonization Working Group," and elevating him as the "Head" of NMAH's educational programming for American elementary, middle, and high school students—all based on his interpretative vision of American history.

But what exactly is that vision? It is, in short, as you will read below, the vision of abolishing America's criminal justice system, "the state," and the "logic" of western civilization itself.

12. NMAH's Head of PreK-12 Learning's Disdain for America's "System of Law"

In a 2023 article published in the *Journal of Museum Education*, Dr. Serrano noted that NMAH's CRH was explicitly created for the purpose of activism, or as he put it, "predicated on the idea that historical inquiry, research, and practice could be leveraged for justice" and "resolution, repair, and/or redress."[209] But he also explained how CRH and Restorative Justice, while great, were not the ultimate goal, but merely "a beginning," writing: "It must be stated at the outset that the thinking, writing, and practice in [Restorative Justice] RJ is rich and deep. The four themes outlined below are not the totality of thinking on [Restorative Justice] RJ, but a beginning."[210]

In a footnote to that sentence, Serrano reveals what the ending to that "beginning" is.[211] The footnote reads: "A closely related community of thinking and practice [to Restorative Justice], transformative justice (TJ), is growing."[212] Likewise, CRH's recommended reading list includes a piece entitled, "Center for Restorative History Convening 2: Transformative Justice."[213]

NMAH's ultimate goal for CRH is therefore not merely restorative justice, but transformative justice. But what does transformative justice mean? In short, it means that the Museum seeks not just the abolition of ICE (as shown in its *Tell Me What Democracy Looks Like* programming[214]) but abolition of the entire U.S. criminal justice system, including prisons and all forms of incarceration, and "the state" itself.

Serrano's footnote concludes, "For a primer on TJ [Transformative Justice] visit the Barnard Center for the Study of Women for a series of videos titled *Building Accountable Communities* that introduces TJ principles and practices."[215]

Upon visiting that website, one will learn about how the Barnard Center for the Study of Women works to "advance intersectional social justice feminist analyses and generate steps toward social transformation" and how transformative justice seeks "to end policing and develop real strategies for keeping each other safe" while moving "towards an abolitionist horizon."[216]

As Mia Mingus, a prominent transformative justice advocate (honored by the Obama White House as a "Champion of Change,"[217] cited in a recent *Smithsonian magazine* article,[218] and featured on the website Serrano directs readers to visit[219]) explained, transformative justice "is an abolitionist framework that understands systems such as prisons, police and I.C.E. as sites where enormous amounts of violence take place and as systems that were created to be inherently violent in order to maintain social control. TJ works to build alternatives to our current systems which often position themselves as protectors, while simultaneously enacting the very forms of violence they claim to condemn."[220] In short, "transformative justice" envisions a country without a justice system at all.

This ideological foundation that Museum leadership references helps explain why NMAH continually denigrates ICE, police, and the rule of law and why Director Hartig argued that the "modern-day police force" arose out of "slave patrols."[221]

It also explains why Dr. Serrano went on to criticize "the U.S. system of law" in the same article because it involves a neutral judge presiding over an adversarial process that "makes one party the 'bad guy'" and includes "coercion or punishment" and "force" as "a consideration" rather than focus on "problem-solving."[222] He explained that:

> In the U.S. system of law, problem-solving is rarely foregrounded. A judge presides over a case and
>
> > … makes one party the 'bad guy' and the other 'the good guy;' one of them is 'wrong' and the other is 'right.' The vertical justice system is so concerned with winning and losing that when the parties come to the end of the case, little or nothing is done to solve the underlying problems which caused the dispute in the first place. For centuries, the focus of English and American law has been punishment by the 'state.'
>
> In contrast, Navajo justice is driven by problem-solving, 'peacemaking,' a process of talking things out. Yazzie explains, '[t]he absence of coercion or punishment is important in Navajo justice concept because there are differences in the way people are treated when force is a consideration.'[223]

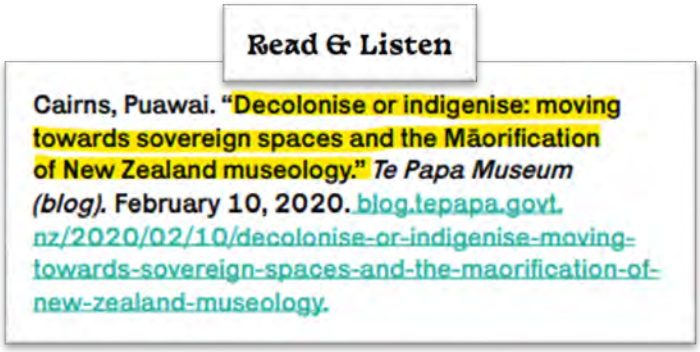
13. NMAH's Head of PreK-12 Learning Criticized Western Civilization Because it "Privileges Order" and White People; Wants to Give U.S. Land Back to Indigenous Peoples

NMAH does not seek to merely eradicate America's criminal justice system; it seeks to uproot the foundational "logic" of western civilization itself on the grounds that it allegedly elevates white people and western culture to the exclusion of others.[224]

In the same article, Dr. Serrano explained that, "We do not feel free, because we are still in the same place that centers" "western liberal humanism," "a western liberal logic that privileges order, organization, and taxonomy," "[t]hat is to say, metrics that it creates and can understand," and "situates non-white and non-western as inferior."[225] This claim, however, confuses historical prejudices with the foundational principles of the West—e.g., rule of law, rationalism, free inquiry, and individual liberty—which have lifted people of every color, culture, and creed out of poverty precisely because they are rooted in the timeless truth that all men are made in the Image of God and therefore endowed with God-given human dignity and equality.

Dr. Serrano also discussed how before coming to the Smithsonian, he made his ninth-grade classroom a place that was "informed by thinking that confronts coloniality"[226] and how he believes that museums like NMAH should go further than "decolonization" and "move towards reMaorification or reindigenosation," which involves giving land and power back to Indigenous peoples, viewing "the museum as an imperial structure that is intimately tied to systemic whiteness," as prominent Decolonization advocate Puawai Cairns put it.[227]

In fact, NMAH's CRH featured an article authored by Puawai Cairns making that exact argument in its *Restorative History [explained]* explanatory document.[228]



Screenshot of the Recommended Reading and Listening section of CRH's explanatory document, available at https://americanhistory.si.edu/sites/default/files/Restorative History-explained_2.pdf.

Dr. Serrano concluded his 2023 article with several recommendations to his readers, including one about "be[ing] sincere" that noted, "If one is going to claim to do RH [Restorative History] work, one needs to do RH work."[229] Citing two academics, Dr. Serrano noted that, **"**in the U.S. settler colonial context, decolonization 'must involve the repatriation of land simultaneous to the recognition of how land and relations to land have always already been differently understood and enacted; that is *all* of the land and not just symbolically.'"[230] Serrano concluded, "Decolonization is incommensurable with civil rights, social justice, and/or DEIA [Diversity, Equity, Inclusion, and Accessibility] because it requires a full-scale re-ordering of the world through political, economic, and social processes that have material expressions. If one is not doing RH, one should not say they are doing RH."[231]

It is evident that Director Hartig, who regularly begins her official speeches with a land acknowledgement, and Dr. Serrano both seek a "full-scale re-ordering of the world" under the guise of "restorative history."

14. NMAH Promoted Materials from the Anti-White Southern Poverty Law Center in Its "Educational" Curriculum and Programming for High School Students

In achieving this "full-scale re-ordering of the world," NMAH chose to partner with the SPLC, which was recently criminally indicted by a grand jury for funneling more than $3 million in a "massive fraud operation" that involved paying "the leaders" of "extremist groups" "including the Ku Klux Klan, Aryan Nations, and National Socialist Party of America" to engage in racist acts, including "state and federal crimes," and then fundraising off of those crimes to advance an anti-white agenda.[232] In other words, the SPLC—a self-proclaimed "anti-hate group"—was found to be "manufacturing racism to justify its existence."[233]

For example, in its *Becoming US: Teacher Resources for a More Accurate & Inclusive Migration & Immigration Narrative*, which Dr. Serrano and other NMAH staff members helped develop, NMAH recommends[234] that high school teachers prepare to teach the curriculum by exploring the website of SPLC's *Teaching Tolerance* program[235] and using SPLC's *Let's Talk* guide, which (a) frames classroom discussion around themes of "injustice," "identity and power," and systems that "privilege some at the expense of others," (b) discusses how to "not reinforce hierarchies, but to correct for them," and (c) highlights a toolkit entitled "Confronting White Nationalism in Schools."[236]

15. How the Smithsonian Works to Indoctrinate Thousands of American Teachers

In addition to NMAH, the Smithsonian's educational leadership has also embraced the SPLC's anti-white agenda and pushed an anti-American ideology that claims our country rests on stolen land. For example, Smithsonian Under Secretary for Education Monique Chism, the individual responsible for establishing the Smithsonian's educational priorities and overseeing its collective initiatives, opened the Smithsonian's 2023 National Education Summit with two separate "land acknowledgement[s]" (one at the beginning of each of the summit's first two days of programming).[237] To get an understanding of the reach of these summits, the Smithsonian's 2024 National Education Summit was attended by over 5,400 educators, librarians, and policymakers from all 50 states and 87 countries.[238]



Screenshot of Smithsonian Under Secretary for Education Monique Chism delivering a land acknowledgement at the beginning of the Smithsonian's 2023 National Education Summit, available at https://www.si.edu/educators/national-education-summit-2023#rworp.

Under Secretary Chism then went on to discuss the importance of focusing on "systemic racism," complained that "the whole construct [of history taught in K-12 schools] was primarily white,"[239] and promoted the SPLC's *Teaching Tolerance* program, which, as one family-oriented non-profit noted, seeks to force an "endorsement of the [LGBTQ] community" among children as young as preschoolers and kindergarteners.[240] By devoting institutional energy into promoting these ideological frameworks, the Smithsonian has demonstrably and improperly deviated from scholarship into activism, especially attempting to target the youth with their radical ideology.

16. NMAH's Head of PreK-12 Learning Warned of the "Danger of A Single Story in Storytelling Today" that Focuses on White People

Incorporating SPLC's divisive materials into its "educational" curriculum for high school students also fits within NMAH Director Hartig and Dr. Serrano's broader effort to avoid any suggestion of an "Anglo-centric" narrative of American history,[241] which includes using the Museum's annual National Youth Summit programming to divide and dispirit young Americans.[242]

In their 2022 article entitled "To Reimagine the Future, Start by Expanding the Stories of Our Past," Dr. Serrano and his NMAH colleague Megan Linehan discuss "The 'Danger of a Single Story' in Storytelling Today."[243] They stated:

> Each year, the National Museum of American History (NMAH) brings together young people for a conversation on a topic of their choosing, a National Youth Summit (NYS). We meet with young people and ask them what they are interested in learning about and discussing together. Recent summits have centered Woman Suffrage, Teen Resistance to Racism, and Gender Equity. This year, we are discussing Democracy. Our driving question is, 'How do the stories we tell about the past shape our democracy?' In particular, we are interested in how these stories, the perspectives they hold, and people they center impact how we imagine what democracy is and can be. Diverse and inclusive protagonists, authors, and narratives are vital to cultivating imagination, creativity, and empathy. As educators, we should be creating learning environments that provide our students windows and mirrors: points of entry into experiences different from their own, as well as opportunities to reflect on their lives and histories *in relationship with others*. The alternative, one narrative and perspective, is myopic, even dangerous.[244]

17. NMAH's Head of PreK-12 Learning Believes That White People Have an "Empathy Gap" Preventing Them from Wanting to "See Stories That Center Black People"

Serrano and Linehan then explain that white people are to blame for all this, noting that "white audiences" have an "empathy gap" which "makes it difficult for [them] to relate to and subsequently want to see stories that center Black people."[245] Serrano and Linehan emphasize that it is important to "clos[e] the empathy gap" in "our popular culture" but even more so "in our classrooms" and through NMAH programming to "open up imaginative possibilities for what the U.S. could be and become."[246]

This is where NMAH's annual National Youth Summits, which have reached tens of thousands of Americans,[247] come in. Rather than tell America's story, NMAH seeks to use its youth-oriented programming to turn America's children into activists and "reimagine the story of democracy in the U.S.," specifically, a "non-white" story that does not tell a cohesive narrative of American history.[248]

This is why NMAH's Youth Summits on "Woman Suffrage, Teen Resistance to Racism, and Gender Equity" have consistently focused on elevating the stories of non-white males,[249] and why NMAH's 2024 National Youth Summit asked the question, "How can young people engage

in political action and influence elections?," explored "questions of representation, power, and accountability to examine how young people have boldly driven change in our democracy," and "offer[ed] ideas for students to consider how they will develop their civic identities to inspire our shared future."[250]

To understand what kind of "political action and influence [over] elections" NMAH was seeking to advance through its 2024 Summit, consider a few of the featured speakers it chose to invite:

- "Gen-Z Historian" Kahlil Greene, who has argued that "ICE enforcement has chilling parallels to the slave patrols of the 19th Century, designed to hunt human beings for profit and power";[251]

- Jahnavi Rao, who was the former Youth Head of Youth Engagement and Millennial Voter Participation for the Democratic National Committee, where she "[w]orked with College Democrats of America Chapters to implement voter registration events at college graduations," then Deputy Campaign Manager for a Democratic candidate in Pennsylvania, then an intern in the Biden White House where she "discuss[ed] youth priorities and collaboration opportunities with the Second Gentleman and various cabinet officials";[252] and

- Sydney Fahn, a former Director of Outreach for Women High Schoolers for Biden, former Outreach Director for Colorado High Schoolers for Biden, former field intern for a Democratic candidate for the U.S. Congress, former intern for then-Democratic candidate Jon Ossoff's U.S. Senate campaign, former President and Founder of the Boulder Chapter of High School Democrats of Colorado, former co-founding President of a Chapter of New York High School Democrats, former intern for a Democratic Member of the New York City Council, and most recently, former intern for Senate Majority Leader Chuck Schumer, prior to her current role running New Voters Research Network with Jahnavi Rao, according to her LinkedIn profile.[253]

Rather than spend time highlighting America's rich history, NMAH utilizes its youth-focused "educational" programming as an opportunity to invite Democratic Party operatives to turn American teenagers into political activists. And NMAH leaves no doubt as to what it believes that activism should be.



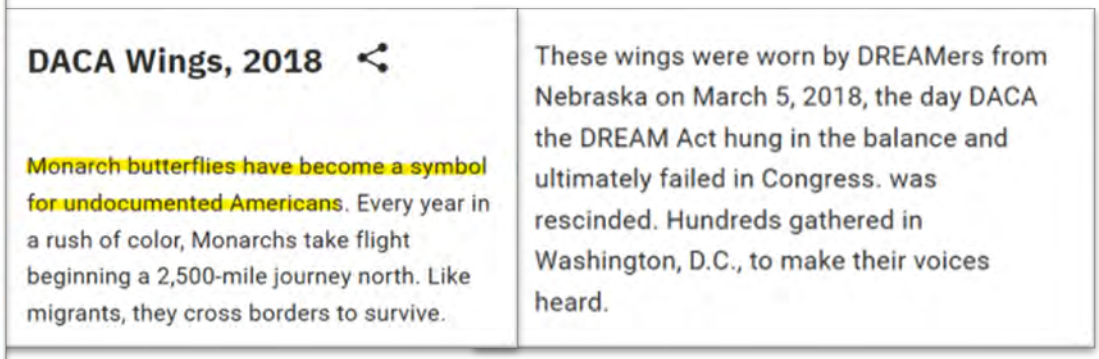
Screenshot of the promotional graphic NMAH created for its 2024 National Youth Summit, encouraging teenagers to become political activists, available at https://americanhistory.si.edu/releases/youth-summit-2024.

18. NMAH's Pro-Illegal Alien Activism and Its Role Informing Other Major Exhibits

In their *Redefining 'American'* article, NMAH's UOCI curators Bercaw and Arteaga explain how they worked to integrate "undocumented organizing" materials collected through UOCI into multiple exhibits across the Smithsonian, including NMAH's *Girlhood (It's Complicated)* and the National Museum of the American Latino's (NMAL) flagship exhibit, *¡Presente! A Latino History of the United States*.[254]

Within *Girlhood (It's Complicated)*, NMAH included a display case featuring "DACA Wings" with the phrases "#Here to Fight" and "Undocumented & UNAFRAID" written on the back.[255] Surrounding the "DACA Wings" case, NMAH placed four panels featuring various didactics; all four talk about citizenship and include didactics with titles like "Raising Citizens," "Claiming Citizenship," and "Making Citizens."[256]





Photos of the "DACA Wings" display and didactic in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.[257]

The first didactic directly in front of the "DACA Wings" display, "Raising Citizens," states that America denied women "their personhood" for 140+ years because they were ineligible to vote, noting: "Girls' education became important after the American Revolution. The Republic wanted educated voters and counted on girls (as future mothers) to teach their children well. While the United States valued women as mothers, it denied them their personhood. Nationally, women had a voice but no vote until 1920."[258]



Photo of the "Raising Citizens" didactic in front of the "DACA Wings" display in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

The second didactic on the same panel, entitled "Schooled for the Nation," frames motherhood as something to be escaped from or questioned and alleges that "Girls' power over the future made many adults uncomfortable. Who would raise future citizens? Who would raise children denied this right? The battleground over national belonging was waged over a girl's education. Girls could shape the future and create new versions of America."[259]

Notice how this first panel frames women's voting rights, citizenship, and education as just a few examples of America's enduring "battleground[s] over national belonging."[260] With the DACA butterfly in the background, the exhibit's implication is clear: illegal aliens' citizenship is another "battleground over national belonging."[261]

Like the first, the second panel focuses the visitor's attention on citizenship, with a didactic entitled "Claiming Citizenship: Freedom Schools" discussing how "slavery, segregation, and racism denied African Americans access to full citizenship"—implying that similar injustices are behind America's refusal to grant citizenship to millions of illegal aliens.[262]



Photo of the "Claiming Citizenship" didactic facing toward the "DACA Wings" display in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.[263]

Likewise, the third panel includes a didactic entitled, "Making Citizens: Indian Boarding Schools," which says: "American citizenship is not always desired. As members of sovereign, independent nations, American Indian families raised girls to pass on their languages, values, and traditions. In response, U.S. educators physically removed girls and boys from their homes and communities. These educators wanted to erase Indian cultures. And, yet again, the key target was girls because Anglo educators also believed girls would raise the next generation."

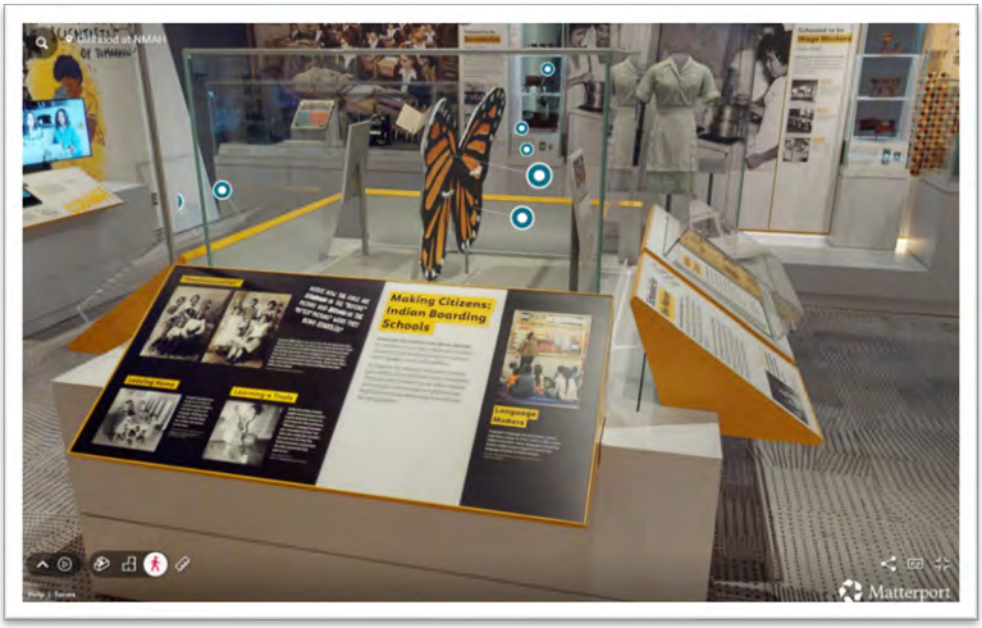


Photo of the "Making Citizens" didactic facing toward the "DACA Wings" display in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

Ironically, while instructing American teachers in its educational resources that "[t]here is no single American culture, language, or narrative,"[264] the one place NMAH admits a native country's language matters is in reference to Indians losing their native language in American boarding schools. A didactic on the same panel entitled "Language Matters" reads: "A people's language carries names, words, and ideas unique to their culture. After many children lost their native language in boarding school, Indian nations began to teach their language formally in tribal schools."[265]

The fourth and final panel surrounding the DACA Butterfly Wings features a didactic entitled "Demanding Inclusion: Deferred Action for Childhood Arrivals," which states: "Schoolgirls have been on the front line of change, demanding inclusion. Undocumented girls raised in the United States see themselves as Americans. The nation disagrees. In 2012 the Obama administration issued Deferred Action for Childhood Arrivals (DACA). Under DACA, youths could stay in the country if they could document having lived in the United States for five years. But DACA made it clear that citizenship would not be granted. DACA offers only temporary protection from deportation, a fact driven home when President Donald Trump rescinded DACA in 2017—only to be blocked by the Supreme Court in 2020."[266]

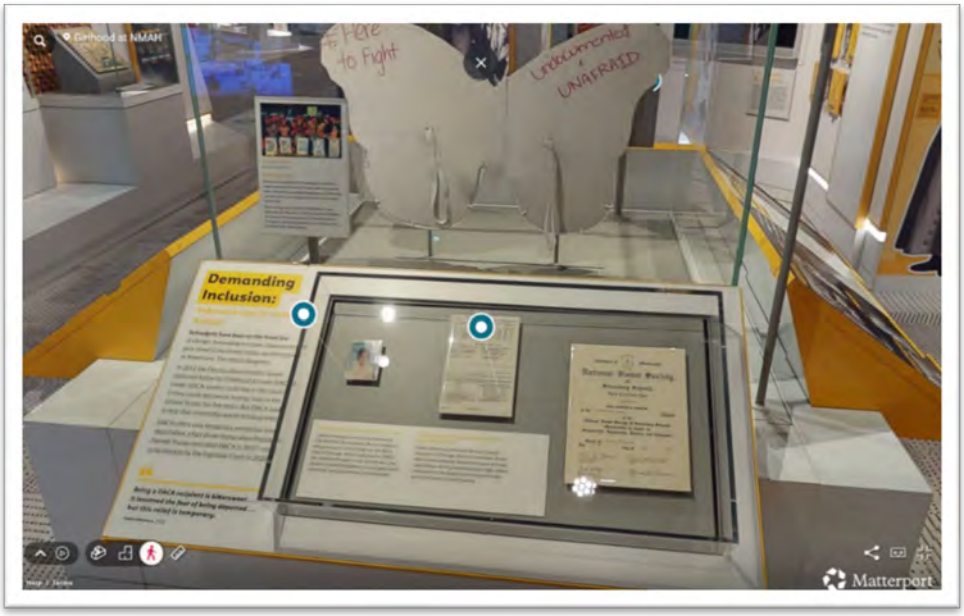


Photo of the "Demanding Inclusion" didactic facing toward the "DACA Wings" display in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

The didactic also includes several artifacts belonging to a Mexican illegal alien (e.g., her first-grade picture, high school report card, national honor society certificate), and a quote, stating: "Being a DACA recipient is bittersweet. . . . It lessened the fear of being deported . . . but this relief is temporary."[267]

In its *American Democracy* exhibit, NMAH recently added an umbrella and t-shirt depicting a Monarch butterfly covered in American stars and stripes and the word "VOTE" underneath, implying that illegal aliens should be given the right to vote.



Photos of an umbrella and t-shirt in NMAH's "American Democracy" exhibit.

Again, the message could not be clearer: a visitor encountering the exhibits on display at NMAH or the educational materials provided online will notice how it is *the illegal alien* whose rights and interests NMAH seeks to prioritize and tell the story of, *not the American people's*. In discussing the issue of illegal immigration, NMAH makes no effort to highlight Americans' rights and interests in, for example, protecting (a) the availability and wages of low-skilled jobs and workers; (b) already strained public resources like schools, healthcare, and welfare; and (c) the public safety, national security, and cultural and social cohesion of America—not to mention the rule of law. This is by design, and it is intended to spur visitors into political action, not teach American history.



Photo of wall in NMAH's "Girlhood" exhibit, https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

A message on a wall in NMAH's *Girlhood (It's Complicated)* exhibit illustrates how the Museum's new mission shows up in practice: "When the rules don't fit, many girls take action."[268]

In short, NMAH's repeated message to young visitors is: "Be a social and political activist." To be clear, this message is not unique to NMAH's *Girlhood (It's Complicated)* exhibit. Indeed, Kathleen Franz, the "project director" for NMAH's *Girlhood* exhibit[269] was a member of the 11-

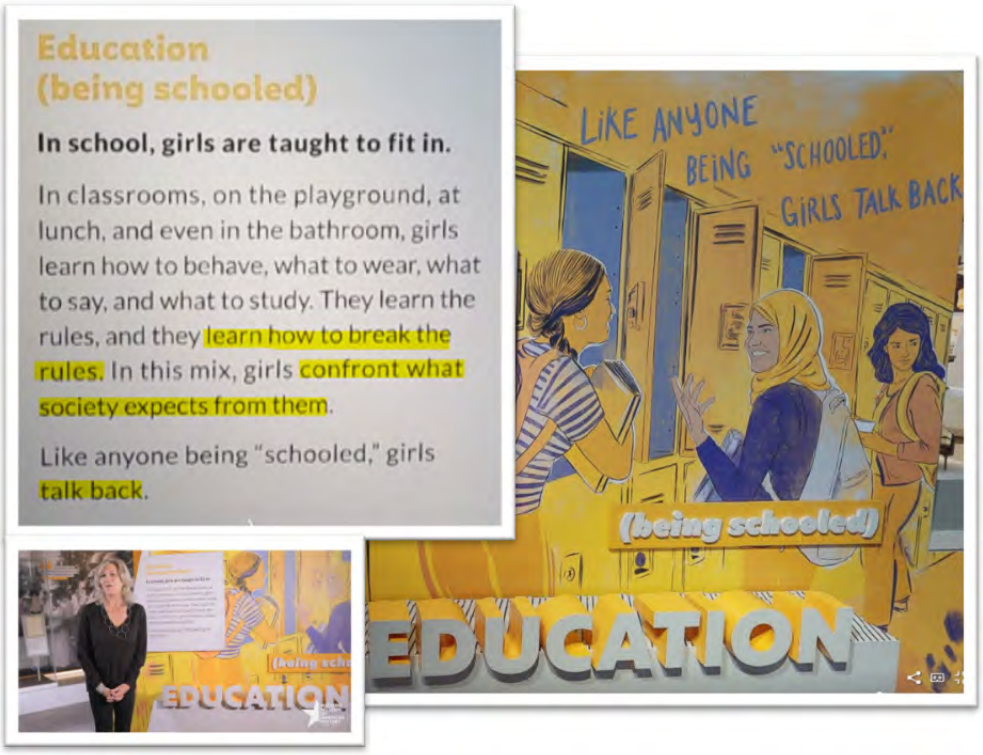
person committee responsible for drafting NMAH's Collections Plan, which directs the entire Museum to collect and present history to "inspire community organizers to effect change," "making choices in response to the needs and knowledge of our time, with an eye toward shaping new futures."[270]

19. NMAH's Efforts to Convince America's Children to Defy All Authority

As *Girlhood* curator Sam Vong makes clear, NMAH's *Girlhood (It's Complicated)* exhibit is simply one manifestation of the NMAH Interpretive Plan's directive to challenge all authority by sharing stories that "illuminate how power works" and change "ingrained structures of power,"[271] stating:

> Girls have consistently resisted and even subverted how institutions, experts, and other social authorities have sought to define and shape them and their girlhood. They have creatively fashioned their own identities and have influenced the ways we see and understand gender in all its nuances. This exhibition is important because it not only invites people to see girls as political and as history makers but it also encourages us to explore how power operates in American society through this concept of girlhood.[272]

NMAH encourages all young children—but girls in particular—to "talk back," defy authority, including teachers, parents, and religion. As just one example, in a didactic about girls' education, NMAH states that "[i]n school, girls are taught to fit in… They learn the rules, and they learn how to break the rules. In this mix, girls confront what society expects from them. Like anyone being 'schooled,' girls talk back."[273]



Photos of NMAH's "Girlhood (It's Complicated)" exhibit, available at https://youtu.be/GVYesfMeMOc?t=1229 and https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery. Highlights added.

In other words, NMAH and the Smithsonian does not just promote activism; it explicitly encourages opposition to authority in general, and specifically for minors, on the apparent assumption that authority figures are always or usually wrong.

20. NMAH's Involvement in the Smithsonian's "Reckoning with Our Racial Past" Initiative

In line with its new activist objectives, the Smithsonian created its "Our Shared Future: Reckoning with Our Racial Past" initiative in 2021. Deborah Lynn Mack, the initiative's head, explained how the initiative explores how museums can take "an activist stance" to advance "equity."[274]

Director Hartig ensured that NMAH played a central role in this initiative, co-hosting an event with current Smithsonian Under Secretary for Museums and Culture Kevin Gover (who receives over $515,000 in annual compensation, according to the Smithsonian's 2023 tax filing[275]) to discuss how museums can serve as engines for "social justice work."[276]

At the event, Gover asked Dr. Mack, "Deborah, I mean, did you get into the museum business in order to be an agent of social change?"[277] Mack replied,

> Actually, absolutely! […] [G]iven a charge that basically said, you know, that an activist stance, an engaged community stance, a listening and collaborative stance would be totally appropriate, and that was the history that I brought to the museum, it's been really excellent. It's been great to bring on the next two generations of practitioners, of staff, across Smithsonian, to see them engage in this work in ways that actually reinforces their activism, their sense of equity, their sense of social justice, and in a sense that also tells them that when they come to Smithsonian, they can bring their total selves to Smithsonian. They can bring their histories and their aunties and their communities and their collections and their beliefs with them, and THAT is part of who we are.[278]

Gover then asked Hartig "And is that why you came to the Smithsonian, Anthea?"[279] Hartig replied, "It is, actually! I was at a point in my life and my career where there was no higher calling than to do my best every day to lead the National Museum of American History. […] The fundamental needs of a democratic and civilized society are domestic peace and social justice."[280]

21. NMAH Implemented an Anti-Racist "Toolkit" for Staff to "Transform" Museums into Anti-White Institutions

In 2019—the same year Hartig became Director—NMAH started holding a recurring meeting for NMAH staff members to meet, discuss and read the "Museums as a Site for Social Action Toolkit," (or "MASS Action Toolkit"), a 200+ page, three-year roadmap (co-authored by half a dozen current/former Smithsonian employees[281]) on how to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts,

destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions."[282]

In order to truly transform the museum space, we must first recognize how and why it has come to be and for whom. We must pay attention to what its physical presence tells us, what its adjacencies are saying. We must see that the arrangement of its collection is a means of producing knowledge and we must ask what knowledge it is making. Finally, we must recognize that the changes that we and our audiences wish to see will structurally shift how museums function.

Historical and social context informs the conditions under which museums, historic sites and houses are created and within which their roles and purposes are defined. These sites cannot separate themselves from the collective memories that link their development with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting and representing art and artifacts, structural racism and other oppressions.

Screenshot of the "Museums as a Site of Social Action" toolkit, available at https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 13. Highlights added.

Smithsonian Diversity and Inclusion Initiatives Report
Fiscal Year 2023

NMAH	Mass Action Reading Group	The Mass Action Reading Group is reoccurring meeting for NMAH staff members to meet, discuss, and read the Mass Action Toolkit (https://www.museumaction.org/resources). The Toolkit is a "comprehensive guide outlines the theory and tools for practice towards creating greater equity within the museum field." The Reading Group is an activity of NMAH's IDEA Council.	10/2019 - Present

Screenshot of the Smithsonian's DEI Initiatives Report for Fiscal Year 2023, showing that NMAH convened a reading group to discuss the toolkit for at least four years (October 2019-October 2023, i.e., the end of FY 2023), available at https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41.

One of the charts within the toolkit, entitled *Continuum on Becoming an Anti-Racist Multicultural Organization,* notes that the ultimate goal is to structurally "transform" museums from institutions that maintain "white power and privilege" to "anti-racist multicultural" organizations in a "transformed society" that "share[s] power with diverse racial, cultural, and economic groups."[283] "Institutional structures and culture that maintain white power and privilege" must be destroyed.[284]

Continuum on Becoming an Anti-Racist Multicultural Organization

MONOCULTURAL ==> MULTICULTURAL ==> ANTI-RACIST ==> ANTI-RACIST MULTICULTURAL

Racial and Cultural Differences Seen as Deficits ==> Tolerant of Racial and Cultural Differences ==> Racial and Cultural Differences Seen as Assets

Exclusive An Exclusionary Institution	2. Passive A "Club" Institution	3. Symbolic Change A Compliance Organization	4. Identity Change An Affirming Institution	5. Structural Change A Transforming Institution	6. Fully Inclusive Anti-Racist Multicultural Organization in a Transformed Society
• Intentionally and publicly excludes or segregates African Americans, Native Americans, Latinos, and Asian Americans • Intentionally and publicly enforces the racist status quo throughout institution • Institutionalization of racism includes formal policies and practices, teachings, and decision making on all levels • Usually has similar intentional policies and practices toward other socially oppressed groups such as women, gays and lesbians, Third World citizens, etc. • Openly maintains the dominant group's power and privilege	• Tolerant of a limited number of "token" People of Color and members from other social identify groups allowed in with "proper" perspective and credentials. • May still secretly limit or exclude People of Color in contradiction to public policies • Continues to intentionally maintain white power and privilege through its formal policies and practices, teachings, and decision making on all levels of institutional life • Often declares, "We don't have a problem." • Monocultural norms, policies and procedures of dominant culture viewed as the "righ" way" business as usual" • Engages issues of diversity and social justice only on club member's terms and within their comfort zone.	• Makes official policy pronouncements regarding multicultural diversity • Sees itself as "non-racist" institution with open doors to People of Color • Carries out intentional inclusiveness efforts, recruiting "someone of color" on committees or office staff • Expanding view of diversity includes other socially oppressed groups *But…* • "Not those who make waves" • Little or no contextual change in culture, policies, and decision making • Is still relatively unaware of continuing patterns of privilege, paternalism and control • Token placements in staff positions: must assimilate into organizational culture	• Growing understanding of racism as barrier to effective diversity • Develops analysis of systemic racism • Sponsors programs of anti-racism training • New consciousness of institutionalized white power and privilege • Develops intentional identity as an "anti-racist" institution • Begins to develop accountability to racially oppressed communities • Increasing commitment to dismantle racism and eliminate inherent white advantage • Actively recruits and promotes members of groups have been historically denied access and opportunity *But…* • Institutional structures and culture that maintain white power and privilege still intact and relatively untouched	• Commits to process of intentional institutional restructuring, based upon anti-racist analysis and identity • Audits and restructures all aspects of institutional life to ensure full participation of People of Color, including their world-view, culture and lifestyles • Implements structures, policies and practices with inclusive decision making and other forms of power sharing on all levels of the institutions life and work • Commits to struggle to dismantle racism in the wider community, and builds clear lines of accountability to racially oppressed communities • Anti-racist multicultural diversity becomes an institutionalized asset • Redefines and rebuilds all relationships and activities in society, based on anti-racist commitments	• Future vision of an institution and wider community that has overcome systemic racism and all other forms of oppression. • Institution's life reflects full participation and shared power with diverse racial, cultural and economic groups in determining its mission, structure, constituency, policies and practices • Members across all identity groups are full participants in decisions that shape the institution, and inclusion of diverse cultures, lifestyles, and interest • A sense of restored community and mutual caring • Allies with others in combating all forms of social oppression • Actively works in larger communities (regional, national, global) to eliminate all forms of oppression and to create multicultural organizations.

Screenshot of "Continuum on Anti-Racism" chart within the Museums as a Site of Social (MASS) Action Toolkit that NMAH staff met regularly to discuss, available at https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 201. Highlights added.

The toolkit also included various sections calling on museum staff to "confront whiteness" by "making the case for inclusion" to "create more just institutions"[285]—mirroring the language Director Hartig incorporated into her new vision for NMAH to be the most "inclusive" museum in the nation and NMAH's new mission to "create a more just and compassionate future."[286]

For example, one heading in *Chapter 8: Change-Making through Pedagogy*, entitled "Centering Anti-Oppression: Confronting Whiteness" states:

> Museums hold institutional and cultural power as established by their colonial and imperial histories. Like other institutions (schools, hospitals, housing, policing, etc.) the ways in which museums maintain that power is by uncritically and unreflectively upholding the very systems that define this power. These systems, intersecting

> assemblages of capitalism, patriarchy, whiteness, ableism, and cis- and heteronormativity, have been historically presented as "objective" in museum interpretation and continue to be the lens by which objects and narratives are interpreted. As such, museum educators are tasked with making these interpretations accessible to audiences, the burden being to promote critical thinking and inquiry skills that deconstruct this 'objectivity'. In our interviews, it became evident that one system of power that manifests most saliently is white supremacy. White supremacy culture is defined and expanded upon in Chapter Three of this toolkit (Changing Museum Culture: Making the Case for Inclusion), but some of its characteristics, defensiveness, either/or thinking, power hoarding, objectivity, and right to comfort, came up in our interviews. We discussed the psychic and emotional toll women of color educators bear, the roles white museum educators need to embody in museums, and transforming the spaces we create by confronting whiteness. When considering the impacts of whiteness, nothing is more important to consider than the bodily, emotional, and psychic harm of unreflectively acting within white supremacy culture.[287]

According to the NMAH-endorsed toolkit, museums "being 'non-racist' or 'culturally sensitive'" is not enough; they must "take on an explicitly anti-racist/anti-oppressive stance."[288] "What seems clear is that white supremacy is a white people problem that white people need to fix," the toolkit reads.[289] "White supremacy culture breeds defensiveness. If museums are truly going to open up toward transformation, those with the most proximity to whiteness, white people, need to let go of defensiveness in order to share power."[290]

The NMAH-endorsed toolkit also mirrors NMAH's Interpretive Plan, its Center for Restorative History, and Director Hartig's broad vision for NMAH in crucial ways. First, the toolkit states that "[a]nti-oppression work has mechanisms built into it to critically reflect and recognize when and how power manifests," mirroring the NMAH Interpretive Plan's directive to "share histories that. . . illuminate how power works."[291]

Second, the toolkit states that "centering anti-oppression work needs to be a cross-departmental effort if there are to be systemic changes," mirroring the NMAH Interpretive Plan's directive to "share histories that…cross disciplines and sub-disciplines."

Third, the toolkit states that "social justice work cannot be institutional(ized). The very nature of social justice movements is the need for flexible, improvisatory, and constantly evolving responsiveness to fight against the status quo and problematic normative standards," mirroring (a) the NMAH Interpretive Plan's directive to "arrive at ever-evolving understandings—interpretations—that frame the past in new ways"[292]; and (b) Director Hartig's statement that American history should be "an ever-shifting landscape of knowledge" that can be "turn[ed] into a tool of utility" to "ignite civic engagement."[293]

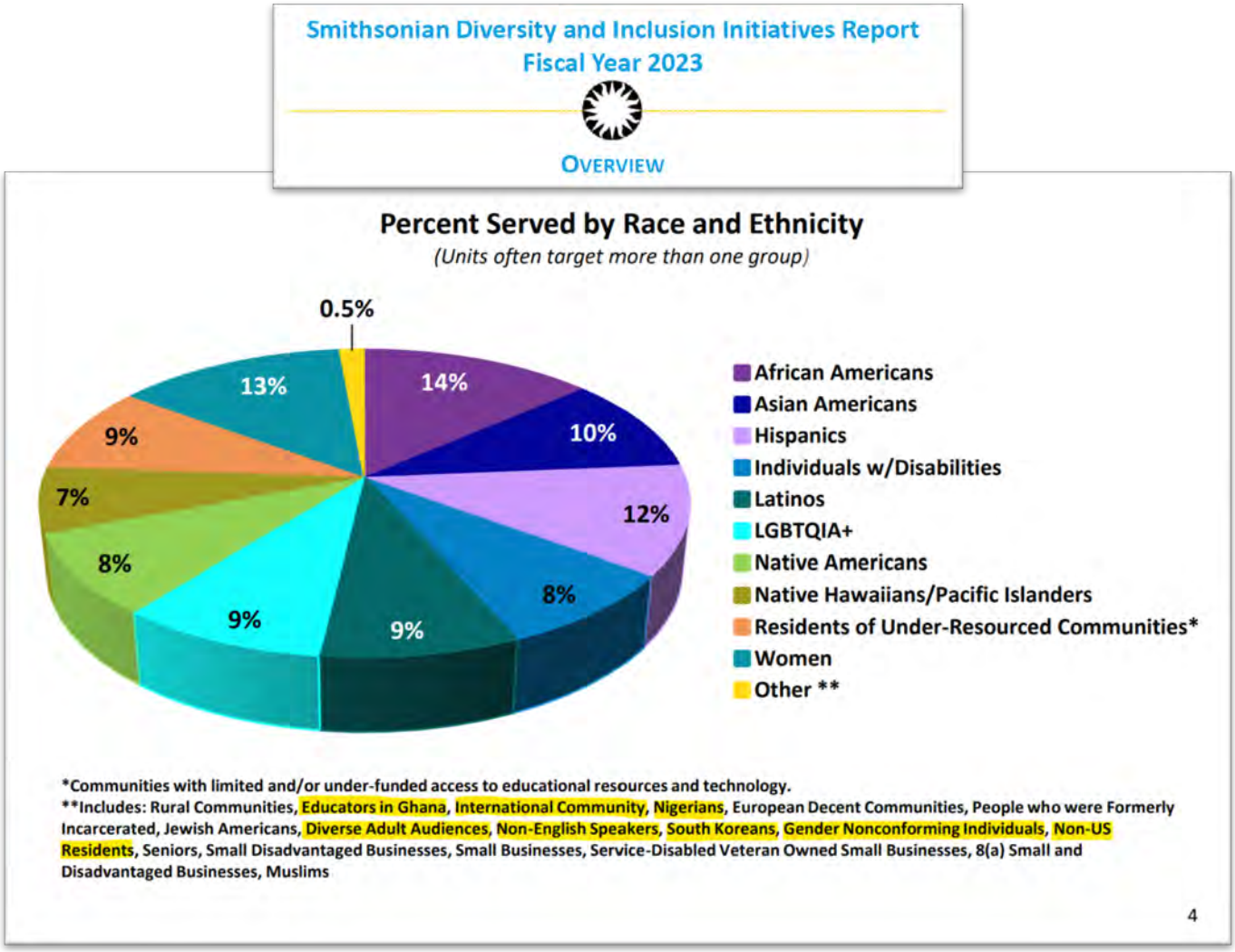
Fourth, the toolkit states that "[t]he history of museums is rooted in colonialism and patriarchy," mirroring NMAH's decision to (a) write a museum-wide "Decolonization Plan," as highlighted in its current Collections Plan, which the Smithsonian has failed to provide to the White House despite our request for it as part of our monthslong investigation, (b) establish a Center for Restorative History; and (c) create a "decolonization working group" because "the museum is an

institution that has perpetuated harm through its histories of collecting and display."[294] Indeed, NMAH's Collections Plan states that NMAH "must document and understand instances in which collections were assembled in support of, justification for, or expression of colonialism and racism. Across the institution, we must collaborate to use the emerging framework of Restorative History and decolonization to address these injustices and their legacies of harm."[295] As Director Hartig put it, "We're launching the Center for Restorative History…[to] address the harm that we've done as the Smithsonian."[296]

Fifth, the toolkit laments how "Non-Hispanic, White staff continue to dominate the job categories most closely associated with the intellectual and educational mission of museums, including those of curators, conservators, educators and leadership,"[297] mirroring (a) NMAH's decision to create an IDEA (Inclusion, Diversity, Equity and Access) Advisory Council[298]; (b) the Smithsonian's broader effort to make diversity, equity, and inclusion (DEI) "integral to all aspects of [its] operations and key components of [its] Strategic Plan" and "increase representation" of "under-served communities" in the Smithsonian's "workforce, supplier base, and public programming"; and (c) the Smithsonian's decision to regularly publish annual Diversity and Inclusion Initiatives Reports (DIIR) "to capture and report on the multiplicity of diversity and inclusion related activities around the Institution" including "more than 4,570 Smithsonian Institution diversity and inclusion initiatives" since FY 2014 under the categories of "Program Diversity," "Supplier Diversity," and "Workforce Diversity."[299] The toolkit does not value merit in museum hiring, but one's race.

To make it clear that whites, Christians, males, and Americans are the only major groups of individuals intentionally *not* included in its special DEI hiring practices and programming, the Smithsonian defines "under-served communities" as the following groups:

- "African Americans"
- "Asian Americans"
- "Hispanics"
- "Latinos"
- "LGBTQIA+"
- "Native Americans"
- "Native Hawaiians/Pacific Islanders"
- "Residents of Under-Resourced Communities"
- "Women" and
- "Other," which includes, among others:
    - "Educators in Ghana"
    - "International Community"
    - "Nigerians"
    - "People who were Formerly Incarcerated"
    - "Diverse Adult Audiences"
    - "Non-English Speakers"
    - "Gender Nonconforming Individuals"
    - "Non-US Residents" and
    - "Muslims."[300]



Screenshot of the Smithsonian's FY 2023 Diversity and Inclusion Initiatives Report, available at https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 4. Highlights added.

Notice how despite receiving over one billion dollars from *American* taxpayers every year,[301] the Smithsonian prioritizes hiring and providing special programming to "Non-US Residents," such as those in Ghana, Nigeria, South Korea, and "Non-English Speakers"—demonstrating that the Smithsonian has sold out the very people who pay for its operations and whom it supposedly serves.[302]

Sixth, the toolkit's stated goal of "transforming" museums into multicultural, anti-racist, and anti-capitalist (and ultimately institutions antagonistic to whites and males)[303] is mirrored in the goal of NMAH's Center for Restorative History, which seeks to be "a systemic intervention" to (a) "transform [museum] policies to effectively meet the [historically harmed] partner's needs while also redressing past and current practices that perpetuate harm" and (b) "transform the national historical narrative, restructur[e] institutional priorities, and privileg[e] knowledge production in the communities that have been silenced or overlooked by museums and other educational institutions."[304]

Even the toolkit's title, "Museums as a Site for Social Action,"[305] mirrors Director Hartig's misguided, overarching vision for NMAH, which is that the Museum and the practice of public history should be "a prime tool for social justice."[306] The title also fits well with Hartig's admission that she "got into the museum business in order to be an agent of social change."[307]

Like NMAH's CRH and the broader Smithsonian, the toolkit bemoans how museum leadership positions have historically "overwhelmingly been filled with straight, white people," causing museum culture to "strongly reflect the norms of white, straight culture, able-bodied people."[308] It also repeatedly criticizes museums for "center[ing] the culture of white, straight, male-dominated society as the pinnacle of culture" and for "othering" non-white, straight, male cultures, noting that "when we collect, interpret or preserve the cultures of marginalized or oppressed peoples, they are labeled, or 'othered' as different than the norm."[309] In short, the toolkit argues that museums are infected with an "oppressive" "culture of whiteness, straightness, and maleness" that must be eradicated:

> Practices embedded in museums are based on a culture of whiteness, straightness, and maleness. Norms of curator generated narratives and high culture defined by museums permeate the bedrock of best practices. Regardless of intentions, often the impact of these practices is oppressive to marginalized groups. Until museums can define and create inclusive museum cultures that foster inclusive museum practices, the best efforts of museum staff may not be good enough.[310]

This helps explain why NMAH boasts that its Center for Restorative History "is comprised of predominantly BIPOC staff," referring to Black, Indigenous, and People of Color (i.e., non-white people).[311]

Ironically, NMAH spends years studying a toolkit that condemns museums for staffing leadership with people of a particular race and culture and then turns around and boasts about staffing its Center for Restorative History based on race. A reader should ask: if filling positions based on the race of staff was wrong before, why is it celebrated now? But the toolkit never answers that question, because doing so would expose that the goal is not fairness, but power.

This anti-white agenda also helps explain why NMAH seeks to erase Christopher Columbus, the Founding Fathers, and the Pilgrims from American history. Portraying such history and historical figures at all, no matter how pivotal, let alone accurately, would be, in the eyes of NMAH, to perpetuate the oppressive "white supremacy culture" that the Smithsonian and broader museum profession is currently working so hard to undo.

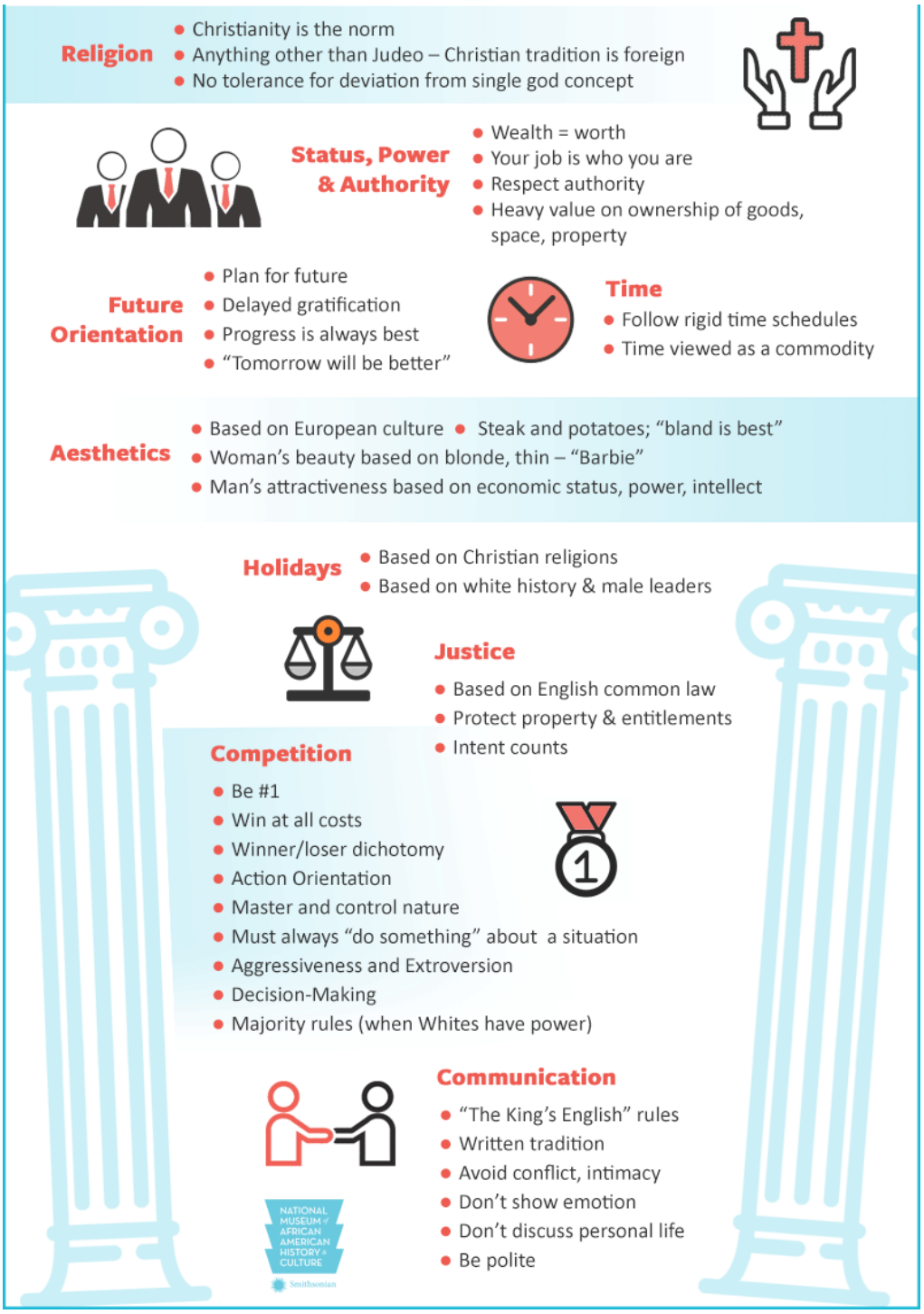
Moreover, the toolkit explains that any attempt to resist this radical takeover and transformation of museums from history-focused institutions to political activist organizations would itself be deemed an expression of white privilege and a form of "defensiveness" that would prove the reality and oppressive nature of "white supremacy culture," even though the toolkit states that such privilege often operates as "unseen, invisible, even seemingly nonexistent:"[312]

> As white privilege, and other types of privilege prevalent in museums (straight privilege, male privilege, able-bodied privilege) operate as unseen, invisible, even seemingly

nonexistent, people often feel that their power is challenged when inclusion of others is imminent. This often leads to a sense of defensiveness exhibited by those in power. People often respond to new ideas with defensiveness, making it more difficult to implement change. Within museums, 'much energy is spent trying to prevent abuse and protect power as it exists' or to expend extra energy in an effort not to hurt the feelings of those with power. 'The defensiveness of people in power creates an oppressive culture.' This is the opposite of the culture that must be created for museums to become inclusive organizations.[313]

The "White Supremacy Culture" document (shown two pages below) included in the NMAH-endorsed toolkit mirrors the language found in the Smithsonian's now infamous "Aspects & Assumptions of Whiteness & White Culture in the United States" graphic, which asserted that "rational thinking and hard work, among others, are white values" that have been "normalized" and "internalized" in American society.[314]





Screenshot of the "Aspects & Assumptions of Whiteness & White Culture in the United States" graphic, available at https://www.newsweek.com/smithsonian-race-guidelines-rational-thinking-hard-work-are-white-values-1518333.

While the Smithsonian deleted and apologized for the above graphic after receiving substantial public backlash, noting that it had "erred in including the chart,"[315] the document below demonstrates that those same racist statements and ideas were being discussed at NMAH for years after that apology, informing staff responsible for the development of NMAH's Interpretive and Collection Plans, educational resources, and exhibits of today.

White Supremacy Culture

From Dismantling Racism: A Workbook for Social Change Groups, by Kenneth Jones and Tema Okun, ChangeWork, 2001

This is a list of characteristics of white supremacy culture which show up in our organizations. Culture is powerful precisely because it is so present and at the same time so very difficult to name or identify. The characteristics listed below are damaging because they are used as norms and standards without being pro-actively named or chosen by the group. They are damaging because they promote white supremacy thinking. They are damaging to both people of color and to white people. Organizations that are people of color led or a majority people of color can also demonstrate many damaging characteristics of white supremacy culture.

Perfectionism

- little appreciation expressed among people for the work that others are doing; appreciation that is expressed usually directed to those who get most of the credit anyway
- more common is to point out either how the person or work is inadequate
- or even more common, to talk to others about the inadequacies of a person or their work without ever talking directly to them
- mistakes are seen as personal, i.e. they reflect badly on the person making them as opposed to being seen for what they are ó mistakes
- making a mistake is confused with being a mistake, doing wrong with being wrong
- little time, energy, or money put into reflection or identifying lessons learned that can improve practice, in other words little or no learning from mistakes
- tendency to identify whatís wrong; little ability to identify, name, and appreciate whatís right

antidotes: develop a culture of appreciation, where the organization takes time to make sure that peopleís work and efforts are appreciated; develop a learning organization, where it is expected that everyone will make mistakes and those mistakes offer opportunities for learning; create an environment where people can recognize that mistakes sometimes lead to positive results; separate the person from the mistake; when offering feedback, always speak to the things that went well before offering criticism; ask people to offer specific suggestions for how to do things differently when offering criticism

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Sense of Urgency

- continued sense of urgency that makes it difficult to take time to be inclusive, encourage democratic and/or thoughtful decision-making, to think long-term, to consider consequences
- frequently results in sacrificing potential allies for quick or highly visible results, for example sacrificing interests of communities of color in order to win victories for white people (seen as default or norm community)
- reinforced by funding proposals which promise too much work for too little money and by funders who expect too much for too little

antidotes: realistic workplans; leadership which understands that things take longer than anyone expects; discuss and plan for what it means to set goals of inclusivity and diversity, particularly in terms of time; learn from past experience how long things take; write realistic funding proposals with realistic time frames; be clear about how you will make good decisions in an atmosphere of urgency

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Defensiveness

- the organizational structure is set up and much energy spent trying to prevent abuse and protect power as it exists rather than to facilitate the best out of each person or to clarify who has power and how they are expected to use it
- because of either/or thinking (see below), criticism of those with power is viewed as threatening and inappropriate (or rude)
- people respond to new or challenging ideas with defensiveness, making it very difficult to raise these ideas
- a lot of energy in the organization is spent trying to make sure that peopleís feelings arenít getting hurt or working around defensive people
- the defensiveness of people in power creates an oppressive culture

antidotes: understand that structure cannot in and of itself facilitate or prevent abuse; understand the link between defensiveness and fear (of losing power, losing face, losing comfort, losing privilege); work on your own defensiveness; name defensiveness as a problem when it is one; give people credit for being able to handle more than you think; discuss the ways in which defensiveness or resistance to new ideas gets in the way of the mission

Quantity Over Quality

- all resources of organization are directed toward producing measurable goals
- things that can be measured are more highly valued than things that cannot, for example numbers of people attending a meeting, newsletter circulation, money spent are valued more than quality of relationships, democratic decision-making, ability to constructively deal with conflict
- little or no value attached to process; if it can't be measured, it has no value
- discomfort with emotion and feelings
- no understanding that when there is a conflict between content (the agenda of the meeting) and process (peopleís need to be heard or engaged), process will prevail (for example, you may get through the agenda, but if you haven't paid attention to peopleís need to be heard, the decisions made at the meeting are undermined and/or disregarded)

antidotes: include process or quality goals in your planning; make sure your organization has a values statement which expresses the ways in which you want to do your work; make sure this is a living document and that people are using it in their day to day work; look for ways to measure process goals (for example if you have a goal of inclusivity, think about ways you can measure whether or not you have achieved that goal); learn to recognize those times when you need to get off the agenda in order to address peopleís underlying concerns

Worship of the Written Word

- if itís not in a memo, it doesn't exist
- the organization does not take into account or value other ways in which information gets shared
- those with strong documentation and writing skills are more highly valued, even in organizations where ability to relate to others is key to the mission antidotes: take the time to analyze how people inside and outside the organization get and share information; figure out which things need to be written down and come up with alternative ways to document what is happening; work to recognize the contributions and skills that every person brings to the organization (for example, the ability to build relationships with those who are important to the organizationís mission)
- only one right way
- the belief there is one right way to do things and once people are introduced to the right way, they will see the light and adopt it
- when they do not adapt or change, then something is wrong with them (the other, those not changing), not with us (those who ëknowí the right way)
- similar to the missionary who does not see value in the culture of other communities, sees only value in their beliefs about what is good

antidotes: accept that there are many ways to get to the same goal; once the group has made a decision about which way will be taken, honor that decision and see what you and the organization will learn from taking that way, even and especially if it is not the way you would have chosen; work on developing the ability to notice when people do things differently and how those different ways might improve your approach; look for the tendency for a group or a person to keep pushing the same point over and over out of a belief that there is only one right way and then name it; when working with communities from a different culture than yours or your organizationís, be clear that you have some learning to do about the communitiesí ways of doing; never assume that you or your organization know whatís best for the community in isolation from meaningful relationships with that community

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Paternalism

- decision-making is clear to those with power and unclear to those without it
- those with power think they are capable of making decisions for and in the interests of those without power
- those with power often don't think it is important or necessary to understand the viewpoint or experience of those for whom they are making decisions
- those without power understand they do not have it and understand who does
- those without power do not really know how decisions get made and who makes what decisions, and yet they are completely familiar with the impact of those decisions on them

antidotes: make sure that everyone knows and understands who makes what decisions in the organization; make sure everyone knows and understands their level of responsibility and authority in the organization; include people who are affected by decisions in the decision-making

Either/Or Thinking

- things are either/or ó good/bad, right/wrong, with us/against us
- closely linked to perfectionism in making it difficult to learn from mistakes or accommodate conflict
- no sense that things can be both/and
- results in trying to simplify complex things, for example believing that poverty is simply a result of lack of education
- creates conflict and increases sense of urgency, as people are felt they have to make decisions to do either this or that, with no time or encouragement to consider alternatives, particularly those which may require more time or resources

antidotes: notice when people use ëeither/orí language and push to come up with more than two alternatives; notice when people are simplifying complex issues, particularly when the stakes seem high or an urgent decision needs to be made; slow it down and encourage people to do a deeper analysis; when people are faced with an urgent decision, take a break and give people some breathing room to think creatively; avoid making decisions under extreme pressure

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Power Hoarding

- little, if any, value around sharing power
- power seen as limited, only so much to go around
- those with power feel threatened when anyone suggests changes in how things should be done in the organization, feel suggestions for change are a reflection on their leadership
- those with power don't see themselves as hoarding power or as feeling threatened
- those with power assume they have the best interests of the organization at heart and assume those wanting change are ill-informed (stupid), emotional, inexperienced

antidotes: include power sharing in your organizationís values statement; discuss what good leadership looks like and make sure people understand that a good leader develops the power and skills of others; understand that change is inevitable and challenges to your leadership can be healthy and productive; make sure the organization is focused on the mission

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Fear of Open Conflict

- people in power are scared of conflict and try to ignore it or run from it
- when someone raises an issue that causes discomfort, the response is to blame the person for raising the issue rather than to look at the issue which is actually causing the problem
- emphasis on being polite
- equating the raising of difficult issues with being impolite, rude, or out of line

antidotes: role play ways to handle conflict before conflict happens; distinguish between being polite and raising hard issues; don't require those who raise hard issues to raise them in ëacceptableí ways, especially if you are using the ways in which issues are raised as an excuse not to address the issues being raised; once a conflict is resolved, take the opportunity to revisit it and see how it might have been handled differently

Individualism

- little experience or comfort working as part of a team
- people in organization believe they are responsible for solving problems alone
- accountability, if any, goes up and down, not sideways to peers or to those the organization is set up to serve
- desire for individual recognition and credit
- leads to isolation
- competition more highly valued than cooperation and where cooperation is valued, little time or resources devoted to developing skills in how to cooperate
- creates a lack of accountability, as the organization values those who can get things done on their own without needing supervision or guidance antidotes: include teamwork as an important value in your values statement; make sure the organization is working towards shared goals and people understand how working together will improve performance; evaluate peopleís ability to work in a team as well as their ability to get the job done; make sure that credit is given to all those who participate in an effort, not just the leaders or most public person; make people accountable as a group rather than as individuals; create a culture where people bring problems to the group; use staff meetings as a place to solve problems, not just a place to report activities
- iim the only one
- connected to individualism, the belief that if something is going to get done right, ëIí have to do it
- little or no ability to delegate work to others

antidotes: evaluate people based on their ability to delegate to others; evaluate people based on their ability to work as part of a team to accomplish shared goals

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Progress is Bigger, More

- observed in systems of accountability and ways we determine success
- progress is an organization which expands (adds staff, adds projects) or develops the ability to serve more people (regardless of how well they are serving them)
- gives no value, not even negative value, to its cost, for example, increased accountability to funders as the budget grows, ways in which those we serve may be exploited, excluded, or underserved as we focus on how many we are serving instead of quality of service or values created by the ways in which we serve

antidotes: create Seventh Generation thinking by asking how the actions of the group now will affect people seven generations from now; make sure that any cost/benefit analysis includes all the costs, not just

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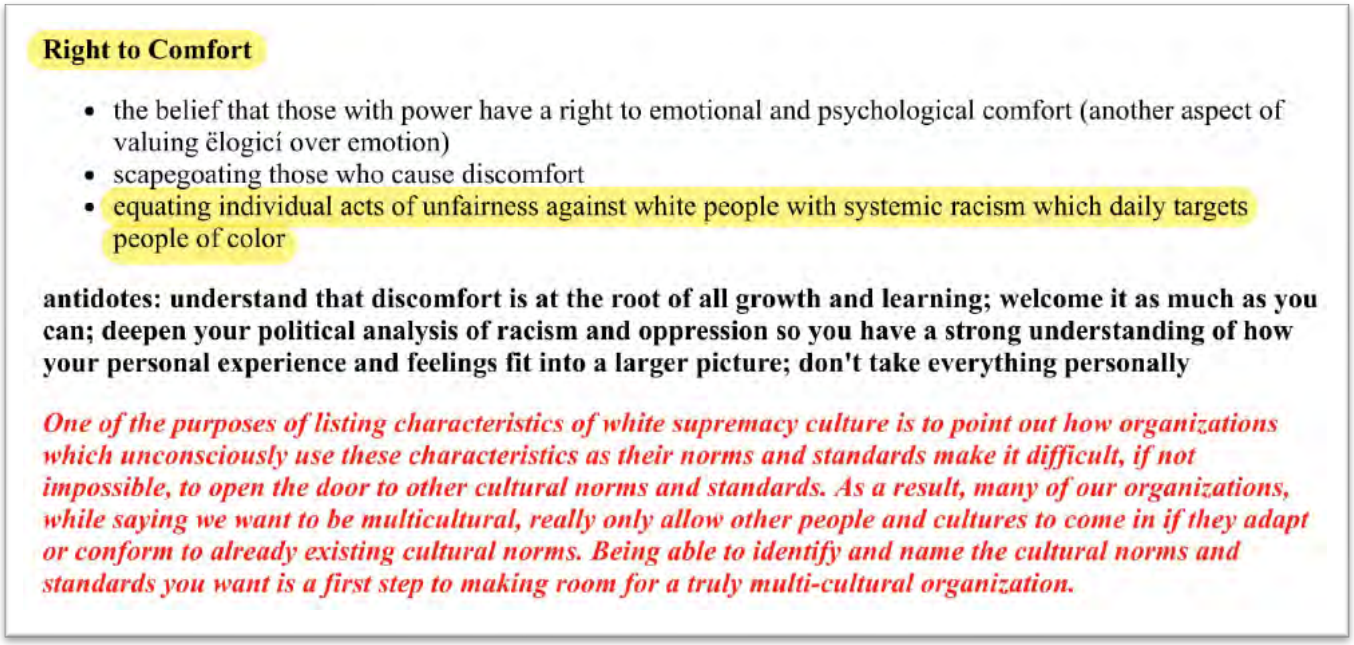
Objectivity

- the belief that there is such a thing as being objective
- the belief that emotions are inherently destructive, irrational, and should not play a role in decision-making or group process
- invalidating people who show emotion
- requiring people to think in a linear fashion and ignoring or invalidating those who think in other ways
- impatience with any thinking that does not appear ëlogicalí to those with power

antidotes: realize that everybody has a world view and that everybodyís world view affects the way they understand things; realize this means you too; push yourself to sit with discomfort when people are expressing themselves in ways which are not familiar to you; assume that everybody has a valid point and your job is to understand what that point is



Right to Comfort

- the belief that those with power have a right to emotional and psychological comfort (another aspect of valuing ëlogicí over emotion)
- scapegoating those who cause discomfort
- equating individual acts of unfairness against white people with systemic racism which daily targets people of color

antidotes: understand that discomfort is at the root of all growth and learning; welcome it as much as you can; deepen your political analysis of racism and oppression so you have a strong understanding of how your personal experience and feelings fit into a larger picture; don't take everything personally

One of the purposes of listing characteristics of white supremacy culture is to point out how organizations which unconsciously use these characteristics as their norms and standards make it difficult, if not impossible, to open the door to other cultural norms and standards. As a result, many of our organizations, while saying we want to be multicultural, really only allow other people and cultures to come in if they adapt or conform to already existing cultural norms. Being able to identify and name the cultural norms and standards you want is a first step to making room for a truly multi-cultural organization.

Screenshots of the "White Supremacy Culture" document included in the NMAH-endorsed toolkit, describing objectivity, individualism, perfectionism, paternalism, either/or thinking, a sense of urgency, defensiveness, quantity over quality, worship of the written word, and other traits as damaging "white supremacy" characteristics, available at https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 206-207. Highlights added.

22. More Examples of NMAH's Progressive Reframing of American History

The first exhibit debuted under Hartig's leadership, *All Work, No Pay: A History of Women's Invisible Labor*, framed homemaking as oppressive to all women but particularly to "African Americans, Latinas and other women of color."[316] The exhibit proudly displayed a quote by Angela Davis, a famous Marxist feminist and former vice-presidential candidate of the U.S. Communist Party in 1980, who has called for the abolition of police, jails, prisons, ICE, and immigration detention facilities, and whose quote "You have to act as if it were possible to radically transform the world. And you have to do it all the time" is prominently featured on the homepage of the Smithsonian's "Our Shared Future: Reckoning with Our Racial Past" initiative.[317]

NMAH's *Girlhood (It's Complicated)* exhibit, which debuted the following year in 2020, alleged that America is fundamentally misogynist because white, African American, and Latina women earn less than white men do on average, stating, "Schools undervalue girls because Americans undervalue women. Gender bias is reflected in their paychecks."[318]

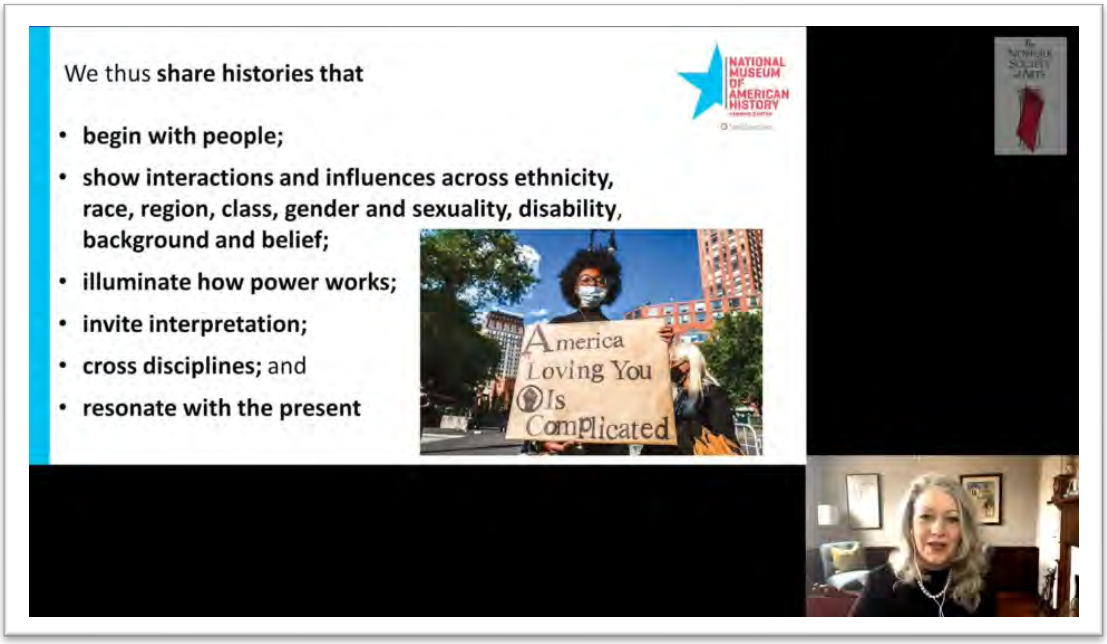
NMAH's "Wage Gap" chart bemoans how white men earn more than white women, who in turn earn more than African American women, who in turn earn more than Latinas—all due to alleged "[g]ender bias."[319]



Photos of "Schooled to Work" and "The Wage Gap, 2018" didactics in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

This exhibit fails to present other possible explanations for why wages may differ, and simply assumes it is because of "gender bias." To NMAH's current leaders and curators, factors like hours worked, education, skillsets, and occupation have no bearing. The answer must be discrimination and oppression, everywhere and always.

Indeed, this is the simplistic explanation NMAH provides for nearly every outcome in American history. There is little room for merit, hard work, personal choice, religious conviction, education, or factors largely outside anyone's control, such as geography, environment, family background, personality traits, or childhood development.



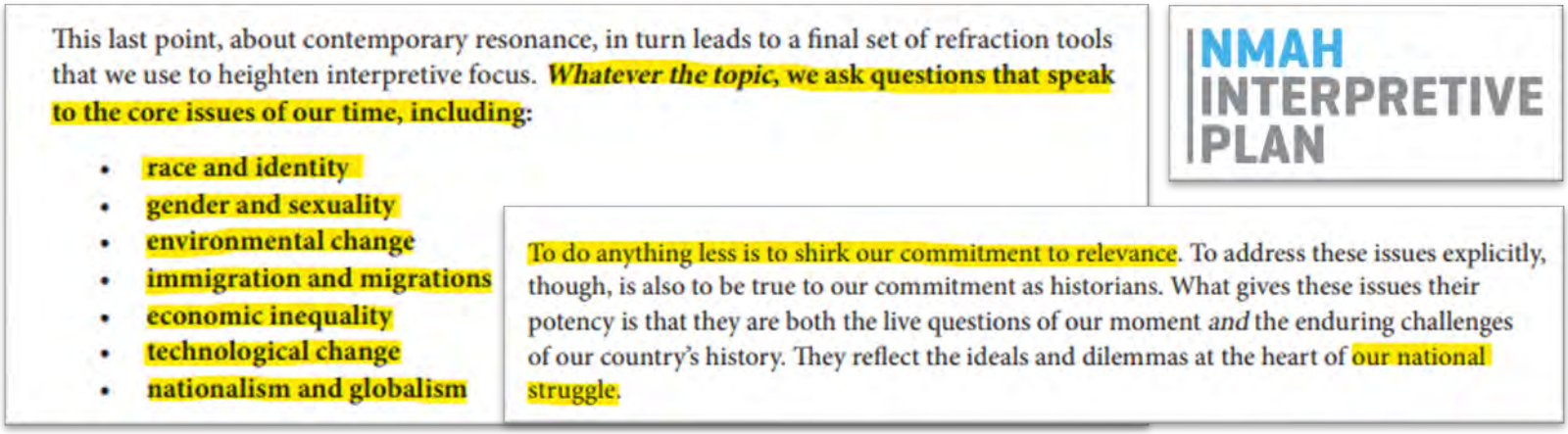
Screenshot of slide where Hartig explains how NMAH shares histories that "illuminate how power works" and "invite interpretation" in a 2022 lecture, available at https://www.youtube.com/watch?v=HERz54an_-c&t=3023s.

This is why today, when walking through NMAH's *Entertainment Nation* exhibit—which is featured in the Smithsonian's "Our Shared Future: 250" programming for America's 250th anniversary[320]—visitors learn that P.T. Barnum's circus symbols reflect "concerns about maintaining white supremacy," that "Ukeleles are both a product of U.S. imperialism and a potent symbol of Native Hawaiian resistance," that "Wild West shows turned the subjugation of Indigenous people into theater," and that Mickey Mouse represents "vestiges of longstanding traditions of blackface minstrelsy."[321]

At the same time, those visitors also learn about a bisexual blues singer, a lesbian actress, a sexually-liberated film star, an LGBTQ "icon," a lesbian TV star, a gay major league baseball player, and a queer women's soccer player, reflecting the NMAH Interpretative Plan's prime directive to, "whatever the topic," tie everything to "the core issues of our time," namely:

(1) "race and identity";
(2) "gender and sexuality";
(3) "environmental change";
(4) "immigration and migrations";
(5) "economic inequality";
(6) "technological change"; and
(7) "nationalism and globalism."[322]

NMAH directs that *every* exhibit, no matter the topic, be linked to at least one of these seven "core issues," stating that "To do anything less is to shirk our commitment to relevance. . . . What gives these issues their potency is that they are both the live questions of our moment *and* the enduring challenges of our country's history. They reflect the ideals and dilemmas at the heart of our national struggle."[323]


This last point, about contemporary resonance, in turn leads to a final set of refraction tools that we use to heighten interpretive focus. ***Whatever the topic*, we ask questions that speak to the core issues of our time, including:**

- **race and identity**
- **gender and sexuality**
- **environmental change**
- **immigration and migrations**
- **economic inequality**
- **technological change**
- **nationalism and globalism**

NMAH INTERPRETIVE PLAN

To do anything less is to shirk our commitment to relevance. To address these issues explicitly, though, is also to be true to our commitment as historians. What gives these issues their potency is that they are both the live questions of our moment *and* the enduring challenges of our country's history. They reflect the ideals and dilemmas at the heart of our national struggle.

Screenshots of NMAH's Interpretive Plan, available at https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf. Highlights added.

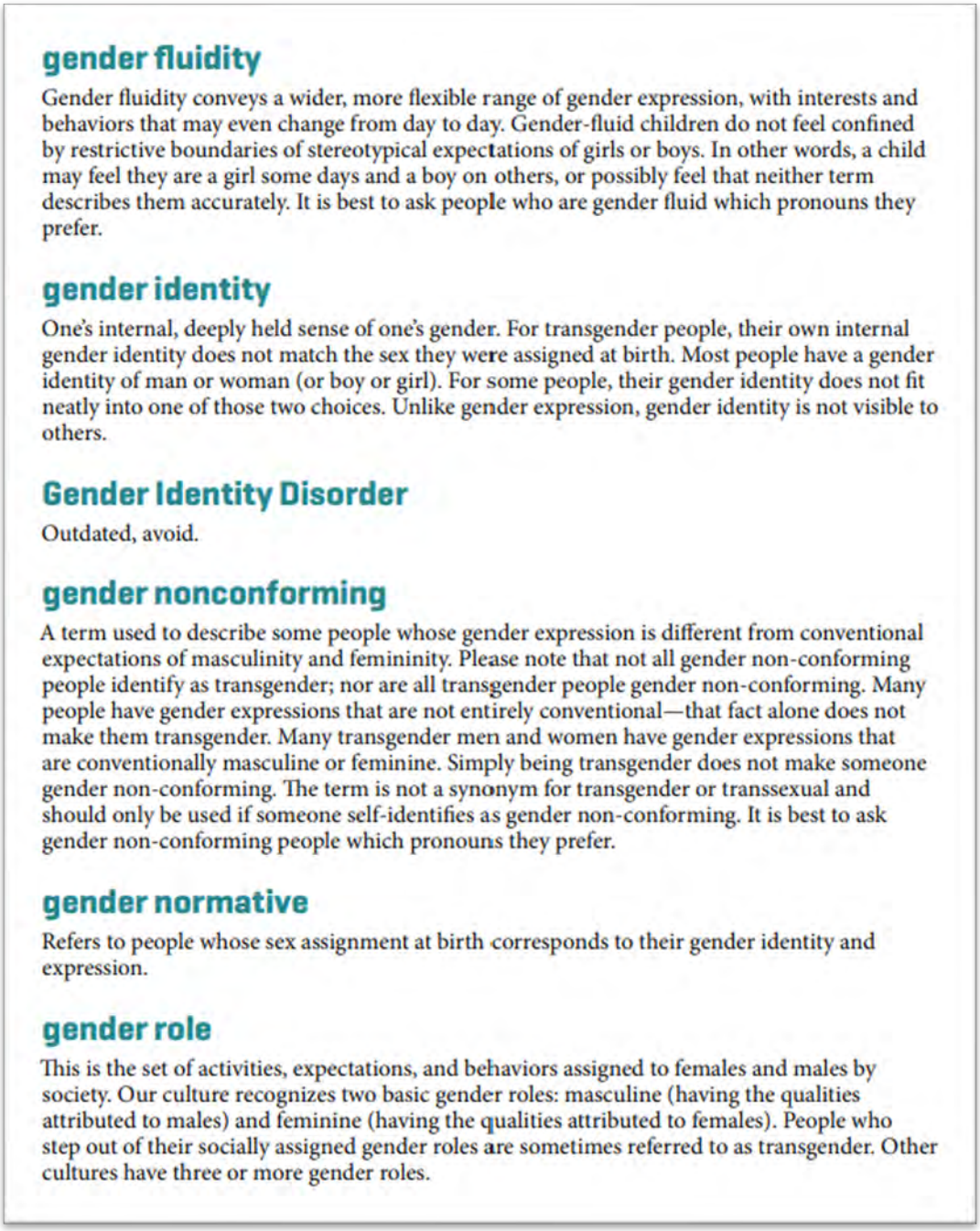
NMAH's Interpretive Plan and its seven core issues is the radical lens through which the current leadership of the Smithsonian and NMAH views both the past and the present. Therefore, it should come as no surprise that the Museum's exhibits are often cast in the wild-eyed language of an ideological manifesto.

23. NMAH's Efforts to Reject Biological Reality and Support Anti-Woman Activism

One of the clearest examples of NMAH's radical ideology is its refusal to correctly identify or define what a woman is.[324] For example, in its Glossary of Terms for its *Becoming US* educational curriculum, which is supposedly intended to "change how migration and immigration are learned,"[325] NMAH defines and discusses the terms "gender fluidity," "[g]ender-fluid children," "gender identity," "gender nonconforming," "gender normative," and "gender role."[326] NMAH's Glossary states that "a child may feel they are a girl some days and a boy on others, or possibly feel that neither term describes them accurately," so it "is best to ask people who are gender fluid which pronouns they prefer."[327] The Glossary also defines "gender identity" as "[o]ne's internal, deeply held sense of one's gender" that "does not [always] fit neatly into" the male or female categories and instructs educators to "avoid" the "[o]utdated" term "Gender Identity Disorder."[328]

NMAH's Glossary then notes that "[p]eople who step out of their socially assigned gender roles are sometimes referred to as transgender" but that "[s]imply being transgender does not make someone gender non-conforming" and therefore it "is best to ask gender non-conforming people which pronouns they prefer."[329] The Glossary concludes its discussion of gender by claiming that "[o]ur culture recognizes two basic gender roles: masculine (having the qualities attributed to males) and feminine (having the qualities attributed to females)" but "[o]ther cultures have three or more gender roles," and therefore suggests that we should be open to the possibility that our culture is simply wrong on this issue.[330]

How "gender identity," "gender fluidity," "gender normativity," "gender nonconformity," and "gender roles" have anything to do with the history of migration and immigration in the United States is unclear. NMAH never explains in its Glossary. This is likely because NMAH's true goal is not to teach history, but to push a radical, all-encompassing, transformative ideology that seeks to uproot Americans' "outdated" and well-established views on these issues.



gender fluidity

Gender fluidity conveys a wider, more flexible range of gender expression, with interests and behaviors that may even change from day to day. Gender-fluid children do not feel confined by restrictive boundaries of stereotypical expectations of girls or boys. In other words, a child may feel they are a girl some days and a boy on others, or possibly feel that neither term describes them accurately. It is best to ask people who are gender fluid which pronouns they prefer.

gender identity

One's internal, deeply held sense of one's gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices. Unlike gender expression, gender identity is not visible to others.

Gender Identity Disorder

Outdated, avoid.

gender nonconforming

A term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Many people have gender expressions that are not entirely conventional—that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non-conforming. The term is not a synonym for transgender or transsexual and should only be used if someone self-identifies as gender non-conforming. It is best to ask gender non-conforming people which pronouns they prefer.

gender normative

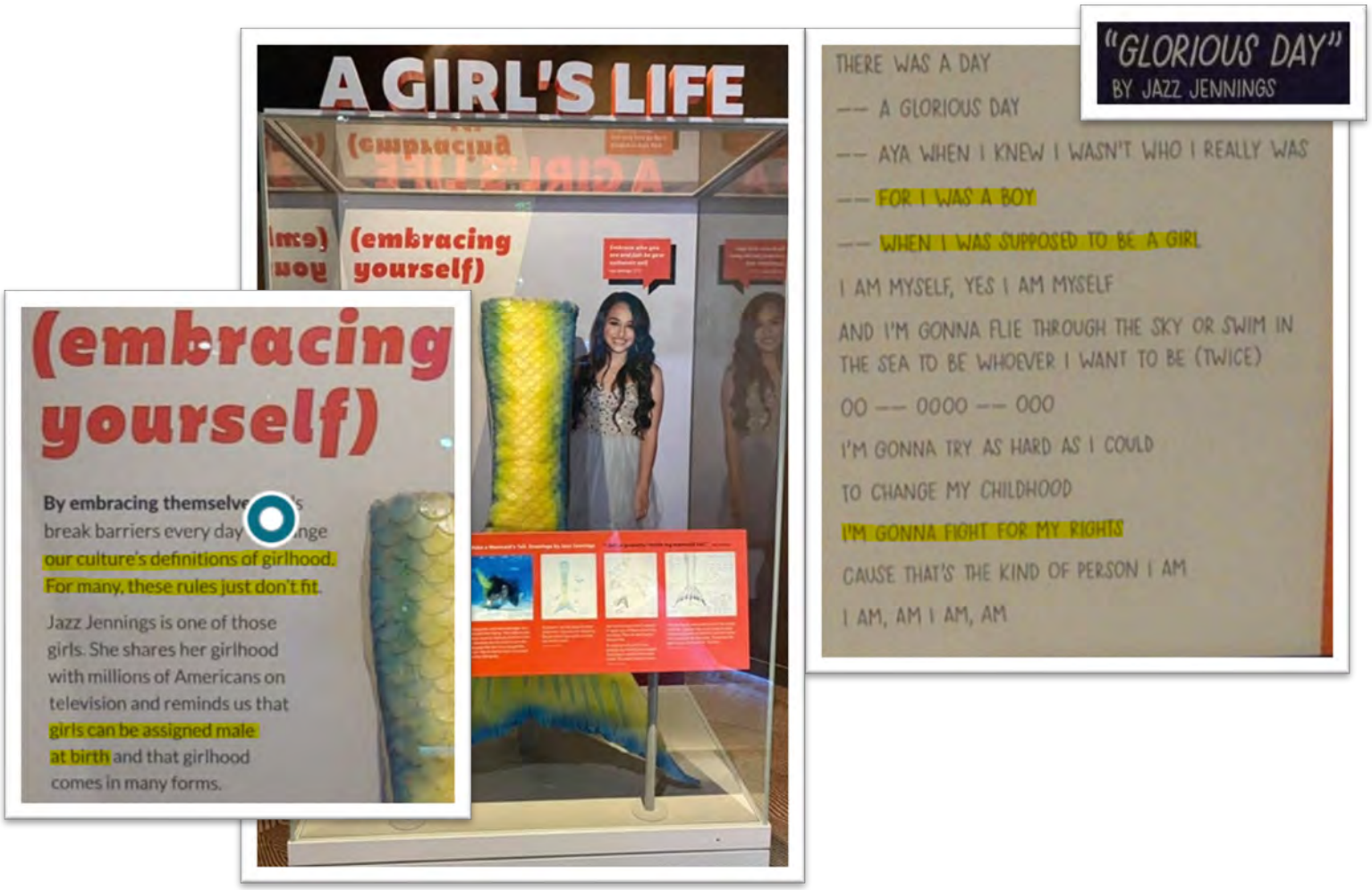
Refers to people whose sex assignment at birth corresponds to their gender identity and expression.

gender role

This is the set of activities, expectations, and behaviors assigned to females and males by society. Our culture recognizes two basic gender roles: masculine (having the qualities attributed to males) and feminine (having the qualities attributed to females). People who step out of their socially assigned gender roles are sometimes referred to as transgender. Other cultures have three or more gender roles.

Screenshot of NMAH's "Becoming US" gender-related Glossary of Terms, available at https://americanhistory.si.edu/becoming-us/sites/default/files/downloads/NMAH_Becoming%20Us_Glossary.pdf.

Indeed, unlike most Americans, NMAH believes that men can become women and pushes that ideology onto minors. For example, NMAH's *Girlhood* exhibit framed Jazz Jennings, a biological male, as someone who "always knew [that] she 'was a girl trapped inside a boy's body,'" dedicating an entire "A Girl's Life" display to discuss his "transgender" experience.[331] The display included statements such as, "I was a boy, when I was supposed to be a girl," "our culture's definitions of girlhood . . . just don't fit," "girls can be assigned male at birth," and "girlhood comes in many forms."[332]



Photos of display case and didactic in NMAH's "Girlhood (It's Complicated)" exhibit.[333] *Highlights added.*

Another display entitled, "Not Checking the Boxes," similarly alleges that gender is merely a deeply-felt inner sense of one's identity, noting, "Sometimes gender isn't revealed at birth."[334] The didactic tells the story of an "intersex" biological female who was "called by a name traditionally given to girls" but "legally changed his name to Ryan and transitioned to male" "because he felt he possessed 'a girl body and a boy brain'" and "never performed activities expected of a girl."[335] The didactic concludes: "Ryan's story shows how checking boxes as male or female is limited. Those boxes could never fully capture the complex realities of one's gender and sexuality."[336]



Photos of "Not Checking the Boxes" didactic in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

An accompanying quote from Ryan encourages children visiting NMAH's exhibit to embrace their true gender identity, even if it differs from biological reality.[337] It reads: "[F]or so many years, I lived and hid behind my mask…. You need your mask to protect you from harm, but if you don't remove it (or leave it on too long) it obstructs your view and prevents you from seeing. My mask serve(d) as my protection for decades but it was only when I finally had the courage to remove it that I was able to live freely."[338]



Photo of display case and Ryan's quote in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

24. NMAH's Efforts to Upend "Entrenched Gender Binaries" and Allow Men in Women's Sports

In a December 2024 speech, Director Hartig noted that the *Girlhood (It's Complicated)* exhibit was designed to highlight what it was like "growing up female in the United States since the early republic in the face of patriarchal oppression" and intended to not "reconstruct entrenched gender binaries, but rather provoke a thoughtful discussion of gender as having a long and complicated history."[339] Hartig explained how the exhibit "invited visitors to become part of this long legacy of activism," concluding that she hoped "that girls, women, and people inhabiting female bodies will keep talking to each other and to us."[340] Apparently, to NMAH, "people inhabiting female bodies" are *not always* girls or women, and people "inhabiting" male bodies are *not always* boys or men.

Hartig's confusion about what it means to be a woman is also reflected across multiple NMAH exhibits[341] and encapsulated well in a message written on a wall in the *Girlhood* exhibit, stating, "In school, we learn who gets to be a girl…" implying that "who gets to be a girl" is something that society, not biology, determines.[342]



Photo of wall art stating "In school, we learn who gets to be a girl" in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

In a virtual event celebrating the opening of the *Girlhood* exhibit, NMAH featured video submissions from several young girls stating that girls "love and support all colors, sizes, beliefs, and genders" and "always will be disproving the idea of what a girl is and what a girl isn't."[343]

In line with its commitment to avoiding "entrenched gender binaries" and inviting "visitors to become part of this long legacy of activism," NMAH's *Change Your Game* exhibit (currently on display) discusses whether biological male athletes should be allowed in women's sports and questions whether "gender testing" is "fair" because "intersex, transgender, and gender nonconforming athletes complicate those binary categories," and "challenge traditional gender norms."[344]



Photo of the "Is Gender Testing Fair?" didactic currently on display at NMAH's "Change Your Game" exhibit.

NMAH's *We Belong Here* exhibit—which features a chest binder belonging to a "trans nonbinary" skateboarder—answered this slanted question, alleging that "The struggle for equal opportunity in sports began long before Title 9 became law in 1972. And it continues today as transgender, nonbinary, and cisgender female athletes demand equality."[345]

Apart from directly calling biological males females and biological females males, NMAH also praises activism that blurs the lines between the two genders, whether it be women embracing more masculine dress and hair styles, or participating in traditionally "male-dominated" academic fields and sports. For example, one didactic in the *Girlhood* exhibit, entitled "Dangerous Girls," praises how girls "made new *gender-bending ideas*—such as bobbing their hair—popular" and "upended ideas about female respectability."[346]



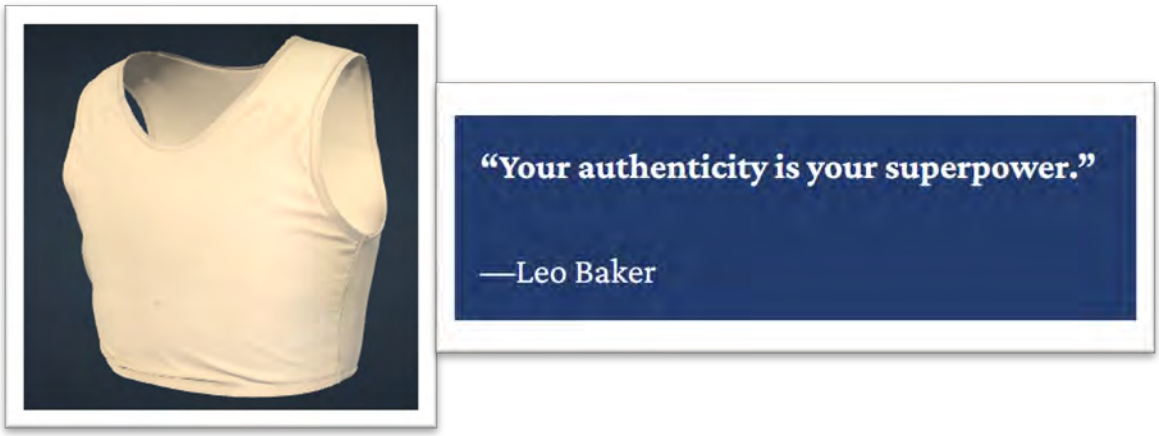
Photo of "Dangerous Girls" didactic in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery. Highlights added.

Another wall features a didactic stating that "girls have used fashion to *transform* themselves, markets, and *ideas about gender* and growing up."[347]



Photos of "Fashion (remix)" wall and didactic in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery. Highlights added.

Similarly, NMAH's "We Belong Here" exhibit highlights a chest binder that "trans nonbinary" skateboarder Leo Baker used to make herself appear more like a man while skateboarding.



"Trans nonbinary" skateboarder Leo Baker's chest binder is on display on NMAH's "We Belong Here" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/we-belong-here/online/leo-baker.

The ideology threading through all of these exhibits—from the overtly transgender content to the seemingly benign "girls breaking barriers" framing—is gender theory, a branch of the postmodern critical theory framework (often called "postmodern progressivism"). Its core claim is that biological sex is a social construct, gender exists on a fluid spectrum, and traditional categories of male and female are oppressive "binaries" that must be dismantled.

What makes NMAH's approach particularly concerning is the packaging. The more explicit content—displaying a chest binder, questioning gender testing in women's sports, referring to biological females as "people inhabiting female bodies"—is easy to identify. But the same ideology is being smuggled into exhibits that appear, on the surface, to simply celebrate girls and women.

The *Girlhood* exhibit is a case in point. It is not, at its core, a celebration of accomplished American girls and women. It is a vehicle for teaching children that "who gets to be a girl" is determined by society rather than biology, that traditional femininity is something to be "upended," and that young girls should view themselves as foot soldiers in "a long legacy of activism." The wall art, the video testimonials from young girls dutifully reciting that they are "disproving the idea of what a girl is," the praise for "gender-bending"—none of this is neutral history. It is ideological instruction directed at minors, using the authority and prestige of a national museum to normalize ideas that most American families have not consented to have taught to their children.

In short, NMAH is not preserving and presenting American history. It is using history as a wrapper for delivering gender ideology to the public—and doing so with federal funding.

25. NMAH's Decision to Put Inappropriate Material in Front of Children

NMAH's ideological agenda comes at a direct cost to the dignity and privacy of the very children it claims to celebrate. While refusing to call her a girl in its *Girlhood* exhibit, NMAH displayed inappropriate pages from Ryan's diary where she recounts her struggle with being a girl, including where Ryan (then-named Jennifer) says "I hope no body reads my diary."[348] Indeed, NMAH invited children to read about how the then-six-year-old biological female struggled with the idea of "getting boobs" and a "period" after attending a birthday party where other little girls were talking about the matter, writing, "Every body was talking about getting boobs and their period. I wanted to hide. I pray to God every night for my penis to grow. I know now it won't but I still pray."[349]



Photos of "Dear Diary…" display with Ryan's diary pages in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

26. NMAH's Decision to Put Sexually Suggestive Material in Front of Children

NMAH also placed sexually suggestive material and other material inappropriate for young children in and around its *Entertainment Nation* exhibit, which is frequented by families and children, including video clips depicting drag queens and a magazine cover featuring a photo of nude young women.[350] A separate exhibit featured a two-piece chrome and rubber crotch harness designed for sadomasochism (S&M) sexual activity,[351] and another displayed the cover of a self-published magazine entitled "Girl Germs" that shows two partially nude women embracing and discusses female masturbation and sexual experiences.[352]



Photos of a video playing on repeat depicting drag queens and a magazine cover featuring nude women in NMAH's "Entertainment Nation" exhibit, which is frequented by young children, a "Girl Germs" magazine cover on display in its "Music HerStory" online exhibit featuring partially nude women (https://library.si.edu/exhibition/music-herstory/changemakers), and a BDSM crotch harness on display in its "Illegal to be You: Gay History Beyond Stonewall" exhibit (https://americanhistory.si.edu/explore/exhibitions/gay-history-beyond-stonewall/online).

27. NMAH's Pro-Abortion Activism

Another clear example of NMAH's ideological extremism is Director Hartig's decision to turn NMAH into a pro-abortion institution. For example, immediately after the Supreme Court's *Dobbs v. Jackson* decision was announced on June 24, 2022, Hartig noted that she crafted a statement condemning the ruling.[353]

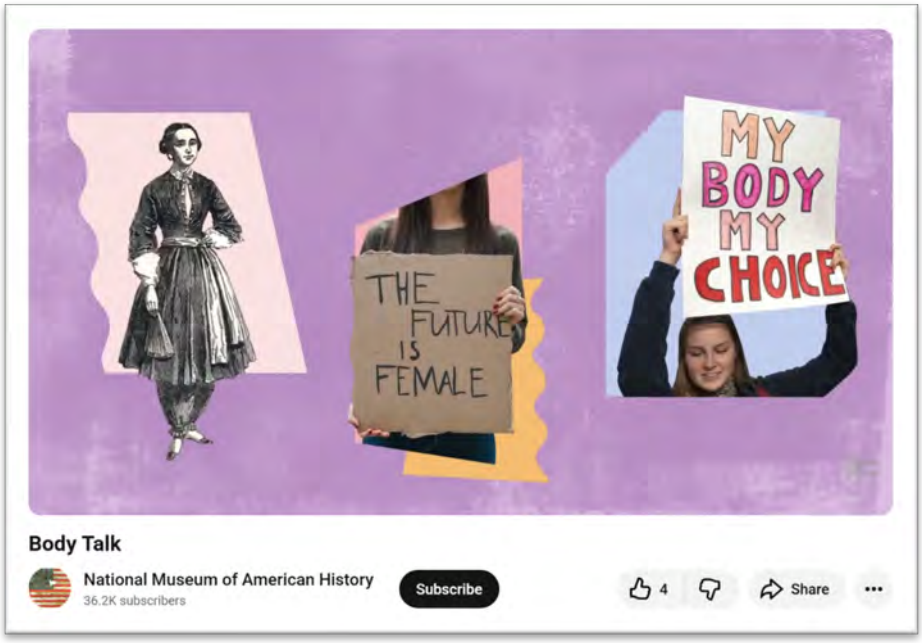
In a 2024 speech, Hartig explained that one of the "Talk Back" prompts featured in NMAH's *Girlhood (It's Complicated)* exhibit "became especially—and painfully—relevant after *Politico* leaked the draft of the Supreme Court's decision […] in May 2022: Has someone else ever made a decision that affected your body?"[354] Hartig continued: "The Supreme Court did just that when it ruled against *Dobbs* on June 24, effectively overturning the 1973 *Roe v. Wade* decision, which held that the Constitution protects access to abortion."[355]

In the same speech, Hartig boasted to her fellow historians that NMAH's *Girlhood (It's Complicated)* exhibit urged museum visitors to voice "their outrage about attacks on reproductive freedom through these Talk Back cards, penned by the political voices of people identifying themselves mostly as women, girls, and lgbtqia+ (lesbian, gay, bisexual, transgender, queer, intersex, asexual, plus) youth," adding that, "while two cards spoke for the unborn, 184 tracked closely to national polls that put the majority of Americans on the side of reproductive rights."[356]

Hartig then explained how NMAH's new mission is designed to empower activism on politically controversial issues like abortion, stating: "At the Smithsonian, we are committed to the increase and diffusion of knowledge to all. And at the National Museum of American History, we are then moreover committed to our mission: empowering people to create a just and compassionate future by exploring, preserving, and sharing the complexity of our past. I feel that a future without federally protected reproductive health care rights is not informed, just, or compassionate."[357] Hartig concluded that she and her colleagues were "[s]olidly in our lanes as historians" when they shared their "dismay" in how history was "manipulated" when "the Court adopted a flawed interpretation of abortion criminalization," instructing fellow historians that: "It is essential that we continue to engage our audiences in conversations on the history of reproductive health care… so that a brighter future that centers all our needs and rights to our bodies and lives will emerge… remember our powers as historians… That history is a prime tool of justice only continues to grow more resolute in my mind, as I hope it does in yours."[358]

Many of the phrases from Hartig's 2024 speech appear verbatim in an October 2022 NMAH press release, entitled *Girls talk back on questions of body autonomy*, issued four months after the Supreme Court's ruling in *Dobbs*.[359] As the statement's title reframed the abortion debate in terms of a woman's "body autonomy," the text repeatedly referenced the *Dobbs* decision in the context of a long history of oppression against women's bodies, such as through "dress codes" and "birth control," in the U.S.[360] The statement also articulated Hartig's and NMAH's stated commitment to not "reconstruct entrenched gender binaries" and highlighted how NMAH's *Girlhood* exhibit has helped "women, girls, and LGBTQIA+ youth" express their "political voices":

As for reproductive rights, the Talk Back space has been animated by the political voices of people identifying themselves as women, girls, and LGBTQIA+ youth since the May 2, 2022, leak of the draft opinion on *Roe v. Wade* published in *Politico*. Many visitors gestured to the lack of self-determination over female and trans bodies in general as evidenced by dress codes, body shaming, and birth control. Others answered the question posed on the card directly, pointing to the Supreme Court and using slogans that have been spread across various media."[361]



Screenshot of a YouTube video created for NMAH's "Girlhood (It's complicated)" exhibit showing an activist raising a poster with the phrase "MY BODY MY CHOICE," available at https://youtu.be/bE5NKAE58w0?t=24.

28. NMAH's Efforts to Turn America's Youth into Anti-Gun Activists

NMAH and the Smithsonian have not been able to resist incorporating their anti-Second Amendment activism into exhibits, articles, and educational materials, including those aimed at young children.

For example, in its *Girlhood (It's Complicated)* exhibit, NMAH dedicated an entire space to "News and Politics (girls on the front lines of change)" that exclusively featured anti-gun activists, artwork, and didactics.

One of the walls featured an end-to-end quote by Toni Morrison, an anti-white activist and author who attempted to link a spike in "hate crimes" after the 2016 election to "Trump voters" who were afraid that "America is losing its whiteness."[362] In a 2016 article, entitled *Making America White Again*, Morrison argued that "the United States holds whiteness as the unifying force," bemoaned how white people are "not watched in a department store" and "are the preferred customer in high-end restaurants," and lamented how "so many white voters…embraced the shame and fear sowed by Donald Trump."[363] Below Morrison's quote, NMAH dedicated the rest of the wall to artwork showcasing dozens of pro-gun control "March

for Our Lives" activists at the Capitol in Washington, DC, holding up signs common at gun-control rallies, such as "Enough Is Enough" and "Not One More."[364]



Photo of the space that exclusively featured anti-gun activists, artwork, and didactics in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

The accompanying didactic implies that the anti-gun activism on display is both a bipartisan issue and history in the making, encouraging visitors to join in. It reads: "Girls make history. Now, and in the past, girls show us that politics runs much deeper than being a Democrat or a Republican. It's political to speak up, to support a cause, or to use social media to turn heads or change minds. Some girls grab headlines. Others don't. But that doesn't mean they don't make history. Just being a girl makes a person political."[365]



Photos of "News and Politics (girls on the front lines of change)" didactic and wall featuring a quote by activist Toni Morrison and pro-gun control protestors in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery. Highlights added.

In the corner, NMAH displayed a life-sized poster of Naomi Wadler, an 11-year-old girl who delivered a speech "in the 2018 March for Our Lives to end gun violence" after "becoming politically aware at age 5[.]"[366]



Photos of "Naomi Wadler" display and didactic in NMAH's Girlhood (It's Complicated) exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

An accompanying didactic shows Wadler speaking at a podium displaying the logo of March for Our Lives (MFOL), an organization that says it is dedicated to supporting prosecutions and investigations into gun rights groups like the National Rifle Association (NRA) and advocating for policy change, including downsizing police departments; dismantling voter ID laws; ending lifetime appointments for Supreme Court justices; appointing judges of "diverse…genders;" stripping gun manufacturers' legal immunity; repealing "Stand Your Ground" laws; requiring national licensing to purchase a firearm; and banning "assault weapons," unserialized firearms, and high-capacity magazines.[367]

MFOL also advocates for creating a national registry of firearms, raising the minimum age to purchase a firearm to 21, and preventing individuals "convicted of misdemeanor-level hate or bias-motivated crimes" from acquiring or possessing a firearm.[368] Notably, in its 2024 policy agenda, MFOL stated that it opposes history that centers a "cisgender, heterosexual, white, Christian, able-bodied man" and seeks to confront "armed supremacy," which it defines as "the use of guns and the threat of gun violence to reinforce power structures, hierarchies and status," including by law enforcement.[369]

The exhibit also sets in front of young NMAH visitors a quote from the young activist's speech, encouraging children in elementary school to already be thinking about activism and politics.[370] It reads: "My friends and I might still be in . . . elementary school, but . . . we know life isn't equal for everyone and we know what is right and wrong. We . . . stand in the shadow of the Capitol and we know that we have seven short years until we too have the right to vote."[371]

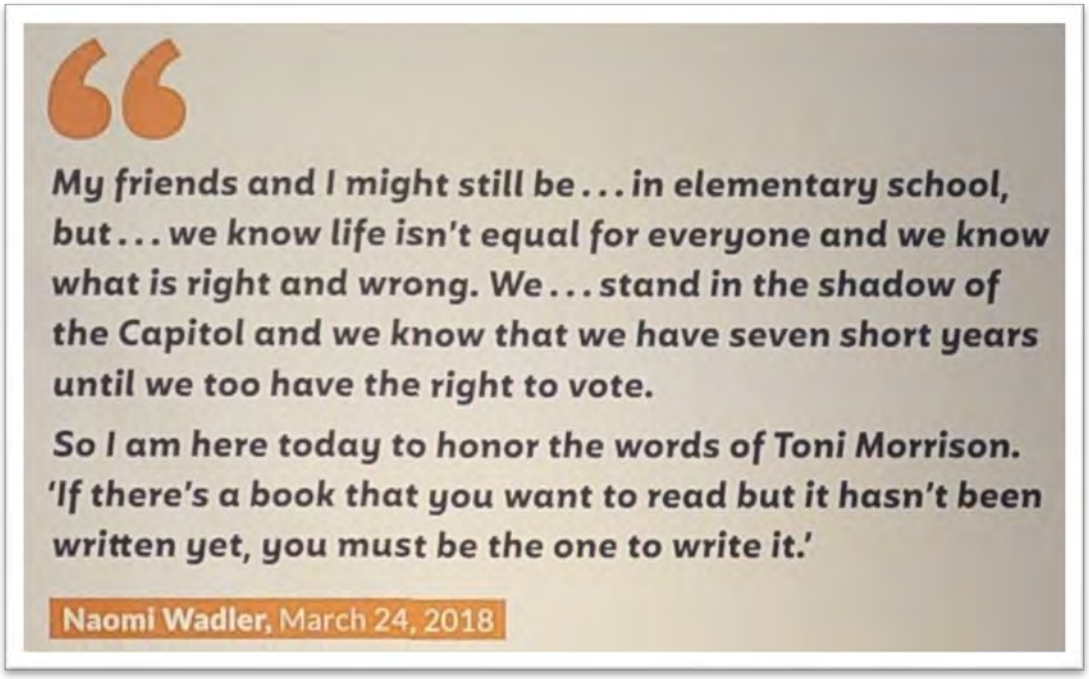


Photo of "Naomi Wadler, March 24, 2018" didactic in NMAH's "Girlhood (It's Complicated)" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

When introducing the exhibit to the American people, Director Hartig chose to sit in front of the Naomi Wadler display because, as she put it, "girlhood is political and because girls past and present have pushed back against expectations and spoken their minds."[372]



Screenshots of NMAH Director Anthea Hartig sitting in front of the wall featuring the pro-gun control "March for Our Lives" activists in 2020, available at https://youtu.be/GVYesfMeMOc?t=728.

Chapter IV. How the National Museum of American History Undermines American History

Today, America's Founders, Founding, and national story are missing at America's history museum. By design, the Museum is not telling any cohesive national story. As illustrated by the educational resources it offers to high school teachers across America, stating that "[t]here is no single American culture, language, or narrative,"[373] NMAH has no plans to tell a coherent story of America and will not do so as currently led.

Millions of museum visitors, student groups and families, immigrants and international guests, expecting to learn something about America's inspiring narrative, attracted by the prestige of a great national museum and its prominent artifacts, are given an altogether different story of our past at the National Museum of American History. As the Museum is curated today, there is no "infinite richness" of American history worth recounting, and no national narrative worth teaching. There is only "the complexity of our past" that tells a shameful tale of systemic oppression.

1. NMAH and the Smithsonian's Rejection of a Coherent National Narrative

The larger "systemic intervention" at the NMAH to reframe American history overall is reflected especially in the two key exhibits currently on display at the museum that address America's beginnings: *American Democracy: A Great Leap of Faith* and *Many Voices, One Nation*. These exhibits illustrate how the changes Hartig made to NMAH's mission statement has directly influenced exhibit development.

As previously stated, by substituting "our" for "American" in describing the past and taking out "infinite richness" as a modifier for the past within the new mission statement, Director Hartig telegraphed her desire to move the National Museum of American History away from a cohesive, patriotic national narrative towards an amorphous, undefined, non-American-centric, and—as Hartig later put it—"ever-shifting" portrayal of American history that can be used as "a tool of utility" to "ignite civic engagement."[374]

Indeed, like other members of current Smithsonian leadership,[375] Hartig has questioned whether there even should be a "grand narrative" of American history.[376] In 2021, she stated that she does not believe NMAH's "audiences" want such a "grand narrative" of American history: "I also think we're hearing from our audiences that they want not just one narrative; they don't want a kind of a grand narrative. They want many stories represented. They want to see themselves reflected in the stories, the art, the science that we share, that we collect, that we preserve, and that we digitize. So, I think in many respects, especially our younger audiences want the information so that then they can apply their critical lens so that we can help them on their path towards an understanding. And really, I think in the end . . . to help them find ways to enact their civic duty."[377]

This explains why *American Democracy: A Great Leap of Faith* begins with a reference to the Declaration of Independence—"many Americans" united around its statement of rights and the principle of the consent of the governed—but immediately notes that "Americans also inherited a

belief in social hierarchy and institutions that perpetuated inequality."[378] References to early events of the period center on Thomas Paine to emphasize the revolutionary nature of the moment.[379]

But there is no narrative explaining how Americans got to this point, who the key players were, what shaped their thinking and political judgments, or why they declared independence and what they intended in creating a new nation.

The exclusive focus of the exhibit following this content is the Nation's failures as a democracy and popular resistance to alleged systemic flaws. For example, one wall features large lettering with the words "PRIVILEGE," "SLAVERY," and "RIGHTS OF WOMAN" while terms like "FREE PRESS," "CITIZENSHIP," and "RIGHTS OF MAN" are much smaller.[380]

The right to petition, which is a core right of the First Amendment, is interpreted to mean protest. The exhibit culminates in a wall of thirty-two protest posters, almost all for various progressive causes, such as one calling for "basic rights and more efficient pathways to citizenship for the nearly 11 million people living in the country without legal authorization."[381]

Hartig's decision to avoid a unified, national narrative also explains why NMAH's *American Democracy* exhibit asks visitors, "How should Americans remember their Revolution and the founding of the nation?" without providing an answer. The didactic, unironically entitled "Revolution and the National Story" gives visitors no definitive information about either, suggesting that no one really knows whether the America's Founding was a "sacred event led by a great patriot, who as American children would learn, never told a lie" or a "deeply imperfect" event as "Americans disputed the issue within decades of the Revolution itself."[382]

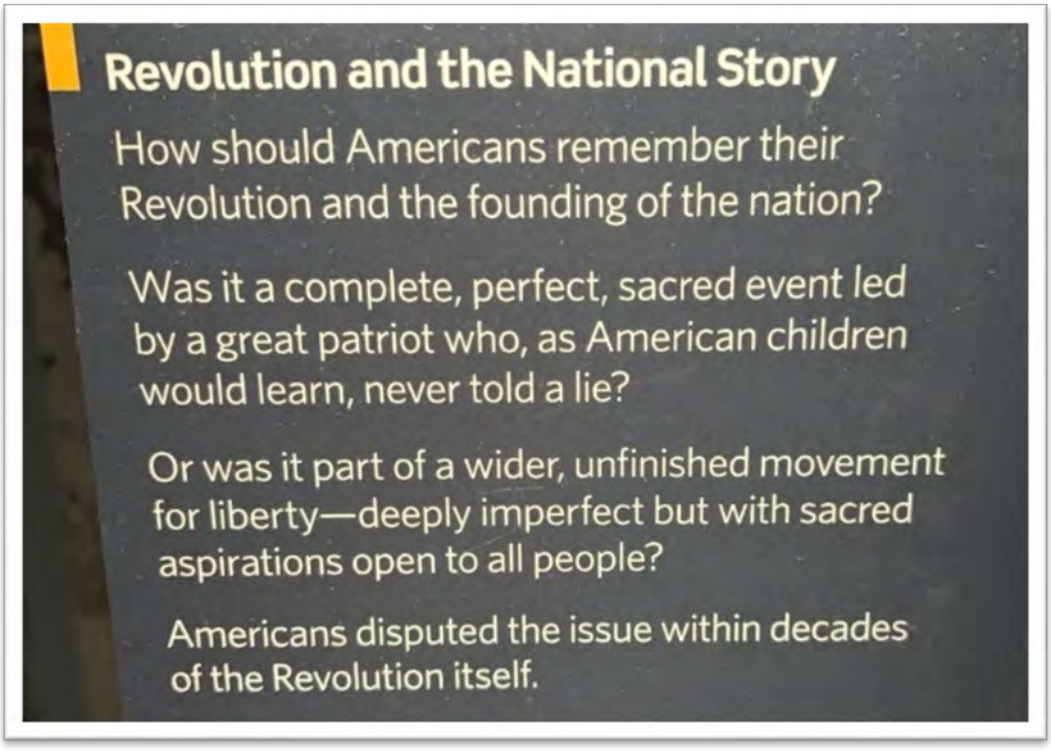


Photo of the "Revolution and the National Story" didactic in NMAH's "American Democracy" exhibit.

Another didactic asks, "Do We Need a Shared National Identity?" While noting that Americans have "established holidays such as the Fourth of July and later Thanksgiving Day and chronicled the story of America from the landing at Plymouth Rock through the Founding Fathers and the Revolutionary War," it frames the issue as unsettled and part of an "ongoing debate," asking visitors to consider, "if there were to be common beliefs and a national narrative that expressed the values of the nation, what should be included?"[383] In other words, the museum effectively tells its visitors, "We are the National American History Museum, but we do not know what the national narrative should be, so you tell us."

In a didactic entitled "Teaching American History," NMAH refuses to take a firm stance on whether schools should teach "patriotic values and the history of the nation through the Founding Fathers and aspirational figures" at all or rather teach "*historical understanding* and the stories of less famous and diverse peoples and groups," noting that "Schools throughout the nation have struggled to find the right balance appropriate for their communities."[384]

The didactic implies that teaching patriotism and the Founding Father's central role in America's story is somehow ahistorical, is more or less appropriate for certain American "communities," rather than for everyone to learn, and that there is a legitimate debate about whether the contributions to American history of George Washington, John Adams, Thomas Jefferson, James Madison, Benjamin Franklin, Alexander Hamilton, and John Jay should be taught in schools throughout the country.[385]

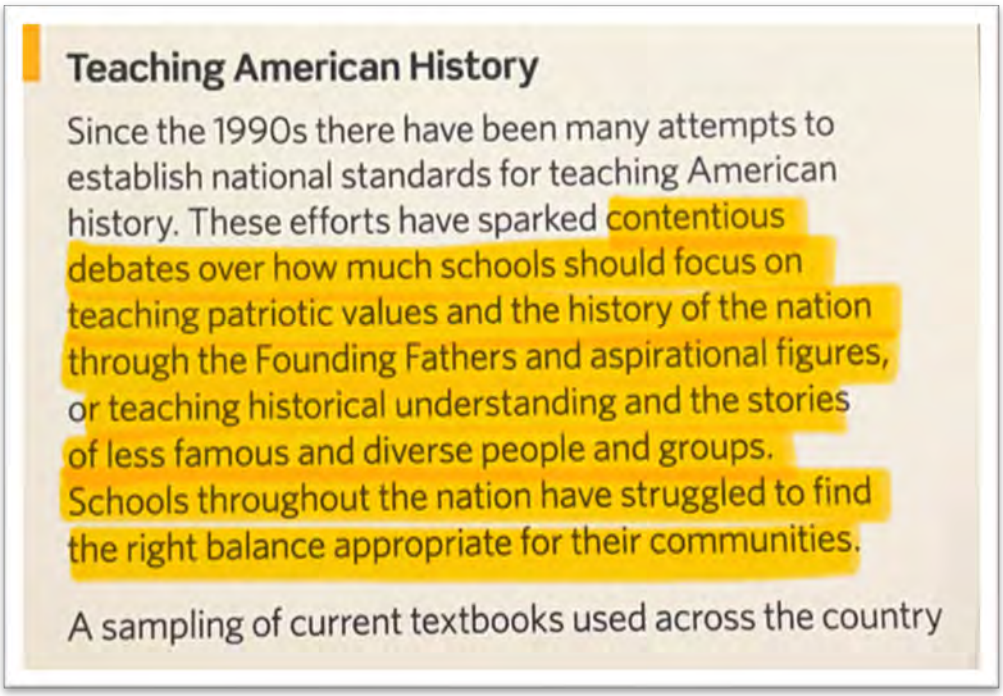


Photo of the "Teaching American History" didactic in NMAH's "American Democracy: A Great Leap of Faith" exhibit. Highlights added.

Another didactic entitled "Creating the Father of Our Country" states that "Mason Locke Weems's biography of George Washington…helped to establish a national narrative that cemented Founding Fathers in our national consciousness."[386]

In this telling by NMAH, a biography, not the heroic actions of George Washington and other Founders to fight, found, and lead our country, is the reason that there were "dozens of pageants and plays that celebrated the bicentennial of [Washington's] birth and continue today"—as if Americans had to "create" the narrative that George Washington was the father of our country.

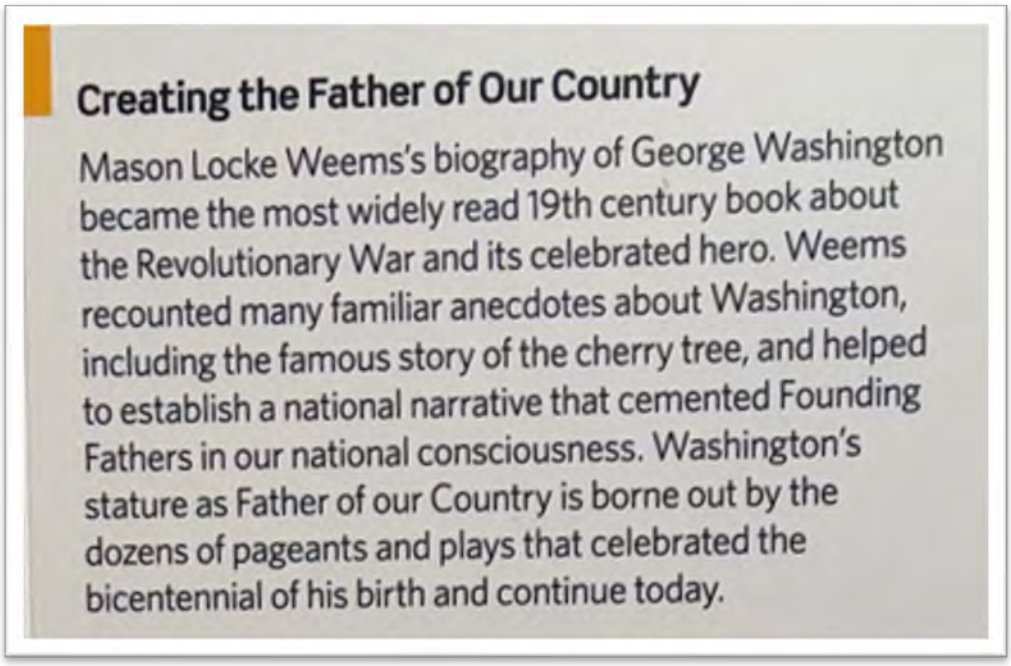


Photo of the "Creating the Father of Our Country" didactic in NMAH's "American Democracy" exhibit.

2. NMAH and the Smithsonian's Political Activism by Omission

NMAH's refusal to affirm that Washington was a hero mirrors how its *Many Voices, One Nation* exhibit handles the Father of Our Country, limiting references to Washington to trivial facts and never his profound influence and role in shaping the new nation.

George Washington is never properly presented to visitors. For example, one didactic entitled "Assimilation through Public Schools" notes that "Public schools encouraged the incorporation of newcomers with programs and images intended to inspire patriotism. In most classrooms, American flags hung alongside images of the American eagle and George Washington"—completely failing to tell visitors a single fact about him.[387] Another didactic, entitled "Emblem of America Pitcher, around 1800," states that, "This British-made pitcher depicts America as a European American female figure with a U.S. flag, and George Washington, along with smaller images of Native Americans."[388] Who is George Washington and why does he matter? Visitors are never told.

Likewise, a didactic in *American Democracy* on "The Pledge of Allegiance" does not tell visitors anything about what the Pledge says, but only includes basic information (i.e., its author, when

and how it was published) and that it was intended to "instill American nationalism through flag ceremonies" across the country.[389] Why does NMAH not showcase the words? Perhaps because the words themselves would undercut the Museum's broader narrative that America is not, and has not long been, dedicated to "Liberty and Justice for all."

Indeed, an adjoining didactic on "Independence Day" states that Americans created "celebrations" to "establish national identity" and "a day of patriotic symbolism and a tribute to the founding principles of equality of liberty and revolutionary ideals of democracy," while not including any reference to the actual Founders who proclaimed those principles and fought and died in that Revolution to secure them. Yet, the didactic promptly adds, "For Americans still fighting for those freedoms, the holiday became a day to remind the country of the promise yet to be fulfilled."[390]

Even a didactic in *American Democracy* entitled "Abraham Lincoln in the Classroom" only notes that "The historic images that hung in classrooms across America were intended to instill patriotic values and reinforce the idea of a shared national heritage. While George Washington was a perennial favorite, fellow president Abraham Lincoln tended to be only regionally displayed."[391]

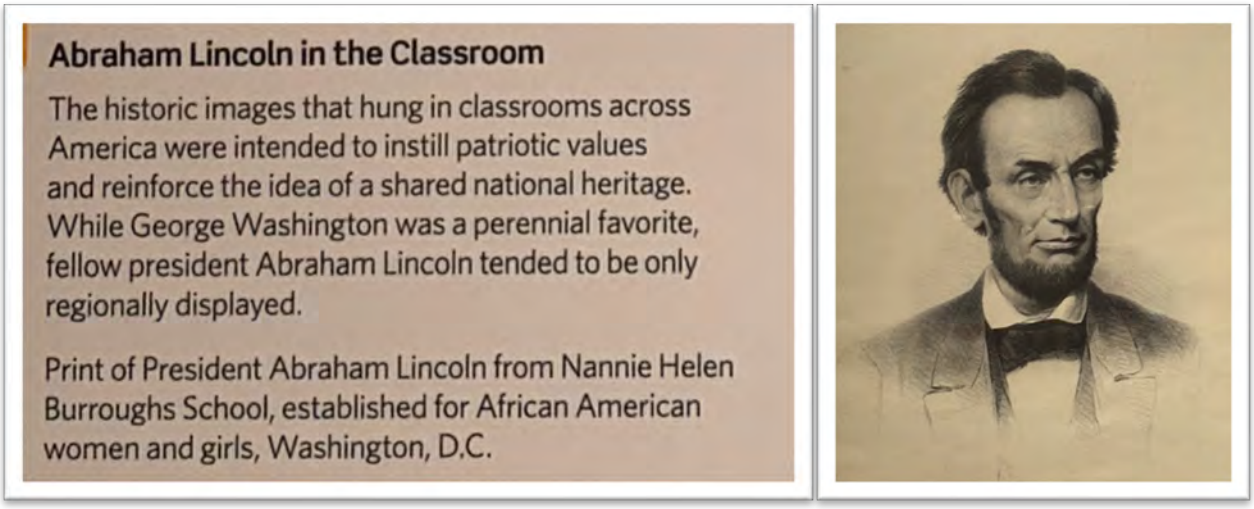


Photo of "Abraham Lincoln in the Classroom" didactic in NMAH's "American Democracy: A Great Leap of Faith" exhibit.

Visitors will note the complete lack of information about the accomplishments of two of America's greatest heroes. All visitors learn from this didactic is that Washington and Lincoln were U.S. presidents and that Americans have used images of them in an attempt to "instill patriotic values and reinforce the idea of a shared national heritage."[392] What are those values, what is that shared national heritage, and how and why do these men embody them? In this didactic and throughout the exhibit, NMAH is noticeably silent on such matters.

Another didactic in *American Democracy* asks, "What are the Rights and Responsibilities of Citizens?" continuing: "The founding generation of American political leaders asserted that the independent nation would be based on the ideal that its citizens had the right to 'Life, Liberty, and the Pursuit of Happiness,' and that the government under the Constitution was designed to

'promote the general Welfare and secure the Blessings of Liberty.' With these rights, they believed, came responsibilities that citizens needed to assume in order to fulfill the promise of the new nation. These lofty goals and principles never had a singular interpretation and over time have led to differing ideas and heated debates."[393]



Photos of "What are the Rights and Responsibilities of Citizens?" didactic in NMAH's "American Democracy: A Great Leap of Faith" exhibit.

Visitors will not find any Founders mentioned by name or even referred to by their traditional collective title ("Founders" or "Founding Fathers") in this didactic, but rather acknowledged as a "founding generation of American political leaders."[394] Nor will visitors find the most important part of the Declaration of Independence's preamble: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[395] Why are these historic words intentionally omitted? It is likely because including this essential context would prove that our Founders truly did believe (a) that there are self-evident, objective truths about human beings, (b) that one of those truths is that *all men are created equal*, and (c) that those universal rights of "Life, Liberty and the pursuit of Happiness" are *granted by God*, not men.

An informed visitor will also take note that the only part of the Constitution's preamble that the didactic cites refers to promoting "welfare" and securing undefined "Blessings of Liberty."[396] There is no reference to how the Constitution secures those rights or promotes such welfare, namely by "establish[ing] Justice" (a fair legal system where law is higher than any individual), "provid[ing] for the common defence" (against foreign invaders and outside threats), and creating a structured system of government that separates and limits government power.[397] Such a visitor will also notice how NMAH refuses to affirmatively note that rights do actually come with responsibilities, noting only that the Founders "believed" that was the case.[398]

The NMAH didactic claims that these "lofty goals and principles never had a singular interpretation and over time have led to differing ideas and heated debates."[399] In other words, NMAH states that no one knows what these words actually mean and the debate is ongoing. This

suggests that one can interpret them however they see fit and that the Founders did not explain themselves enough.[400] Finally, the NMAH didactic never attempts to answer the stated question of what responsibilities might come with the rights of citizenship.[401]

NMAH does not tell visitors that citizens have a duty to obey the laws, respect the rights and property of others, and treat fellow citizens with equality. It does not tell visitors that citizens have a fundamental responsibility to join together in voluntary groups and civic associations to solve community problems without state intervention, actively participate in local politics, and make sacrifices for the communal good. It fails to mention that citizens have a responsibility to love their country, prioritize the public good over private interests, and maintain the moral virtue necessary for free society. And it fails to tell visitors that citizens must remain watchful over the government and laws to maintain control over their own destiny.

These are omissions by design. If NMAH provided even the most basic context on didactics about America's Founders and the American Founding, it would undercut the underlying arguments presented in those didactics, not to mention the broader exhibit and museum. And if NMAH informed visitors about the responsibilities of citizenship (like jury duty or paying taxes), it would undermine its goal of radical social transformation through civil disobedience and resistance to legitimate laws and state institutions.

3. NMAH's Slander of America's Founders

Since it rewrote its mission statement to take out the words "infinite richness…of American history," NMAH has only committed to telling visitors about "the complexity of our past." And when the Founders are mentioned, that "complexity" is always code for slavery. For example, one didactic about the Broadway musical *Hamilton* in *Entertainment Nation* simply called Alexander Hamilton an "influential and flawed founding father" likely, in part, because he may have owned slaves.[402] There is no mention of Hamilton's key role in drafting *The Federalist Papers,* helping Washington win the Revolutionary War, establishing the American financial system, founding the Coast Guard, or devising early American industrial policy—or the fact that he was a vocal critic of slavery and helped found the anti-slavery New York Manumission Society in 1785, which worked to end the slave trade,[403] supported and lobbied for the "ultimate extermination" of slavery,[404] "connected black people with resources such as legal representation, helped protect them from kidnapping from slave dealers, put on anti-slavery lectures and readings," and quickly started founding African Free Schools that "educat[ed] more than 1,400 students by the time they started becoming part of the New York City public school system in the 1830s[.]"[405] Indeed, "[h]istorian Eric Foner, in his book *Gateway to Freedom,* describes the [New York Manumission Society's African Free Schools] as 'the backbone of black education in the city,'" educating remarkable Americans, such as "James McCune Smith, the first African American to earn a medical degree; Ira Aldridge, a prominent Shakespearean actor; and Henry Highland Garnet, a leading abolitionist once called America's 'Moses.'"[406]

Another NMAH exhibit, *The Electric Dr. Franklin*, devotes a full 20 percent of the exhibit to "Enslaved People," stating that "Benjamin Franklin's remarkable scientific accomplishments were, in part, enabled by slavery" and he "chose to take advantage of that system" even though

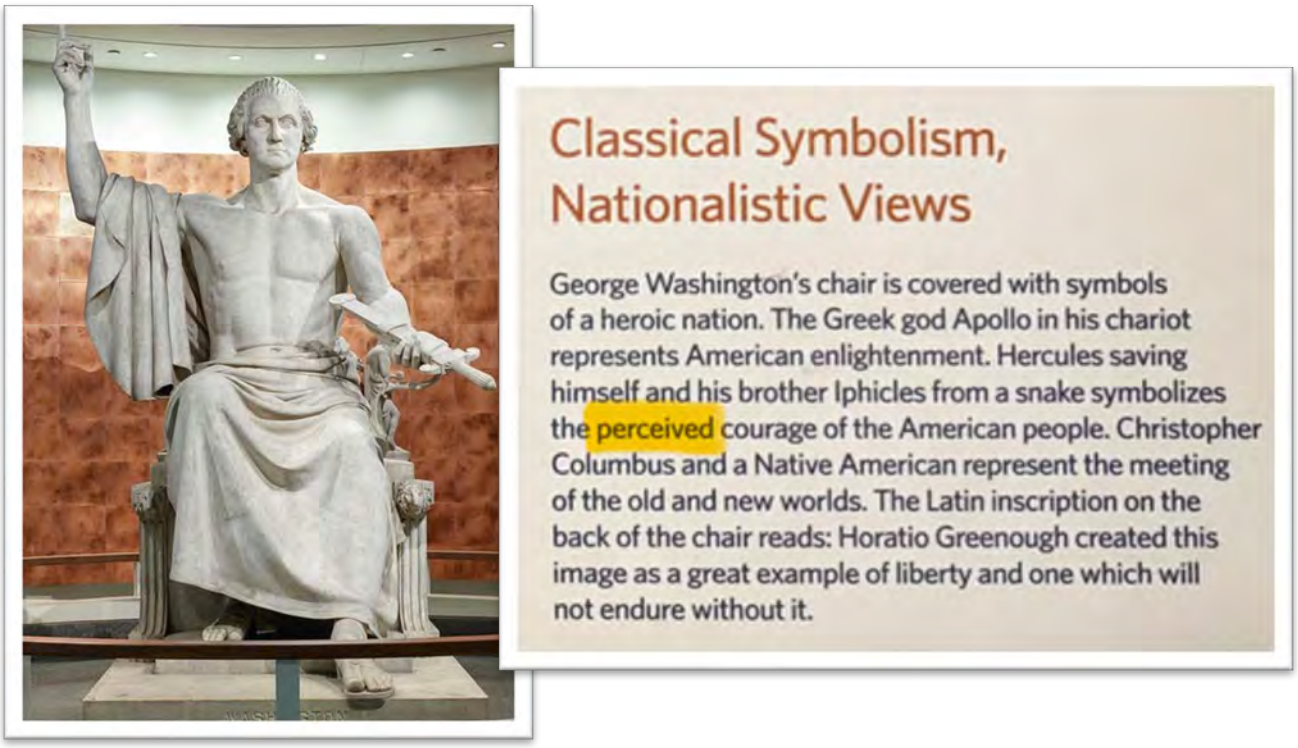
"he later became an abolitionist."[407] While entitled *The Electric Dr. Franklin*, the exhibit is dedicated to "the women, indentured servants, and enslaved people" whose "labor enabled" Franklin's electrical research, rather than to Benjamin Franklin himself.[408]

The exhibit includes multiple speculative paragraphs asking museum visitors to ponder whether Franklin's experiments, including those related to "electric shocks," ever involved "an indentured servant or an enslaved person," while admitting there is no evidence that they did and "he never mentioned them in reports of his work."[409]

In fact, the exhibit curators admit that they are "not even certain exactly how many people he kept enslaved" and how many were indentured servants.[410] Only in the section's second to last paragraph do we learn that "Franklin became president of the Pennsylvania Society for the Abolition of Slavery in 1787, and supported Pennsylvania's adoption of gradual emancipation," in addition to making the "emancipation of Bob a condition for the Baches to inherit his estate."[411]

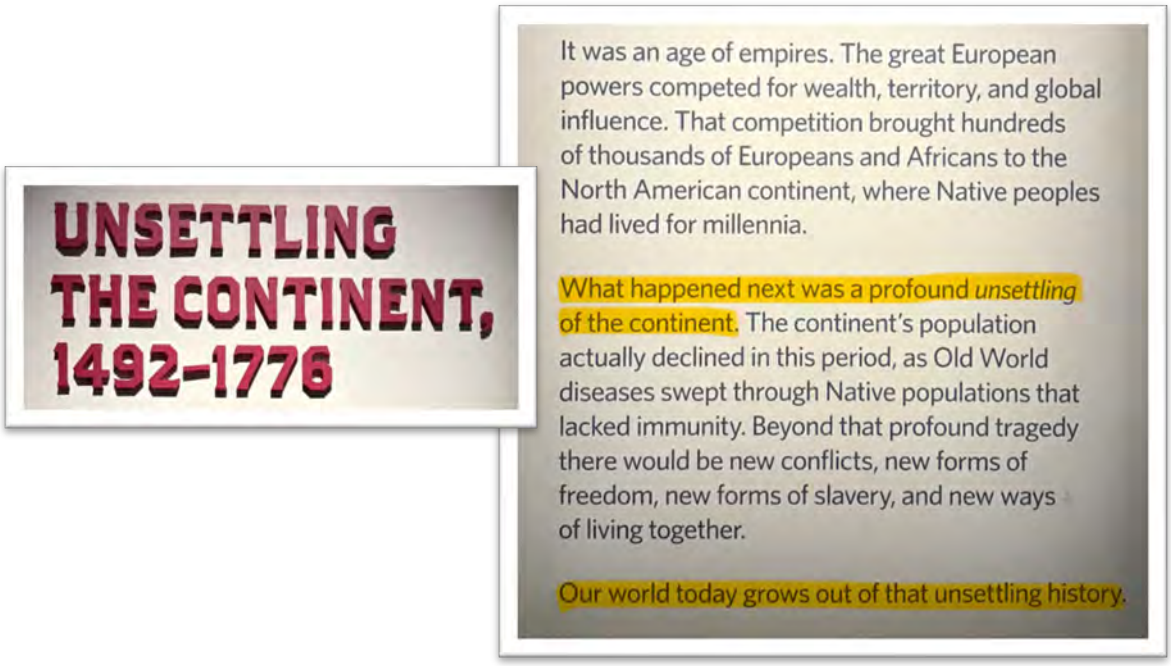
The section concludes, "Franklin's place in the nation's history of slavery is part of his legacy, as is his electrical research. […] We encourage visitors to look for more information about Franklin, and especially about the people whom he enslaved."[412]

Even the didactic beside the famous eleven-foot Neoclassical statue of a toga-clad George Washington, which has long greeted visitors at the museum since shortly after it opened in 1964, refuses to affirm the exceptional courage of the American people. It reads that the depiction of "Hercules saving himself and his brother Iphicles from a snake" on the sculpture "symbolizes the *perceived* courage of the American people."[413]



"George Washington" sculpture by Horatio Greenough, 1840, and accompanying didactic on display at NMAH.

The thinly veiled anti-Americanism on display at NMAH is merely a symptom of the widespread belief among Smithsonian leadership that America is, and has been since Columbus first set foot in the New World, a fundamentally oppressive nation. This helps to explain why Smithsonian leadership has called Christopher Columbus a "murderer," "slaver," "killer," and "thief," and ignored his contributions to America's Founding, urging the abolition of Columbus Day.[414] It is why NMAH's *Upending 1620* exhibit reframes the Pilgrims as "colonizers" and suggests Thanksgiving should be a "National Day of Mourning,"[415] and why the *Many Voices, One Nation* exhibit portrays the European settling of America as a "profound unsettling of the continent" with a section entitled "Unsettling the Continent, 1492-1776" noting that, "Our world today grows out of that unsettling history."[416]



Photos of "Unsettling the Continent, 1492-1776" didactic in NMAH's "Many Voices, One Nation" exhibit. Highlights added.[417]

Indeed, as illustrated by the "1492-1776" didactic, current Smithsonian leadership view Columbus and our Founders as two sides of the same coin. After calling Columbus a murderous "slaver," they levy the same charge against our Founders. In 2023, NMAH Director Hartig stated that "chattel slavery," not Americans' relentless fight for freedom, was "the legacy of the nation's founding" and that our "democracy was founded on the backs of African and . . . Indian slavery and genocide."[418] In 2019, the Secretary of the Smithsonian insisted that the Institution "legitimize" and "support the *New York Times*' 1619 Project" which, "in the words of the *Times*, set out to 'reframe the country's history, understanding 1619 as our true founding, and placing the consequences of slavery and the contributions of black Americans at the very center of the story we tell ourselves about who we are.'"[419] In collaborating with the *New York Times*' 1619 Project, the Secretary of the Smithsonian noted that he viewed it as "a great victory" that "everybody" "saw that the Smithsonian had fingerprints on it."[420]

The National Museum of the American Indian's (NMAI) *Nation to Nation* exhibit—which is also featured in the Smithsonian's "Our Shared Future: 250" programming for America's 250th anniversary and which current Smithsonian Under Secretary for Museums and Culture Kevin Gover actively promoted as head of NMAI between 2007 and 2021[421]—frames America's founding as a fundamentally oppressive and genocidal effort to take Native Americans' land and oppress their culture and peoples.[422] For example, the exhibit's introductory video begins by stating that the story of the U.S. and Native American Indian nations is a story about "the rise of a new great nation at the sacrifice of hundreds of others."[423] The exhibit also features several YouTube videos, including one entitled "The 'Indian Problem'" where Suzan Shown Harjo, one of the exhibit's curators, states that, "When you wrench people from their homelands, wasn't that genocide? We don't make the case that there was genocide. We know there was."[424]

4. NMAH's Repeated Claim that America Rests on Stolen Land

Echoing NMAI's fundamental claim that America was built on stolen land, Smithsonian Under Secretary for Education Monique Chism and NMAH Director Anthea Hartig, on at least *ten* different occasions, have begun their official museum-related speeches with a "land acknowledgement" of thanksgiving "to the First Peoples on *whose land* we're honored to live, love, struggle, and work."[425]

NMAH's exhibits also allege that the U.S. rests on stolen land. For example, NMAH's *Many Voices, One Nation* exhibit alleges that the U.S. government, "forcibly pushed Indians from their ancestral lands" for "European American settlement," "provided 160 acres of land often taken from Native peoples to immigrants who declared intent to become citizens and willingness to farm on the land for five years,"[426] and "declared war with Mexico to acquire western land" in 1846.[427]

5. NMAH's Slander of America and Reframing of its "Traditional Celebratory Narrative"

Like *American Democracy,* NMAH's *Many Voices, One Nation* exhibit explains that in creating the new nation, "early leaders envisioned a country that promised opportunity and freedom—but only for some."[428] It would be up to "the people who lived in the United States . . . to negotiate, or work out, what it meant to be American."[429]

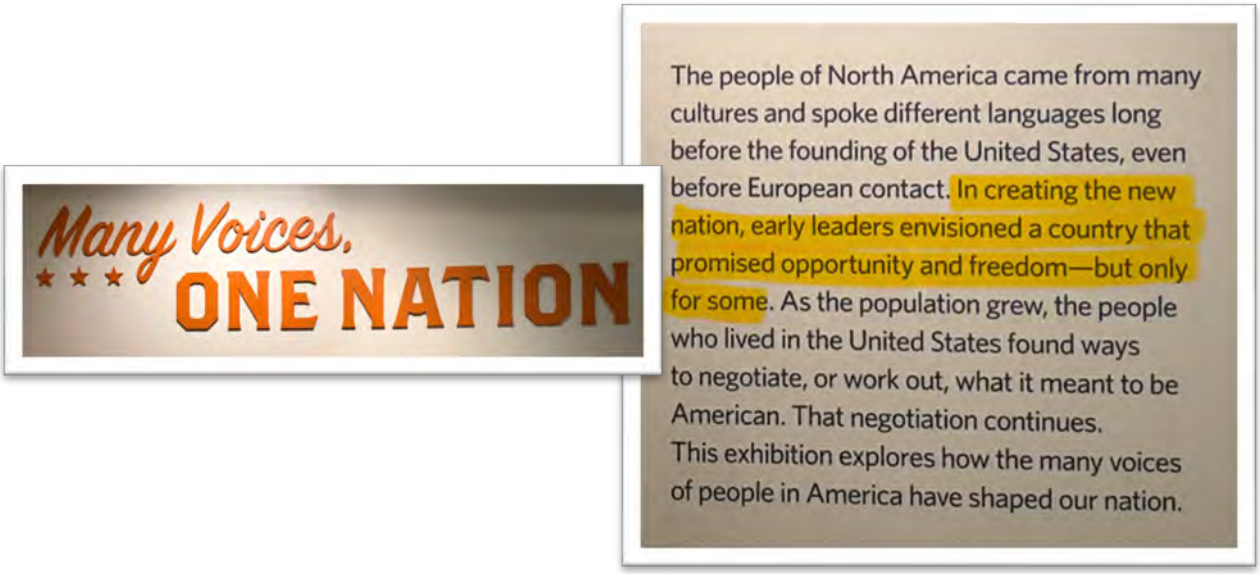


Photo of the introductory didactic in NMAH's "Many Voices, One Nation" exhibit. Highlights added.[430]

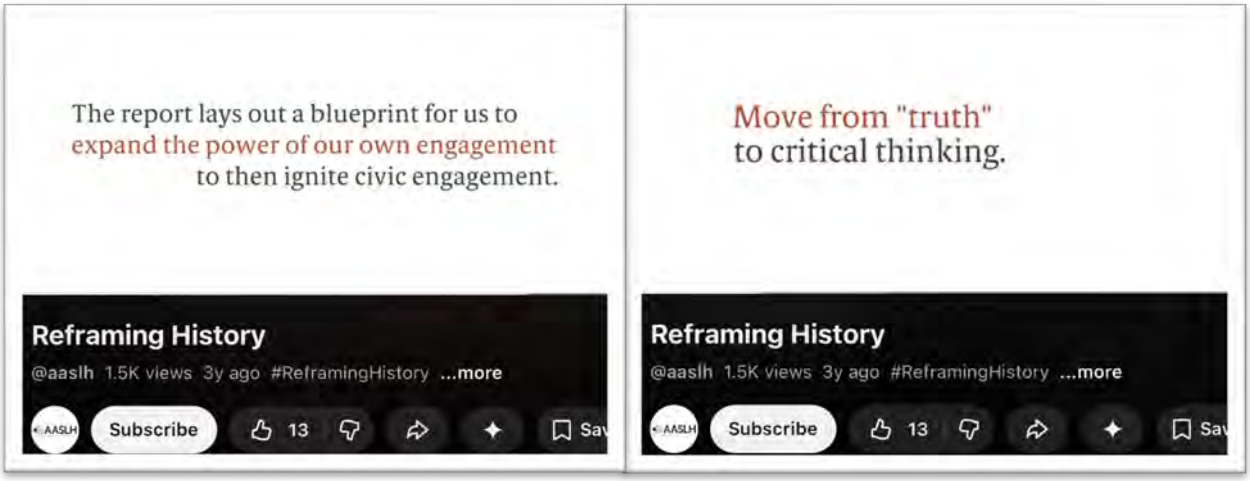
While *American Democracy: A Great Leap of Faith* deconstructs and reinterprets the American idea to mean revolution and resistance to persistent racial hierarchies and systemic flaws through petition and protest, *Many Voices, One Nation* reframes "our past" to consist of cross-cultural encounters of ethnic, sexual, and racial identity groups seeking restorative justice, particularly immigrants.

The two exhibits—both of which are prominently featured in the Smithsonian's "Our Shared Future: 250" programming for America's 250th anniversary[431]—decisively reframe the narrative of American history.

The key figures of early American history are set aside, and the key events are decontextualized to avoid the presentation of a coherent or chronological story by which those historic individuals and events are central. This decentering avoids, as Hartig explained, "the traditional celebratory narrative of U.S. history"[432] and deconstructs American history through a progressive analysis of the past, and then the reconceptualization of history as social encounters and restorative action defines and empowers a new public identity "to create a more just and compassionate future."[433]

NMAH's reframing of American history follows the exact blueprint outlined in the final report of the American Association for State and Local History's (AASLH) *Reframing History* project, which notes that "historical narratives that center white men as the 'neutral,' depoliticized American history that should be taught in schools (for example, learning about the Founding Fathers)" are "a way of perpetuating dominant groups' power" and "reinforce white supremacist logic."[434]

This *Reframing History* report was endorsed by multiple Smithsonian museums,[435] with Hartig calling it a "blueprint for us to expand the power of our own engagement to then ignite civic engagement" and NMAL Founding Director Jorge Zamanillo calling it "a great resource" for NMAL "staff and the educators that work on these programs every day."[436]



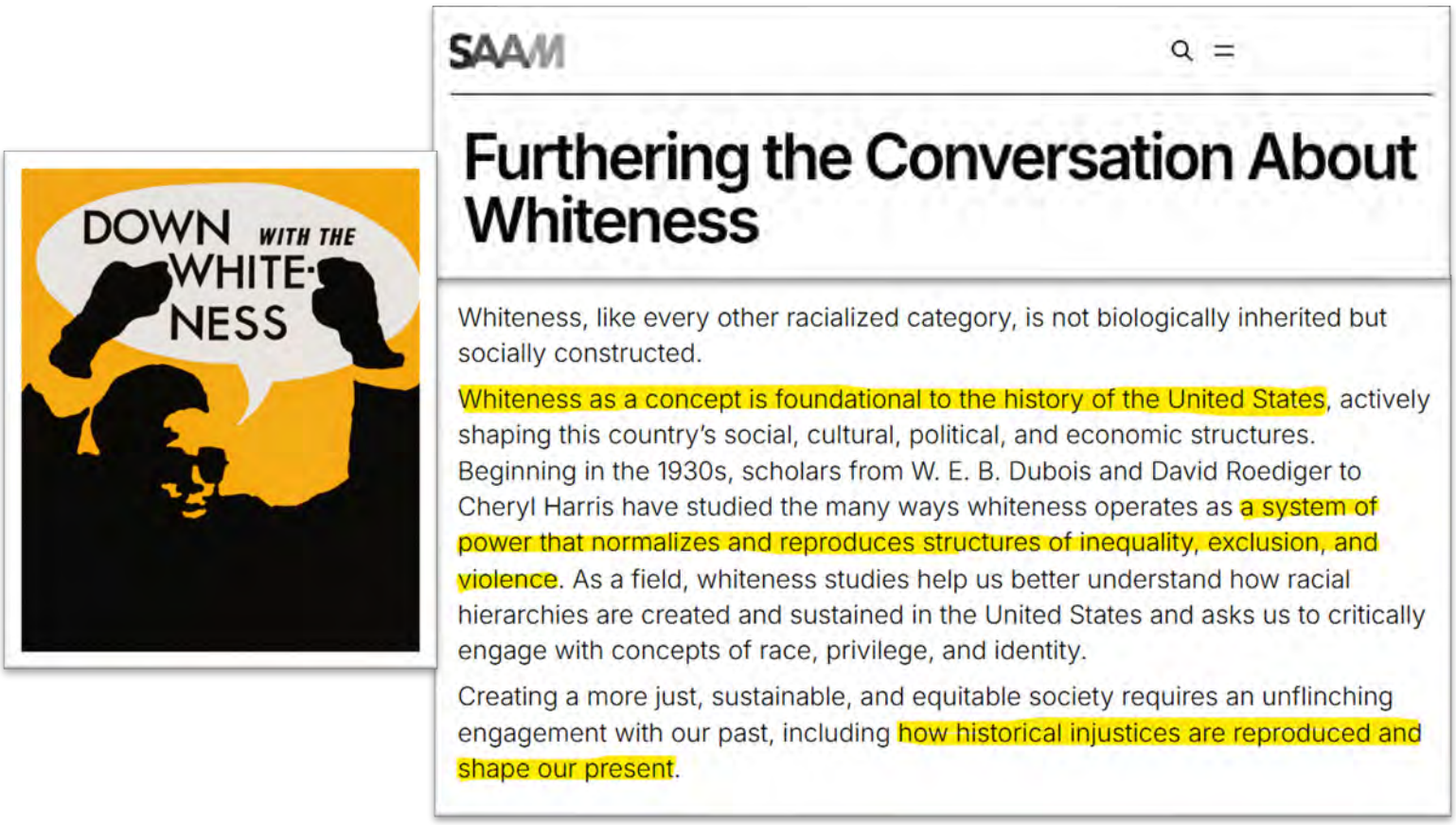
Screenshots from AASLH's "Reframing History" June 2022 YouTube video, https://youtu.be/A0qv7DVXBvw?t=283.

In fact, in 2022, Hartig hosted an event at NMAH to discuss and "mark the launch" of the report, stating, "We are delighted to welcome this program, especially in light of our work as we together have crafted a new Strategic Plan that we hope will take us through the next 10 years of our existence."[437]



Screenshot from AASLH'S "Reframing History: A Conversation at the Smithsonian National Museum of American History" March 2022 YouTube video, https://youtu.be/IQv2tN9p5_E?t=1523. NMAH Director Anthea Hartig is sitting on the far right, moderating the panel, and NMAL Director Jorge Zamanillo is sitting on the far left.

The *Reframing History* report's anti-white animus helps explain the anti-white and anti-Christian sentiment expressed by Hartig, others across the Smithsonian, and within NMAH exhibits.[438]



Screenshots of the Smithsonian American Art Museum and Smithsonian Learning Lab's poster, "DOWN WITH THE WHITENESS," and a page with additional information and recommended reading for SAAM's "groundbreaking" exhibition, which argues that whiteness "operates as a system of power that normalizes and reproduces structures of inequality, exclusion, and violence." These screenshots typify the anti-white sentiment across the Smithsonian and are available at https://learninglab.si.edu/q/r/6186305 and https://americanart.si.edu/furthering-conversation-about-whiteness. Highlights added.

For example, one didactic in *Many Voices, One Nation* states that America stole Indian land in the 1800s to help "white gold miners" and "pressured the Nez Perce people into ceding their lands by exploiting divisions caused by Christianizing efforts."[439] Another bemoans how one Native population "had largely been forced out or Christianized . . . by the early 1800s."[440] And another notes, "Some [Indians who were removed in the Midwest] were able to retain Native belief systems; others became Christians."[441] Yet another states that "Christian religious fervor… lay behind early European efforts at conquest in the Americas."[442]

These claims are selective, tendentiously framed, and present a distorted picture of history by omitting critical context. The displacement of Native peoples in the 1800s was driven by a complex mix of factors—agricultural expansion, the belief in Manifest Destiny, population pressure, economic opportunity, and resource extraction—making the reduction of this history to serving "white gold miners" a politically loaded oversimplification.[443]

Presenting Native conversion as uniformly coerced similarly erases the historical record of voluntary conversion and the significant role Christian Native leaders played in their own

communities.[444] And describing early European conquest as motivated by "Christian religious fervor" frames Christian evangelism and Christians' flight from religious persecution in Europe as an intent to subjugate the New World, rather than flee life-threatening persecution, spread the good news of the Gospel, and share the love of Jesus Christ with those in this new land.

What makes this pattern especially glaring is what NMAH leaves out entirely. The Museum makes no meaningful effort to acknowledge the central and positive role Christianity played in the Founding and flourishing of America. It was Christian conviction and principles that animated the abolitionist movement and Civil Rights Movement. Figures like William Wilberforce,[445] Frederick Douglass,[446] Harriet Beecher Stowe,[447] and Martin Luther King Jr.[448] grounded their opposition to slavery and racial discrimination explicitly in Christian faith. It was Christian moral philosophy that undergirded the Declaration of Independence's assertion of God-given, unalienable rights.[449] And it was Christian institutions—churches, schools, and charitable organizations—that built much of America's civil society from the ground up.[450] The selective condemnation of Christianity's role in American history, combined with the complete silence on its civilizing and liberating contributions, is not a neutral curatorial choice. It is a pattern—one consistent with a museum-wide editorial agenda that treats Christianity as a historical villain while ignoring the faith that, more than any other, shaped the ideals that America continues to strive toward.

Additionally, NMAH's *Upending 1620: Where Do We Begin?* exhibit explicitly reframes the Christian Pilgrims as colonizers, *not* "founders" or "settlers" and claims that the fact that a "chest that traveled across the Atlantic Ocean" on the *Mayflower* was owned by an English family that "did not belong to the Pilgrims' religious sect . . . demonstrates that not every passenger aboard the Mayflower was fleeing religious persecution."[451] It also reframes Thanksgiving as a "National Day of Mourning," offers "evidence that upends these myths," and "urges audiences to reexamine these stories without reducing their importance in American history. Fragments from Plymouth Rock are on display, juxtaposed with artifacts from the Wampanoag community, questioning the stone's role in the Plymouth's landing and challenging visitors' preconceptions."[452]



Photos of NMAH's "Upending 1620: Where Do We Begin?" exhibit.[453]

The Smithsonian stated that the exhibit was designed to undo the "myth" of Plymouth precisely because it "is cemented in many minds as the birthplace of the United States and central to its founding events." Because it is central to these events, it therefore contradicts the incoherent, anti-Christian, and anti-freedom narrative of America that NMAH and the Smithsonian seek to tell.[454] Because Plymouth proves that America's longstanding belief in self-government and peaceful coexistence with neighboring sovereigns has Christian roots, current Smithsonian leadership has stated that it must be destroyed, boycotted, mourned, and "upended."



Photo of the 1998 "Day of Mourning" "protest banner" displayed in NMAH's "Upending 1620: Where Do We Begin?" exhibit, which says it seeks to "upend" the "powerful myths, when later Americans reimagined the English as 'Pilgrims' and founders of the U.S. nation."[455] *The Smithsonian notes that the banner was used in a National Day of Mourning protest "first organized by Indigenous Americans in 1970 to honor their ancestors, tell a more complete history, and continue their strive for equality" and "provid[es] insight into this alternative way to mark the American Thanksgiving holiday."*[456]

In addition to attacking America's white Christian Founders, NMAH's exhibits also portray restrictive immigration laws as a tool of white supremacy. The *Many Voices, One Nation* didactic entitled "Negotiating Inclusion" alleges that when "thousands of Chinese journeyed to the American West, encouraged by the promise of gold rush opportunity" in the 1850s, "[t]heir race…troubled white Americans," leading to the 1882 Chinese Exclusion Act, "the first of many restrictive immigration laws."[457] Another states, "White laborers considered the Chinese competition and responded with hostility."[458]

One *American Democracy* didactic asks "How Diverse Should the Citizenry Be?" and notes that "In a nation created by immigrants…One view is that 'multiculturalism,' the preservation of diverse cultural heritage, enriches the country…Still others challenged diversity by seeking to restrict immigration and exclude certain racial and ethnic groups."[459]
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Photo of "How Diverse Should the Citizenry Be?" didactic in NMAH's "American Democracy" exhibit.

Another *American Democracy* didactic claims that "the calls for exclusion of certain groups span the history of the nation" and is not limited "to certain ethnic and racial groups, but also sought to exclude those of differing . . . sexual orientations."[463]

This rhetoric mirrors language Director Hartig used in an April 13, 2024 address while serving as the President of the Organization for American Historians, where she recounted the story of

Juana Briones, a Mexican-American immigrant who "fought a long battle to retain title to her lands" after "the American take-over of California in 1848," stating:

> Understanding Juana's life thus also foreshadows and connects for us the long and on-going histories of brutality in all European colonial regimes across the continent. In particular, in California after 1848, Anglo-American 'sexual violence, laws prohibiting interracial and same-sex relationships, and controls on women's reproduction helped establish and maintain white male supremacy and class hierarchy in North America. Each served as scaffolding to slavery, Native American removal, Jim Crow, and immigration restrictions.'[464]

Notice what Hartig repeatedly demonizes here—"European," "Anglo-American," "white male"—and her characterization of "immigration restrictions" as a racist and oppressive practice akin to "slavery," "Native American removal," and "Jim Crow."[465]

6. America's Flagship Museum Insists the Country Hasn't Changed Since 1957

But it is not just America's past that NMAH and Smithsonian leadership have a problem with; they view America as systemically racist *today*. This is a remarkable position for a history museum to take. Between 1957 and today, America passed the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act; desegregated its schools, military, and public institutions; elected a Black president twice; and built the most racially diverse professional and civic leadership class in its history. None of this appears to register with NMAH's current leadership.

In 2020, Director Hartig directed NMAH staff to form a "rapid response collecting posture as the pandemic hit and as, of course, the ongoing and cascading crises—especially racial, constitutional, environmental, as well as civic—roiled throughout the nation. And that meant, of course, especially after the murders of George Floyd and Ahmaud Arbery and Breonna Taylor and sadly so many others . . . really trying to center anti-Black violence across time in our new collecting around political history but as well thinking about the many, many ways in which the discrepancies of history have played out in COVID response and, of course, human loss[.]"[466]



Screenshot of Director Hartig explaining how NMAH worked to document the Black Lives Matter movement, available at https://youtu.be/CVpbfZnBNu4?t=703.

Hartig oversaw the creation of NMAH's *Reckoning with Remembrance* exhibit, which argues that the murder of Emmett Till in 1955 "is not just part of a racist past; it reflects our ongoing present."[467] Hartig also ensured that NMAH was involved in the Smithsonian's *Reckoning with Our Racial Past* initiative, which notes that it is based on "centuries of systemic racism and its urgent, present-day reality."[468] Other articles, including some published by NMAH staff curators on NMAH's website allege that: "Our political and legal systems are inextricably intertwined with and fueled by structural racism."[469] "Racism has been a public health emergency in America for over 400 years."[470] And America is facing "two pandemics—COVID-19 and structural racism."[471]

In support of her assertion that America is systemically racist today, Director Hartig compared the example of Minnie Jean Brown fighting "daily discriminatory and tortuous behaviors of her white classmates" at Little Rock Central High School in the 1950s to recent data, featured in NMAH's *Girlhood (It's Complicated)* exhibit, finding that "Black girls are suspended 6x more often than white girls."[472]

Hartig noted that this black-white discrepancy in suspensions clearly means that there is "ongoing discrimination especially against black and brown girls," displaying an NMAH graphic stating that "Schools are telling black girls that they (and their education) don't matter."[473]



Screenshot of Director Hartig explaining how America is racist today because data shows that black girls are suspended from school more often than white girls, available at https://youtu.be/CVpbfZnBNu4?t=893.

After all, to Director Hartig, there could be no other reason why a student in America today could be suspended from school apart from their race. This conclusion, however, ignores a substantial body of research finding that disparities in school discipline are influenced by numerous factors beyond race alone, including lack of parental guidance or support, trauma, mental health issues, gang involvement, drug use, social media, socioeconomic status, school climate, and wide variation in disciplinary policies across districts and states—none of which Hartig acknowledges or attempts to address.[474]

NMAH's intentional decision to pretend that race relations in America were the same in 1957 as they are 63 years later in 2020 (when the exhibit opened) illustrates how current museum

leadership, under the pretext of telling American history, seeks to highlight and twist tragic events in America's past to achieve its partisan goal of shaming Americans into supporting radical social and political change in the present.



Photos of NMAH's "Who Gets to Go to School and Stay in School?" didactic, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

7. *The Smithsonian and NMAH Are Not Celebrating America's Founders or Founding on America's 250th Anniversary*

NMAH's only special programming to commemorate America's 250th anniversary, *In Pursuit of Life, Liberty & Happiness*, fails to celebrate America's Founders and the American Founding. This exhibition highlights 250 objects from the museum's collections, including remarkable artifacts like the desk Thomas Jefferson used to draft the Declaration of Independence, George Washington's uniform, a ship of the early U.S. Navy, and, of course, the Star-Spangled Banner, the 1813 flag that inspired the National Anthem.[475]

Visitors to NMAH today will notice that these objects have not been moved to any new, prominent position within the Museum. Jefferson's desk and Washington's uniform remain in the same display cases and exhibits that they were previously. NMAH has only affixed a couple small bilingual stickers to each display case, indicating that the pieces belong to its broader "In Pursuit" list of objects. This is hardly a new "exhibition," as claimed by NMAH.[476] It is a repackaging of items spread like a scavenger hunt across the Museum.



Photos of NMAH's display case for Jefferson's desk as of May 17, 2026.



Photos of NMAH's display cases for Washington's uniform as of May 17, 2026.

While NMAH failed to move these revered, historic objects to a place of prominence, it did move several of its preferred objects of political activism to a central place in the Museum. For example, in the *Souvenir Guidebook* provided to visitors, the Museum highlights a Monarch-butterfly-themed graduation gown, symbolizing the movement to grant illegal aliens U.S. citizenship.



Photos of NMAH's Souvenir Guidebook informing visitors about the objects on display for its "In Pursuit" exhibit.

NMAH created a special display near the main entrance to the Museum (on the first floor), showcasing the butterfly gown and a didactic stating that it "expand[ed] the boundaries of belonging" when it was worn by a "queer, Mexican, and undocumented" man who "came out" at his college graduation.



Photos of NMAH's special display showcasing the Butterfly gown and "COME OUT" didactic.

NMAH also highlighted a framed photo of a drag queen in a separate special display in its Flag Hall (main atrium on the second floor) as well as in its *Souvenir Guidebook*, again, as part of its *In Pursuit* programming allegedly designed to celebrate the 250th anniversary of America's independence. The accompanying didactic states: "Drag legend Angel Jack, part of San Francisco's counterculture in the 1970s, wore thrift-store finds and exaggerated makeup to entertain audiences with parodies of gender norms."



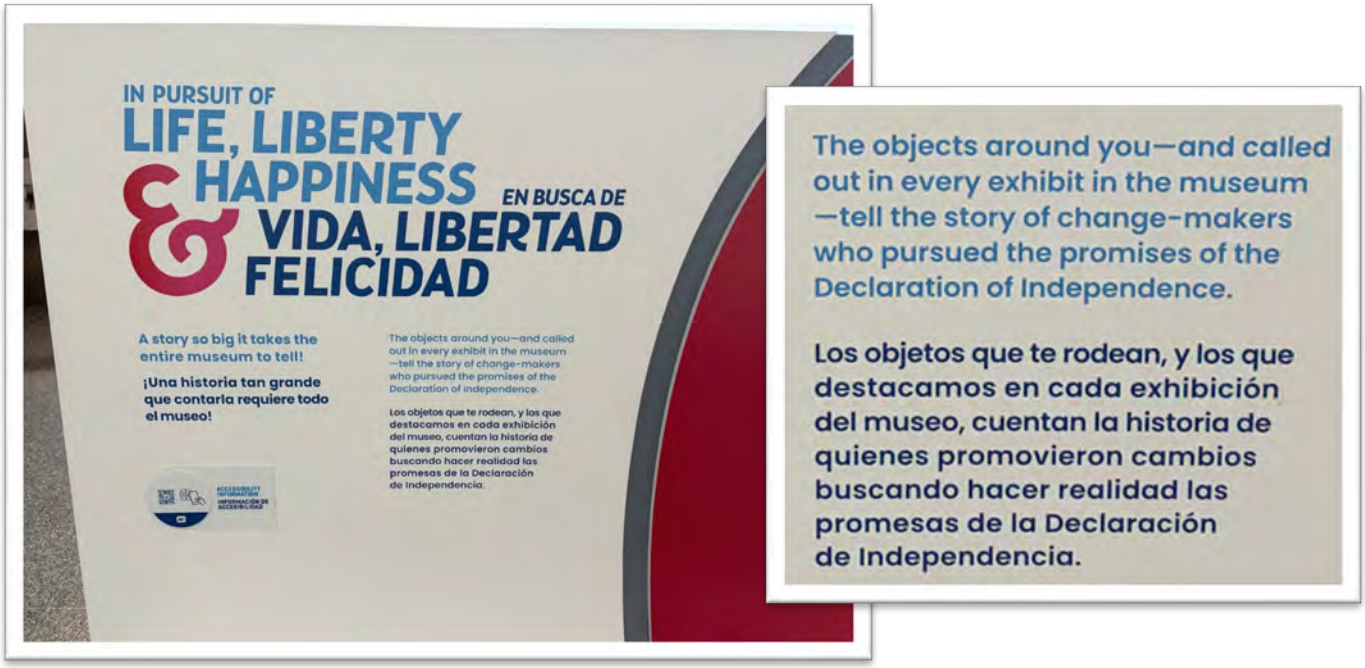
Photos of NMAH's special display showcasing the drag queen framed photo and "ENTERTAIN" didactic.

NMAH was sure to include its 12-foot immigrant farm worker statue of liberty among its 250 objects as well.



Photos of NMAH's "Immokalee Statue of Liberty" and "In Pursuit" sticker.

This is because NMAH's special programming to commemorate America's 250th anniversary is more about American activism than the American Founding. One of the primary informational panels explaining the new "exhibition" reads: "The objects around you—and called out in every exhibit in the museum—tell the story of change-makers who pursued the promises of the Declaration of Independence."



Photos of one of the primary informational panels for the "In Pursuit" exhibit.

What are those promises? Who are those change-makers? Apart from the title of "life, liberty, and happiness," NMAH does not tell visitors.

The Museum refuses to substantively address the Declaration of Independence and Revolutionary War because it does not want visitors thinking about America's Founders or Founding at all. When drafting the words for a welcome sign explaining NMAH's new programming, Director Hartig made sure to include her pronouns ("she/her/hers") but failed to mention any of the Founding Fathers, anything about the Revolutionary War, or anything of substance about America's Founding. Instead, Hartig stated that the focus would be on the "Americans [who] have worked since that time to realize the ideals written into" the Declaration, as well as "the next 250 years," rather than "the revolutionary generation" who signed, fought, and died for it. She stated:

Thank you for joining us this year as we celebrate the 250th anniversary of the Declaration of Independence. Throughout the museum you'll experience the history and legacies of the revolutionary generation, that took a great leap into democracy together in 1776. And you'll see how Americans have worked since that time to realize the ideals written into this groundbreaking document. We are proud to celebrate the birth of the United States and will continue to share the stories of all Americans as we look to the next 250 years.



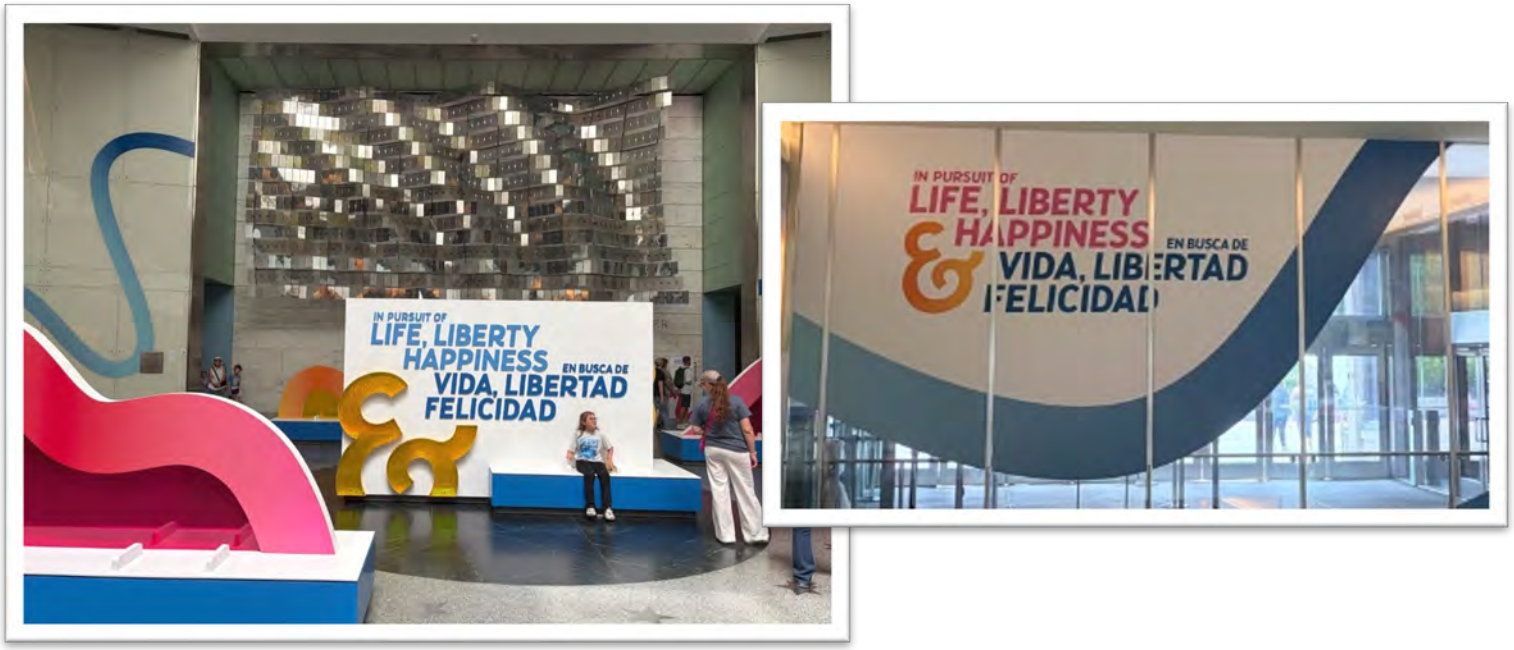
Photos of Director Hartig's welcome sign explaining NMAH's "In Pursuit" programming.

A visitor to the Museum today will not find a single depiction of a Founding Father or other famous American symbol (e.g., Liberty Bell, Statue of Liberty, bald eagle, American flag) on any of the promotional boards surrounding the Museum building or on the covers of the current promotional materials provided to visitors inside the building (e.g., maps, guidebooks). Instead, NMAH's main design theme is white squiggly lines with red and blue backgrounds.



Photos of the "In Pursuit" promotional boards, banners, and signs surrounding the Museum.

Despite being the Museum housing America's most iconic flag, American flags—including new reproductions or depictions of the Star-Spangled Banner—are noticeably absent from the Flag Hall of the Museum and most of the interior decorations.



Photos of the Flag Hall of the Museum and other interior "In Pursuit" decorations.

The only new depiction of the American flag that we could find inside the Museum was wall art depicting two Americans holding up their own American flags at a ceremony honoring a fallen soldier.

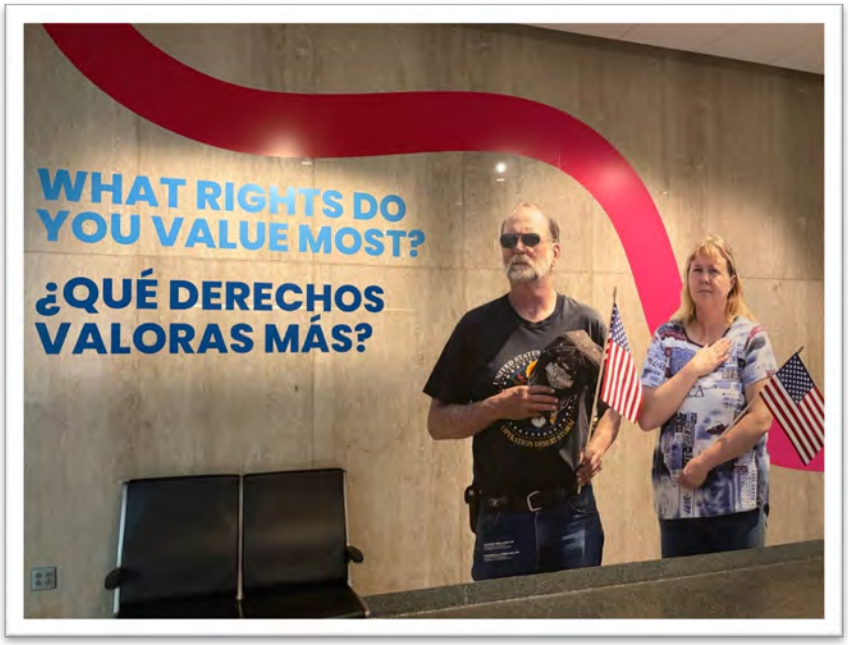
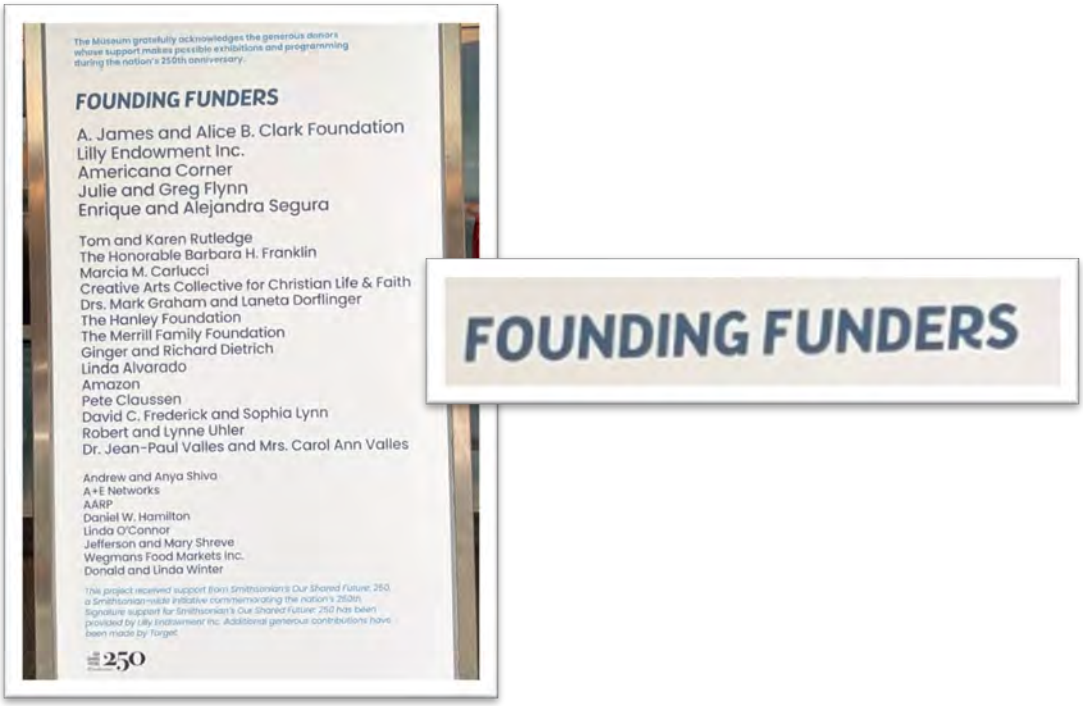


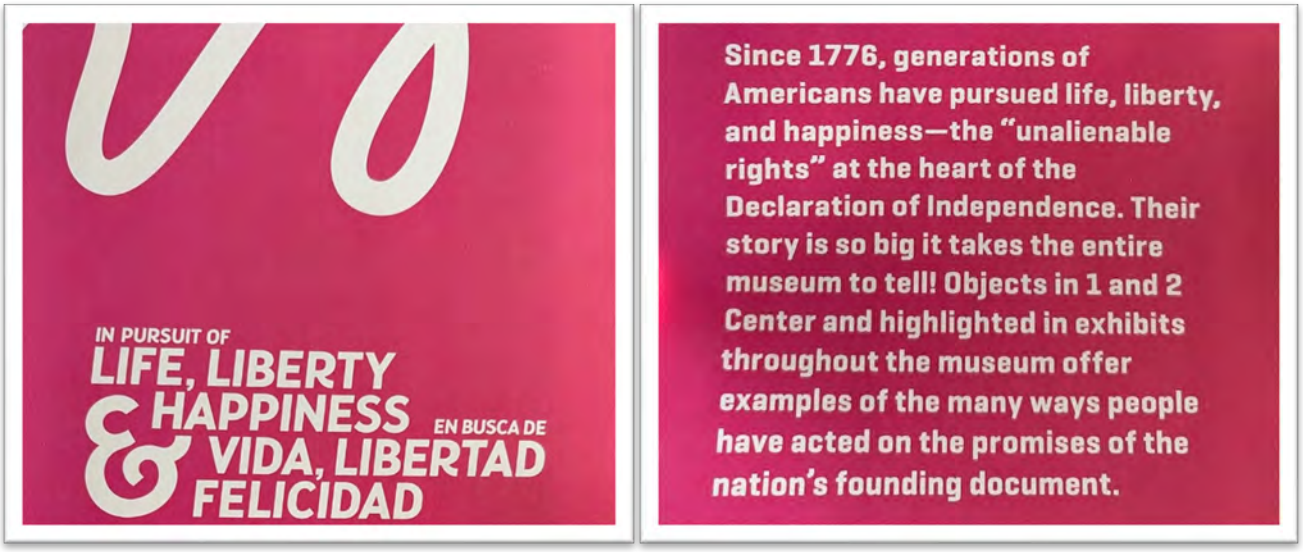
Photo of wall art depicting two Americans holding up American flags at a ceremony honoring a fallen soldier.

In fact, NMAH included a sign with the names of the "Founding Funders" who contributed financially towards its special programming that refuses to substantively address the Founding Fathers.



Photos of the "Founding Funders" sign on display as part of NMAH's "In Pursuit" exhibit.

Even the Museum's new map refuses to utter the phrase "Founding Fathers." The back cover reads: "Since 1776, generations of Americans, have pursued life, liberty, and happiness—the 'unalienable rights' at the heart of the Declaration of Independence. Their story is so big it takes the entire museum to tell! Objects in 1 and 2 Center and highlighted in exhibits throughout the museum offer examples of the many ways people have acted on the promises of the nation's founding document."



Photos of the back of the English version of the museum map for NMAH's "In Pursuit" exhibit.

As with every other material related to America's 250th anniversary, visitors will notice the intentional vagueness here. Not only are the Founding Fathers not mentioned, but there is no reference to any of the brave Americans who fought, sacrificed, and won the Revolutionary War and toiled to establish the enduring constitutional framework of the American Republic.

It quickly becomes clear that the goal of NMAH's *In Pursuit* programming is not to inspire visitors with the exceptional bravery and wisdom of the Founders, nor marvel at the providential Founding and endurance of our Republic, but rather to highlight the activists whom the Museum believes have done what the Founders and Founding ultimately failed to do. In short, NMAH does not seek to celebrate America's 250th anniversary; it seeks to "problematize" it.

By failing to create any new exhibits recognizing the great figures or the key events of the American Revolution or any special presentation on the Declaration of Independence during America's 250th anniversary, NMAH has shown what it looks like to "problematize" and reframe American history away from any "celebratory narrative of U.S. history."[477]

Much like NMAH's *In Pursuit* "exhibition," the Smithsonian's new *American Aspirations* exhibit located within the Smithsonian Castle is a collection of approximately "30 objects from five of the Smithsonian's 21 museums."[478] While referencing "the ideals expressed in the Declaration of Independence," this exhibit likewise fails to tell the story of any of America's Founders or the American Founding, providing incredibly minimal information about the Founders it does mention in passing (i.e., Thomas Jefferson, George Washington, and John Adams).[479] This is because the exhibit is focused on "presenting the promise and aspirations of America," rather than celebrating the Nation's Founders, Founding, and our unparalleled legacy of freedom.[480]

In fact, the opening didactic of the Smithsonian's new *American Aspirations* exhibit states that the ideals of the Declaration have been "in conflict and contested since [America's] founding" and still need to be "fulfill[ed]" and "ma[d]e concrete."[481] Another didactic, "In Pursuit of New Horizons," besmirches one of the opening chapters in American history, editorializing that the "romantic story" of Plymouth is a "tale" that is part of America's "mythic past."[482]

Another didactic entitled "In Pursuit of Fairness" shamefully divides Americans based on race by reducing the decades-long effort to eradicate slavery—pursued by Americans of every background and color—to a racial lens, noting that, "Since the inception of our nation, African Americans fought to abolish slavery, achieve equality and freedom, and overcome segregation through a variety of means: legal recourse, political persuasion, public protests, and non-violent demonstrations," and that "many have found…tragic irony in the phrase 'We hold these truths to be self-evident, that all men are created equal."[483]

Rather than *celebrate* the ideals, heroes, and exceptional achievements of Americans of all backgrounds, the Smithsonian's *American Aspirations* exhibit *critiques* America's alleged contradictions and divides Americans by race. In so doing, the exhibit is the latest example of how the Smithsonian is working to "problematize" and discredit American history during our Nation's 250th anniversary year and is illustrative of the NMAH Interpretive Plan's curatorial

guidelines, which instruct staff to, "whatever the topic," bring exhibits back to a radical ideological framework as part of the Smithsonian's "commitment to relevance."[484]

8. NMAH No Longer Holds Patriotic Ceremonies Celebrating America's Flag

In fact, for many years, NMAH held a hands-on summer "flag folding" program where visitors would unfold a replica of the Star-Spangled Banner in the middle of the Museum each "June, July and August," sing the National Anthem, and then refold the flag.[485] For at least the last five years, NMAH has no longer hosted this program. Even in the 250th year of America's independence, it appears that this program will not be making a return to the Museum. The only flag-related ceremony we found since 2020 under current Smithsonian and NMAH leadership was a June 13, 2022 ceremony to mark the addition of four flags belonging to unincorporated U.S. territories to NMAH's "outdoor display of the 50 state flags and those of Puerto Rico and the District of Columbia" to advance "the museum's role in telling the complicated story of American history."[486]



Screenshot of June 14, 2017 video where "Smithsonian visitors at [NMAH] unfold a replica of the 30x42 foot Star Spangled Banner and sing the National Anthem together," available at https://youtu.be/NS58ilwIa2Q?t=10.

Perhaps the reason NMAH does not devote any substantial attention to the "the symbol of our nation" on "Flag Day" (June 14) is because it is too busy preparing for "June Pride Month/WorldPride in D.C." each year.[487] Last year, NMAH listed on its website its calendar of exhibitions and events for June 2025, and its programming for Flag Day was inviting visitors to visit the Star-Spangled Banner in the same display case where it rests year-round.[488] NMAH announced that its LGBTQ-Pride Month celebrations, however, would begin on May 24, span 12 full days, and include participating in the Washington D.C.'s citywide "WorldPride" event "by hosting a series of programs between May 24 and June 8" that included "ongoing and special displays, a documentary screening, [and] book signing and choral performances."[489]



Screenshot of the "WorldPride" event logo featured on NMAH's website, available at https://americanhistory.si.edu/press/releases/June-2025-calendar.

As Director Hartig explained in a June 2024 presentation, all her attention was focused on flying the Smithsonian Pride Alliance's "intersexual pride flag during June" in 2023 and 2024: "One of the other key policy changes that's just happened this month internally has been—I'm the liaison to the Pride Alliance here—and for the first time in the history of the Smithsonian, we flew the pride flag last year and this year, and so that's a small thing in a way: to fly their intersexual pride flag during June."[490]

This year—America's 250th year of independence—NMAH has failed to schedule or hold any special programming or celebratory activities for Flag Day (June 14), not even one of its traditional flag-folding ceremonies.[491]

9. NMAH No Longer Celebrates America's Independence Day (July 4th)

In fact, NMAH's *Calendar of Exhibitions and Events* for the summer of 2025 reveals that America's national history museum did not devote any special programming to celebrate Independence Day on July 4th, 2025, despite the museum being open that day.[492] Even the article NMAH published describing the NMAH-related programming that would be taking place during July 2025 failed to even refer to "Independence Day" or "July 4."[493] No one reading that article would even know the holiday exists, let alone that the following year—2026—is the 250th anniversary of the drafting and adoption of the Declaration of Independence for which we celebrate it.

Rather, the only NMAH programming in close proximity to July 4th that the Museum highlighted last year was "a screening of 'The Ride Ahead,' a documentary" on July 3rd that "follows Samuel Habib, a typical 21-year-old, itching to move out, start a career and find love."[494] In keeping with its view that the telling of history should result in activism, NMAH explained that, "Following the screening, the filmmakers will be in conversation with lawyer, scholar, activist and community organizer Ly Xīnzhèn M. Zhǎngsūn Brown and the audience."[495]

Even NMAH's Civic Season programming, which uses "history" as a pretext to spur America's youth to become political activists,[496] spans "from Juneteenth (June 19) to the Fourth of July," stopping short on July 3.[497] Indeed, NMAH's "Civic Season 2025" page makes clear that there was "No Programming" on July 4.[498]

Even in 2026—the 250th anniversary year of America's independence—the Smithsonian and NMAH have failed to schedule or hold any special July 4th-only programming for Independence Day.[499]

10. The Smithsonian's Determination to Stage an Intervention with the American People and Focus on America's Flaws During Our 250th Anniversary

These actions are not an oversight, but quite intentional. By its own terms, the leadership of the Smithsonian and NMAH are dedicated to carrying out an intervention with the American people, who must be made to confront "national reckonings" of America's past.[500] If you thought you could spend a day visiting the Capitol with your family to celebrate America's 250th birthday and share in the infinitely rich history of the country you love by visiting America's national history museum, you would be sadly mistaken.

NMAH leadership has openly stated that it seeks to focus on America's flaws this year. In 2020, Director Hartig asserted that the museum profession has "to figure out" how "we're going to problematize" the "250th Anniversary of the signing of the Declaration of Independence in 2026."[501] In 2023, Hartig wrote that "given that we are lurching towards the semiquincentennial of the signing of the Declaration of Independence in 2026, let's focus on the gaps surrounding that document."[502]

Barbara Clark Smith—a NMAH "curator of early American social and political history" and co-curator NMAH's *Upending 1620* exhibit,[503] who was on the Committee responsible for drafting NMAH's current Interpretive Plan[504]—noted in a recent interview posted on NMAH's website that, "The 250th anniversary invites us to reconsider the Declaration's relevance and its role in shaping American identity today" given "the historical and present-day inequities that would have us question the authenticity of these promises."[505] When asked, "What lessons from 1776 are relevant today, and should we celebrate the 250th?" Smith simply replied, "The Revolutionary era teaches us that profound change is possible. Despite inheriting a world structured by deep inequalities, the revolutionaries challenged these norms. They imagined a new order based on the consent of the common people. It's up to us to ask for ourselves: What parts of our history should we celebrate today? What do we regret, and how must we change? Can we unite around shared commitments in order to make a difference?"[506]

In addition, the Smithsonian's programming for America's 250th anniversary is entitled "Our Shared Future: 250," integrating it into the Smithsonian's broader "Our Shared Future" initiative, the only other aspect of which is entitled "Our Shared Future: Reckoning with our Racial Past,"[507] which, according to the Secretary of the Smithsonian, is intended to "explore [the] history and legacy of race and racism" in America.[508] As noted on its website, the initiative seeks to explore "how museums and cultural institutions can serve as an engine for social justice and

the changes needed to end racial and economic inequality" in light of "Black Lives Matter and 2020 and George Floyd."[509]

11. The Smithsonian Proudly Highlighted an Employee's Talk on a Future Where "America Exists in Hindsight" in Its 2023 DEI Initiatives Report

The Smithsonian decided to highlight the entry of one Smithsonian employee in one of its annual DEI initiatives reports, which stated that the employee had "delivered a talk from the perspective of a future when the United States of America (and the Archives of American Art) exists in hindsight."[510] The Smithsonian chose to proudly list a talk about a future where America no longer exists as a contribution to one of its 400+ DEI initiatives that fiscal year.[511]



Screenshot of the Smithsonian highlighting an employee who "delivered a talk from the perspective of when the United States of America…exists in hindsight" as one of its DEI initiatives in its FY 2023 DEI report, available at https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 34.

Chapter V. Conclusion: Ideological Capture at the Museum

We must be committed to restoring truth and sanity in how American history is presented and taught. President Trump's Executive Order of March 2025 notes that the Smithsonian's effort "to rewrite history deepens societal divides and fosters a sense of national shame, disregarding the progress America has made and the ideals that continue to inspire millions around the globe."[512] As a result, to restore the truth of America's story as it regards the Smithsonian Institution, EO 14253 directs the Vice President (as Regent of the Smithsonian) to work with the Assistant to the President for Domestic Policy "to remove improper ideology from such properties, and shall recommend to the President any additional actions necessary to fully effectuate such policies" and with the Director of the Office of Management and Budget to "prohibit expenditure on exhibits or programs that degrade shared American values, divide Americans based on race, or promote programs or ideologies inconsistent with Federal law and policy."[513]

Rather than part of a national trust for the diffusion of knowledge, dedicated to explaining the "infinite richness and complexity of American history,"[514] the National Museum of American History has become an instrument—a "prime tool," as Director Hartig has put it—for a radical, activist cohort dedicated to reframing the American story to serve its ideological ends.[515]

In both theory and practice, NMAH is a clear and institutionalized example of intersectional critical theory—an intellectual framework rooted in Marxism that seeks to radically transform society by revealing and challenging alleged "overlapping systems of oppression"—applied to American history. It fails "to provide America's young people access to what is genuinely inspiring and unifying in our history, as well as to the lessons imparted by the American experience of overcoming great national challenges"—stories and lessons that make "possible the informed and honest patriotism that is essential for a successful republic."[516] Its message does not seek to instill an "American education grounded in the principles of our founding that is accurate, honest, unifying, inspiring, and ennobling," but rather seeks to teach disdain and inspire disgust of our great country.[517]

Today, the Museum fails to "place before millions who visit the Nation's Capital each year a stimulating permanent exposition that commemorates our heritage of freedom and highlights the basic elements of our way of life."[518] It has strayed far from Secretary Carmichael's original vision of a place that "instill[s] in each citizen a deepened faith in our country's destiny as champion of individual dignity and enterprise" and "in each foreign visitor admiration and respect for our ever-expanding social and technological horizons."[519] It has fallen far short of Director Kellogg's hope that it would "awaken in citizen and foreigner alike a clear understanding of the inspiring story of the United States—its origins, struggles, development, traditions, strength."[520] And it has failed to live up to President Johnson's dream that it would record "as William Faulkner expressed it, the agony and the sweat of the human spirit, the victory of freedom and genius of our country" and "the ripe fruit of America's historical harvest" for the children of the Nation.[521] In short, NMAH has failed to maintain the "treasure-house of our inheritance" because it no longer seeks to "illuminate our heritage."[522]

As our nation celebrates its 250th anniversary, NMAH has refused to celebrate the Nation and its history. It has not created any exhibit dedicated to presenting a general narrative of American

history or telling the story of any of our Founding Fathers, the Second Continental Congress, the Declaration of Independence, the American Revolutionary War, or the achievement of independence and the establishment of the constitutional rule of law—even in the 250th anniversary of the first of those pivotal events.

For purposes of policy formulation under EO 14253, this review of the National Museum of American History concludes that NMAH, by the intention and at the direction of current Museum and Smithsonian leadership, has become subject to institutional capture by a radical, activist ideology that is fundamentally opposed to telling the noble, honest story of the great country we know and love.

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[1] David K. Allison & Hannah Peterson, *Exhibiting America: The Smithsonian's National History Museum, 1881-2018* (Feb. 18, 2021), https://www.govinfo.gov/content/pkg/GOVPUB-SI-PURL-gpo152991/pdf/GOVPUB-SI-PURL-gpo152991.pdf, at 50.
[2] *Id.*
[3] *Id.*
[4] *Id*.
[5] *Id.* at 54.
[6] *Id.* at 43.
[7] *Id.* at 44.
[8] *Id.*
[9] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 3:01, https://youtu.be/WaxpiAFKW8o?t=181.
[10] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 41:24, https://youtu.be/QxKVJ1pYcEw?t=2484.
[11] Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.
[12] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 41:24, https://youtu.be/QxKVJ1pYcEw?t=2484.
[13] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 1:03:31, https://youtu.be/QxKVJ1pYcEw?t=3811.
[14] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 14:15, https://youtu.be/CVpbfZnBNu4?t=855.
[15] Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 35:30, https://youtu.be/HERz54an_-c?t=2130.
[16] Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.
[17] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 1:03:31, https://youtu.be/QxKVJ1pYcEw?t=3811.
[18] *See Hamilton* didactic in *Entertainment Nation* exhibit ("Featuring performers of color in the roles of the nation's all-white founders, *Hamilton* struck a chord that reverberated far beyond Broadway. Lin-Manuel Miranda told the story of influential and flawed founding father, Alexander Hamilton. Through rap and hip-hop-and non-white casting—*Hamilton* made this history accessible and relatable to audiences of color and gave more people a sense of ownership of American history."); *Franklin's Electrical Years: Enslaved People in Franklin's Research?*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/electric-dr-franklin/online/enslaved-people (last accessed Mar. 31, 2026) (where NMAH devotes a full 20 percent—one of the five sections—of the exhibit to "Enslaved People," stating that "Benjamin Franklin's remarkable scientific accomplishments were, in part, enabled by slavery," and only in the section's second to last paragraph do we learn that "Franklin became president of the Pennsylvania Society for the Abolition of Slavery in 1787, and supported Pennsylvania's adoption of gradual emancipation," in addition to making the "emancipation of Bob a condition for the Baches to inherit his estate.").

[19] *See, e.g.,* "Creating the Father of Our Country" and "Abraham Lincoln in the Classroom" didactics in NMAH's *American Democracy: A Great Leap of Faith* exhibit; "Assimilation through Public Schools" and "Emblem of America Pitcher, around 1800" didactics in NMAH's *Many Voices, One Nation* exhibit.
[20] *See* "The Pledge of Allegiance" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit ("Francis Bellamy wrote the original Pledge of Allegiance. It was first published in *The Youth's Companion* to coincide with the dedication of the World's Columbian Exposition in Chicago on October 21, 1892, as a way to instill American nationalism through flag ceremonies.").
[21] *See* "What are the Rights and Responsibilities of Citizens?" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit; *see also* Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 439.
[22] *See, e.g.,* "Incorporating Nez Perce Land," "Tataviam Sandstone Mortar and Pestle, used in the 1800s," "Indian Removal in the Midwest," and "Helmet" didactics in NMAH's *Many Voices, One Nation* exhibit; *1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin; *Upending 1620: Where Do We Begin?*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Apr. 7, 2026).
[23] *See, e.g.,* "Negotiating Inclusion" didactic in NMAH's *Many Voices, One Nation* exhibit; Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 429-430 (where Hartig repeatedly demonizes the terms "European," "Anglo-American," and "white male" and treats "immigration restrictions" as a racist and oppressive practice akin to "slavery," "Native American removal," and "Jim Crow); *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 12-13, 147-149 (which was studied by NMAH staff for years and outlines the three-year roadmap to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions." *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41).
[24] *Upending 1620: Where Do We Begin,* NMAH (n.d.) https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Mar. 31, 2026).
[25] *Id*; *see also 1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin.
[26] *See* "Unsettling the Continent, 1492-1776" didactic in NMAH's *Many Voices, One Nation* exhibit.
[27] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 1:03:31, https://youtu.be/QxKVJ1pYcEw?t=3811.
[28] *See, e.g., Problematize*, NEW DISCOURSES (n.d.), https://newdiscourses.com/tftw-problematize/ (last accessed May 28, 2026) (noting that "Problematizing is the functional core of Critical Social Justice and its Theory and activism. To problematize something is to look for, identify, manufacture, and/or 'expose' the 'problematics' in it or associated with it. Problematics are ways in which the phenomenon, entity, person, circumstance, object, etc., under examination falls short of the moral agenda that necessarily lies at the heart of the critical theory examining it (by definition of a critical theory, which must be normative against what it sees as 'oppression' Problematizing is, as adherents to Critical Social Justice and other critical theories would say, the process of making those oppressions (and other moral failings) 'visible.' Put otherwise, problematics are what critical theories criticize, and problematizing is how it does its criticism. The goal of this activity is to replace false consciousness (especially internalized oppression) with critical consciousness (i.e., wokeness) and thus agitate for a social and cultural revolution.). Of particular interest are ways in which those things might marginalize, exclude, minoritize, harm, cause oppression, or maintain or legitimate dominance and injustice through the machinations of systemic power. It is impossible to overstate the central relevance of problematizing to the Theory and praxis of Critical Social Justice. This is because problematizing is the chief epistemological tool of any critical theory, which is taken to a particular extreme in the critical Theories of Critical Social Justice (e.g., critical race Theory, postcolonial Theory, queer Theory, whiteness studies, fat studies, disability studies, gender studies, women's studies, masculinity studies, media studies, and critical pedagogy). That is, problematization is the primary, if not sole, means by which a critical theory

decides whether or not a concept is valid and thus constitutes authentic knowledges (or 'truths')."); Mike Gonzalez & Katharine Cornell Gorka, *Nextgen Marxism: What It Is And How To Combat It* (2024), at 142 (noting that "These terms—*dismantle, centering, disrupt, problematize, interrogate*, all existing words with new revolutionary twists that made up a veritable new dialect—were furnished by a coterie of legal academics who took over an important corner of the law faculty, the area of civil rights."); *see also* Duncan Waite & Khalid Arar, *Problematizing the Social in Social Justice Education,* in *Handbook on Promoting Social Justice in Education* (Denise Mifsud et al. eds., 2020), https://link.springer.com/rwe/10.1007/978-3-030-14625-2_153 at 169; *Problematising History: Indigenous perspectives on Welsh settlement in Patagonia*, THE NATIONAL LIBRARY OF WALES, n.d., https://www.library.wales/discover-learn/external-exhibitions/problematising-history (last accessed May 28, 2026) (discussing a "Problematising History" project that seeks "to reflect critically on settler colonialism and its foundational narratives, where the relationship between indigenous peoples, Welsh immigrants and the Argentine State is portrayed as a harmonious meeting of cultures" and reframe that narrative away from one that "make[s] Mapuche Tehuelche memories invisible and silence[s] their testimonies about forced displacement, territorial dispossession and heritage appropriations" and towards one that highlights the "life experiences, testimonies, and memories that were made invisible, denied or pushed to the margins."); Paul R. Carr, *Whiteness and White Privilege: Problematizing Race and Racism in a Color-blind World and in Education*, INT'L J. CRITICAL PEDAGOGY 1, 1 (2016), https://janeway.uncpress.org/ijcp/article/id/740/, at 7, (arguing "that Whiteness captures different, overlapping and fundamental concerns that shape contemporary societies globally, and can be used to understand, problematize and deconstruct a range of social conditions, interactions, and lived realities for all people" and "concluding with some suggestions for critical engagement in and through education so as to, hopefully, lay the groundwork for social justice and a more socially just society.").

[29] Anthea Hartig et al.*, Modern American History and the Smithsonian,* 6 MOD. AM. HIST., 250 (2023), https://doi.org/10.1017/mah.2023.30, at 244.

[30] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 1:15:36, https://youtu.be/WaxpiAFKW8o?t=4536.

[31] Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 35:30, https://youtu.be/HERz54an_-c?t=2130.

[32] *See Calendar of Exhibitions and Events: July 2025,* NMAH (Jun 12, 2025), https://americanhistory.si.edu/press/releases/July-2025-calendar; *see also Civic Season*, NMAH (n.d.), https://americanhistory.si.edu/explore/topics/civic-season (last accessed Apr. 15, 2026).

[33] *See Strategic Plan 2020-2030*, NMAH (Feb. 2020) (on file with author), at 1; *see also* Screenshot of Director Hartig outlining NMAH's new mission, available at https://youtu.be/QxKVJ1pYcEw?t=2578.

[34] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 1:15:36, https://youtu.be/WaxpiAFKW8o?t=4536.

[35] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 41:24, https://youtu.be/QxKVJ1pYcEw?t=2484.

[36] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 1:20:34, https://youtu.be/CVpbfZnBNu4?t=4834.

[37] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 3:01, https://youtu.be/WaxpiAFKW8o?t=181.

[38] *See, e.g.,* Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.

[39] *See, e.g.,* Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 32:00, https://youtu.be/WaxpiAFKW8o?t=1920; *Id.* at 1:24:15, https://youtu.be/WaxpiAFKW8o?t=5055.

[40] *See, e.g.,* Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future,* (YouTube, Sept. 20, 2022) at 15:45 https://youtu.be/CVpbfZnBNu4?t=948; *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf (last accessed Mar. 30, 2026).

[41] *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf (last accessed Mar. 30, 2026).
[42] *See, e.g.,* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 4 (noting that NMAH's "Decolonization/Restorative History plan" was "called for in the Strategic Plan"); *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf, at 10 (last accessed Mar. 30, 2026); *see also* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan 26, 2022) at 50:23, https://www.youtube.com/watch?v=HERz54an_-c&t=3023s (where Hartig references the existence of the Decolonization Plan); Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future,* (YouTube, Sept. 20, 2022) at 9:49, https://youtu.be/CVpbfZnBNu4?t=589 (where Hartig notes that the Strategic Plan "called out for three subsequent plans: Collections Plan, Interpretive Plan, and a Decolonization Plan").
[43] *See, e.g.,* Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 3:01, https://youtu.be/WaxpiAFKW8o?t=181; *Transcript: From 'Our Divided Nation' to 'Our Shared Future': Museums and the Advancement of Equity and Understanding*, OUR SHARED FUTURE (Oct. 27, 2021), https://web.archive.org/web/20250328103327/https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding#transcript.
[44] *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 7.
[45] *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41; *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf.
[46] *Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, THE SMITHSONIAN (2023), https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 3-4.
[47] *See, e.g., Undocumented Organizing Collecting Initiative*, NMAH (n.d.), https://web.archive.org/web/20240724002347/https://americanhistory.si.edu/about/centers/restorative-history/projects/uoci?utm_source=web&utm_medium=calendar (last accessed Mar. 31, 2026); Anna Diamond, *How the Smithsonian Is Documenting the Work of Immigrant Rights Activists*, SMITHSONIAN MAG. (Feb. 21, 2020), https://web.archive.org/web/20241204082257/https://www.smithsonianmag.com/smithsonian-institution/how-smithsonian-documenting-undocumented-political-organizing-movements-180974220/; Nancy Bercaw & Patricia Arteaga, *Redefining 'American'*, AMERICAN ALLIANCE OF MUSEUMS (Sept. 1, 2020), https://www.aam-us.org/2020/09/01/redefining-american/.
[48] Anna Diamond, *How the Smithsonian Is Documenting the Work of Immigrant Rights Activists*, SMITHSONIAN MAG. (Feb. 21, 2020), https://web.archive.org/web/20241204082257/https://www.smithsonianmag.com/smithsonian-institution/how-smithsonian-documenting-undocumented-political-organizing-movements-180974220/ ("The curatorial team has settled on six different locations to conduct their collecting: Washington, D.C., Southern California (Orange County and Los Angeles), Chicago, Nebraska, North Carolina in the U.S. and Mexico City in Mexico. Each city corresponds to a pattern in immigration and organizing identified in their research. For example, Mexico City is where many who have been deported from the U.S. currently live in large numbers and are organizing to bring awareness to their situation.").
[49] *See* NMAH's "Tell Me What Democracy Looks Like" graphic, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like; Screenshot of Anthea Hartig's Screen at Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 21:54, https://youtu.be/CVpbfZnBNu4?t=1314.
[50] *See, e.g.,* Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 436; "Is Gender Testing Fair?" didactic currently on display at NMAH's *Change Your Game* exhibit; *We Belong Here: Explore Online*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/we-belong-here/online; Dangerous Girls" didactic in NMAH's

Girlhood (It's Complicated) exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery; "Fashion (remix)" wall and didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery; "Trans nonbinary" skateboarder Leo Baker's chest binder on display at NMAH's "We Belong Here" exhibit, available at https://americanhistory.si.edu/explore/exhibitions/we-belong-here/online/leo-baker.

[51] *See, e.g.,* "Dear Diary…" display with Ryan's diary pages in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery (discussing how she struggled with the idea of "getting boobs" and praying "every night for my penis to grow."); "What is love?" movie theater video and other videos in NMAH's *Entertainment Nation* exhibit.

[52] Exec. Order No. 14,253, 90 Fed. Reg. 14,563 (Apr. 3, 2025) (Restoring Truth and Sanity to American History).

[53] *Id.*

[54] *National Museum of American History – Strategic Plan: 2013-2018*, NMAH (2013), https://amhistory.si.edu/docs/nmah_strategicplan_2013.pdf (showing NMAH's previous mission statement).

[55] *See* Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025), https://youtu.be/WaxpiAFKW8o?t=181 (with Hartig noting that "History as a practice...is for me a prime tool of social justice.").

[56] Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 5, 2020) (Executive Order on Establishing the President's Advisory 1776 Commission).

[57] *Id.*

[58] David K. Allison & Hannah Peterson, *Exhibiting America: The Smithsonian's National History Museum, 1881-2018* (Feb. 18, 2021), https://www.govinfo.gov/content/pkg/GOVPUB-SI-PURL-gpo152991/pdf/GOVPUB-SI-PURL-gpo152991.pdf, at 50.

[59] *Id.*

[60] *Id.* a 54.

[61] *Id.* at 44.

[62] *Id.* at 44-45.

[63] 20 U.S.C. § 41.

[64] *See* the Smithsonian's 2023 tax filing (Form 990, Schedule G, Part IV), https://projects.propublica.org/nonprofits/organizations/530206027/202542239349300544/full (noting that the Smithsonian Institution "IS A TRUST INSTRUMENTALITY OF THE U.S. AND AS SUCH IS EXEMPT FROM STATE REGULATIONS PURSUANT TO THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.").

[65] 20 U.S.C. § 41 *et seq*.

[66] *The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act*, 12 Op. O.L.C. 122 (1988), https://www.justice.gov/file/150986/dl?inline.

[67] *Immunity of Smithsonian Institution from State Insurance Laws*, 21 Op. O.L.C. 81, 86 (1997), https://www.justice.gov/file/146711/dl?inline.

[68] Office of General Counsel, *Legal History*, THE SMITHSONIAN (n.d.), https://www.si.edu/ogc/legalhistory (last accessed June 4, 2026).

[69] *Id.*

[70] Exec. Order No. 14,253, 90 Fed. Reg. 14,563 (Apr. 3, 2025) (Restoring Truth and Sanity to American History).

[71] *Id.*

[72] *See* NMAH Facilities Master Plan Update, May 2018 (on file with author) (noting that "The National Museum of American History is the nation's primary exhibition and research center for exploring, celebrating, and telling the American story.").

[73] In contrast, the NMAH-endorsed *Reframing History* report views "talking about historical 'truth'" and "reporting on 'just the facts'" as unhelpful because it "will cue unproductive thinking about truth versus bias and will lead people to assume that interpretations about the past—including those made by historians—are inherently 'biased.'" *Making History Matter: From Abstract Truth to Critical Engagement,* AASLH (Feb. 2022), https://download.aaslh.org/Research/FWI-Reframing-History-Report.pdf, at 6, 8.

[74] *See* Letter from Vince Haley, Dir., Domestic Policy Council, Lindsey Halligan, White House Senior Assoc., & Russ Vought, Dir., Office of Mgmt. & Budget, to Lonnie G. Bunch III, Sec'y, Smithsonian Inst. (Aug. 12, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/08/Letter-Sec.-Bunch-Smithsonian-8.12.2025.pdf.

[75] In January 2026, 12 of the 16 advertising boards placed on sidewalks around the museum highlighted just two exhibits: *Corazon y Vida: Lowriding Culture*, highlighting Mexican-Americans and Mexican culture, and *How Can You Forget Me: Filipino American Stories*, highlighting Filipino-Americans and Filipino culture.
[76] The museum profession has catechized and codified the ideological dogma of DEI to such an astonishing degree that to begin to understand and unpack the academic underpinnings of this radical ideological framework would itself need to be the subject of a separate update. One example illustrative of this ideological radicalism is NMAH's decision to host "a recurring meeting for NMAH staff members to meet, discuss and read the MASS Action Toolkit" since 2019. *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41. MASS Action stands for "Museums as a Site for Social Action." The toolkit outlines the three-year roadmap to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions." *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 12-13.
[77] In 2021, the Mellon Foundation allocated $72 million to "racial justice" projects aimed at shedding a public spotlight on "the nation's racist past" and bringing about "cultural and social transformation." *Mellon Awards $72M+ to Teams Led by Humanities Scholars to Ensure "Just Futures" and Expand National Cultural Narratives*, MELLON FOUND. (Jan. 13, 2021), https://www.mellon.org/news/mellon-awards-more-than-72-million-to-teams-led-by-humanities-scholars-to-ensure-just-futures-and-expand-national-cultural-narratives. It has also subsidized other social justice projects on "Ecowomanism," "Transfeminisms," "Racial Colonial Capitalism," "Environmental Anti-Racism," "Black Trans Studies," and "Visualizing Abolition," a project that "promotes research and art that calls for the elimination of prisons." *See* John D. Sailer, *The Mellon Foundation's Idea of 'Social Justice'*, WALL ST. J. (Feb. 6, 2026), https://www.wsj.com/opinion/the-mellon-foundations-idea-of-social-justice-d73cebf7?
[78] The Smithsonian's intertwinement with the dogma of DEI is too voluminous and all-encompassing to be adequately addressed here. As such, it will be the subject of a future update.
[79] *History*, NMAH, https://americanhistory.si.edu/about/history (last accessed May 1, 2026).
[80] *Id.*; *Record Unit 250*, SMITHSONIAN INSTITUTION ARCHIVES (n.d.), https://siarchives.si.edu/collections/siris_arc_216814 (last accessed May 1, 2026).
[81] Blue Ribbon Comm'n on the Nat'l Museum of Am. History, *Report of the Blue Ribbon Commission on the National Museum of American History* (2002), https://americanhistory.si.edu/reports/brc/2a.htm.
[82] *History*, NMAH, https://americanhistory.si.edu/about/history (last accessed May 1, 2026) (noting that "some 4 million visitors a year have passed through the doors to enjoy the museum's exhibitions, public programs, educational activities, collections, and research facilities"); *see also* NMAH Facilities Master Plan Update, May 2018, at 10 (on file with author) (noting that "the Museum welcomes more than 3.8 million visitors a year, supports over 500 staff, and operates 364 days a year on a 12.8 acre site, and in a 750,000 square foot, 6–level structure, prominently located on the National Mall.").
[83] *History*, NMAH, https://americanhistory.si.edu/about/history (last accessed May 1, 2026).
[84] *Smithsonian Fiscal Year 2023 Budget Justification to Congress*, THE SMITHSONIAN (Apr. 2022), https://www.si.edu/sites/default/files/about/smithsonianfy2023budgetrequestcongress.pdf; *Smithsonian Fiscal Year 2024 Budget Justification to Congress*, THE SMITHSONIAN (Mar. 2023), https://www.si.edu/sites/default/files/about/fy2024-budgetrequestcongress.pdf (noting that "The NMAH's vision is a timely reflection of its status as the Smithsonian's flagship history museum").
[85] Blue Ribbon Comm'n on the Nat'l Museum of Am. History, *Report of the Blue Ribbon Commission on the National Museum of American History* (2002), https://americanhistory.si.edu/reports/brc/2a.htm.
[86] *Id.*
[87] *Women are increasingly getting the top museum jobs. Will more of them finally get equal pay?* CIMAM (July 5, 2019), https://cimam.org/news-archive/women-are-increasingly-getting-top-museum-jobs-will-more-them-finally-get-equal-pay/ (noting that Hartig "took over the National Museum of American History for $300,000").
[88] *See* the Smithsonian's FY 2024 tax filing (Form 990, Schedule J), https://projects.propublica.org/nonprofits/organizations/530206027/202542239349300544/full (listing $989,566 as the Secretary of the Smithsonian's total compensation in 2023); the Smithsonian's FY 2019 tax filing (Form 990, Schedule J), https://projects.propublica.org/nonprofits/organizations/530206027/202022279349301432/full.

[89] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 41:24, https://youtu.be/QxKVJ1pYcEw?t=2484; *see also* Alice George, *Why Museums Are Primed to Address Racism, Inequality in the U.S.*, SMITHSONIAN MAG. (Nov. 4, 2021), https://www.smithsonianmag.com/smithsonian-institution/why-museums-are-primed-address-racism-inequality-us-180978992/ (in which Hartig states, "I think that it's possible for us to create a very complicated landscape of interwoven narratives in which we see the intersections. . .where we understand the solidarities, where we know and come together to make change"); Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179 (in which Hartig asks, "And what is the role that women historians can have in connecting schools, universities, and communities in the project of promoting change and greater social and gender justice?").
[90] Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.
[91] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 1:20:34, https://youtu.be/CVpbfZnBNu4?t=4834.
[92] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 3:01, https://youtu.be/WaxpiAFKW8o?t=181.
[93] *About*, NMAH (n.d.), https://americanhistory.si.edu/about (last accessed Mar. 31, 2026); AASLH, *Reframing History: A Conversation at the Smithsonian National Museum of American History*, (YouTube, Mar. 1, 2022) at 1:55, https://youtu.be/IQv2tN9p5_E?t=115 (Hartig: "We've dedicated ourselves and my incredible staff and board and volunteers to becoming the most inclusive, relevant, accessible, and sustainable museum in the nation."); *see also* Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179 ("As we move toward and through the semiquincentennial toward realizing our vision in 2030 to be the most inclusive, accessible, relevant, and sustainable history museum in the nation…").
[94] *National Museum of American History – Strategic Plan: 2013-2018*, NMAH (2013), https://amhistory.si.edu/docs/nmah_strategicplan_2013.pdf (showing NMAH's previous mission statement).
[95] *Strategic Plan 2020-2030*, NMAH (Feb. 2020) (on file with author), at 1. Despite listing its Interpretive and Collection Plans on its website, NMAH's current Strategic Plan is noticeably absent on the "Plans and Reports" page of its website. We had to request a copy after the Smithsonian failed to provide the Plan in its initial document productions. *See Plans and Reports,* NMAH, https://americanhistory.si.edu/about/reports (last accessed Mar. 30, 2026). Also absent from NMAH's website is its "Decolonization/Restorative History plan" cited on page 4 of NMAH's Collections Plan as being "called for in the Strategic Plan" (although there is no reference to such a plan in the version of the Strategic Plan the Smithsonian provided to us) and referenced by Director Hartig as in existence in a January 2022 lecture. *See* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 50:23, https://www.youtube.com/watch?v=HERz54an_-c&t=3023s.
[96] *Compare National Museum of American History – Strategic Plan: 2013-2018*, NMAH (2013), https://amhistory.si.edu/docs/nmah_strategicplan_2013.pdf, *with Strategic Plan 2020-2030*, NMAH (Feb. 2020) (on file with author). It is also worth noting that since removing "rigorous research" from its mission, the Smithsonian website reports that NMAH staff have been consistently publishing fewer and fewer academic studies and books. *See Publication History for NMAH-American History*, SMITHSONIAN DASHBOARD, https://dashboard.si.edu/research (last accessed Mar. 30, 2026).
[97] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 3:01, https://youtu.be/WaxpiAFKW8o?t=181.
[98] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 1:15:36, https://youtu.be/WaxpiAFKW8o?t=4536.
[99] *Id.* (cleaned up).
[100] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 1:13:40, https://youtu.be/WaxpiAFKW8o?t=4420.
[101] *See* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 20:25, https://youtu.be/HERz54an_-c?t=1225.
[102] Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 20:25, https://youtu.be/HERz54an_-c?t=1225.

[103] *Id.* at 35:30, https://youtu.be/HERz54an_-c?t=21 30.
[104] *Id* at 29:31, https://y outu.be/HERz54an_-c?t=1772.
[105] *Id* at 30:16, https://youtu.be/HERz54an_-c?t=1816.
[106] *Id* at 26:21, https://youtu.be/HERz54an_-c?t=1581.
[107] *Id* at 28:18, https://youtu.be/HERz54an_-c?t=1698.
[108] *Id* at 31:32, https://youtu.be/HERz54an_-c?t=1892.
[109] *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf.
[110] *Id.*
[111] Alice George, *Why Museums Are Primed to Address Racism, Inequality in the U.S.*, SMITHSONIAN MAG. (Nov. 4, 2021), https://www.smithsonianmag.com/smithsonian-institution/why-museums-are-primed-address-racism-inequality-us-180978992/.
[112] *See* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 4 (noting that NMAH's "Decolonization/Restorative History plan" was "called for in the Strategic Plan"); *See Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf, at 10 (last accessed Mar. 30, 2026); *see also* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan 26, 2022) at 50:23, https://www.youtube.com/watch?v=HERz54an_-c&t=3023s (where Hartig references the existence of the Decolonization Plan); Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future,* (YouTube, Sept. 20, 2022) at 9:49, https://youtu.be/CVpbfZnBNu4?t=589 (where Hartig notes that the Strategic Plan "called out for three subsequent plans: Collections Plan, Interpretive Plan, and a Decolonization Plan"). However, to date, the Smithsonian has failed to produce NMAH's "Decolonization Plan" to the White House.
[113] Letter from the Smithsonian Institution to the White House (Apr. 20, 2026) (on file with the author) (asserting that "No Decolonization/Restorative History Plan exists. While the 2020 NMAH Strategic Plan called for one, efforts to produce that plan were disbanded as such a plan was not prudent or possible. Likewise, the Decolonization Working Group no longer exists. Similarly, there is also no *New Collections Interpretive Decolonization Plan*, nor has there ever been one.").
[114] *See* Summary of the Smithsonian's Document Productions to the White House (on file with the author); NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 5 (noting "the Decolonization Plan's pursuit of restorative justice through history").
[115] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 15:45, https://youtu.be/CVpbfZnBNu4?t=948 (Hartig: "The hopes that we had to create a true Decolonization Plan have grown and were challenged and have beautifully come into another being, if you will, in the form of the emergent Center for Restorative History—this practice developed by many, including those on the call with me…spearheaded by Tsione Wolde-Michael and Dr. Nancy Bercaw.").
[116] *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf (last accessed Mar. 30, 2026).
[117] *Id.*
[118] *Id.*
[119] At the same time that the Center was created in 2019, and continuing for the next three years, there was "a recurring meeting for NMAH staff members to meet, discuss and read the MASS Action Toolkit." *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41. MASS Action stands for "Museums as a Site for Social Action." The toolkit outlines the three-year roadmap to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions." *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 12-13.
[120] *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf (last accessed Mar. 30,

2026). The Center's recommended reading for its audiences includes a variety of materials divided into six categories: (1) "Restorative Justice" with titles like *Decolonizing Restorative Justice*; (2) "Reconciliation, Transitional Justice, and Reparative Practice" with titles like *Restorative Justice and Reparations*; (3) "Decolonization and Museums" with titles like *Decolonization Is Not a Metaphor* and *Decolonizing the Smithsonian*; (4) "Collections and Community Engagement" with titles like *Museums, African Collections and Social Justice*, *Ten Principles for an Anti-Racist, Anti-Orientalist, Activist Approach to Collections*, and *Legacies of Colonialism in Museum Documentation*; (5) "Museum Theory and Practice" with titles like *Centering Intersectional Feminism Online* and *The Future of Archaeology Is Antiracist*; and (6) "History of Museums," with titles like *Rethinking Settler Colonialism* and *From Scientific Racism to Human Prehistory in Museums*. *See Bibliography for Further Reading and Listening*, NMAH CENTER FOR RESTORATIVE HISTORY, https://americanhistory.si.edu/sites/default/files/CRH%20Website%20Bibliography.pdf (last accessed Mar. 30, 2026).

[121] *Center for Restorative History*, NMAH, https://americanhistory.si.edu/about/centers/restorative-history (last accessed Mar. 30, 2026) (cleaned up).

[122] While the page outlining CRH's UOCI no longer exists on NMAH's website, an archived version can still be found online. *See Undocumented Organizing Collecting Initiative*, NMAH (n.d.), https://web.archive.org/web/20240724002347/https://americanhistory.si.edu/about/centers/restorative-history/projects/uoci?utm_source=web&utm_medium=calendar (last accessed Mar. 31, 2026).

[123] *Undocumented Organizing Collecting Initiative*, NMAH (n.d.), https://web.archive.org/web/20240724002347/https://americanhistory.si.edu/about/centers/restorative-history/projects/uoci?utm_source=web&utm_medium=calendar (last accessed Mar. 31, 2026).

[124] Anna Diamond, *How the Smithsonian Is Documenting the Work of Immigrant Rights Activists*, SMITHSONIAN MAG. (Feb. 21, 2020), https://web.archive.org/web/20241204082257/https://www.smithsonianmag.com/smithsonian-institution/how-smithsonian-documenting-undocumented-political-organizing-movements-180974220/ (noting that "The curatorial team has settled on six different locations to conduct their collecting: Washington, D.C., Southern California (Orange County and Los Angeles), Chicago, Nebraska, North Carolina in the U.S. and Mexico City in Mexico. Each city corresponds to a pattern in immigration and organizing identified in their research. For example, Mexico City is where many who have been deported from the U.S. currently live in large numbers and are organizing to bring awareness to their situation.").

[125] *Id*; After losing his election, Sheriff Carmichael sat down for an interview with a local news station, which reported that "the biggest push back Carmichael faced was for 287G - the immigration program, that was in place long before Carmichael became Sheriff, that flags criminals who are in the country unlawfully. 'Top 4 crimes in Mecklenburg County for 287G: DWI is 1, assault on a female is 2, both of those are misdemeanors,' said Sheriff Carmichael. 'The third and fourth ones are felonies. Third one is trafficking heroin and the fourth one is indecent liberties with a child.'" *Mecklenburg County Sheriff reflects on success, criticism as term ends*, WBTV (Nov. 21, 2018), https://www.wbtv.com/2018/11/21/mecklenburg-county-sheriff-reflects-success-criticism-term-ends/. In other words, CRH chose to document the stories of illegal aliens who ousted a sheriff for helping ICE deport hundreds of criminals from American communities.

[126] Anna Diamond, *How the Smithsonian Is Documenting the Work of Immigrant Rights Activists*, SMITHSONIAN MAG. (Feb. 21, 2020), https://web.archive.org/web/20241204082257/https://www.smithsonianmag.com/smithsonian-institution/how-smithsonian-documenting-undocumented-political-organizing-movements-180974220/.

[127] *Id.*

[128] Nancy Bercaw & Patricia Arteaga, *Redefining 'American'*, AMERICAN ALLIANCE OF MUSEUMS (Sept. 1, 2020), https://www.aam-us.org/2020/09/01/redefining-american/.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Resiliency + Hope—Highlights Report 2021*, NMAH (2021), https://amhistory.si.edu/docs/NMAH_report_2021.pdf.

[133] *Compare* Original NMAH "Tell Me What Democracy Looks Like" Page, available at https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like *with* Archived Version of

NMAH's "Tell Me What Democracy Looks Like" Page, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like.
[134] *See* Navigation Panel on an Archived Version of NMAH's "Tell Me What Democracy Looks Like" Page, available at https://web.archive.org/web/20230206065951/https://americanhistory.si.edu/tell-me-what-democracy-looks-like/esther-jeon.
[135] *See* NMAH's "Tell Me What Democracy Looks Like" graphic, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like.
[136] *Tell Me What Democracy Looks Like: Learning from Undocumented Organizers*, SMITHSONIAN LEARNING LAB (last modified Feb. 5, 2025), https://learninglab.si.edu/collections/tell-me-what-democracy-looks-like-learning-from-undocumented-organizers/jio9sA5r6OIWbgqQ.
[137] *Survival, Compassion, and Connection: Jung Woo Kim on Organizing through Mutual Aid*, NMAH (n.d.), https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim (last accessed Apr. 15, 2026).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *See* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 2 (noting that "For instance, as the strategic plan compels and inspires us to collect from underrepresented communities (so as to challenge traditionally exclusionary historical narratives), we do so in a spirit of collaboration, building relationships and trust. In all our collecting, we creatively balance acquisition of collections that extend the reach and utility of our holdings with alternatives to outright ownership that sustain partnerships, avoid duplication, and conserve resources").
[142] *See* Screenshot of Anthea Hartig's Screen at Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 21:54, https://youtu.be/CVpbfZnBNu4?t=1314.
[143] *See id*.
[144] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 14:15, https://youtu.be/CVpbfZnBNu4?t=855 (where Hartig states, "As we all know in this conference, loving America is very complicated.").
[145] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 9:32, https://youtu.be/CVpbfZnBNu4?t=572.
[146] *See* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 30:16, https://youtu.be/HERz54an_-c?t=1816.
[147] *Id; id* at 31:32, https://youtu.be/HERz54an_-c?t=1892.
[148] *See Becoming US: About*, NMAH (n.d.) (last accessed Apr. 4, 2026), https://americanhistory.si.edu/becoming-us/about; *Becoming US,* NMAH (n.d.), https://americanhistory.si.edu/becoming-us/ (last accessed May 8, 2026) (noting that the *Becoming US* educational curriculum seeks to answer "How did we become US?" and focus people's attention to peoples, cultures, and languages that came "long before the founding of the United States[.]").
[149] *About*, NMAH (n.d.) (last accessed Apr. 4, 2026), https://americanhistory.si.edu/becoming-us/about.
[150] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 4, 2026); Larry Ferlazzo, *The Smithsonian Releases New Curriculum on U.S. Migration & Immigration History*, LARRY FERLAZZO BLOG (Nov. 17, 2019), https://larryferlazzo.edublogs.org/2019/11/17/the-smithsonian-releases-new-curriculum-on-u-s-migration-immigration-history/.
[151] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 7, 2026).
[152] *Id.*
[153] *Becoming Us – Glossary of Terms*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/sites/default/files/downloads/NMAH_Becoming%20Us_Glossary.pdf (last accessed June 11, 2026), at 16.
[154] *Id.*

[155] *See, e.g.,* Arizona v. United States, 132 S. Ct. 2492, 2497 (2012), https://www.law.cornell.edu/supremecourt/text/11-182 (holding that "Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens" and citing the Immigration Reform and Control Act of 1986 (IRCA), which the Court describes as "a comprehensive framework for 'combating the employment of illegal aliens,' *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137"); Presidential Memorandum on Deterring Illegal Immigration, 60 Fed. Reg. 7885 (Feb. 7, 1995), https://www.govinfo.gov/content/pkg/FR-1995-02-10/pdf/95-3554.pdf (where President Clinton notes that "this Administration is the first to obtain funding from the Congress to reimburse States for a share of the costs of incarcerated illegal aliens.").
[156] *See, e.g., id.*; 8 U.S.C. §1365, https://www.law.cornell.edu/uscode/text/8/1101; 8 U.S.C. §1101 (a)(3), https://www.law.cornell.edu/uscode/text/8/1101.
[157] *Over Border on Bicycle*, N.Y. TIMES (Aug. 15, 2026), https://timesmachine.nytimes.com/timesmachine/1926/08/15/104211201.html.
[158] *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *See Immigrant Law Group PC*, INFLUENCE WATCH (n.d.), https://www.influencewatch.org/for-profit/immigrant-law-group-pc/ (last accessed May 5, 2026).
[164] *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026); *see* Infographic created by the for-profit law firm, Immigrant Law Group PC, that NMAH encourages high school teachers to pass out to students, available at https://web.archive.org/web/20240727121953/https://www.riohondo.edu/dreamers/wp-content/uploads/sites/71/2016/11/DACA-infographic-copy-4-low-low-res-1024x791.jpg.
[165] *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026); *see* Vox, *DACA, explained* (YouTube, Sept. 6, 2017) (pro-DACA YouTube video that NMAH recommends high school teachers across America play for their students in the classroom), https://youtu.be/UzYDqQDNFzc?t=297.
[166] Vox, *DACA, explained* (YouTube, Sept. 6, 2017) (pro-DACA YouTube video that NMAH recommends high school teachers across America play for their students in the classroom), https://youtu.be/UzYDqQDNFzc?t=297.
[167] *See id.*
[168] *See* Matthew Green, *TIMELINE: Inside the Epic, Ongoing Battle over DACA*, KQED (Feb. 26, 2018), https://www.kqed.org/lowdown/28184/how-we-got-here-the-rise-and-demise-of-daca-with-lesson-plan.
[169] *See id*.
[170] *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026).
[171] Dara Lind, *Trump just turned DACA into a ticking time bomb for 800,000 immigrants*, VOX (Sept. 5, 2017), https://web.archive.org/web/20180816145228/https://www.vox.com/2017/9/5/16252648/trump-daca-end-deadline.
[172] *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026).
[173] *Id.*
[174] *Id.*
[175] *About*, NMAH (n.d.) (last accessed Apr. 4, 2026), https://americanhistory.si.edu/becoming-us/about.
[176] *Compare* "Becoming US" Essential Understandings and other educational materials *with Many Voices, One Nation's* opening display and didactics.
[177] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 6, 2026) (noting that "There is no single American culture, language, or narrative.").
[178] *Many Voices, One Nation*, NMAH (n.d.) (last accessed Apr. 6, 2026), https://americanhistory.si.edu/explore/exhibitions/many-voices.
[179] *See* "Establishing the United States" didactic in NMAH's *Many Voices, One Nation* exhibit.

[180] *Original Design of the Great Seal of the United States (1782)*, NATIONAL ARCHIVES (n.d.), https://www.archives.gov/milestone-documents/original-design-of-the-great-seal-of-the-united-states (last accessed June 12, 2026).
[181] *Congress Adopts the Great Seal of the United States*, HISTORY.COM (Nov. 13, 2009), https://www.history.com/this-day-in-history/june-20/congress-adopts-the-great-seal-of-the-united-states.
[182] *Id.*
[183] *See, e.g.,* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000), https://www.amren.com/news/2018/11/alexander-keyssar-history-of-the-right-to-vote/ (noting that "In the late colonial period, perhaps just under 60 percent of white men owned property and could vote."); *What Are Property Qualifications?*, SPIEGATO (n.d.), https://spiegato.com/en/what-are-property-qualifications? (last accessed June 12, 2026); *Chapter 1.0. Voting Rights in Early America, Introduction*, UNIV. OF WISCONSIN-MADISON (n.d.), https://wisc.pb.unizin.org/ls261/chapter/part-1-the-road-to-partial-democracy/ (last accessed June 12, 2026) (noting that "The linchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property.").
[184] *See* "Germans in Pennsylvania" didactic in NMAH's *Many Voices, One Nation* exhibit.
[185]*Many Voices, One Nation: Explore Online*, NMAH (n.d.) (last accessed Apr. 7, 2026), https://americanhistory.si.edu/explore/exhibitions/many-voices/online.
[186] *See Many Voices, One Nation: Explore Online*, NMAH (n.d.) (last accessed Apr. 7, 2026), https://americanhistory.si.edu/explore/exhibitions/many-voices/online (noting that "The people of North America came from many cultures and spoke different languages long before the founding of the United States, even before European contact. In creating the new nation, early leaders envisioned a country that promised opportunity and freedom—but only for some. As the population grew, the people who lived in the United States found ways to negotiate, or work out, what it meant to be American. That negotiation continues. This exhibition explores how the many voices of people in America have shaped our nation.").
[187] *See* introductory didactic in NMAH's *Many Voices, One Nation* exhibit (noting that "The people of North America came from many cultures and spoke different languages long before the founding of the United States, even before European contact. In creating the new nation, early leaders envisioned a country that promised opportunity and freedom—but only for some. As the population grew, the people who lived in the United States found ways to negotiate, or work out, what it means to be American. That negotiation continues. This exhibition explores how the many voices of people in America have shaped our nation.").
[188] *See generally* NMAH's *Many Voices, One Nation* exhibit and the "Negotiating Freedom" didactic in NMAH's *Many Voices, One Nation* exhibit.
[189] *See* the "Negotiating Freedom" didactic in NMAH's *Many Voices, One Nation* exhibit (noting that "The importation of enslaved African peoples and slavery's acceptance by founders of the new nation bound the country to an institution at odds with its ideals of equality, liberty, and freedom.").
[190] *See* Statue of Liberty and Columbia displays across NMAH's *Many Voices, One Nation* exhibit.
[191] *See Abraham Lincoln's July 10, 1858 Speech at Chicago, Illinois*, TEACHING AMERICAN HISTORY, https://teachingamericanhistory.org/document/speech-at-chicago-illinois.
[192] *Id.*
[193] *See Becoming US – "George Washington" Search Results*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/search?search_api_fulltext=george+washington (last accessed May 8, 2026) (showing no results).
[194] *See Becoming US – "Thomas Jefferson" Search Results*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/search?search_api_fulltext=thomas+jefferson (last accessed May 8, 2026) (showing no results).
[195] Search "John Adams," "James Madison," "Alexander Hamilton," "Benjamin Franklin," and "John Jay" at NMAH's *Becoming US* webpage, and you will not find anything. *See, e.g., Becoming US – "John Adams" Search Results*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/search?search_api_fulltext=john+adams (last accessed May 8, 2026).
[196] *See Becoming US – "Declaration" Search Results*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/search?search_api_fulltext=declaration (last accessed May 8, 2026) (showing no results).
[197] *See Becoming US – "Constitution" Search Results*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/search?search_api_fulltext=constitution (last accessed May 8, 2026) (showing one result, which is simply a reference to "Constitution Avenue" where NMAH is located).

[198] *See Celebrate the Nation's 250th in 2026*, NMAH (n.d.), https://americanhistory.si.edu/explore/projects/celebrate-the-nations-250th-in-2026 (last accessed May 8, 2026).
[199] *See Public Engagement: Educational Outreach*, THE SMITHSONIAN (n.d.), https://dashboard.si.edu/public-engagement#educational-outreach (last accessed Apr. 23, 2026); *see also Smithsonian Institution: FY 2025 Management's Discussion & Analysis*, THE SMITHSONIAN (n.d. – last cited Sept. 20, 2025), https://www.si.edu/sites/default/files/about/smithsonian_fy2025_mda.pdf (stating that "Participation in Smithsonian educational programs" reached "30.1 million" in FY 2024).
[200] *See AHA Staff and Members Quoted on the Impact of Smithsonian Review on Classrooms*, AM. HISTORICAL ASSOC. (Sept. 5, 2025), https://www.historians.org/news/aha-staff-and-member-quoted-on-the-impact-of-smithsonian-review-on-classrooms/.
[201] *Orlando R. Serrano, Jr., Ph.D.*, LINKEDIN (n.d.), https://www.linkedin.com/in/orlando-r-serrano-jr-ph-d-16426771/ (last accessed Apr. 23, 2026) (listing Serrano as the "Elizabeth MacMillan Head of PreK-12 Learning" since May 2024 to Present as the "Manager of PreK-12 Learning" between January 2023 and May 2024 and the "Manager of Youth and Teacher Programs" between July 2017 and January 2023.)
[202] *See* Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178#ack.
[203] *Orlando R. Serrano, Jr., Ph.D.*, LINKEDIN (n.d.), https://www.linkedin.com/in/orlando-r-serrano-jr-ph-d-16426771/ (last accessed Apr. 23, 2026).
[204] Megan Linehan & Orlando Serrano, *To Reimagine the Future, Start by Expanding the Stories of Our Past*, SMITHSONIAN MAG. (Dec. 1, 2022), https://www.smithsonianmag.com/blogs/smithsonian-education/2022/12/01/2022-national-youth-summit/.
[205] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 32:00, https://youtu.be/WaxpiAFKW8o?t=1920.
[206] *Orlando R. Serrano, Jr., Ph.D.*, LINKEDIN (n.d.), https://www.linkedin.com/in/orlando-r-serrano-jr-ph-d-16426771/ (last accessed Apr. 23, 2026).
[207] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 7, 2026); *Becoming US: A Dream Deferred*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/policy/dream-deferred (last accessed Apr. 9, 2026).
[208] *Orlando R. Serrano, Jr., Ph.D.*, LINKEDIN (n.d.), https://www.linkedin.com/in/orlando-r-serrano-jr-ph-d-16426771/ (last accessed Apr. 23, 2026); *see* Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178#abstract.
[209] Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178.
[210] *Id.*
[211] *Id.*
[212] *Id.*, at https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178#inline_frontnotes.
[213] *Bibliography for Further Reading and Listening*, NMAH (n.d.) https://americanhistory.si.edu/sites/default/files/CRH%20Website%20Bibliography.pdf, at 7 (last accessed June 26, 2026).
[214] *See Survival, Compassion, and Connection: Jung Woo Kim on Organizing through Mutual Aid*, NMAH (n.d.), https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim (last accessed Apr. 15, 2026) (showing a *Tell Me What Democracy Looks Like* video of illegal alien activists holding banners and wearing shirts calling for "CITIZENSHIP FOR ALL" and to "ABOLISH ICE."); NMAH's "Tell Me What Democracy Looks Like" graphic, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like (depicting illegal aliens wearing shirts with phrases like NO "287g," referring to the primary program that allows local law enforcement to partner with ICE to identify and deport criminal illegal aliens).
[215] *Id.*, at https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178#inline_frontnotes
[216] *Everyday Practices of Transformative Justice,* BARNARD CENTER FOR RESEARCH ON WOMEN (n.d.), https://bcrw.barnard.edu/videos/everyday-practices-of-transformative-justice/ (last accessed Apr. 23, 2026).

[217] *See Wanting More and Finding Disability Justice*, OBAMA WHITE HOUSE (May 13, 2013), https://obamawhitehouse.archives.gov/blog/2013/05/13/wanting-more-and-finding-disability-justice.
[218] *See* Lorraine Boissoneault, *Ancient Humans Mastered Fire. Now, Burning Fossil Fuels and Blazing Landscapes Threaten to 'Undo the World'*, SMITHSONIAN MAGAZINE (Apr. 16, 2026), https://www.smithsonianmag.com/science-nature/ancient-humans-mastered-fire-now-burning-fossil-fuels-and-blazing-landscapes-threaten-to-undo-the-world-180988531/ (quoting Mia Mingus).
[219] *See Everyday Practices of Transformative Justice,* BARNARD CENTER FOR RESEARCH ON WOMEN (n.d.), https://bcrw.barnard.edu/videos/everyday-practices-of-transformative-justice/ (last accessed Apr. 23, 2026) (including a video featuring Mia Mingus, among others).
[220] Mia Mingus, *Transformative Justice: A Brief Description*, (Jan. 11, 2019), https://transformharm.org/tj_resource/transformative-justice-a-brief-description/.
[221] *See, e.g., Survival, Compassion, and Connection: Jung Woo Kim on Organizing through Mutual Aid*, NMAH (n.d.), https://web.archive.org/web/20230201233112/https:/americanhistory.si.edu/tell-me-what-democracy-looks-like/jung-woo-kim (last accessed Apr. 15, 2026) (showing a *Tell Me What Democracy Looks Like* video of illegal alien activists holding banners and wearing shirts calling for "CITIZENSHIP FOR ALL" and to "ABOLISH ICE."); NMAH's "Tell Me What Democracy Looks Like" graphic, available at https://web.archive.org/web/20240701064456/https://www.americanhistory.si.edu/explore/projects/tell-me-what-democracy-looks-like (depicting illegal aliens wearing shirts with phrases like NO "287g," referring to the primary program that allows local law enforcement to partner with ICE to identify and deport criminal illegal aliens); Anthea Hartig, *In Slavery's Shadow: George Floyd and American Legacies, Anthea M. Hartig, Elizabeth MacMillan Director, National Museum of American History*, NMAH (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth (where Hartig states that "The killing of George Floyd is the latest chapter of violently policing the movement, action, and freedom of African Americans" and that "slave patrols lasted for over 150 years and are part of the foundation of the modern-day police force.").
[222] Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178.
[223] *Id.*
[224] Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178.
[225] *Id.*
[226] *Id.*
[227] *See id*; Puawai Cairns, *Decolonisation: we aren't going to save you*, AM. ALLIANCE FOR MUSEUMS (Dec. 17, 2018), https://www.aam-us.org/2018/12/17/decolonisation-we-arent-going-to-save-you/.
[228] *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.), https://americanhistory.si.edu/sites/default/files/Restorative History-explained_2.pdf, at 11 (last accessed Apr. 23, 2026).
[229] Orlando R. Serrano, Jr., *There are Different Suns: Learning, Restorative History, and Finding Ground*, JOURNAL OF MUSEUM EDUCATION (July 4, 2023), 346–360, https://www.tandfonline.com/doi/full/10.1080/10598650.2023.2286178.
[230] *Id.*
[231] *Id.*
[232] Press Release, Dept. of Justice Office of Public Affairs, Federal Grand Jury Charges Southern Poverty Law Center for Wire Fraud, False Statements, and Conspiracy to Commit Money Laundering (Apr. 21, 2026), https://www.justice.gov/opa/pr/federal-grand-jury-charges-southern-poverty-law-center-wire-fraud-false-statements-and.
[233] *Id.*
[234] *Becoming US: Preparing to Teach*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/preparing-teach (last accessed Apr. 24, 2026).
[235] *See id.* (linking to a page on SPLC's "Learning for Justice" website featuring SPLC's *Let's Talk!* Report, available at https://www.splcenter.org/resources/reports/lets-talk/).

[236] *See* NMAH's page featuring SPLC's *Let's Talk* guide, available at https://americanhistory.si.edu/becoming-us/sites/default/files/downloads/TT-Lets-Talk-December-2019.pdf.
[237] *National Education Summit: Towards A More Equitable Future (Transcript)*, SMITHSONIAN OUR SHARED FUTURE: RECKONING WITH OUR RACIAL PAST (n.d.), https://web.archive.org/web/20240607142320/https://oursharedfuture.si.edu/events/national-education-summit-towards-more-equitable-future#transcript (last accessed Apr. 25, 2026).
[238] Mark Mills, *2024 Education Impact Report Released*, SMITHSONIAN MAG. (Apr. 2, 2025), https://www.smithsonianmag.com/blogs/smithsonian-education/2025/04/02/2024-education-impact-report-released/.
[239] *National Education Summit: Towards A More Equitable Future (Transcript)*, SMITHSONIAN (2023), https://web.archive.org/web/20240607142320/https://oursharedfuture.si.edu/events/national-education-summit-towards-more-equitable-future#transcript (where Dr. Monique M. Chism notes that "I missed a lot during my, K through 12 years. In terms of Asian American history, there was never introduced Native American Indian history, never introduced or talked about, never learned anything about Latino, Mexican American. I mean, **the whole construct was primarily white**. And at times, there was a construct around blackness with Martin Luther King, Rosa Parks. But I never learned about any of the other contributions of people of color in my formal learning at all. So there was a huge absence in every aspect, and women never heard about the contributions of women. So big gaps." Emphasis added.).
[240] *See Issue Brief: Southern Poverty Law Center's "Teaching Tolerance" Project*, FAMILY RESEARCH COUNCIL (n.d.), https://downloads.frc.org/EF/EF14C22.pdf (last accessed Apr. 26, 2026).
[241] Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 35:30, https://youtu.be/HERz54an_-c?t=2130.
[242] *See* Megan Linehan & Orlando Serrano, *To Reimagine the Future, Start by Expanding the Stories of Our Past*, SMITHSONIAN MAG. (Dec. 1, 2022), https://www.smithsonianmag.com/blogs/smithsonian-education/2022/12/01/2022-national-youth-summit/.
[243] Megan Linehan & Orlando Serrano, *To Reimagine the Future, Start by Expanding the Stories of Our Past*, SMITHSONIAN MAG. (Dec. 1, 2022), https://www.smithsonianmag.com/blogs/smithsonian-education/2022/12/01/2022-national-youth-summit/.
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Smithsonian Hosts National Youth Summit on Elections and Politics*, NMAH (Aug. 20, 2024), https://americanhistory.si.edu/releases/youth-summit-2024 (noting that "Since the program was launched in 2011, the museum has created vigorous programing with detailed curricula, websites and outreach opportunities for students and teachers across the nation through which the National Youth Summit has engaged more than 70,000 live viewers and many more through the archived programs.").
[248] *See id.*
[249] Megan Linehan & Orlando Serrano, *To Reimagine the Future, Start by Expanding the Stories of Our Past*, SMITHSONIAN MAG. (Dec. 1, 2022), https://www.smithsonianmag.com/blogs/smithsonian-education/2022/12/01/2022-national-youth-summit/.
[250] *National Youth Summit – Join the Conversation*, THE SMITHSONIAN (n.d.), https://affiliations.si.edu/national-youth-summits/ (last accessed Apr. 26, 2026).
[251] *See Smithsonian Hosts National Youth Summit on Elections and Politics*, NMAH (Aug. 20, 2024), https://americanhistory.si.edu/releases/youth-summit-2024; The Preamble Podcast*, How ICE Is Mimicking 19th Century Slave Patrols, and What AI Tech Billionaires Really Want* (Feb. 2, 2026), https://podscan.fm/podcasts/the-preamble/episodes/how-ice-is-mimicking-19th-century-slave-patrols-and-what-ai-tech-billionaires-really-want.
[252] *See Smithsonian Hosts National Youth Summit on Elections and Politics*, NMAH (Aug. 20, 2024), https://americanhistory.si.edu/releases/youth-summit-2024; *Jahnavi Rao*, LINKEDIN (n.d.), https://www.linkedin.com/in/jahnavirao/details/experience/ (last accessed May 5, 2026).
[253] *See Smithsonian Hosts National Youth Summit on Elections and Politics*, NMAH (Aug. 20, 2024), https://americanhistory.si.edu/releases/youth-summit-2024; *Sydney Fahn*, LINKEDIN (n.d.), https://www.linkedin.com/in/sydney-fahn/details/experience/ (last accessed May 5, 2026).
[254] Nancy Bercaw & Patricia Arteaga, *Redefining 'American'*, AMERICAN ALLIANCE OF MUSEUMS (Sept. 1, 2020), https://www.aam-us.org/2020/09/01/redefining-american/ (noting that "'Undocumented Organizing' material will be

on view this fall in the 'Girlhood (It's Complicated)' exhibition at the National Museum of American History and will be part of the opening exhibition of the Smithsonian Latino Center's Molina Gallery in 2021.").
[255] *See* display case featuring "DACA Wings" in NMAH's *Girlhood (It's Complicated)* exhibit.
[256] *See* "DACA Wings, 2018" display in NMAH's *Girlhood (It's Complicated)* exhibit, available at *https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery*.
[257] *Id.* Highlights added.
[258] *See* "Raising Citizens" didactic in NMAH's *Girlhood (It's Complicated)* exhibit.
[259] *See "*Schooled for the Nation" didactic in NMAH's *Girlhood (It's Complicated)* exhibit.
[260] *See id.*
[261] *Id.*
[262] *See "*Claiming Citizenship: Freedom Schools" didactic in NMAH's *Girlhood (It's Complicated)* exhibit.
[263] *See* the "Claiming Citizenship: Freedom Schools" didactic facing toward the "DACA [Butterfly] Wings," which symbolizes the activist movement to grant 11 million+ illegal aliens U.S. citizenship and voting rights, in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[264] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 4, 2026).
[265] *See* didactic entitled "Language Matters" in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[266] *See* "Demanding Inclusion: Deferred Action for Childhood Arrivals" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[267] *See* "Demanding Inclusion: Deferred Action for Childhood Arrivals" didactic and "DACA Wings" didactic and display case in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[268] *See "*When the Rules Don't Fit, Many Girls Take Action" wall message in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[269] Megan Smith, *Why Did the Smithsonian Create an Exhibit About Girlhood?* SMITHSONIAN MAG. (Aug. 9, 2021) https://www.smithsonianmag.com/blogs/national-museum-american-history/2021/08/09/why-girlhood/; *see also* Kathleen Franz, *Girlhood (It's complicated)*, SMITHSONIAN DIGITIZATION PROGRAM OFFICE (Mar. 29, 2021), https://dpo.si.edu/blog/girlhood-its-complicated.
[270] *See* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 1, 3 (noting that "The NMAH Collections Plan Working Group is: Benjamin Filene, Josh Gorman, and Diane Wendt (co-chairs), Stephanie Fares, Kathleen Franz, Steve Hemlin, Claire Jerry, Ken Kimery, Scott Nolley, Alison Oswald, Abby Pfsterer, Carlene Stephens, Steve Velasquez, Hillery York" and that NMAH is "constantly building and rebuilding the collection of our moment, making choices in response to the needs and knowledge of our time, with an eye toward shaping new futures.").
[271] *See NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 6.
[272] Megan Smith, *Why Did the Smithsonian Create an Exhibit About Girlhood?* SMITHSONIAN MAG. (Aug. 9, 2021) https://www.smithsonianmag.com/blogs/national-museum-american-history/2021/08/09/why-girlhood/.
[273] *See* "Education (being schooled)" wall and didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[274] *Transcript: From 'Our Divided Nation' to 'Our Shared Future': Museums and the Advancement of Equity and Understanding*, OUR SHARED FUTURE (Oct. 27, 2021), https://web.archive.org/web/20250328103327/https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding#transcript.
[275] *See* the Smithsonian's 2023 tax filing (Form 990, Schedule J), https://projects.propublica.org/nonprofits/organizations/530206027/202542239349300544/full (listing $515,671 as Gover's total compensation in 2023).
[276] *Transcript: From 'Our Divided Nation' to 'Our Shared Future': Museums and the Advancement of Equity and Understanding*, OUR SHARED FUTURE (Oct. 27, 2021), https://web.archive.org/web/20250328103327/https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding#transcript.

[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] At least a half dozen current and former Smithsonian employees and consultants contributed to the drafting of the toolkit, including Kayleigh Bryant-Greenwell, "an education specialist with the Smithsonian Institution's National Museum of African American History and Culture," Makeba Clay, a consultant for "the Smithsonian Institution National Museum of African Art," V. Gina Díaz, a former employee of the "Smithsonian Institution Latino Center," Omar Eaton-Martínez, an employee of "the Smithsonian National Museum of American History," Sage Morgan-Hubbard, the former "youth programs coordinator at the National Museum of American History," Evelyn Orantes, a consultant for "The Smithsonian National Museum of the American Indian," and Toni Wynn, who is working on a project for the "Smithsonian's Anacostia Community Museum." *See MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 220-222, 226-227, 231.
[282] *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41. MASS Action stands for "Museums as a Site for Social Action." The toolkit outlines the three-year roadmap to "truly transform the museum space" that "privileges dominant Western ideals of race, class, and gender" and is linked "with white supremacy, hetero-patriarchy, abuse of labor, colonization, imperialist theft of art and artifacts, destruction or absencing of alternative ways of interpreting or representing art and artifacts, structural racism and other oppressions." *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 12-13.
[283] *See MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 201 (cleaned up).
[284] *Id.*
[285] *See, e.g., MASS Action Toolkit,* INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 147.
[286] *See About*, NMAH (n.d.), https://americanhistory.si.edu/about (last accessed Mar. 31, 2026); AASLH, *Reframing History: A Conversation at the Smithsonian National Museum of American History*, at 1:55 (YouTube, Mar. 1, 2022), https://youtu.be/IQv2tN9p5_E?t=115 (where Hartig notes that "We've dedicated ourselves and my incredible staff and board and volunteers to becoming the most inclusive, relevant, accessible, and sustainable museum in the nation."); *see also* Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179 (noting that "As we move toward and through the semiquincentennial toward realizing our vision in 2030 to be the most inclusive, accessible, relevant, and sustainable history museum in the nation…"); *Strategic Plan 2020-2030*, NMAH (Feb. 2020) (on file with author), at 1 (citing NMAH's new mission: "Empowering people to create a more just and compassionate future by exploring, preserving, and sharing the complexity of our past.").
[287] *MASS Action Toolkit,* INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 147.
[288] *MASS Action Toolkit,* INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 148-149.
[289] *Id.* at 149.
[290] *Id.*
[291] *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 6. *See also* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 50:23 https://www.youtube.com/watch?v=HERz54an_-c&t=3023s (showing Hartig highlighting how NMAH will share histories that "illuminate how power works.").
[292] *See* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 5.
[293] AASLH, *Reframing History*, (YouTube, June 15, 2022) at 1:42, https://youtu.be/A0qv7DVXBvw?t=102 (where Hartig notes that "Just thinking about the ways in which history is animated—history has its eyes on you, history is watching—history doesn't do anything. Historians do. Thinkers do. Teachers do. Archivists do. We are the ones who engage with the past who put the clues and the pieces together to understand in an ever-shifting landscape of knowledge what has happened so that then we can turn that into a tool of utility. […] I like to think of democracy

and history as verbs, right? They should be animated and active and alive and the [Reframing History] report lays out a blueprint for us to expand the power of our own engagement to then ignite civic engagement.").
[294] *See* NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 4 (noting that NMAH's "Decolonization/Restorative History plan" was "called for in the Strategic Plan"); *See Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf, at 10 (last accessed Mar. 30, 2026); *see also* Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan 26, 2022) at 50:23, https://www.youtube.com/watch?v=HERz54an_-c&t=3023s (where Hartig references the existence of the Decolonization Plan); Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future,* (YouTube, Sept. 20, 2022) at 9:49, https://youtu.be/CVpbfZnBNu4?t=589 (where Hartig notes that the Strategic Plan "called out for three subsequent plans: Collections Plan, Interpretive Plan, and a Decolonization Plan"). However, to date, the Smithsonian has failed to produce NMAH's "Decolonization Plan" to the White House.
[295] NMAH Collections Plan (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Collections_Plan.pdf, at 19.
[296] Alice George, *Why Museums Are Primed to Address Racism, Inequality in the U.S.*, SMITHSONIAN MAG. (Nov. 4, 2021), https://www.smithsonianmag.com/smithsonian-institution/why-museums-are-primed-address-racism-inequality-us-180978992/.
[297] *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 41.
[298] *See Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, THE SMITHSONIAN (2023), https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 41; (noting that Magdalena Mieri and Leslie Poster are both NMAH IDEA Council representatives.)
[299] *Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, THE SMITHSONIAN (2023), https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 3.
[300] *Id.* at 4.
[301] *See Facts About the Smithsonian Institution*, THE SMITHSONIAN (Apr. 7, 2026), https://www.si.edu/newsdesk/factsheets/facts-about-smithsonian-institution-short (noting that "The Smithsonian's current federal appropriation is more than $1 billion. The Institution is about 62% federally funded (an annual congressional appropriation and federal grants and contracts).").
[302] *Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, THE SMITHSONIAN (2023), https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 3.
[303] *See MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 201.
[304] *See Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf, at 9-10 (last accessed Mar. 30, 2026).
[305] *See generally MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf.
[306] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025), https://youtu.be/WaxpiAFKW8o?t=181.
[307] *See Transcript: From 'Our Divided Nation' to 'Our Shared Future': Museums and the Advancement of Equity and Understanding*, OUR SHARED FUTURE (Oct. 27, 2021), https://web.archive.org/web/20250328103327/https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding#transcript (where Smithsonian Under Secretary for Museums and Culture Kevin Gover asks Director Hartig "And is that why you came to the Smithsonian, Anthea?"—referring to Dr. Mack's previous explanation that she "got into the museum business in order to be an agent of social change" and Hartig replies, "It is, actually!").
[308] *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 34, 35, 40.
[309] *Id.* at 34-35.
[310] *Id.* at 35.

[311] *Restorative History [explained]*, NMAH CENTER FOR RESTORATIVE HISTORY (n.d.) https://americanhistory.si.edu/sites/default/files/Restorative%20History-explained_2.pdf, at 10.
[312] *MASS Action Toolkit*, INCLUSEUM (Oct. 2017), https://incluseum.com/wp-content/uploads/2018/07/df17e-toolkit_10_2017.pdf, at 40-41.
[313] *Id.*
[314] *See* Marina Watts, *In Smithsonian Race Guidelines, Rational Thinking and Hard Work Are White Values*, NEWSWEEK (July 17, 2020), https://www.newsweek.com/smithsonian-race-guidelines-rational-thinking-hard-work-are-white-values-1518333.
[315] *See* Chacour Koop, *Smithsonian museum apologizes for saying hard work, rational thought is 'white culture'*, MIAMI HERALD (July 17, 2020), https://www.miamiherald.com/news/nation-world/national/article244309587.html.
[316] Allison Keyes, *In the Home, a Woman's Work Is Never Done, Never Honored and Never Paid For*, SMITHSONIAN MAG. (Mar. 18, 2019), https://www.smithsonianmag.com/smithsonian-institution/home-womans-work-never-done-never-honored-and-never-paid-180971703/.
[317] *Id.* (noting that "'Black women, Asian women and Latinos are at the lower end of the wage scale, and we have a nice quote in this exhibition from (activist) Angela Davis because she is really part of the debates in the 1960s and 70s to value women's work. What she points out is, that black women are like Sisyphus. They've labored in a double invisibility in the home working in other people's homes and working in their own homes and their wages are the lowest,' says [exhibit co-curator Kathleen] Franz. 'So, we really wanted to pull that out as well so that people see that women are not all the same.'"); Beth Potier, *Abolish prisons, says Angela Davis:*, THE HARVARD GAZETTE (Mar. 13, 2003), https://news.harvard.edu/gazette/story/2003/03/abolish-prisons-says-angela-davis/; *An Initiative for Social Change*, https://oursharedfuture.si.edu/ (last accessed Apr. 2, 2026) (showing a photo of Smithsonian Secretary Lonnie Bunch just above a quote by Angela Davis, stating, "You have to act as if it were possible to radically transform the world. And you have to do it all the time."). In addition to NMAH and the Smithsonian more broadly, Angela Davis is also beloved by other individual Smithsonian museums, such as NMAL, NMAAHC, SAWHM. *See* NMAAHC (@nmaahc), INSTAGRAM (June 4, 2022), https://www.instagram.com/p/CeYfCIitrCr/ (where NMAAHC honors Angela Davis in an Instagram post and notes that she was "the vice-presidential candidate of the U.S. Communist Party" in 1980); *Upcoming Events: Connecting our Past & Present with Thread: Angela Davis*, THE SMITHSONIAN (n.d.), https://www.si.edu/events/hispanic-heritage-month?page=2&trumbaEmbed=view%3Devent%26eventid%3D181031307 (last accessed Apr. 2, 2026) (noting that NMAL will be hosting a "virtual embroidery workshop honoring the legacy of Angela Davis" for Women's History Month in March 2025); *Angela Davis*, NMAAHC, https://nmaahc.si.edu/angela-davis (praising Angela Davis for "tackl[ing] oppression faced by the black community, women, and the LGBTQ+ community," founding "Critical Resistance, an organization working to abolish the prison-industrial complex," and authoring books like "*Are Prisons Obsolete*? (2003)"); Smithsonian, *How Did Angela Davis Inspire a Movement?*, (YouTube, Mar. 9, 2020), https://www.youtube.com/watch?v=QBNZo_joB-E (highlighting Angela Davis as an inspiring figure in American women's history who provided "national attention for prisoners' rights," "social and human rights activism," "black girl magic," and "black pride" and noting that any person of color who is incarcerated is a "political prisoner" because "the system itself is oppressive").
[318] *See* "The Wage Gap, 2018" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[319] *Id.*
[320] *See Our Shared Future: 250 | Exhibitions,* THE SMITHSONIAN (n.d.), https://www.si.edu/250/exhibitions (last accessed Mar. 31, 2026).
[321] *See* didactics currently on display at NMAH's *Entertainment Nation* exhibit.
[322] *Id*; *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 7 (cleaned up).
[323] *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 7.
[324] In all fairness to NMAH, multiple other Smithsonian museums—including the Smithsonian's American Women's History Museum (SAWHM), National Museum of African American History and Culture (NMAAHC), NMAL, and National Portrait Gallery (NPG)—also allege that biological males can be women. *See, e.g., Photographic slide of Marsha P. Johnson at a New York City Gay Pride Parade*, NMAAHC, https://nmaahc.si.edu/object/nmaahc_TA2019.38.1.1.1.14 (describing Marsha P. Johnson, a biological male, with

the pronouns "she herself"); *Sylvia Rivera*, NMAL (n.d.), https://latino.si.edu/exhibitions/presente/latino-identity/sylvia-rivera (highlighting three biological males—Sylvia Rivera, Marsha P. Johnson, and Adela Vázquez—as women and noting Vázquez's efforts to support "trans women"); Smithsonian NPG (@smithsoniannpg), INSTAGRAM (Mar. 11, 2022), https://www.instagram.com/p/Ca9xvoPMQDm/ (highlighting Sylvia Rivera, a biological male, as "a transgender woman" for Women's History Month). SAWHM's website features an "Adult Learners" page, linking to a Smithsonian podcast about Lucy Hicks Anderson, a biological male who "owned brothels." *Adult Learners*, SAWHM (n.d.), https://womenshistory.si.edu/learn/adult-learners (last accessed Mar. 31, 2026); *Lucy Hicks Anderson*, SMITHSONIAN SIDEDOOR (Nov. 30, 2022), https://www.si.edu/sidedoor/lucy-hicks-anderson. In the podcast, Ashleigh Coren, then-Acting Head of Education for the Smithsonian American Women's History Initiative, called Anderson "the coolest woman ever." *Season 8, Episode 13 Lucy Hicks Anderson Final Transcription*, Smithsonian (Nov. 2022), https://www.si.edu/sites/default/files/season_8_episode_13_lucy_hicks_anderson_final_transcription.pdf.

[325] *Becoming US - About*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/about (last accessed June 11, 2026).

[326] *Becoming Us – Glossary of Terms*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/sites/default/files/downloads/NMAH_Becoming%20Us_Glossary.pdf (last accessed June 11, 2026), at 13.

[327] *Id*.

[328] *Id*.

[329] *Id*.

[330] *Id*.

[331] *See* the "A Girl's Life" display dedicated to Jazz Jennings in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[332] *See Girlhood: Virtual Gallery Tour*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery (last accessed Mar. 31, 2026).

[333] *See* "'Glorious Day' By Jazz Jennings" display in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[334] *See* "Not Checking the Boxes" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[335] *Id.*

[336] *Id.*

[337] *See* Ryan's quote beside the "Not Checking the Boxes" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[338] *Id.*

[339] Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 436 (where Hartig highlights how the exhibit was "traveling across the country" after having been on display at NMAH between autumn 2020 and January 2023, adding that "The exhibition was organized around the thesis that, for many, growing up female in the United States since the early republic in the face of patriarchal oppression did not mean they lacked political awareness or agency. Moreover, as the crack curatorial team led by the project director Kathleen Franz posited, 'As historians, we don't want to reconstruct entrenched gender binaries, but rather provoke a thoughtful discussion of gender as having a long and complicated history.' Exploring the themes of news and politics (in the section 'Girls on the Front Line of Change'), education (in 'Getting Schooled'), work (in 'Hey, Where's My Girlhood?'), wellness (in 'Body Talk'), and fashion (in 'Remix'), in corresponding sections of the exhibition design, with spotlights on individuals in 'A Girl's Life.'").

[340] *Id.* at 439.

[341] *See, e.g.,* NMAH's *We Belong Here*, *Change Your Game*, and *Illegal to Be You: Gay History Beyond Stonewall* exhibits.

[342] *See* wall art in NMAH's *Girlhood (It's Complicated)* exhibit (stating "In school, we learn who gets to be a girl…"), available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[343] Exactly Agency, *NMAH Presents: Girlhood (It's Complicated) Virtual Opening Event*, (YouTube, Oct. 8, 2020) at 4:10, https://youtu.be/GVYesfMeMOc?t=250.

[344] *See* "Is Gender Testing Fair?" didactic on display at NMAH's *Change Your Game* exhibit. A now-taken down didactic previously asked visitors to ponder whether college swimmer Lia Thomas, who "was assigned male at

birth" and began his "swimming career on the men's team," should be allowed to switch to the women's team. *See* David Scott, *Trans athlete exhibition sparks outrage at Smithsonian museum as Donald Trump orders review*, THE SUN (Aug. 15, 2025), https://www.the-sun.com/sport/14983781/trans-athlete-exhibition-smithsonian-outrage-donald-trump/.

[345] *We Belong Here: Explore Online*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/we-belong-here/online.

[346] *See* "Dangerous Girls" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[347] *See* "Fashion (remix)" wall and didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery. Italics added.

[348] *See* "Dear Diary…" display with Ryan's diary pages in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[349] *Id.*

[350] *See* "What is love?" movie theater video and other videos in NMAH's *Entertainment Nation* exhibit.

[351] *See* photo of the display case of NMAH's *Illegal to Be You: Gay History Beyond Stonewall* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/gay-history-beyond-stonewall; objects on display on NMAH's online *Illegal to be You: Gay History Beyond Stonewall* exhibit, under the heading "How far will you go to express who you are?", available at https://americanhistory.si.edu/explore/exhibitions/gay-history-beyond-stonewall/online/how-far-will-you-go.

[352] *Music HerStory: Changemakers*, NMAH (n.d.), https://library.si.edu/exhibition/music-herstory/changemakers (last accessed May 8, 2026).

[353] Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179 (quoting Hartig's presidential address from the annual meeting of the Organization of American Historians on April 13, 2024: "When I was determining the topic for this address, the days immediately after the Supreme Court overturned *Roe v. Wade* played across my mind's eye. Along with my announcement of a significant reorganization of the National Museum of American History and my diagnosis with COVID-19 for the first time, the release of the *Dobbs v. Jackson* decision closed out the week on June 24, 2022. Already tracking and participating in analyzing the *Dobbs* decision in both OAH and national museum capacities, we immediately went to work crafting statements. The OAH's was released along with those of the American Historical Association, the National Council of Public History, and countless others. Mine and the museum's were not made available, but I shall share much of it tonight, with assistance from my colleagues."). *See also* OAH and AHA's joint statement on the *Dobbs v. Jackson* decision here: *OAH and AHA Issue Joint Statement on the U.S. Supreme Court Dobbs v. Jackson Decision*, OAH (July 6, 2022), https://web.archive.org/web/20240415081125/https://www.oah.org/2022/07/06/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision/ (stating that the "decision erodes fundamental rights and has the potential to exacerbate historic injustices and deepen inequalities in our country" and has "established a flawed and troubling precedent.").

[354] Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 439.

[355] *Id.*

[356] *Id.*, at 439-440.

[357] *Id.*, at 441.

[358] *Id.,* at 441-442.

[359] *Girls talk back on questions of body autonomy*, NMAH (Oct. 26, 2022), https://americanhistory.si.edu/explore/stories/girls-talk-back.

[360] *Id.*

[361] *Id.*

[362] *See* Megan Lasher, *Toni Morrison Explains Why White Supremacy Is Spiking*, TIME (Nov. 22, 2016), https://time.com/4579856/toni-morrison-trump-white-crime/.

[363] Toni Morrison, *Making America White Again*, THE NEW YORKER (Nov. 14, 2016), https://www.newyorker.com/magazine/2016/11/21/toni-morrison-trump-election-making-america-white-again.

[364] *See* wall featuring "News and Politics (girls on the front lines of change)" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.

[365] *See* "News and Politics (girls on the front lines of change)" didactic in NMAH's *Girlhood (It's Complicated)* exhibit, available at https://americanhistory.si.edu/explore/exhibitions/girlhood/gallery.
[366] *See* "Naomi Wadler" didactic in NMAH's *Girlhood (It's Complicated)* exhibit ("Speaking before hundreds of thousands of people can be nerve-racking. But you'd never guess that watching Naomi Wadler. At age 11, she rose to national prominence as a leader in the 2018 March for Our Lives to end gun violence. She remembers becoming politically aware at age 5 when George Zimmerman fatally shot Trayvon Martin, a 17-year-old African American high school student").
[367] *It Ends with Us: A Plan to Reimagine Safety and End Gun Violence,* MARCH FOR OUR LIVES (2024), https://marchforourlives.org/wp-content/uploads/2024/04/MFOL-Policy-Agenda-2024.pdf.
[368] *Id.*
[369] *Id.*
[370] *See* "Naomi Wadler, March 24, 2018" didactic in NMAH's *Girlhood (It's Complicated)* exhibit ("My friends and I might still be in . . . elementary school, but . . . we know life isn't equal for everyone and we know what is right and wrong. We . . . stand in the shadow of the Capitol and we know that we have seven short years until we too have the right to vote. So I am here today to honor the words of Toni Morrison, 'If there's a book that you want to read but it hasn't been written yet, you must be the one to write it.'").
[371] *Id.*
[372] *See* Exactly Agency, *NMAH Presents: Girlhood (It's Complicated) Virtual Opening Event*, (YouTube, Oct. 8, 2020) at 12:08, https://youtu.be/GVYesfMeMOc?t=728.
[373] *See Becoming US: Essential Understandings*, NMAH (n.d.), https://americanhistory.si.edu/becoming-us/essential-understandings (last accessed Apr. 4, 2026) (noting "There is no single American culture, language, or narrative.").
[374] AASLH, *Reframing History*, at 1:42 (YouTube, June 15, 2022), https://youtu.be/A0qv7DVXBvw?t=102 (where Hartig notes that "Just thinking about the ways in which history is animated—history has its eyes on you, history is watching—history doesn't do anything. Historians do. Thinkers do. Teachers do. Archivists do. We are the ones who engage with the past who put the clues and the pieces together to understand in an ever-shifting landscape of knowledge what has happened so that then we can turn that into a tool of utility. […] I like to think of democracy and history as verbs, right? They should be animated and active and alive and the [Reframing History] report lays out a blueprint for us to expand the power of our own engagement to then ignite civic engagement.").
[375] *See, e.g., Transcript: From 'Our Divided Nation' to 'Our Shared Future': Museums and the Advancement of Equity and Understanding*, OUR SHARED FUTURE (Oct. 27, 2021), https://web.archive.org/web/20250328103327/https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding#transcript (in which Gover asks Hartig, "do you think it's even possible to construct an American narrative upon which we all agree?").
[376] *Transcript: The Path Forward: Museums with Secretary of the Smithsonian Institution Lonnie G. Bunch III & Director of the National Museum of American History Anthea M. Hartig, PhD*, WASH. POST (May 12, 2021), https://www.washingtonpost.com/washington-post-live/2021/05/12/transcript-path-forward-museums-with-secretary-smithsonian-institution-lonnie-g-bunch-iii-director-national-museum-american-history-anthea-m-hartig-phd/.
[377] *Id.*
[378] *See* "Declaring Independence" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[379] *See generally* didactics in NMAH's *American Democracy: A Great Leap of Faith* exhibit, including Thomas Paine's quote "We have it in our power to begin the world over again."
[380] *See* wall with "PRIVILEGE," "SLAVERY," and "RIGHTS OF WOMAN" in very large lettering in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[381] *Id; See "*Justice & Dignity For All US Immigrants" poster description.
[382] *See* "Revolution and the National Story" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit ("How should Americans remember their Revolution and the founding of the nation? Was it a complete, perfect, sacred event led by a great patriot who, as American children would learn, never told a lie? Or was it part of a wider, unfinished movement for liberty—deeply imperfect but with sacred aspirations open to all people? Americans disputed the issue within decades of the Revolution itself.").
[383] *See* "Do We Need a Shared National Identity?" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit ("Following independence, citizens of the new nation sought to forge their own identity and create a

unique history. They established holidays such as the Fourth of July and later Thanksgiving Day and chronicled the story of America from the landing at Plymouth Rock through the Founding Fathers and the Revolutionary War. In part Americans did so not only for themselves, but also to instill in future generations a shared ideal of citizenship. An ongoing debate resulted: if there were to be common beliefs and a national narrative that expressed the values of the nation, what should be included?").
[384] *See* "Teaching American History" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit. Italics added.
[385] *See id.*
[386] *See* "Creating the Father of Our Country" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[387] *See* "Assimilation through Public Schools" didactic in NMAH's *Many Voices, One Nation* exhibit.
[388] *See* "Emblem of America Pitcher, around 1800" didactic in NMAH's *Many Voices, One Nation* exhibit.
[389] *See* "The Pledge of Allegiance" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit ("Francis Bellamy wrote the original Pledge of Allegiance. It was first published in *The Youth's Companion* to coincide with the dedication of the World's Columbian Exposition in Chicago on October 21, 1892, as a way to instill American nationalism through flag ceremonies.
[390] *See* "Independence Day" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[391] *See* "Abraham Lincoln in the Classroom" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[392] *Id.*
[393] *See* "What are the Rights and Responsibilities of Citizens?" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.
[394] *Id.*
[395] *Id.*
[396] *Id.*
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*
[402] *See* "Hamilton" didactic in NMAH's *Entertainment Nation* exhibit ("Featuring performers of color in the roles of the nation's all-white founders, *Hamilton* struck a chord that reverberated far beyond Broadway. Lin-Manuel Miranda told the story of influential and flawed founding father, Alexander Hamilton. Through rap and hip-hop-and non-white casting—*Hamilton* made this history accessible and relatable to audiences of color and gave more people a sense of ownership of American history.").
[403] *Race and Antebellum New York City: The New York Manumission Society*, NEW YORK HISTORICAL SOCIETY (n.d.), https://www.nyhistory.org/web/africanfreeschool/history/manumission-society.html (last accessed May 11, 2026) (noting that "'The New York Society for the Manumission of Slaves and the Protection of such of them as had been or wanted to be Liberated' was created in 1785 by some of New York's most wealthy and influential white citizens. Its members included luminaries such as John Jay and Alexander Hamilton. Their work on behalf of black New Yorkers began with protesting the widespread practice of kidnapping black New Yorkers (both slave and free) and selling them as slaves elsewhere. Later they lobbied to pass the 1799 law which granted gradual manumission to New York's slaves. The organization provided legal assistance to both free and enslaved blacks who were being abused.").
[404] Craig A. Landy, *When Men Amongst Us, Shall Cease to Be: Emancipation of Slaves in the State of New York*, 12 Judicial Notice 42 (2017), https://racism.org/articles/citizenship-rights/21-slavery-to-reparations/2003-emancipation-of-slaves-in-the-state-of-new-york (noting that "In 1811, the Manumission Society petitioned the New York legislature for an end to slavery. Governor Tompkins, a longtime member of the Society, called in his 1812 annual message to that body for the 'gradual and ultimate extermination amongst us, of slavery, that reproach of a free people.'").
[405] *Hamilton Education Program – Founding the New-York Manumission Society, 1785*, THE GILDER LEHRMAN INST. OF AM. HISTORY (n.d.), https://hamilton.gilderlehrman.org/event/founding-new-york-manumission-society-1785 (last accessed May 11, 2026) (noting that "In 1785, Alexander Hamilton and 31 other prominent New Yorkers

founded the New-York Manumission Society. In their charter, the founders declared that 'those, among us, who are held as Slaves ... are by Nature, as much entitled as ourselves' to liberty. The Society supported the gradual abolition of slavery and focused on education for African American children and adults, founding African Free Schools. The members also worked to defend Black New Yorkers (enslaved and free) who were kidnapped to be sold elsewhere into slavery. Many of the men who founded the Manumission Society were slaveholders themselves who rejected Alexander Hamilton's proposal that all members manumit the men, women, and children they enslaved. Slavery, Hamilton wrote as early as 1774, 'relaxes the sinews of industry, clips the wings of commerce, and introduces misery and indigence in every shape.'").

[406] Olivia B. Waxman, *Land Deed for Pioneering School Sheds Light on an Early American Anti-Slavery Effort*, TIME (Feb. 26, 2020), https://time.com/5790341/alexander-hamilton-african-free-school/.

[407] *Franklin's Electrical Years: Enslaved People in Franklin's Research?*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/electric-dr-franklin/online/enslaved-people (last accessed Mar. 31, 2026).

[408] *The Electric Dr. Franklin: Explore Online*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/electric-dr-franklin/online (last accessed Apr. 15, 2026).

[409] *Id.*

[410] *Id.*

[411] *Id.*

[412] *Id.*

[413] *See* the current didactic accompanying the 1840 Horatio Greenough statue of George Washington on display at NMAH. Italics added.

[414] In a 2016 baccalaureate address entitled "Choosing our Histories," Smithsonian Under Secretary for Museums and Culture Kevin Gover told Brown University students that he supports replacing Columbus Day with Indigenous Peoples' Day, arguing that Columbus was a "slaver" and "killer," and says Americans should reconsider our origin stories with "Indians in them," such as the "pilgrims, Plymouth, and the first Thanksgiving, the Jamestown colony and Pocahontas, Lewis and Clark's Corps of Discovery and Sacajawea, and the Trail of Tears." *Baccalaureate address: "Choosing our Histories" by Kevin Gover*, BROWN UNIV. (May 28, 2016), https://www.brown.edu/news/2016-05-28/gover. In 2021, Gover stated that the traditional understanding of Thanksgiving as a "day where the Indians and the Pilgrims came together and there was this wonderful giving of thanks and all this racial harmony…works to the disadvantage of Native people." *Transcript: Race in America: History Matters with Angeline Boulley & Kevin Gover*, WASH. POST (Nov. 19, 2021), https://www.washingtonpost.com/washington-post-live/2021/11/19/transcript-race-america-history-matters-with-angeline-boulley-kevin-gover/. In 2024, Gover added new descriptors to his list for Columbus, calling him a murderer, slaver, and thief. *See* Association of Tribal Archives, Libraries, and Museums, *Kevin Gover, Keynote Address at the 2015 ATALM Conference* (YouTube, Sept. 28, 2024), https://youtu.be/H78cppVUxTw?t=912 ("…everybody started going, well, what about this Columbus guy? And then they learned he was a murderer and a slaver and a thief.").

[415] *Upending 1620: Where Do We Begin,* NMAH (n.d.) https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Mar. 31, 2026).

[416] *See Visual Description | Many Voices, One Nation, NMAH* (n.d.), https://americanhistory.si.edu/visual-descriptions/visual-description-many-voices-one-nation (last accessed Mar. 31, 2026).

[417] *See* "Unsettling the Continent, 1492-1776" didactic in NMAH's *Many Voices, One Nation* exhibit.

[418] Anthea Hartig et al.*, Modern American History and the Smithsonian,* 6 MOD. AM. HIST. 244, 250 (2023), https://doi.org/10.1017/mah.2023.30.

[419] Ryan P. Smith, *Lonnie Bunch Sizes Up His Past and Future at the Smithsonian*, SMITHSONIAN MAG. (Sept. 23, 2019), https://www.smithsonianmag.com/smithsonian-institution/lonnie-bunch-sizes-his-past-and-future-smithsonian-180973198/.

[420] *Id.*

[421] *See Our Shared Future: 250 | Exhibitions,* THE SMITHSONIAN (n.d.), https://www.si.edu/250/exhibitions (last accessed Mar. 31, 2026); Kevin Gover, *Nation to Nation: Treaties Between the United States and American Indian Nations*, AM. INDIAN, Summer/Fall 2014, https://www.americanindianmagazine.org/story/nation-nation-treaties-between-united-states-and-american-indian-nations (noting that the exhibit highlights "from a Native perspective" the "American acceptance of tribal self-government and nation-to-nation diplomacy through treaty making" that

"quickly morphed into disaster through broken and coercive treaties that promoted Indian removal and tribal land loss, as well as government policies that dismantled tribes as political institutions, obliterated tribal land ownership and fostered the forced assimilation of Native people into white culture.").

[422] *See* Smithsonian NMAI, *The "Indian Problem"*, (YouTube, Mar. 3, 2015) at 10:51, https://youtu.be/if-BOZgWZPE?t=651.

[423] Smithsonian NMAI, *Nation to Nation*, (YouTube, Mar. 12, 2015) at 0:10, https://youtu.be/gNll8ZWQPkI?t=10.

[424] Smithsonian NMAI, *The "Indian Problem"*, (YouTube, Mar. 3, 2015) at 10:51, https://youtu.be/if-BOZgWZPE?t=651 ("When you move a people from one place to another, when you displace people, when you wrench people from their homelands, wasn't that genocide? We don't make the case that there was genocide. We know there was.") The video begins with a quote attributed to a Native American tribal leader, stating, "They [the U.S.] made us many promises, more than I can remember. But they kept but one. They promised to take our land and they took it." Smithsonian NMAI, *The "Indian Problem"*, (YouTube, Mar. 3, 2015) at 0:09, https://youtu.be/if-BOZgWZPE?t=9.

[425] *See, e.g.,* Smithsonian Education, *Towards A More Equitable Future*, (YouTube, July 25, 2023) at 0:21, https://youtu.be/g7ea-eIRitg?t=21 (where Smithsonian Under Secretary for Education Monique Chism states, "I wanna first offer a land acknowledgement to say we gratefully acknowledge the native peoples on whose ancestral homelands we gather, and to say that we're just so thankful to be able to host our event here and also to honor the native communities across the nation."); LemelsonCenter, *Welcome to Black Inventors and Innovators: New Perspectives 2020*, (YouTube, Nov. 13, 2020) at 0:15, https://youtu.be/wEKnRZcMPHc?t=15 (where NMAH Director Anthea Hartig states, "I'm honored to join you today and to acknowledge the precedents of the Piscataway, Pamunkey, and Nacotchtank peoples here, as I am in Washington, D.C. Wherever you are, at this moment, give thanks to the First People on whose land we live, love, struggle, and work."). There is no guessing about Hartig's belief that America's existence is a testament to its participation in an ongoing, centuries-old theft of land from Native Americans. On at least 10 occasions during her tenure as NMAH Director, Hartig has claimed that the United States rests on stolen land. In addition to the above, *see* University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 6:34, https://youtu.be/QxKVJ1pYcEw?t=394 (where Hartig states that "I, too, am honored to join you and acknowledge the precedents, the ancestors, and the descendants of the Piscataway, the Pamunkey, and the Nacotchtank tribes as I join you from Washington, D.C. So wherever you are at this moment, give thanks to the First Peoples on whose land we're honored to live, love, struggle, and work.") National Museum of American History, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 6:34, *Smithsonian Power of Giving 2020 | Educational Equity – Symposium Welcome, Day 1*, (YouTube, Mar. 23, 2021) at 1:03, https://youtu.be/ivhpLjRrSsQ?t=63 (where Hartig states that "I'd like to first acknowledge that the Smithsonian is on the native lands shared by the Piscataway, the Pamunkey, and the Nacotchtank, and their descendants are with us today. Wherever we're viewing this, let us acknowledge and give our respect and gratitude to native peoples for the opportunity to work and live in their territories."); Norfolk Society of Arts, *2022 NSA | Lecture Four | Anthea M Hartig*, (YouTube, Jan. 26, 2022) at 18:00, https://youtu.be/HERz54an_-c?t=1080 (where Hartig states that "I'm honored to acknowledge the precedents and the ancestors and the descendants of the Piscataway, Pamunkey, and Nacotchtank tribes here as I join you from Washington D.C.'s Capitol Hill neighborhood. So wherever you are at this moment, give thanks to the First Peoples on whose land we're honored to live, love, struggle, work, preserve, care, and do our work."); AASLH, *Reframing History: A Conversation at the Smithsonian National Museum of American History*, (YouTube, Mar. 1, 2022) at 0:46, https://youtu.be/IQv2tN9p5_E?t=46 (where Hartig states that "Let us acknowledge the precedents of the Piscataway, Pamunkey, and Anacostine tribes and their descendants. As we know, the Chesapeake Bay area is rich indigeneity and is still home to many indigenous peoples from all over the hemisphere. We give our respect and our gratitude to all of them for the opportunity to work and to live in their territories."); National Museum of American History, *Smithsonian Institution Constitution and Citizenship Day | Dr. Anthea Hartig*, (YouTube, Sept. 16, 2022) at 0:21, https://youtu.be/1H50qpqv8vs?t=21 (where Hartig states that "I'd like to first gratefully acknowledge the precedents of the Piscataway peoples on whose land this museum sits. They shared this greater Washington, D.C., area with the Anacostine and the Pamunkey tribes. Wherever we are today, let us acknowledge and give our respect and gratitude for the opportunity to work and live in their territories."); *Challenging the Narrative Landscape of the Past to Create a More Just Future*, (YouTube, Sept. 20, 2022) at 2:15, https://youtu.be/CVpbfZnBNu4?t=135 (where Hartig states that "I'm honored to first recognize that I'm here in the museum on the ancestral lands that were shared by the broader Algonquian peoples, in particular the

Piscataway, the Pamunkey, the Nacotchtank. Their descendants and so many native peoples still live and work here in the District of Columbia, and we're deeply grateful and want to acknowledge and give our respects and gratitude to them and to their ancestors for the opportunity to work in this territory."); TDC, *The Power of Giving: Philanthropy's Impact on Social Justice*, (Vimeo, Sept. 21, 2023) at 1:34, https://vimeo.com/1054649094?fl=pl&fe=cm#t=1m32s (where Hartig states that "Before we begin, let us pause to acknowledge with gratitude the native peoples on whose land we gather today. These are the ancestral homes of the Piscataway people joined by the Nacotchtank and the Pamunkey tribes and, of course, their descendants. We acknowledge the native peoples of more broadly the Americas. And this is a humble and incomplete acknowledgement, but it reminds us of the significance of place, the continued persistence and lives of indigenous peoples and our work to build respectful relationships."); Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179 (quoting Hartig's presidential address from the annual meeting of the Organization of American Historians on April 13, 2024: "As we gather here in this layered and complicated place, we acknowledge that the land upon which the colonial city of New Orleans sits has been and remains known as Balbancha, a Choctaw word for "a place of other languages." Many nations since time's beginning have and continue to live here—currently including but not limited to the Isle de Jean Charles Band of the Chitimacha, Choctaw, Biloxi Tribe, the United Houma Nation, and Pointe-au-Chien Indian Tribe. These incomplete but heartfelt acknowledgements remind us not only of the depth of our histories but also of our collective and ongoing work to uplift and honor each other. In this complex space, I so hope that you have found engagement, meaning, and inspiration in both the offerings and the opportunities to come together at the conference."); Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, June 17, 2024) at 0:37, https://youtu.be/WaxpiAFKW8o?t=37 (where Hartig states that "I want to acknowledge with humility and in incompleteness that we're here, of course, in what we know is Washington, in the District of Columbia, but I speak to you on the, from the unseated lands of the Piscataway people who were joined by the Nacotchtank and Pamunkey tribes is part of the broader Algonquin Alliance that really still shapes this region today. And so wherever we call home, let us join and acknowledging the layered complexities of our place, give our respect and gratitude to Native local peoples and the opportunity to live, and to work, and to study in their territories."); *What is the role of a public historian?: A Conversation with Anthea Hartig*, (YouTube, Mar. 11, 2025), at 8:20, https://youtu.be/-hiEA5hVMaM?t=500 (where Hartig states that "To this day, I'm here in Washington, D.C. I'm on the ancestral lands that were shared by the Piscataway, the Nacotchtank, and they, you know, as you know, the descendants are here, our communities are, are very rich with native peoples from all over the continent, especially here in Washington and in Los Angeles, and, but yet we still, I think, struggle to recognize that.").

[426] *See* "Land and Opportunity in the Midwest" didactic in NMAH's *Many Voices, One Nation* exhibit.

[427] *See* "Incorporating Western Lands" didactic in NMAH's *Many Voices, One Nation* exhibit.

[428] *See* the introductory didactic in NMAH's *Many Voices, One Nation* exhibit.

[429] *Id.*

[430] *Id.*

[431] *See Our Shared Future: 250 | Exhibitions,* THE SMITHSONIAN (n.d.), https://www.si.edu/250/exhibitions (last accessed Mar. 31, 2026). In fact, the *American Democracy* exhibit was selected as the exhibit representing the other America 250 related exhibitions on the Smithsonian's *Our Shared Future: 250* homepage. *See Our Shared Future: 250*, THE SMITHSONIAN (n.d.), https://www.si.edu/250 (last accessed Mar. 31, 2026).

[432] *See* Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.

[433] *Strategic Plan 2020-2030*, NMAH (Feb. 2020) (on file with author), at 1.

[434] *Making History Matter: From Abstract Truth to Critical Engagement,* AASLH (Feb. 2022), https://download.aaslh.org/Research/FWI-Reframing-History-Report.pdf, at 12, 15.

[435] E.g., NMAH and NMAL. *See* AASLH, *Reframing History*, (YouTube, June 15, 2022) at 4:43, https://youtu.be/A0qv7DVXBvw?t=283 (where Hartig notes that "The report lays out a blueprint for us to expand the power of our own engagement to then ignite civic engagement"); AASLH, *Reframing History*, (YouTube, June 15, 2022) at 1:03, https://youtu.be/A0qv7DVXBvw?t=63 (where NMAL Founding Director Jorge Zamanillo notes that "I think now we have this framework and a toolkit that we can share with the staff and the educators that work on these programs every day, and that's going to be a great resource.").

[436] *See* AASLH, *Reframing History*, (YouTube, June 15, 2022) at 4:43, https://youtu.be/A0qv7DVXBvw?t=283 (where Hartig notes that "The report lays out a blueprint for us to expand the power of our own engagement to then ignite civic engagement"); AASLH, *Reframing History*, (YouTube, June 15, 2022) at 1:03, https://youtu.be/A0qv7DVXBvw?t=63 (with NMAL Founding Director Jorge Zamanillo noting, "I think now we have this framework and a toolkit that we can share with the staff and the educators that work on these programs every day, and that's going to be a great resource.").
[437] AASLH, *Reframing History: A Conversation at the Smithsonian National Museum of American History*, (YouTube, Mar. 1, 2022) at 1:42, https://youtu.be/IQv2tN9p5_E?t=102.
[438] *See, e.g.,* the Smithsonian American Art Museum and Smithsonian Learning Lab's poster on display, stating "DOWN WITH THE WHITENESS." Smithsonian American Art Museum, *Smithsonian Learning Lab Resource: Down with the Whiteness,* SMITHSONIAN LEARNING LAB (Feb. 6, 2022), https://learninglab.si.edu/q/r/6186305. And NMAH Director Hartig has made statements like, "Pausing, I acknowledge openly the privilege and dominance of my whiteness and the comfortable cushion my class affords me." *See, e.g.,* Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179. Following January 6, Hartig issued a press release, stating that "This week reminds us of the long and deep history of white supremacy and the hatred and privilege it affords." Anthea M. Hartig, *Statement from the Elizabeth MacMillan Director Anthea M. Hartig*, NAT. MUSEUM OF AM. HIST. (Jan. 8, 2021), https://americanhistory.si.edu/press/releases/statement-elizabeth-macmillan-director-anthea-m-hartig.
[439] *See* "Incorporating Nez Perce Lands" didactic in NMAH's *Many Voices, One Nation* exhibit.
[440] *See* "Tataviam Sandstone Mortar and Pestle, used in the 1800s" didactic in NMAH's *Many Voices, One Nation* exhibit.
[441] *See* "Indian Removal in the Midwest" didactic in NMAH's *Many Voices, One Nation* exhibit.
[442] *See* "Helmet" didactic in NMAH's *Many Voices, One Nation* exhibit.
[443] *See, e.g., Westward Expansion*, HISTORY.COM (n.d.), https://www.history.com/articles/westward-expansion (last accessed June 13, 2026).
[444] *See* Rory Wilson, *Úuyitpe hiwéeke c'íiqin: The Creation and Reception of Written Nez Perce in the 19th Century*, COLUMBIA UNIV. IN THE CITY OF N.Y. (Apr. 3, 2023), https://sites.asit.columbia.edu/historydept/wp-content/uploads/sites/29/2024/05/Wilson-Rory_Final-thesis.pdf, at 9-11 (noting that "from the very beginning, it was Native interest and initiative that brought both formal instruction in writing and Christianity to the tribe").
[445] *See, e.g*., William Wilberforce, *A Letter on the Abolition of the slave trade, Addressed to the Freeholders and Other Inhabitants of Yorkshire* (1807), https://christianhistoryinstitute.org/study/module/wilberforce/ (noting that "God Almighty has set before me two great objects, the suppression of the slave trade and the reformation of manners").
[446] *See, e.g.,* Irene Ludji et al., *Frederick Douglass: Christianity of Slaveholders vs. Christianity of Christ* (Dec. 2014), https://ejurnal.iftkledalero.ac.id/index.php/JLe/article/download/75/59 (noting that "In New Bedford [Douglass] started to read the *Liberator*, a paper edited by William Lloyd Garrison, a white abolitionist. […] Douglass claimed Garrison as the messenger from God who came to deliver colored people from the bondage of slavery. Garrison himself relied on the Scripture and his interpretation of it in order to build his argument. Therefore, Douglass' encounter with Garrison added a new side to the development of his thinking of abolitionism in America. […] Only six years after his first encounter with Garrison, Douglass published his first autobiography *Narrative of the Life*. In this first autobiography, Douglass[] […] by using his understanding of Christian teaching, challenged the injustice of the slavery and showed the misleading deeds of a Church that was proslavery. A church in union with slaveholders was standing against Christ because 'slavery is a crime against God.' Douglass' close interpretation of the Scripture proved his compatibility as the follower of the Garrisonian movement. […] Here, Douglass' faith became a foundation for his criticism of the hypocrisy of the proslavery Christianity. […] Douglass also spoke about what he thought Christianity should look like in America. In his reception speech on May 1846 he stated: 'I love that religion that comes from above, in the Wisdom of God … I love that religion that sends its votaries to bind up the wounds of him that has fallen among thieves. I love that religion that makes it the duty of its disciples to visit the fatherless and the widow in their affliction. I love that religion that is based upon the glorious principle of love to God and love to man.' This was what Douglass pictured of how Christianity should look. This showed Douglass' Christian beliefs. Douglass, by using his knowledge of scripture, wanted to show that it is easy for the true followers of Christ to see that slavery and Christianity were not compatible. […] Douglass almost always referenced Christian scriptures and interpretation to elaborate his passion for bringing freedom for slaves. He was a "democratic as well

as Christian idealist" according to Martin. Abolitionism was an integral part of Douglass' vision and Christianity was the basis he used to expand this vision. […] Douglass' argument on uplifting the oppressed also demonstrated his Christian understanding of grace. Grace always comes first. It is because of God's grace that we were created equal in God's image. When this equality is not granted because of a system such as slavery then it is a Christian's duty to win it back. When we choose to be what God created us to be, it will be counted as an achievement in God's eye. For Douglass, to be free and to bring freedom for others were his Christian duties. […] 'The Christian story informed his understanding of his own life, his estimates of human good and evil, and his verdicts regarding slavery and quality. Christianity was an inheritance he received and interpreted, a faith system that shaped him, and that he shaped.'").

[447] *See, e.g.,* Harriet Beecher Stowe, 8 The Writings of Harriet Beecher Stowe: Household Papers and Stories (Riverside ed., Houghton Mifflin and Company 1896), https://www.gutenberg.org/files/31217/31217-h/31217-h.htm (noting that "Mrs. Stowe, speaking of *Uncle Tom's Cabin*, said: 'I wrote what I did because, as a woman, as a mother, I was oppressed and heartbroken with the sorrows and injustice which I saw, and because, as a Christian, I felt the dishonor to Christianity.'").

[448] *See, e.g.,* Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (explaining how segregation is "morally wrong and sinful" because it does not accord with "the moral law or the law of God" and noting that "I am grateful to God that, through the influence of the Negro church, the way of nonviolence became an integral part of our struggle"; that "there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire"; that "Just as the prophets of the eighth century B.C. left their villages and carried their 'thus saith the Lord' far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid"; that "though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: 'Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.' Was not Amos an extremist for justice: 'Let justice roll down like waters and righteousness like an ever flowing stream.' Was not Paul an extremist for the Christian gospel: 'I bear in my body the marks of the Lord Jesus.' Was not Martin Luther an extremist: 'Here I stand; I cannot do otherwise, so help me God.' And John Bunyan: 'I will stay in jail to the end of my days before I make a butchery of my conscience.' And Abraham Lincoln: 'This nation cannot survive half slave and half free.' And Thomas Jefferson: 'We hold these truths to be self evident, that all men are created equal . . .' So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime--the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment"; and that "I say this as a minister of the gospel, who loves the church; who was nurtured in its bosom; who has been sustained by its spiritual blessings and who will remain true to it as long as the cord of life shall lengthen.").

[449] *See, e.g., Christianity and the Declaration of Independence*, CHRISTIAN LAW ASSOCIATION (July 11, 2024), https://christianlaw.org/christianity-and-the-declaration-of-independence/ (noting that "The Declaration, of course, asserts that all people are created equal. Even though they did not fully live out this idea in regards to slavery at the time, the Christian idea about the equality of humans would eventually be adopted more and more in the American system of government, culminating in a time when slavery would be abolished. […] In 1890, historian Richard Frothingham wrote, '[A] low view of man was exerting its full influence when Rome was at the height of its power and glory. Christianity then appeared with its central doctrine, that man was created in the Divine image, and destined for immortality; pronouncing that, in the eye of God, all men are equal. This asserted for the individual an independent value. It occasioned the great inference, that man is superior to the State, which ought to be fashioned for his use. This was the advent of a new spirit and a new power in the world.' Ultimately, the eradication of slavery in the United States is rooted in the Christian ideal of the equality of mankind. […] Jefferson drew many of his ideas

from John Locke and William Blackstone, both Biblical Christians. He also reflected the work of a group of twenty-seven Scotch-Irish church elders in Mecklenburg County, North Carolina, who drafted their own Declaration in May 1775, under the direction of Elder Ephraim Brevard, a graduate of Princeton. A comparison of the Declaration of Independence with the Mecklenburg Declaration of Independence reveals many similar phrases. In declaring the endowment of these unalienable rights, Jefferson was also influenced by George Mason's "Virginia Declaration of Rights" […] Much of the wording of the Declaration itself is rooted in the work of Christian ideas as expressed by Godly people of Jefferson's generation.").

[450] *See, e.g.,* Barbara J. Elliott, *Faith, Civil Society, & the American Founding*, THE IMAGINATIVE CONSERVATIVE (Jan. 31, 2025), https://theimaginativeconservative.org/2025/01/faith-civil-society-american-founding-barbara-elliott.html.

[451] *See 1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin; *Upending 1620: Where Do We Begin?*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Apr. 7, 2026).

[452] *Id.*; *Upending 1620*, SMITHSONIAN LEARNING LAB (n.d.), https://learninglab.si.edu/collections/upending-1620/QTpjC87EvKW3dxlA (last accessed Apr. 7, 2026).

[453] *Upending 1620: Where Do We Begin?*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Apr. 7, 2026).

[454] *See 1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin.

[455] *See 1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin; *Upending 1620: Where Do We Begin?* NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/upending-1620-where-do-we-begin (last accessed Apr. 7, 2026).

[456] *1620 Display at National Museum of American History Asks "Where Do We Begin?"*, THE SMITHSONIAN (Nov. 4, 2021), https://www.si.edu/newsdesk/releases/1620-display-national-museum-american-history-asks-where-do-we-begin. Emphasis added.

[457] *See* "Negotiating Inclusion" didactic in NMAH's *Many Voices, One Nation* exhibit.

[458] *See* "Chinese Exclusion" didactic in NMAH's *Many Voices, One Nation* exhibit.

[459] *See* "How Diverse Should the Citizenry Be?" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.

[460] *See* "Negotiating Inclusion" didactic in NMAH's *Many Voices, One Nation* exhibit.

[461] *See* "Chinese Exclusion" didactic in NMAH's *Many Voices, One Nation* exhibit.

[462] *See* "How Diverse Should the Citizenry Be?" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.

[463] *See* "Love It or Leave It" didactic in NMAH's *American Democracy: A Great Leap of Faith* exhibit.

[464] Anthea M. Hartig, *Where Have All the Women Gone? Let's Bring Them Back before It's Too Late,* THE J. OF AM. HIST. (Dec. 2024), https://doi.org/10.1093/jahist/jaae179, at 429-430. Emphasis added.

[465] *Id.*

[466] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 11:38, https://youtu.be/CVpbfZnBNu4?t=698.

[467] *Reckoning with Remembrance: Explore Online*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/reckoning-with-remembrance/online (last accessed Mar. 31, 2026).

[468] *An Initiative for Social Change*, OUR SHARED FUTURE (July 25, 2023), https://oursharedfuture.si.edu/ (last accessed Mar. 31, 2026).

[469] Mahader Tamene, et al., *COVID-19, police violence, and the historical thread that binds them: Structural racism as a public health issue*, NMAH (Aug. 27, 2020), https://americanhistory.si.edu/explore/stories/covid-19-police-violence-and-historical-thread-binds-them-structural-racism-public.

[470] Katherine Ott, *Racism is a public health crisis*, NMAH (Aug. 21, 2020), https://americanhistory.si.edu/explore/stories/racism-public-health-crisis. Ott has been a curator at the National Museum of American History for 20+years and curated NMAH's *Illegal to Be You: Gay History Beyond Stonewall*

exhibit. *Smithsonian Online Event! Illegal to Be You: Gay History Beyond Stonewall with Katherine Ott*, ARIZONA HISTORICAL SOC. (June 11, 2020), https://arizonahistoricalsociety.org/events/smithsonian-online-event-illegal-to-be-you-gay-history-beyond-stonewall-with-katherine-ott/.

[471] Modupe Labode, *Black Life in Two Pandemics: Histories of Violence*, NMAH (Aug. 25, 2020), https://americanhistory.si.edu/explore/stories/black-life-two-pandemics-histories-violence. Labode has been a curator at NMAH since August 2019, concentrating on "African American social justice history." Krystal Klingenberg & Modupe Labode, *An Inside Look at Smithsonian's 'Collected' Podcast Season Two: The Musical Genius of Black Women*, SMITHSONIAN MAG. (June 4, 2025), https://www.smithsonianmag.com/blogs/smithsonian-american-womens-history-museum/2025/06/04/an-inside-look-at-smithsonians-collected-podcast-season-two-the-musical-genius-of-black-women/. "She is the chair of the African American History Curatorial Collective and is on the staff of the Center for Restorative History, where she is the lead of the Emmett Till Historic Marker Project." *Modupe Labode*, GRADFUTURES (n.d.), https://gradfutures.princeton.edu/ModupeLabode (last accessed Apr. 3, 2026).

[472] Joseph McGill and the Slave Dwelling Project, *Challenging the Narrative Landscape of the Past to Create a More Just Future* (YouTube, Sept. 20, 2022) at 14:53, https://youtu.be/CVpbfZnBNu4?t=893.

[473] *Id.* at 15:32, https://youtu.be/CVpbfZnBNu4?t=932.

[474] *See* U.S. Gov't Accountability Off., GAO-18-258, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018), https://www.gao.gov/assets/gao-18-258.pdf, at 24-26 (listing trauma, mental health issues, social media, gang involvement, drug use, lack of parental guidance or support, and situational barriers, among others, as behavior challenges that impact school discipline decisions).

[475] *In Pursuit of Life, Liberty & Happiness*, SMITHSONIAN (n.d.), https://www.si.edu/exhibitions/pursuit-life-liberty-happiness%3Aevent-exhib-6778 (last accessed May 26, 2026).

[476] *See In Pursuit of Life, Liberty, and Happiness*, NMAH (n.d.), https://americanhistory.si.edu/explore/exhibitions/in-pursuit (last accessed May 26, 2026) (stating that "*In Pursuit* is a museum-wide exhibition that spans the full 250,000 square feet of our building's three floors" that "opened on May 14, 2026.").

[477] *See* Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.

[478] Robin Pogrebin, *Curating in the Cross Hairs: Is This the Smithsonian Chief's Last Show?,* N.Y. TIMES (May 28, 2026), https://www.nytimes.com/2026/05/28/arts/design/lonnie-bunch-smithsonian-american-aspirations.html.

[479] *American Aspirations*, THE SMITHSONIAN (n.d.), https://www.si.edu/exhibitions/american-aspirations%3Aevent-exhib-6813 (last accessed June 20, 2026).

[480] *Smithsonian Exhibition: American Aspirations*, THE SMITHSONIAN (n.d.), https://www.si.edu/castle/american-aspirations?utm_campaign=MyVisitSI&utm_medium=referral&utm_source=si.edu (last accessed June 20, 2026); *see* "American Aspirations" didactic in the Smithsonian's *American Aspirations* exhibit at the Smithsonian Castle.

[481] *See* "American Aspirations" didactic in the Smithsonian's *American Aspirations* exhibit at the Smithsonian Castle (noting that "The United States has been shaped by aspirational ideals, often shared but sometimes in conflict and contested since its founding. […] America's challenge and obligation is to fulfill, to expand access to, and to make concrete these founding ideals.").

[482] *See* "In Pursuit of New Horizons" didactic in the Smithsonian's *American Aspirations* exhibit at the Smithsonian Castle (noting that "According to oral tradition, the merchant ship the *Mayflower* landed on or near Plymouth Rock in 1620. The romantic story of the Pilgrims at Plymouth has had lasting effect on Americans' identity. Set against the harsh realities of carving out a settlement in a new frontier and the impact of displacing native communities, is the tale of discovery, opportunity, and religious freedom. Pieces of Plymouth Rock became keepsakes and relics of America's mythic past.").

[483] *See* "In Pursuit of Fairness" didactic in the Smithsonian's *American Aspirations* exhibit at the Smithsonian Castle (noting that "The struggle to extend the benefits of freedom to all Americans has been the source of conflict, war, protest, and human loss. Yet in the struggle to make a freer and fairer America, many have found both inspiration and tragic irony in the phrase 'We hold these truths to be self-evident, that all men are created equal….' Since the inception of the nation, African Americans fought to abolish slavery, achieve equality and freedom, and overcome segregation through a variety of means: legal recourse, political persuasion, public protests, and non-violent

demonstrations. The African American struggle provided plans and strategies for others to follow to ensure that American freedom was available to all.").
[484] *NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 7.
[485] *See Hands-on history: Folding a national symbol*, NMAH (Nov. 14, 2011), https://americanhistory.si.edu/explore/stories/hands-history-folding-national-symbol; *Folding a full-size replica of the Star-Spangled Banner*, NMAH (Nov. 7, 2011), https://americanhistory.si.edu/explore/stories/folding-full-size-replica-star-spangled-banner.
[486] *PHOTO OPPORTUNITY: U.S. Territories Will Be Honored in Flag-Raising Ceremony June 14*, NMAH (June 13, 2022).
[487] *See Calendar of Exhibitions and Events: June 2025,* NMAH (May 7, 2025), https://americanhistory.si.edu/press/releases/June-2025-calendar.
[488] *Id.*
[489] *Id.*
[490] Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025) at 48:53, https://youtu.be/WaxpiAFKW8o?t=2933.
[491] *See* NMAH's 2026 Event Calendar for June 14, 2026, available at https://tinyurl.com/5fhpzsma (last accessed May 8, 2026) (showing no flag-related programming or celebrations for Flag Day).
[492] *See Calendar of Exhibitions and Events: June* 2025, NMAH (May 7, 2025), https://americanhistory.si.edu/press/releases/June-2025-calendar; *Calendar of Exhibitions and Events: July 2025,* NMAH (Jun 12, 2025), https://americanhistory.si.edu/press/releases/July-2025-calendar.
[493] *See Calendar of Exhibitions and Events: July 2025,* NMAH (Jun 12, 2025), https://americanhistory.si.edu/press/releases/July-2025-calendar.
[494] *Id.*
[495] *Id.*
[496] *See Civic Season*, NMAH (n.d.), https://americanhistory.si.edu/explore/topics/civic-season (last accessed Apr. 15, 2026) (noting that the programming seeks to help participants "pursue historically informed civic action" after exploring NMAH exhibits like *Many Voices, One Nation* and *American Democracy* and educational videos entitled, "Young People Shake Up Elections (History Proves It)").
[497] *See Calendar of Exhibitions and Events: July 2025,* NMAH (Jun 12, 2025), https://americanhistory.si.edu/press/releases/July-2025-calendar.
[498] *Civic Season 2025*, NMAH (n.d.), https://americanhistory.si.edu/explore/topics/civic-season/2025 (last accessed Apr. 15, 2026).
[499] *See Celebrate the Nation's 250th in 2026*, NMAH (n.d.), https://americanhistory.si.edu/explore/projects/celebrate-the-nations-250th-in-2026 (last accessed May 8, 2026); *Smithsonian Launches "Our Shared Future: 250" Programming To Commemorate America's Birthday*, SMITHSONIAN (Mar. 23, 2026), https://www.si.edu/newsdesk/releases/smithsonian-launches-our-shared-future-250-programming-commemorate-americas.
[500] *See* Anthea M. Hartig, *In Slavery's Shadow: George Floyd and American Legacies*, NAT'L MUSEUM OF AM. HIST. (May 31, 2020), https://americanhistory.si.edu/press/releases/slaverys-shadow-george-floyd-and-american-legacies-anthea-m-hartig-elizabeth.
[501] University of California Riverside, *Chancellor's Distinguished Lecture Series: Anthea M. Hartig*, (YouTube, Nov. 16, 2020) at 1:03:31, https://youtu.be/QxKVJ1pYcEw?t=3811.
[502] Anthea Hartig et al.*, Modern American History and the Smithsonian,* 6 MOD. AM. HIST. 244, 250 (2023), https://doi.org/10.1017/mah.2023.30.
[503] GlavasC, *5 Questions With Barbara Clark Smith*, SMITHSONIAN AFFILIATIONS (Oct. 29, 2019), https://affiliations.si.edu/5-questions-with-barbara-clark-smith/ (Smith: "I am working with my colleague Kenneth Cohen on a small exhibition case that treats the encounter between Wampanoag people and the Separatists (or 'Pilgrims') who landed at Patuxet / Plymouth in 1620. The 400th anniversary of that encounter offers an opportunity to revisit and rethink those extraordinary events.").
[504] *See NMAH Interpretative Plan*, NMAH (Jan. 2021), https://americanhistory.si.edu/sites/default/files/NMAH_Interpretive_Plan.pdf, at 2(noting that "The NMAH Interpretive Plan Committee is: Benjamin Filene and Christopher Wilson (co-chairs), Amanda Bowen, Nigel Briggs,

Barbara Clark-Smith, Jordan Grant, Michael Johnson, Jocelyn Knauf, Magdalena Mieri, Christine Russo, Margaret Salazar-Porzio").
[505] Barbara Clark Smith & Caroline Klibanoff, *Made By Us Q&A Series: Barbara Clark Smith*, NMAH (n.d.), https://americanhistory.si.edu/explore/projects/made-by-us/qa (last accessed Apr. 3, 2026).
[506] *Id.* Channeling Hartig, Smith also noted that "this anniversary should be a catalyst for increased civic engagement and understanding of our collective history." *Id.*
[507] *See National Education Summit: Towards A More Equitable Future (Transcript)*, SMITHSONIAN OUR SHARED FUTURE: RECKONING WITH OUR RACIAL PAST (n.d.), https://web.archive.org/web/20240607142320/https://oursharedfuture.si.edu/events/national-education-summit-towards-more-equitable-future#transcript (last accessed Apr. 25, 2026) (noting that "as part of our Shared Future initiative, we [the Smithsonian] have an initiative that is entitled Reckoning with Our Racial Past.").
[508] *See* Alice George, *Why Museums Are Primed to Address Racism, Inequality in the U.S.*, SMITHSONIAN MAG. (Nov. 4, 2021), https://www.smithsonianmag.com/smithsonian-institution/why-museums-are-primed-address-racism-inequality-us-180978992/; *Our Shared Future: 250*, The Smithsonian, https://www.si.edu/250; *From 'Our Divided Nation' to "Our Shared Future': Museums and the Advancement of Equity and Understanding*, Our Shared Future (Oct. 27, 2021), https://oursharedfuture.si.edu/events/our-divided-nation-our-shared-future-museums-and-advancement-equity-and-understanding.
[509] *Id.*
[510] *Smithsonian Diversity and Inclusion Initiatives Report: Fiscal Year 2023*, THE SMITHSONIAN (2023), https://www.si.edu/sites/default/files/unit/oeema/diir_fy2023.pdf, at 34.
[511] *Id.*
[512] Exec. Order No. 14,253, 90 Fed. Reg. 14,563 (Apr. 3, 2025) (Restoring Truth and Sanity to American History).
[513] *Id.*
[514] *National Museum of American History – Strategic Plan: 2013-2018*, NMAH (2013), https://amhistory.si.edu/docs/nmah_strategicplan_2013.pdf (showing NMAH's previous mission statement).
[515] *See* Luskin Center for History and Policy, *Doing History Now Musings on Relevance, Impact, and Service (Anthea Hartig)*, (YouTube, Feb. 25, 2025), https://youtu.be/WaxpiAFKW8o?t=181 (with Hartig noting that "History as a practice...is for me a prime tool of social justice.").
[516] Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 5, 2020) (Executive Order on Establishing the President's Advisory 1776 Commission).
[517] *Id.*
[518] David K. Allison & Hannah Peterson, *Exhibiting America: The Smithsonian's National History Museum, 1881-2018* (Feb. 18, 2021), https://www.govinfo.gov/content/pkg/GOVPUB-SI-PURL-gpo152991/pdf/GOVPUB-SI-PURL-gpo152991.pdf, at 50.
[519] *Id.*
[520] *Id.* a 54.
[521] *Id.* at 44.
[522] *Id.* at 44-45.

Washington National Opera Is Leaving the Kennedy Center

The opera, which has performed at the arts center since 1971, was concerned about declines in attendance and donations during President Trump's second term.

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By Adam Nagourney

Jan. 9, 2026

The Washington National Opera decided on Friday to move its performances out of the John F. Kennedy Center for the Performing Arts, abandoning the hall where it has played since 1971 in perhaps the largest artistic rebuke yet to President Trump's campaign to remake the Kennedy Center in his image.

The opera company is seeking to sever its ties with the Kennedy Center after a tumultuous year in which both groups have faced cancellations by artists, empty seats and the retrenchment of donors protesting Mr. Trump's intervention. Within weeks of beginning his second term, the president named himself chairman of the center and installed a political ally, Richard Grenell, as its executive director, while filling its board with supporters.

A resolution to leave was approved by the opera's board of trustees on Friday. The opera said in a statement that it would "seek an amicable early termination of its affiliation agreement with the Kennedy Center and resume operations as a fully independent nonprofit entity."

The resolution calls for the opera to move its performances out of the Kennedy Center's 2,364-seat Opera House as soon as possible and to reduce the number of performances as a cost-saving measure. Opera officials said that new sites in Washington have been lined up but that no leases have been signed. They declined to name those venues.

The officials said details about the new schedule would be announced shortly. The Kennedy Center's website currently lists the opera's lineup of spring performances, including Scott Joplin's "Treemonisha" and "West Side Story" as well as its upcoming gala, but a separate website has been set up.

The resolution also calls for the opera to begin negotiations with the Kennedy Center about ending an affiliation agreement that has bound the cultural institutions since it was signed in 2011, when the opera was facing financial challenges.

The opera declined to release a copy of the resolution, which was approved by the 37-member board during a virtual meeting on Friday. But details of its contents were provided to The New York Times by officials involved in the deliberations.



Francesca Zambello, the opera's artistic director, said she was "deeply saddened to leave the Kennedy Center." Kayla Bartkowski/Getty Images

Under Mr. Grenell, the Kennedy Center has been aggressive in trying to discredit artists who have canceled commitments with the center. But on Friday, Roma Daravi, a spokeswoman, said the center agreed that the time had come to end this relationship.

"After careful consideration, we have made the difficult decision to part ways with the W.N.O. due to a financially challenging relationship," she said. "We believe this represents the best path forward for both organizations and enables us to make responsible choices that support the financial stability and long-term future of the Trump Kennedy Center."

In a social media post that has since been deleted, Mr. Grenell said that ending the arrangement would give the Kennedy Center the flexibility to bring in operas from around the world. "Having an exclusive Opera was just not financially smart," he wrote. "And our patrons clearly wanted a refresh."

Opera leaders said the decision to leave was in response to a drop in attendance and a decline in donor contributions during the president's second term, as well as an escalating number of artists who have refused to appear at the Kennedy Center since Mr. Trump's name was added to the building last month. (The authority of the board to overrule Congress and rename the center, which was created in 1971 in tribute to John F. Kennedy, is disputed, and The Times has continued to refer to its legal name.)

"I am deeply saddened to leave the Kennedy Center," Francesca Zambello, who has been the opera's artistic director for 14 years, said in a statement. "I have been proud to be affiliated with a national monument to the human spirit, a place that has long served as an inviting home for our ever-growing family of artists and opera lovers."

In its statement, the opera appeared to take pains to be conciliatory, not naming Mr. Trump or Mr. Grenell.

“The board and management of the company wish the center well in its own future endeavors including recognizing the center for having secured significant funding, including $275 million from Congress, for upgrades to the center,” the statement said.

The affiliation agreement was first negotiated when Barack Obama was president, setting a framework for the organizations to work cooperatively in hiring the opera company’s general director (currently Timothy O’Leary) and artistic director, as well as to make decisions on its programming. The Kennedy Center also leases space to the opera company for storage, offices and rehearsals.

Among the most difficult issues that need to be resolved is the future of the opera’s $30 million endowment, which has already become a matter of dispute. The opera contends that the affiliation agreement makes clear that both entities control the fund, the result of a history of donations from opera supporters in Washington.

Officials with the opera said they would move all performances out of the center, regardless of whether its formal ties are ended. They asserted that taking their shows to other venues would free the company of programming and personnel entanglements with the Kennedy Center.



Several artists, including Béla Fleck and Stephen Schwartz, have withdrawn from events at the Kennedy Center since President Trump's name was added to the facade. Nathan Howard/Reuters

The Washington National Opera was established in 1957, with an inaugural performance of Mozart's "The Abduction From the Seraglio" at George Washington University. With a few exceptions — it performed at Constitution Hall while its home on the Potomac was being renovated — it has been performing at the Kennedy Center since the building opened.

The opera has provided a stage to some of the most prominent performers of the generation, including Plácido Domingo (who also served as its artistic director), Anna Netrebko, Denyce Graves and Renée Fleming. It has staged warhorses like "Carmen" and a new production of the "Ring" cycle in 2016, which was directed by Ms. Zambello. It also created the American Opera Initiative to showcase young composers.

"The Washington National Opera is one of our most prominent companies," said Marc A. Scorca, the president emeritus of Opera America, a service organization for opera companies. "It has presented a mix of work from our inherited repertoire

and new works from a wonderful young artists program."

Matthew Shilvock, the general director of the San Francisco Opera, said the Washington National Opera played "a vital role in expressing the national consciousness on the operatic stage."

Since early in his second term, Mr. Trump has sought to put his imprint on traditionally nonpartisan Washington institutions like the Smithsonian. His appointment of Mr. Grenell came with a clear message that the president wanted changes at the Kennedy Center.

"Ric shares my Vision for a GOLDEN AGE of American Arts and Culture, and will be overseeing the daily operations of the Center. NO MORE DRAG SHOWS, OR OTHER ANTI-AMERICAN PROPAGANDA," the president said then in a social media post.

Before long, the center ordered the National Symphony Orchestra to open all concerts with the national anthem (Mr. Grenell took the baton and conducted one of them) and hired a dance director who had complained to Mr. Grenell about "radical leftist ideologies in ballet."



The Washington National Opera performed “Come Home: A Celebration of Return,” inspired by Justice Ruth Bader Ginsburg, at the Kennedy Center in 2021. Kenny Holston for The New York Times

Officials with the Washington National Opera noted that operas often advance strong political and moral points of views — whether they were written two centuries or two years ago — and that they were worried they would be blocked from performing operas that did not follow Mr. Grenell’s edicts. Among its programming this season is Robert Ward’s “The Crucible,” based on the Arthur Miller play that explored the waves of paranoia overtaking a small town during the Salem witch trials of the 17th century.

In addition, Mr. Grenell said he wanted all productions at the Kennedy Center to be revenue neutral, taking in as much money in ticket sales and contributions as they cost to mount. Operas are expensive to produce and are typically not revenue neutral.

The opera company, in its statement, said the Kennedy Center's requirement that productions be fully funded in advance was "incompatible with opera operations." Ticket sales, it said, cover between 30 percent and 60 percent of costs, with the rest coming from grants and donations.

Ms. Zambello publicly raised the possibility of leaving the Kennedy Center in an interview with The Guardian in November, saying that the Trump administration's policies had "shattered" the confidence of donors and resulted in a 40 percent drop in ticket revenues. "If we cannot raise enough money, or sell enough tickets in there, we have to consider other options," she said at the time.

After her remarks produced an uproar, Ms. Zambello and other leaders of the opera reaffirmed their intention to stay. But since then, she and other opera officials said, the situation has only grown worse.

Béla Fleck, the celebrated banjoist, recently announced he was pulling out of performances with the National Symphony Orchestra, and the "Wicked" composer Stephen Schwartz said he would not host the opera's gala. Both said that appearing at the Kennedy Center had become a political statement.

Adam Nagourney is the classical music and dance correspondent for The New York Times.

A version of this article appears in print on , Section A, Page 24 of the New York edition with the headline: Washington National Opera Will Exit Kennedy Center, Its Base Since 1971

4:00 – 5:00 pm

In Conversation

AN INTERVIEW WITH DAVID MCCRAW, THE NEW YORK TIMES

In this fireside chat, Kate Bolger and David McCraw, Senior Vice President and Deputy General Counsel of The New York Times, will explore how The Times balances legal risk and its traditional value-based mission in the midst of unprecedented technological, political, and economic disruption.

Drawing on McCraw's experience advising a global news organization on high-stakes, high-visibility legal threats—while protecting the work at the core of the institution—this conversation will examine how The Times lawyers working with its outside counsel have navigated the past two decades of challenges, from the kidnapping of reporters and the rise of hyper-partisanship around the world to the existential threat of generative AI, the transformation to a digital-first news organization, and being sued by the President of the United States.

Panelist:

David McCraw, Senior Vice President and Deputy General Counsel, The New York Times

Moderator:

Kate Bolger, Partner, Davis Wright Tremaine LLP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BLAKE LIVELY,

Plaintiff,

-v-

WAYFARER STUDIOS LLC, JUSTIN BALDONI, JAMEY HEATH, STEVE SAROWITZ, IT ENDS WITH US MOVIE LLC, MELISSA NATHAN, THE AGENCY GROUP PR LLC, JENNIFER ABEL, JED WALLACE, STREET RELATIONS INC.,

Defendants.

WAYFARER STUDIOS LLC, JUSTIN BALDONI, JAMEY HEATH, IT ENDS WITH US MOVIE LLC, MELISSA NATHAN, JENNIFER ABEL, STEVE SAROWITZ,

Plaintiffs,

-v-

BLAKE LIVELY, RYAN REYNOLDS, LESLIE SLOANE, VISION PR, INC., THE NEW YORK TIMES COMPANY,

Defendants.

24-cv-10049 (Lead Case);
25-cv-449 (Member Case)

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Consolidated Defendants Blake Lively ("Lively"), Ryan Reynolds ("Reynolds"), Leslie Sloane ("Sloane"), Vision PR, Inc. ("Vision PR," and together with Sloane the "Sloane Parties" or "Sloane"[1]), and The New York Times Company (the "New York Times" or "Times," and

[1] The Amended Complaint make no allegations against Vision PR, Inc. other than that it is a

together with Lively, Reynolds, and the Sloane Parties, "Defendants"), each move to dismiss the Amended Complaint of Wayfarer Studios LLC ("Wayfarer"), Justin Baldoni ("Baldoni"), Jamey Heath ("Heath"), It Ends With Us Movie LLC, Melissa Nathan ("Nathan"), Jennifer Abel ("Abel,"), and Steve Sarowitz ("Sarowitz," and collectively with Wayfarer, Baldoni, Heath, It Ends With Us Movie LLC, Nathan, and Abel, the "Wayfarer Parties") pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. Nos. 86, 105, 132, 144.[2]

Reynolds, Sloane, and Vision PR additionally move for an award of attorney's fees and costs pursuant to New York's anti-SLAPP law, New York Civil Rights Law § 70-a. Dkt. Nos. 86, 132. Lively moves for an award of attorney's fees, treble damages, and punitive damages pursuant to California Civil Code § 47.1. Dkt. No. 144.

Finally, Lively, Sloane, and Reynolds move to strike Exhibit A to the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(f). Dkt. Nos. 86, 132, 144.

For the following reasons, the motions to dismiss are granted. The motion to strike is denied, but the Court will disregard Exhibit A to the Amended Complaint for purposes of this motion. The motions for fees are denied without prejudice to renewal.

BACKGROUND

The Wayfarer Parties' Amended Complaint contains allegations regarding a dispute between two well-known actors over the making of a Hollywood motion picture. Virtually every fact is hotly contested. For purposes of this motion, the Court accepts as true the well-pleaded allegations of the Wayfarer Parties' Amended Complaint. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002). Accordingly, the narrative set out below "do[es] not reflect the

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New York corporation affiliated with Sloane. Dkt. No. 50 ¶¶ 282, 310. Accordingly, this opinion uses "Sloane" to refer to Sloane and Vision PR together.

[2] Sloane and Vision PR submit a joint motion. Dkt. No. 86. Each other defendant moves separately. Dkt. Nos. 105, 132, 144.

Court's own findings" but simply repeats the account of events stated by the Wayfarer Parties in their Amended Complaint. *Brown v. Maxwell*, 929 F.3d 41, 52 (2d Cir. 2019). At this stage of proceedings, the Court has not considered whether the allegations in the Amended Complaint are true.[3]

In addition to the allegations in the Amended Complaint, the Court has considered several documents which are deemed to be part of the Amended Complaint as a matter of law. A complaint is "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *Sierra Club v. Con-Strux, LLC*, 911 F.3d 85, 88 (2d Cir. 2018) (quoting *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011)). If a complaint makes "clear, definite, and substantial" reference to a document, for example by quoting from it extensively, the entire document is deemed to be part of the complaint. *Trump v. Vance*, 977 F.3d 198, 210 n.8 (2d Cir. 2020)); *see Geiger v. Town of Greece*, 311 F. App'x 413, 416 (2d Cir. 2009) ("Geiger's amended complaint quoted extensively from the Assurance, thereby incorporating it into the pleading."). Relatedly, if the complaint "relies heavily on [the] terms and effect," of a document, but for some reason does not include the entire document, the Court may consider the entire document as part of the complaint. *Searle v. Red Creek Cent. Sch. Dist.*, 2023 WL 3398137, at *2 (2d Cir. May 12, 2023) (quoting *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016)). The purpose of this rule is to prevent a complaint from surviving simply because a clever plaintiff included certain parts of a key document and left out others.

[3] The Second Circuit has cautioned the press to understand court documents "for what they are," including by distinguishing between facts which are found by a court to be true and allegations which "are prepared by parties seeking to advance their own interests in an adversarial process." *Brown*, 929 F.3d at 52.

See Guzman v. Bldg. Serv. 32BJ Pension Fund, 2023 WL 2526093, at *6 (S.D.N.Y. Mar. 15, 2023) ("The purpose of the rule is to prevent complaints from being invulnerable at the motion to dismiss stage purely 'by clever drafting.'" (*quoting Glob. Network Comm'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006))).

Under this standard, the Amended Complaint is deemed to include the New York Times article that is the subject of the Wayfarer Parties' defamation claims (the "Article"), Dkt. No. 107-1, the accompanying video (the "Video"), Dkt. No. 107-2, Lively's California Civil Rights Department ("CRD") complaint, Dkt. Nos. 107-3–107-7, a list of seventeen protections demanded by Lively to return to production in November 2023, Dkt. No. 84-1,[4] and emails between the New York Times and the Wayfarer Parties, Dkt. Nos. 107-7–107-12. Each of these documents is extensively quoted and discussed in the amended complaint. *See* Dkt. No. 50 ¶¶ 36, 131–132, 163, 262, 275, 278, 285 (CRD complaint); *id.* ¶¶ 75–122 (return to production demands); *id.* ¶¶ 262–263, 270, 274–276, 278, 282 (Article); *id.* ¶¶ 266–267 (Video); *id.* ¶¶ 257–258, 376–379, 385–389 (Times emails). The complaint also "relies heavily on [the] terms and effect" of each document, either because it alleges the terms are defamatory or because it alleges they constitute a contract. *Searle*, 2023 WL 3398137, at *2 (quoting *Nicosia*, 834 F.3d at 230); *see Glob. Network Comm'ns*, 458 F.3d at 157 ("In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls."); *Bongiorno v. Baquet*, 2021 WL 4311169,

[4] This document is also in the record as part of Exhibit A to the Wayfarer Parties' complaint, Dkt. No. 50-1 at 52. The list of protections in Exhibit A of the Wayfarer Parties' complaint is identical to the list at Dkt. No. 84-1.

at *10 (S.D.N.Y. Sept. 20, 2021) ("[T]his principle applies to documents alleged to contain the false and misleading statement.").[5]

In determining whether the Wayfarer Parties have stated a claim for relief, the Court does not consider Exhibit A to the Wayfarer Parties' Amended Complaint. Dkt. No. 50-1. Under the Federal Rules of Civil Procedure, a "[d]efendant is entitled to know the allegations against it, and to have those allegations framed in separate paragraphs, with sufficient clarity to allow the defendant to frame a responsive pleading." *In re Turquoise Hill Res. Ltd.*, 2024 WL 4711185, at *11 (S.D.N.Y. Nov. 7, 2024) (quoting *Ahmad v. Experian Info. Sols., Inc.*, 2023 WL 8650192, at *5 (S.D.N.Y. Dec. 14, 2023)); *see Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015) (refusing to consider an "affidavit, buried in 170 pages of exhibits" attached to the complaint because it "would do considerable damage to Rule 8(a)'s notice requirement"); Fed. R. Civ. P. 10(b) ("A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances."). The body of the Wayfarer Parties' Amended Complaint is 224 pages long. Dkt. No. 50. Exhibit A is a "timeline" providing "a summarized account of the sequence of key events" which is an additional 168 pages long. Dkt. No. 50-1. It is significantly but not entirely repetitive of the Amended Complaint, and it does not set out its claims in numbered paragraphs as required by Federal Rule of Civil Procedure 10. *Id.*; *see* Fed. R. Civ. P. 10(b). The document is not a written instrument that "evidences legal rights or duties" or

[5] The Wayfarer Parties do not object to consideration of the Article, the Video, the CRD complaint, or the return to production demands, but they do object to consideration of the emails between the Times and the Wayfarer Parties. Dkt. No. 137 at 24 & n.27. This objection is unavailing, because the Wayfarer Parties plead in their complaint that "the[] express written words" of the emails "created an implied-in-fact contract," which the Wayfarer Parties accepted and the Times then breached. Dkt. No. 50 ¶¶ 386–389. The emails therefore show the terms of the purported contract and are necessarily integral to the breach-of-contract claim. *See Glob. Network Comm'ns*, 458 F.3d at 157; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Nicosia*, 834 F.3d at 234; *Guzman*, 2023 WL 2526093, at *7.

otherwise forms the basis for the Wayfarer Parties' claims, but is simply an additional "narrative summary." *Smith*, 794 F.3d at 254. "If such a[] [document] could be deemed part of a complaint, then Rule 8(a)'s requirement of a short and plain statement of a claim for which relief could be granted would be eviscerated." *Id.* at 255. If the Wayfarer Parties wanted any factual statements in the "timeline" to be considered, they should have alleged them in the Amended Complaint.[6]

I. The Parties

Justin Baldoni is an individual residing in Los Angeles, California. Dkt. No. 50 ¶ 301. Baldoni co-founded Wayfarer Studios LLC ("Wayfarer") in 2019 to be a studio that would produce "world-class entertainment driven by a powerful vision for change." *Id.* ¶ 20. Wayfarer

[6] At this time, the Court will not grant the motions to strike Exhibit A from the docket. Federal Rule of Civil Procedure 12(f) authorizes courts to strike "any redundant, immaterial, impertinent or scandalous matter" from a pleading. Fed. R. Civ. P. 12(f). Exhibit A is largely redundant of the Amended Complaint and, given that it must be disregarded, is immaterial to the Court's decision on the motion to dismiss. But the fact that material is irrelevant or must be disregarded generally does not justify striking it from the docket, unless "permit[ting] the allegations to stand would result in prejudice to the movant." *Bartlett v. Societe Generale De Banque Au Liban SAL*, 2021 WL 8155950, at *1 (E.D.N.Y. Aug. 5, 2021) (quoting *Roe v. City of New York*, 151 F. Supp. 2d 495, 510 (S.D.N.Y. 2001)). None of the Defendants have identified any particular prejudice caused by Exhibit A, a document which is no more scandalous than the Amended Complaint. *See* Dkt. No. 87 at 23–25 (arguing only that Exhibit A is irrelevant); Dkt. No. 106 at 1 n.1; Dkt. No. 133 at 29; Dkt. No. 145 at 11 n.14; *see also Lipsky v. Commonwealth United Corp.* 551 F.2d 887, 893 (2d Cir. 1976) ("[C]ourts should not tamper with the pleadings unless there is strong reason for doing so."). At the conference on February 3, 2025, counsel for Lively and Reynolds expressed some concern about the use of the attachment on a website created by defense counsel and stated they would move "promptly" to strike the exhibit. Dkt. No. 63 at 38:7–20. But the earliest motion to strike was made by Sloane on February 20, Dkt. No. 86, Reynolds and Lively did not move until March 18 and 20, Dkt. Nos. 132, 144. More importantly, none of the motions mentioned anything about improper or prejudicial use of Exhibit A. "Motions to strike are generally disfavored, and should be granted only when there is a strong reason for doing so." *Dolan v. Fairbanks Cap. Corp., 2008 WL 4515932*, at *1 (E.D.N.Y. Sep. 30, 2008). Absent prejudice or impropriety there is no strong reason to strike the document, as opposed to simply disregarding it.

is a Delaware limited liability company with its principal place of business in Los Angeles, California. *Id.* ¶ 300. All of Wayfarer's members are citizens of California. *Id.*

Wayfarer produced and co-financed the film *It Ends With Us*. *Id.* ¶ 6. Baldoni directed the film and played the lead role of Ryle. *Id.* ¶¶ 6, 89.

It Ends With Us Movie LLC is a California limited liability company with its principal place of business in California. *Id.* ¶ 303. All members of the LLC are citizens of California. *Id.*

Jamey Heath is an individual residing in Los Angeles, California. *Id.* ¶ 302. He is the CEO of Wayfarer Studios and a producer of *It Ends With Us*. *Id.* ¶ 157.

Steve Sarowitz is an individual residing in the County of Lake, Illinois. *Id.* ¶ 306.

Jennifer Abel is an individual residing in Los Angeles, California. *Id.* ¶ 305. She managed the Baldoni/Wayfarer account at Wayfarer's public relations firm, Jonesworks. *Id.* ¶¶ 196–197.

Melissa Nathan is an individual residing in Los Angeles, California. *Id.* ¶ 305. She is a crisis public relations ("PR") specialist and was engaged by Wayfarer in approximately August 2024. *Id.* ¶ 227.

Blake Lively is an individual residing in New York, New York. *Id.* ¶ 307. She played the lead role of Lily Bloom ("Lily") in *It Ends With Us*. *Id.* ¶ 27.

Ryan Reynolds is an individual residing in New York, New York. *Id.* ¶ 308. Reynolds is married to Lively and is a well-known actor. *Id.* ¶ 176.

Leslie Sloane is an individual residing in New York, New York. *Id.* ¶ 309. She is Lively's publicist. *Id.* ¶ 14. Sloane is affiliated with Vision PR, a New York corporation with its principal place of business in New York, New York. *Id.* ¶¶ 282, 310.

The New York Times Company is a New York corporation with its principal place of business in New York, New York. *Id.* ¶ 311.

II. *It Ends With Us*

The book *It Ends With Us* is a romance novel by Colleen Hoover ("Hoover") published in 2016. *Id.* ¶ 22. The book explores themes of domestic violence and generational patterns of abuse. *Id.* Baldoni was moved by the book and wanted to make it into a film. *Id.* ¶¶ 21, 23. In early 2019, he emailed Hoover complimenting the book's realistic depiction of a difficult subject matter, stating that it could "change (and save) lives" and "have a huge impact," and asked to option it for production as a film. *Id.* ¶ 23. Hoover believed Baldoni was the right person for the project because she appreciated his film *Five Feet Apart*, which told the story of a woman with cystic fibrosis. *Id.* ¶¶ 21, 23. She emailed Baldoni that "[y]ou 'get'" the book, stating that "[m]y big fear is that I'll option it to someone who thinks it's a hot romance and they'll take it in the absolute wrong direction." *Id.* ¶ 23. Hoover also suggested that Baldoni portray one of the lead characters, Ryle. *Id.* ¶ 23.

Wayfarer acquired the film rights to *It Ends With Us* in 2019. *Id.* ¶ 22. Wayfarer partnered with Sony to co-finance and distribute the film. *Id.* ¶ 24. As part of the deal, Baldoni insisted that 1% of the film's proceeds be donated in support of survivors of domestic abuse. *Id.*

On or around December 31, 2022, Lively agreed to take the lead role of Lily Bloom in the adaptation of *It Ends With Us*. *Id.* ¶ 27. Lively was granted an executive producer credit. *Id.* In the film, Lively's character Lily is romantically involved with Baldoni's character Ryle. *Id.* ¶¶ 39, 89, 100.

III. Early Production of the Film

Production of the film occurred in two parts. Initial production occurred in approximately May–June of 2023, at which point filming was disrupted by the Writers Guild of

America ("WGA") and Screen Actors Guild ("SAG-AFTRA") strikes. *Id.* ¶¶ 27–65; *see id.* ¶¶ 79–121 (further describing events during this period). The strikes ended in September and November 2023, respectively, and the second stage of filming occurred in January–February 2024. *Id.* ¶¶ 73, 132. The film premiered on August 6, 2024. *Id.* ¶ 166.

A. Pre-Production

The parties took a number of steps in early 2023 to prepare for the filming of *It Ends With Us*. Beginning around February 2023, Baldoni and Lively worked with trainers to physically prepare for their roles. *Id.* ¶¶ 47–50. Lively introduced Baldoni to the personal trainer he worked with for the film. *Id.* ¶ 47. On February 17, 2023, Lively texted Baldoni expressing a desire to do body scenes at the end of the schedule. *Id.* ¶ 50. Baldoni responded that she would look amazing, that she should not stress about her body, and that they would talk through anything she was insecure about. *Id.* Lively responded stating that she would work extremely hard and make sure to be in shape, even though she just had her fourth baby, and that Baldoni's support in this area was critical and appreciated. *Id.*

In early April 2023, Baldoni hired an intimacy coordinator to work on the film. *Id.* ¶ 79. Although an intimacy coordinator is not required by SAG-AFTRA, Baldoni was eager to engage one to ensure that he and others felt safe during intimate scenes. *Id.* ¶ 80. It was important to him that the intimacy coordinator be female to help craft sex scenes that would appeal to the mostly-female audience of the book. *Id.* Baldoni attempted to set up a meeting between the intimacy coordinator and Lively, but Lively declined, saying she would meet the coordinator "when we start." *Id.* ¶ 85. Baldoni met with the intimacy coordinator alone and then later relayed plans for the sex scenes to Lively at meetings which Lively insisted occur at her home, often while her husband was present. *Id.* Although Lively later accused Baldoni of personally adding "graphic content" and insisting she do "uncomfortable" or "gratuitous" scenes, including

a scene in which Lively would orgasm on camera, the scenes were in fact proposed by the intimacy coordinator. *Id.* ¶¶ 87–88.

At some point during pre-production, Lively asked Baldoni if she could "take a pass" at writing the rooftop scene in *It Ends With Us* in which Lily and Ryle first meet. *Id.* ¶ 39. Lively sent Baldoni a draft that differed dramatically from what was originally written. *Id.* ¶ 40. Baldoni thanked Lively for her passion and told her the scene would likely end up being somewhere between the original version and the version she submitted. *Id.* Lively told Baldoni to come to her apartment, where Reynolds and a famous friend of Lively's enthusiastically praised Lively's script. *Id.* ¶ 41. On April 14, 2023, Baldoni texted Lively that her writing made the scene "more fun and interesting" and he "would have felt that way without Ryan and Taylor." *Id.* ¶ 42. Lively responded with thanks and encouragement, stated that it "didn't feel great" when he originally praised only her passion, stated that Ryan and the friend had watched her be overlooked in the past, and stated that Ryan and the friend want to make sure Lively is "seen for all I can, and do, offer." *Id.*

On April 22, 2023, Baldoni reached out to his personal trainer to ask how much Lively weighed so that he could train his back muscles to prepare for a lift scene. *Id.* ¶¶ 47–48. On April 25, 2023, Lively invited Baldoni to her penthouse to discuss the script, but when Baldoni arrived he was met by Reynolds, who screamed at him about "fat-shaming" Lively and demanded that he remove the lift scene. *Id.* ¶ 49. Baldoni apologized. *Id.* Lively eventually refused to perform the lift scene, and Baldoni rewrote it. *Id.* After the April 25 incident, Lively told Baldoni that if he could not get on board with her work methods, he still had two weeks to recast her. *Id.* ¶ 51.

By May of 2023, Lively was making daily alterations to the script. *Id.* ¶ 43. Although Baldoni initially invited Lively to make changes to the script, the frequency of her changes alarmed the producers and studio. *Id.* ¶ 43. On May 1, 2023, a producer texted Heath "Blake is now directing the movie," "[t]his is bad." *Id.* Around the same time, the same producer texted Heath "[h]e cannot let her have her opinions on everything" "[o]r shes going to be codirecting this film," "[t]his is why everyone is starting to lose it," and "[w]e been talking about the same thing for months." *Id.* ¶ 52.

Lively insisted on creative control over her character's wardrobe, ignoring the director's vision for her character and the choices made by the wardrobe team in accordance with that vision. *Id.* ¶ 31. She required the costume designer to re-shop her wardrobe in the style she wanted, insisted that her character could afford $5,000 shoes as a small business owner, and required that her wardrobe be delivered to her personal residence instead of the production office. *Id.* ¶¶ 32–33. To maintain harmony, Baldoni and Wayfarer reluctantly ceded to Lively full control over her wardrobe. *Id.* ¶ 34.

Prior to filming, Wayfarer attempted to secure Lively's signature on a certificate of engagement and a nudity rider. *Id.* ¶¶ 106–107. On May 8, 2023, Wayfarer provided Lively with a nudity rider approved by the intimacy coordinator. *Id.* ¶ 79. On May 12, 2023, Lively's counsel responded that they were reviewing the nudity rider and would provide notes. *Id.* ¶ 107. However, the discussion then shifted to the issue of whether Lively's fee should be deposited in escrow despite the fact that she had not yet signed her employment agreement or certificate of engagement. *Id.* ¶¶ 106–107. The fee was deposited in escrow, and filming began without Lively signing the certificate of engagement or nudity rider. *Id.* ¶ 107.

B. Initial Filming

Filming began in early May of 2024. *Id.* ¶¶ 54, 79. On the first day of principal photography, paparazzi photographs of Lively's wardrobe were negatively reported and led to Baldoni receiving criticism from Sony. *Id.* ¶ 35. Baldoni had a conversation with Lively in her trailer to discuss wardrobe adjustments, reassert his role as director, and get her on board with him having approval over her character's wardrobe. *Id.* ¶ 36. Lively suggested that Baldoni was being "gaslit" by Sony and Heath. *Id.* ¶ 37. She also complimented Baldoni's work as a director and actor, which led him to become emotional. *Id.* ¶ 37. The conversation took "considerable time" but was "professional." *Id.* ¶ 36.[7]

During the first period of filming, Lively had a close relationship with Baldoni and repeatedly expressed gratitude for his work. *Id.* ¶¶ 55–61, 98. She spoke openly with him about what would make her character look "sexier." *Id.* ¶ 56. She freely breastfed in front of him during meetings and took photographs of him soothing her crying baby. *Id.* ¶ 59.

Lively sometimes invited Baldoni, Heath, and other producers into her trailer. *Id.* ¶ 104. For example, she invited Baldoni into her trailer to work on lines while she pumped breast milk. *Id.* On one occasion, Heath was invited into Lively's trailer while she was having makeup removed from her collarbone, with Lively's nanny, makeup artist, and assistant present. *Id.* Lively was fully covered while either nursing or pumping breast milk. *Id.* Lively asked Heath to turn away while they spoke, and he did so. *Id.* At some later point, Lively told Heath that she was uncomfortable that he had made eye contact with her during this interaction. *Id.* Heath said

[7] Lively later misrepresented this conversation in her complaint to the CRD. *Id.* ¶¶ 4, 36. She characterized it as a "lengthy outburst" lasting "hours" in which Baldoni cried and made inappropriate "comments on her appearance." *Id.* ¶¶ 36, 38.

"I'm so sorry, I really didn't realize," and Lively responded "I know you weren't trying to cop a look." *Id.*

No intimacy or simulated sex scenes with Lively were shot during the first phase of filming. *Id.* ¶¶ 82, 108. However, some romantic or otherwise sensitive scenes were shot during this phase. One simulated nude scene was shot, for which Lively wrote and directed the action. *Id.* ¶ 82. Lively never requested a nudity rider or intimacy coordinator for that scene. *Id.* A scene was shot showing Lively's character giving birth, in which Lively was wearing black briefs and a pregnancy suit and her top was covered by a hospital gown. *Id.* ¶ 83.[8] Only essential individuals were present for the scene, and only Lively's legs were exposed. *Id.* ¶¶ 83 & n.16, 84. The actor portraying the obstetrician in the scene was an experienced actor who is friends with Baldoni. *Id.* ¶ 119. In connection with this scene and Baldoni's vision for the scene, Heath offered to show Lively a video taken of his wife and their newborn baby after his wife gave birth at home. *Id.* ¶ 101. Lively asked to see the video after she ate, but she never actually saw the video. *Id.* She only saw the first image at the start of the video, which shows Heath's wife, himself, and their baby after his wife gave birth at home. *Id.*

A romantic scene shot in the first phase depicted a "romance montage" of Lily and Ryle on a date. *Id.* ¶ 89. As part of the scene, the characters were slow dancing. *Id.* Lively insisted she liked the idea of the characters constantly talking, because that is what she and her husband like to do. *Id.* Baldoni said this was "cute" but tried to persuade Lively that they should instead silently look into each other's eyes. *Id.* As the scene continued, Lively apologized for the smell of her spray tan and body makeup. *Id.* ¶ 90. Baldoni responded "it smells good" and continued

[8] It is not clear from the Amended Complaint whether the "simulated nude" scene described in the previous sentence is this birth scene or a different scene. *Id.* ¶¶ 82–83.

acting and dancing. *Id.* Footage of the scene shows that there was no unprofessional conduct. *Id.* ¶ 90.

There were only two kissing scenes filmed before the strike break, both of which included kisses written in the script. *Id.* ¶ 92. In one scene, Lively initiated unchoreographed kissing, with different variations for different takes. *Id.* ¶ 91. Baldoni accepted this as a normal and acceptable part of filming romantic scenes. *Id.* Although some kissing by Lively was "unchoreographed," the kissing scenes were not "improvised." *Id.* ¶¶ 91–92.[9] Baldoni acted professionally during the kissing scenes. *Id.* ¶ 91.

In another scene, where everyone was wearing "onesies," Lively covered her onesie with a big coat. *Id.* ¶ 94. Baldoni asked that she take off the big coat so that her onesie would be visible. *Id.* He stated that "it will be hot," referring to the fact that it was 90 degrees in a small bar with no air conditioning. *Id.* He also said "it's sexy," to which Lively responded "that's not what I'm going for." *Id.* Baldoni then recognized that Lively appeared offended, and he apologized multiple times. *Id.*

Although the planned sex scenes between Lily and Ryle were not shot during the first phase, Lively and Baldoni did discuss them. *Id.* ¶ 100. In response to a proposal from the intimacy coordinator that Ryle not orgasm in one of the scenes after he satisfied Lily, Lively remarked "I'd be mortified if that happened to me." *Id.* Baldoni responded that "those have been some of the most beautiful moments" between him and his wife. *Id.* In another instance, Lively stated that she did not want a scene to "look like porn," and then additionally stated that she had never seen pornography in her life. *Id.* Baldoni stated that this was wonderful, because

[9] The distinction between "unchoreographed" and "improvised" kissing is not clear from the Amended Complaint. However, the statement that kissing was not "improvised" appears to reflect the fact that the scenes "included kisses as written in the script." *Id.* ¶ 92.

he had been exposed to pornography early in his life and had struggled with a pornography addiction. *Id.* Pornography addiction is an issue Baldoni had openly discussed in several books. *Id.*

On May 2, 2023, the WGA went on strike. *Id.* ¶ 63. Production on the film halted temporarily on June 14, 2023, due to WGA picketing. *Id.* ¶ 64. Production resumed the next day after the WGA agreed not to picket the set, but Lively was already gone and refused to immediately return. *Id.* ¶ 64. Wayfarer reworked the shooting schedule, at great expense, to film scenes which did not require Lively. *Id.* ¶ 64. However, production shut down entirely on June 27, 2023. *Id.* On July 14, 2023, SAG-AFTRA went on strike. *Id.* ¶ 65.

IV. Return to Set and End of Production

During the strikes, Baldoni began editing the film footage in his role as director. *Id.* ¶ 66. Lively repeatedly asked for access to the "dailies," raw footage of what is filmed on a given day that is generally not shared with the cast, and early cuts of scenes. *Id.* ¶ 68. Baldoni asked Heath and another producer about the request for dailies. *Id.* ¶ 69. All of the producers agreed the answer was no, with Heath saying "[i]t's an absolute no." *Id.* Baldoni expressed concerns that Lively would then "start to edit the movie and tell me which takes to use," similar to what had happened with the writing of the rooftop scene. *Id.* When Baldoni told Lively it was "too early" to share the dailies, Lively asked: "none of the producers have had access to dailies? It's just you?" *Id.* ¶ 71. Baldoni responded that Heath and another person had access to the dailies, and he shared some limited scenes with Lively. *Id.* ¶ 72.

The WGA strike ended on September 27, 2023, and the SAG-AFTRA strike ended on November 9, 2023. *Id.* ¶ 73.

On November 9, 2023, Lively's lawyer sent Wayfarer "a list of protections that will need to be guaranteed and observed by the Film's producers" for Lively to return to work. *Id.* ¶ 75. The document listed seventeen demands. *Id.*; *see* Dkt. No. 84-1.

1) That an intimacy coordinator be present at all times when Lively was on set. Dkt. No. 50 ¶ 79.

2) Limiting review of intimate scene footage to essential personnel. *Id.* ¶ 82.

3) No spontaneous improvisation of scenes involving physical touching, simulated sex, or nudity, which must be choreographed with the intimacy coordinator. *Id.* ¶ 85.

4) No physical touching of Lively (including hugging) or comments on her physical appearance except in connection with the character and/or scene work. *Id.* ¶ 93.

5) No discussion of personal experiences with sex or nudity, including as it relates to conduct with spouses or others. *Id.* ¶ 98.

6) No one to enter Lively's trailer while she is undressed. *Id.* ¶ 104.

7) No filming nude or sex scenes without a nudity rider in place, and no use of scenes shot without a nudity rider except with Lively's consent. *Id.* ¶ 106; Dkt. No. 84-1 ¶ 7.

8) Lively may have a personal representative on set. Dkt. No. 50 ¶ 109.

9) Notice of COVID-19 exposure. *Id.* ¶ 110.

10) No retaliation for making these requests. *Id.* ¶ 112.

11) Mutually-approved Sony representative required on set. *Id.* ¶ 113.

12) Additional, Lively-approved producer to be hired to supervise filming. *Id.* ¶ 114.

13) Existing third-party producers empowered to actively supervise the production. *Id.* ¶ 116.

14) Use of a Lively-approved body and stunt double for rape and sexual violence scenes. *Id.* ¶ 117.

15) No filming nude or sex scenes of any actor's portrayal of Lily except in accordance with the nudity rider. *Id.* ¶ 118; Dkt. No. 84-1 ¶ 15.

16) All day players must be hired through talent agencies, not personal connections. Dkt. No. 50 ¶ 119.

17) All-hands meeting before production resumes. *Id.* ¶ 122.

Wayfarer and Sony sought to revise the document because they believed it inaccurately represented set culture. *Id.* ¶ 76. However, Lively's counsel responded that the document was not "a starting place for negotiation," but "a set of protections that needs to be in place in order for our client to return to work." *Id.* Although they were concerned about the "underlying insinuations/allegations," Wayfarer and Sony found the substance of many of the demands unobjectionable, because the relevant protections were already in place. *Id.* ¶¶ 77, 123. For example, an intimacy coordinator was already engaged and involved in coordinating scenes (despite Lively's refusal to meet with her), *id.* ¶¶ 79, 85, intimate scene footage was already limited to essential personnel, *id.* ¶ 82, touching and comments on Lively's appearance were limited to character work, *id.* ¶¶ 93–94, Wayfarer had sought to ensure Lively had a nudity rider (despite her refusal to sign it), *id.* ¶¶ 106–108, and existing third-party producers were already empowered to supervise production, *id.* ¶ 116. Additionally, Wayfarer had no objection to Lively having a personal representative on set, *id.* ¶ 109, to having a Sony representative on set, *id.* ¶ 113, or to Lively's preapproved stunt and body doubles, *id.* ¶ 117. The Wayfarer Parties did object to the cost of hiring an additional producer and to Lively's imposition of control over nude or sex scenes involving the younger version of Lily, played by a different actress. *Id.* ¶¶ 114, 118. However, the Wayfarer Parties agreed to the demands because "[t]he alternative was to lose millions of dollars, cost hundreds of people their jobs after they had been out of work for months, and destroy their relationship with Sony." *Id.* ¶ 77.

On December 27, 2023, Baldoni sent an email to other members of the production team attaching a revised script with further changes demanded by Lively. *Id.* ¶ 124. He stated that he was angry that "Blake has taken over our film and somehow re-wrote a movie we spent years developing," but he had decided to wave "the white flag" and "give her 98% of what she wants"

since "none of us have the energy to fight anymore." *Id.* ¶ 124. He also expressed concerns about further intimacy given "the risk of something innocuous or not meeting her standards could and would very likely be used against me (as it already has)." *Id.* On January 1, 2024, Baldoni stated there would now be a "negotiation" with Lively "for what the final script looks like." *Id.* ¶ 126.

On January 4, 2024, the day before filming was scheduled to resume, Lively reached out to Baldoni, Heath, and the film's producers to meet in her home in New York. *Id.* ¶ 127. At the meeting, Lively read a list of grievances which were separate and apart from the seventeen demands already made. *Id.* ¶¶ 128, 131. Reynolds then aggressively berated Baldoni, demanding that he apologize for actions that did not happen or were grossly mischaracterized. *Id.* ¶ 129. One of the producers stated that in his forty-year career, he had never seen anyone speak to someone like that in a meeting. *Id.*

Baldoni and Heath were deeply unsettled by the meeting, but they felt compelled to finish the film given that the financial and reputational implications of shutting down a film halfway through production. *Id.* ¶ 131. On January 19, 2024, the parties signed the seventeen-point list of demands. *Id.* ¶ 131. Filming resumed the next day and concluded on February 9, 2024, without any further grievances from Lively. *Id.* ¶ 132.

V. Post-Production

The Directors' Guild of America ("DGA") requires a ten-week editing period for directors to privately edit and assemble their director's cut. *Id.* ¶ 134. Lively requested to join Baldoni in the editing bay during this time. *Id.* ¶ 135. On February 25, 2024, Baldoni offered for her to join him beginning on March 18, after he had a few weeks to start working. *Id.* Lively responded that she would love to "be in the passenger seat with you as soon as possible." *Id.* The collaboration was originally supposed to be for two days but extended to ten days, and

Lively sought to work alone in the editing bay without Baldoni. *Id.* ¶ 137. Texts between Baldoni and the film's editors show them reluctantly agreeing to give Lively what she wanted in the hope that she can "move on from this need of hers." *Id.* ¶ 137.

In April and May 2024, Sony agreed to allow Lively to create her own cut of the entire film, a right that is generally reserved exclusively for directors. *Id.* ¶ 140. Sony told Wayfarer that Lively refused to promote the film unless her demands were met. *Id.* Wayfarer argued that Lively should at least finally sign her engagement contract before her demands were met, but Sony disagreed. *Id.* Sony told the editors and Baldoni that they were not permitted to look at Lively's cut. *Id.* ¶ 141. At this point, Baldoni assumed that Lively's edits would simply supplement his work. *Id.* ¶ 142. However, as Lively threatened to refuse to promote the film or approve related marketing materials, Wayfarer and Baldoni were forced to agree to more demands, including co-funding a "friends and family" screening of Lively's version of the film. *Id.* ¶ 142. Lively ultimately replaced the film's editors and composer with her own choices, who had previously worked with Reynolds. *Id.* ¶ 143. Sony supported these demands. *Id.*

Wayfarer and Sony ended up with two competing versions of the film: Lively's and Baldoni's. *Id.* ¶ 144. Because of Lively's threat to withhold promotion of the film and the concern that she would end Baldoni's career with false accusations, Wayfarer agreed to do an audience test of both versions. *Id.* This decision was made on the understanding that Lively had agreed with Sony to drop the matter if Baldoni's cut of the film scored higher than hers. *Id.* Baldoni's cut did score higher with most key demographics, with Lively's cut scoring higher only with men, who were not the target audience of the film. *Id.* ¶ 145. However, Lively still insisted that her version, rather than Baldoni's, be publicly released. *Id.* ¶ 146. Sony told Wayfarer that neither Lively nor the rest of the cast would promote the film unless Lively's cut

was used. *Id.* Baldoni reluctantly stood down and allowed Lively's version of the film to be released and promoted. *Id.* ¶ 146.

Sony did convince Lively to put much of Baldoni's work back into the film. *Id.* However, Baldoni was completely locked out of Lively's final cut of the film. *Id.* ¶ 149. He was permitted only to "give notes as a studio" due to his role at Wayfarer. *Id.* ¶ 150.

Lively additionally threatened to abandon her contractual obligation to promote the film and approve marketing materials if she was not awarded a producer credit. *Id.* ¶ 152. Lively sought the *p.g.a.* mark on her producer credit, a designation licensed by the Producers Guild of America ("PGA") to identify a producer who has performed the majority of the production work on a motion picture. *Id.* ¶ 153. She demanded "with extortionate threats" that Baldoni, Heath, and other producers send letters to the PGA in support of this mark. *Id.* ¶ 154. Wayfarer reluctantly agreed to give Lively a producer credit, *id.* ¶ 152, but Wayfarer and Baldoni refused to support the *p.g.a.* mark because Lively had not earned it, *id.* ¶ 155. In response, Lively instructed Sony to tell Wayfarer and Baldoni that "any good will left between us is done." *Id.* ¶ 156. Eventually, Wayfarer and Baldoni did send a letter of support for the *p.g.a.* mark. *Id.* ¶ 157. Heath memorialized their reasons for doing so in a letter to Wayfarer's attorneys stating that "Justin and I ended up agreeing to write the letter due to feeling trapped" because Lively "continues to hold a threat over our heads and every time we try and hold a line she uses that threat either directly or indirectly." *Id.* It continues: "I am not suggesting that we were literally forced to acquiesce, but given the high profile of the movie, the partnership with Sony, the amount of money invested, and the need to complete the movie, we have written the letter on her behalf, omitting the truth of how and why she was able to contribute." *Id.* ¶ 157.

VI. Release of the Film and Public Relations Efforts

Around June 6, 2024, Baldoni was hospitalized with a serious spine infection. *Id.* ¶ 146. At that time, Lively was dictating much of the marketing for the film. *Id.* ¶ 147. She removed Baldoni from all posters, trailers, and promotional materials, saying she would otherwise refuse to promote the film. *Id.* ¶ 148. She also removed his "A Film By" credit. *Id.* ¶ 158. Lively insisted on screening her cut of the film at Book Bonanza, an annual Colleen Hoover convention, but stated that Baldoni could not attend. *Id.* ¶ 149. Lively informed Sony that she and the cast would not participate in any marketing or promotion of the film alongside Baldoni. *Id.* ¶ 158. Lively, Reynolds, and other cast members "unfollowed" Baldoni on social media. *Id.* ¶¶ 158–159. Lively encouraged the other cast members to shun Baldoni. *Id.* ¶ 159. Baldoni was not invited to any cast promotional events, cast screenings, premieres, photo shoots, or other cast campaigns. *Id.* ¶ 163.

Because Baldoni was systematically excluded from marketing of the film, he also did not agree to Sony's marketing plan for the film. *Id.* ¶ 163. That plan suggested marketing "focus more on Lily's strength and resilience as opposed to describing the film as a story about domestic violence," "avoid talking about this film that makes it sad or heavy," and "focus on the positive elements in interviews" rather than "discussing abuse." *Id.* As he had always planned, Baldoni wanted to use the film to bring awareness to domestic violence. *Id.* Baldoni was specifically focused on Wayfarer's partnership with No More, a global initiative aimed at raising awareness, inspiring action, and sparking conversations to end domestic violence and sexual assault. *Id.* ¶ 172.

In July 2024, Lively's social media posts promoting the film took a lighthearted tone, focusing on fun, fashion, and floral motifs. *Id.* ¶ 179. She also promoted the launch of her new

hair care line, Blake Brown, which was timed to coincide with the film's release, and her alcohol brand Betty Booze. *Id.* ¶¶ 180–181.

Reynolds' movie *Deadpool and Wolverine* premiered on July 26, 2024. *Id.* ¶ 164. The film had a character named Nicepool, also portrayed by Reynolds, who could be interpreted as a reference to Baldoni. *Id.* Nicepool is a caricature of a "woke" feminist who inappropriately comments on a female character's body after childbirth, excuses his inappropriate remarks by claiming he is a feminist, and references an intimacy coordinator. *Id.* Nicepool is shot and killed by a character voiced by Lively. *Id.* During the premiere of *Deadpool and Wolverine*, Reynolds approached an executive at William Morris Endeavor ("WME"), Baldoni's agency, and told him Baldoni was a "sexual predator." *Id.* ¶ 162. At a later date, Reynolds also demanded that WME drop Baldoni. *Id.* WME also represented Reynolds and Lively. *Id.* ¶ 16.

Wayfarer and Baldoni became fearful that Lively and Reynolds were attempting to destroy Baldoni's career and personal life. *Id.* ¶ 162. Baldoni sought help from Wayfarer's public relations firm, Jonesworks, which Wayfarer had engaged since 2020 and which also handled publicity for Baldoni personally. *Id.* ¶ 196. The Baldoni/Wayfarer account at Jonesworks was managed by Abel. *Id.* ¶ 197. Abel recommended that Wayfarer engage a crisis PR specialist, Nathan, to assist with "a massive PR crisis" stemming from news stories beginning to trickle out concerning tension between Lively and Baldoni. *Id.* ¶ 227.

A particular public relations concern at the time was a threat by Lively that if Baldoni attended the film's premiere on August 6, 2024, she and a majority of the cast would boycott. *Id.* ¶¶ 166, 227. Eventually, Heath and Sony negotiated a compromise in which Baldoni and Wayfarer attended the premiere but arrived before Lively and others. *Id.* ¶ 169. When Lively arrived, Baldoni and his group were required to leave the red carpet and were escorted by

security to a makeshift area in the basement with folding tables and chairs. *Id.* ¶¶ 169–170. Once the main theater was cleared of Lively and her guests, Baldoni and his group were permitted to watch the film in a separate theater. *Id.* ¶ 171. The fact that Lively and Baldoni did not appear together at the premiere led to further speculation on social media regarding their relationship. *Id.* ¶ 231.

In a red-carpet interview at the New York premiere of the film, Lively stated that Reynolds actually wrote the rooftop scene. *Id.* ¶ 44. The Wayfarer Parties and Sony were not previously aware that Reynolds, who had no formal role in the film, contributed to the scene. *Id.* ¶¶ 44–46.

On August 8, 2024, two days after the premiere, Nathan and Lively's publicist, Sloane, agreed that neither would speak to any reporters about problems between Lively and Baldoni without informing the other. *Id.* ¶ 188. However, Sloane then immediately responded to a text from a reporter at the Daily Mail who reached out regarding problems on the set between Lively and Baldoni. *Id.* ¶ 189. Sloane texted back that the reports were "1000 percent untrue"; "[y]our info is totally off"; "[y]ou have it all wrong"; and "[y]our reporters are so wrong." *Id.* ¶ 190. She added: "wtf is going on. The whole cast doesn't like Justin nothing [to] do with Blake," and "[t]hey are panicking as the whole cast hates him." *Id.* ¶ 190. Nathan was contacted by the same reporter the next day and told Sloane she "would have to speak with him," but would "tell him nothing." *Id.* ¶ 191. Nathan was not aware that Sloane was speaking to the media outside of their agreement, and she and Abel still sought to maintain the truce they had agreed on with Sloane. *Id.* ¶¶ 192, 230.

However, also on August 8, 2024, Abel's supervisor, Jonesworks' CEO Stephanie Jones ("Jones"), spoke to a Daily Mail reporter about a story the Daily Mail had published about

Baldoni and Lively. *Id.* ¶ 231. Jones had not previously been closely involved with Wayfarer and Baldoni, leaving management of the account to Abel. *Id.* ¶ 226. But Abel was transitioning out of Jonesworks to start her own business and was set to finish work on August 23, 2024. *Id.* ¶ 212. Jones was unhappy with this decision and, with Abel leaving, Jones sought to reassert her authority over the account and convey her engagement. *Id.* ¶ 226. Even though Abel had expressly told Jones and others not to speak to the press because of the truce agreed to between Lively's and Baldoni's teams, Jones did so. *Id.* ¶ 231. Contemporaneous texts show that Nathan and Abel were furious with Jones for ruining their plan. *Id.* Wayfarer directed Jones to cease all activities on behalf of Wayfarer and Baldoni and let Abel, Nathan, and another Jonesworks employee handle the crisis. *Id.* ¶ 232.[10] Sloane and Sony learned that someone from Baldoni's team had been communicating with the media, and Nathan started hearing that Sloane was planting her own negative stories. *Id.* ¶ 233.

In the days after the premiere, Lively received a wave of online criticism for her marketing of the film, which was criticized as "shallow" and "tone deaf." *Id.* ¶¶ 184–185, 279. Her cross-promotions with her alcohol brand were criticized due to the ties between alcohol and domestic violence. *Id.* ¶¶ 181, 280. A post stating "grab your friends. wear your florals" went viral and was perceived as insensitive given the film's focus on domestic violence. *Id.* ¶¶ 183–185, 280. On August 9, 2024, Heath emailed Sony noting that "many people are pointing out that the DV is being glossed over and that Justin is essentially the only one appreciating the subject matter whilst others may be not giving it the proper respect it deserves." *Id.* ¶ 182. He further stated that "this has always been a concern of ours" and suggested that the movie be

[10] Jones continued to advocate for a more aggressive PR strategy and repeatedly stated that she had not spoken with the Daily Mail. *Id.* ¶¶ 234–237.

"more deliberate in embracing the DV aspect" so that people know "we too recognize the gravity and sensitivities of this subject." *Id.*

On August 12, 2024, Heath and Abel had a call with two executives from "their then talent agency."[11] *Id.* ¶ 250. One admitted that the criticism of Lively was caused by the focus on frivolities and glamor in her promotion of the film. *Id.* However, the executive also told Heath and Abel that Lively believed Wayfarer, Baldoni and Heath were waging a shadow campaign against her. *Id.* ¶ 251; *see id.* ¶ 282 (messages from Sloane denying that the backlash was organic and stating that Lively "did nothing"). Abel stated her belief that the parties had reached a truce. *Id.* ¶ 251. The executive communicated a demand from Lively and Reynolds that Wayfarer, Heath, and Baldoni make a public apology that day or else "the gloves would come off." *Id.* ¶ 250. The next day, Heath told talent agency executives that Wayfarer, Baldoni, and Heath had no connection to the negative publicity but that Lively and Reynolds had demanded they take the blame. *Id.* ¶ 253. The executives told Heath and Abel that Lively and Reynolds demanded Wayfarer put out a statement that Lively and Reynolds had dictated calling *It Ends With Us* a "troubled" production and requiring Wayfarer to take "accountability," or else Lively and Reynolds would attack Wayfarer in the press. *Id.* ¶ 254. The executive admitted that Lively and Reynolds brought the backlash on themselves but were looking to find someone else to blame. *Id.* ¶ 255.

In a number of contemporaneous messages, Nathan and Abel stated that they were not creating negative publicity about Lively. On August 13, 2024, Nathan sent Abel a text describing a negative TMZ story about Lively as "completely unsolicited." *Id.* ¶ 279. Abel

[11] The Court construes this allegation to refer to Baldoni and Wayfarer's talent agency, WME. *See id.* ¶ 16.

stated that "The post has a similar tip / Not from any of us obv," and further stated "These are clearly people on set coming out to defend JB which is good and we just let them do their thing." On August 15, 2024, Nathan texted Baldoni a negative Daily Mail story about Lively stating "This just ran – obviously none of us knew about this either." *Id.* On August 16, 2024, Baldoni texted Nathan's team asking to confirm that certain Instagram comments defending him that "feel like bots" were not created by his team, to which Abel and Nathan responded that it was not them and they do not use bots. *Id.* ¶ 286. Baldoni expressed worry about the perception that "we are planting these stories which is not true obviously," and Abel stated that he should not worry because "[t]he people saying that there are bots and this is a PR play on your side is a minority voice compared to the thousands and thousands who are calling it what it is, and reacting to Blake's own actions and interviews." *Id.* Baldoni asked "[h]ow can we say somehow that we are not doing any of this – it looks like we are trying to take her down" and Nathan responded "[i]t doesn't. They are doing all of this themselves and it's really obvious." *Id.* On August 18, 2024, Baldoni texted Nathan asking for reassurance that "This is not us right?" referring to a story about a TikTok creator receiving messages instructing her how to discuss the Lively and Baldoni drama. *Id.* ¶ 281. Nathan responded: "None of us would ever do this." *Id.* In texts with a TMZ reporter, Nathan stated "BL camp keeps thinking its us placing and we are doing f all." *Id.* ¶ 282.[12]

On August 16, 2024, Nathan forwarded Abel a screenshot of a message from a reporter informing her of a story in the Daily Mail titled "Is Blake Lively set to be CANCELLED?" *Id.*

[12] On August 14, 2024, Abel's team was asked for comment about HR complaints and an intervention with Baldoni during production and responded that there were no relevant HR complaints and that it was not an intervention but more of a "contentious meeting" between Lively's team and Baldoni's team in which "Blake expressed all the things she was upset about." *Id.* ¶ 282.

¶ 276. The screenshot shows that Nathan had responded to the reporter: "Damn this is unfair because its also not me / Everything now looks like it's me / Maybe not to you." *Id.* Nathan then sent Abel a link to the story, and Abel responded: "Wow / You really outdid yourself with this piece 🙃." *Id.* ¶ 275. The 🙃 emoji is commonly used to convey irony, sarcasm, joking, or silliness. *Id.* ¶ 277. Nathan responded "That's why you hired me right? I'm the best." *Id.*

On August 21, 2024, two days before her last day at Jonesworks, Abel arrived at the office and was ushered into a conference room with an attorney, a security guard, and others. *Id.* ¶ 217. The attorney told her that Jonesworks believed she had proprietary information on her personal laptop and that Jonesworks would likely have grounds to sue if Abel did not allow it access. *Id.* Abel went into a state of shock and signed several documents without digesting their contents, at which point an IT professional searched her laptop and found nothing. *Id.* ¶ 219. The lawyer instructed Abel to hand over her phone, which she agreed to do as long as Jonesworks would immediately release her personal cell phone number. *Id.* ¶ 220. Jonesworks' chief of staff and attorney expressly confirmed that they would do so, and Abel handed them the phone and was ushered out of the building. *Id.* Abel went directly to a Verizon store to transfer the number to a new phone, but Jonesworks did not release the number. *Id.* ¶ 221. Abel's access to her contacts and critical accounts was cut off, and Jonesworks gained unrestricted access to everything in Abel's phone, including personal messages and accounts. *Id.*[13]

On the same day, Sloane called Nathan stating that she had seen Nathan's text messages and that Nathan should expect to be sued. *Id.* ¶ 238. The Wayfarer Parties allege on information and belief that Jones provided Abel's texts, including her texts with Nathan, to Lively. *Id.* ¶¶ 244–245, 283. Jones had a motive to do so because she was upset that Wayfarer and Baldoni

[13] It took Abel over a month to regain access to her accounts. *Id.* ¶ 222.

continued working with Abel, not Jones, after Abel left Jonesworks. *Id.* ¶¶ 239–240. Rather than accepting Wayfarer's decision to leave, Jones threatened to sue and demanded exorbitant payment for work not done. *Id.* ¶ 241.

VII. The New York Times Article

On December 20, 2024, Lively filed a complaint with the California Civil Rights Department. *Id.* ¶ 262; Dkt. Nos. 107-3–107-6. The complaint alleged that "Baldoni and his Wayfarer associates embarked on a sophisticated press and digital plan in retaliation for Ms. Lively exercising her legally-protected right to speak up about their misconduct on the set," attempting to "destroy Ms. Lively's reputation." Dkt. No. 103-3 ¶ 8 (internal quotation marks omitted). The complaint alleged among other things that Baldoni bit and sucked on Lively's lower lip during an improvised kissing scene that he insisted on shooting over and over again, *id.* ¶ 31, slowly dragged his lips down her neck during the romance montage in a way that had nothing to do with their roles, *id.* ¶ 32, personally added graphic content, including a scene where Lively would orgasm on camera, *id.* ¶ 33, insisted that Lively be naked in the birthing scene, *id.* ¶ 35, discussed his pornography addiction with Lively and revealed to other cast and crew that Lively had never seen pornography, *id.* ¶ 41, and repeatedly commented that Lively looked "sexy" or "hot," *id.* ¶¶ 43–44. It included a number of quotations and screenshots of messages allegedly showing that after Lively complained about this treatment, Baldoni and Wayfarer worked with Abel, Nathan, and Wallace on an online campaign to ruin Lively's reputation. *See generally* Dkt. Nos. 103-3–103-6. The complaint asserted claims for sexual harassment, retaliation, breach of contract, intentional infliction of emotional distress, and false light invasion of privacy under California law. Dkt. No. 103-3.

At 9:46 p.m. the same day, New York Times reporter Megan Twohey ("Twohey") emailed the Wayfarer Parties requesting comment on an imminent 4,000-word story concerning

their alleged orchestration of a smear campaign against Lively as a response to her disclosure of concerns about the working environment on the set of *It Ends With Us*, based on the CRD complaint. Dkt. No. 50 ¶ 257; *see* Dkt. Nos. 107-8–107-12. Twohey described the allegations of the CRD complaint and stated:

> [W]e are seeking your response . . . and we would welcome the opportunity to talk with you on the record. . . . Please offer any on-the-record comment, as well as any other information you think we should know. Additionally, please notify us of any inaccuracies. We need to hear back from you tomorrow by noon Eastern.

Dkt. No. 107-8; *see* Dkt. Nos. 107-9–107-12.

At 2:16 a.m., the Wayfarer Parties' legal representatives responded:

> It is shameful that Ms. Lively and her representatives would make such serious and categorically false accusations against Mr. Baldoni, Wayfarer Studios and its representatives, as yet another desperate attempt to 'fix' her negative reputation which was garnered from her own remarks and actions during the campaign for the film; interviews and press activities that were observed publicly, in real time and unedited, which allowed for the internet to generate their own views and opinions. These claims are completely false, outrageous and intentionally salacious with an intent to publicly hurt and rehash a narrative in the media. Wayfarer Studios made the decision to proactively hire a crisis manager prior to the marketing campaign of the film, to work alongside their own representative with Jonesworks employed by Stephanie Jones, due to the multiple demands and threats made by Ms. Lively during production which included her threatening to not showing up to set, threatening to not promote the film, ultimately leading to its demise during release, if her demands were not met. It was also discovered that Ms. Lively enlisted her own representative, Leslie Sloan with Vision PR, who also represents Mr. Reynolds, to plant negative and completely fabricated and false stories with media, even prior to any marketing had commenced for the film, which was another reason why Wayfarer Studios made the decision to hire a crisis professional to commence internal scenario planning in the case they needed to address. The representatives of Wayfarer Studios still did nothing proactive nor retaliated, and only responded to incoming media inquiries to ensure balanced and factual reporting and monitored social activity. What is pointedly missing from the cherry-picked correspondence is the evidence that there were no proactive measures taken with media or otherwise; just internal scenario planning and private correspondence to strategize which is standard operating procedure with public relations professionals.

Dkt. No. 50 ¶ 294; Dkt. No. 107-7. Twohey responded by asking who was represented by the statement, and Abel stated that it was Baldoni, Heath, Sarowitz, Abel, Nathan, and Wallace. Dkt. No. 107-7.

The Article was published at 10:11 a.m. on December 21, 2024, with the headline "'We Can Bury Anyone': Inside a Hollywood Smear Machine." Dkt. No. 50 ¶ 261. The Article draws heavily from Lively's CRD complaint and includes a link to a PDF of the complaint. *Id.* ¶¶ 262, 265. The Article states that the CRD complaint "includes excerpts of thousands of pages of text messages and emails that [Lively] obtained through a subpoena. These and other documents were reviewed by the New York Times." *Id.*; Dkt. No. 107-1. The Wayfarer Parties allege on information and belief that Lively provided her CRD complaint to the Times long before filing it. Dkt. No. 50 ¶ 275. URLs for images in the Article include strings of characters such as "2024-12-16" and "2024/12/18," apparently referencing dates before the CRD complaint was filed. *Id.* ¶ 264. The CRD Complaint linked in the Article states that it was created on December 21, 2024, but a web crawler (a program that scours the Internet to locate and catalog websites and files) records the file as having been uploaded on December 10, 2024. *Id.* ¶ 265. The file name for a video of Twohey reporting on the contents of the Article contains the characters "2024/12/12," apparently a reference to December 12, 2024. *Id.*¶ 266.[14]

The body of the Article details "an alleged campaign to tarnish Blake Lively after she accused Justin Baldoni of misconduct on the set of 'It Ends With Us.'" Dkt. No. 107-1 at 1. It states that "according to a legal complaint," Baldoni and Heath hired a crisis PR expert with an "explicit goal" to "harm Ms. Lively's reputation" after expressing fears that her allegations of

[14] A piece of the HTML source code for the article related to embedding text messages references October 31, 2024. *Id.* ¶ 268.

on-set misconduct would "become public and taint them." *Id.* at 2. The Article is framed by the idea that the documents reviewed by the Times "show a[] . . . playbook for waging a largely undetectable smear campaign in the modern era." *Id.*

The Article specifies that on August 2, 2024, Nathan sent Baldoni an initial planning document with media talking points, including negative talking points regarding Lively. *Id.* at 7. Baldoni texted Abel and Heath that he was "[n]ot in love with the document" and "[n]ot sure I'm feeling the protection I felt." *Id.* Abel then texted Nathan that Baldoni "wants to feel like she can be buried." *Id.* at 2, 7. Nathan responded "Of course—but you know when we send over documents we can't send over the work we will or could do because that could get us in a lot of trouble," adding "[w]e can't write we will destroy her." *Id.* at 7. Nathan also wrote: "You know we can bury anyone." *Id.*

The Article states that Nathan then "went hard at the press, pushing to prevent stories about Mr. Baldoni's behavior and reinforce negative ones about Ms. Lively, the text messages show," and that the effort "appears to have paid off" via negative media coverage "within days of the film's release." *Id.* at 2–3. The Article specifies that Baldoni texted Abel a social media thread that accused another celebrity of bullying behavior, stating "[t]his is what we would need." *Id.* at 8. Nathan then proposed hiring contractors to "dominate social media through 'full social account take downs'" that would be "untraceable," and the Wayfarer Parties started working with Jed Wallace and his company Street Relations for that purpose. *Id.* Abel told Nathan on August 4 that "I'm having reckless thoughts of wanting to plant pieces this week of how horrible Blake is to work with," and Nathan responded that she had already spoken off the record to an editor at the Daily Mail. *Id.* at 9. The Article quotes a text from one of Nathan's employees stating "[w]e've started to see shift on social, due largely to Jed and his team's efforts

to shift the narrative." *Id.* at 10. The Article cites a brand marketing report completed for Lively that "concluded she had likely been the object of a 'targeted, multichannel online attack.'" *Id.* at 12.

The Article quotes the August 16 texts between Abel and Nathan in which Nathan shared the Daily Mail article headlined "Is Blake Lively set to be CANCELLED?" *Id.* It quotes Abel as stating "[y]ou really outdid yourself with this piece," and Nathan responding "[t]hat's why you hired me right?" *Id.* It did not provide any context suggesting these statements could have been sarcastic. *Id.*

The Article prominently includes statements from Wayfarer's counsel that the Wayfarer Parties "did nothing proactive nor retaliated," that the claims are "completely false" and that Lively planted her own negative stories, which "was another reason why Wayfarer Studios made the decision to hire a crisis professional." *Id.* at 2. The Article comments that "[i]t is impossible to know how much of the negative publicity" against Lively "was seeded by Ms. Nathan, Mr. Wallace and their team, and how much they noticed and amplified." *Id.* at 9. It also notes that during the film rollout, Lively was criticized for being insensitive about domestic violence, for cross-promoting the film with Betty Booze, and for stating that Reynolds had written the rooftop scene. *Id.* at 10. It states that Baldoni encouraged the campaign but sometimes "vacillate[d], seeking assurances about the tactics being deployed." *Id.* at 11.

The Article was accompanied by a Video in which Twohey, drawing on text messages and other images, explained the story. Dkt. No. 50 ¶¶ 266–267; Dkt. No. 107-2. The Video states that:

> In a legal complaint Lively filed on Friday, private text messages and other documents that we've obtained reveal what really happened: a campaign to tarnish Lively after she alleged that Justin Baldoni, her co-star and director, and Jamey Heath, the producer, had engaged in misconduct while shooting the film.

Dkt. No. 107-2. The Video otherwise does not mention the CRD complaint. *Id.* It follows a similar narrative to the Article. *Id.* It concludes by stating that "[t]his story reveals a new playbook for waging a far-reaching and largely undetectable smear campaign in the digital age." Dkt. No. 50 ¶ 267; Dkt. No. 107-2.

The Wayfarer Parties allege that "Lively and her team used cherry-picked text messages, stripped of context and even manipulated, to peddle a narrative that the Wayfarer Parties had responded to Lively's complaints about purported sexual harassment by plotting to destroy her reputation through a shadow smear campaign" to the New York Times. *Id.* ¶ 272. It states that Lively "selectively and deceptively edited" the text messages in her CRD complaint, and "apparently in the materials she forwarded to the Times," to tell the false story that the Wayfarer Parties committed public relations sabotage as revenge for her sexual harassment complaints. *Id.* ¶ 275. For example, Lively's CRD complaint includes the message from Abel to Nathan stating "[y]ou really outdid yourself with this piece" while omitting the upside-down smiley face and preceding messages suggesting that this comment was sarcastic. *Id.* ¶¶ 277, 285. In the CRD complaint, the initial statements by Nathan that "you know we can bury anyone" and "[w]e can't write we will destroy her" are included without the context of communications in which Nathan and Abel are discussing how to explain the process to Baldoni and explain to him "why we can't be proactive." *Id.* ¶ 285.

The Amended Complaint alleges that the Times then "failed to review and/or investigate the plethora of communications demonstrating that the Wayfarer Parties' press strategy was at all times wholly defensive." *Id.* ¶ 286. It also alleges that the Times "deliberately takes [the text] communications out of context to bolster a fallacious narrative (designed in concert with Lively) to harm the Wayfarer Parties." *Id.* ¶ 285. It claims the Article deliberately omits "any

meaningful discussion of the true source of tension between Lively and the Wayfarer Parties," which was Lively's effort to take over the film, *id.* ¶ 284, as well as any mention of "a critical player in this manufactured controversy: Stephanie Jones," *id.* ¶ 283. It states that the Times "failed to follow its own journalistic standards," including by publishing the Article without further inquiry only hours after the Wayfarer Parties informed them that the story was false. *Id.* ¶¶ 292, 295.

After publication of the Article, Nathan received death threats. *Id.* ¶ 296. A reporter from the Daily Mail texted Nathan saying that now Sloane is "saying that Blake was sexually assaulted," noting that this differed from Sloane's original story that "the whole cast hates Justin and its nothing to do with Blake." *Id.* ¶ 193.

PROCEDURAL HISTORY

On December 31, 2024, Lively filed a complaint against the Wayfarer Parties in this Court, bringing claims for sexual harassment, retaliation, breach of contract, and intentional and negligent infliction of emotional distress. Dkt. No. 1.[15] The Wayfarer Parties then filed their original complaint on January 16, 2025. Dkt. No. 1, 25-cv-449.[16] The Times was not named in that complaint. *Id.*

On January 30, 2025, the Court ordered the parties to show cause by January 30, 2025, why the case initiated by the Wayfarer Parties should not be consolidated with the previously-filed case brought by Lively, *Lively v. Wayfarer Studios LLC et al.*, 24-cv-10049. Dkt. No. 37, 25-cv-449. No party objected to consolidation. Dkt. Nos. 44–46, 25-cv-449. On January 30, 2025, the Court ordered the cases to be consolidated. Dkt. No. 49, 25-cv-449.

[15] All citations which do not provide a case number are to the docket in 24-cv-10049.
[16] Filings in 25-cv-449 before consolidation with 24-cv-10049 are available only on the docket of 25-cv-449, and they are therefore cited to that docket.

On January 31, 2025, the Wayfarer Parties filed an Amended Complaint naming the New York Times as a defendant. Dkt. No. 50.[17]

On February 3, 2025, the Court held an initial pretrial conference and entered a Case Management Plan and Scheduling Order. Dkt. No. 58; February 3, 2025, Minute Entry. The Case Management Plan and Scheduling Order provided, among other things, that any motion to amend or join additional parties would be filed no later than April 18, 2025. Dkt. No. 58.

On February 20, 2025, Sloane and Vision PR filed a motion to dismiss accompanied by a memorandum of law. Dkt. Nos. 86–87. On March 6, 2025, the Wayfarer Parties filed a memorandum in opposition to Sloane and Vision PR's motion to dismiss. Dkt. No. 121. On March 13, 2025, Sloane and Vision PR filed a reply memorandum of law. Dkt. No. 126. On March 17, 2025, Sloane and Vision PR moved to stay discovery pending a decision on their motion to dismiss. Dkt. No. 129. The motion was denied on March 21, 2025. Dkt. No. 156.

On February 28, 2025, the Times filed a motion to dismiss accompanied by a memorandum of law and a declaration of counsel with twelve exhibits. Dkt. Nos. 105–108. The Times also moved for leave to file hard copy materials with the Court on a flash drive, which was granted. Dkt. Nos. 108, 115. The same day, the Times moved for a stay of discovery pending a decision on its motion to dismiss. Dkt. No. 109. On March 4, 2025, the motion was granted and discovery was stayed as to the Times. Dkt. No. 118. On March 14, 2025, the Wayfarer Parties filed a memorandum in opposition to the Times' motion to dismiss, accompanied by a declaration of counsel with one exhibit. Dkt. No. 128. The Times filed a reply memorandum of law in support of its motion on March 21, 2025. Dkt. No. 158.

[17] The New York Times had previously been sued by the Wayfarer Parties in California, but that suit was dismissed after the New York Times was added as a Defendant in the Amended Complaint. *See* Dkt. No. 63 at 21:21–22:1, 23:10–13.

On March 18, 2025, Reynolds filed a motion to dismiss accompanied by a memorandum of law. Dkt. Nos. 132–133. On April 1, 2025, the Wayfarer Parties filed a memorandum of law in opposition. Dkt. No. 160. On April 9, 2025, Reynolds filed a reply memorandum of law in support of his motion. Dkt. No. 166.

On March 20, 2025, Lively filed a motion to dismiss accompanied by a memorandum of law and a declaration of counsel with one exhibit. Dkt. Nos. 144–146. On April 3, 2025, the Wayfarer Parties filed a memorandum of law in opposition. Dkt. No. 162. On April 10, 2025, Lively filed a reply memorandum of law in support of her motion. Dkt. No. 172.

On April 15, 2025, the Wayfarer Parties filed a letter notifying the Court that the Wayfarer Parties would not move to amend their pleading by the April 18, 2025 deadline set out in the Case Management Plan and Scheduling Order. Dkt. No. 178; *see* Dkt. No. 58. However, the Wayfarer Parties stated that "[i]f the Court were to grant one or more of the motions to any extent, the Wayfarer Parties will move for leave to amend pursuant to Fed. R. Civ. P. 15(a)(2) and seek a commensurate modification of the Scheduling Order under the 'good cause' standard pursuant to Fed. R. Civ. P. 16(b)(4)." Dkt. No. 178.

LEGAL STANDARD

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). A complaint must offer more than "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement" in order to survive dismissal. *Twombly*, 550 U.S. at 555, 557. The ultimate question is whether "[a] claim has facial plausibility, [i.e.,] the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Put another way, the plausibility requirement "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim]." *Twombly*, 550 U.S. at 556; *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011).

DISCUSSION

The Amended Complaint focuses broadly on two types of claims. First, the Wayfarer Parties claim that Lively, assisted by Reynolds and Sloane, stole the film from Baldoni and Wayfarer, threatening to refuse to promote the film and attack Baldoni and Wayfarer in the press if the Wayfarer Parties did not agree to grant her, rather than Wayfarer, control over and credit for the film. Dkt. No. 50 ¶¶ 124, 130, 144, 146, 152–157, 192–193, 250–255. The Wayfarer Parties seek damages for this conduct based on a legal theory that Lively, Reynolds, and Sloane committed civil extortion. *Id.* ¶¶ 316–323. Second, the Wayfarer Parties claim that Lively, Sloane, Reynolds, and the Times spread a false narrative that Baldoni committed sexual misconduct towards Lively and the Wayfarer Parties then engaged in a smear campaign to ruin her reputation. *Id.* ¶ 17; *see id.* ¶¶ 8, 162, 193, 272–273, 275, 370. The Wayfarer Parties claim that by doing so, Lively, Reynolds, Sloane, and the Times committed the torts of defamation and false light. Although these two types of claims are the focus of the Amended Complaint, the Wayfarer Parties also bring claims for breach of contract, tortious interference with contract or prospective economic advantage, and promissory fraud. *See id.* ¶¶ 340–391.

The Wayfarer Parties cannot recover for Lively's alleged actions to steal creative control of the film from Baldoni and the Wayfarer Parties. Regardless of the propriety of these actions, they do not constitute civil extortion under California law. California courts have recognized a

claim for civil extortion in situations where a plaintiff gives a defendant money or property under threat and seeks to have it returned. *See Fuhrman v. Cal. Satellite Sys*., 231 Cal. Rptr. 113, 122 (Cal. Ct. App. 1986). However, the Wayfarer Parties have not adequately alleged that Lively's threats were wrongful extortion rather than legally permissible hard bargaining or renegotiation of working conditions. Additionally, the Wayfarer Parties have not shown that some of Lively's allegedly extortionate acts damaged them.

The Wayfarer Parties also cannot recover on their defamation claims. The Wayfarer Parties have not alleged that Lively is responsible for any statements other than the statements in her CRD complaint, which are privileged. The Wayfarer Parties have alleged that Reynolds and Sloane made additional statements accusing Baldoni of sexual misconduct and that the Times made additional statements accusing the Wayfarer Parties of engaging in a smear campaign. But the Wayfarer Parties have not alleged that Reynolds, Sloane, or the Times would have seriously doubted these statements were true based on the information available to them, as is required for them to be liable for defamation under applicable law.

The Wayfarer Parties' additional claims also fail. Accordingly, the Amended Complaint must be dismissed in its entirety. However, the Wayfarer Parties have leave to amend their claims for breach of implied covenant and tortious interference with contract.

I. Choice of Law

The Wayfarer Parties plead their claims under California law. Dkt. No. 50 at 211 n.27. Lively agrees with the Wayfarer Parties that California law applies to the claims asserted against her. Dkt. No. 145 at 10. However, Sloane, Reynolds, and the Times argue that New York law applies to the claims against them. Dkt. No. 87 at 7; Dkt. No. 106 at 6–7; Dkt. No. 133 at 5–6.

This dispute is important because New York and California law differ in a number of ways relevant to the Wayfarer Parties' claims. *See Karaha Bodas Co. v. Perusahaan*

Pertambangan Minyak Dan Gas Bumi Negara ("*Pertamina*"), 313 F.3d 70, 85 (2d Cir. 2002) ("The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." (quoting *In re Allstate Ins. Co. & Stolarz*, 81 N.Y.2d 219, 223 (N.Y. 1993))). New York law does not recognize causes of action for civil extortion, false light invasion of privacy, or negligent interference with prospective economic advantage. *See Shak v. Krum*, 2018 WL 5831319, at *5 (S.D.N.Y. Nov. 6, 2018) ("Civil extortion is not a recognized cause of action under New York law."); *Minnelli v. Soumayah*, 839 N.Y.S.2d 727, 728 (1st Dep't 2007) (same); *DeIuliis v. Engel*, 2021 WL 4443145, at *9 (S.D.N.Y. Sept. 27, 2021) ("New York does not recognize the tort of false light invasion of privacy."); *Howell v. N.Y. Post Co*., 612 N.E.2d 699, 703 (N.Y. 1993) (declining to recognize such a tort); *Lokai Holdings LLC v. Twin Tiger USA LLC*, 306 F. Supp. 3d 629, 643 (S.D.N.Y. 2018) ("The third cause of action, negligent interference with prospective economic relations, does not exist."); *Alvord & Swift v. Stewart M. Muller Const. Co*., 385 N.E.2d 1238, 1241 (N.Y. 1978) ("[T]he interference must be intentional, not merely negligent."). In addition, although the elements of defamation under New York and California Law are generally similar, the New York Constitution provides independent protection for statements of opinion, *see Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1277–1280 (N.Y. 1991), and the two states have different statutory privileges against defamation, *see, e.g.*, Cal. Civ. Code § 47.1 (recognizing a privilege for reports of sexual assault and harassment that is not available under New York law).

"[A] federal court sitting in diversity borrows the forum State's choice-of-law rule." *Cassirer v. Thyssen-Bornemisza Collection Found*., 596 U.S. 107, 115 (2022). "In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions

has the greater interest in having its law applied in the litigation." *Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994).[18] This requires consideration of the "facts or contacts" relating to the tort and "in which jurisdiction they are located." *Id.* at 1002 (quoting *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985)).

As to the claims against Sloane and Reynolds, the Court is unable to determine what law applies at this stage. "The record lacks facts necessary to conduct the context-specific . . . analysis required by New York's choice-of-law principles." *Speedmark Transp., Inc. v. Mui*, 778 F. Supp. 2d 439, 444 (S.D.N.Y. 2011); *see DarkPulse, Inc. v. Crown Bridge Partners LLC*, 2024 WL 3872725, at *3 (2d Cir. Aug. 19, 2024) ("[A]ccepting the complaint's allegations as true, and relying solely on those allegations as we must at this stage, it is not clear whether a reasonable relationship exists between the parties, the transaction, and any particular state."); *Bristol–Myers Squibb Co. v. Matrix Lab'ys Ltd.*, 655 F. App'x 9, 13 (2d Cir. 2016) (summary order) (noting that "choice-of-law determinations are fact-intensive inquiries" which may be "premature to resolve at the motion-to-dismiss stage"). The Wayfarer Parties' defamation and false light claims are based on allegations that Sloane made false statements in texts to a Daily Mail reporter, Dkt. No. 50 ¶¶ 189–190, 193, that Reynolds made false statements that Baldoni

[18] The Wayfarer Parties' fourth and ninth causes of action sound in contract. *See* Dkt. No. 50 ¶¶ 340–346, 384–391. However, choice of law is not meaningfully disputed with regard to these causes of action. The fourth cause of action is solely against Lively, and the parties agree that the claims against Lively should be decided under California law. Dkt. No. 145 at 10. The ninth cause of action is for breach of implied contract against the Times. Dkt. No. 50 ¶¶ 384–391. The parties have identified no difference between New York law and California law relevant to whether the Wayfarer Parties have stated a claim for breach of implied contract. *See* Dkt. No. 127 at 24 & n.25 (stating that under both New York and California law, a cause of action for breach of implied contract has the same elements as a cause of action for express contract); *Prestige Brands Inc. v. Guardian Drug Co.*, 951 F. Supp. 2d 441, 446 (S.D.N.Y. 2013) (noting that the elements of breach of contract are the same under New York and California law); *Rudolph v. Hudson's Bay Co.*, 2019 WL 2023713, at *9–11 (S.D.N.Y. May 7, 2019) (same); *Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 528 (S.D.N.Y. 2007) (same).

was a "sexual predator," *id.* ¶¶ 8, 162, and that both Sloane and Reynolds participated in a campaign to leak false information to the press, *id.* ¶¶ 17, all of which occurred at unspecified locations. The civil extortion and false light claims against Sloane and Reynolds are based on essentially the same allegations, as are the claims for tortious interference against Reynolds. *See* Dkt. No. 121 at 36 (civil extortion against Sloane); Dkt. No. 50 ¶¶ 17, 162, 250–255 (civil extortion against Reynolds); *id.* ¶¶ 332–339 (false light); *id.* ¶¶ 347–374 (tortious interference).

Because it is unclear from the pleadings where the facts underlying the claims against Sloane and Reynolds occurred, the Court cannot dismiss the claims based on a holding that they must be brought under New York law. If the allegations state a claim under California law, the claim must be allowed to continue until such time as the facts developed show California law does not apply. Therefore, the Court will analyze the claims against Sloane and Reynolds under California law for purposes of this motion. *See Halberstam, Tr. of Zupnick Fam. Tr. 2008 B v. Allianz Life Ins. Co. of N. Am.*, 2017 WL 10187689, at *3–4 (E.D.N.Y. June 9, 2017) (evaluating claims under each potentially applicable law when "[t]he complaint and its attachments do not contain sufficient allegations . . . to determine" which law applies); *Meserole v. Sony Corp. of Am.*, 2009 WL 1403933, at *5 n.6 (S.D.N.Y. May 19, 2009) (same); *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 42–43 (1st Cir. 2020) ("[W]hen there are important holes in the record, discovery will likely illuminate critical facts bearing on the unanswered questions and, thus, on the ultimate question of which state's law should apply.").

However, the defamation and false light[19] claims against the Times must be analyzed under New York law.[20] The Wayfarer Parties argue that these claims are properly brought under California law, because they are California citizens and feel the impact of the defamation in California. Dkt. No. 127 at 9. But the Second Circuit analyzed a similar situation in *Kinsey v. N.Y. Times Co.*, 991 F.3d 171, 176–78 (2d Cir. 2021), in which the Times published an allegedly defamatory article regarding events that took place in the District of Columbia and affected the plaintiff's employment there. The Circuit distinguished between defamation cases involving a targeted publication, in which "the state of the plaintiff's domicile will usually have the most significant relationship to the case," and "multistate defamation cases" in which "an allegedly defamatory statement is published nationally" and the plaintiff suffers harm in every state simultaneously. *Id.* (quoting *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 545 (2d Cir. 1999)). The Circuit stated that in multistate defamation cases, the traditional rule that the law of the plaintiff's domicile applies is only "presumptive" and may be overcome if "some other state has a more significant relationship," taking into account "where [the] plaintiff suffered the greatest injury; where the statements emanated and were broadcast; where the activities to which the allegedly defamatory statements refer took place; and the policy interests of the states whose law might apply." *Id.* (quoting *Catalanello v. Kramer*, 18 F. Supp. 3d 504, 512 (S.D.N.Y. 2014) and then quoting *Condit v. Dunne*, 317 F. Supp. 2d 344, 353-54 (S.D.N.Y. 2004)). The Circuit then held that although the plaintiff suffered the greatest injury in the District of Columbia and Maryland

[19] Because the Wayfarer Parties' false light claim against the Times involves the same underlying facts as the defamation claim, the choice-of-law analysis is the same. *See* Dkt. No 127 at 23 (arguing that false and reckless accusations in the Article state a claim for false light); *see also* Dkt. No. 50 ¶¶ 267 (alleging that publication of the Video "constituted a malicious and reckless act of defamation and false light invasion of privacy").

[20] Choice of law is not disputed as to the remaining claims against the Times, which are for breach of contract and promissory fraud. *See* Dkt. No. 50 ¶¶ 375–391.

(where he was domiciled), New York had the most significant interest in the litigation because "the Times is domiciled in New York," "the allegedly defamatory statement emanated from New York, and "New York has strong policy interests in regulating the conduct of its citizens and its media." *Id.* at 178.

The same factors require application of New York law to the defamation and false light claims against the Times here. The Wayfarer Parties presumably suffered the greatest injury in California, where they are domiciled,[21] but *Kinsey* holds that this is not decisive. The events underlying the allegedly defamatory statements took place in New York, where Lively, Sloane and Reynolds were based and sometimes met with Baldoni and the Wayfarer Parties, California, where the Wayfarer Parties were based, and the location of filming, which is not clearly specified but at least some of which occurred in New York. *See* Dkt. No. 50 ¶ 67 ("Lively expressed excitement over returning to shoot in the fall in New York."). The statements emanated from New York, where the Times is located. Dkt. No. 50 ¶ 311. And decisively, "New York has strong policy interests in regulating the conduct of its citizens and its media." *Kinsey*, 991 F.3d at 178. "[A]s the national center of the publishing industry, [New York] has a significant interest in assuring that the risks and liabilities flowing from publishing . . . will be uniform," ensuring that publishers are able to "mold their conduct" to predictable legal norms. *Jacob v. Lorenz*, 626 F. Supp. 3d 672, 685 (S.D.N.Y. 2022) (quoting *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1092 (S.D.N.Y. 1984)); *cf. Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 245 (2d Cir. 2007) (noting that New York chose not to give its courts jurisdiction over non-domiciliaries based on defamation causing injury within New York, because the legislature "did not wish New

[21] Sarowitz is domiciled in Illinois, but no party has argued the law of Illinois should apply to the claims against him. Dkt. No. 50 ¶ 306.

York to force newspapers published in other states to defend themselves in states where they had no substantial interests"). Under *Kinsey*, a plaintiff must do more to overcome this interest than simply show that a publisher based in New York and reporting from New York was reporting on a plaintiff who lives in another state, especially here where the underlying events also have a nexus to New York. The Court will "follow the reasoning from *Kinsey* and also join several of our sister courts in this District" holding that similar circumstances require the application of New York law. *DeIuliis*, 2021 WL 4443145, at *10; *see Jacob*, 626 F. Supp. 3d at 685 (applying New York law to a defamation claim against a New York publisher involving California citizens and events); *Prince v. Intercept*, 634 F. Supp. 3d 114, at 133–134 (S.D.N.Y. 2022); *Belya v. Kapral*, 2025 WL 963111, at *4 (S.D.N.Y. Mar. 31, 2025).[22]

II. Impermissible Pleading

All Defendants argue that the Amended Complaint should be dismissed without further analysis because it engages in impermissible group pleading and otherwise violates Federal Rule of Civil Procedure 8. Dkt. No. 87 at 5–6; Dkt. No. 106 at 8–9; *see* Dkt. No. 133 at 6 n.4; Dkt. No. 145 at 2, 11 n.14. Under Rule 8, a complaint is required to "give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Defendants argue that they lack proper notice of the claims against them because the Amended Complaint consistently makes allegations regarding

[22] The Wayfarer Parties argue that this case is distinguishable from *Kinsey* because it involves "not only California residents but also Hollywood's entertainment industry" and because the Article focuses heavily on Lively's CRD complaint filed in California. Dkt. No. 127 at 11. But these facts do not distinguish the case from *Kinsey*, in which the Times reported on alleged sexual harassment that occurred entirely in the District of Columbia and involved a quintessentially Washingtonian entity, the Department of Justice. *Kinsey*, 991 F.3d at 177. Analysis of "where the activities to which the allegedly defamatory statements refer took place" favors New York here to a greater degree here than in *Kinsey*, where the underlying events had no connection to New York whatsoever. *Id.* (quoting *Condit*, 317 F. Supp. 2d at 354).

"the Lively Parties" and "the Wayfarer Parties," leaving defendants unable to discern which of them purportedly injured which plaintiff, and how. Dkt. No. 87 at 6; Dkt. No. 106 at 8–9. This issue is compounded by the fact that "the complaints' length and 'tangents' 'make it difficult to understand exactly how the facts alleged provide a basis for Plaintiff's claims.'" Dkt. No. 106 at 9 (quoting *Komatsu v. City of New York*, 2021 WL 3038498, at *5 (S.D.N.Y. July 16, 2021)).

"Rule 8 'does not demand that a complaint be a model of clarity' so long as it provides 'fair notice of what the plaintiff's claim is and the ground upon which it rests.'" *Vantone Grp. Liab. Co. v. Yangpu NGT Indus. Co*., 2015 WL 4040882, at *3–4 (S.D.N.Y. July 2, 2015) (quoting *Atuahene v. City of Hartford*, 10 F. App'x. 33, 33 (2d Cir.2001) (summary order)). "Dismissal [under Rule 8] is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Komatsu*, 2021 WL 3038498, at *3 (quoting *Salahuddin*, 861 F.2d at 42). The Wayfarer Parties' Amended Complaint is lengthy and repetitive, and it relies heavily on group pleading, but it is not so confusing or lacking in substance that dismissal is appropriate. *See Komatsu*, 2021 WL 3038498, at *1 (dismissing complaint under Rule 8 that was "a total of 1,713 pages and include[d] dozens, if not hundreds, of links to days' worth of video footage, as well many lengthy diatribes against the defendants and others not named in the case"); *Barsella v. United States*, 135 F.R.D. 64, 66 (S.D.N.Y. 1991) (dismissing complaint under Rule 8 that was "a virtually illegible handwritten document accompanied by numerous equally incomprehensible documents termed 'exhibits'").

"The key to Rule 8(a)'s requirements is whether adequate notice is given." *Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004); *see Vantone Grp.*, 2015 WL 4040882, at *3–4. Although the Amended Complaint lacks clarity as to the boundaries of certain claims,

Defendants have adequate notice of many core claims that are evident from the face of the complaint and have been fully briefed by the parties. For example, it is evident from the language of the complaint that the civil extortion claim is based on Lively refusing to promote the film unless she was allowed to create her own cut, Dkt. No. 50 ¶¶ 140, 142, Lively demanding "with extortionate threats" that Baldoni and Heath support her *p.g.a.* certification, *id.* ¶ 154, and Lively and Reynolds attempting to force Baldoni and Wayfarer to read a statement apologizing for issue with the film, *id.* ¶¶ 3, 16. It is evident that the defamation claim is based on Lively, Sloane, and Reynolds providing the CRD complaint to the Times before it was released and stating to the Times in substance that the Wayfarer Parties engaged in sexually inappropriate conduct towards Lively and retaliated against her for reporting the misconduct by engaging in a campaign to ruin her reputation, *id.* ¶ 325, Sloane and Reynolds making additional statements that Baldoni had committed sexual misconduct, *id.* ¶¶ 8, 162, 193, and the Times stating that Baldoni, Health, Abel, and Nathan had engaged in a "smear campaign" to ruin Lively's reputation, *id.* ¶¶ 272, 274. "[P]laintiff's submission is a model of neither clarity nor brevity . . . but it is sufficient to put the defendants on fair notice" of these claims. *Wynder*, 360 F.3d at 79.

Where the Amended Complaint does lack clarity, the Court will consider only the claims of which Defendants have fair notice. To the extent a fair reading of the Amended Complaint does not provide notice that the Wayfarer Parties are making a particular claim, against a particular defendant, based on a particular statement, the Court will not parse through the various allegations and documents to determine whether a claim could theoretically be stated. For example, although the Amended Complaint alleges the CRD complaint "was rife with lies and doctored 'evidence,'" Dkt. No. 50 ¶ 4, the Court will not consider whether the CRD complaint

contained any defamatory statements beyond those specifically alleged in the Amended Complaint. Similarly, in analyzing the defamation claim against the New York Times, the Court will not consider whether any statements in the Article are defamatory beyond those identified in the Amended Complaint. The Wayfarer Parties have an obligation to identify the statements which harmed them, rather than gesturing at a document or category of statements and forcing the defendant to guess at which ones are actionable. *See D'Annunzio v. Ayken, Inc*., 876 F. Supp. 2d 211, 216 (E.D.N.Y. 2012) ("[T]he pleadings must be sufficient to afford the defendant sufficient notice of the communications complained of to enable him to defend himself." (quoting *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir.1986)); *see Biro v. Conde Nast*, 883 F. Supp. 2d 441, 456 (S.D.N.Y. 2012). Likewise, if the complaint uses the "Lively Parties" or "Wayfarer Parties" in a context where a particular plaintiff or defendant is not clearly indicated, the Court will not guess at what claim the Amended Complaint is attempting to make. Such a course would "promote litigation by ambush," allowing plaintiffs to use vague pleading to hide their claims only to spring them on defendants in opposition briefing or at trial. *Wade Park Land Holdings, LLC v. Kalikow*, 2023 WL 2614243, at *10 (S.D.N.Y. Mar. 23, 2023), *aff'd sub nom. In re Wade Park Land Holdings*, 2024 WL 3024648 (2d Cir. June 17, 2024).

Accordingly, though the Court will not strike or dismiss any allegations on Rule 8 grounds, the Court will consider only those claims that a reasonable defendant would understand to be asserted against it based on the allegations in the Amended Complaint.

III. Civil Extortion

The Wayfarer Parties' first claim is for civil extortion under California law against Lively, Reynolds, and Sloane. Dkt. No. 50 ¶¶ 316–323. In support of this claim, the Wayfarer Parties allege 1) that Lively refused to return to production unless the Wayfarer Parties agreed to her return to production demands, *id.* ¶¶ 6, 75, 124, 130; 2) that Lively threatened to abandon her

contractual obligation to promote the film or approve marketing materials unless the Wayfarer Parties agreed to co-fund a screening of her version of the Film, *id.* ¶ 142, eventually release that version, *id.* ¶ 146, and grant her a producer credit and support in seeking the *p.g.a.* designation, *id.* ¶¶ 152–157; 3) that Lively threatened to boycott the premiere unless Baldoni was excluded, *id.* ¶¶ 166–170; 4) that Lively and Reynolds threatened to attack Wayfarer in the press if it did not take the blame for problems during filming, *id.* ¶¶ 250–255; and 5) that Sloane carried out Lively and Reynolds' threats by spreading false allegations that the Wayfarer Parties had engaged in or concealed sexual misconduct, *id.* ¶¶ 192–193; *see* Dkt. No. 121 at 36.[23]

Lively, Sloane, and Reynolds argue that none of the alleged acts are wrongful and that they did not obtain money or property from the Wayfarer Parties. Dkt. No. 87 at 7–9; Dkt. No. 133 at 19; Dkt. No. 145 at 27–30. The Wayfarer Parties argue that they are not required to allege a transfer of money or property and that the threats alleged in the Amended Complaint are sufficient. Dkt. No. 160 at 17; Dkt. No. 162 at 24. Lively, Sloane, and Reynolds have the better of the argument.

[23] The Wayfarer Parties also allege in several instances that they took actions desired by Lively because of her past threats or because of a general atmosphere of threats and fear. Specifically Baldoni realized after the return to production demands that "he needed to cede control of the script to Lively," Dkt. No. 50 ¶124, and "the studio" agreed "in light of" Lively's threats to do an official audience test of Lively's version of the Film. Dkt. No. 50 ¶ 144. These allegations fail to connect particular threats by Lively with particular demands, and it is at best unclear whether the Wayfarer Parties are alleging that Lively threatened to take a particular action unless the Wayfarer Parties gave her control of the script or agreed to an audience test. Lively does not have fair notice that the Wayfarer Parties' extortion claim could be based on such allegations. *See Salahuddin*, 861 F.2d at 42 (stating that a party must have "fair notice of the claim asserted so as to enable him to answer and prepare for trial"). Assuming these claims were clearly alleged, they would nevertheless fail for the reasons discussed below. Neither threat constitutes wrongful duress as a matter of law, and the Wayfarer Parties have not pleaded that ceding control of the script resulted in damages.

A. Governing Law

The parties advance different understandings of the tort of civil extortion under California law. Lively, Reynolds and Sloane argue that civil extortion is a cause of action for "moneys obtained by duress," which is separate from the crime of extortion and requires proof of actual damages. Dkt. No. 145 at 27 (quoting *Fuhrman*, 231 Cal. Rptr. at 122). The Wayfarer Parties argue that civil extortion is a cause of action based on the criminal extortion statute and that it does not require money or property actually be obtained. Dkt. No. 162 at 24. Lively, Reynolds, and Sloane are correct. Although the claim is labeled "civil extortion," it is derived from the common law rather than the criminal extortion statute and requires actual damages.

"Blackmail and extortion are, in almost all jurisdictions, crimes, not civil causes of action." *Rader v. ShareBuilder Corp*., 772 F. Supp. 2d 599, 606 (D. Del. 2011), *aff'd sub nom. Rader v. ING Groep NV*, 497 F. App'x 171 (3d Cir. 2012). The crime of extortion involves "the obtaining of property or other consideration from another, with his or her consent, . . . induced by a wrongful use of force or fear." Cal. Penal Code § 518. A few states have also recognized a tort of civil extortion based on the criminal offense. *See, e.g.*, *Lagonoy v. Gun*, 2022 WL 496252, at *2 (Mich. Ct. App. Feb. 17, 2022) ("Michigan law recognizes the tort of civil extortion based upon the criminal statute prohibiting extortion."); *Duncan v. Ford Motor Credit, Repossessors, Inc*., 2018 WL 3060265, at *3 (Iowa Ct. App. 2018) ("The criminal offense of extortion gives rise to a civil cause of action for extortion.").

A slightly larger number of states have recognized a similar cause of action for duress. *See Troutman v. Facetglas, Inc.*, 316 S.E.2d 424, 426 (S.C. Ct. App. 1984) (collecting cases); *First Nat. Bank in Albuquerque v. Sanchez*, 815 P.2d 613 (N.M. 1991); *Wurtz v. Fleischman*, 278 N.W.2d 266, 270–72 (Wis. Ct. App. 1979), *rev'd on other grounds*, 293 N.W.2d 155 (Wis. 1980); *Likover v. Sunflower Terrace II, Ltd*., 696 S.W.2d 468, 472 (Tex. App. 1985). Like

extortion, duress involves the obtaining of a benefit by wrongful threats. However, the tort of duress is not descended from the criminal law but rather from the contractual defense of duress. This defense allows a party to void a contract and receive restitution for any benefits it provided to its counterparty if it entered into the contract due to "unlawful threats or wrongful, oppressive, or unconscionable conduct on the part of the defendant which leaves the plaintiff no reasonable alternative but to acquiesce." *Mach. Hauling, Inc. v. Steel of W. Va.*, 384 S.E.2d 139, 142 (W.Va. 1989); *see* Restatement (Second) of Contracts § 175 (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 14 (2011) (noting that "[t]he transferee is liable in restitution as necessary to avoid unjust enrichment").

California permits plaintiffs to bring a claim labeled "civil extortion." However, "an action for extortion under California law is more appropriately considered a claim for 'moneys obtained by duress.'" *Intermarketing Media, LLC v. Barlow*, 2021 WL 5990190, at *12 (C.D. Cal. May 4, 2021) (quoting *Fuhrman*, 231 Cal. Rptr. at 122); *see Fowler v. Univ. of Phoenix, Inc.*, 2019 WL 1746576, at *17 (S.D. Cal. Apr. 18, 2019) ("California courts recognize extortion as civil tort cause of action for moneys obtained by duress, a form of fraud." (citation and quotation marks omitted)), *aff'd*, 817 F. App'x 442 (9th Cir. 2020); *Doe v. Mahboubi-Fardi*, 2024 WL 2206640, at *12 (C.D. Cal. Jan. 2, 2024) (same). In other words, the California tort is based on the common-law concept of duress rather than the statutory elements of criminal extortion. *See Intermarketing Media*, 2021 WL 5990190, at *12 n.10; *Yang v. Yang*, 2019 WL

8640452, at *2 (Cal. Super. May 31, 2019).[24] Although the concepts of duress and criminal extortion are similar, the lineage of the tort clarifies two points important to this case. First, if a threat would not support a contract claim for duress it is not sufficient to support a tort claim for civil extortion. Second and of equal importance, in order to state a civil extortion claim, the plaintiff must allege that they suffered damages or lost something of value as a result of defendant's threat. The threat alone is not sufficient.

The few published California cases discussing the tort involve the return of money conveyed due to a wrongful threat, a situation which the cases analogize to voiding a contract made under duress and receiving restitution. *See Fuhrman*, 231 Cal. Rptr. 113, 122 (Cal. Ct. App. 1986); *Leeper v. Beltrami*, 347 P.2d 12, 18 (Cal. 1959); *Woodham v. Allen*, 162 P. 398, 399 (Cal. 1900). The leading California case articulating the tort is *Fuhrman v. California Satellite Systems*. *See Intermarketing Media*, 2021 WL 5990190, at *12 (citing and discussing *Fuhrman*, 231 Cal. Rptr. at 122); *Monex Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135, 1136 n.3 (C.D. Cal.

[24] Some cases have stated that "there is no private right of action for 'extortion'" under California law. *Arista Recs. v. Sanchez*, 2006 WL 5908359, at *2 (C.D. Cal. Mar. 1, 2006); *see Samzelius v. Bank of Am.*, 2012 WL 12949683, at *9 (N.D. Cal. Oct. 9, 2012). However, the holding of these cases is simply that there is no cause of action for civil extortion based on criminal extortion statutes. *See Arista Recs.*, 2006 WL 5908359, at *2 ("Extortion is a criminal offense, not a civil cause of action."); *Samzelius*, 2012 WL 12949683, at *9 ("Extortion is a federal criminal offense, and there is no private right of action for extortion."). The cases do not and cannot deny that California recognizes a cause of action for recovery of moneys obtained under threat, which has been explicitly recognized by the California Supreme Court. *Leeper*, 347 P.2d at 18. It is also notable that, in addition to the cases cited above, there are numerous unpublished California cases involving the tort of civil extortion. *See Hines v. Anderson*, 2006 WL 2796209, at *9 (Cal. Ct. App. Sept. 29, 2006); *Young v. Schultz*, 2023 WL 2705830, at *10 (Cal. Ct. App. Mar. 30, 2023), *review denied* (July 12, 2023); *Fleet v. State Pers. Bd.*, 2018 WL 1061579, at *5 (Cal. Ct. App. Feb. 27, 2018); *Berglund v. Rogers*, 2020 WL 373019, at *3 (Cal. Ct. App. Jan. 23, 2020); *Schiffman v. Knoll*, 2019 WL 1254152, at *3 (Cal. Ct. App. Mar. 19, 2019); *Ryan v. Allione*, 2015 WL 7919253, at *3 (Cal. Ct. App. Dec. 4, 2015); *From the Earth, LLC v. Beltran*, 2022 WL 9692823, at *6 (Cal. Ct. App. Oct. 17, 2022); *Platino Recs., Inc. v. Univision Music, LLC*, 2010 WL 1840216, at *7 (Cal. Ct. App. May 10, 2010).

2009) ("[T]he Court relies on *Fuhrman* as the most relevant authority for this issue."). In *Fuhrman*, the plaintiff brought a claim for "extortion," alleging that the defendants baselessly accused her of illegally receiving satellite broadcasts and threatened to sue her unless she paid them $275 to settle the claim. 231 Cal. Rptr. at 115, 121. The California Court of Appeal held that a claim for "extortion" was cognizable, rejecting the defendant's argument that "'extortion' is only a crime and cannot form the basis for a civil action in tort." *Id.* at 122. At the same time, *Fuhrman* did not discuss or even mention the criminal extortion statute. *See id.* Rather, it described the relevant claim, "[h]owever denominated (e.g. extortion, menace, duress)" as "essentially a cause of action for moneys obtained by duress, a form of fraud." *Id.* at 122; *see id.* at 123 (stating that a claim is properly brought "for the recovery of moneys received by a defendant under the influence of duress"). The court suggested that if the plaintiff "had actually paid the money demanded by defendants," she could have recovered her money. *Id.* at 123. However, it dismissed the claim because she had not paid the demand and therefore had no claim for relief. *Id*. The threat itself did not support a claim for extortion or duress in the absence of an allegation that defendants took property from plaintiff as a result of the threat. *Fuhrman* thus stands for the propositions that 1) a plaintiff may bring a civil claim for extortion under California law, 2) such a claim is based on the common-law concept of duress, and 3) the plaintiff may not recover on such a claim unless she actually paid the demand or conveyed something of value to the defendant. *See Intermarketing Media*, 2021 WL 5990190, at *12 (stating that "following *Fuhrman*," a claim for extortion is in substance a claim for duress and requires actual damages, and collecting authority).

This reading of *Fuhrman* is supported by the decisions on which it relies. Although *Fuhrman* was an intermediate appellate court decision, it relied on two California Supreme Court

decisions which had previously recognized "a cause of action for the recovery of money obtained by the wrongful threat of criminal or civil prosecution." 231 Cal. Rptr. at 122. In *Woodham v. Allen*, the California Supreme Court sustained a tort claim by a woman seeking to recover money that was "unlawfully extorted" from her based on the defendant's threat that he would have her husband arrested on false pretenses. 62 P. 398, 398–99 (Cal. 1900). The court stated that "the ultimate fact to be established" was that the money was paid under duress, and if this were established, "the money can be recovered back." *Id.* at 399.

In *Leeper v. Beltrami*, the California Supreme Court sustained a cause of action "for wrongful acts in the nature of duress" when the defendant filed a false suit which clouded the title of plaintiff's property, preventing its sale, and demanded consideration to withdraw the claims, which the plaintiff paid. 347 P.2d 12, 17–18 (Cal. 1959). The court expressed some uncertainty over whether the case should "be considered a suit for restitution to recover money paid under duress," "an action for money had and received sounding in tort," or "simply an action for money damages for the tortious conduct of the defendants resulting in injury to the plaintiffs." *Id.* at 20–21. But it stated that "the basic nature of the wrongdoing of these defendants is duress." *Id.* at 21. *Leeper* explained that although generally "the taking of legal action or the threat to take such action cannot constitute duress," the pressing of a false claim is a wrongful act that may constitute duress. *Id.* at 19. It added that duress does not exist if the plaintiff "had a reasonable alternative to the parting with the consideration to satisfy the false claim," which should be judged by the standard of "a reasonably prudent person." *Id.* at 19.

Each of these cases involved a suit to recover money paid under a threat of wrongful prosecution. As stated in *Leeper*, this type of claim sounds in restitution, "the return of money or other property obtained through an improper means to the person from whom the property was

taken." *Clark v. Superior Ct.*, 235 P.3d 171, 176 (Cal. 2010); *see Leeper*, 347 P.2d at 20–21. "[T]he historic purpose of restitution in equity" is "to preclude unjust enrichment" by preventing a party from retaining a wrongfully gained benefit. *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 714 (Cal. 2000). The tort of civil extortion was not derived from the criminal extortion statute, but stems from the California courts' recognition that it would be unjust to allow a party to retain a benefit that it received in circumstances that the common law recognizes as duress. *See Leeper*, 347 P.2d at 18–19; *Woodham*, 62 P. at 399; *see also Burke v. Gould*, 38 P. 733, 734 (Cal. 1894) ("Money paid to prevent the unlawful taking or detention of property may be recovered back. The doctrine is an equitable one, and is founded upon the theory of the moral duress not justified by law.").

Accordingly, a civil extortion claim under California law will not lie in the absence of a threat that would be sufficient to support a claim of duress. "Duress generally exists whenever one is induced by the unlawful act of another to make a contract or perform some other act under circumstances that deprive him of the exercise of free will." *Tarpy v. County of San Diego*, 1 Cal. Rptr. 3d 607, 614 (Cal. Ct. App. 2003). As recognized in *Leeper*, "[u]nder modern law duress is not limited to threats against the person" but "may also consist of threats to business or property interests." *Leeper*, 347 P.2d at 18. The law of criminal extortion may help elucidate the civil concept of duress, and indeed some California courts have drawn on it for this purpose. *See Philippine Exp. & Foreign Loan Guarantee Corp. v. Chuidian*, 267 Cal. Rptr. 457, 466 (Cal. Ct. App. 1990); *Morrill v. Nightingale*, 28 P. 1068, 1069 (Cal. 1892); *Tran v. Nguyen*, 315 Cal. Rptr. 3d 607, 613–15 (Cal. Ct. App. 2023). However, the list of wrongful acts that will support a claim for civil extortion is neither defined nor limited by those listed in the California Penal Code. *See* Cal. Penal Code. § 519; *Geragos v. Abelyan*, 305 Cal. Rptr. 3d 303, 315 (Cal. Ct.

App. 2023) ("Only threats that fall within one of these [five] categories of section 519 [constitute] extortion." (quoting *People v. Umana*, 41 Cal. Rptr. 3d 573, 582 (Cal. Ct. App. 2006))). Rather, courts rely on the broader body of jurisprudence describing what types of threat are both "wrongful" and "sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure." *Rich & Whillock, Inc. v. Ashton Dev., Inc*., 204 Cal. Rptr. 86, 89 (Cal. Ct. App. 1984); *see Leeper*, 347 P.2d at 18; *CrossTalk Prods.*, 76 Cal. Rptr. 2d at 623 (drawing a direct connection between the tort of duress and contract law); *Chuidian*, 267 Cal. Rptr. at 467–68.[25] If a given threat is sufficient to void a contract, it is also sufficient to reverse a non-contractual transaction. If a threat is not sufficient to void a contract, it also cannot justify reversing a non-contractual transaction.

Fuhrman also makes clear that a civil extortion claim requires "actual damages." *Fuhrman*, 231 Cal. Rptr. at 122. *Fuhrman* stated that "[t]he fatal flaw in plaintiff's action is that she apparently *never paid* the money defendants demanded in their letters," and dismissed the case on this ground. 231 Cal. Rptr. at 122. Accordingly, a civil plaintiff cannot recover simply for being threatened. *See Raiser v. Ventura Coll. of L.*, 2009 WL 10692058, at *3 (C.D. Cal.

[25] For the same reasons, Lively and Reynolds' argument that the tort should be limited to threats of litigation is unavailing. Dkt. No. 145 at 27–28; Dkt. No. 133 at 19; *see Fuhrman*, 231 Cal. Rptr. at 122 (noting that *Leeper* and *Woodham* recognized "a cause of action for the recovery of money obtained by the wrongful threat of criminal or civil prosecution"). Although the key California cases involve duress via threats of prosecution, *Leeper* expressly recognized the traditional understanding of duress as "threats against the person," i.e. threats of violence, and noted that duress "may also consist of threats to business or property interests." *Leeper*, 347 P.2d. at 18; *see* Restatement (First) of Contracts § 493 (1932) ("Duress may be exercised by . . . personal violence or a threat thereof."). Nothing about *Leeper* or *Woodham* suggests the illogical result that a plaintiff could properly recover money turned over in response to the threat that the plaintiff's spouse would be imprisoned but not the threat that the spouse would be killed. And more recent California cases have recognized that duress may be based on other types of threats. *See CrossTalk Prods.*, 76 Cal. Rptr. 2d at 623 (considering wrongful threats to business interests); *Tran v. Nguyen*, 315 Cal. Rptr. 3d 607, 615 (Cal. Ct. App. 2023) (considering defendant's threat to disclose plaintiff's secret child to his wife).

Sept. 1, 2009) (dismissing civil claim for "attempted extortion" for lack of damages); *Baffert v. Wunderler*, 2024 WL 5237442, at *3 (S.D. Cal. June 6, 2024) (dismissing civil extortion claim that only alleged "emotional distress and punitive damages"); *Intermarketing Media*, 2021 WL 5990190, at *12 (collecting cases). This differentiates the elements of civil extortion from the elements of criminal extortion. *See Intermarketing Media*, 2021 WL 5990190, at *12 ("[A] civil claim for extortion requires proof of elements not associated with the crime of extortion."). Because attempted extortion is a crime under California law, a defendant can be criminally prosecuted for making a threat even if the plaintiff does not acquiesce. *See* Cal. Penal Code § 524 ("[E]very person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort property or other consideration from another is punishable by imprisonment in the county jail not longer than one year."). However, this is not true for civil extortion.[26]

Further evidence that the civil extortion claim requires damages comes from the repeated statement in the California cases that duress is a "species of fraud." *Leeper*, 347 P.2d at 18; *see Fuhrman*, 231 Cal. Rptr. at 122; *see also Intermarketing Media*, 2021 WL 5990190, at *13 ("[E]xtortion is in substance a fraud claim."). When duress involves some type of coercion other

[26] This difference between civil and criminal extortion is consistent with general distinctions between criminal law and tort. A crime is "an offense against the public pursued by the sovereign, whereas the tort is a private injury to be pursued by the injured party." 21 Am. Jur. 2d Criminal Law § 2; *see* Model Penal Code § 1.02 (1962) (stating that the purpose of criminal law is to "forbid and prevent conduct that . . . threatens substantial harm to . . . public interests"). By contrast, tort claims involve an offense to the individual. Accordingly, tort claims generally require that a plaintiff suffer damages. *See* Restatement (Second) of Torts § 47 (1965) ("[C]onduct which is tortious because intended to result in bodily harm to another or in the invasion of any other of his legally protected interests does not make the actor liable for an emotional distress which is the only legal consequence of his conduct."); *Lagonoy*, 2022 WL 496252 (holding that because "damages of necessity is an element of a tort action," civil extortion but not criminal extortion requires proof of damages).

than the pressing of a false claim, it is not literally a form of fraud.[27] *See Steinger v. Smith*, 213 S.W.2d 396, 400 (Mo. 1948) (noting that while courts sometimes state that duress is "species of fraud," "there is a clear distinction between them"). But the analogy drawn by the California courts is logical, as both fraud and duress are grounds to revoke an apparently voluntary transaction that was in substance involuntary. Under California law, "unless the plaintiff merely seeks to rescind the contract, it must suffer actual monetary loss to recover on a fraud claim." *All. Mortg. Co. v. Rothwell*, 900 P.2d 601, 609 (Cal. 1995); *see Zamfir v. CasperLabs, LLC*, 2023 WL 2415262, at *5 (S.D. Cal. Mar. 8, 2023) (requiring Plaintiff in fraudulent misrepresentation claim to show actual monetary loss from competitor's misappropriation of a trade name); *NRG Energy, Inc. v. Fuchs*, 2011 WL 1625169, at *4 (S.D. Cal. Apr. 28, 2011) (dismissing fraud claim when plaintiff alleged "that his harm was lack of information rather than an actual monetary loss"). Monetary loss is measured by "out-of-pocket" damages, which are "directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received." *Rothwell*, 900 P.2d at 609 (quoting *Stout v. Turney*, 586 P.2d 1228, 1232 (Cal. 1978)). This remedy is akin to restitution in that it places the plaintiff in his former position. *See* 37 C.J.S. Fraud § 64 ("[O]ut-of-pocket damages are restitutionary."). Given that a tort action for duress is a "form of fraud" and akin to an action for restitution, *Leeper*, 347 P.2d at 20, a plaintiff must similarly show some out-of-pocket loss which

[27] For this reason, defendants' argument that all duress claims must satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b) is unavailing. *See* Dkt. No. 145 at 27; Dkt. No. 87 at 8–9. When the duress involves a false statement, it makes sense to require a defendant to "allege facts that give rise to a strong inference of fraudulent intent." *Shields v. Citytrust Bancorp, Inc*., 25 F.3d 1124, 1128 (2d Cir. 1994). But when a defendant demands that the plaintiff give him money on threat of harm to the plaintiff's person or property, it does not make sense to require the plaintiff to plead with specificity that this demand is "false."

may be restored to him. The cause of action is one to reverse a transfer of value, not simply for emotional damages or distress. *See* Restatement (Third) of Restitution and Unjust Enrichment § 14 ("A transfer induced by duress is subject to rescission and restitution."); *Lawless v. Cent. Prod. Credit Ass'n*, 592 N.E.2d 1210, 1217 (Ill. Ct. App. 1992) ("It should be remembered . . . that the doctrine of duress is in essence a remedy that is restitutionary in nature." (quoting *First Nat. Bank in Albuquerque*, 815 P.2d at 616)).

The Wayfarer Parties argue to the contrary that a plaintiff can recover for civil extortion even if no money or property was obtained. Dkt. No. 162 at 25. This argument relies on a district court decision, *Monex*, which inferred a private right of action from the extortion provision of the California Penal Code. *Monex*, 666 F. Supp. 2d at 1137 (citing Cal. Penal Code § 523). Because the California Penal Code criminalizes attempted extortion, *see* Cal. Penal. Code § 524, by the logic of *Monex* a plaintiff could also recover for attempted civil extortion. However, "[n]o published California case has adopted the reasoning in *Monex*," and the decision has been largely disapproved by the federal courts for that reason. *Intermarketing Media*, 2021 WL 5990190, at *12 n.10; *see Talkdesk, Inc. v. Pham*, 2024 WL 4866690, at *7 (C.D. Cal. Aug. 9, 2024) ("The Court joins the chorus of authorities that have declined to follow the nonbinding reasoning of *Monex*."), *amended on denial of reconsideration*, 2025 WL 873010 (C.D. Cal. Jan. 13, 2025); *but see Khadavi v. Stalgi, Inc.*, 2021 WL 929099, at *6 (C.D. Cal. Mar. 10, 2021) (following *Monex*). At least one published California decision has expressly stated that *Monex* contradicts *Fuhrman* and does not reflect California law. *See Yang*, 2019 WL 8640452, at *2 ("[T]o the extent the court in *Monex* concluded a claim for duress or extortion had been stated in the absence of an allegation of accession to the demand, its decision was contrary to California law."); *see also Tran v. Eat Club, Inc.*, 2020 WL 4812634, at *14–20 (Cal. Ct. App. Aug. 18,

2020) (unpublished). The Court agrees. *Monex* directly conflicts with *Fuhrman*, and its logic is inconsistent with the California decisions deriving the tort of civil extortion from the concept of duress rather than the criminal statute. *See Fuhrman*, 231 Cal. Rptr. at 122; *CrossTalk Prods.*, 76 Cal. Rptr. 2d at 623; *Leeper*, 347 P.2d at 18.

Accordingly, to plead a tort claim for civil extortion under California law, it is neither necessary nor sufficient for a plaintiff to plead the elements of criminal extortion. Instead, the plaintiff must plead a wrongful threat constituting duress, to which the plaintiff acquiesced, causing damages. *See Fuhrman*, 231 Cal. Rptr. at 122; *Intermarketing Media*, 2021 WL 5990190, at *12.

B. Application

The Wayfarer Parties' civil extortion claim is based on allegations 1) that Lively refused to return to production unless the Wayfarer Parties agreed to her return to production demands, Dkt. No. 50 ¶¶ 6, 75, 124, 130, 2) that Lively threatened to abandon her contractual obligation to promote the film or approve marketing materials unless the Wayfarer Parties agreed to co-fund a screening of her version of the film, *id.* ¶ 142, eventually release that version, *id.* ¶ 146, and grant her a producer credit and support in seeking the *p.g.a.* designation, *id.* ¶¶ 152–157, 3) that Lively threatened to boycott the premiere unless Baldoni was excluded, *id.* ¶¶ 166–170; 4) and that Lively and Reynolds threatened to attack Wayfarer in the press if it did not take the blame for problems during filming, *id.* ¶¶ 250–255. The last set of allegations is not actionable because Wayfarer did not acquiesce in the threat and did not accept blame for problems during filming. Wayfarer did not lose anything and Lively and Reynolds did not gain anything from the threat. The remaining allegations must be dismissed because the allegations regarding Lively's wrongful threats are conclusory and fail to support that the threats were wrongful. In addition,

the Wayfarer Parties have failed to plead that several key instances of alleged extortion caused "actual monetary loss." *Rothwell*, 900 P.2d at 609.

The Wayfarer Parties focus significantly on "the demand by Reynolds and Lively that the Wayfarer Parties issue a self-destructive statement taking blame for Lively's press woes or else 'the gloves would come off' and they 'would attack Wayfarer in the press.'" Dkt. No. 160 at 18 (quoting Dkt. No. 50 ¶¶ 250–256); *see* Dkt. No. 162 at 23. However, the Wayfarer Parties refused to issue any such statement. Dkt. No. 50 ¶ 256. Accordingly, there was no reliance on the threat, the Wayfarer Parties did not give up anything to Reynolds or Lively, and "plaintiff did not sustain damages cognizable in a cause of action for duress." *Fuhrman*, 231 Cal. Rptr. at 123; *see Raiser*, 2009 WL 10692058, at *3; *Baffert*, 2024 WL 5237442, at *3; *Am. Shooting Ctr., Inc. v. Secfor Int'l*, 2015 WL 1914924, at *4 (S.D. Cal. Apr. 27, 2015) (dismissing claim when "it is unclear what damages were proximately caused by the alleged attempted extortion.").[28]

The Wayfarer Parties allege that in response to threats that Lively would stop acting in the film or breach her contractual obligations to promote it, they were forced to agree to the return to production demands, Dkt. No. 50 ¶ 75, give Lively greater control over the script, give her a producer credit, and support her in seeking the *p.g.a.* mark, *id.* ¶¶ 124, 130, 140–146, and accept marginalization from the premiere, *id.* ¶ 166. However, Wayfarer does not plead sufficient facts to support an inference that these threats were legally wrongful. Lively did not threaten to physically harm the Wayfarer Parties or their property; nor did she threaten a false lawsuit as in *Leeper* and *Fuhrman*. *See Leeper*, 347 P.2d at 18; *Fuhrman*, 231 Cal. Rptr. at 122.

[28] The complaint alleges that Lively subsequently followed through on her threat by providing false information about the Wayfarer Parties to the Times. Dkt. No. 50 ¶¶ 256–260. But that conduct is actionable, if at all, under the law of defamation and not under the law of civil extortion. It does not support an inference that the Wayfarer Parties gave anything to Lively or that Lively obtained anything from them by virtue of the threat.

The Wayfarer Parties' claims do not turn on what Lively threatened to do but what she threatened not to do. The Wayfarer Parties allege that Lively "threatened to refuse to promote the Film or approve any related marketing materials," *id.* ¶ 142, and threatened to "abandon her contractual obligations to promote the Film or approve marketing materials," *id.* ¶152.[29] However, the Wayfarer Parties do not allege facts showing that Lively had an obligation to promote the film or to approve marketing materials. They do not point to any contractual provisions, explain what Lively's contractual obligations were, or even explain what contract is being referenced. Similarly, with regard to Lively's refusal to attend the premiere with Baldoni, the Wayfarer Parties do not allege that Lively had any obligation to attend the premiere with Baldoni. *Id.* ¶ 166–170. While the Wayfarer Parties plead that Lively had an obligation to act in the film, they do not allege that she had such an obligation no matter the circumstances.[30] A refusal to provide that which one has no obligation to provide is not a threat; it is a bargaining position. Conclusory allegations are insufficient to plead a breach of contract, and are therefore insufficient to plead that Lively threatened to breach her contract. *See AK Futures LLC v. LCF Labs Inc*., 2022 WL 2784409, at *4 (C.D. Cal. June 24, 2022) ("A complaint for breach of contract must include the contract itself or plead its essential terms." (quoting *J D Factors, LLC v. Reddy Ice Holdings*, 2016 WL 6996152, at *2 (C.D. Cal. June 6, 2016)); *Wiebe v. NDEX W., LLC*, 2010 WL 2035992, at *3 (C.D. Cal. May 17, 2010).

[29] With regard to the *p.g.a.* credit, the Wayfarer Parties simply allege that Lively demanded they support her *p.g.a.* certification "with extortionate threats." Dkt. No. 50 ¶ 154. The failure to specify what Lively purportedly threatened is fatal to any claim based on this allegation.

[30] Lively's contractual obligation to continue acting in the film is unclear. The complaint emphasizes in several places that Lively had not signed relevant employment contracts, Dkt. No. 50 ¶¶ 106–107, and never explains what contract Lively did sign.

Moreover, assuming the Wayfarer Parties did plead that Lively refused to do that which her contract required her to do, that would not alone be sufficient to plead that such a refusal was wrongful and could support a claim for civil extortion. A threat to breach a contract may constitute a breach of contract or an anticipatory repudiation of a contract, but it "is not, of itself, improper." Restatement (Second) of Contracts § 176, cmt. e; *see Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.*, 286 Cal. Rptr. 3d 333, 344–45 (Cal. Ct. App. 2021), *as modified on denial of reh'g* (Dec. 2, 2021). There are circumstances in which a breach or threatened breach may be commercially reasonable or efficient. *See Mission Beverage Co. v. Pabst Brewing Co., LLC*, 223 Cal. Rptr. 3d 547, 562 (Cal. Ct. App. 2017) ("[T]he concept of efficient breach of contract . . . supports a rule that allows one party to a contract to breach and pay damages rather than perform, at least where it is worth more to that party to breach rather than to perform." (internal quotation marks and brackets omitted)). There also are circumstances where, in the execution of a contract, one party realizes (or both parties realize) that there is a term agreed to on contract signing that no longer is in the mutual interest of both parties and seeks a modification.

It thus is not uncommon in commercial relationships that one or the other party will demand that a condition to their agreement change before performance is rendered. A refusal to perform unless the counterparty agrees to additional consideration or a new term may, depending on the circumstances, give rise to a claim for breach of contract. *See Riddick v. Summit House, Inc.,* 835 F. Supp. 137, 142 n.14 (S.D.N.Y. 1993) ("Contracts cannot be amended unilaterally by one party." (citing Restatement (Second) of Contracts § 318(3)); *Asmus v. Pac. Bell*, 999 P.2d 71, 78 (Cal. 2000) (noting that modification of a bilateral contract requires "mutual assent"); *Carlsen v. Glob. Client Sols., LLC*, 423 F. App'x 697, 699 (9th Cir. 2011). But, if the other party

finds the modification to be acceptable—either because it is in the mutual interest of the parties or because the modification is not so significant that the counterparty believes she is denied the benefit of her bargain—she can accept the modification either by words or by conduct. *See* Cal. Civ. Code § 1698 (noting that a written contract may be modified by an oral agreement "to the extent that the oral agreement is executed" or by "an oral agreement supported by new consideration"); *Fanucchi & Limi Farms v. United Agri Prods.*, 414 F.3d 1075, 1081 (9th Cir. 2005). In the absence of a continuing condition of duress, a party can agree to a modification "by either express consent or conduct inconsistent with anything other than approval." 25 Am. Jur. 2d Duress and Undue Influence § 30; *see also Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 852 (Cal. 2016) ("[A] voidable transaction, unlike a void one, is subject to ratification by the parties."). In those circumstances, the new agreement will define the relationship between the parties and their respective obligations to one another. A party who has enjoyed the benefits of the new bargain will not be heard to complain after-the-fact that it would have preferred the old deal and to ask a court to unwind an agreement to which both parties have, as a result of hard bargaining, agreed.

It follows that not every statement that a party will stop performing a contract unless the conditions are changed or new consideration provided will give rise to a claim in tort for civil extortion. Rather, courts consider a claim to involve "economic duress" only under limited circumstances, generally involving "the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value." *Martinez-Gonzalez v. Elkhorn Packing Co. LLC*, 25 F.4th 613, 620 (9th Cir. 2022) (quoting *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 469 (9th Cir. 1987)); *see Rich & Whillock*, 204 Cal. Rptr. at 89–90; *Chan v. Lund*, 116 Cal. Rptr. 3d 122, 134

(Cal. Ct. App. 2010).[31] A "bad faith threat to breach a contract" may constitute economic duress. *Martinez-Gonzalez*, 25 F.4th at 621. However, such a bad faith threat must be distinguished from an attempt to "press a claim that is within a party's rights," *Philippine Exp.*, 267 Cal. Rptr. at 468, as well as from "[h]ard bargaining, 'efficient' breaches and reasonable settlements of good faith disputes," none of which support a claim for duress, *Rich & Whillock*, 204 Cal. Rptr. at 89. In determining whether a threat constitutes economic duress, courts focus on whether the threat is "made for some purpose unrelated to the contract," *id.*, or involves a "disproportionate exchange of value," *Martinez-Gonzalez*, 25 F.4th at 620; *see Leeper*, 346 P.2d at 20 ("The very fact that the conveyance was for an allegedly inadequate consideration, under the cases, is of some importance determining whether or nor it was made under duress."). To allege a civil extortion claim, the Wayfarer Parties must therefore allege facts supporting that the threats were unrelated to or disproportionate to the obligations Lively had assumed under her agreement with the Wayfarer Parties, and that the Wayfarer Parties had no adequate remedy and could not have refused her demands. *See Rich & Whillock*, 204 Cal. Rptr. at 89 ("The economic duress doctrine serves as a last resort . . . when conventional alternatives and remedies are unavailing.").

The facts alleged do not support an economic duress claim. The Wayfarer Parties first allege that Lively threatened to stop acting in the film unless they agreed to her return to production demands. Dkt. No. 50 ¶ 75. The Court assumes, though it is not explicitly pleaded, that Lively had a contractual obligation to perform in the film. But the Wayfarer Parties do not plead that she had an obligation to perform no matter the conditions on the set, and is it not

[31] More traditional duress claims are supported by "an unlawful act in the nature of a tort or crime." *Rich & Whillock*, 204 Cal. Rptr. at 89 (Cal. Ct. App. 1984); *see Leeper*, 347 P.2d at 18. The refusal to act in or market *It Ends With Us* is not an independent tort or crime.

unusual for employees to seek changes or improvements in workplace conditions. The demands Lively is alleged to have made, including that there be no physical touching of her except in connection with character or scene work, that there be no discussion of personal experiences with sex, that she have a personal representative on set, and that there be a nudity rider, are all closely related to the conditions of her own performance and largely involve adherence to protections for Lively (and other cast members) that the Wayfarer Parties had already implemented. The only apparent cost to the Wayfarer Parties was hiring an additional producer, *id.* ¶ 114, which would not financially benefit Lively. The allegations do not support that Lively was attempting to extort the Wayfarer Parties into hiring a producer, as opposed to seeking to confirm previously understood terms and conditions or at worst seeking slightly more favorable terms of employment.[32] Even if they turn out to be unneeded, an employee can insist on protections at workplace for sexual harassment without being accused of extortion. If an employer accedes, it cannot later claim to be a victim of the employee's wrongful threats.

A similar result applies with respect to the Wayfarer Parties's allegations that Lively threatened to breach her contractual obligation to promote the film unless they allowed her to edit the movie and released her cut, gave her a producer credit, supported her in seeking the *p.g.a.* mark, and co-funded a screening of her version of the film. Dkt. No. 50 ¶¶ 124, 130, 140–146. These demands do not involve a disproportionate exchange of value, as Lively "insist[ed] on taking on additional work for no additional pay." *Id.* ¶ 174; *see Martinez-Gonzalez*, 25 F.4th

[32] Although the Wayfarer Parties allege that the list was "drafted for the apparent purpose of insinuating or outright claiming that Baldoni, Heath, and others had engaged in sexually inappropriate conduct," there are no allegations that Lively threatened to reveal such behavior if her demands were not met. *Cf. Flatley v. Mauro*, 139 P.3d 2, 21 (Cal. 2006) (holding that attorney's threat to publicly accuse plaintiff of rape unless he paid money to client was extortionate).

at 622 ("In the few California cases finding a 'wrongful act,' the exploitation involved the disproportionate loss of *economic* value."). There also is no allegation that Lively had a contractual obligation to promote the film; if not, there is no basis to assume that the value that she conveyed in terms of her willingness to promote represented anything other than a fair trade for the Wayfarer Parties' willingness to use her cut. Her demands were related to the subject-matter of the contract, as Lively sought to have the film she would be promoting fit her vision. Dkt. No. 50 ¶¶ 135, 137, 174; *see Flatley*, 139 P.3d at 23 (noting that "the threat to disclose criminal activity *entirely unrelated to any alleged injury suffered*" by the demander was evidence of extortion (emphasis added)); *Philippine Exp.*, 267 Cal. Rptr. at 468; *Martinez-Gonzalez*, 25 F.4th at 620. Although the Wayfarer Parties allege that they did not believe Lively deserved a producer credit or *p.g.a.* mark, Dkt. No. 50 ¶¶ 153–155, they also allege that Lively took over significant production responsibilities, *see id.* ¶ 296 (stating that Lively used baseless sexual harassment allegations "to assert unilateral control over every aspect of the production"); *id.* ¶ 344 (alleging that Lively seized creative control over the production and the Wayfarer Parties "were deprived of the opportunity to produce, edit, and market a film"); *cf. United States v. Jackson*, 180 F.3d 55, 70–72 (2d Cir.), *on reh'g*, 196 F.3d 383 (2d Cir. 1999) (suggesting that a threat is not wrongful if it has a "nexus to a plausible claim of right"). The Wayfarer Parties have not alleged that Lively requested changes in the production "for some purpose unrelated to the contract," *Martinez-Gonzalez*, 25 F.4th at 620; the Amended Complaint alleges that Lively believed her version of the film to be better than the version favored by the Wayfarer Parties and that her efforts deserved recognition, Dkt. No. 50 ¶ 18 ("Lively and Reynolds' efforts failed to win them the acclaim they believed they so richly deserved."); *id.* ¶ 42.

The Amended Complaint is not clear whether the Wayfarer Parties, as opposed to Sony, had the ultimate right to choose the cut of the film that would be distributed or the marketing plan that would be used to promote the film. There are indications from the Amended Complaint that such rights resided with Sony. Dkt. No. 50 ¶ 142 ("Lively's extortionate threats coerced *Sony* to allow her to create her own cut of the Film." (emphasis added); *id.* ¶ 149 (stating that Lively insisted on screening her cut "[o]ver Sony's objection" and that Sony informed Wayfarer Baldoni could not attend); *id.* ¶163 (noting that the marketing plan for the film was created by Sony). If so, Lively would not have been withholding from the Wayfarer Parties anything that the Wayfarer Parties had a right to obtain from her in the first place. But even assuming that the Wayfarer Parties had such a right as against Lively, they were not without a remedy. If, in fact, Lively announced that she would not perform unless the Wayfarer Parties gave something of value to her to which she was not entitled, the Wayfarer Parties could have sued. They were not without "a reasonable alternative" to meeting Lively's demands. *Leeper*, 347 P.2d at 20; *see Hartsville Oil Mill v. United States*, 271 U.S. 43, 49 (1926) ("Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate."). Although the Wayfarer Parties state that "Baldoni was forced to choose between killing the film and his own career by insisting on his own creative vision and rights," at the point these threats were made, filming was complete. If the Wayfarer Parties had the right to put out a film with Baldoni's edits in the first place, they were not without the ability to do so as a result of Lively's demands. *Id.* ¶ 146. The only loss would have been Lively's promotion of the film. But there is no allegation regarding Lively's obligations to the Wayfarer Parties regarding promotion. And, even if there were, although the film might be less profitable without Lively's promotional efforts, the desire

to avoid a loss in profits is not the same as duress "within the meaning of the law." *London Homes, Inc. v. Korn*, 44 Cal. Rptr. 262, 267 (Cal. Ct. App. 1965) (holding that economic duress was not present when defendants threatened to breach contract unless the plaintiffs paid a higher price for a parcel of land, and defendants agreed because they needed to quickly secure the last parcel of land in a planned subdivision). "[T]he plaintiff[s] could have brought suit against [Lively] for damages; but for what appeared to them to be good business reasons, they elected not to do so." *Id.* at 249; *see River Bank Am. v. Diller*, 45 Cal. Rptr. 2d 790, 804 (Cal. Ct. App. 1995) (holding there was no economic duress when plaintiff initially agreed to a transaction but sought restructuring at the last minute, which defendant agreed to because of the difficulty of securing alternative financing). The case does not involve a potential foreclosure, imprisonment, "economic disaster," or "imminent bankruptcy." *Martinez-Gonzalez*, 25 F.4th at 620 (quoting *Rich & Whillock*, 204 Cal. Rptr. at 91); *see Leeper*, 347 P.2d at 204. The fact that a plaintiff decides it is more financially beneficial to acquiesce to a demand than to sue does not mean the plaintiff lacks an adequate remedy in damages. Having made their decision, the Wayfarer Parties cannot now seek to recover in damages for what they would have obtained had they not agreed and had Lively promoted some different version of the film more consistent with the Wayfarer Parties' artistic vision.

Finally, the Wayfarer Parties allege that Lively's threat to boycott forced Baldoni to accept marginalization from the premiere. Dkt. No. 50 ¶ 166. Initially, the Wayfarer Parties do not allege that Lively had an obligation to them to attend the premiere, much less to attend the premiere with Baldoni. However, even if Lively had such an obligation, her suggested modification is directly related to the conditions of her own performance; there is no threat extrinsic and unrelated to the production of the film. There is also no disproportionate exchange

of value, as the separation of the parties at the premiere is not alleged to have had any financial implications.

Lively, Sloane, and Reynolds also argue that the Wayfarer Parties have not alleged damages from any of Lively's threats. Dkt. No. 87 at 7–9; Dkt. No. 133 at 19; Dkt. No. 145 at 27–30. For reasons largely stated above in the analysis of disproportionate value, this provides an alternative basis for dismissal of most aspects of the extortion claim.[33]

The Court assumes, without deciding, that an extortion claim could be based on the transfer of creative control if, as a result of such transfer, the plaintiff lost something of value for which it did not receive equivalent or greater value in exchange.[34] However, the Wayfarer Parties have not alleged that Lively's editing or the eventual release of her cut of the film caused them "actual monetary loss." *Rothwell*, 900 P.2d at 609. Although the Wayfarer Parties preferred Lively to take less of a role in the production of the film, they do not allege that it made less money due to her editing or that her role resulted in costs to them. Accordingly, there are no

[33] As noted above, the Wayfarer Parties allege that they were financially damaged by agreement to the return to production demands and agreeing to co-fund a screening of her version of the film. Dkt. No. 50 ¶¶ 75, 142. These aspects of the claim are dismissed only due to the failure to allege a wrongful threat.

[34] The Lively Parties argue that a civil extortion claim may only be based on the transfer of "money or property," drawing on the fact that the relevant California cases all involve reversing a transfer of money. *Fuhrman*, 231 Cal. Rptr. at 122; *see Leeper*, 347 P.2d at 18; *Woodham*, 62 P. at 399 ("[T]he money can be recovered back."). However, there is no principled reason that the claim should be limited to money or tangible property. Wayfarer possessed the film rights to *It Ends With Us* and therefore had the right to control what film would be produced and released based on the book. Had a party demanded at gunpoint that the Wayfarer Parties employ a novice to edit their film, and this caused the Wayfarer Parties damages, the Wayfarer Parties might be able to bring a civil extortion claim. *See Burke v. Gould*, 38 P. 733, 734 (Cal. 1894) (stating that the principle that a plaintiff should be able to recover amounts paid under duress "is applicable alike to cases where money or other valuable thing is extorted"); *People v. Fisher*, 156 Cal. Rptr. 3d 836, 840 (Cal. Ct. App. 2013) (holding that when the defendant "demanded to be employed by the business owner or face vandalism to vehicles at the business," this was actionable in criminal extortion as "a demand for part of the employer's business, i.e., part of the intangible benefit and prerogative of being able to control whom to employ in one's business").

factual allegations that could support an award of damages for "the difference in actual value at the time of the transaction between what the plaintiff gave and what he received." *Rothwell*, 900 P.2d at 609 (quoting *Stout*, 586 P.2d at 1232). Accepting the allegations, Wayfarer gave up on releasing its preferred version of the movie, cut by Baldoni, in favor of a version that Lively preferred. But there is no allegation that Baldoni's version of the movie was of greater value than Lively's. For that independent reason, the Wayfarer Parties' civil extortion claim related to the demands for creative control fails.

Similarly, although the Wayfarer Parties allege that conditions at the premiere were "demeaning and humiliating," Dkt. No. 50 ¶ 169, they do not allege any costs to Wayfarer. There are also no allegations supporting that providing Lively a producer credit and *p.g.a.* support resulted in a monetary loss to the Wayfarer Parties. *See Evans v. Sleep No. Corp.*, 2025 WL 1093332, at 10 (E.D. Cal. Apr. 11, 2025) (holding Plaintiff failed to plead actual damages when she was deceived into buying a product but failed to plead she lost money in the transaction); *Fladeboe v. Am. Isuzu Motors Inc.*, 58 Cal. Rptr. 3d 225, 244 (Cal. Ct. App. 2007), *as modified* (Apr. 24, 2007) (similar). The injury the Wayfarer Parties focus on regarding the *p.g.a.* mark is essentially a moral injury that they believed that "Lively did not perform the duties of a producer and therefore did not merit the p.g.a. mark," but were forced to write a letter "omitting the truth." Dkt. No. 50 ¶¶ 155, 157.

Finally, there are no allegations supporting Reynolds or Sloane's liability. The Wayfarer Parties argue that Sloane and Reynolds are liable in conspiracy because by actually spreading defamatory statements, Sloane and Reynolds "play[ed] the role of the 'heavy' [in] carrying out Lively's extortionate threats." Dkt. No. 121 at 36. However, the only instance in which Lively (and Reynolds) allegedly threatened to spread defamatory statements was in demanding that the

Wayfarer Parties make a harmful public statement. As stated above, the Wayfarer Parties never provided such a statement, so no conspiracy related to the statement is actionable. In addition, if Sloane and Reynolds actually spread defamatory statements, they would be liable in defamation, not civil extortion. Finally, the Wayfarer Parties' allegations regarding the purported conspiracy to commit civil extortion are entirely conclusory.

The Wayfarer Parties' claims for civil extortion must be dismissed.

IV. Defamation

The Wayfarer Parties bring defamation claims against all Defendants. Dkt. No. 50 ¶¶ 324–331. The allegedly defamatory statements are statements to the effect that 1) "the Wayfarer Parties engaged in, permitted, and/or failed to prevent sexually inappropriate conduct toward Lively" and 2) "the Wayfarer Parties retaliated against Lively and others for reporting the alleged sexual misconduct including by propagating false and misleading narratives about Lively for the purpose of damaging her image and reputation." *Id.* ¶ 325. The Wayfarer Parties allege that Lively, Sloane, and Reynolds engaged in a conspiracy to spread these defamatory narratives to the Times, other media outlets, and Baldoni's agency, *id.* ¶¶ 8, 17, 162, 193, 273, 370, and that the Times committed defamation by publishing the same narratives, *id.* ¶¶ 272–276. These allegations fail to state a defamation claim.

A. Legal Standard

The Court refers to California law in setting out the legal standard for defamation, leaving any distinguishing aspects of New York law for discussion as applicable to the Times. Although some applicable statutes and privileges differ, "the elements of defamation in both states are similar." *Feitosa v. Keem*, 2023 WL 2267055, at *4 (W.D.N.Y. Feb. 28, 2023).

"Defamation constitutes an injury to reputation" by a false oral or written communication. *Shively v. Bozanich*, 80 P.3d 676, 683 (Cal. 2003), *as modified* (Dec. 22, 2003).

Under California law, "[t]he tort of defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2007) (citation and internal quotation marks omitted). California defamation law incorporates, as it must, speech protections required by the First Amendment to the United States Constitution. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that defamatory falsehoods about public officials are protected unless made with "actual malice"); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (noting that the First Amendment protects statements which lack "a provably false factual connotation").

"Publication" does not refer to "a written dissemination, as suggested by the common meaning of that term," but merely requires communication of the statement "to a third person who understands its defamatory meaning as applied to the plaintiff." *Shively v. Bozanich*, 80 P.3d 676, 683 (Cal. 2003), *as modified* (Dec. 22, 2003). Publication "need not be to the public or a large group; communication to a single individual is sufficient." *Ringler Assocs. Inc. v. Md. Cas. Co.*, 96 Cal. Rptr. 2d 136, 148 (Cal. Ct. App. 2000). "Each publication ordinarily gives rise to a new cause of action for defamation." *Shively*, 80 P.3d at 683. However, for mass communications, California has adopted the "single-publication rule," which states that "for any single edition of a newspaper or book, there [i]s but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book [a]re distributed." *Id.* at 685.[35] With regards to statements in this type of publication,

[35] Although originally framed in terms of newspapers and books, the single-publication rule also applies to other types of mass communications, including communications posted on the internet. *See Traditional Cat Assn., Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 362 (Cal. Ct. App. 2004); *Hebrew Acad. of S.F. v. Goldman*, 173 P.3d 1004, 1009 (Cal. 2007).

the plaintiff is deemed to be harmed once, "when the book or newspaper is first generally distributed to the public," not every time the publication "came into the hands of a new reader who had not discovered it previously." *Id.* at 684, 686.

"The *sine qua non* of recovery for defamation . . . is the existence of a falsehood." *Baker v. L.A. Herald Exam'r*, 721 P.2d 87, 90 (Cal. 1986) (quoting *Letter Carriers v. Austin* 418 U.S. 264, 283 (1974)). "Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability." *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 59 (Cal. Ct. App. 2012) (quoting *McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 479 (Cal. Ct. App. 2007)); *see Taus*, 151 P.3d at 1209. If a statement "cannot reasonably [be] interpreted as stating actual facts," it is protected by the First Amendment and not actionable. *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005) (quoting *Milkovich*, 497 U.S. at 20); *see Seelig v. Infinity Broad. Corp*., 119 Cal. Rptr. 2d 108, 116 (Cal. Ct. App. 2002); *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 188 (Cal. Ct. App. 2016). "'[R]hetorical hyperbole,' 'vigorous epithet [s],' 'lusty and imaginative expression[s] of [] contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 1999) (quoting *Greenbelt Pub. Assn. v. Bresler* 398 U.S. 6, 14 (1970) and then quoting *Letter Carriers*, 418 U.S. at 284). However, the publication may be actionable if "a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion." *Nygard, Inc. v. Uusi-Kerttula*, 72 Cal. Rptr. 3d 210, 226 (Cal. Ct. App. 2008); *see Milkovich*, 497 U.S. at 21. "[E]xpressions of opinion may imply an assertion of objective fact, and a statement that implies a false assertion of fact, even if couched as an opinion, can be actionable." *McGarry*, 64 Cal. Rptr. 3d at 479 (citing *Milkovich*, 497 U.S. at 18–19).

"It is the province of the court to determine whether a statement is actionable as a statement of fact susceptible of a defamatory meaning, versus a nonactionable statement of opinion privileged under the First Amendment." *John Doe 2*, 206 Cal. Rptr. 3d at 68–69; *see Gallagher v. Philipps*, 563 F. Supp. 3d 1048, 1086 (S.D. Cal. 2021). "To determine whether a statement is actionable fact or nonactionable opinion, [courts] apply a totality of the circumstances test pursuant to which [they] consider both the language of the statement itself and the context in which it is made." *Summit Bank*, 142 Cal. Rptr. 3d at 60; *Gallagher*, 563 F. Supp. 3d at 1086; *Steam Press Holdings, Inc. v. Hawaii Teamsters, Allied Workers Union, Loc. 996*, 302 F.3d 998, 1005 (9th Cir. 2002). Courts look to "the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." *Baker*, 721 P.2d at 90–91; *see Knievel*, 393 F.3d at 1074–78; *Reed*, 204 Cal. Rptr. 3d at 189. "[T]he publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in law, but by the natural and probable effect upon the mind of the average reader." *Baker*, 721 P.2d at 90 (quoting *MacLeod v. Trib. Pub. Co*., 343 P.2d 36, 41–42 (Cal. 1959)); *see Knievel*, 393 F.3d at 1074.

"[T]ruth is a complete defense" to a defamation claim. *Bently Rsrv. LP v. Papaliolios*, 160 Cal. Rptr. 3d 423, 434 (Cal. Ct. App. 2013). Where the plaintiff is a public figure or the speech involves a matter of public concern, the plaintiff bears the burden of showing the falsity of the statements. *See Carver v. Bonds*, 37 Cal. Rptr. 3d 480, 493 (Cal. Ct. App. 2005); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990); *Appel v. Wolf*, 2023 WL 5108962, at *4 (S.D. Cal. Jan. 31, 2023). "As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true,

irrespective of slight inaccuracy in the details." *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (citation and internal quotation marks omitted); *see Reed*, 204 Cal. Rptr. 3d at 192. The test is whether the statement "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*, 501 U.S. at 517.

The state of mind necessary to support a defamation claim depends on whether the plaintiff is a private figure or a public figure. If the defamatory statement concerns a private figure, the standard under California law is whether the defendant acted negligently by "fail[ing] to use reasonable care to determine the truth or falsity" of the statement. *Hecimovich v. Encinal Sch. Parent Tchr. Org.*, 137 Cal. Rptr. 3d 455, 470 (Cal. Ct. App. 2012). However, the First Amendment requires that "public figures may prevail in a libel action only if they prove that the defendant's defamatory statements were made with actual malice, i.e., actual knowledge of falsehood or reckless disregard for the truth." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001); *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–47 (1974); *N.Y. Times*, 376 U.S. at 283. Public figures have generally "invite[d] attention and comment" by "thrust[ing] themselves to the forefront of particular public controversies," and enjoy "significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 343; *see Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 702 (Cal. 1998), *as modified* (Dec. 22, 1998). Applying the actual malice standard to such figures allows "the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).[36]

[36] To be actionable under California law, "[t]he defamatory statement must specifically refer to, or be 'of and concerning,' the plaintiff." *John Doe 2*, 206 Cal. Rptr. 3d at 68 (quoting *Blatty v.*

"Under Cal. Civ. Code § 45a, a plaintiff may only prevail on a claim for libel if the publication is libelous on its face or if special damages have been proven." *Newcombe v. Adolf Coors Co*., 157 F.3d 686, 694 (9th Cir. 1998); *see* Cal. Civ. Code § 45a ("Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage.").[37] "Statements constitute libel *per se* when 'a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter." *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 686 (Cal. Ct. App. 2021) (quoting *McGarry*, Cal. Rptr. 3d at 478). In such a case, "damage to plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages." *Barnes-Hind, Inc. v. Superior Ct*., 226 Cal. Rptr. 354, 356 (Cal. Ct. App. 1986) (quoting *Contento v. Mitchell*, 104 Cal. Rptr. 591, 592 (Cal. Ct. App. 1972)). But if understanding the defamatory meaning requires "knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge," a plaintiff must plead specific damages that he has suffered "in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or

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N.Y. Times Co., 728 P.2d 1177, 1182 (Cal. 1986)). This requirement "limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." *Dickinson v. Cosby*, 250 Cal. Rptr. 3d 350, 367 (Cal. Ct. App. 2019) (quoting *Blatty*, 728 P.2d at 1183). When a statement concerns a group, it may be actionable "if the group is sufficiently small and its members easily ascertainable," but not "[w]here the statement refers to a large group—typically any group numbering more than 25 members." *Id.*; *see Blatty*, 728 P.2d at 1185.

[37] California Civil Code § 45a refers to libel, which is written defamation, as opposed to slander, which is spoken defamation. However, in this context "[c]ourts use the phrases 'defamatory on its face,' 'defamation on its face,' 'defamation per se,' 'defamatory per se,' 'libelous on its face,' and 'libel per se' interchangeably." *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 2023 WL 3568077, at *8 n.13 (N.D. Cal. Apr. 21, 2023), *appeal dismissed*, 2024 WL 2317687 (9th Cir. Apr. 8, 2024).

she has expended as a result of the alleged libel." *Barnes-Hind*, 226 Cal. Rptr. at 356, 360 (quoting Cal. Civ. Code § 48a).

Several privileges under California law may prevent an otherwise defamatory statement from being actionable. Relevant here, California recognizes a litigation privilege, Cal. Civ. Code § 47(b), a fair report privilege, *id.* § 47(d), and a privilege for statements by the victim "regarding an incident of sexual assault, harassment, or discrimination," *id.* § 47.1.[38] The litigation privilege is an absolute privilege that applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Jacob B. v. County of Shasta*, 154 P.3d 1003, 1007 (Cal. 2007) (quoting *Silberg v. Anderson*, 786 P.2d 365, 269 (Cal. 1990), *as modified* (Mar. 12, 1990)). It aims to "afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions." *Id.* at 1008 (quoting *Rusheen v. Cohen*, 128 P.3d 713, 722 (Cal. 2006)). The privilege applies not only to court proceedings but to "'all kinds of truth-seeking proceedings,' including administrative, legislative and other official proceedings." *See People ex rel. Gallegos v. Pac. Lumber Co.*, 158 70 Cal. Rptr. 3d 501, 508 (Cal. Ct. App. 2008) (quoting *Silberg*, 786 P.2d at 370)).

The fair and true report privilege applies to "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof." Cal. Civ. Code § 47(d). "'Fair and true' in this context does not refer to the truth or accuracy of the matters asserted in the judicial proceedings,

[38] The defendant bears the initial burden of showing "that the allegedly defamatory communication was made on a privileged occasion." *Lundquist v. Reusser*, 875 P.2d 1279, 1287 (Cal. 1994).

but rather to the accuracy of the challenged statements with respect to what occurred in the judicial proceedings." *Healthsmart Pac., Inc. v. Kabateck*, 212 Cal. Rptr. 3d 589, 603 (Cal. Ct. App. 2016), *as modified* (Jan. 10, 2017). The standard for whether the report is "fair and true" is essentially equivalent to the standard for whether a statement is "substantially true;" the issue is whether the report captures "the substance, the gist or sting, of the subject proceedings as measured by considering the natural and probable effect [of the report] on the mind of the average reader." *Argentieri v. Zuckerberg*, 214 Cal. Rptr. 3d 358, 373 (Cal. Ct. App. 2017) (citation and quotation marks omitted); *see Kilgore v. Younger*, 640 P.2d 793, 777 (Cal. 1982).

In 2023, the California legislature added a privilege for "[a] communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination." Cal. Civ. Code § 47.1. This legislation was a response to the #MeToo movement and expanded on an existing privilege which protected complaints of sexual harassment to an employer or court. Dkt. No. 146-1 at 3, 25, 27, 71; *see* Cal. Civ. Code § 47(b)–(c). "Communication" is defined as "factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication." Cal. Civ. Code § 47.1(d). The section applies only to an individual "that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination." *Id.* § 47.1(c). The legislation also provides that if a plaintiff brings an action "for making a communication that is privileged under this section," the prevailing defendant "shall be entitled to their reasonable attorney's fees and costs for successfully defending themselves in the litigation, plus treble damages for any harm caused to them by the defamation action." *Id.* § 47.1(b).

B. Lively, Sloane, and Reynolds

The Wayfarer Parties allege generally that Lively, Sloane, and Reynolds worked together to "advance[] a fabricated narrative in the press that the Wayfarer Parties had sexually harassed Lively, then embarked on a calculated and malicious smear campaign to destroy her reputation as retaliation for daring to complain about the harassment." Dkt. No. 50 ¶ 17. This general allegation has multiple facets. Most prominently, the Wayfarer Parties allege that Lively, Sloane, and Reynolds worked together to spread a false narrative to the Times. *Id.* ¶ 273. In addition, the Wayfarer Parties allege that as part of the same conspiracy, Sloane and Reynolds individually made false statements about Baldoni to other press outlets and Baldoni's agency. *Id.* ¶¶ 8, 162, 193, 370.[39]

[39] Portions of the Amended Complaint could be read to suggest that the defamation claim is partly based on Lively's return to production demands, which "insinuated misconduct had occurred during filming." Dkt. No. 50 ¶ 6; *see id.* ¶¶ 81, 85, 90, 92, 100, 104. However, the Wayfarer Parties have disclaimed any reliance on these statements, which are outside of the statute of limitations. Dkt. No. 162 at 11. The Lively Parties argue that the fact that Lively arguably insinuated sexual misconduct in the return to production demands triggers the statute of limitations under California's Uniform Single Publication Act, making all actions based on later claims of sexual misconduct untimely. Dkt. No. 145. However, this argument is meritless. The single publication rule applies to "any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture." Cal. Civ. Code. § 3425.3. It is broad enough to cover "six different editions of a newspaper, all dated on the same date but distributed over two days," but not "publication of a paperback edition of a book previously published as a hardback." *Miller v. Collectors Universe, Inc*., 72 Cal. Rptr. 3d 194, 201 (Cal. Ct. App. 2008); *see Christoff v. Nestle USA, Inc*., 213 P.3d 132, 140 (Cal. 2009) (holding that issues of fact existed as to whether the use of a single image on Nestlé's product label over a five-year period and across various media constituted a "single integrated publication"). Here, the allegation is not that Lively simply republished the text of the return to production demands. Claims of sexual harassment and retaliation made in different words, to different audiences, at different times do not constitute a single integrated publication. *See Miller*, 72 Cal. Rptr. 3d at 201 ("The words 'founded upon any single publication or exhibition or utterance' must . . . mean the communication of the same words or images to more than one person.").

The Wayfarer Parties have not adequately alleged a defamation claim as to any part of the purported conspiracy. The Wayfarer Parties have not adequately alleged that any false statements were made to the Times other than the statements in Lively's CRD complaint, which were privileged under California law. There also is no allegation that the distribution of the CRD complaint was made by anyone other than Lively or, more particularly, with the involvement or agreement of Sloane or Reynolds. The Wayfarer Parties have not adequately alleged that Sloane or Reynolds individually did any more than repeat Lively's version of events, which they had no reason to doubt. And the Wayfarer Parties have not adequately alleged that Lively should be held responsible for Sloane or Reynolds' statements. Their allegations of a conspiracy between the parties are conclusory.

1. Statements to the New York Times

The Wayfarer Parties' claims of defamation against Lively, Sloane, and Reynolds are partly based on allegations that Lively "and her team" made false statements about the Wayfarer Parties to the Times. Dkt. No. 50 ¶¶ 272–273, 275; *see* Dkt. No. 121 at 19; Dkt. No. 160 at 7; Dkt. No. 162 at 10. A fundamental obstacle to this claim is that the Wayfarer Parties do not plead, and may not know, exactly what if anything the Lively Parties and the New York Times communicated to each other. Accordingly, the Amended Complaint fails to allege facts regarding who said what (if anything) to the New York Times, and when. The Amended Complaint instead relies on inferences from the fact that the Times had the CRD complaint before it was publicly available and on conclusory and often dramatized allegations—sometimes "on information and belief,"—that the Lively Parties worked together to feed the Times a false narrative, Dkt. No. 50 ¶¶ 275–276, 278, "apparently" based on text messages that were "selectively and deceptively edited" *id.* ¶¶ 275, 278, that "the Wayfarer Parties had responded to

Lively's complaints about purported sexual harassment by plotting to destroy her reputation" via a "smear campaign," *id.* ¶¶ 272, 275–276, 278.

A plaintiff who is unable to plead direct facts must at a minimum plead circumstantial facts supporting a plausible inference that the defendant's behavior crossed the line from lawful to unlawful conduct. *See Twombly*, 550 U.S. at 556; *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 323 (2d Cir. 2010) (holding claim was properly pleaded when the plaintiff lacked direct evidence of an unlawful agreement but provided circumstantial allegations supporting its existence); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 186 (2d Cir. 2012) (same). That standard applies to the Wayfarer Parties' defamation claim here. *See Iqbal*, 556 U.S. at 684; *Biro*, 883 F. Supp. 2d at 456.

"The tort of defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus*, 151 P.3d at 1209 (citation and internal quotation marks omitted). Accordingly, if the Wayfarer Parties allege facts supporting that a given defendant made statements to the Times that were true, privileged, or mere opinion, coupled with a "bare assertion" that defamation occurred, the pleading is insufficient. *Twombly*, 550 U.S. at 556. On the other hand, if the Wayfarer Parties plead facts, including circumstantial evidence, that create a plausible inference that a defendant made statements to the Times that were false, defamatory, and unprivileged, the Wayfarer Parties have stated a claim.

The factual allegations pleaded in the Amended Complaint do not state a claim. They support at most the plausible inference that Lively or someone acting on her behalf provided the Times with a copy of the CRD complaint and related text messages before the complaint was filed. While the Article was published on December 21, 2024, the day after Lively filed her

CRD complaint, Dkt. No. 50 ¶¶ 258, 263, the Times asked the Wayfarer Parties to comment on the Article at 9:46 p.m. reporting on the CRD complaint on December 20, 2024, the same day it was filed, *id.* ¶ 257. There is a powerful inference that the Times had access to the CRD complaint well before that date. The Article and CRD complaint are both purportedly based on "thousands of pages of text messages and emails that [Lively] obtained through a subpoena," which the Article states "were reviewed by the New York Times." *Id.* ¶ 262. URLs for images, PDFs, and videos associated with the Article contain the dates December 12, December 10, and December 16, 2024. *Id.* ¶¶ 264–266. The Article draws heavily from Lively's CRD complaint. *Id.* ¶ 262. It would have taken time to review that complaint and its attachments. In addition, source code for a portion of the Article contains the date October 31, 2024. *Id.* ¶ 268. And because the Times had access to the CRD complaint before it was filed and while it was still confidential, there also is a powerful inference that it was provided by Lively or by someone on her team. Lively obviously had access to the CRD Complaint before it was filed. It only makes sense that the CRD Complaint was given to the Times by Lively or someone acting on her behalf. If the complaint was provided to the Times, it is highly likely that Lively played a "responsible part." *See Dickinson v. Cosby*, 250 Cal. Rptr. 3d 350, 365 (Cal. Ct. App. 2019).[40]

[40] The same inference does not hold as to Sloane and Reynolds, which provides an independent ground for dismissing the defamation claim based on these statements as to them. Lively is the plaintiff in the CRD complaint, and even if she did not personally provide it to the Times it is plausible to infer that she authorized or made the decision to provide it. *See Dickinson*, 250 Cal. Rptr. 3d at 365 (holding that client could reasonably be expected to have "approved or otherwise authorized" press releases put out by his lawyer regarding a case against him). Sloane and Reynolds are not plaintiffs in the CRD compliant, and there is no reason to infer they would have approved or been responsible for the provision of the CRD complaint to the Times. There are also no allegations supporting that they worked together with Lively to provide the CRD complaint to the Times or make any other statements to the Times. The mere fact that they are related to Lively as her publicist and husband does not provide the basis for an inference that they made or were responsible for any particular statements to the Times.

The act of providing the CRD complaint to the Times is not sufficient to constitute defamation because the complaint is protected by the fair report privilege. The CRD complaint is a filing in a "quasi-judicial proceeding." *Gallegos*, 158 70 Cal. Rptr. 3d at 508; *see Healthsmart Pac.*, 212 Cal. Rptr. 3d at 602 ("California courts have construed the phrase, 'judicial proceeding,' broadly to include the filing of a complaint."). And the fair report privilege applies to Lively providing the complaint to the Times, because it is "a communication to[] a public journal[] of" statements "said in the course" of a "public official proceeding." Cal. Civ. Code § 47(d).

The Wayfarer Parties' main response is that the privilege does not apply because at the time Lively provided the CRD complaint to the Times, it had not yet been filed in an official proceeding. Dkt. No. 162 at 20. However, under California law, a party need not wait until a legal document is formally filed before providing it to members of the press. The fair report privilege extends to advance communication to a public journal of a complaint so long as the party intends in good faith to file it in a public official proceeding. *See Bond v. Lilly*, 2024 WL 4879324, at *5–6 (Cal. Ct. App. Nov. 25, 2024) (unpublished).[41]

The fair report privilege originally applied only to reports in a public journal, not communications to that journal. *See Healthsmart Pac.*, 212 Cal. Rptr. 3d at 601. In 1996,

[41] Although unpublished opinions lack precedential value under the California Rules of Court and cannot be cited by California courts, Cal. R. Ct. 8.1115, federal courts have considered such opinions as "persuasive authority." *Lefkowitz v. Westreich*, 2017 WL 3491968, at *5 n.5 (S.D.N.Y. Aug. 14, 2017); *see Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008 n.2 (9th Cir. 2012) (stating that unpublished opinions may "lend support" to an interpretation of California law); *State Farm Mut. Auto. Ins. Co. v. Penske Truck Leasing Co., L.P.*, 2021 WL 4810642, at *2 (9th Cir. Oct. 15, 2021) (stating that the court was not "precluded from considering" an unpublished opinion, but it was "not a conclusive indication of how California courts would rule in a precedential opinion"). Accordingly, the Court considers the unpublished decision in *Bond*, which is directly on point, as persuasive support for the view that the principles set out in published authority require the result here.

however, the California legislature extended the privilege to protect individuals who communicate litigation statements to the press. *Id.* "This amendment was enacted to abrogate the holding in *Shahvar v. Superior Court* [] that an attorney's transmittal of a copy of a pleading to a newspaper was not protected by the fair report privilege." *Id.* (citing 30 Cal. Rptr. 2d 597, 599 (Cal. Ct. App. 1994), *as modified* (June 22, 1994)). The legislature noted that statements in an official proceeding "are protected when originally uttered by the litigation privilege and are protected when published by the press by the fair report privilege." *J-M Mfg. Co. v. Phillips & Cohen LLP*, 201 Cal. Rptr. 3d 782, 791 (Cal. Ct. App. 2016) (quoting Cal. Assem. Com. On Judiciary, Analysis of Sen. Bill No. 1540 (1995–1996 Reg. Sess.)). The legislative decision to include communications to the media within the privilege was intended to "create the bridge between these two privileges to protect a third party who communicates this already privileged material to the press." *Id.* (quoting Cal. Assem. Com. On Judiciary, Analysis of Sen. Bill No. 1540).

The rationale of providing a "bridge" between protected statements supports application of the privilege here. The litigation privilege can protect statements in a complaint that has not yet been filed if they are related to "an imminent lawsuit or judicial proceeding which is actually contemplated seriously and in good faith." *Edwards v. Centex Real Est. Corp.*, 61 Cal. Rptr. 2d 518, 531 (Cal. Ct. App. 1997); *see Laffer v. Levinson, Miller, Jacobs & Phillips*, 40 Cal. Rptr. 2d 233, 238 (Cal. Ct. App. 1995) (collecting cases); *Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1068 (N.D. Cal. 2005).[42] Thus, if the CRD complaint had been sent between the Lively

[42] This is consistent with the "broad application" of the privilege to protect "the utmost freedom of the courts" and "open channels of communication and the presentation of evidence." *Silberg*, 786 P.2d at 369 (citation omitted). Parties must be free to communicate with allies and counsel as well as to engage in the "well established legal practice to communicate promptly with a

Parties or to an adversary as an attempt to secure settlement in good faith before the complaint was filed, the statements would be regarded to be in the "course of" the proceeding and the litigation privilege would apply. Cal. Civ. Code 47(b); *See Visto Corp*., 360 F. Supp. 2d at 1068; *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284, 293–294 (Cal. Ct. App. 1996) ("[T]he test is satisfied by demand letters and like communications between litigants or their attorneys which are directed toward settlement of a pending or anticipated lawsuit."). Assuming the lawsuit is actually filed, the statements will also be privileged when published by the media outlet. Applying the fair report privilege in this situation protects "the bridge between these two privileges," avoiding the result in *Shahvar* that an intermediary could be held liable for defamation for passing along statements that are privileged on each end. So long as "litigation was actually contemplated seriously and in good faith," the fair report privilege applies to a party who communicates a complaint to the press before that complaint is publicly filed. *Edwards*, 61 Cal. Rptr. 2d at 531; *see Bond*, 2024 WL 4879324, at *6.

Here, there is no basis to infer anything other than that "litigation was actually contemplated seriously and in good faith." *Edwards*, 61 Cal. Rptr. 2d at 531; *see Bond*, 2024 WL 4879324, at *6. In the first place, Lively commenced litigation. She filed the CRD complaint within months of the events described in the CRD complaint and not long after it was plausibly given to the Times. Dkt. No. 50 ¶ 263. Eleven days after she filed the CRD complaint, Lively filed suit in this Court, making the same allegations that she made before the CRD. *Id.* ¶ 4; *see* Dkt. No. 1. The Wayfarer Parties assert that the fact that Lively eschewed the administrative process and filed suit in federal court instead demonstrates that she did not file her

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potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action." *Fuhrman*, 231 Cal. Rptr. at 118 (quoting *Lerette v. Dean Witter Org., Inc*., 131 Cal. Rptr. 592, 594 (Cal. Ct. App. 1976)).

claim in good faith. Dkt. No. 162 at 13. But the conclusion does not follow from the premise. It is a requirement under California law that "before suing for any violation of the [California Fair Employment and Housing Act], a plaintiff must file a timely and sufficient administrative complaint with the CRD." *Collins v. Wal-Mart Stores, Inc.*, 2024 WL 56993, at *6 (S.D. Cal. Jan. 4, 2024), *reconsideration denied*, 2025 WL 1435525 (S.D. Cal. May 19, 2025). "The CRD then issues a 'right-to-sue' notice" allowing the plaintiff to proceed to court. *Id.* (quoting Cal. Gov't Code § 12965(c)(1)(C). The court, but not the agency is "authorized to award either punitive or general compensatory damages." *Rojo v. Kliger*, 801 P.2d 373, 382 (Cal. 1990). Thus, the fact that Lively chose to file in federal court rather than to continue in the administrative process does not deprive her of the benefit of the privilege. It is common that plaintiffs "with more serious discrimination claims would prefer to bypass the administrative procedures to seek a vindication of their civil rights." *Schifando v. City of Los Angeles*, 79 P.3d 569, 576 (Cal. 2003). Lively's actions support, rather than detract from, the inference that the administrative complaint was filed as part of a genuine attempt to pursue Lively's claims. It was only by filing the administrative complaint that Lively was able to pursue the claims that she is pursuing.[43]

[43] The Wayfarer Parties would have the Court infer that the preparation of the complaint was "merely an attempt to use the litigation privilege to shield her behind-the-scenes conspiracy with the New York Times." Dkt. No. 50 ¶ 4; *see* Dkt. No. 162 at 13. But, as described below, there are no allegations of a "conspiracy" other than that Lively provided the CRD complaint and related emails and messages to the Times. The Wayfarer Parties' argument is best understood to claim that Lively used the filing of the CRD complaint as a pretext to spread defamatory statements to the Times without incurring the potential liability that would arise if she provided the same comments to the Times in a form other than through a complaint. But so understood, the argument turns upon whether the Wayfarer Parties have alleged that Lively prepared the complaint other than in good faith with the serious intent to file and pursue it. The Wayfarer Parties have not alleged such facts. To the contrary, the Amended Complaint and facts of which the Court can take notice show that Lively assiduously pursued her legal claims.

To be sure, as the Wayfarer Parties argue, the fair report privilege does not protect "litigating in the press." Dkt. No. 162 at 13; *see Rothman v. Jackson*, 57 Cal. Rptr. 2d 284, 291–95 (Cal. Ct. App. 1996) (privilege did not extend to press conferences and press releases related to litigation); *GetFugu, Inc. v. Patton Boggs LLP*, 162 Cal. Rptr. 3d 831, 840 (Cal. Ct. App. 2013) (same). And the fair report privilege does not extend to communications which go beyond the allegations in a judicial proceeding or which "communicat[e] the alleged facts without reference to the complaint." *Healthsmart Pac.*, 212 Cal. Rptr. at 435.

The Amended Complaint plausibly alleges that Lively provided the Times with text messages and emails that are not included in the CRD complaint. The Article suggests the Times reviewed "thousands of pages of text messages and emails," Dkt. No. 107-1 at 2, and the Article includes messages that are not in the CRD complaint, *id.* at 11. However, the Wayfarer Parties do not allege that any text messages and emails not included in the CRD complaint and that could have been provided to the Times were defamatory. The messages in the Article and Video providing the strongest support for the smear campaign narrative are those included in the CRD complaint, with those not included lending minimal, if any, additional support to this narrative. On the contrary, the messages discussed in the Article but not in the CRD complaint are often supportive of Baldoni's narrative. *See* Dkt. No. 107-1 at 11 (quoting messages showing that Baldoni "appear[ed] to vacillate" and that Baldoni and Nathan believed Lively was creating bad press about Baldoni). The Amended Complaint alleges that the Times had access to "a plethora of communications" demonstrating that Lively's narrative was not true. Dkt. No. 50 ¶¶ 286–287. But if Lively provided messages to the Times reflecting that a smear campaign was *not* waged, that would not be defamatory of the Wayfarer Parties.

The Wayfarer Parties additionally allege that Lively provided the Times with text messages that were "apparently selectively and deceptively edited." *id.* ¶¶ 275, 278. But that does not add to her claim. The Amended Complaint alleges that the "selective[] and deceptive[] edit[ing]" was simply the editing of the CRD complaint, *i.e.* that in the CRD complaint, Lively provided excerpts of the messages that were deceptively edited. *Id.* ¶ 278 ("In her CRD complaint and apparently in the materials she forwarded to the Times for their malicious and reckless publication, Lively deliberately excluded not only the preceding screenshot of the text exchange in which Nathan denies involvement in the story, but also the '🙃' emoji."). The Wayfarer Parties assert, as litigants frequently will assert, that the version of events recited by their adversary is selective and does not tell the whole story. But the claim that the CRD complaint painted a deceptively favorable picture in favor of Lively and took quotations out of context does not deprive Lively of the litigation privilege. *See Silberg*, 786 P.2d at 370 ("To effectuate its vital purposes, the litigation privilege is held to be absolute in nature."). A litigant is not required to file a balanced pleading before an agency or in court; she is permitted to marshal the facts to tell her side of a contested story. And an adversary cannot invoke the law of defamation and defeat the privilege by contending that the allegations are untrue. *See id.* at 373 ("The salutary policy reasons for an absolute privilege supersede individual litigants' interests in recovering damages for injurious publications made during the course of judicial proceedings."). He must respond in kind by telling his side of the story, as Baldoni has done. If the CRD complaint was privileged, as the Court has held it was, the addition of the claim that it contained selectively edited emails thus does not do away with the privilege.

To the extent that the Wayfarer Parties mean to assert that the Wayfarer Parties separately sent the Times selectively edited messages, beyond merely providing the Times with a CRD

complaint that had selectively edited messages, no facts support that conclusory allegation. If Lively wanted to paint an overly rosy picture of her narrative and did so by selectively quoting messages in the CRD complaint, there is no reason why she would have needed to provide the Times with other selectively edited messages. No such other selectively edited messages are pleaded.

The Amended Complaint insinuates that in addition to leaking the CRD complaint and providing the Times with related messages and emails, Lively, Reynolds, or the Sloane Parties could have made other unspecified communications pressing their version of events. *See* Dkt. No. 50 ¶ 260 (alleging a "scheme" in which the Lively Parties and Times "worked closely together" to defame the Wayfarer Parties). But the Wayfarer Parties allege no facts to support those insinuations. Allegations that "Lively and her co-conspirators" told the Times "a false and damning story about an insidious PR sabotage operation," *id.* ¶ 273, or that Lively spread a narrative "that the Wayfarer Parties had responded to Lively's complaints about purported sexual harassment by plotting to destroy her reputation through a shadow smear campaign," *id.* ¶ 272, are indistinguishable from the allegation that Lively leaked the CRD complaint. The alleged narrative peddled by Lively and her team is simply the narrative of the CRD complaint. *See* Dkt. No. 107-3 ¶ 8 ("Mr. Baldoni and his Wayfarer associates embarked on a sophisticated press and digital plan in retaliation for Ms. Lively exercising her legally-protected right to speak up about

their misconduct on the set.").[44] Adding "bare assertion[s] of conspiracy" is insufficient under *Twombly*. 550 U.S. at 556.[45]

2. "Sexual Assault" and "Sexual Predator" Statements

The Wayfarer Parties separately allege that Sloane and Reynolds made defamatory statements that Baldoni was a "sexual predator" or committed "sexual assault." Dkt. No. 50 ¶¶ 8, 162, 193. Specifically, the Amended Complaint alleges that Sloane told a Daily Mail Reporter that Lively was "sexually assaulted," *id.* ¶ 193, and Reynolds told a WME executive and Baldoni's agent that Baldoni was a "sexual predator, *id.* ¶¶ 8, 162. The Wayfarer Parties have not alleged that these statements were made with actual malice. Their claim thus fails.

A false accusation of sexual assault or similar sexual misconduct can support a defamation claim. *See Todd v. Lovecruft*, 2020 WL 60199, at * (N.D. Cal. Jan. 6, 2020) ("Lovecruft's argument that the First Statement is ambiguous as to whether it accuses Todd of rape or of a less serious sexual assault is unavailing, since both interpretations would be defamatory."); *Harvey v. Netflix, Inc*., 2024 WL 4536639 (C.D. Cal. Sept. 27, 2024) (holding

[44] The Wayfarer Parties argue based on paragraph 270 of the Amended Complaint that Lively told the Times that "the Wayfarer Parties' agreement to the 17-point letter was proof positive that sexual harassment was endemic on the Film's set." Dkt. No. 162 at 10 (citing Dkt. No. 50 270). However, this paragraph is not fairly read to allege that Lively made any such statement to the Times. The paragraph does not purport to report on particular actions or statements, but generally characterizes Lively's motivations for making the return to production demands. It concludes by stating that "[w]hen she buffaloed the Wayfarer Parties into agreeing, she sealed the perfect narrative poison pill, allowing her to later claim that the Wayfarer Parties' agreement to the 17-point letter was proof positive that sexual harassment was endemic on the Film's set." Dkt. No. 50 ¶ 270. The statement that the demands allowed her to "later claim" the Wayfarer Parties' agreement to the demands proved their wrongdoing does not clarify when, where, to whom, or even if she actually claimed this, as opposed simply stating that the demands allowed to do so. The paragraph does not put Lively on notice that the Wayfarer Parties could base their defamation claim on this purported "communication."

[45] Because the Court holds that any plausibly alleged communications to the Times were privileged under the litigation and fair report privileges, it need not consider whether they fall under the sexual harassment privilege or were made with actual malice. *See* Dkt. No. 145 at 18–22.

statements accusing plaintiff of sexual assault constituted defamation); *see also White v. Gabriel*, 2025 WL 1218201, at *11 (Cal. Ct. App. Apr. 28, 2025) (unpublished); *Hi-land Mountain Homes, Inc. v. McEntyre*, 2019 WL 3335176, at *10 (Cal. Ct. App. July 25, 2019) (unpublished). Sexual assault is a crime, and an allegation of criminal activity is defamatory *per se*. *See Barnes-Hind, Inc. v. Superior Ct*., 226 Cal. Rptr. 354, 385 (Cal. Ct. App. 1986) ("Perhaps the clearest example of libel per se is an accusation of crime."). A statement that an individual committed sexual assault would generally be understood as a statement of fact. *See Giuffre v. Maxwell*, 165 F. Supp. 3d 147, 152 (S.D.N.Y. 2016) ("Sexual assault . . . is a clear-cut issue; either transgression occurred or it did not."); *Luke v. Schwartz*, 2024 WL 2304594, at *3 (W.D. Tex. May 21, 2024). Likewise, in the context of *It Ends With Us* and Reynolds' relationship with Lively, the comments from Reynolds that Baldoni is a "sexual predator" could reasonably be understood as a claim of fact that Baldoni had engaged in sexual misconduct towards Lively. *See Gill v. Hughes*, 278 Cal. Rptr. 306, 311 (Cal. Ct. App. 1991) (holding statement that surgeon was "incompetent" implied undisclosed facts when made by hospital board); *cf. John Doe 2*, 206 Cal. Rptr. 3d at 75 (holding opinion did not imply undisclosed facts when "nothing . . . suggests Doe 2 had any inside information").[46]

However, the Wayfarer Parties have not alleged that Sloane or Reynolds had knowledge that the statements they are alleged to have made were false or that they entertained "serious doubts" as to their truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Because Baldoni is

[46] Although Reynolds argues that the Wayfarer Parties have failed to plead special damages, Dkt. No. 133 at 15, the sexual predator statement can be understood to be defamatory *per se*. The allegation that a movie director has acted as a sexual predator towards the star of the movie is obviously an accusation of "questionable professional conduct" that would tend "directly to injure a plaintiff in respect to his . . . profession." *Balla*, 273 Cal. Rptr. 3d at 286 (quoting *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 351 (Cal. Ct. App. 2013)); *see* Cal. Civil Code § 46(3) (providing that statements falling into this category are defamatory *per se*).

a public figure,[47] he may only recover if the statements were made with actual malice, meaning "actual knowledge of falsehood or reckless disregard for the truth." *N.Y. Times*, 376 U.S. at 279–80. At the pleading stage, a plaintiff in federal court cannot simply state in a conclusory fashion that a defendant knew a statement was false. *See Biro v. Conde Nast*, 807 F.3d 541, 545 (2d Cir. 2015). He must "plead facts demonstrating that the claim of actual malice is plausible." *Id.*; *see Brimelow v. N.Y. Times Co.*, 2021 WL 4901969, at *1–2 (2d Cir. Oct. 21, 2021); *BYD Co. Ltd. v. VICE Media LLC*, 2022 WL 598973, at *3 (2d Cir. Mar. 1, 2022); *see also Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1028 (N.D. Cal. 2017) ("[C]ircuits that have considered the question have uniformly held that a claim may be dismissed for failing plausibly to allege actual malice without permitting discovery."). Although actual malice is a state of mind, it "can be proved by circumstantial evidence." *Reader's Dig. Assn. v. Superior Ct.*, 690 P.2d 610, 618 (Cal. 1984); *see BYD Co.*, 2022 WL 598973, at *3 ("[A]ctual malice can be established using circumstantial evidence." (quoting *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013))). Direct or circumstantial evidence thus must be pleaded. Evidence may include allegations of "failure to investigate," "anger and hostility toward the plaintiff," "reliance upon sources known to be unreliable," or the plaintiff's possession of contrary information. *Reader's Dig.*, 690 P.2d at 618–19; *see Balla*, 273 Cal. Rptr. 3d at 684; *Palin v. New York Times Co.*, 940 F.3d 804, 813–15 (2d Cir. 2019). However, "courts must be careful

[47] The Wayfarer Parties do not contest that Baldoni is a public figure. Dkt. No. 121 at 32–34. They argue that the other Wayfarer Parties are not public figures. *Id.* at 34. However, the "sexual assault" and "sexual predator" statements are statements about Baldoni, not the other Wayfarer Parties. The other Wayfarer Parties cannot recover for these statements under any standard. *See Blatty*, 728 P.2d at 1183 ("The "of and concerning" or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt.").

not to place too much reliance" on motive or lack of care, which are not themselves sufficient in the absence of evidence that the defendant had some awareness of the falsity or likely falsity of the statements. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667–68 (1989); *see id.* at 666 ("[T]he actual malice standard is not satisfied merely through a showing of ill will."); *St. Amant*, 390 U.S. at 732 (1968) ("Failure to investigate does not itself establish bad faith.").

a. Sloane

The Amended Complaint alleges that, after the publication of the CRD complaint, Sloane told a reporter that Lively was "sexually assaulted." Dkt. No. 50 ¶ 193.[48] The Amended Complaint alleges that this statement is false, because all contact between Lively and Baldoni was consensual and within the bounds of their roles. *See id.* ¶ 91; *see generally id.* ¶¶ 76–123. However, the Amended Complaint does not allege facts to support the inference that Sloane

[48] The Wayfarer Parties' allegations that Sloane made this defamatory statement rely on text messages sent to Nathan by a reporter for the Daily Mail after the CRD complaint was released that stated, among other things, "She said the whole cast hits [sic] Justin this has nothing to do with Blake and now she's saying that Blake was sexually assaulted. Why wouldn't she say anything about that then?" Dkt. No. 50 ¶ 193. Sloane argues these text messages do not in fact show that Sloane told the reporter Baldoni had committed sexual assault. Dkt. No. 87 at 16. She argues that the phrase "sexually assaulted" is not a direct quotation of Sloane and "appears to be the Reporter's characterization of details included in Lively's administrative complaint." *Id.* at 12, 16. Sloane's argument offers a plausible interpretation of the text messages, given that they were apparently sent to Nathan immediately after the release of Lively's administrative complaint. Dkt. No. 50 ¶ 193. The messages may also be a paraphrase, and it is possible that Sloane used innocuous language the reporter characterized as a report of sexual assault. Rule 8(a)(2) does not "impose a probability requirement at the pleading stage," *Twombly*, 550 U.S. at 556, but simply calls for enough allegations to "raise a right to relief about the speculative level," *id.* at 555, and on a motion to dismiss the court must "draw all reasonable inferences in favor of the plaintiff," *Kassner v. 2nd Ave. Deli. Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). "The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." *Anderson News*, 680 F.3d at 189. The reporter's statement that Sloane is "saying that Blake was sexually assaulted" supports a plausible inference that Sloane told the reporter: "Blake was sexually assaulted." *Id.* ¶ 193. The allegations "raise a reasonable expectation that discovery will reveal evidence" supporting the Wayfarer Parties' version of the facts. *Twombly*, 550 U.S. at 556.

would have known (or recklessly failed to know) that the sexual assault statement was false. Sloane was Lively's PR agent; she was not Lively's custodian. There is no allegation that she was present when any contact between Lively and Baldoni occurred. Nor are there allegations that she would have been told secondhand by Lively (or Reynolds) anything other than what Lively had alleged in the CRD complaint. *See Hughes v. Twenty-First Century Fox, Inc.*, 304 F. Supp. 3d 429, 453 (S.D.N.Y. 2018) (holding actual malice was insufficiently alleged when general counsel simply repeated the client's version of events). From the facts available to Sloane, the contact between Baldoni and Lively was not consensual nor was it within the bounds of their roles. As the Amended Complaint alleges, Lively's version of events included that "that there was inappropriate and improvised kissing." *Id.* ¶ 92. The CRD complaint, which was filed prior to Sloane's statement, more specifically states that, without Lively's consent, Baldoni "discreetly bit and sucked on Ms. Lively's lower lip during a scene in which he improvised numerous kisses" and "dragged his lips from her ear and down her neck . . . caressing M[s]. Lively with his mouth in a way that had nothing to do with their roles." Dkt. No. 107-3 ¶¶ 31–32. The CRD complaint referenced Lively's earlier return to production demands, which lent credibility to Lively's claims of sexual harassment. Dkt. No. 107-3 ¶ 3; *see* Dkt. No. 50 ¶ 270. Sloane is not alleged to have reason to believe that Lively was untruthful; the statements were contained in a legal filing on behalf of and by a person whose credibility the Wayfarer Parties do not allege Sloane had reason to doubt. In the absence of allegations suggesting Lively's account was inaccurate or that Sloane would have reason to believe Lively was being duplicitous, Sloane had no duty to investigate. *See World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1266 (S.D.N.Y. 1989) ("[T]here is no rule that an author must conduct an investigation absent a showing that he had reason to doubt the veracity of his sources.").

Moreover, once Sloane credited Lively's account of the facts, she also could have reasonably and not recklessly concluded that Baldoni had engaged in sexual assault. Although "sexual assault" has many different legal definitions, Sloane is not a lawyer and is not alleged to have used the term in a legal sense. The core of the concept in colloquial use is nonconsensual sexual conduct. *See Sexual Assault*, U.S. Dep't of Justice, https://www.justice.gov/ovw/sexual-assault ("[T]he term 'sexual assault' means any nonconsensual sexual act proscribed by federal, tribal, or state law."); *Sexual Assault*, U.S. Dep't of Health and Human Services, Office on Women's Health, https://womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/sexual-assault ("Sexual assault is any type of sexual activity or contact that you do not consent to."); *Sexual Assault*, Merriam-Webster ("[I]llegal sexual contact that usually involves force upon a person without consent."). A bite on the lip and a caress of the neck with the mouth, without consent, could fit within that definition.[49]

The Wayfarer Parties argue that as a close associate of Lively, Sloane had a motive to defame Baldoni. Dkt. No. 121 at 33. First, aside from the generic premise that Sloane was Lively's publicist and was on Lively's "side" of the conflict, no allegations suggest any particular benefit Sloane would derive from telling a falsehood in this context. More importantly, that a person bears "ill will or 'malice' in the ordinary sense of the term" toward

[49] The Wayfarer Parties argue that Sloane "knew that Baldoni had not sexually assaulted Lively because Lively herself did not allege that Baldoni sexually assaulted her." Dkt. No. 121 at 33. It is true that the CRD complaint does not use the words "sexual assault" or accuse Baldoni of a sexual assault. It frames its claim as "sexual harassment." Dkt. No. 107-3 at 1. But the issue is not whether Lively characterized her own experience as sexual assault; it is whether Sloane would have entertained serious doubts that Lively was sexually assaulted based on the information imparted to her. The Wayfarer Parties have not alleged facts establishing that Sloane was reckless in characterizing the nonconsensual kissing, biting, and touching by Baldoni of his mouth to Lively's neck to be "sexual assault." *See* Dkt. No. 121 at 27–28, 33.

another does not establish that the person has "actual malice" with respect to their statements in the constitutional sense. *See Harte-Hanks*, 491 U.S. at 666; *Palin*, 940 F.3d at 814 (holding that "political opposition alone does not constitute actual malice," but may support other evidence of malice). The plaintiff must show facts pointing to "knowledge of falsehood or reckless disregard for the truth." *N.Y. Times*, 376 U.S. at 279–80; *see Westmoreland v. CBS Inc.,* 596 F. Supp. 1170, 1172 n.1 (S.D.N.Y. 1984) (Leval, J.) ("[W]hat is meant [by 'actual malice'] is something distinctly different from malice in its everyday sense of spite, ill will, or hatred.").

The Amended Complaint repeatedly alleges that Sloane was part of a "conspiracy" to spread knowing falsehoods, Dkt. No. 50 ¶¶ 4, 8, 17. However, these allegations are entirely conclusory. *See 1st Amend. Praetorian v. N.Y. Times Co*., 2025 WL 949575, at *9–10 (S.D.N.Y. Mar. 28, 2025) (dismissing claim that statements were published "as part of a preconceived government narrative" that "betrayed the truth" and that plaintiffs "knew" was false for failure to allege specific facts supporting actual malice). Sloane was Lively's publicist, and she presumably worked together with Lively. But there are no factual allegations to support that Lively told Sloane that she was not sexually assaulted or that Lively and Sloane agreed that Sloane would spread rumors of sexual assault despite knowing they were false. Even assuming Sloane accused Baldoni of sexual assault, the Wayfarer Parties fail to support an inference that she was not simply reporting what she was told by Lively and genuinely believed. *See St. Amant*, 390 U.S. at 730 (holding that actual malice was not shown when the defendant repeated the claims of a source with purported personal knowledge, without independently verifying the information, but there was no indication the source was unreliable or that the defendant did not believe his account).

b. Reynolds

The Wayfarer Parties argue that Reynolds defamed Baldoni by telling a WME executive at the premiere of his movie *Deadpool & Wolverine* that Baldoni was a "sexual predator," Dkt. No. 50 ¶ 162, and using the same term in a phone call to Baldoni's agent, *id.* ¶ 8. The term "sexual predator" is broader than the term "sexual assault," but in this context could reasonably be understood to imply that Baldoni engaged in sexual misconduct towards Lively.

However, as with Sloane, Reynolds was not present for any events during filming, and the Amended Complaint does not provide any reason he would have doubted Lively's version of events. *See Prince*, 634 F. Supp. 3d at 139 (Plaintiff does not "allege facts that would have prompted [Defendants] to question the reliability of any . . . sources" (quoting *Biro*, 807 F.3d at 546)). In fact, several allegations in the complaint support that Reynolds believed that Baldoni engaged in sexual misconduct towards Lively. During pre-production, Reynolds screamed at Baldoni after finding out that Baldoni had asked his trainer about Lively's weight. Dkt. No. 50 ¶ 49. Reynolds then later yelled at Baldoni and demanded that he apologize for "actions that had never happened" in connection with the return to production demands, becoming further enraged when Baldoni refused to apologize. *Id.* ¶¶ 128–129. Given that the return to production demands concerned Baldoni's alleged inappropriate behavior towards Lively, the obvious inference is that Reynolds was yelling about Baldoni about this alleged behavior.[50] These facts tend to suggest that Reynolds believed that Baldoni had inappropriately commented on Lively's body and then engaged in inappropriate or "predatory" actions towards Lively during filming.

[50] Although Baldoni allegedly denied this behavior, Dkt. No. 50 ¶ 129, "mere denials, however vehement; . . . are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the [listener] to the likelihood of error," *Edwards*, 556 F.2d at 121.

The Wayfarer Parties argue that actual malice can be inferred from Reynolds' "deep disdain" for Baldoni and the fact that he was trying to convince WME to drop Baldoni when he made the "sexual predator" statements. Dkt. No. 160 at 10–11. But as noted above, "actual malice" refers to knowledge of falsity or recklessness with respect to truth rather than a motive to harm, and motive alone is insufficient to show actual malice. *See Harte-Hanks*, 491 U.S. at 666; *Palin*, 940 F.3d at 814. Reynolds may have disliked Baldoni, as the Amended Complaint suggests, but that does not mean that he knew Baldoni had not engaged in misconduct or was reckless with respect to whether he had engaged in misconduct. The facts alleged in the Amended Complaint in fact suggest an inference that Reynolds disliked Baldoni because he believed he did engage in misconduct towards Reynolds' wife.[51] No actual malice exists when a defendant seeks to harm a plaintiff by spreading facts the defendant genuinely (and not recklessly) believes are true.[52]

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[51] The Wayfarer Parties also allege that Baldoni created a character named Nicepool, who "made reference to an 'intimacy coordinator'" and "commented inappropriately on a female character's attractive body after childbirth and excused his remark by claiming he identified as a feminist" as "a transparent and mocking portrayal of Reynold's warped perception of Baldoni." Dkt. No. 50 ¶ 164. This allegation does not support the claim that Reynolds disliked Baldoni for reasons independent of his belief that Baldoni engaged in misconduct, as opposed to for that very reason. To the extent the Amended Complaint suggests that Reynold's portrayal of Nicepool could be defamatory, *id.*, the portrayal of Baldoni as a fake feminist who makes inappropriate comments is clearly subjective and unverifiable opinion, *see Milkovich*, 497 U.S. at 20; *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53–57 (1988) (discussing protections for parody under the First Amendment).

[52] Reynolds additionally argues that the "sexual predator" statements are substantially true. Dkt. No. 133 at 11–14. However, this argument relies on outside evidence that may not be properly considered on a motion to dismiss. *See Glob. Network Commc'ns*, 458 F.3d at 155–56. Reynold's purported evidence that Baldoni is a sexual predator comes from Baldoni's past statements and interviews. Dkt. No. 133 at 12–14. The Amended Complaint's glancing references to Baldoni's books and podcast, Dkt. No. 50 ¶¶ 95, 100, do not incorporate every statement ever made by Baldoni on topics of masculinity or sexuality. If Reynolds seeks to introduce outside evidence regarding Baldoni's purportedly predatory behavior, Baldoni must be allowed to introduce his own evidence rebutting this charge. *See Glob. Network Commc'ns*, 458

The Wayfarer Parties' theory of the case is that Reynolds, Sloane, and Lively all knew Baldoni's behavior was appropriate but conspired to exaggerate and fabricate events that had occurred on set. Dkt. No. 50 ¶¶ 8, 16–17. The Amended Complaint alleges that Lively knew there was no sexual misconduct, and the Wayfarer Parties' desired inference is that given Lively's close relationships with Reynolds and Sloane, she would have told them the truth. But the Court cannot simply infer, on the theory that Lively knew her allegations were false, that Reynolds and Sloane also would have known them to be false. *See Prince*, 634 F. Supp. 3d at 141 ("It is well established that denials without more are insufficient to support a plausible claim of actual malice."); *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977). Lively's version of events is not so "inherently improbable" that there was obvious reason to doubt it. *See Biro*, 807 F.3d at 545 (quoting *St. Amant*, 390 U.S. at 732).[53] The Wayfarer Parties must plead more than factual allegations that Sloane and Reynolds made false statements combined with a "bare assertion" that they knew the statements were false. *Twombly*, 550 U.S. at 556; *see Biro*, 807 F.3d at 546 (stating that *Twombly* "rejected" the approach of allowing an "implausible claim to proceed to discovery" in the hope that discovery will reveal evidence of actual malice").

F.3d at 155 ("[W]hen a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it.").

[53] In fact, Lively's version of events involves only mostly small, if crucial, departures from the account given in the Amended Complaint. Dkt. No. 50 ¶¶ 87–88 (Baldoni's suggestion that Lively's orgasm on camera in fact originated with the intimacy coordinator), 94 (Baldoni's statements that "it will be hot" and "it's sexy" misinterpreted by Lively); 100 (Baldoni's mention of his pornography addiction appropriate in context). Even if Lively only slightly misrepresented, exaggerated, or failed to reveal particular details, Reynolds and Sloane could easily have believed she was sexually assaulted and that Baldoni engaged in sexual misconduct. Reynolds and Sloane were not present for filming and would not have been aware of the critical distinctions between Lively's account and the allegations of the Amended Complaint.

3. Additional Statements by Sloane

The Wayfarer Parties additionally suggest that Sloane made defamatory statements to the Daily Mail reporter "concerning Lively's accumulation of power over the production . . . and the resulting turmoil." Dkt. No. 121 at 19–20. These statements are not actionable.

The Daily Mail reporter texted Sloane regarding reports of "probs on the set involving [Lively] and Justin Baldoni and fallout over that with Blake being labeled difficult and a power struggle existing." Dkt. No. 50 ¶ 189. Sloane texted back that the reports were "1000 percent untrue"; "Your info is totally off"; "You have it all wrong"; and "Your reporters are so wrong." *Id.* ¶ 190. She added: "wtf is going on. The whole cast doesn't like Justin nothing [to] do with Blake," and "They are panicking as the whole cast hates him." *Id.* ¶ 190.

These statements "cannot reasonably [be] interpreted as stating actual facts." *Milkovich*, 497 U.S. at 20.[54] Sloane's initial statements that reports of a problem between Lively and Baldoni were "1000 percent untrue," "totally off," and "so wrong," Dkt. No. 50 ¶ 190, are simply "rhetorical hyperbole," and additionally are not defamatory because they convey nothing negative about the Wayfarer Parties, *Ferlauto*, 88 Cal. Rptr. 2d at 849 (citation omitted). The subsequent statements that "the whole cast hates" or "doesn't like" Baldoni for reasons that have "nothing to do with" Lively, *id.* ¶ 190, are "subjective assertions" not "objectively verifiable events," *Milkovich*, 497 U.S. at 22 (quoting *Scott v. News-Herald*, 496 N.E.2d 699, 707 (Oh. 1986)); *see Lieberman v. Fieger*, 338 F.3d 1076, 1081 (9th Cir. 2003) (holding statement plaintiff "was a terrible witness disliked by the jury" not actionable). In the context of Sloane's hyperbolic defense of Lively, the statements cannot be taken as literal assertions that every single

[54] The Sloane Parties also argue that these statements are substantially true. No. 87 at 14. Because the Court holds these statements to be non-falsifiable statements of opinion, it need not consider whether they are substantially true.

cast member hated Baldoni for reasons entirely unrelated to his co-star in the film. Rather, they convey a general view that Baldoni is disliked and the cause of any problems, an assertion which "contain[s] too many . . . elastic terms[] and elements of subjectivity to be susceptible of proof or disproof." *James v. San Jose Mercury News, Inc*., 20 Cal. Rptr. 2d 890, 898 (Cal. Ct. App. 1993); *see also Adler v. Solar Power, Inc.*, 2018 WL 1626162, at *10 (S.D.N.Y. Mar. 30, 2018) ("[C]haracterizing Plaintiff as a bad person is a statement of opinion."); *Nygard*, 72 Cal.Rptr.3d at 229 (holding statements that employer was "horrible" to work for and "used" plaintiff not actionable).

The Wayfarer Parties argue that the statements imply undisclosed facts, because a reasonable reader would "interpret Sloane's statements to mean that Baldoni had engaged in misconduct or had otherwise, through his own actions, caused [the cast] to turn against him." Dkt. No. 121 at 25. But there are many reasons a person may be disliked or even hated—a director may be hated by the cast because he is demanding, obstinate, incompetent, or simply annoying. It may be for no particular reason or no single reason alone. It may be for reasons having nothing to do with his skills as a director. And it may reflect poorly on the cast and not on the director. In context, the statement that the turmoil on the set related to issues between Baldoni and the cast and not between Baldoni and Lively does not convey any particular misconduct on the part of Baldoni or imply any particular provable fact. *See ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 643 (Cal. Ct. App. 2001) (holding that assertions that "promoters only cared about stock and not about generating a genuine business[] were too vague to be taken as fact"); *Chaker v. Mateo*, 147 Cal. Rptr. 3d 496, 504 (Cal. Ct. App. 2012) (holding that the statement that the plaintiff was a "deadbeat dad" was a nonactionable insult that "lack[ed] any specificity as to the time or place of [the plaintiff's] supposed behavior"). General

statements that a person is disliked, like "general statements charging a person with being racist, unfair, or unjust—without more . . . do not contain a provably false assertion of fact." *See Overhill Farms, Inc. v. Lopez*, 119 Cal. Rptr. 3d 127, 140 (Cal. Ct. App. 2010); *Dodds v. Am. Broad. Co*., 145 F.3d 1053, 1067 (9th Cir. 1998) (holding statement that judge acted "wrongfully" is "vague and not susceptible to proof as to its truth or falsity"); *McGarry*, 64 Cal. Rptr. 3d at 482 (holding general allegations of immoral behavior not actionable because "concepts [of morality] are infinitely debatable, and their precise meaning is extremely elusive" (quoting *Held v. Pokorny*, 583 F. Supp. 1038, 1040 (S.D.N.Y. 1984))).[55]

4. Lively Responsibility for Statements by Reynolds and Sloane

The Wayfarer Parties argue that Lively should be held responsible for the statements made by Sloane and Reynolds because she "took a responsible part in publishing each of the allegedly defamatory statements by approving or authorizing them prior to publication." Dkt. No. 162 at 8 (quoting *Dickinson v. Cosby*, 250 Cal. Rptr. 3d 350, 362 (Cal. Ct. App. 2019). The Wayfarer Parties argue that Lively is responsible via respondeat superior and independently under principles of agency. Dkt. No. 162 at 5–7.

[55] The Wayfarer Parties argue that Sloane's statement that the cast hating Baldoni had "nothing to do with" Lively can be disproven by showing that, as alleged in the complaint, "Lively induced the other cast members to shun Baldoni." *Id.* (quoting Dkt. No. 50 ¶ 159). Sloane's hyperbolic statement that the problems had "nothing to do with Lively" is best understood as a statement that the problems with the cast were predominantly Baldoni's fault, not a statement that Lively literally had nothing to with any such problems. But in any case, this argument confuses the issue. The issue is whether Sloane made a false factual statement about Baldoni, not whether she made a false factual statement about Lively. *See Gallagher*, 563 F. Supp. 3d at 1088 (S.D. Cal. 2021) (holding that inaccurate statement bolstering credibility of party adverse to plaintiff was not defamatory of plaintiff); *Ringcentral, Inc. v. Nextiva, Inc.,* 2021 WL 2476879, at *7 (N.D. Cal. June 17, 2021) (holding false positive reviews of competitor were not defamatory of plaintiff). A statement about Lively could be actionable if it implied a false statement of fact about Baldoni, *see* Restatement (Second) of Torts § 564, cmt. e (1977), but here the implied statement about Baldoni is that he was to blame for the cast turning against him. For the reasons stated above, this is a statement of opinion.

Respondeat superior is "a form of vicarious liability . . . pursuant to which, by default, an employer may be held vicariously liable for torts committed by an employee within the scope of employment." *Presbyterian Camp & Conf. Centers, Inc. v. Superior Ct.*, 501 P.3d 211, 217 (Cal. 2021) (quotation marks and citation omitted). Even assuming Sloane was Lively's employee, this theory of liability would fail because Sloane did not commit a tort. Because respondeat superior is based on the fault of the employee not the employer, "the employer cannot be held vicariously liable unless the employee is found responsible." *Lathrop v. HealthCare Partners Med. Grp.*, 8 Cal. Rptr. 3d 668, 675 (Cal. Ct. App. 2004); *see Farmers Ins. Grp. v. County of Santa Clara*, 906 P.2d 440, 453 (Cal. 1995) ("[F]actors that might be relevant to whether the County itself acted negligently are not relevant to whether the County should be vicariously liable for an employee's misconduct regardless of its own fault."). Sloane has done no wrong for which Lively can be held vicariously liable.

The Wayfarer Parties' second argument relies on principles of agency. Dkt. No. 162 at 7–10; *see Dickinson*, 250 Cal. Rptr. 3d at 366–67. Under principles of agency, "an employer may be directly liable for acts of its agents." *Myers v. Trendwest Resorts, Inc.*, 56 Cal. Rptr. 3d 501, 518 (Cal. Ct. App. 2007). This theory does not require Sloane herself to have known the statements are false; instead it requires Lively to have known that the statements are false and to be responsible for Sloane making them. A person who directs the conduct of another "may be subject to tort liability because of an actor's conduct although the actor is not subject to liability," for example if the person has "notice of facts that the actor lacks." Restatement (Third) Of Agency § 7.04 cmt. c (2006); *see Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012). Accordingly, if Lively approved Sloane or Reynolds' "sexual assault" and

"sexual predator" statements or authorized them to be made, she could be held liable for those statements even if Sloane and Reynolds were not liable.

However, the Wayfarer Parties have not plausibly alleged that Lively is responsible for Reynolds or Sloane's statements based on principles of agency. The "essential elements necessary to establish an agency relationship are 'manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act.'" *Hoffmann v. Young*, 515 P.3d 635, 646 (Cal. 2022) (quoting *Church Mut. Ins. Co., S.I. v. GuideOne Specialty Mut. Ins. Co*., 287 Cal. Rprt. 3d 809, 824 (Cal. Ct. App. 2021), *as modified on denial of reh'g* (Jan. 11, 2022)). There are no allegations supporting that Lively agreed that, in communicating with Baldoni's agency, Reynolds was acting on Lively's behalf and under her control. Reynolds also was a client of the agency and capable of communicating with the agency on his own behalf—he would not need Lively's consent or assistance to contact the agency and state his views. "[A]gency cannot be implied from the marriage relationship alone." *Valentine v. Plum Healthcare Grp*., *LLC*, 249 Cal. Rptr. 3d 905, 915 (Cal. Ct. App. 2019).[56]

The Wayfarer Parties have also not plausibly alleged that Lively is responsible for Sloane's alleged "sexual assault" statement. The only nonconclusory allegation in the Amended

[56] Contrary to the Wayfarer Parties' arguments, Lively is not responsible for Reynolds' statements because she "ratified" them by failing to dispute them or by filing a complaint with similar allegations. Dkt. No. 162 at 9–10. "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person." *Rakestraw v. Rodrigues*, 500 P.2d 1401, 1405 (Cal. 1972). Filing a privileged complaint does not demonstrate intent to adopt all similar statements regardless of the context in which they are made and whether the plaintiff is even aware of them. *See id.* ("It is essential . . . that the act of adoption be truly voluntary in character."). Nothing about Lively's CRD complaint or failure to contest the "sexual predator" statements suggests a choice to adopt these particular statements as her own.

Complaint regarding the relationship between Lively and Sloane is that Sloane is Lively's "publicist." Dkt. No. 50 ¶¶ 8, 14. The Amended Complaint suggests that Sloane is affiliated with a separate entity, Vision PR. *Id.* ¶¶ 282, 310. There are no allegations that Lively was aware of Sloane's statement before it was made and authorized it. To the extent they are included in the Amended Complaint, Sloane's text messages are informal and "off record," and they do not purport to be press releases or official statements from Lively. *Id.* ¶¶ 189–190. There are also no allegations regarding Lively's control or lack thereof over Sloane's text messages with reporters or any other communications. *Id.* ¶¶ 15, 282; *see Cunningham v. Quick Whiz Funding, Inc*., 2019 WL 8013755, at *3 (C.D. Cal. Dec. 12, 2019) ("The significant test of an agency relationship is the principal's right to control the activities of the agent." (quoting *Violette v. Shoup*, 20 Cal. Rptr. 2d 358, 363 (Cal. Ct. App. 1993)). Even assuming Lively authorized Sloane to communicate with reporters generally, this fact would not be sufficient to support an inference that Lively authorized Sloane to make a defamatory statement that the Amended Complaint describes as "an unsubstantiated accusation that not even Lively had gone so far as to claim." *Id.* ¶ 193. The fact that Sloane is Lively's "publicist," without more, suggests that Lively controls the direction of Sloane's communications generally but is not sufficient to support that Lively controls Sloane's word choice in each text message. *See Kreiser v. Asset Mgmt. Grp., Inc*., 2021 WL 3579414, at *3 (C.D. Cal. Apr. 23, 2021) ("Although the precise details of the agency relationship need not be pleaded to survive a motion to dismiss, sufficient facts must be offered to support a reasonable inference that an agency relationship existed." (citation omitted)). The allegations are insufficient to support that Lively approved Sloane telling the reporter she was "sexually assaulted."

Relatedly, the Wayfarer Parties allege that each of the Lively Parties conspired with the others to commit defamation. Dkt. No. 50 ¶ 330. Under California law, conspiracy to commit a tort is not actionable in the absence of an underlying tort. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994) ("Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.").[57] Because the Wayfarer Parties have not adequately alleged the underlying tort of defamation, the Lively Parties cannot be liable for defamation on a conspiracy theory.

* * *

The Wayfarer Parties have not alleged a defamation claim against Lively, Sloane, or Reynolds. The factual allegations of the Amended Complaint show at most only that Lively made a communication of the CRD complaint to the Times, which was privileged, and that Reynolds and Sloane made statements regarding Baldoni's sexual harassment of Lively that they believed were true. The Wayfarer Parties' conclusory allegations that the Lively, Reynolds, and Sloane engaged in a conspiracy to defame the Wayfarer Parties by disseminating knowingly false statements cannot substitute for factual allegations supporting a plausible inference that this occurred.

C. The New York Times

The Wayfarer Parties argue that the Times committed defamation by publishing the Article and Video, which stated "that the Wayfarer Parties engaged in, permitted, and/or failed to prevent sexual misconduct and orchestrated a 'smear campaign' in retaliation for Lively's purportedly protected disclosure thereof." Dkt. No. 127 at 15–17 (citing Dkt. No. 50 ¶¶ 257, 266–267, 272, 274–275). The Times argues that the Article and Video are privileged as a fair

[57] The same is true under New York law. *See Williams v. Williams*, 53 N.Y.S.3d 152, 153 (2d Dep't 2017); *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006).

report of Lively's CRD complaint, that the statement the Wayfarer Parties engaged in a "smear campaign" is protected opinion, and that the Wayfarer Parties have not pled actual malice. Dkt. No. 106 at 10–22. The statements in the Article and Video regarding the alleged sexual harassment are subject to the fair report privilege and were not plausibly made with actual malice. It is plausible that the statements in the Article and Video that the Wayfarer Parties engaged in a "smear campaign" are not subject to the fair report privilege, but the Wayfarer Parties have also not alleged that these statements were made with actual malice.

New York Civil Rights Law § 74 creates a privilege for "the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." N.Y. Civ. Rts. Law § 74. For the privilege to apply, an ordinary reader must be able to "determine from the publication itself that the publication is reporting on [a judicial] proceeding," and the report must be fair and true. *Kinsey*, 991 F.3d at 178 (quoting *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 216 (N.D.N.Y. 2014)). As with the California fair report privilege, the New York privilege applies to administrative agency proceedings. *See Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 588 (S.D.N.Y. 2009) ("New York Courts have found that an administrative agency investigation into activities within its purview is an official proceeding." (citation and quotation marks omitted)). By relaying the allegations in an official proceeding, the journalist does not necessarily vouch for those allegations and cannot be held liable on the basis that the allegations are not true. "For a report to be characterized as 'fair and true' within the meaning of the statute . . . it is enough that the substance of the article be substantially accurate." *Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 399 N.E.2d 1185, 1187 (N.Y. 1979); *see Gottwald v. Sebert*, 220 N.E.3d 621, 630 (N.Y. 2023); *Kinsey*, 991 F.3d at 178 ("A statement comes within the privilege and 'is deemed a fair and true report if it is

substantially accurate, that is if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth.'" (quoting *Friedman v. Bloomberg L.P.*, 884 F.3d 83, 93 (2d Cir. 2017))). "New York courts adopt a 'liberal interpretation of the "fair and true report" standard . . . so as to provide broad protection to news accounts of judicial . . . proceedings.'" *Friedman*, 884 F.3d at 93 (quoting *Becher v. Troy Publ'g Co.*, 589 N.Y.S.2d 644, 646 (3d Dep't 1992)). However, the journalist may not go beyond the allegations and suggest conduct that is different or more serious than that alleged. *See Kesner v. Dow Jones & Co., Inc.*, 515 F. Supp. 3d 149, 172 (S.D.N.Y. 2021) ("[S]ection 74 does not protect statements that, 'considered in their context, suggest more serious conduct than that actually suggested in the official proceeding.'" (quoting *Lan Sang v. Ming Hai*, 951 F. Supp. 2d 504, 521 (S.D.N.Y. 2013))).

The Wayfarer Parties allege two types of defamatory statements made by the Times: "(1) Allegations that certain of the Wayfarer Parties engaged in sexual misconduct towards Lively; and (2) Allegations that the Wayfarer Parties orchestrated a retaliatory 'smear campaign' to damage Lively's image and reputation after she purportedly reported their alleged misconduct." Dkt. No. 127 at 6. To the extent the Article makes the first statement at all, it is covered by the fair report privilege. The Article does not state that sexual misconduct actually occurred, only that "Lively . . . complained that [Baldoni and Heath] had repeatedly violated physical boundaries and made sexual and other inappropriate comments to her." Dkt. No. 107-1 at 2. This and similar statements are clearly marked as the complaints in Lively's legal filing and are privileged as a fair and true report of that filing. *See id.* at 4 ("Lively had expressed concerns about Mr. Baldoni from the beginning, according to her legal complaint."); *id.* at 5 ("She detailed her complaints during a meeting with Mr. Baldoni, Mr. Heath and other producers in January,

according to the legal filing. She claimed . . ."). The Amended Complaint does not even allege that the Article accuses any of the Wayfarer Parties of sexual misconduct. *See* Dkt. No. 50 ¶¶ 257, 266–267, 272, 274–275.[58] The Times is not liable for any statements that the Wayfarer Parties engaged in or condoned sexual misconduct.[59]

The Article focuses not on the sexual harassment allegations but on the "smear campaign" against Lively. Dkt. No. 107-1; *see* Dkt. No. 50 ¶¶ 272, 274. The statement that the Wayfarer Parties engaged in a "smear campaign" may not be covered by the fair report privilege, but the Wayfarer Parties have not alleged it was made with actual malice.

In explaining the "smear campaign," the Article states both that the campaign is alleged in Lively's legal complaint and that "the text messages show" it occurred. Dkt. No. 107-1 at 2. The Article makes clear that it is reporting on a "legal complaint," repeatedly references the complaint, and includes the Wayfarer Parties' denials of the allegations. *Id.* It includes a link to a PDF of the CRD complaint. Dkt. No. 50 ¶ 265.

However, the Article also prominently states that the Times has reviewed "thousands of pages of text messages and emails," of which only "excerpts" are included in Lively's filings. Dkt. No. 107-1 at 2. The Article attributes several statements regarding the smear campaign to "the text messages" or "the documents" rather than to Lively's complaint. *See id.* at 2 ("Ms.

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[58] The Amended Complaint alleges, for example, that the Times falsely stated that "the Wayfarer Parties orchestrated a retaliatory public relations campaign against Lively for speaking out about sexual harassment." *Id.* ¶ 274. This and similar statements are not sufficient to put the Times on notice that the Wayfarer Parties defamation claim was based on any statements that sexual harassment occurred, as opposed to that the Wayfarer Parties orchestrated a smear campaign. *See Biro*, 883 F. Supp. 2d at 456 (requiring that defendants have "sufficient notice of the communications complained of to enable [them] to defend [themselves]").

[59] In addition, the Amended Complaint does not allege actual malice as to the Times for the same reasons it does not allege it as to Sloane and Reynolds. The Times had no firsthand knowledge of the allegations or reason to disbelieve them. *See St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith.").

Nathan . . . went hard at the press, pushing to prevent stories about Mr. Baldoni's behavior and reinforce negative ones about Ms. Lively, the text messages show."); *id.* ("The documents show an additional playbook for waging a largely undetectable smear campaign in the digital era."); *id.* at 10 ("Seeing that blowback, the text messages show, Mr. Baldoni and his P.R. team decided instead to highlight survivors of domestic violence."). A reader who compared the Article to the linked CRD complaint would note that the Article contains messages not included in the CRD complaint. *Id.* at 11. The subtitle of the Article, which states that "[p]rivate messages detail an alleged campaign to tarnish Blake Lively," indicates that the Article is based both on allegations and on the Times' review of the private messages. *Id.* at 1.

The Video explains the basis for the story by stating as follows:

> In a legal complaint Lively filed on Friday, private text messages and other documents that we've obtained reveal what really happened: a campaign to tarnish Lively after she alleged that Justin Baldoni, her co-star and director, and Jamey Heath, the producer, had engaged in misconduct while shooting the film.

Dkt. No. 107-2. The Video, which is four minutes and thirty seconds long, otherwise does not mention Lively's legal complaint. *Id.* Like the Article, it includes some messages not included in the Amended Complaint. *Id.* at 3:00–3:20.

At the motion to dismiss stage, the role of the Court is to "decide whether the statements, considered in the context of the entire publication, are reasonably susceptible of a defamatory connotation, such that the issue is worthy of submission to a jury." *BYD Co. Ltd. v. VICE Media LLC*, 531 F. Supp. 3d 810, 818 (S.D.N.Y. 2021) (citation omitted), *aff'd*, 2022 WL 598973 (2d Cir. Mar. 1, 2022); *see Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997); *Biro*, 883 F. Supp. 2d at 456. "If the words are reasonably susceptible of multiple meanings . . . 'it is then for the trier of fact, not for the court acting on the issue solely as a matter of law, to determine in what sense

the words were used and understood.'" *Celle v. Filipino Rep. Enters. Inc.,* 209 F.3d 163, 178 (2d Cir. 2000) (quoting *Davis v. Ross*, 754 F.2d 80, 83 (2d Cir. 1985)).

The challenged statement here is that the Wayfarer Parties participated in a smear campaign to ruin Lively's reputation. *See* Dkt. No. 50 ¶¶ 272, 274. In the context of the Article and Video as a whole, this statement is susceptible of multiple meanings. The Article states that "[t]he documents show an additional playbook for waging a largely undetectable smear campaign," Dkt. No. 107-1 at 2, a statement which in combination with the repeated references to "thousands of pages" of documents and text messages could be read to mean that the Times' independent review of text messages and documents outside of the CRD complaint showed that the Wayfarer Parties waged a smear campaign. This statement would not fall within the fair report privilege. *See Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of New York*, 475 N.Y.S.2d 383, 389 (1st Dep't 1984) (holding privilege did not apply to the "product of [defendant's] own research after learning of the Department's findings"); *Greenberg v. Spitzer*, 62 N.Y.S.3d 372, 388 (2d Dep't 2017) (denying motion to dismiss based on privilege when plaintiff was charged with fraud and defendant reported that "the fraud charges . . . had already been established"). That message is reinforced by the statement on the video that the "private text messages and other documents" in addition to the CRD complaint showed "what really happened." Dkt. No. 107-2. A jury asked to determine whether the assertion the Wayfarer Parties engaged in a smear campaign was merely a report on the allegations in an official proceeding could conclude to the contrary.

However, due to the Article's extensive focus on the allegations in Lively's CRD complaint, which itself also includes excerpts of text messages and documents, the statement could also be read to mean that the CRD complaint and the excerpts therein show that the

Wayfarer Parties waged a smear campaign. The reference to the excerpts of emails and text messages in the Article, when coupled with the reported facts that the CRD complaint contains excerpts and that the emails were obtained only by subpoena, could be understood by the ordinary reader to refer to the emails as excerpted in the CRD complaint. A reporter need not add the caveat "as excerpted in the CRD complaint" to enjoy the benefit of the privilege. *See Kinsey*, 991 F.3d at 180 (holding that attribution of a particular statement to a filing can be "clear from the context and structure of the article as a whole"). Understood as a reference to the CRD complaint, this statement would fall within the fair report privilege. Because there is "a genuine issue of fact as to whether [the] statement was in fact a report on a judicial proceeding," the Court cannot conclude at this time that the privilege applies. *Wenz v. Becker*, 948 F. Supp. 319, 323 (S.D.N.Y. 1996); *see Sheindlin v. Brady*, 597 F. Supp. 3d 607, 638 (S.D.N.Y. 2022) (holding fair report privilege was an issue for the jury when it was unclear whether context would have led the ordinary viewer or reader to determine that YouTube videos were reporting on a judicial proceeding).[60]

The Times next argues that the statement that the Wayfarer Parties engaged in a "smear campaign" is not actionable because it is a protected opinion based on disclosed facts. Dkt. No. 106 at 19–20. Although in some contexts the phrase "smear campaign" could lack factual content, in the context of the Article a reasonable reader could understand it to mean that Baldoni, Heath, Nathan, and Abel engaged in a public relations campaign with "an explicit goal:

[60] If the ordinary reader understood that the Times' quotations from the emails and text messages relayed only what was excerpted in the CRD complaint, it would be irrelevant to the applicability of the privilege *vel non* that the Times in fact had access to the full emails and text messages. The issue here is that in addition to having access to the full emails and text messages, the Times signaled to the reader by using and referencing text messages outside of the complaint that it might not be simply reporting on the CRD complaint.

to harm Ms. Lively's reputation." Dkt. No. 107-1 at 2; *see id.* at 3 ("Nathan . . . went hard at the press, pushing to . . . reinforce negative [stories] about Ms. Lively"); *id.* at 9 ("negative publicity was seeded by Ms. Nathan, Mr. Wallace and their team"). Whether Baldoni, Heath, Nathan, and Wallace participated in a campaign to spread negative stories about Lively is a factual question. The Article discloses certain facts supporting its statement that such a campaign existed, but for the same reasons stated above, it can also be read to "impl[y] that it is based upon facts which justify the opinion but are unknown to those reading or hearing it." *Davis v. Boeheim*, 22 N.E.3d 999, 1004 (N.Y. 2014) (quoting *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552–53 (N.Y. 1986)). If the smear campaign statement is read as based on the allegations in the CRD complaint, it also would necessarily be based on the facts disclosed in the CRD complaint, which is linked to the Article and thus disclosed. But if the statement is understood to be based on the Times' review of messages outside of the CRD complaint, the messages are generally not included or publicly available. Dkt. No. 107-1 at 2. The Article sometimes states that the "text messages show" certain things happened without including the actual texts in the Article. Dkt. No. 107-1 at 2, 6, 10, 11. Without access to the underlying messages, the reader cannot evaluate the accuracy of the Times' statement that a smear campaign existed. *Cf. Davis*, 22 N.E.3d at 1004 (stating that an opinion based on disclosed facts is protected because the reader has "the opportunity . . . to draw [the reader's] own conclusions concerning its validity." (quoting *Silsdorf v. Levine*, 449 N.E.2d 716, 719 (N.Y. 1983)). A reader could reasonably understand the Article to make the factual statement, based on facts to which the reader does not have access, that the Wayfarer Parties spread negative stories about Lively.

However, the Wayfarer Parties fail to allege that the Times made this statement with actual malice. The Wayfarer Parties concede that under New York law, the "actual malice"

requirement extends to claims brought by all the Wayfarer Parties, including not only Baldoni but also Wayfarer, Heath, Nathan, Abel, and Sarowitz, because the alleged defamation involves "communication in a place open to the public or a public forum in connection with an issue of public interest." N.Y. Civ. Rts. Law § 76-a(1)(a)(1), (2); Dkt. No. 127 at 19 (failing to dispute the Times' argument that this requirement applies here); *Satanic Temple, Inc. v. Newsweek Mag. LLC*, 2025 WL 919423, at *8 (S.D.N.Y. Mar. 26, 2025) (holding that this requirement is substantive and applies in federal court); *Coleman v. Grand*, 523 F. Supp. 3d 244, 258 (E.D.N.Y. 2021) (same). The Wayfarer Parties argue that actual malice is satisfied because the Times reporters "reviewed private internal communications . . . directly refuting the Article." Dkt. No. 127 at 21. In response, the Times argues that the text messages contained in the Article and CRD complaint, the authenticity of which have not been disputed by the Wayfarer Parties, show that the Wayfarer Parties did in fact engage in a smear campaign. Dkt. No. 158 at 7. Therefore, the issue here is whether documentary evidence of undisputed authenticity would plausibly indicate that the Times made the statement that the Wayfarer Parties engaged in a smear campaign against Lively "with a high degree of awareness of [the statement's] probable falsity." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013) (quoting *Harte-Hanks*, 491 U.S. at 667); *see Biro*, 807 F.3d at 546; *St. Amant*, 390 U.S. at 731.[61] Even drawing all reasonable inferences in favor of the Wayfarer Parties, the evidence does not support that the Times would have held such doubts.

[61] In the more common case, the primary issue relevant to actual malice is whether the defendant should have doubted the trustworthiness of a given source. *Cf. Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (discussing the use of unverified, anonymous, or incredible sources as relevant to actual malice).

The CRD complaint and Article contain numerous messages and documents strongly suggesting the Wayfarer Parties did spread negative stories about Lively. Specifically, Abel stated to Nathan that Baldoni "wants to feel like she can be buried," Nathan responded "we can't send over the work we will or could do because that could get us in a lot of trouble," and Nathan provided a "Scenario Planning" document to Baldoni and Wayfarer that included negative statements about Lively as "Key Messaging Points." Dkt. Nos. 107-1, 106-7. Subsequently, Abel texted Nathan "we need to put the social combat plan into motion," and Nathan responded to Abel's text about "wanting to plant pieces . . . of how horrible Blake is to work with" by stating that she had already spoken to an editor at the Daily Mail. Dkt. No. 107-1 at 8. Baldoni texted Abel a social media threat accusing a celebrity of bullying behavior and said "[t]his is what we would need," texted Nathan and Abel about "flipping the narrative" on Reynolds by "using their own words against them," Dkt. No. 107-5 ¶¶ 169–170, and circulated a negative TikTok to which a member of Nathan's team responded that she would "let digital know," *id.* ¶ 150. Text messages referenced "a shift on social, due largely to Jed and his team's efforts to shift the narrative towards shining a spotlight on Blake and Ryan," Dkt. No. 50 ¶ 286, and "boost[ing]" content that was critical of Lively, Dkt. No. 107-2 at 03:17. In addition, a report from a brand marketing consultant concluded Lively had likely been the target of a "multichannel online attack." Dkt. No. 107-1 at 12. The Wayfarer Parties' statements regarding sending negative content to "digital" and Wallace's attempts to "shin[e] a spotlight on Blake and Ryan" are inexplicable unless the Wayfarer Parties were spreading negative content about Lively, and this impression is reinforced by messages from Baldoni, Abel, and Nathan suggesting this strategy. It is fair to presume that the Wayfarer Parties did what they said that they planned to do. *Cf. Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 296 (1892); Fed. R.

Evid. 803 advisory committee note (1973) ("The rule of *Mutual Life Ins. Co. v. Hillmon*, allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed."). Those messages are what is contained in the Article and referenced in the Video. A reader of those messages would have little doubt that the Wayfarer Parties engaged in a smear campaign.

The Wayfarer Parties rely on other text messages, also allegedly reviewed by the Times, which suggest that the negative publicity Lively was attracting derived from sources other than Nathan and Abel. For example, Nathan and Abel sent each other and Baldoni specific stories they described as "completely unsolicited," and "not from any of us," and similar phrases, *id.* ¶¶ 276, 279; Nathan and Abel stated to Baldoni that negative publicity was "reacting to Blake's own actions and interviews," was "organic," and that "they are doing all of this themselves," *id.* ¶ 286; and Nathan stated to a reporter "BL camp keeps thinking its us placing and we are doing f all," *id.* ¶ 282.

These messages do not show that the Times had a "high degree of awareness" the Wayfarer Parties probably did not engage in a smear campaign. *Dongguk Univ.*, 734 F.3d at 123 (quoting *Harte-Hanks*, 491 U.S. at 667). At most, the messages reflect the Times chose among "a number of possible rational interpretations of a document that bristled with ambiguities," which is "not enough to create a jury issue of 'malice.'" *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); *see Harte-Hanks*, 491 U.S. at 681 (noting that the choice of one version of events over another conflicting version "does not alone constitute clear and convincing evidence that the defendant acted with [actual malice]"). The messages relied on by the Wayfarer Parties must be read together with the other messages the Times possessed. General statements to the effect that "they are doing all of this themselves" and "we are doing f all" do not explain how a specific

reference to "Jed and his team's efforts to shift the narrative towards shining a spotlight on Blake and Ryan" would be anything other than a reference to negative publicity about Lively. Dkt. No. 50 ¶ 286. Nor does the fact that some or many articles were organic contradict the specific messages stating that the Wayfarer Parties gave negative information to editors or boosted negative content. *See* Dkt. No. 107-1 at 8; Dkt. No. 107-2 at 03:17.[62] The Article does not claim that the smear campaign was the only source of backlash against Lively. It acknowledges that "[i]t is impossible to know how much of the negative publicity was seeded by Ms. Nathan, Mr. Wallace and their team." Dkt. No. 107-1 at 9. The text messages are consistent with this view. There are no allegations that the messages suggestive of a smear campaign were inauthentic or that the Times ignored some obvious additional source that would have demonstrated its interpretation of the messages was incorrect. *Cf. Harte-Hanks*, 491 U.S. at 682–84 (holding that actual malice was shown by the additional facts that the reporter disregarded six witnesses contradicting the published account and avoided interviewing "most important" witness); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 157–58 (1967) (similar).

The alleged facts indicate that the Times reviewed the available evidence and reported, perhaps in a dramatized manner, what it believed to have happened. The Times had no obvious

[62] Some messages relied on by the Wayfarer Parties for the claim that they were not engaging in negative messaging regarding Lively and Reynolds can in fact be read to imply the opposite. A message from Baldoni to Nathan about "protecting myself" asks "[s]o do we say / Blake and ryan hire Harvey Weinstein publicist" to which Nathan responds "[t]hat's a conversation I'm going to have with Jen/Jamey today." Dkt. No. 50 ¶ 233. This implies that Baldoni and Nathan at least considered spreading a negative story regarding Lively's choice of Sloane as her publicist. In addition, the Wayfarer Parties emphasize texts between TAG team members stating "[w]e didn't tell Jed to go after the idea that her promo was inappropriate / That happened organically." *Id.* ¶ 280. But these texts can be read to imply that TAG *did* tell Wallace to go after Lively on other issues. If Wallace never spread anything negative about Lively, it is unclear why TAG team members would feel the need to note that Wallace did not spread this particular piece of negative publicity about Lively.

motive to favor Lively's version of events. Though the Article largely follows the narrative of the CRD complaint, it includes additional context favoring Baldoni. It acknowledges criticism of Lively's promotional efforts, and comments that it is "impossible to know how much of the negative publicity" was caused by the smear campaign. Dkt. No. 107-1 at 9–10. It prominently includes the Wayfarer Parties' denials. *Id.* at 2. It states that Baldoni was unsure about the publicity tactics and that the Wayfarer Parties believed Lively was using the same tactics against them. *Id.* at 11. These facts further cut against an inference of actual malice. The Times may have otherwise parroted the breathless "smear campaign" narrative of Lively's complaint, but it had evidence to support that narrative. *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 285 (S.D.N.Y. 2013) ("The fact that an article is one sided or fails to include as many positive features about the subject as negative ones 'has no tendency to prove that the publisher believed it to be false.'" (quoting *Westmoreland*, 601 F. Supp. at 69)), *aff'd*, 807 F.3d 541, *and aff'd*, 622 F. App'x 67 (2d Cir. 2015). "The issue in the libel suit is whether the publisher recklessly or knowingly published false material." *Id.* (quoting *Westmoreland*, 601 F. Supp. at 68). It is not defamatory for the Times to dramatize the impact of the smear campaign or downplay the Wayfarer Parties' side of the story, so long as the Times actually believed a smear campaign occurred. *See Kipper v. NYP Holdings Co.*, 912 N.E.2d 26, 30–31 (N.Y. 2009) ("A writer can make an article a 'better read' and engage in 'more interesting word selection' without sacrificing factual integrity.").

The Amended Complaint identifies a single specific quotation in the Article that plausibly was taken out of context. The Article strongly implies that Nathan contributed to a Daily Mail article headlined "Is Blake Lively set to be CANCELLED?," reporting Abel texting "[y]ou really outdid yourself with this piece" and Nathan replying "[t]hat's why you hired me right? I'm the best." Dkt. No. 102-1 at 11–12. However, the Amended Complaint plausibly

alleges that in the context of the full text exchange, the exchange was sarcastic and Nathan did not contribute to the Daily Mail article. Dkt. No. 50 ¶¶ 276–277. An inference of actual malice may arise from allegations a reporter "knowingly or recklessly misstates … evidence to make it seem more convincing or condemnatory than it is." *Westmoreland*, 596 F. Supp. at 1174. But the Amended Complaint does not allege that this quotation in isolation is defamatory, nor is such a theory mentioned in the Wayfarer Parties' briefing. *See* Dkt. No. 127 at 16 (focusing only on "statements that the Wayfarer Parties engaged in, permitted, and/or failed to prevent sexual misconduct and orchestrated a 'smear campaign' in retaliation for Lively's purportedly protected disclosure thereof"); Dkt. No. 50 ¶ 277 (describing this misrepresentation as "further evidence" of "the New York Times' malicious and reckless defamation"). The Wayfarer Parties' complaint is that the overall smear campaign narrative is defamatory. Given the strength of the evidence in favor of a smear campaign, it is not plausible that the Times "entertained serious doubts as to the truth" of the smear campaign narrative as a whole, even if, for whatever reason, it misrepresented one particular set of messages in aid of that narrative. *Harte-Hanks*, 491 U.S. at 667.

"[T]he great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *See Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 10 (1970). Even assuming that the Wayfarer Parties prepared and laid the groundwork for a negative publicity campaign but never in fact put that campaign into operation, and the references to "using their own words against them," Dkt. No. 107-5 ¶¶ 169–170, and "shining a spotlight on Blake and Ryan," Dkt. No. 50 ¶ 286, were innocuous, it is not plausible the Times would have known this. "Freedoms of expression require breathing space," and a publisher must be permitted to publish the story that it

believes in good faith to be before it. *Hustler Mag.*, 485 U.S. at 51 (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). The Times is not liable for defamation.

V. False Light

The Wayfarer Parties' third cause of action is for false light invasion of privacy against all Defendants. Dkt. No. 50 ¶¶ 332–339.

California law recognizes a false light claim for "an invasion of privacy by publicity that places the plaintiff in a false light in the public eye." *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 99 (Cal. 1986). The false light must be "highly offensive to a reasonable person." *Id.*; *see Jackson v. Mayweather*, 217 Cal. Rptr. 3d 234, 256 (Cal. Ct. App. 2017). In addition, the defendant must "kn[o]w or act[] in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Id.* (quoting *Price v. Operating Eng'rs Loc. Union No. 3*, 125 Cal.Rptr.3d 220, 225 (Cal. Ct. App. 2011); *see* Restatement (Second) of Torts § 652E.

Although some false light claims may not constitute defamation, "publicity placing one in a highly offensive false light will in most cases be defamatory as well." *Fellows*, 721 P.2d at 99–100; *see id.* at 106 n.12 (noting "substantial overlap in the interests protected"). *But see* Restatement (Second) of Torts § 652E cmt. b (providing illustrations of false light that do not constitute defamation). When "[a] 'false light' cause of action is in substance equivalent to a libel claim, [it] should meet the same requirements of the libel claim." *Jackson*, 217 Cal. Rptr. 3d at 256 (quoting *Med. Marijuana, Inc. v. ProjectCBD.com*, 212 Cal. Rptr. 3d 45, 55 (Cal. Ct. App. 2016), *as modified on denial of reh'g* (Dec. 19, 2016)); *see Fellows*, 721 P.2d at 106–08 (reasoning that restrictions on defamation claims should also apply to false light claims based on defamatory language).

The Wayfarer Parties suggest that the false light claim is independent of the defamation claim because it is based on allegations of "distorting factual statements beyond recognition into falsehoods." Dkt. No. 162 at 25–26 (citing Dkt. No. 50 ¶¶ 162, 274–282); Dkt. No. 160 at 18. The Wayfarer Parties cite paragraphs of the amended complaint alleging that Lively and her team "selectively and deceptively edited" text messages so that they portrayed a false narrative of a smear campaign. Dkt. No. 50 ¶¶ 162, 275–278. However, those factual allegations simply allege in different words the same conduct that is alleged to constitute defamation. *See Issa v. Applegate*, 242 Cal. Rptr. 3d 809, 820 (Cal. Ct. App. 2019) ("If the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication . . . he may be held responsible." (quoting *Weller*, 283 Cal. Rptr. at 652 n.10)). The Court has already explained why the Wayfarer Parties do not state a claim for defamation based on these allegations. To the extent that the Wayfarer Parties mean to allege that Lively provided selectively and deceptively edited text messages to the Times through the CRD complaint, such communication was privileged. To the extent the Wayfarer Parties mean to allege that she separately provided selectively edited texts, the Amended Complaint is conclusory. The Wayfarer Parties cannot benefit by the expedient of simply relabeling their defamation claim as false light.

The Wayfarer Parties otherwise concede that the false light claim stands or falls based on "whether it meets the same requirements as the defamation cause of action." Dkt. No. 162 at 26 (quoting *Eisenberg v. Alameda Newspapers*, 88 Cal.Rptr.2d 802, 823 (Cal. Ct. App. 1999)). Accordingly, the false light claim must be dismissed for the same reasons as the defamation claim.

The false light claim against the New York Times is based on the same facts as the defamation claim against the Times, and accordingly must also be analyzed under New York law. Therefore, the false light claim against the Times must be dismissed for the additional reason that "New York does not recognize the tort of false light invasion of privacy." *DeIuliis*, 2021 WL 4443145, at *9.

VI. Breach of Implied Covenant of Good Faith Against Lively

The Wayfarer Parties allege that Lively breached the implied covenant of good faith and fair dealing in the contract "by which Lively agreed to perform as an actor in the Film *It Ends With Us*," by making threats, seizing creative control, and depriving the Wayfarer Parties[63] of "the opportunity to produce, edit, and market a film as contemplated by the contract." Dkt. No. 50 ¶¶ 340–346.

California recognizes "an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. Am. Empire Surplus Lines Ins. Co*., 2 P.3d 1, 8 (Cal. 2000) (quoting *Comunale v. Traders & Gen. Ins. Co*., 328 P.2d 198, 200 (Cal. 1958)). The covenant "is aimed at making effective the agreement's promises," and "[t]he precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." *Foley v. Interactive Data Corp*., 765 P.2d 373, 389 (Cal. 1988) (quoting *Egan v. Mut. of Omaha Ins. Co*., 620 P.2d 141, 145 (Cal. 1979)). The covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat. Inc*., 8 P.3d 1089, 1110 (Cal. 2000).

[63] Though the Amended Complaint states that the "Lively parties" were deprived of the opportunity to produce, edit, and market the film, the Court construes the allegation to refer to the Wayfarer Parties. Dkt. No. 50 ¶ 344.

Accordingly, "to state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiff must allege: (1) the existence of some specific contractual obligation; and (2) interference with plaintiff's performance of the contract or failure to cooperate with the plaintiff." *Kaurloto v. U.S. Bank, N.A.*, 2016 WL 6808117, at *6 (C.D. Cal. Nov. 17, 2016). The "plaintiff must identify the specific contractual provision that was frustrated." *Rockridge Tr. v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1156 (N.D. Cal. 2013).

The Wayfarer Parties' breach of implied covenant allegations are conclusory. The Wayfarer Parties do not plead the terms of a relevant contract, which of the Wayfarer Parties it was with, or when it was made. The Amended Complaint contains vague references to contract negotiations or entitlements, Dkt. No. 50 ¶¶ 31, 33, 117, 144, 152, but it also indicates several times that Lively did not sign her employment contract for the Film, *id.* ¶¶ 106–107, 140. The Wayfarer Parties do not allege any particular contractual provision that gave any particular Wayfarer Party to "the opportunity to produce, edit, and market" the film or that prohibited Lively from involvement in the production, editing or marketing of the film. *Id.* ¶ 344. They therefore do not identify any contractual provision the exercise of which Lively frustrated. The Wayfarer Parties attempt to specify the relevant contractual provisions in their opposition briefing, Dkt. No. 162 at 32, but "the [c]omplaint cannot be amended by the briefs in opposition to a motion to dismiss." *Jordan v. Chase Manhattan Bank*, 91 F. Supp. 3d 491, 500 (S.D.N.Y. 2015) (quoting *Weir v. City of New York*, 2008 WL 3363129, at *9 (S.D.N.Y. Aug. 11, 2008)). The breach of implied covenant claim is dismissed.

VII. Tortious Interference with Contractual Relations or Prospective Economic Advantage

The Wayfarer Parties allege that Lively and Reynolds intentionally interfered with a contract between the Wayfarer Parties and WME by making threats to induce WME to "drop"

Baldoni. Dkt. No. 50 ¶¶ 347–355. They also allege in the alternative that Lively and Reynolds intentionally interfered with a prospective economic relationship between the Wayfarer Parties and WME, and, as a further alternative, that Lively and Reynolds negligently interfered with the relationship between the Wayfarer Parties and WME. Dkt. No. 50 ¶¶ 356–374.

Under California law,[64] "[t]ortious interference with contractual relations requires '(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.'" *Ixchel Pharma, LLC v. Biogen, Inc.*, 470 P.3d 571, 575 (Cal. 2020) (quoting *Reeves v. Hanlon*, 95 P.3d 513, 517 (Cal. 2004)). Tortious inference with prospective economic advantage requires "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 950 (Cal. 2003). In addition, the plaintiff "must plead that the defendant engaged in an act that is wrongful apart from the interference itself." *Id.*; *see Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 751 (Cal. 1995). "Negligent interference with prospective economic advantage requires [a] plaintiff to show the same elements as intentional interference with prospective economic advantage" except that the intent

[64] Reynolds notes that there is no claim for negligent inference with economic advantage under New York law, Dkt. No. 133 at 23, but he argues in any case that "the claims fail under both New York and California law," *id.* at 5–6. Because the Court agrees that the claims fail under California law, and the facts regarding choice of law have not yet been fully developed, the Court assumes without deciding that California law applies to the claims against Reynolds.

is replaced by negligence and the plaintiff must show that "the defendant owes the plaintiff a duty of care." *Axia Fin., LLC v. Mason McDuffie Mortg. Co*., 2023 WL 7280443, at *10 (N.D. Cal. Sept. 20, 2023) (quoting *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 551 (Cal. Ct. App. 1997)).

The Wayfarer Parties fail to allege facts regarding their relationship with WME to support any of these torts. The Amended Complaint alleges that WME is Baldoni's agency, Dkt. No. 50 ¶ 162, that Lively, Reynolds, Wayfarer, and Baldoni were represented by the same talent agency, *id.* ¶ 16, and that Reynolds told WME that the agency was working with a "sexual predator" and demanded that "the agent 'drop' Baldoni," *id.* ¶ 162. However, the Wayfarer Parties do not allege that they had contract with WME the breach of which Reynolds knowingly induced or any economic benefit that would have been realized from a prospective relationship with WME with which Reynolds could have interfered. They also fail to allege that WME was influenced by Reynolds' statements in any way, aside from conclusory statements that WME "cease[d] performing," *id.* ¶ 350, the relationship was "disrupted," *id.* ¶ 361, or the Wayfarer parties "were harmed," *id.* ¶ 362; *see Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do."). This is fatal to all three claims, because there is no claim in the absence of facts showing that the relevant economic relationship existed and was disrupted. Regarding the claims of interference with prospective economic advantage, because the Wayfarer Parties do not allege that Reynolds' statements were defamatory, they do not allege that they were independently wrongful. *See Korea Supply*, 63 P.3d at 954 ("[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard."). Finally, the

Wayfarer Parties admittedly do not allege a duty of care to support the negligence claim. Dkt. No. 160 at 27.

VIII. Promissory Fraud and Breach of Implied Contract Against the New York Times

The Wayfarer Parties bring claims for promissory fraud and breach of implied contract against the Times for stating that the Wayfarer Parties had until noon on December 21, 2024, to comment on the Article and then subsequently publishing the Article at 10:11 a.m. on December 21, 2024. Dkt. No. 50 ¶¶ 375–391. These claims are meritless.

Under California law,[65] promissory fraud is a "subspecies" of the general cause of action for fraud. *Lazar v. Superior Ct.*, 909 P.2d 981, 985 (1996). "The elements of a promissory fraud action are: (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage." *Fuks v. Vanetik*, 2024 WL 94312, at *2 (9th Cir. Jan. 9, 2024). "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." *Yari v. Producers Guild of Am., Inc.*, 73 Cal. Rptr. 3d 803, 811 (Cal. Ct. App. 2008). The plaintiff must plead "(1) the existence of a contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages." *T & M Solar & Air Conditioning, Inc. v. Lennox Int'l Inc.*, 83 F. Supp. 3d 855, 872 (N.D. Cal. 2015).

A reporter for the Times emailed the Wayfarer Parties at approximately 9:40 p.m. Eastern Time on December 20, 2024, describing the allegations of the CRD complaint and stating:

> [W]e are seeking your response . . . and we would welcome the opportunity to talk with you on the record. . . . Please offer any on-the-record comment, as well as any other information you think we should know. Additionally, please notify us of any inaccuracies. We need to hear back from you tomorrow by noon Eastern.

[65] The Court assumes without deciding that California law applies to these claims.

Dkt. No. 107-8; *see* Dkt. Nos. 107-9, 107-10, 107-11, 107-12. The Wayfarer Parties' counsel then responded at 2:16 a.m. Eastern Time providing comment on behalf of the Wayfarer Parties. *Id.* ¶ 294; Dkt. No. 107-7. The reporter sought to clarify who was represented by the statement, and Abel stated that it was all of the Wayfarer Parties as well as Jed Wallace. Dkt. No. 107-7. The on-the-record comment was included in the Article. Dkt. No. 107-1. No allegation is made of any additional attempt to provide a comment between 2:16 a.m. and the publication of the article at 10:11 a.m. or of any comment provided after that time.

The Wayfarer Parties have not pleaded the existence of a contract. The emails do not constitute a contract. There is no offer, no acceptance, and no consideration. The email sets a deadline of noon Eastern for comment, but it does not offer to hold publication in exchange for anything. The Wayfarer Parties email does not accept any such offer by the Times, or even indicate any further comments are forthcoming—it simply provides comments. *See* Dkt. No. 107-7. The Wayfarer Parties' theory is apparently that by sending their comment, they accepted an offer from the Times that they would have until noon the next day to comment. Dkt. No. 127 at 23. But this makes little sense, because once the Times had the Wayfarer Parties' comment it would not need to wait until noon for an additional comment. Dkt. No. 107-8. A request for information before a certain time is not a contract. Moreover, if there was a contract, it was satisfied. The Times' email can be read, at most, to state that if a comment was provided before noon, it would be considered by the Times. A comment was provided and the Times considered it, including it in the Article. There was no breach.

For the same reasons, the promissory fraud claim is also flawed. At most, the email promises that the Wayfarer Parties will have until noon to send comments, *i.e.*, that if the Wayfarer Parties have not submitted comments by noon the Times will publish. Dkt. No. 107-8.

But the Wayfarer Parties did provide comment, and the comment was included in the Article. Dkt. Nos. 107-1, 107-7. The Wayfarer Parties did not suggest that further comment was forthcoming. The Times did not promise to withhold publication after receiving comments. Additionally, no facts are pleaded to support that the Wayfarer Parties relied on the alleged representation that they had until noon to submit comments or were injured by the belief that they had until noon rather than until 10:11 a.m. to provide comment which they had already provided at 2:16 a.m. Dkt. No. 50 ¶ 294; Dkt. No. 107-7. Notably, the Wayfarer Parties do not allege any further response they could have or actually would have made between 10:11 a.m. and noon had the Article not been published.

IX. Leave to Amend

The Wayfarer Parties seek leave to amend their complaint to cure any pleading defects. *See* Dkt. Nos. 162 at 32; Dkt. No. 121 at 13, 17 n.6, 26, 36, 39; Dkt. No. 160 at 2, 5 n.4, 19; Dkt. No. 127 at 7, 9 n.8, 25 & n.29. The Wayfarer Parties' proposed amendments would 1) cure impermissible group pleading, Dkt. No. 127 at 7 n.3; 2) include additional facts relevant to choice of law, Dkt. No. 127 at 9 n.8; 3) address the fair report privilege and actual malice as applicable to the New York Times, Dkt. No. 127 at 25; 4) more fully incorporate the allegations in Exhibit A, Dkt. No. 162 at 2; 5) amend allegations relevant to the civil extortion claim, Dkt. No. 162 at 25; 6) amend the false light claim, Dkt. No. 162 at 26; 7) add additional allegations of conspiracy to defame, Dkt. No. 162 at 32; 8) specify that Lively's contract requires that her right to consult and approve on the film be exercised in a reasonable manner and not frustrate Wayfarer's production and development rights, Dkt. No. 162 at 32; and 9) adequately allege Baldoni's contract with WME in support of the tortious interference with contract claim, Dkt. No. 160 at 23. Defendants oppose leave to amend on the grounds of futility and undue delay. Dkt. No. 158 at 9–10; Dkt. No. 172 at 2 & n.2, 4 n.5; Dkt. No. 166 at 15.

"When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint." *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *see* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). "However, it is well established that leave to amend a complaint need not be granted when amendment would be futile." *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003); *see Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190–91 (2d Cir. 2015) ("Our opinion today, of course, leaves unaltered the grounds on which denial of leave to amend has long been held proper, such as undue delay, bad faith, dilatory motive, and futility.").

The Court will not grant leave to amend the majority of the Wayfarer Parties' claims because amendment would be futile. The dismissal of the claims does not rest on technical pleading defects, and the Wayfarer Parties have not made "a showing that the complaint's defects can be cured." *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006). The Wayfarer Parties do not identify any particular factual allegations that could be added to support the defamation or civil extortion claims, nor is it plausible that any allegations not yet mentioned would change the basic substance of Lively's threats, the conclusion that the CRD complaint was privileged, or the conclusion that relevant statements were made without actual malice. In addition to their 224-page Amended Complaint, the Wayfarer Parties have already submitted to this Court an additional 168-page Exhibit with additional details relevant to their claims. Dkt. No. 50-1. Although the Exhibit is not properly considered for purposes of the motion to dismiss, the allegations within it still would not allow the Wayfarer Parties to state a claim.

The Exhibit contains additional detail on Lively's threats, but if anything these details cut against a finding of extortion. For example, the Exhibit details that for some time Sony and

Wayfarer in fact resisted Lively's requests, stating "This is a Wayfarer movie. Wayfarer has Final Cut and runs the process." Dkt. No. 50-1 at 72–73. It then states that Lively did not sign her acting agreement so that she could "continu[e] to leverage her promotional participation as a bargaining tool," implying that Lively may not have had a contractual obligation towards Wayfarer to promote the film. Dkt. No. 50-1 at 74. Incorporating these facts would not aid the Wayfarer Parties in alleging that Lively's threats were legally wrongful and could not be resisted. If, in fact, Lively did not owe the Wayfarer Parties an obligation to promote the film, her demands regarding what she would need in order to comply with their request that she engage in promotion would not have been wrongful. They would constitute hard bargaining.

Similarly, although Exhibit A contains a number of messages between the Wayfarer Parties not included in the Amended Complaint, *e.g.* Dkt. No. 50-1 at 143, 148, these messages are consistent with those included in the Amended Complaint and would not show that the New York Times acted with actual malice. Given that the Wayfarer Parties have already provided an extensive record of facts that purportedly portrays their claims in the best possible light, the promise that more unspecified facts will now change the central aspects of their core claims suggests a "dilatory motive" to extend the litigation rather than a legitimate belief that amendment will alter the Court's determination. *Loreley Fin.*, 797 F.3d at 190.[66]

However, the Court will grant leave to amend the claims for tortious interference with contract and breach of implied contract. The Wayfarer Parties fail to plead the specific details of

[66] The Court will also not grant leave to amend the claims for false light, breach of implied covenant, intentional or negligent interference with prospective economic relations, or promissory fraud. The false light claim is essentially duplicative of the defamation claim, and therefore amendment is futile for the same reasons. The failure of the defamation claim against Reynolds is also fatal to the claims for intentional and negligent interference with prospective economic relations, which require interference be through a wrongful act. The breach of implied contract and promissory fraud claims are meritless in any formulation.

any contract between Baldoni and WME, but suggest in their briefing that this defect is "easily curable" and that they will plead an oral or implied contract of which Reynolds was aware. Dkt. No. 160 at 23 & n.10. Given the allegations that Reynolds told WME to "drop" Baldoni, it cannot be said that repleading this claim on such terms would be futile. Similarly, the Wayfarer Parties assert that they are able to allege the details of Lively's contract with Wayfarer, including that her right to consult and approve on the film be exercised in a reasonable manner. Dkt. No. 162 at 32. Without seeing the contract, the Court cannot say that the amending the breach of implied covenant claim will be futile.

X. Motions for Fees

Reynolds, Sloane, and Vision PR have moved for an award of attorney's fees and costs pursuant to New York's anti-SLAPP law, New York Civil Rights Law § 70-a. Dkt. Nos. 86, 132. Lively has moved for an award of attorney's fees, treble damages, and punitive damages pursuant to California Civil Code § 47.1. Dkt. No. 144.

The Court denies the motions without prejudice to renewal in accordance with the ruling here. The Court has ruled that the law applicable to the claims against Reynolds and Sloane cannot be determined absent further factual development. The Court has not ruled on whether Lively's statements were privileged under California Civil Code § 47.1. If Defendants choose to renew their motions, they shall fully brief the impact of this opinion, if any, as well as the issues raised in prior briefing.[67]

[67] The Court has received several motions for leave to file amicus briefs. Dkt. Nos. 241–242, 275, 283. These briefs largely concern the application of California and New York's anti-SLAPP laws. The Court has not considered any of the briefs in resolving the motions to dismiss.

CONCLUSION

The motions to dismiss are GRANTED. The Wayfarer Parties have leave to file a Second Amended Complaint by June 23, 2025, amending only the allegations relevant to the claims of tortious interference with contract and breach of implied covenant. The motions to strike are DENIED. The motions for fees and damages pursuant to New York Civil Rights Law § 70-a and California Civil Code § 47.1 are DENIED without prejudice to renewal by formal motion.

The Clerk of Court is respectfully directed to close Dkt. Nos. 86, 105, 132, 144.

SO ORDERED.

Dated: June 9, 2025
New York, New York

LEWIS J. LIMAN
United States District Judge

KeyCite Yellow Flag
Not Followed as Dicta Barclays Capital Inc. v. Theflyonthewall.com, S.D.N.Y., March 18, 2010

121 S.Ct. 1753
Supreme Court of the United States

Gloria BARTNICKI and Anthony F. Kane, Jr., Petitioners,
v.
Frederick W. VOPPER, aka Fred Williams, et al.
United States, Petitioner,
v.
Frederick W. Vopper, aka Fred Williams, et al.

Nos. 99–1687, 99–1728.
|
Argued Dec. 5, 2000.
|
Decided May 21, 2001.

Synopsis

Persons whose cellular telephone conversation had been intercepted and taped by unknown third party sued media defendants who broadcast tape and individual who had given tape to media, asserting claims under federal and Pennsylvania wiretapping acts. The United States District Court for the Middle District of Pennsylvania, Kosik, J., denied cross-motions for summary judgment. On interlocutory appeal, the Third Circuit Court of Appeals, 200 F.3d 109, Sloviter, Circuit Judge, reversed and remanded, finding that application of statutes to defendants unduly infringed their free speech rights, and directing judgment for defendants. Certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) wiretap acts' prohibitions against intentional disclosure of illegally intercepted communication which disclosing party knows or should know was illegally obtained are content-neutral laws of general applicability, and (2) application of those provisions against defendants violated their free speech rights, since tape concerned matter of public importance and defendants had played no part in the illegal interception.

Affirmed.

Justice Breyer filed concurring opinion joined by Justice O'Connor.

The Chief Justice filed dissenting opinion joined by Justices Scalia and Thomas.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1]	**Telecommunications**Purpose and construction in general
	One purpose of federal wiretap act is to protect effectively privacy of wire and oral communications. 18 U.S.C.A. § 2510 et seq. 43 Cases that cite this headnote

[2]	**Constitutional Law**Interception or surveillance; wiretapping **Telecommunications**Unauthorized access to or transmission of electronic communications; electronic surveillance
	Federal and Pennsylvania wiretap acts' prohibitions against intentional disclosure to any other person of contents of wire, oral, or electronic communication which disclosing party knows or has reason to know was obtained through interception in violation of acts are content-neutral laws of general applicability; on the other hand, they constitute regulations of pure speech, not conduct. 18 U.S.C.A. § 2511(1)(c); 18 Pa.C.S.A. § 5725(a). 107 Cases that cite this headnote

[3]	**Constitutional Law**Content-Neutral Regulations or Restrictions
	In determining whether regulation of speech is content-based or content-neutral, court looks to purpose behind regulation; typically, government regulation of expressive activity is content-neutral so long as it is justified without reference to content of regulated speech. U.S.C.A. Const.Amend. 1. 59 Cases that cite this headnote

[4]	**Constitutional Law**Press in General
	If a newspaper lawfully obtains truthful information about a matter of public significance, state officials may not constitutionally punish publication of such information, absent a need of the highest order. U.S.C.A. Const.Amend. 1. 69 Cases that cite this headnote

[5]	**Constitutional Law**Journalists **Constitutional Law**Interception or surveillance; wiretapping **Telecommunications**Privilege or immunity
	Individual who lawfully received tape of cellular phone conversation concerning matter of public concern from unknown third party who had recorded it in violation of federal and Pennsylvania wiretap acts, and media outlet which broadcast tape after lawfully receiving it from that individual, could not be held liable under acts' prohibition of intentional disclosure of contents of illegally intercepted communications; First Amendment interest in publishing matters of public importance outweighed conversants' privacy rights, given fact that individual and media outlet had played no part in illegal interception. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 2511(1)(c); 18 Pa.C.S.A. § 5725(a). 116 Cases that cite this headnote

[6]	**Torts**Matters of Public Interest or Public Record; Newsworthiness
	Where publication of private information constitutes wrongful act, law recognizes privilege allowing reporting of threats to public safety. Restatement (Second) of Torts § 595, comment. 9 Cases that cite this headnote

West Codenotes

Unconstitutional as Applied
18 U.S.C.A. §2511(1)(c)18 Pa. C.S.A. §5725(a) (2000)

Concurring opinion

****1754** *Syllabus*[*]

***514** During contentious collective-bargaining negotiations between a union representing teachers at a Pennsylvania high school and the local school board, an unidentified person intercepted and recorded a cell phone conversation between the chief union negotiator and the union president (hereinafter petitioners). After the parties accepted a nonbinding arbitration

proposal generally favorable to the teachers, respondent Vopper, a radio commentator, played a tape of the intercepted conversation on his public affairs talk show in connection with news reports about the settlement. Petitioners filed this damages suit under both federal and state wiretapping laws, alleging, among other things, that their conversation had been surreptitiously intercepted by an unknown person; that respondent Yocum, the head of a local organization opposed to the union's demands, had obtained the tape and intentionally disclosed it to, *inter alios,* media representatives; and that they had repeatedly published the conversation even though they knew or had reason to know that it had been illegally intercepted. In ruling on cross-motions for summary judgment, the District Court concluded that, under the statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she knows or has reason to know that the information was obtained through an illegal interception, even if the individual was not involved in that interception; found that the question whether the interception was intentional raised a genuine issue of material fact; and rejected respondents' defense that they were protected by the First Amendment even if the disclosures violated the statutes, finding that the statutes were content-neutral laws of general applicability containing no indicia of prior restraint or the chilling of free speech. The Third Circuit accepted an interlocutory appeal, and the United States, also a petitioner, intervened to defend the federal Act's constitutionality. Applying intermediate scrutiny, the court found the statutes invalid because they deterred significantly more speech than necessary to protect the private ***515** interests at stake, and remanded the case with instructions to enter summary judgment for respondents.

Held: The First Amendment protects the disclosures made by respondents in this suit. Pp. 1758–1766.

(a) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, generally prohibits the interception of wire, electronic, and oral communications. Title 18 U.S.C. § 2511(1)(a) applies to the person who willfully intercepts such communications and subsection (c) to any person who, knowing or having reason to know that the communication was obtained ****1755** through an illegal interception, willfully discloses its contents. Pp. 1758–1760.

(b) Because of this suit's procedural posture, the Court accepts that the interception was unlawful and that respondents had reason to know that. Accordingly, the disclosures violated the statutes. In answering the remaining question whether the statutes' application in such circumstances violates the First Amendment, the Court accepts respondents' submissions that they played no part in the illegal interception, that their access to the information was obtained lawfully, and that the conversations dealt with a matter of public concern. P. 1760.

(c) Section 2511(1)(c) is a content-neutral law of general applicability. The statute's purpose is to protect the privacy of wire, electronic, and oral communications, and it singles out such communications by virtue of the fact that they were illegally intercepted—by virtue of the source rather than the subject matter. Cf. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. On the other hand, the prohibition against disclosures is fairly characterized as a regulation of speech. Pp. 1760–1761.

(d) In *New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, this Court upheld the press' right to publish information of great public concern obtained from documents stolen by a third party. In so doing, this Court focused on the stolen documents' character and the consequences of public disclosure, not on the fact that the documents were stolen. *Ibid.* It also left open the question whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may punish not only the unlawful acquisition, but also the ensuing publication. *Florida Star v. B.J.F.,* 491 U.S. 524, 535, n. 8, 109 S.Ct. 2603, 105 L.Ed.2d 443. The issue here is a narrower version of that question: Where the publisher has lawfully obtained information from a source who obtained it unlawfully, may the government punish the ensuing publication based on the defect in a chain? The Court's refusal to construe the issue more broadly is consistent with its repeated refusal to answer categorically whether the publication of truthful information may ever be punished consistent with the First Amendment. Accordingly, the Court considers whether, ***516** given the facts here, the interests served by § 2511(1)(c) justify its restrictions on speech. Pp. 1761–1762.

(e) The first interest identified by the Government—removing an incentive for parties to intercept private conversations—does not justify applying § 2511(1)(c) to an otherwise innocent disclosure of public information. The normal method of deterring unlawful conduct is to punish the person engaging in it. It would be remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party. In virtually all § 2511(1)(a), (c), or (d) violations, the interceptor's identity has been known. There is no evidence that Congress thought that the prohibition against disclosures would deter illegal interceptions, and no evidence to support the assumption that the prohibition reduces the number of such interceptions. Pp. 1762–1764.

(f) The Government's second interest—minimizing the harm to persons whose conversations have been illegally intercepted—is considerably stronger. Privacy of communication is an important interest. However, in this suit, privacy concerns give way when balanced against the interest in publishing matters of public importance. One of the costs associated with participation in public affairs is an attendant loss of privacy. The profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open supported this Court's holding in *New York Times Co. v.*

Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First ****1756** Amendment shield from criticism of official conduct. Parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. Pp. 1764–1765.

200 F.3d 109, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. Breyer, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post,* p. 1766. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 1769.

Attorneys and Law Firms

Jeremiah A. Collins, Washington, DC, for petitioners in 99–1687.

Seth P. Waxman, Washington, DC, for petitioner in 99–1728.

***517** Lee Levine, Washington, DC, for respondents Frederick W. Vopper, et al.

Thomas C. Goldstein, Washington, DC, for respondent Jack Yocum.

Opinion

Justice STEVENS delivered the opinion of the Court.

These cases raise an important question concerning what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication. That question is both novel and narrow. Despite the fact that federal law has prohibited such disclosures since 1934,[1] this is the first time that we have confronted such an issue.

The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception ***518** was unlawful. Accordingly, these cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. The Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action. It is therefore not surprising that Circuit judges, as well as the Members of this Court, have come to differing conclusions about the First Amendment's application to this issue. Nevertheless, having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

I

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at the Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board. Petitioner Kane, then the president of the local union, testified that the negotiations were " 'contentious' " and received "a lot of media attention." App. 79, 92. In May 1993, petitioner Bartnicki, who was acting as the union's "chief negotiator," used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of the negotiations. An unidentified person intercepted and recorded that call.

In their conversation, Kane and Bartnicki discussed the timing of a proposed ****1757** strike, *id.,* at 41–45, difficulties created by public comment on the negotiations, *id.,* at 46, and the need for a dramatic response to the board's intransigence. At one point, Kane said: " 'If they're not gonna move for three percent, we're gonna have to go to their, their ***519** homes .... To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully

because this is, you know, this is bad news. (UNDECIPHERABLE).' " *Ibid.*

In the early fall of 1993, the parties accepted a nonbinding arbitration proposal that was generally favorable to the teachers. In connection with news reports about the settlement, respondent Vopper, a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show. Another station also broadcast the tape, and local newspapers published its contents. After filing suit against Vopper and other representatives of the media, Bartnicki and Kane (hereinafter petitioners) learned through discovery that Vopper had obtained the tape from respondent Jack Yocum, the head of a local taxpayers' organization that had opposed the union's demands throughout the negotiations. Yocum, who was added as a defendant, testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum played the tape for some members of the school board, and later delivered the tape itself to Vopper.

II

In their amended complaint, petitioners alleged that their telephone conversation had been surreptitiously intercepted by an unknown person using an electronic device, that Yocum had obtained a tape of that conversation, and that he intentionally disclosed it to Vopper, as well as other individuals and media representatives. Thereafter, Vopper and other members of the media repeatedly published the contents of that conversation. The amended complaint alleged that each of the defendants "knew or had reason to know" that the recording of the private telephone conversation had been obtained by means of an illegal interception. ***520** *Id.,* at 27. Relying on both federal and Pennsylvania statutory provisions, petitioners sought actual damages, statutory damages, punitive damages, and attorney's fees and costs.[2]

After the parties completed their discovery, they filed cross-motions for summary judgment. Respondents contended that they had not violated the statute because (a) they had nothing to do with the interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently. Moreover, even if they had violated the statute by disclosing the intercepted conversation, respondents argued, those disclosures were protected by the First Amendment. The District Court rejected the first statutory argument because, under the plain statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she "know[s] or ha[s] reason to know that the information was obtained" through an illegal interception.[3] App. to Pet. for Cert. in No. 99–1687, pp. 53a–54a (emphasis deleted). Accordingly, actual involvement in the illegal ****1758** interception is not necessary in order to establish a violation of that statute. With respect to the second statutory argument, the District Court agreed that petitioners had to prove that the interception in question ***521** was intentional,[4] but concluded that the text of the interception raised a genuine issue of material fact with respect to intent. That issue of fact was also the basis for the District Court's denial of petitioners' motion. Finally, the District Court rejected respondents' First Amendment defense because the statutes were content-neutral laws of general applicability that contained "no indicia of prior restraint or the chilling of free speech." *Id.,* at 55a–56a.

Thereafter, the District Court granted a motion for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). It certified as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant [Vopper's] radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of [the] Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping] statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." App. to Pet. for Cert. in No. 99–1728, p. 76a. The Court of Appeals accepted the appeal, and the United States, also a petitioner, intervened pursuant to 28 U.S.C. § 2403 in order to defend the constitutionality of the federal statute.

All three members of the panel agreed with petitioners and the Government that the federal and Pennsylvania wiretapping statutes are "content-neutral" and therefore subject to "intermediate scrutiny." 200 F.3d 109, 121 (C.A.3 1999). Applying that standard, the majority concluded that the ***522** statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake. The court remanded the case with instructions to enter summary judgment for respondents. In dissent, Senior Judge Pollak expressed the view that the prohibition against disclosures was necessary in order to remove the incentive for illegal interceptions and to preclude compounding the harm caused by such interceptions through wider dissemination. In so doing, he agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner v. McDermott,* 191 F.3d 463 (C.A.D.C.1999). See also *Peavy v. WFAA–TV, Inc.,* 221 F.3d 158 (C.A.5 2000).[5] We granted certiorari to resolve the conflict. 530 U.S. 1260, 120 S.Ct. 2716, 147 L.Ed.2d

981 (2000).

III

As we pointed out in *Berger v. New York,* 388 U.S. 41, 45–49, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), sophisticated (and not so sophisticated) methods of eavesdropping on oral conversations and intercepting ****1759** telephone calls have been practiced for decades, primarily by law enforcement authorities.[6] In *Berger,* we held that New ***523** York's broadly written statute authorizing the police to conduct wiretaps violated the Fourth Amendment. Largely in response to that decision, and to our holding in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the attachment of a listening and recording device to the outside of a telephone booth constituted a search, "Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise. S.Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968), U.S.Code Cong. & Admin.News 1968, pp. 2112, 2153." *Gelbard v. United States,* 408 U.S. 41, 78, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) (REHNQUIST, J., dissenting). The ultimate result of those efforts was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, entitled Wiretapping and Electronic Surveillance.

[1] One of the stated purposes of that title was "to protect effectively the privacy of wire and oral communications." *Ibid.* In addition to authorizing and regulating electronic surveillance for law enforcement purposes, Title III also regulated private conduct. One part of those regulations, § 2511(1), defined five offenses punishable by a fine of not more than $10,000, by imprisonment for not more than five years, or by both. Subsection (a) applied to any person who "willfully intercepts ... any wire or oral communication." Subsection (b) applied to the intentional use of devices designed to intercept oral conversations; subsection (d) applied to the use of the contents of illegally intercepted wire or ***524** oral communications; and subsection (e) prohibited the unauthorized disclosure of the contents of interceptions that were authorized for law enforcement purposes. Subsection (c), the original version of the provision most directly at issue in this suit, applied to any person who "willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." The oral communications protected by the Act were only those "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." § 2510(2).

As enacted in 1968, Title III did not apply to the monitoring of radio transmissions. In the Electronic Communications Privacy Act of 1986, 100 Stat. 1848, however, Congress enlarged the coverage of Title III to prohibit the interception of "electronic" as well as oral and wire communications. By reason of that amendment, as well as a 1994 amendment which applied to cordless telephone communications, 108 Stat. 4279, Title III now applies to the interception of conversations over both cellular and cordless phones.[7] ****1760** Although a lesser criminal penalty may apply to the interception of such transmissions, the same civil remedies are available whether the communication was "oral," "wire," or "electronic," as defined by 18 U.S.C. § 2510 (1994 ed. and Supp. V).

IV

The constitutional question before us concerns the validity of the statutes as applied to the specific facts of these cases. Because of the procedural posture of these cases, it is appropriate to make certain important assumptions about those ***525** facts. We accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents "had reason to know" that it was unlawful. Accordingly, the disclosure of the contents of the intercepted conversation by Yocum to school board members and to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and state statutes. Under the provisions of the federal statute, as well as its Pennsylvania analogue, petitioners are thus entitled to recover damages from each of the respondents. The only question is whether the application of these statutes in such circumstances violates the First Amendment.[8]

In answering that question, we accept respondents' submission on three factual matters that serve to distinguish most of the cases that have arisen under § 2511. First, respondents played no part in the illegal interception. Rather, they found out about

the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Cf. *Florida Star v. B.J.F.,* 491 U.S. 524, 536, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) ("Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step"). Third, the subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

***526** V

[2] [3] We agree with petitioners that § 2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability. "Deciding whether a particular regulation is content based or content neutral is not always a simple task.... As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642–643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation; typically, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).[9]

****1761** In this suit, the basic purpose of the statute at issue is to "protec [t] the privacy of wire[, electronic,] and oral communications." S.Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968), U.S.Code Cong. & Admin.News 1968, pp. 2112, 2153. The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.

On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the "use" of the contents of ***527** an illegal interception in § 2511(1)(d),[10] subsection (c) is not a regulation of conduct. It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects.[11] As the majority below put it, "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." 200 F.3d, at 120.

VI

[4] As a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). More specifically, this Court has repeatedly ***528** held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need ... of the highest order." *Id.,* at 103, 99 S.Ct. 2667; see also *Florida Star v. B.J.F.,* 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978).

Accordingly, in *New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) *(per curiam),* the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation. In resolving ****1762** that conflict, the attention of every Member of this Court was focused on the character of the stolen documents' contents and the consequences of public disclosure. Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted in Justice Harlan's dissent, *id.,* at 754, 91 S.Ct. 2140, neither

the majority nor the dissenters placed any weight on that fact.

[5] However, *New York Times v. United States* raised, but did not resolve, the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[12] *Florida Star,* 491 U.S., at 535, n. 8, 109 S.Ct. 2603. The question here, however, is a narrower version of that still-open question. Simply put, the issue here is this: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Boehner,* 191 F.3d, at 484–485 (Sentelle, J., dissenting).

***529** Our refusal to construe the issue presented more broadly is consistent with this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment. Rather,

> "[o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily.... We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star,* 491 U.S., at 532–533, 109 S.Ct. 2603.

See also *Landmark Communications,* 435 U.S., at 838, 98 S.Ct. 1535. Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech.

The Government identifies two interests served by the statute—first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information that he or she acquired by violating § 2511(1)(a), but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter ***530** conduct by a non-law-abiding third party. Although there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another, see, *e.g., New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982),[13] this is not such a case.

****1763** With only a handful of exceptions, the violations of § 2511(1)(a) that have been described in litigated cases have been motivated by either financial gain or domestic disputes.[14] In virtually all of those cases, the identity of the person or persons intercepting the communication has been known.[15] Moreover, petitioners cite no evidence that Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons making improper use of scanners and other surveillance devices and accordingly of deterring such conduct,[16] and there is no ***531** empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions.[17]

Although this suit demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case. Moreover, there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions. Unusual cases fall far short of a ***532** showing that there is a "need ... of the highest order" for a rule supplementing the traditional means of deterring antisocial conduct. The justification for any such novel burden on expression must be "far stronger than mere ****1764** speculation about serious harms." *United States v. Treasury Employees,* 513 U.S. 454, 475, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).[18] Accordingly, the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient.[19]

The Government's second argument, however, is considerably stronger. Privacy of communication is an important interest, *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985),[20] and Title III's restrictions are intended to protect that interest, thereby "encouraging the uninhibited exchange of ideas and information among private parties...." Brief for United States 27. Moreover, ***533** the fear of public disclosure of private conversations might well have a chilling effect on private speech.

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

Accordingly, it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.

We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern. Cf. *Time, Inc. v. Hill,* 385 U.S. 374, 387–388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (reserving the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed). In other words, the outcome of these cases does not turn on whether § 2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in these cases, however, implicates the core purposes ***534 **1765** of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.

In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." The Right to Privacy, 4 Harv. L.Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' " *Time, Inc. v. Hill,* 385 U.S., at 388, 87 S.Ct. 534 (quoting *Thornhill v. Alabama,* 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).[21]

Our opinion in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), reviewed many of the decisions that settled the "general proposition that freedom of expression upon public questions is secured by the First Amendment." *Id.,* at 269, 84 S.Ct. 710; see *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *Bridges v. California,* 314 U.S. 252, 270, 62 S.Ct. 190, 86 L.Ed. 192 (1941); *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Those cases all relied on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times,* 376 U.S., at 270, 84 S.Ct. 710; see *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); ***535** *De Jonge v. Oregon,* 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937); *Whitney v. California,* 274 U.S. 357, 375–376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); see also *Roth,* 354 U.S., at 484, 77 S.Ct. 1304; *Stromberg,* 283 U.S., at 369, 51 S.Ct. 532; *Bridges,* 314 U.S., at 270, 62 S.Ct. 190. It was the overriding importance of that commitment that supported our holding that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. *Id.,* at 273, 62 S.Ct. 190; see also *NAACP v. Button,* 371 U.S. 415, 445, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 342, 343, n. 5, 345, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges,* 314 U.S., at 270, 62 S.Ct. 190.

We think it clear that parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.[22] The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern. That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v. California,* 274 U.S., at 372, 47 S.Ct. 641, but it is no less worthy of constitutional protection.

****1766** The judgment is affirmed.

It is so ordered.

Justice BREYER, with whom Justice O'CONNOR joins, concurring.

I join the Court's opinion. I agree with its narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved ***536** a matter of unusual public concern, namely, a threat of potential physical harm to others. I write separately to explain why, in my view, the Court's holding does not imply a significantly broader constitutional immunity for the media.

As the Court recognizes, the question before us—a question of immunity from statutorily imposed civil liability—implicates competing constitutional concerns. *Ante,* at 1763–1764. The statutes directly interfere with free expression in that they prevent the media from publishing information. At the same time, they help to protect personal privacy—an interest here that includes not only the "right to be let alone," *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), but also "the interest ... in fostering private speech," *ante,* at 1756. Given these competing interests "on both sides of the equation, the key question becomes one of proper fit." *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 227, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (BREYER, J., concurring in part). See also *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring).

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called "strict scrutiny" —with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated. See *ante,* at 1756 (recognizing "conflict between interests of the highest order"); *ante,* at 1764 ("important interests to be considered on *both* sides of the constitutional calculus"); *ante,* at 1765 ("balanc[ing]" the interest in privacy "against the interest ***537** in publishing matters of public importance"); *ibid.* (privacy interest outweighed in these cases).

The statutory restrictions before us directly enhance private speech. See *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (describing " 'freedom *not* to speak publicly' " (quoting *Estate of Hemingway v. Random House, Inc.,* 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968))). The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.

At the same time, these statutes restrict public speech directly, deliberately, and of necessity. They include media publication within their scope not simply as a means, say, to deter interception, but also as an end. Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call. See *Gelbard v. United States,* 408 U.S. 41, 51–52, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). And the threat of that widespread dissemination ****1767** can create a far more powerful disincentive to speak privately than the comparatively minor threat of disclosure to an interceptor and perhaps to a handful of others. Insofar as these statutes protect private communications against that widespread dissemination, they resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom. See generally Warren & Brandeis, The Right to Privacy, 4 Harv. L.Rev. 193 (1890) (hereinafter Warren & Brandeis). See also Restatement (Second) of Torts § 652D (1977).

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate ***538** laws of this kind because of the importance of these privacy and speech-related objectives. See Warren & Brandeis 196 (arguing for state-law protection of the right to privacy). Cf. *Katz v. United States,* 389 U.S. 347, 350–351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States"); *ante,* at 1756 (protecting privacy and promoting speech are "interests of the highest order"). Rather than broadly forbid this kind of legislative enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

Nonetheless, looked at more specifically, the statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives. Rather, they disproportionately interfere with media freedom. For one thing, the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained. They "neither encouraged nor participated directly or indirectly in the interception." App. to Pet. for Cert. in No. 99–1687, p. 33a. See also *ante,* at 1760. No one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later

delivery by the intermediary to the media. Cf. 18 U.S.C. § 2 (criminalizing aiding and abetting any federal offense); 2 W. LaFave & A. Scott, Substantive Criminal Law §§ 6.6(b)-(c), pp. 128–129 (1986) (describing criminal liability for aiding and abetting). And, as the Court points out, the statutes do not forbid the receipt of the tape itself. *Ante,* at 1760. The Court adds that its holding "does not apply to punishing parties for obtaining the relevant information *unlawfully.*" *Ante,* at 1764, n. 19 (emphasis added).

[6] ***539** For another thing, the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blow[ing] off ... front porches" and "do[ing] some work on some of those guys," App. 46, thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety. See Restatement (Second) of Torts § 595, Comment *g* (1977) (general privilege to report that "another intends to kill or rob or commit some other serious crime against a third person"); *id.,* § 652G (privilege applies to invasion of privacy tort). Cf. Restatement (Third) of Unfair Competition § 40, Comment *c* (1995) (trade secret law permits disclosures relevant to public health or safety, commission of crime or tort, or other matters of substantial public concern); *Lachman v. Sperry–Sun Well Surveying Co.,* 457 F.2d 850, 853 (C.A.10 1972) (nondisclosure agreement not binding in respect to criminal activity); *Tarasoff v. Regents of Univ. of Cal.,* 17 Cal.3d 425, 436, 131 Cal.Rptr. 14, 551 P.2d 334, 343–344 (1976)(psychiatric privilege not binding in presence of danger to self or others). Even where the danger may have passed by the time of publication, that fact cannot legitimize the ****1768** speaker's earlier privacy expectation. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.

Further, the speakers themselves, the president of a teacher's union and the union's chief negotiator, were "limited public figures," for they voluntarily engaged in a public controversy. They thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs. See, *e.g., ante,* at 1765 (respondents were engaged in matter of public concern); ***540** *Wolston v. Reader's Digest Assn., Inc.,* 443 U.S. 157, 164, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111, 134, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). See also Warren & Brandeis 215.

This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i.e.,* communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters. See *Michaels v. Internet Entertainment Group, Inc.,* 5 F.Supp.2d 823, 841–842 (C.D.Cal.1998) (broadcast of videotape recording of sexual relations between famous actress and rock star not a matter of legitimate public concern); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts § 117, p. 857 (5th ed.1984) (stating that there is little expectation of privacy in mundane facts about a person's life, but that "portrayal of ... intimate private characteristics or conduct" is "quite a different matter"); Warren & Brandeis 214 (recognizing that in certain matters "the community has no legitimate concern"). Cf. *Time, Inc. v. Firestone,* 424 U.S. 448, 454–455, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (despite interest of public, divorce of wealthy person not a "public controversy"). Cf. also *ante,* at 1764 ("[S]ome intrusions on privacy are more offensive than others").

Thus, in finding a constitutional privilege to publish unlawfully intercepted conversations of the kind here at issue, the Court does not create a "public interest" exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. Here, the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high. Given these circumstances, along with the lawful nature of respondents' behavior, the statutes' enforcement would disproportionately harm media freedom.

***541** I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy. Clandestine and pervasive invasions of privacy, unlike the simple theft of documents from a bedroom, are genuine possibilities as a result of continuously advancing technologies. Eavesdropping on ordinary cellular phone conversations in the street (which many callers seem to tolerate) is a very different matter from eavesdropping on encrypted cellular phone conversations or those carried on in the bedroom. But the technologies that allow the former may come to permit the latter. And statutes that may seem less important in the former context may turn out to have greater importance in the latter. Legislatures also may decide to revisit statutes such as those before us, creating better tailored provisions designed to encourage, for example, more effective privacy-protecting technologies.

For these reasons, we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict ****1769** legislative flexibility. I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations. In an attempt to prevent some of the most egregious violations of privacy, the United States, the District of Columbia, ***542** and 40 States have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications.[1] The Court holds that all of these statutes violate the First Amendment insofar as the illegally intercepted conversation touches upon a matter of "public concern," an amorphous concept that the Court does not even attempt to define. But the Court's decision diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.

Over 30 years ago, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress recognized that the

> "tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic ***543** surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance.... No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S.Rep. No. 1097, 90th Cong., 2d Sess., 67 (1968) (hereinafter S.Rep. No. 1097), U.S.Code Cong. & Admin.News 1968, pp. 2112, 2154.

This concern for privacy was inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure:

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's ****1770** speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

To effectuate these important privacy and speech interests, Congress and the vast majority of States have proscribed the intentional interception and knowing disclosure of the contents of electronic communications.[2] See, *e.g.,* 18 U.S.C. § 2511(1)(c) (placing restrictions upon "any person who ... intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, ***544** knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication").

The Court correctly observes that these are "content-neutral law[s] of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and ... in fostering private speech." *Ante,* at 1760, 1756. It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. See *ante,* at 1763 (holding that petitioners have not established the requisite " 'need ... of the highest order' ") (quoting *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 103, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979)). There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny.

A content-neutral regulation will be sustained if

> " 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (quoting *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

Here, Congress and the Pennsylvania Legislature have acted " 'without reference to the content of the regulated speech.' " *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). There is no intimation that these laws seek "to suppress unpopular ideas or information or manipulate the public debate" or that they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting, supra,* at 641, 643, 114 S.Ct. 2445. The antidisclosure provision is based solely upon the manner in which the conversation was acquired, not the subject matter of the conversation or the viewpoints of the speakers. The same ***545** information, if obtained lawfully, could be published with impunity. Cf. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) (upholding under intermediate scrutiny a protective order on information acquired during discovery in part because "the party may disseminate the identical information ... as long as the information is gained through means independent of the court's processes"). As the concerns motivating strict scrutiny are absent, these content-neutral restrictions upon speech need pass only intermediate scrutiny.

The Court's attempt to avoid these precedents by reliance upon the *Daily Mail* string of newspaper cases is unpersuasive. In these cases, we held that statutes prohibiting the media from publishing certain ****1771** truthful information—the name of a rape victim, *Florida Star v. B.J. F.,* 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the confidential proceedings before a state judicial review commission, *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), and the name of a juvenile defendant, *Daily Mail, supra; Oklahoma Publishing Co. v. District Court, Oklahoma Cty.,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) *(per curiam)*—violated the First Amendment. In so doing, we stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail, supra,* at 103, 99 S.Ct. 2667. Neither this *Daily Mail* principle nor any other aspect of these cases, however, justifies the Court's imposition of strict scrutiny here.

Each of the laws at issue in the *Daily Mail* cases regulated the content or subject matter of speech. This fact alone was enough to trigger strict scrutiny, see *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("[A] content-based speech restriction ... can stand only if it satisfies strict scrutiny"), and suffices to distinguish these antidisclosure provisions. But, as our synthesis of these ***546** cases in *Florida Star* made clear, three other unique factors also informed the scope of the *Daily Mail* principle.

First, the information published by the newspapers had been lawfully obtained from the government itself.[3] "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star, supra,* at 534, 109 S.Ct. 2603. See, *e.g., Landmark Communications, supra,* at 841, and n. 12, 98 S.Ct. 1535 (noting that the State could have taken steps to protect the confidentiality of its proceedings, such as holding in contempt commission members who breached their duty of confidentiality). Indeed, the State's ability to control the information undermined the claim that the restriction was necessary, for "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Cox Broadcasting, supra,* at 495, 95 S.Ct. 1029. This factor has no relevance in the present cases, where we deal with private conversations that have been intentionally kept out of the public domain.

Second, the information in each case was already "publicly available," and punishing further dissemination would not have advanced the purported government interests of confidentiality. *Florida Star, supra,* at 535, 109 S.Ct. 2603. Such is not the case here. These statutes only prohibit "disclos [ure]," 18 U.S.C. § 2511(1)(c); 18 Pa. Cons.Stat. § 5703(2) (2000), and one cannot "disclose" what is already in the public domain. See Black's Law Dictionary 477 (7th ed.1999) (defining "disclosure" as "[t]he act or process of making known something that was previously unknown; a revelation of facts"); ***547** S.Rep. No. 1097, at 93, U.S.Code Cong. & Admin.News 1968, pp. 2112, 2181 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited"). These laws thus do not fall under the axiom that "the interests in privacy fade when the information involved already appears on the public ****1772** record." *Cox Broadcasting, supra,* at 494–495, 95 S.Ct. 1029.

Third, these cases were concerned with "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Florida Star,* 491 U.S., at 535, 109 S.Ct. 2603. But fear of "timidity and self-censorship" is a basis for upholding, not striking down, these antidisclosure provisions: They allow private conversations to transpire without inhibition. And unlike the statute at issue in *Florida Star,* which had no scienter requirement, see *id.,* at 539, 109 S.Ct. 2603, these statutes only address those who *knowingly* disclose an illegally intercepted conversation.[4] They do not impose a duty to inquire into the source of the information and one could negligently disclose the contents of an illegally intercepted communication without liability.

In sum, it is obvious that the *Daily Mail* cases upon which the Court relies do not address the question presented here. Our decisions themselves made this clear: "The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star, supra,* at 535, n. 8, 109 S.Ct. 2603; see also *Daily Mail,* 443 U.S., at 105, 99 S.Ct. 2667 ("Our holding in this case is narrow. There is no issue before us of unlawful press [conduct]"); *Landmark* ***548** *Communications,* 435 U.S., at 837, 98 S.Ct. 1535 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it").[5]

Undaunted, the Court places an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized. See *ante,* at 1761–1764. But this hardly renders those who knowingly receive and disclose such communications "law-abiding," *ante,* at 1762, and it certainly does not bring them under the *Daily Mail* principle. The transmission of the intercepted communication from the eavesdropper to the third party is itself illegal; and

where, as here, the third party then knowingly discloses that communication, another illegal act has been committed. The third party in this situation cannot be likened to the reporters in the *Daily Mail* cases, who lawfully obtained their information through consensual interviews or public documents.

These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a substantial ***549** governmental interest unrelated to the suppression of free speech, and they do.

****1773** Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect. It is estimated that over 20 million scanners capable of intercepting cellular transmissions currently are in operation, see Thompson, Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished, 35 Am.Crim. L.Rev. 137, 149 (1997), notwithstanding the fact that Congress prohibited the marketing of such devices eight years ago, see 47 U.S.C. § 302a(d).[6] As Congress recognized, "[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected." S.Rep. No. 1097, at 69, U.S.Code Cong. & Admin.News 1968, pp. 2112, 2156. See also Hearings on H.R. 3378 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess. and 2d Sess., 290 (1986) ("Congress should be under no illusion ... that the Department [of Justice], because of the difficulty of such investigations, would be able to bring a substantial number of successful prosecutions").

Nonetheless, the Court faults Congress for providing "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions," *ante,* at 1763, and insists that "there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing ***550** to engage in surreptitious interceptions," *ante,* at 1763. It is the Court's reasoning, not the judgment of Congress and numerous States regarding the necessity of these laws, which disappoints.

The "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 391, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). "[C]ourts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting,* 512 U.S., at 665, 114 S.Ct. 2445 (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 103, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973)). This deference recognizes that, as an institution, Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues and that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting,* 512 U.S., at 665, 114 S.Ct. 2445. Although we must nonetheless independently evaluate such congressional findings in performing our constitutional review, this "is not a license to reweigh the evidence *de novo,* or to replace Congress' factual predictions with our own." *Id.,* at 666, 114 S.Ct. 2445.

The "dry-up-the-market" theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime, is neither novel nor implausible. It is a time-tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.10(a), p. 422 (1986) ("Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any ****1774** society anxious to stamp out theft in its various forms"). We ourselves adopted the exclusionary ***551** rule based upon similar reasoning, believing that it would "deter unreasonable searches," *Oregon v. Elstad,* 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), by removing an officer's "incentive to disregard [the Fourth Amendment]," *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).[7]

The same logic applies here and demonstrates that the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications. Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. The law against interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions.

For a similar reason, we upheld against First Amendment challenge a law prohibiting the distribution of child pornography. See *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Just as with unlawfully intercepted electronic communications, we there noted the difficulty of policing the "low-profile, clandestine industry" of child pornography

production and concurred with 36 legislatures that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.,* at 760, 102 S.Ct. 3348. In so doing, we did not demand, nor did Congress provide, any empirical ***552** evidence to buttress this basic syllogism. Indeed, we reaffirmed the theory's vitality in *Osborne v. Ohio,* 495 U.S. 103, 109–110, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), finding it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[8]

At base, the Court's decision to hold these statutes unconstitutional rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of 41 legislative bodies and the United States Congress.[9] The ****1775** Court does not explain how or from where Congress should obtain statistical evidence about the effectiveness of these laws, and "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled." *Elkins, supra,* at 218, 80 S.Ct. 1437. Reliance upon the "dry-up-the-market" theory ***553** is both logical and eminently reasonable, and our precedents make plain that it is "far stronger than mere speculation." *United States v. Treasury Employees,* 513 U.S. 454, 475, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

These statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications. Over a century ago, Samuel Warren and Louis Brandeis recognized that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." The Right to Privacy, 4 Harv. L.Rev. 193, 196 (1890). "There is necessarily, and within suitably defined areas, a ... freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (internal quotation marks and citation omitted). One who speaks into a phone "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz v. United States,* 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); cf. *Gelbard v. United States,* 408 U.S. 41, 52, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) (compelling testimony about matters obtained from an illegal interception at a grand jury proceeding "compounds the statutorily proscribed invasion of ... privacy by adding to the injury of the interception the insult of ... disclosure").

These statutes undeniably protect this venerable right of privacy. Concomitantly, they further the First Amendment rights of the parties to the conversation. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting,* 512 U.S., at 641, 114 S.Ct. 2445. By "protecting the privacy of individual thought and expression," *United States* ***554** *v. United States Dist. Court for Eastern Dist. of Mich.,* 407 U.S. 297, 302, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), these statutes further the "uninhibited, robust, and wide-open" speech of the private parties, *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Unlike the laws at issue in the *Daily Mail* cases, which served only to protect the identities and actions of a select group of individuals, these laws protect millions of people who communicate electronically on a daily basis. The chilling effect of the Court's decision upon these private conversations will surely be great: An estimated 49.1 million analog cellular telephones are currently in operation. See Hao, Nokia Profits from Surge in Cell Phones, Fla. Today, July 18, 1999, p. E1.

Although the Court recognizes and even extols the virtues of this right to privacy, see *ante,* at 1764, these are "mere words," W. Shakespeare, Troilus and Cressida, act v, sc. 3, overridden by the Court's newfound right to publish unlawfully acquired information of "public concern," *ante,* at 1760. The Court concludes that the private conversation between Gloria Bartnicki and Anthony Kane is somehow a "debate .... worthy of constitutional protection." *Ante,* at 1765. Perhaps the Court is correct ****1776** that "[i]f the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy." *Ante,* at 1760. The point, however, is that Bartnicki and Kane had no intention of contributing to a public "debate" at all, and it is perverse to hold that another's unlawful interception and knowing disclosure of their conversation is speech "worthy of constitutional protection." Cf. *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' "). The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or ***555** concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.

The Court's decision to hold inviolable our right to broadcast conversations of "public importance" enjoys little support in our precedents. As discussed above, given the qualified nature of their holdings, the *Daily Mail* cases cannot bear the weight the Court places upon them. More mystifying still is the Court's reliance upon the "Pentagon Papers" case, *New York Times*

Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) *(per curiam),* which involved the United States' attempt to prevent the publication of Defense Department documents relating to the Vietnam War. In addition to involving Government controlled information, that case fell squarely under our precedents holding that prior restraints on speech bear " 'a heavy presumption against ... constitutionality.' " *Id.,* at 714, 91 S.Ct. 2140. Indeed, it was this presumption that caused Justices Stewart and White to join the 6–to–3 *per curiam* decision. See *id.,* at 730–731, 91 S.Ct. 2140 (White, J., joined by Stewart, J., concurring) ("I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system"). By no stretch of the imagination can the statutes at issue here be dubbed "prior restraints." And the Court's "parallel reasoning" from other inapposite cases fails to persuade. *Ante,* at 1765.

Surely "the interest in individual privacy," *ante,* at 1756, at its narrowest, must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations. The Court subordinates that right, not to the claims of those who themselves wish to speak, but to the claims of those who wish to ***556** publish the intercepted conversations of others. Congress' effort to balance the above claim to privacy against a marginal claim to speak freely is thereby set at naught.

All Citations

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Footnotes

*	The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
1	See 48 Stat. 1069, 1103.
2	Either actual damages or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000" may be recovered under 18 U.S.C. § 2520(c)(2); under the Pennsylvania Act, the amount is the greater of $100 a day or $1,000, but the plaintiff may also recover punitive damages and reasonable attorney's fees. 18 Pa. Cons.Stat. § 5725(a) (2000).
3	Title 18 U.S.C. § 2511(1)(c) provides that any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; ... shall be punished...." The Pennsylvania Act contains a similar provision.
4	Title 18 U.S.C. § 2511(1)(a) provides: "(1) Except as otherwise specifically provided in this chapter [§§ 2510–2520 (1994 ed. and Supp. V)] any person who— "(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; ... shall be punished...."
5	In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. 191 F.3d, at 465. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media. *Id.,* at 476. Apparently because the couple responsible for the interception did not eavesdrop "for purposes of direct or indirect commercial advantage or private financial gain," they were fined only $500. See Department of Justice Press Release, Apr. 23, 1997. In another similar case involving a claim for damages under § 2511(1)(c), *Peavy v. WFAA–TV, Inc.,* 221 F.3d 158 (C.A.5 2000), the media defendant in fact participated in the interceptions at issue.

6	In particular, calls placed on cellular and cordless telephones can be intercepted more easily than those placed on traditional phones. See *Shubert v. Metrophone, Inc.,* 898 F.2d 401, 404–405 (C.A.3 1990). Although calls placed on cell and cordless phones can be easily intercepted, it is not clear how often intentional interceptions take place. From 1992 through 1997, less than 100 cases were prosecuted charging violations of 18 U.S.C. § 2511. See Statement of James K. Kallstrom, Assistant Director in Charge of the New York Division of the FBI on February 5, 1997 before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives Regarding Cellular Privacy. However, information concerning techniques and devices for intercepting cell and cordless phone calls can be found in a number of publications, trade magazines, and sites on the Internet, see *id.,* at 6, and at one set of congressional hearings in 1997, a scanner, purchased off the shelf and minimally modified, was used to intercept phone calls of Members of Congress.
7	See, *e.g., Nix v. O'Malley,* 160 F.3d 343, 346 (C.A.6 1998); *McKamey v. Roach,* 55 F.3d 1236, 1240 (C.A.6 1995).
8	In answering this question, we draw no distinction between the media respondents and Yocum. See, *e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 265–266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).
9	"But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.... Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642–643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).
10	The Solicitor General has cataloged some of the cases that fall under subsection (d): "[I]t is unlawful for a company to use an illegally intercepted communication about a business rival in order to create a competing product; it is unlawful for an investor to use illegally intercepted communications in trading in securities; it is unlawful for a union to use an illegally intercepted communication about management (or vice versa) to prepare strategy for contract negotiations; it is unlawful for a supervisor to use information in an illegally recorded conversation to discipline a subordinate; and it is unlawful for a blackmailer to use an illegally intercepted communication for purposes of extortion. See, *e.g.,* 1968 Senate Report 67 (corporate and labor-management uses); *Fultz v. Gilliam,* 942 F.2d 396, 400 n. 4 (6th Cir.1991) (extortion); *Dorris v. Absher,* 959 F.Supp. 813, 815–817 (M.D.Tenn.1997) (workplace discipline), aff'd. in part, rev'd in part, 179 F.3d 420 (6th Cir.1999). The statute has also been held to bar the use of illegally intercepted communications for important and socially valuable purposes. See *In re Grand Jury,* 111 F.3d 1066, 1077–1079 (3d Cir.1997)." Brief for United States 24.
11	Put another way, what gave rise to statutory liability in this suit was the information communicated on the tapes. See *Boehner v. McDermott,* 191 F.3d 463, 484 (C.A.D.C.1999) (Sentelle, J., dissenting) ("What ... is being punished ... here is not conduct dependent upon the nature or origin of the tapes; it is speech dependent upon the nature of the contents").
12	That question was subsequently reserved in *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 837, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978).
13	In cases relying on such a rationale, moreover, the speech at issue is considered of minimal value. *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *New York v. Ferber,* 458 U.S., at 762, 102 S.Ct. 3348 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis* "). The Government also points to two other areas of the law—namely, mail theft and stolen property—in which a ban on the receipt or possession of an item is used to deter some primary illegality. Brief for United States 14; see also *post,* at 1773–1774 (REHNQUIST, C.J., dissenting). Neither of those examples, though, involve prohibitions on speech. As such, they are not relevant to a First Amendment analysis.

14	The media respondents have included a list of 143 cases under § 2511(1)(a) and 63 cases under §§ 2511(1)(c) and (d)—which must also involve violations of subsection (a)—in an appendix to their brief. The Reply Brief filed by the United States contains an appendix describing each of the cases in the latter group.
15	In only 5 of the 206 cases listed in the appendixes, see n. 14, *supra,* n. 17, *infra,* was the identity of the interceptor wholly unknown.
16	The legislative history of the 1968 Act indicates that Congress' concern focused on private surveillance "in domestic relations and industrial espionage situations." S.Rep. No. 1097, 90th Cong., 2d Sess., 225 (1968), U.S.Code Cong. & Admin.News 1968, pp. 2112, 2274. Similarly, in connection with the enactment of the 1986 amendment, one Senator referred to the interest in protecting private communications from "a corporate spy, a police officer without probable cause, or just a plain snoop." 131 Cong. Rec. 24366 (1985) (statement of Sen. Leahy).
17	The dissent argues that we have not given proper respect to "congressional findings" or to " 'Congress' factual predictions.' " *Post,* at 1773. But the relevant factual foundation is not to be found in the legislative record. Moreover, the dissent does not argue that Congress did provide empirical evidence in support of its assumptions, nor, for that matter, does it take real issue with the fact that in the vast majority of cases involving illegal interceptions, the identity of the person or persons responsible for the interceptions is known. Instead, the dissent advances a minor disagreement with our numbers, stating that nine cases "involved an unknown *or unproved* eavesdropper." *Post,* at 1774, n. 9 (emphasis added). The dissent includes in that number cases in which the identity of the interceptor, though suspected, was not "proved" because the identity of the interceptor was not at issue or the evidence was insufficient. In any event, whether there are 5 cases or 9 involving anonymous interceptors out of the 206 cases under § 2511, in most of the cases involving illegal interceptions, the identity of the interceptor is no mystery. If, as the proponents of the dry-up-the-market theory would have it, it is difficult to identify the persons responsible for illegal interceptions (and thus necessary to prohibit disclosure by third parties with no connection to, or responsibility for, the initial illegality), one would expect to see far more cases in which the identity of the interceptor was unknown (and, concomitantly, far fewer in which the interceptor remained anonymous). Thus, not only is there a dearth of evidence in the legislative record to support the dry-up-the-market theory, but what postenactment evidence is available cuts against it.
18	Indeed, even the burden of justifying restrictions on commercial speech requires more than " 'mere speculation or conjecture.' " *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999).
19	Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. "It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Branzburg v. Hayes,* 408 U.S. 665, 691, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).
20	" 'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S., at 559, 105 S.Ct. 2218 (quoting *Estate of Hemingway v. Random House, Inc.,* 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968)).
21	Moreover, "our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth v. Smith,* 494 U.S. 624, 634, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990).

22	See, *e.g., Florida Star v. B.J.F.,* 491 U.S. 524, 535, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (acknowledging "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing truthful information").
1	See 18 U.S.C. § 2511(1) (1994 ed. and Supp. V); Ala.Code § 13A–11–30 *et seq.* (1994); Alaska Stat. Ann. § 42.20.300(d) (2000); Ark.Code Ann. § 5–60–120 (1997); Cal.Penal Code Ann. § 631 (West 1999); Colo.Rev.Stat. § 18–9–303 (2000); Del.Code Ann., Tit. 11, § 1336(b)(1) (1995); D.C.Code Ann. § 23–542 (1996); Fla. Stat. § 934.03(1) (Supp.2001); Ga.Code Ann. § 16–11–66.1 (1996); Haw.Rev.Stat. § 803–42 (1993); Idaho Code § 18–6702 (1997); Ill. Comp. Stat., ch. 720, § 5/14–2(b) (1999 Supp.); Iowa Code § 808B.2 (1994); Kan. Stat. Ann. § 21–4002 (1995); Ky.Rev.Stat. Ann. § 526.060 (Michie 1999); La.Rev.Stat. Ann. § 15:1303 (West 1992); Me.Rev.Stat. Ann., Tit. 15, § 710(3) (Supp.2000); Md. Cts. & Jud. Proc.Code Ann. § 10–402 (Supp.2000); Mass. Gen. Laws § 272:99(C)(3) (1997); Mich. Comp. Laws Ann. § 750.539e (West 1991); Minn.Stat. § 626A.02 (2000); Mo.Rev.Stat. § 542.402 (2000); Neb.Rev.Stat. § 86–702 (1999); Nev.Rev.Stat. § 200.630 (1995); N.H.Rev.Stat. Ann. § 570–A:2 (Supp.2000); N.J. Stat. Ann. § 2A:156A–3 (West Supp.2000); N.M. Stat. Ann. § 30–12–1 (1994); N.C. Gen.Stat. § 15A–287 (1999); N.D. Cent.Code § 12.1–15–02 (1997); Ohio Rev.Code Ann. § 2933.52(A)(3) (1997); Okla. Stat., Tit. 13, § 176.3 (2000 Supp.); Ore.Rev.Stat. § 165.540 (1997); 18 Pa. Cons.Stat. § 5703 (2000); R.I. Gen. Laws § 11–35–21 (2000); Tenn.Code Ann. § 39–13–601 (1997); Tex. Penal Code Ann. § 16.02 (Supp.2001); Utah Code Ann. § 77–23a–4 (1982); Va.Code Ann. § 19.2–62 (1995); W. Va.Code § 62–1D–3 (2000); Wis. Stat. § 968.31(1) (1994); Wyo. Stat. Ann. § 7–3–602 (1995).
2	"Electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U.S.C. § 2510(12) (1994 ed., Supp. V).
3	The one exception was *Daily Mail,* where reporters obtained the juvenile defendant's name from witnesses to the crime. See 443 U.S., at 99, 99 S.Ct. 2667. However, the statute at issue there imposed a blanket prohibition on the publication of the information. See *id.,* at 98–99, 99 S.Ct. 2667. In contrast, these antidisclosure provisions do not prohibit publication so long as the information comes from a legal source.
4	In 1986, to ensure that only the most culpable could face liability for disclosure, Congress increased the scienter requirement from "willful" to "intentional." 18 U.S.C. § 2511(1)(c); see also S.Rep. No. 99–541, p. 6 (1986) ("In order to underscore that the inadvertent reception of a protected communication is not a crime, the subcommittee changed the state of mind requirement under [Title III] from 'willful' to 'intentional' ")
5	Tellingly, we noted in *Florida Star* that "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." 491 U.S., at 534, 109 S.Ct. 2603; see also *id.,* at 535, 109 S.Ct. 2603 ("[I]t is highly anomalous to sanction persons other than the source of [the] release").
6	The problem is pervasive because legal "radio scanners [may be] modified to intercept cellular calls." S.Rep. No. 99–541, at 9. For example, the scanner at issue in *Boehner v. McDermott,* 191 F.3d 463 (C.A.D.C.1999), had been recently purchased at Radio Shack. See Thompson, 35 Am.Crim. L.Rev., at 152, and n. 138 (citing Stratton, Scanner Wasn't Supposed to Pick up Call, But it Did, Orlando Sentinel, Jan. 18, 1997, p. A15).
7	In crafting the exclusionary rule, we did not first require empirical evidence. See *Elkins,* 364 U.S., at 218, 80 S.Ct. 1437 ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained"). When it comes to this Court's awesome power to strike down an Act of Congress as unconstitutional, it should not be "do as we say, not as we do."

8	The Court attempts to distinguish *Ferber* and *Osborne* on the ground that they involved low-value speech, but this has nothing to do with the reasonableness of the "dry-up-the-market" theory. The Court also posits that Congress here could simply have increased the penalty for intercepting cellular communications. See *ante,* at 1762. But the Court's back-seat legislative advice does nothing to undermine the reasonableness of Congress' belief that prohibiting only the initial interception would not effectively protect the privacy interests of cellular telephone users.
9	The Court observes that in many of the cases litigated under § 2511(1), "the person or persons intercepting the communication ha[ve] been known." *Ante,* at 1763. Of the 206 cases cited in the appendices, 143 solely involved § 2511(1)(a) claims of wrongful interception—*disclosure* was not at issue. It is of course unremarkable that intentional *interception* cases have not been pursued where the identity of the eavesdropper was unknown. Of the 61 disclosure and use cases with published facts brought under §§ 2511(1)(c) and (d), 9 involved an unknown or unproved eavesdropper, 1 involved a lawful pen register, and 5 involved recordings that were not surreptitious. Thus, as relevant, 46 disclosure cases involved known eavesdroppers. Whatever might be gleaned from this figure, the Court is practicing voodoo statistics when it states that it undermines the "dry-up-the-market" theory. See *ante,* at 1763, n. 17. These cases say absolutely nothing about the interceptions and disclosures that have been *deterred.*

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141 S.Ct. 2424
Supreme Court of the United States.

Shkelzen BERISHA
v.
Guy LAWSON, et al.

No. 20-1063
|
Decided July 2, 2021

Case below, 973 F.3d 1304.

Opinion

The petition for a writ of certiorari is denied.

Justice THOMAS, dissenting from the denial of certiorari.

In 2015, Guy Lawson published a book detailing the "true story" of how three Miami youngsters became international arms dealers. 973 F.3d 1304, 1306 (CA11 2020). A central plot point involves the protagonists' travels to Albania and subsequent run-ins with the "Albanian mafia," a key figure of which, the book claims, is petitioner Shkelzen Berisha. The book performed well, and Lawson eventually sold the movie rights to Warner Bros., which made the feature film War Dogs.

Unhappy with his portrayal, Berisha sued Lawson for defamation under Florida law. According to Berisha, he is not associated with the Albanian mafia—or any dangerous group—and Lawson recklessly relied on flimsy sources to contend that he was.

The District Court granted summary judgment in favor of Lawson. Setting aside questions of truth or falsity, the court simply asked whether Berisha is a "public figure." Why? Because under this Court's First Amendment jurisprudence, public figures cannot establish libel without proving by clear and convincing evidence that the defendant acted with " 'actual malice' "—that is with knowledge that the published material "was false or with reckless disregard of whether it was false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); accord, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–335, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). After concluding that Berisha is a public figure (or at least is one for purposes of Albanian weapons-trafficking stories), the court found that he had not satisfied this high standard. The Eleventh Circuit affirmed.

Berisha now asks this Court to reconsider the "actual malice" requirement as it applies to public figures. As I explained recently, we should. See ***2425** *McKee v. Cosby*, 586 U. S. ——, ——, 139 S.Ct. 675, 675, 203 L.Ed.2d 247 (2019) (opinion concurring in denial of certiorari).

This Court's pronouncement that the First Amendment requires public figures to establish actual malice bears "no relation to the text, history, or structure of the Constitution." *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (CADC 2021) (Silberman, J., dissenting) (emphasis deleted). In fact, the opposite rule historically prevailed: "[T]he common law deemed libels against public figures to be ... *more* serious and injurious than ordinary libels." *McKee*, 586 U. S., at ——, 139 S.Ct. at 679 (opinion of THOMAS, J.).

The Court provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment's ratification. In *Gertz*, for example, the Court reasoned that public figures are fair targets because "they invite attention and comment." 418 U.S. at 345, 94 S.Ct. 2997. That is, "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Ibid.* But it is unclear why exposing oneself to an increased risk of becoming a victim necessarily means forfeiting the remedies legislatures put in place for such victims. And,

even assuming that it is sometimes fair to blame the victim, it is less clear why the rule still applies when the public figure "has not voluntarily sought attention." 378 F.Supp.3d 1145, 1158 (SD Fla. 2018); see also *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (CA5 1978) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be").

The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be "the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton," Kennedy, 'Pizzagate' Gunman Sentenced to 4 Years in Prison, NPR (June 22, 2017), www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison. Or consider how online posts falsely labeling someone as "a thief, a fraudster, and a pedophile" can spark the need to set up a home-security system. Hill, A Vast Web of Vengeance, N. Y. Times (Jan. 30, 2021), www.nytimes.com/2021/01/30/technology/change-my-google-results.html. Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. See, *e.g.,* Wemple, Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story, Washington Post (Sept. 6, 2019), www.washingtonpost.com/opinions/2019/09/06/bloomberg-law-tried-suppress-its-erroneous-labor-dept-story. Or read about Kathrine McKee—surely this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape. See *McKee*, 586 U. S., at ——– – ——–, 139 S.Ct. at 675–676 (opinion of THOMAS, J.).

The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires. I would grant certiorari.

Justice GORSUCH, dissenting from the denial of certiorari.

The Bill of Rights protects the freedom of the press not as a favor to a particular industry, but because democracy cannot function without the free exchange of ideas. To govern themselves wisely, the ***2426** framers knew, people must be able to speak and write, question old assumptions, and offer new insights. "If a nation expects to be ignorant and free ... it expects what never was and never will be.... There is no safe deposit for [liberty] but with the people ... [w]here the press is free, and every man able to read." Letter from T. Jefferson to C. Yancey (Jan. 6, 1816), in 10 The Writings of Thomas Jefferson 4 (P. Ford ed. 1899).

Like most rights, this one comes with corresponding duties. The right to due process in court entails the duty to abide the results that process produces. The right to speak freely includes the duty to allow others to have their say. From the outset, the right to publish was no different. At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.

This principle extended far back in the common law and far forward into our Nation's history. As Blackstone put it, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but if he publishes falsehoods "he must take the consequence of his own temerity." 4 W. Blackstone, Commentaries on the Laws of England 151–152 (1769). Or as Justice Story later explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F.Cas. 624 (No. 3,867) (CCDRI 1825).

This was "[t]he accepted view" in this Nation for more than two centuries. *Herbert v. Lando*, 441 U.S. 153, 158–159, and n. 4, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Accordingly, "from the very founding" the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–370, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting). As a rule, that meant all persons could recover damages for injuries caused by false publications about them. See Kurland, The Original Understanding of the Freedom of the Press Provision of the First Amendment, 55 Miss. L. J. 225, 234–237 (1985); J. Baker, An Introduction to English Legal History 474–475 (5th ed. 2019); Epstein, Was *New York Times* v. *Sullivan* Wrong? 53 U. Chi. L. Rev. 782, 801–802 (1986); *Peck v. Tribune Co.*, 214 U.S. 185, 189, 29 S.Ct. 554, 53 L.Ed. 960 (1909).

This changed only in 1964. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this Court declared that public officials could no longer recover for defamation as everyone had for centuries. Now, public officials could prevail only by showing that an injurious falsehood was published with " 'actual malice.' " *Id.,* at 279–280, 84 S.Ct.

710. Three years later, the Court extended its actual malice standard from "public officials" in government to "public figures" outside government. See generally *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Later still, the Court cast the net even wider, applying its new standard to those who have achieved "pervasive fame or notoriety" and those "limited" public figures who "voluntarily injec[t]" themselves or are "drawn into a particular public controversy." *Gertz*, 418 U.S., at 351, 94 S.Ct. 2997. The Court viewed these innovations "overturning 200 years of libel law" as "necessary to implement the First Amendment interest in 'uninhibited, robust, and wide-open' ***2427** debate on public issues." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (White, J., concurring in judgment).

Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks demanded significant investment and expertise. See Logan, Rescuing Our Democracy by Rethinking *New York Times Co.* v. *Sullivan*, 81 Ohio St. L. J. 759, 794 (2020) (Logan). Broadcasting required licenses for limited airwaves and access to highly specialized equipment. See *ibid.* Comparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers. See *id.,* at 794–795. But "[t]he liberty of the press" has never been "confined to newspapers and periodicals"; it has always "comprehend[ed] every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938); see also Sentelle, Freedom of the Press: A Liberty for All or a Privilege for a Few? 2013 Cato S. Ct. Rev. 15, 30–34. And thanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. Logan 803 (noting there are 4 billion active social media users worldwide).

The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. See Grieco, Pew Research Center, Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy (Feb. 14, 2020), http://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/. Network news has lost most of its viewers. Pew Research Center, Network Evening News Ratings (Mar. 13, 2006), https://www.journalism.org/numbers/network-evening-news-ratings/. With their fall has come the rise of 24-hour cable news and online media platforms that "monetize anything that garners clicks." Logan 800. No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. *Id.*, at 804. A study of one social network reportedly found that "falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper ... and doing so more quickly than accurate statements." *Id.,* at 804, n. 302; see Vosoughi, Roy, & Aral, The Spread of True and False News Online, Science Magazine, Mar. 9, 2018, pp. 1146–1151. All of which means that "the distribution of disinformation"—which "costs almost nothing to generate"—has become a "profitable" business while "the economic model that supported reporters, fact-checking, and editorial oversight" has "deeply erod[ed]." Logan 800.

It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." Brief in Opposition 22. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands. Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation. Logan 794–795. In that ***2428** era, many major media outlets employed fact-checkers and editors, *id.,* at 795, and one could argue that most strived to report true stories because, as "the public gain[ed] greater confidence that what they read [wa]s true," they would be willing to "pay more for the information so provided," Epstein, 53 U. Chi. L. Rev., at 812. Less clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing.

These questions lead to other even more fundamental ones. When the Court originally adopted the actual malice standard, it took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. See *Sullivan*, 376 U.S., at 270–272, 84 S.Ct. 710. But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability. Statistics show that the number of trials involving defamation, privacy, and related claims based on media publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3. Logan 808–810 (surveying data from the Media Law Resource Center). For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial motions practice. *Id.,* at 809. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal. *Id.,* at 809–810.

The bottom line? It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal

strategy. See *id.,* at 778–779. Under the actual malice regime as it has evolved, "ignorance is bliss." *Id.*, at 778. Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth. See *ibid.* What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable. *Id.*, at 804. As *Sullivan*'s actual malice standard has come to apply in our new world, it's hard not to ask whether it now even "cut[s] against the very values underlying the decision." Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, Make No Law: The *Sullivan* Case and the First Amendment (1991)). If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?

Other developments raise still more questions. In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs. Here again, the Court may have thought that allowing some falsehoods about these persons and topics was an acceptable price to pay to ensure truthful statements vital to democratic self-government were not ***2429** inadvertently suppressed. Perhaps the Court weighed the costs and benefits similarly when it extended the actual malice standard to the "pervasively famous" and "limited purpose public figures."

But today's world casts a new light on these judgments as well. Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most. See, *e.g., Hibdon v. Grabowski*, 195 S.W.3d 48, 59, 62 (Tenn. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group *rec.sport.jetski*, an Internet site that is accessible worldwide"). Lower courts have even said that an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement. See *Berisha v. Lawson*, 973 F.3d 1304, 1311 (CA11 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as limited purpose public figures too. See *McKee v. Cosby*, 586 U. S. ——, ——, 139 S.Ct. 675, 675, 203 L.Ed.2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). In many ways, it seems we have arrived in a world that dissenters proposed but majorities rejected in the *Sullivan* line of cases—one in which, "voluntarily or not, we are all public [figures] to some degree." *Gertz*, 418 U.S. at 364, 94 S.Ct. 2997 (Brennan, J., dissenting) (brackets and internal quotation marks omitted).

Again, it's unclear how well these modern developments serve *Sullivan*'s original purposes. Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted. And the very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.

"In a country like ours, where the people ... govern themselves through their elected representatives, adequate information about their government is of transcendent importance." *Dun & Bradstreet*, 472 U.S. at 767, 105 S.Ct. 2939 (White, J., concurring in judgment). Without doubt, *Sullivan* sought to promote that goal as the Court saw the world in 1964. Departures from the Constitution's original public meaning are usually the product of good intentions. But less clear is how well *Sullivan* and all its various extensions serve its intended goals in today's changed world. Many Members of this Court have raised questions about various aspects of *Sullivan*. See, *e.g., McKee*, 586 U. S., at ——, 139 S.Ct. at 676 (opinion of THOMAS, J.); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz*, 418 U.S. at 370, 94 S.Ct. 2997 (White, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) ***2430** (Harlan, J., dissenting); *id.*, at 78, 91 S.Ct. 1811 (Marshall, J., dissenting); *Rosenblatt v. Baer*, 383 U.S. 75, 92–93, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring); see also Kagan, 18 L. & Soc. Inquiry, at 205, 209; Lewis & Ottley, *New York Times* v. *Sullivan* at 50, 64 De Paul L. Rev. 1, 35–36 (2014) (collecting statements from Justice Scalia). Justice THOMAS does so again today. In adding my voice to theirs, I do not profess any sure answers. I am not even certain of all the questions we should be asking. But given the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.

All Citations

141 S.Ct. 2424 (Mem), 210 L.Ed.2d 991, 21 Cal. Daily Op. Serv. 6614, 2021 Daily Journal D.A.R. 6822, 29 Fla. L. Weekly Fed. S 9

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Not Followed on State Law Grounds People v. Salazar, Colo.App., November 2, 2023

143 S.Ct. 2106
Supreme Court of the United States.

Billy Raymond COUNTERMAN, Petitioner
v.
COLORADO

No. 22-138
|
Argued April 19, 2023
|
Decided June 27, 2023

Synopsis
Background: Defendant was convicted in the Colorado District Court, Arapahoe County, F. Stephen Collins, J., of stalking (serious emotional distress) and harassment. Defendant appealed. The Colorado Court of Appeals, 497 P.3d 1039, affirmed, and the Colorado Supreme Court denied certiorari review. The United States Supreme Court granted defendant's certiorari petition.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] the First Amendment requires proof in a criminal action regarding a true threat that the defendant had some subjective understanding of the threatening nature of his statements; abrogating *People v. Cross*, 127 P. 3d 71; *In re R. D.*, 464 P. 3d 717; and

[2] recklessness is the appropriate mens rea, consistent with the First Amendment, for a criminal conviction for communications constituting a true threat.

Vacated and remanded.

Chief Justice Roberts, Justice Alito, Justice Kavanaugh, and Justice Jackson joined the opinion of the Court.

Justice Sotomayor filed an opinion concurring in part and concurring in the judgment which Justice Gorsuch joined in part.

Justice Thomas filed a dissenting opinion.

Justice Barrett filed a dissenting opinion which Justice Thomas joined.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (32)

[1]	**Constitutional Law**True threats

	True threats of violence lie outside the bounds of the First Amendment's protection. U.S. Const. Amend. 1. 97 Cases that cite this headnote

[2]	**Constitutional Law**True threats
	A statement can count as a true threat of violence, outside the bounds of the First Amendment, based solely on its objective content. U.S. Const. Amend. 1. 41 Cases that cite this headnote

[3]	**Constitutional Law**Incitement or encouragement of crime or lawless action
	First Amendment permits restrictions on incitement, or statements directed at producing imminent lawless action and likely to do so. U.S. Const. Amend. 1. 11 Cases that cite this headnote

[4]	**Constitutional Law**Defamation
	First Amendment permits restrictions on defamation, or false statements of fact harming another's reputation. U.S. Const. Amend. 1. 13 Cases that cite this headnote

[5]	**Constitutional Law**Obscenity in General

	First Amendment permits restrictions on obscenity, or valueless material appealing to the prurient interest and describing sexual conduct in a patently offensive way. U.S. Const. Amend. 1. 2 Cases that cite this headnote

[6]	**Constitutional Law**Particular Issues and Applications in General
	Categories of speech historically unprotected by the First Amendment have been described as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in their proscription. U.S. Const. Amend. 1. 9 Cases that cite this headnote

[7]	**Constitutional Law**True threats
	"True threats" historically unprotected by the First Amendment are serious expressions conveying that a speaker means to commit an act of unlawful violence. U.S. Const. Amend. 1. 106 Cases that cite this headnote

[8]	**Threats, Stalking, and Harassment**Intent; knowledge
	Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat. 14 Cases that cite this headnote

[9]	**Threats, Stalking, and Harassment**Intent; knowledge **Threats, Stalking, and Harassment**Apprehension of harm
	The existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end. 34 Cases that cite this headnote

[10]	**Constitutional Law**True threats
	When the statement is understood as a true threat, all the harms that have long made threats unprotected by the First Amendment naturally follow. U.S. Const. Amend. 1. 56 Cases that cite this headnote

[11]	**Constitutional Law**True threats
	"True threats," which are outside First Amendment protection, subject individuals to fear of violence and to the many kinds of disruption that fear engenders. U.S. Const. Amend. 1. 48 Cases that cite this headnote

[12]	**Constitutional Law**Freedom of Speech, Expression, and Press
	Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. U.S. Const. Amend. 1. 20 Cases that cite this headnote

[13]	**Constitutional Law**Defamation
	False and defamatory statements of fact have no First Amendment value. U.S. Const. Amend. 1. 9 Cases that cite this headnote

[14]	**Libel and Slander**Criticism and comment on public matters and publication of news
	A public figure cannot recover for the injury a false and defamatory statement causes unless the speaker acted with knowledge that it was false or with reckless disregard of whether it was false or not; that rule is based on fear of "self-censorship," or the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. U.S. Const. Amend. 1. 3 Cases that cite this headnote

[15]	**Constitutional Law**Defamation
	The First Amendment requires the protection of some falsehood from a defamation claim in order to protect speech that matters. U.S. Const. Amend. 1. 5 Cases that cite this headnote

[16]	**Constitutional Law**Incitement or encouragement of crime or lawless action
	Like threats, incitement inheres in particular words used in particular contexts: its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. U.S. Const. Amend. 1. 5 Cases that cite this headnote

[17]	**Constitutional Law**Particular Issues and Applications in General **Constitutional Law**Incitement or encouragement of crime or lawless action
	The First Amendment precludes punishment for incitement, whether civil or criminal, unless the speaker's words were intended, not just likely, to produce imminent disorder. U.S. Const. Amend. 1. 13 Cases that cite this headnote

[18]	**Constitutional Law**Incitement or encouragement of crime or lawless action
	Mere advocacy of illegal acts is a kind of speech falling within the First Amendment's core. U.S. Const. Amend. 1. 8 Cases that cite this headnote

[19]	**Constitutional Law**Obscenity in General
	The First Amendment demands proof of a defendant's mindset to make out an obscenity case. U.S. Const. Amend. 1. 2 Cases that cite this headnote

[20]	**Obscenity**Definitions; Test for Obscenity
	Obscenity is obscenity, whatever the purveyor's mental state.

[21]	**Obscenity**Knowledge or intent

	Punishment of obscenity depends on a vital element of scienter, often described as the defendant's awareness of the character and nature of the materials he distributed. 1 Case that cites this headnote

[22]	**Constitutional Law**Obscenity in General
	While obscene speech and writings are not protected, punishing their distribution without regard to scienter would have the collateral effect of inhibiting expression protected by the First Amendment; given the ambiguities inherent in the definition of obscenity, the First Amendment requires proof of scienter to avoid the hazard of self-censorship. U.S. Const. Amend. 1. 4 Cases that cite this headnote

[23]	**Constitutional Law**True threats
	First Amendment requires proof in a criminal action regarding a true threat that the defendant had some subjective understanding of the threatening nature of his statements; abrogating *People v. Cross,* 127 P. 3d 71, and *In re R. D.*, 464 P. 3d 717. U.S. Const. Amend. 1. 57 Cases that cite this headnote

[24]	**Criminal Law**Criminal Intent and Malice
	Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. 9 Cases that cite this headnote

[25]	**Criminal Law**Criminal Intent and Malice

	A person acts "purposefully," for mens rea purposes, when he consciously desires a result. 3 Cases that cite this headnote

[26]	**Criminal Law**Criminal Intent and Malice
	A person acts "knowingly," for mens rea purposes, when he is aware that a result is practically certain to follow. 6 Cases that cite this headnote

[27]	**Criminal Law**Negligence; recklessness
	A person acts "recklessly," in the most common mens rea formulation, when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another; that standard involves insufficient concern with risk, rather than awareness of impending harm. 33 Cases that cite this headnote

[28]	**Criminal Law**Negligence; recklessness
	"Recklessness," as mens rea, is morally culpable conduct, involving a deliberate decision to endanger another. 13 Cases that cite this headnote

[29]	**Threats, Stalking, and Harassment**Intent; knowledge

	In the threats context, "recklessness" means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway. 71 Cases that cite this headnote

[30]	**Criminal Law**Negligence; recklessness
	For mens rea purposes, a person acts "negligently" if he is not but should be aware of a substantial risk. 3 Cases that cite this headnote

[31]	**Constitutional Law**True threats **Threats, Stalking, and Harassment**Intent; knowledge
	Recklessness is the appropriate mens rea, consistent with the First Amendment, for a criminal conviction for communications constituting a true threat; the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence, but need not prove any more demanding form of subjective intent to threaten another. U.S. Const. Amend. 1. 142 Cases that cite this headnote

[32]	**Constitutional Law**Stalking **Threats, Stalking, and Harassment**Intent; knowledge

	To convict defendant under Colorado stalking statute prohibiting communication causing serious emotional distress, the State not only had to show only that a reasonable person would understand defendant's statements as threats, but also had to show awareness on his part that the statements could be understood that way in order to satisfy the recklessness mens rea required by the First Amendment. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 18-3-602(1)(c). 23 Cases that cite this headnote

****2109** *Syllabus*[*]

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. did not respond. In fact, she tried repeatedly to block him, but each time, Counterman created a new Facebook account and resumed contacting C. W. Several of his messages envisaged violent harm befalling her. Counterman's messages put C. W. in fear and upended her daily existence: C. W. stopped walking alone, declined social engagements, and canceled some of her performances. C. W. eventually contacted the authorities. The State charged Counterman under a Colorado statute making it unlawful to "[r]epeatedly ... make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c). Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review.

Held: The State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness. Pp. 2113 - 21191.

(a) The First Amendment permits restrictions upon the content of speech in a few limited areas. Among these historic and traditional categories of unprotected expression is true threats. True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535. The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the receiving end. *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1. Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. That kind of "strategic protection" features in this Court's precedent concerning the most prominent categories of unprotected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789. With regard to defamation, a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686. The same idea arises in the law respecting obscenity and incitement to unlawful conduct. See, *e.g.*, *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303; *Hamling v. United States*, 418 U.S. 87, 122–123, 94 S.Ct. 2887, 41 L.Ed.2d 590. And that same reasoning counsels in favor of requiring a subjective element in a true-threats case. A speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats. Insistence on a subjective element in unprotected-speech cases, no doubt, has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. But a subjective standard is still required for true threats, lest prosecutions chill too much protected, non-threatening expression. Pp. 2113 - 211.

(b) In this context, a recklessness standard—*i.e.,* a showing that a person "consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another," *Voisine v. United States*, 579 U.S. 686, 691, 136 S.Ct. 2272, 195 L.Ed.2d 736—is the appropriate *mens rea*. Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression. Using a recklessness standard also fits with this Court's defamation decisions, which adopted a recklessness rule more than a half-century ago. The Court sees no reason to offer greater insulation to threats than to defamation. While this Court's incitement decisions demand more, the reason for that demand—the need to protect from legal sanction the political advocacy a hair's-breadth away from incitement—is not present here. For true threats, recklessness strikes the right balance, offering "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001. Pp. 2116 - 2119.

(c) The State prosecuted Counterman in accordance with an objective standard and did not have to show any awareness on Counterman's part of his statements' threatening character. That is a violation of the First Amendment. P. 2119.

497 P.3d 1039, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, KAVANAUGH, and JACKSON, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined as to Parts I, II, III–A, and III–B. THOMAS, J., filed a dissenting opinion. BARRETT, J., filed a dissenting opinion, in which THOMAS, J., joined.

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Opinion

Justice KAGAN delivered the opinion of the Court.

***69 **2111** True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show ****2112** that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

***70** I

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. 3 App. 465. Others

suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." 497 P.3d 1039, 1044 (Colo. App. 2021). And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." *Ibid.* "Staying in cyber life is going to kill you." *Ibid.* "You're not being good for human relations. Die." *Ibid.*

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "threat[ening her] life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." 2 App. 177, 181, 193. As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. *Id.*, at 200; see *id.*, at 194–198. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. See *id.*, at 182–183, 199, 201–206, 238–239. Eventually, C. W. decided that she had to contact the authorities. *Id.*, at 184.

Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly ... make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c) (2022). The only ***71** evidence the State proposed to introduce at trial were his Facebook messages.[1]

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. *In re R. D.*, 464 P.3d 717, 731, n. 21 (Colo. 2020). The court decided, after "consider[ing] the totality of the circumstances," that Counterman's statements "r[o]se to the level of a true threat." 497 P.3d at 1045. Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the ****2113** jury, which found Counterman guilty as charged.

The Colorado Court of Appeals affirmed. Counterman had urged the court to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements. Relying on its precedent, the court turned the request down: It "decline[d] today to say that a speaker's subjective intent to threaten is necessary" under the First Amendment to procure a conviction for threatening communications. *Id.*, at 1046 (quoting ***72** *R. D.*, 464 P.3d at 731, n. 21). Using the established objective standard, the court then approved the trial court's ruling that Counterman's messages were "true threats" and so were not protected by the First Amendment. 497 P.3d at 1050. The Colorado Supreme Court denied review.

Courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, what *mens rea* standard is sufficient. We therefore granted certiorari. 598 U. S. ——, 143 S.Ct. 644, 214 L.Ed.2d 382 (2023).

II

[1] [2]True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.[2] Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill ***73** protected, non-threatening speech. Counterman's view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection —and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.

A

[3] [4] [5] [6]"From 1791 to the present," the First Amendment has "permitted restrictions ****2114** upon the content of speech in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). These "historic and traditional categories" are "long familiar to the bar" and perhaps, too, the general public. *Ibid.* One is incitement—statements "directed [at] producing imminent lawless action," and likely to do so. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*). Another is defamation—false statements of fact harming another's reputation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Still a third is obscenity—valueless material "appeal[ing] to the prurient interest" and describing "sexual conduct" in "a patently offensive way." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). This Court has "often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is ***74** clearly outweighed by the social interest" in their proscription. *Stevens*, 559 U.S. at 470, 130 S.Ct. 1577 (internal quotation marks omitted; emphasis deleted).

[7] [8] [9] [10] [11]"True threats" of violence is another historically unprotected category of communications. *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); see *United States v. Alvarez*, 567 U.S. 709, 717–718, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). The "true" in that term distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*). True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Black*, 538 U.S. at 359, 123 S.Ct. 1536. Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. See *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the other end. *Ibid.* When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to "fear of violence" and to the many kinds of "disruption that fear engenders." *Black*, 538 U.S. at 360, 123 S.Ct. 1536 (internal quotation marks omitted). The facts of this case well illustrate how.[3]

***75** **[12]**Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A ****2115** speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. *Gertz*, 418 U.S. at 340, 94 S.Ct. 2997. And an important tool to prevent that outcome—to stop people from steering "wide[ ] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens "the hazard of self-censorship" by "compensat[ing]" for the law's uncertainties. *Mishkin v. New York*, 383 U.S. 502, 511, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966). Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a *mens rea* requirement "provide[s] 'breathing room' for more valuable speech." *Alvarez*, 567 U.S. at 733, 132 S.Ct. 2537 (BREYER, J., concurring in judgment).

[13] [14] [15]That kind of "strategic protection" features in our precedent concerning the most prominent categories of historically unprotected speech. *Gertz*, 418 U.S. at 342, 94 S.Ct. 2997. Defamation ***76** is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." *Id.*, at 340, 94 S.Ct. 2997; see *Alvarez*, 567 U.S. at 718–719, 132 S.Ct. 2537 (plurality opinion). Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); see *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (using the same standard for criminal libel). That rule is based on fear of "self-censorship"—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. *Sullivan*, 376 U.S. at 279, 84 S.Ct. 710. The First Amendment, we have concluded, "requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341, 94 S.Ct. 2997.

[16] [17] [18] [19] [20] [21] [22]The same idea arises in the law respecting obscenity and incitement to unlawful conduct. Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*); see *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–929, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). That rule helps prevent a law from deterring "mere advocacy" of illegal acts—a kind of speech falling within the First Amendment's core. *Brandenburg*, 395 U.S. at 449, 89 S.Ct. 1827. And for a similar reason, the First Amendment demands proof of a defendant's ****2116** mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor's mental state. But we have repeatedly recognized that punishment depends on a "vital element of scienter"—often described as the defendant's awareness of "the character ***77** and nature" of the materials he distributed. *Hamling v. United States*, 418 U.S. 87, 122–123, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); see *Elonis*, 575 U.S. at 739, 135 S.Ct. 2001 (reiterating *Hamling*). The rationale should by now be familiar. Yes, "obscene speech and writings are not protected." *Smith v. California*, 361 U.S. 147, 152, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). But punishing their distribution without regard to scienter would "have the collateral effect of inhibiting" protected expression. *Id.*, at 151, 80 S.Ct. 215. Given "the ambiguities inherent in the definition of obscenity," the First Amendment "requires proof of scienter to avoid the hazard of self-censorship." *Mishkin*, 383 U.S. at 511, 86 S.Ct. 958.[4]

[23]The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer ***78** "wide[ ] of the unlawful zone." *Speiser*, 357 U.S. at 526, 78 S.Ct. 1332. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only political hyperbole. See *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats "a wide berth." *Id.*, at 47, 95 S.Ct. 2091 (concurring opinion). And so use of that standard would discourage the "uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.*, at 48, 95 S.Ct. 2091 (quoting *Sullivan*, 376 U.S. at 270, 84 S.Ct. 710).

****2117** The reasoning—and indeed some of the words—came straight from this Court's decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

B

[24] [25] [26] [27] [28] [29] [30]The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest ***79** to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats. *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Next down, though not often distinguished from purpose, is knowledge. *Ibid.* A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical certainty that others will take his words as threats. *Ibid.* (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Voisine v. United States*, 579 U.S. 686, 691, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden* v. *United States*, 593 U. S. ——, ——, 141 S.Ct. 1817, 1823–1824, 210 L.Ed.2d 63 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *Voisine*, 579 U.S. at 694, 136 S.Ct. 2272. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." *Elonis*, 575 U.S. at 746, 135 S.Ct. 2001 (ALITO, J., concurring in part and dissenting in part).[5]

Among those standards, recklessness offers the right path forward. We have so far mostly focused on the constitutional

interest in free expression, and on the correlative need ***80** to take into account threat prosecutions' chilling effects. But the precedent we have relied on has always recognized—and insisted on "accommodat[ing]"—the "competing value[ ]" in regulating historically unprotected expression. *Gertz*, 418 U.S. at 348, 94 S.Ct. 2997. Here, as we have noted, that value lies in protecting against the profound harms, to both individuals and society, that attend true threats of violence—as evidenced in this case. See *supra*, at 2112, 2114 - 2115. The ****2118** injury associated with those statements caused history long ago to place them outside the First Amendment's bounds. When despite that judgment we require use of a subjective mental-state standard, we necessarily impede some true-threat prosecutions. And as we go up the subjective *mens rea* ladder, that imposition on States' capacity to counter true threats becomes still greater—and, presumably, with diminishing returns for protected expression. In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about *mens rea* (absent, as is usual, direct evidence). And of particular importance, we prevent States from convicting morally culpable defendants. See *Elonis*, 575 U.S. at 745, 135 S.Ct. 2001 (opinion of ALITO, J.). For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.

Using a recklessness standard also fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. See *supra*, at 2115 - 2116. In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required. *Gertz*, 418 U.S. at 342, 94 S.Ct. 2997. And we see no reason to offer greater insulation to threats than to defamation. See *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001 (opinion of ALITO, J.). The societal ***81** interests in countering the former are at least as high. And the protected speech near the borderline of true threats (even though sometimes political, as in *Rogers*) is, if anything, further from the First Amendment's central concerns than the chilled speech in *Sullivan*-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures).

It is true that our incitement decisions demand more—but the reason for that demand is not present here. When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. See *Hess*, 414 U.S. at 109, 94 S.Ct. 326; *supra*, at 2115 - 2116. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827. Such protests gave rise to all the cases in which the Court demanded a showing of intent. See *ibid.*; *Hess*, 414 U.S. at 106, 94 S.Ct. 326; *Claiborne Hardware Co.*, 458 U.S. at 888, 928, 102 S.Ct. 3409. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. See, *e.g.*, *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that protection is not needed here. For the most part, the speech on the other side of the true-threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are ***82** distinguishable; it is more that they compel the use of a distinct standard here.[6]

****2119** **[31]**That standard, again, is recklessness. It offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001 (opinion of ALITO, J.). As with any balance, something is lost on both sides: The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats. But in declining one of those two alternative paths, something more important is gained: Not "having it all"—because that is impossible—but having much of what is important on both sides of the scale.[7]

III

[32]It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See *supra*, at 2112 - 2113. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment.

***83** We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice GORSUCH joins as to Parts I, II, III–A, and III–B, concurring in part and concurring in the judgment.

When the government seeks to punish speech based on its content, the First Amendment typically imposes stringent requirements. This ensures that the government, even when pursuing compelling objectives, does not unduly burden our Nation's commitment to free expression. "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks omitted). These categories must be "well-defined and narrowly limited" in light of the serious consequences that flow from carving out speech from ordinary First Amendment protections. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

"True threats" are one such category, and there is a tradition of criminalizing threats stretching back centuries. This includes punishing single utterances based on the message conveyed. One paradigmatic example of this would be writing and mailing a letter threatening to assassinate ****2120** the President. Such laws are plainly important. There is no longstanding tradition, however, of punishing speech merely because it is unintentionally threatening. Instead, this Court's precedent, along with historical statutes and cases, reflect a commonsense understanding that threatening someone is an intentional act. As to what intent is needed, "[t]raditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." *Tison v. Arizona*, 481 U.S. 137, 150, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (internal ***84** quotation marks omitted). This does not require showing that an individual intends to carry through with the threat. But it does require showing that an individual desires to threaten or is substantially certain that her statements will be understood as threatening.

Today, unfortunately, the Court unnecessarily departs from this traditional understanding. That is not to say that I disagree with the Court on everything. Far from it. I join the Court's conclusion that some subjective *mens rea* is required in true-threats cases. I also agree that in this particular case, where petitioner was prosecuted for stalking that involved threatening statements, a *mens rea* of recklessness is amply sufficient. Where I part ways with the Court is that I would not reach the distinct and more complex question whether a *mens rea* of recklessness is sufficient for true-threats prosecutions generally. Further, requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines. I therefore respectfully concur only in part and in the judgment.

I

As an initial matter, I do not believe that this Court should reach the question whether recklessness is sufficient for true-threats prosecutions. A key conceptual distinction is helpful for explaining why. On the one hand, there are statements that are objectively threatening. In some cases, such statements can be punished because they fall into the unprotected category of "true threats." Yet such statements can also be punished if they fall into another category of unprotected speech, such as speech integral to criminal conduct. Or they might warrant less First Amendment protection for other reasons. On the other hand, there is the question of what constitutes the well-defined and longstanding category of unprotected true threats. It is with this latter question that I do not see the need to address ***85** whether a *mens rea* of recklessness is sufficient across the board.

First, the courts below did not address whether recklessness was sufficient to prosecute true threats and neither of the actual parties have advocated a recklessness standard. Colorado disclaimed the idea that recklessness was required, and petitioner asserted, correctly, that recklessness had not been raised under traditional principles of party presentation. The briefing on recklessness consists almost entirely of a few pages of an argument in the alternative at the tail end of an *amicus* brief filed by the United States.

Second, because petitioner was prosecuted for stalking involving threatening speech, this case does not require resort to the true-threats exemption to the First Amendment.

True-threats doctrine covers content-based prosecutions for single utterances of "pure speech," which need not even be communicated to the subject of the threat. *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*). The First Amendment would normally ****2121** place strict limits on such prosecutions. So there is typically a need to determine whether the speech in question falls within the traditionally unprotected category of true threats.

This is not such a case, however. Petitioner was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted, direct contact with C. W. 497 P.3d 1039, 1043 (Colo. App. 2021).[1] This kind of prosecution raises fewer First Amendment concerns for a variety of reasons. Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. See, *e.g.*, ***86** *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). The content of the repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of "utterly prosaic" communications. *Ante*, at 2111 - 2112. Repeatedly forcing intrusive communications directly into the personal life of "an unwilling recipient" also enjoys less protection. *Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). Finally, while there is considerable risk with a single intemperate utterance that a speaker will "accidentally or erroneously incur liability," *ante*, at 2115 (internal quotation marks and alterations omitted), that risk is far reduced with a course of repeated unwanted contact. Take, for example, petitioner continuously contacting C. W. despite her blocking him.

Given this, prosecuting threatening statements made as part of a course of stalking does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content.[2] True-threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception. I do not think that is accurate, given the lessened First Amendment concerns at issue. In such cases, recklessness is amply sufficient. And I would stop there. There is simply no need to reach out in this stalking case to determine whether anything more than recklessness is needed for punishing true threats generally.

II

Lest there be any doubt, the First Amendment stakes around the definition of "true threats" are high indeed. The First Amendment's mantle covers speech that is "vituperative, abusive and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399. "It might be tempting to dismiss" seemingly low-value speech "as unworthy of ... robust First Amendment protections." ***87** *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ——, ——, 141 S.Ct. 2038, 2048, 210 L.Ed.2d 403 (2021). Yet "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U.S. at 479, 130 S.Ct. 1577 (emphasis deleted). First Amendment vigilance is especially ****2122** important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it. In response, the Court has upheld First Amendment rights in the context of gruesome animal cruelty videos, *id.*, at 472, 130 S.Ct. 1577; cross burning, *Virginia v. Black*, 538 U.S. 343, 347–348, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); hateful rhetoric in protests of the funerals of fallen soldiers, *Snyder v. Phelps*, 562 U.S. 443, 448–449, 458, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); and computer-generated images of child pornography, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239–240, 258, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. Our society's discourse occurs more and more in "the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) (citation omitted). "Rapid changes in the dynamics of communication and information transmission" have led to equally rapid and ever-evolving changes "in what society accepts as proper behavior." *Ontario v. Quon*, 560 U.S. 746, 759, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010). Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience.

Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum. "[A] ***88** drunken joke" in bad taste can lead to criminal prosecution. *Perez* v. *Florida*, 580 U. S. 1187, 137 S.Ct. 853, 197 L.Ed.2d 480 (2017) (SOTOMAYOR, J., concurring in denial of certiorari). In the heat of the moment, someone may post an enraged comment under a news story about a controversial topic. Another person might

reply equally heatedly. In a Nation that has never been timid about its opinions, political or otherwise, this is commonplace.

Many of this Court's true-threats cases involve such charged political speech. See *Black*, 538 U.S. at 348–349, 123 S.Ct. 1536 (Ku Klux Klan rally); *Watts*, 394 U.S. at 707, 89 S.Ct. 1399 (antiwar protest); *Rogers v. United States*, 422 U.S. 35, 41–42, 47–48, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (MARSHALL, J., concurring) (opposition to Nixon's policies toward China). *Amici* give further contemporary examples of such speech from across the political spectrum. See, *e.g.*, Brief for American Civil Liberties Union et al. as *Amici Curiae* 24–29. Much of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening. And the ubiquity of such speech raises the possibility of highly discretionary enforcement.

The burdens of overcriminalization will fall hardest on certain groups. A jury's determination of when angry hyperbole crosses the line will depend on amorphous norms around language, which will vary greatly from one discursive community to another. Juries' decisions will reflect their "background knowledge and media consumption." *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. ——, ——, 138 S.Ct. 1876, 1890, 201 L.Ed.2d 201 (2018). "[S]peakers whose ideas or views occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely ****2123** to strike a reasonable person as threatening." *United States v. White*, 670 F.3d 498, 525 (C.A.4 2012) (FLOYD, J., concurring in part and dissenting in part). Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to being misinterpreted by outsiders. And unfortunately ***89** yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous. See, *e.g.*, A. Dunbar, C. Kubrin, & N. Scurich, The Threatening Nature of "Rap" Music, 22 J. Psychol. Pub. Pol'y & L. 281, 281–282, 288–290 (2016).

On the other hand, the internet has also made stalking and harassment even easier. Stalking can be devastating and dangerous. See Brief for First Amendment Scholars as *Amici Curiae* 7–8. Lives can be ruined, and in the most tragic instances, lives are lost. *Ibid.* Harassers can hide behind online anonymity while tormenting others. This happens in the context of intimate relationships and it happens with strangers. Overly constraining our society's ability to respond to stalking would come at a real cost. For the reasons given, however, a *mens rea* standard for true threats would not hinder stalking prosecutions. See *supra,* at 2120 - 2122.

Even isolated threatening speech can do real harm. Such speech not only disrupts lives, it can silence the speech of others who become afraid to speak out. A *mens rea* requirement would not, however, present an uncommon or insurmountable barrier to true-threats prosecutions.[3] Nonetheless, under such a standard, there will be some speech that some find threatening that will not and should not land anyone in prison.

III

These high First Amendment stakes are further reason for caution when delineating the boundaries of what constitutes a true threat. In undertaking that analysis, the Court and I part ways on the order of operations. The Court begins ***90** by defining true threats as all objectively threatening speech, entirely independent of whether the speaker intended to be threatening, *ante*, at 2114 - 2115, and the lead dissent agrees, *post*, at 2133 - 2134 (opinion of BARRETT, J.). The Court gets there by relying on this Court's interpretation of the word "threat" in a federal statute. *Ante*, at 2114 - 2115 (citing *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015)). The Court declares all such speech categorically unprotected, and then asks what "buffer zone" is needed in order to protect other, unthreatening speech. See *ante*, at 2113 - 2115.

Respectfully, I see the analysis differently. The first step in the analysis should instead be to ask about the scope of the well-defined and narrow category of "true threats" as a constitutional matter. This Court has already warned about the danger of creating new categories of "unprotected speech" exempt from the ordinary First Amendment framework for balancing our society's commitment to free expression with other interests. *Stevens*, 559 U.S. at 470, 130 S.Ct. 1577. If courts were at liberty to redefine what counts as a "threat" or "defamation" at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing ****2124** inadvertent threats as "true threats." This Court's prior definition of the word "threat" in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U.S. at 733, 135 S.Ct. 2001, does not tell us the scope of "true threats" for First Amendment purposes. *Elonis* itself made clear that it did "not ... consider any First Amendment issues." *Id.*, at 740, 135 S.Ct. 2001. Instead, a careful examination of

this Court's true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

A

A natural place to begin, one might think, would be with this Court's most recent decision involving the First Amendment, *mens rea*, and true threats. Yet to read the Court's ***91** decision, one would have little idea that in a seminal 2003 decision, this Court held that a threat conviction could not stand because of an insufficient *mens rea* requirement. See *Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535. *Black* plainly sets out a conception of true threats as including a *mens rea* requirement.

In *Black*, the Court confronted the constitutionality of a Virginia statute that prohibited burning a cross with intent to intimidate. Only part of the decision in *Black* is contained in a five-Justice majority opinion. The other relevant parts of the decision were written by the Members of that majority, who split into a four-Justice plurality and Justice Scalia's partial concurrence in judgment.

The majority explained why a prohibition on cross burning with intent to threaten was constitutional, beginning by defining the category of true threats. " 'True threats,' " the majority explained "encompass those statements where the speaker *means to* communicate a serious expression of an intent to commit an act of unlawful violence." *Id.*, at 359, 123 S.Ct. 1536 (emphasis added). However, "[t]he speaker need not actually intend to carry out the threat," as true threats also include intimidation alone. *Id.*, at 359–360, 123 S.Ct. 1536. And "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of* placing the victim in fear of bodily harm or death." *Id.*, at 360, 123 S.Ct. 1536 (emphasis added).

To the extent the Virginia statute covered intentionally threatening cross burning, it was thus tailored to cover only true threats. Critically, however, the statute also provided that " '[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate.' " *Id.*, at 348, 123 S.Ct. 1536. In other words, the all-important intent requirement could be satisfied by the mere conduct itself.

Consistent with the majority's definition of true threats, both the plurality and Justice Scalia agreed that the lack of a sufficient intent requirement meant that a conviction under ***92** the statute could not stand. *Id.*, at 367, 379, 123 S.Ct. 1536. For the plurality, the intent requirement was "the very reason why a State may ban cross burning" because it "distinguish[ed]" between the constitutionally unprotected true threat of burning a cross with intent to intimidate and "cross burning [as] a statement of ideology." *Id.*, at 365–366, 123 S.Ct. 1536.[4] For Justice Scalia, the "plurality ****2125** [was] correct in all of this." *Id.*, at 372, 123 S.Ct. 1536 (opinion concurring in part, concurring in judgment in part, and dissenting in part). There was a constitutional need for a distinction between cross burning " 'intended to intimidate' " and cross burning as " 'a statement of ideology.' " *Ibid.* The plurality and Justice Scalia only parted ways as to whether to hold that the statute was "facially invalid," *id.*, at 367, 123 S.Ct. 1536 (plurality opinion), or just that the jury instructions made it unclear "whether the jury has rendered its verdict (*as it must*)" with sufficient consideration of "intent to intimidate," *id.*, at 380, 123 S.Ct. 1536 (opinion of SCALIA, J.) (emphasis added).

The through-line is not hard to discern. First, unprotected true threats include a subjective *mens rea* requirement. *Id.*, at 360, 123 S.Ct. 1536 (majority opinion). Second, as a result, "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.*, at 362, 123 S.Ct. 1536 (majority opinion). Third, a conviction could not stand if it had categorically dispensed with that intent requirement, *id.*, at 365–366, 123 S.Ct. 1536 (plurality opinion), or if the jury had insufficiently considered "intent to intimidate," *id.*, at 380, 123 S.Ct. 1536 (opinion of SCALIA, J.).

***93** In sum, all five Justices in the *Black* majority agreed that a true-threats prosecution could not stand under the First Amendment without a sufficient subjective *mens rea* requirement.[5]

B

In defining true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id*., at 359, 123 S.Ct. 1536, the Court in *Black* echoed the traditional understanding of threats. Historically, threat crimes covered the same kind of subjectively threatening speech *Black* invoked.

In reviewing this history, it is also vital to keep in mind the nature of the inquiry. Removing speech from normal First Amendment scrutiny is a major shift in the balance of expression and public interest that our Constitution generally strikes. The inquiry is therefore whether there is a "long-settled tradition" of prohibiting inadvertently threatening speech. *Stevens*, 559 U.S. at 469, 130 S.Ct. 1577. None of the other opinions, however, identify a historical case that expressly raised the question ****2126** whether a subjective *mens rea* is required and held that it is not. That is a remarkable thing ***94** when one considers that the sample size consists of decisions from both sides of the Atlantic across centuries.

There was a long tradition of crimes for threatening another person in order to extort them. See, *e.g.*, 1796 N. J. Laws § 57, p. 108. Colorado and the United States admit that this core category of threat crimes required intent.

Even beyond that, a subjective *mens rea* remained a key component of threat offenses. An 18th-century English statute made it a capital offense to "knowingly send any letter ... threatening to kill or murder any of his Majesty's subject or subjects" or to threaten arson. 27 Geo. II, c. 15, in 21 Eng. Stat. at Large 184 (1754). A leading treatise explained that the statute was "levelled against such whose *intention* it was [to] obtain their object by creating terror in [the victim's] mind." 2 W. Russell & D. Davis, Crimes & Misdemeanors *1845 (emphasis added).

Consistent with this, defendants were convicted of "knowingly, wilfully, and feloniously" sending threatening letters. *Rex* v. *Tyler*, 1 Mood. 428, 168 Eng. Rep. 1330 (1835); *Rex* v. *Paddle*, Russ. & Ry. 484, 168 Eng. Rep. 910 (1822) (indictment for "knowingly, unlawfully, wickedly, and feloniously" sending a threatening letter); see also *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (1776) (indictment for "feloniously" sending a threatening letter). " '[K]nowingly and wilfully' effecting any result applies to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." 12 American and English Encyclopaedia of Law 522–524 (J. Merrill ed. 1890); see also J. Boag, Imperial Lexicon of the English Language 530 (1850) (defining "felonious" as "with the deliberate purpose to commit a crime").

The necessary *mens rea* could sometimes be inferred from the content of the letter, but could be rebutted by other evidence. See *King* v. *Philipps*, 6 East 464, 475, 102 Eng. Rep. 1365, 1369 (1805). Courts thus considered "the threat intended to be made by the prisoner" and "what he meant by ***95** what he had written" in determining whether he had violated the statute. *Regina* v. *Hill*, 5 Cox 233, 235 (Crim. Cas. 1851); see also *King* v. *John and Mary Hammond*, 1 Leach 444, 446, 168 Eng. Rep. 324, 325 (1787) (describing the offense of sending a threatening letter "to the party whose fears the threat it contains was calculated to alarm").

Threat laws in the United States were of a piece. Some state laws about threats expressly required maliciousness. See Me. Rev. Stat., Tit. 12, ch. 154, § 26 (1840); 1884 La. Acts No. 64, § 1, p. 86. Courts more generally emphasized the importance of a *mens rea* requirement. See, *e.g.*, *State v. Benedict*, 11 Vt. 236, 239 (1839). The North Carolina Supreme Court, for example, singled out threats as quintessential examples of offenses where it is "necessary" to prove the "*intent* of the particular letter." *State v. Murphy*, 84 N.C. 742, 743–744 (1881). And where state statutes may have been silent on intent to threaten, courts read such requirements in. See *Commonwealth v. Morton*, 140 Ky. 628, 631, 131 S.W. 506, 507–508 (1910) (letter must be "calculated to alarm, disturb, intimidate, or injure"); see also *State v. Stewart*, 90 Mo. 507, 512, 2 S.W. 790, 792 (1887) (jury instruction requiring that " 'defendant intended to threaten' ").

Leading treatises also explained the importance of *mens rea*. See 25 American and English Encyclopaedia of Law 1071 (C. Williams ed. 1894) (when there is a question as to "whether or not the letter contains the threat alleged, the intent is a question for the jury"); see also 2 R. ****2127** Anderson, Wharton's Criminal Law and Procedure § 803, pp. 659–660 (1957) (threats must be "intended to put the person threatened in fear of bodily harm"); 2 J. Bishop, Commentaries on the Criminal Law § 1201, p. 664 (6th ed. 1877) ("The intent, both under the unwritten law and under the statutes, must be evil").

Against that backdrop, I return to the inquiry at hand: whether there is a "long-settled" or "well-established" history of prosecuting inadvertently threatening speech. ***96** There is no line of cases or pattern of statutes affirmatively stating that an objective standard is sufficient.

C

Put together, *Black* and the history point to an intent requirement. When *Black* defined and analyzed true threats in terms of intent, there is no reason to think the Court used intent to mean anything less than its traditional definition of purpose or knowledge. See, *e.g.*, *Tison*, 481 U.S. at 150, 107 S.Ct. 1676. Nor would a recklessness standard play the necessary role of distinguishing between cross burning that is " 'intended to intimidate' ... and nonintimidating cross burning [that] cannot be prohibited." 538 U.S. at 372, 123 S.Ct. 1536 (opinion of SCALIA, J.). Given the violent history of the symbol, it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened. See *id.*, at 388–391, 123 S.Ct. 1536 (THOMAS, J., dissenting). Recklessness, which turns so heavily on an objective person standard, would not have been enough.

As to the history, it is true that over time courts have often used a wide variety of terms to describe mental states. See, *e.g.*, *Morissette v. United States*, 342 U.S. 246, 252, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Yet "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); see also *Tison*, 481 U.S. at 150, 107 S.Ct. 1676; *Carter v. United States*, 530 U.S. 255, 270, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (describing "feloniously" as equivalent to " 'intent' "). And at the very least, there is no well-settled history showing that it is enough for a defendant to be merely aware of some risk that their statements could be threatening. See, *e.g.*, *Borden* v. *United States*, 593 U. S. ——, ——, 141 S.Ct. 1817, 1824, 210 L.Ed.2d 63 (2021) (plurality opinion) (recklessness requires awareness of a level of risk that "need not come anywhere close to a likelihood"). ***97** The history is, instead, replete with the enduring and commonsense pairing of threats and intent.

D

The Court, eschewing *Black* and history, instead reaches its result based on the need for a "buffer zone" drawn by analogy to other categories of unprotected speech. *Ante*, at 2113. For the reasons above, I do not think we can leap ahead to this question. With that caveat, I agree with the Court that precedent in other areas of unprotected speech and concerns about chilling support a subjective *mens rea* requirement for true threats. Yet these same chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech. Indeed, in the concurrence by Justice Marshall that the Court invokes, *ante*, at 2116 - 2117, he advocated "requir[ing] proof that the speaker intended his statement to be taken as a threat," based on ****2128** concerns about punishing "pure speech." *Rogers*, 422 U.S. at 47–48, 95 S.Ct. 2091. In determining the appropriate *mens rea*, the Court analogizes to three categories of traditionally unprotected speech: incitement, obscenity, and defamation. None of these warrants expanding the narrow boundaries of true threats.

1

Speech inciting harm is the closest cousin to speech threatening harm. Both incitement and threats put other people at risk, and both "sprin[g] from [Justice] Holmes's 'clear and present danger' test." G. Blakey & B. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 1069 (2002). Like true threats, incitement's scope is defined in terms of both intention and effect, covering speech "[1] intended to produce, and [2] likely to produce, *imminent* disorder." *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*).

Despite their similar nature and source, the Court today draws a hard line between the two. Incitement requires ***98** " 'inten[t].' " *Ante*, at 2115 - 2116. While for threats, the speaker need only be "aware that others could regard his statements as threatening violence and delive[r] them anyway." *Ante*, at 2117 (internal quotation marks omitted). The Court justifies this

asymmetry by the idea "that incitement to disorder is commonly a hair's-breadth away from political 'advocacy,' " *ante*, at 2118, and the lead dissent says much the same, *post*, at 2136 - 2137 (opinion of BARRETT, J.). These opinions offer little basis for distinguishing threats on this ground, as this Court's own cases show time and again how true-threats prosecutions sweep in political speech. See *Black*, 538 U.S. at 348–349, 123 S.Ct. 1536; *Watts*, 394 U.S. at 707, 89 S.Ct. 1399 (antiwar protest); *Rogers*, 422 U.S. at 41–42, 95 S.Ct. 2091 (MARSHALL, J., concurring) (opposition to Nixon's policies toward China).[6] Not only that, but incitement itself is often only a hair's-breadth away from threats.

Take the seminal incitement case *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). During a civil rights boycott, NAACP leader Charles Evers, brother of the murdered civil rights hero Medgar Evers, gave a series of heated speeches. See *id.*, at 898–902, 102 S.Ct. 3409. He intoned that "boycott violators would be 'disciplined' " and that " '[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id.*, at 902, 102 S.Ct. 3409. The Court acknowledged that in this charged context, these speeches "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id.*, at 927, 102 S.Ct. 3409. Yet inflammatory and threatening as these speeches were, they did not constitute incitement. That was because ***99** "there [was] no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.*, at 929, 102 S.Ct. 3409. His speeches were thus not " 'directed to inciting or producing imminent lawless action' " and he had not "specifically intended to further an unlawful goal." *Id.*, at 925, n. 68, 928, 102 S.Ct. 3409.

****2129** Under a recklessness rule, *Claiborne* would have come out the other way. So long as Evers had some subjective awareness of some risk that a reasonable person could regard his statements as threatening, that would be sufficient. It would be quite troubling indeed to adopt a rule rendering this Court's admirable defense of the First Amendment wrongly decided. Nor is *Claiborne* the only example. The foundational incitement case, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), extended First Amendment protections to armed Klan members uttering racial slurs, a warning that "there might have to be some revengeance taken," and plans for a " 'four hundred thousand strong' " march in two cities. *Id.*, at 446, 89 S.Ct. 1827. Then, as now, there would be at least some risk that a reasonable resident of those cities could feel threatened.

These concrete examples illustrate a more general principle. Speech inciting imminent and dangerous unlawful activity will reasonably be threatening to those who would be harmed by that illegality. In all such cases, whether seminal decisions by this Court or guilty pleas that barely see the inside of a courtroom, the Court's decision effectively downgrades to recklessness the *mens rea* required for incitement of unlawful force; prosecutors could now simply charge such offenses as true threats. This is particularly worrisome because the standard for recklessness decreases the lower the "social utility" of the conduct. 1 W. LaFave, Substantive Criminal Law § 5.4(f) (3d ed. 2018). That is a troubling standard for juries in a polarized nation to apply in cases involving heated political speech. This collateral damage can be avoided, however, if intent to threaten is understood ***100** as part of a true threat, just like intent to incite is part of incitement.

2

While obscenity is a step further afield of true threats and incitement, examination of this Court's obscenity case law further supports an intent requirement for prosecutions of true threats.

The Constitution " 'requires proof of scienter' " in part " 'to compensate for the ambiguities inherent in the definition of obscenity.' " *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). This is in line with this Court's more general observation that "vagueness" of "content-based regulation of speech" is of "special concern" when it comes to "criminal statute[s]." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).[7]

Specifically, the Court has held that a "knowledge" *mens rea* is sufficient for obscenity: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123, 94 S.Ct. 2887. This ensures that "not innocent but *calculated purveyance* of filth ... is exorcised." *Id.*, at 122, 94 S.Ct. 2887 (internal quotation marks omitted). While the Court today asserts that this Court has "never determined the precise *mens rea*" for obscenity, *ante*, at 2119, n. 6, the Court has cited a knowledge standard approvingly for half a century, see *Hamling*, 418 U.S. at 123, 94 S.Ct. 2887; ****2130** *Elonis*, 575 U.S. at 739, 135 S.Ct. 2001.[8] ***101** Applying that standard to threats, the " 'calculated purveyance' of a threat would require that [a defendant] know the threatening nature of his communication." *Id.*, at 739, 135 S.Ct. 2001.

The considerations that drove this Court to approve a higher *mens rea* for obscenity apply here as well. With obscenity, the ambiguity comes partly from the reliance on " 'contemporary community standards' " to define what is obscene. *Hamling*, 418 U.S. at 129, 94 S.Ct. 2887. Such a standard is notoriously amorphous, and will change a great deal between communities and over time. The same chilling concerns apply to true threats. A recklessness standard based on what a reasonable person could find threatening will depend on ever-shifting community norms around language and when heated speech crosses the line from overly aggressive to criminal. See *supra*, at 2121 - 2123.[9]

3

Finally, the Court relies heavily upon this Court's framework for defamation. Specifically, the Court analogizes to the "reckless disregard" standard for defamation of public figures or punitive damages for certain claims involving private ***102** figures. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Yet while civil defamation may be "the best known and best theorized example" of unprotected speech, *ante*, at 2115, the same does not go for criminal prosecution of defamation. It is true that this Court in 1964 invalidated a prosecution for criminal libel for failing to apply the *Sullivan* standard, which covers "only those false statements made with a high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Yet the Court expressed strong skepticism of the very concept of criminal prosecutions for libel and noted the salutary trend of its "virtual disappearance." *Id.*, at 69–70, 85 S.Ct. 209. The Court approvingly cited the Model Penal Code's recommendation that criminal libel be limited to speech likely to cause a breach of the peace and "calculated" to do so. *Id.*, at 70, 85 S.Ct. 209. This is not a promising theoretical springboard ****2131** for determining the *mens rea* required to criminalize other speech.

If the Court were correct that the *Sullivan* standard is the appropriate analogy, however, then this standard should guide how to analyze recklessness in true-threats prosecutions. The generic formulation of recklessness requires that an individual disregard a relatively unspecified level of risk that the harm in question will occur. See *Borden*, 593 U. S., at ——, 141 S.Ct., at 1823–1824 (plurality opinion). Within that potentially broad range, *Sullivan* provides a more definite and demanding level of risk, reflecting the First Amendment concerns at stake. The Court has "made clear that the defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (internal quotation marks and ellipsis omitted). This makes sense. Allowing liability for awareness of a small chance that a story may be false would undermine the very shield *Sullivan* erects.

***103** For similar reasons, after today's ruling, future courts grappling with how to articulate the appropriate level of recklessness in true-threats cases would be well served to consult the *Sullivan* standard. The equivalent to *Sullivan* for true threats would require a high degree of awareness that a statement was probably threatening or serious doubts as to the threatening nature of the statement. This could avoid the chilling that would arise from a more amorphous and easily satisfied standard.

4

This Court's various frameworks for unprotected speech do not speak with one voice, as perhaps befits the First Amendment. The above survey does not, however, give reason to depart from the traditional understanding of true threats. To the contrary, this case law supports keeping true threats within their traditional bounds. Incitement similarly requires intent. The same chilling concerns that have led this Court to approve a knowledge requirement for obscenity are present with true threats. And to the extent the civil defamation context is relevant, at the very least, it points to a precise and demanding form of recklessness.[10]

***104** IV

Maintaining true threats doctrine within its traditional boundaries will guard against the overcriminalization of a wide range of political, artistic, and everyday speech based on its content alone. This does not mean that unintentionally threatening ****2132** communications are exempt from regulation, far from it. As explained above, there are far fewer First Amendment concerns with stalking laws that punish repeated, targeted, unwanted conduct and accompanying speech. For that reason, recklessness is quite sufficient. As to true threats, intent is neither an unusual nor an insurmountable bar. "[C]ourts and juries every day pass upon knowledge, belief and intent ... having before them no more than evidence of ... words and conduct, from which, in ordinary human experience, mental condition can be inferred." *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

* * *

I agree with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true-threats cases, and I also agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally. If that question is reached, however, the answer is that true threats encompass a narrow band of intentional threats. Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard. Our society has often concluded that an intent standard sets a proper balance between safety and the need for a guilty mind, even in cases that do not involve the First Amendment. Surely when the power of the State is called ***105** upon to imprison someone based on the content of their words alone, this standard cannot be considered excessive. Because I part ways with the Court on this score, I respectfully concur only in part and in the judgment.

Justice THOMAS, dissenting.

I join Justice BARRETT's dissent in full. I write separately to address the majority's surprising and misplaced reliance on *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In *New York Times*, this Court held that the First Amendment bars public figures from recovering damages for defamation unless they can show that the statement at issue was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280, 84 S.Ct. 710. Like the majority's decision today, "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee* v. *Cosby*, 586 U. S. ——, ——, 139 S.Ct. 675, 676, 203 L.Ed.2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). Instead of simply applying the First Amendment as it was understood at the time of the Founding, "the Court fashioned its own ' "federal rule[s]" ' by balancing the 'competing values at stake in defamation suits.' " *Ibid.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334, 348, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501–502, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (acknowledging that "the rule enunciated in the *New York Times* case" is "largely a judge-made rule of law," the "content" of which is "given meaning through the evolutionary process of common-law adjudication"). "The constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *McKee*, 586 U. S., at ——, 139 S.Ct., at 678 (opinion of THOMAS, J.). Thus, as I have previously noted, "[w]e should ***106** reconsider our jurisprudence in this area." *Id.*, at ——, 139 S.Ct., at 682; see also ****2133** *Berisha* v. *Lawson*, 594 U. S. ——, 141 S.Ct. 2424, 210 L.Ed.2d 991 (2021) (THOMAS, J., dissenting from denial of certiorari).

I am far from alone. Many Members of this Court have questioned the soundness of *New York Times* and its numerous extensions. See, *e.g.*, *Berisha*, 594 U. S., at —— – ——, 141 S.Ct., at 2428–2430 (GORSUCH, J., dissenting from denial of certiorari); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986) (BURGER, C. J., joined by REHNQUIST, J., dissenting from denial of certiorari); *Gertz*, 418 U.S. at 370, 94 S.Ct. 2997 (WHITE, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (HARLAN, J., dissenting); *id.*, at 78, 91 S.Ct. 1811 (MARSHALL, J., dissenting); *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (STEWART, J., concurring); see also E. Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993); J. Lewis & B. Ottley, *New York Times v. Sullivan* at 50, 64 DePaul L. Rev. 1, 35–36 (2014) (collecting statements from Justice SCALIA); cf. *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251–256 (CADC 2021) (SILBERMAN, J., dissenting in part) (questioning the doctrine). It is thus unfortunate that the majority

chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence.

Justice BARRETT, with whom Justice THOMAS joins, dissenting.

Billy Counterman was convicted under a Colorado law that prohibits true threats. As everyone agrees, the statute requires that the speaker understand the meaning of his words. *Ante*, at 2113, n. 2. The question is what more the First Amendment requires. Colorado maintains that an *objective* standard is enough—that is, the government must show that a reasonable person would regard the statement as a threat of violence. Counterman, however, argues that the First Amendment requires a *subjective* test—that is, the ***107** speaker himself must intend or know the threatening nature of the statement.

It should be easy to choose between these positions. True threats do not enjoy First Amendment protection, and nearly every other category of unprotected speech may be restricted using an objective standard. Nonetheless, the Court adopts a subjective standard, though not quite the one advanced by Counterman. The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. Because this unjustifiably grants true threats preferential treatment, I respectfully dissent.

I

Since the founding, the First Amendment has allowed the government to regulate certain "areas of speech" "because of their constitutionally proscribable content." *R.A.V. v. St. Paul*, 505 U.S. 377, 382–383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (emphasis deleted). This includes true threats, which are "serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); see also *R. A. V.*, 505 U.S. at 388, 112 S.Ct. 2538 ("[T]hreats of violence are outside the First Amendment"). True threats carry little value and impose great cost. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ("[A]ny benefit that may be derived from [true threats] is ****2134** clearly outweighed by the social interest in order and morality"). "[B]y their very utterance," true threats "inflict injury." *Ibid.* They provoke "the fear of violence," create "disruption," give rise to "the possibility that the threatened violence will occur"—and the list goes on. *Black*, 538 U.S. at 360, 123 S.Ct. 1536 (internal quotation marks omitted).[1]

***108** The nature of a true threat points to an objective test for determining the scope of First Amendment protection: Neither its "social value" nor its potential for "injury" depends on the speaker's subjective intent. *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. 766. They can relate, of course—a speaker who does not intend to threaten is less likely to utter a statement that could be taken that way. But the Constitution ultimately declines to protect true threats for objective reasons, not subjective ones. So an objective test "complements the explanation for excluding threats of violence from First Amendment protection in the first place." *United States v. Jeffries*, 692 F.3d 473, 480 (C.A.6 2012).

II

The Court agrees that "[t]he existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Ante*, at 2114. And it acknowledges that "[w]hen the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow." *Ibid.* Nonetheless, the Court holds Colorado's statute unconstitutional. Why? Because the Court installs a prophylactic buffer zone to avoid chilling protected speech—a buffer zone that protects true threats unless the speaker "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Ante*, at 2111 - 2112, 2113 - 21141. That reasoning is flawed.

A

The Court's first error is awarding true threats "pride of place among unprotected speech." *Elonis v. United States*, 575 U.S. 723, 767, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) (THOMAS, J., dissenting). We have ***109** held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the Court neglects certain cases and misreads others.

Start with fighting words—a category of unprotected speech that the Court skips past. Fighting words are "personally abusive epithets" that are "inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Under our precedent, legislatures may regulate fighting words even when the speaker does not intend to provoke the listener (or does not recklessly disregard that possibility). *Chaplinsky*, 315 U.S. at 572–573, 62 S.Ct. 766 (rejecting First Amendment challenge to a state law punishing "fighting words" according to a reasonable-person standard); *Cantwell v. Connecticut*, 310 U.S. 296, 309–310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (statements unprotected when they are "likely to provoke violence and disturbance of good order, even though no such eventuality be intended"). Instead, we ask only whether ****2135** "the ordinary citizen," using her "common knowledge," would reasonably understand the statement as a "direct personal insult." *Cohen*, 403 U.S. at 20, 91 S.Ct. 1780; see also *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

The Court similarly overlooks the category of "false, deceptive, or misleading" commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *In re R. M. J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) ("Truthful advertising ... is entitled to the protections of the First Amendment," but "[m]isleading advertising may be prohibited entirely"); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994) ("[F]alse, deceptive, or misleading commercial speech may be banned"). Here, too, our cases suggest that First Amendment protection depends on objective falsity rather than the speaker's intention. See *In re R. M. J.*, 455 U.S. at 202, 102 S.Ct. 929 ("[R]egulation—and imposition of discipline—are permissible where the particular advertising is *inherently likely to deceive* or where the record indicates that a ***110** particular form or method of advertising has *in fact been deceptive*" (emphasis added)); see also *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 250–253, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Thus, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading," without regard to whether the speaker knew that the recipient would be deceived or misled. *Zauderer*, 471 U.S. at 638, 105 S.Ct. 2265.

Or take obscenity, which we have long held is "not protected by the freedoms of speech and press." *Roth v. United States*, 354 U.S. 476, 481, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Speech qualifies as obscene if the " 'average person, applying contemporary community standards,' " would conclude that "the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The jury must also make an objective judgment about whether the speech "depicts or describes" sexual conduct "in a patently offensive way," and whether it "lacks serious literary, artistic, political, or scientific value." *Ibid.* The speaker's " 'belief as to the obscenity or non-obscenity of the material is irrelevant.' " *Hamling v. United States*, 418 U.S. 87, 120–121, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). So long as the defendant has "knowledge of the contents of the materials," her speech may be constitutionally regulated. *Id.*, at 123, 94 S.Ct. 2887. An objective, reasonable-person standard applies.

In an effort to bolster its position, the Court floats a different standard for obscenity laws, asserting that "the First Amendment demands proof of a defendant's mindset to make out an obscenity case." *Ante*, at 2116. By "mindset," the Court apparently means that the defendant must have some awareness that an average person would consider the materials obscene. But the Court draws this conclusion from cases rejecting a *strict liability* standard—for example, we have held that the proprietor of a bookstore cannot be liable for possessing an obscene book unless he knew what was in it. *Smith v. California*, 361 U.S. 147, 149, 155, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); ***111** *Mishkin v. New York*, 383 U.S. 502, 510–512, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); see also *Ginsberg v. New York*, 390 U.S. 629, 643–644, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).[2] Knowing ****2136** what the material depicts is not the same as knowing how the average person would react to it—just as there is an important difference between Counterman's knowledge of what his words meant and his knowledge of how they would be perceived. Though the Court conflates the two, our obscenity cases have repeatedly refused to require the latter as a matter of constitutional law. *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887; *Rosen v. United States*, 161 U.S. 29, 41–42, 16 S.Ct. 480, 40 L.Ed. 606 (1896). So obscenity doctrine does not help Counterman.

The Court leans hardest on defamation law, but its argument depends on a single, cherry-picked strand of the doctrine. Yes, *New York Times Co.* v. *Sullivan* requires public figures and public officials to show "actual malice" on a defamation claim, and we have defined "actual malice" as "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But that is not the full story. A private person need only satisfy an objective standard to recover actual damages for defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). And if the defamatory speech does not involve a matter of public concern, she may recover punitive damages with the same showing. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (plurality opinion). We have justified that distinction on the ground that public-figure defamation claims may deter "would-be critics of official conduct ... from voicing ***112** their criticism," which would "dampe[n] the vigor and limit the variety of public debate." *Sullivan*, 376 U.S. at 279, 84 S.Ct. 710. Not only that, but "the state interest in protecting" public figures is weaker, since they tend to "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." *Gertz*, 418 U.S. at 344, 94 S.Ct. 2997. So, despite what the Court says, *Sullivan* does not stand for the broad proposition that the First Amendment "demand[s] a subjective mental-state requirement." *Ante*, at 2114. Instead, it simply raises the bar for borderline unprotected speech with high social value (because of its proximity to public discourse) and low potential for injury (because public figures can engage in counterspeech).

Sullivan's rationale does not justify a heightened *mens rea* for true threats. Because true threats are not typically proximate to debate on matters of public concern, the Court's newly erected buffer zone does not serve the end of protecting heated political commentary. Nor can public figures use counterspeech in the public square to protect themselves from serious threats of physical violence. And perversely, private individuals now have less protection from true threats than from defamation—even though they presumably value their lives more than their reputations. See *Gertz*, 418 U.S. at 347–350, 94 S.Ct. 2997. The Court has therefore extended *Sullivan* in a way that makes no sense on *Sullivan*'s own terms.

I will give the Court this much: Speakers must specifically intend to incite violence before they lose First Amendment ****2137** protection. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (defining incitement as "advocacy ... directed to inciting or producing imminent lawless action and likely to incite or produce such action"); see also *Hess v. Indiana*, 414 U.S. 105, 108–109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*). Once more, however, our precedent itself explains the difference. Incitement, as a form of "advocacy," often arises in the political ***113** arena. See *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827 (Ku Klux Klan rally held to plan a " 'marc[h] on Congress' "); *Hess*, 414 U.S. at 106, 94 S.Ct. 326 (antiwar demonstration); *Abrams v. United States*, 250 U.S. 616, 620, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (pamphlets about the President's " 'shameful, cowardly silence about the intervention in Russia' "). A specific intent requirement helps draw the line between incitement and "political rhetoric lying at the core of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–927, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The Court does not contend that targeted threats and political commentary share a similarly close relationship.

In sum, our First Amendment precedent does not set a "baseline ban on an objective standard." *Ante*, at 2117. Precedent does more than allow an objective test for true threats; on balance, it affirmatively supports one.

B

The Court's analysis also gives short shrift to how an objective test works in practice. Two key features of true threats already guard against the risk of silencing protected speech. Thus, there is no need to go further and adopt the Court's heightened standard.

First, only a very narrow class of statements satisfies the definition of a true threat. To make a true threat, the speaker must express "an intent to commit *an act of unlawful violence*." *Black*, 538 U.S. at 359, 123 S.Ct. 1536 (emphasis added). Speech that is merely "offensive," " 'poorly chosen,' " or "unpopular" does not qualify. Brief for Petitioner 31, 36, 42. The statement must also threaten violence "to a particular individual or group of individuals"—not just in general. *Black*, 538 U.S. at 359, 123 S.Ct. 1536. These tight guardrails distinguish true threats from public-figure defamation, the model for the Court's rule. While defamatory statements can cover an infinite number of topics, true threats target one: unlawful violence.

Second, the statement must be deemed threatening by a reasonable listener who is familiar with the "entire factual ***114** context" in which the statement occurs. *State v. Taveras*, 342 Conn. 563, 572, 271 A.3d 123, 129 (2022). This inquiry captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange

in which the statement occurs.[3] Each consideration helps weed out protected speech from true threats.

Our decision in *Black* illustrates the point. There, the Court considered a Virginia law that prohibited cross burning ****2138** " 'with the intent of intimidating any person or group of persons.' " 538 U.S. at 348, 123 S.Ct. 1536. Notably, the statute included a presumption: " 'Any such burning of a cross shall be prima facie evidence of an intent to intimidate.' " *Ibid.* After three men were convicted under the statute, they challenged it as facially unconstitutional. We upheld the general prohibition on cross burning, concluding that the First Amendment allows the government to ban "a particular type of threat." *Id.*, at 362–363, 123 S.Ct. 1536. A plurality then went on to address the statutory presumption. While cross burning "may mean that a person is engaging in constitutionally proscribable intimidation," the plurality reasoned, the act is not monolithic. *Id.*, at 365, 123 S.Ct. 1536. Cross burning could be directed "at an individual" or "at a group of like-minded believers"; it could be done "on a neighbor's lawn" or "at a public rally"; it could be done with the property owner's "permission" or without it. *Id.*, at 366, 123 S.Ct. 1536. The presumption "blur[red] the line" between these different situations and "ignore[d] all of the contextual factors that are necessary to decide whether ***115** a particular cross burning" was covered by the statute or not.[4] *Id.*, at 365, 367, 123 S.Ct. 1536. Thus, the presumption was unconstitutionally overbroad.

The *Black* plurality's reasoning can be boiled down to the following insight: When context is ignored, true threats cannot be reliably distinguished from protected speech. The reverse also holds: When context is properly considered, constitutional concerns abate. See, *e.g.*, *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*) (concluding that a statement was "political hyperbole" instead of a true threat based on "context," "the expressly conditional nature of the statement," and the "reaction of the listeners").

One more point: Many States have long had statutes like Colorado's on the books. See Brief for Illinois et al. as *Amici Curiae* 16–17. Before we took this case, the vast majority of Courts of Appeals and state high courts had upheld these statutes as constitutional. So objective tests are effectively the status quo today, yet Counterman still struggles to identify past prosecutions that came close to infringing on protected speech. Tr. of Oral Arg. 28–30. The silence is telling.

C

So is the silence in the historical record. Since 1791, true threats have been excluded from the "speech" protected by the First Amendment. *R. A.V.*, 505 U.S. at 382–383, 388, 112 S.Ct. 2538. If Counterman could show that a subjective requirement has ***116** been inherent in the definition of "true threat" since the founding, he would have a compelling case. But Counterman cannot make that showing.

For starters, he produces no evidence directly addressing the meaning of the First Amendment—nothing from state ratifying conventions, political commentary, or even early debates about efforts to regulate ****2139** threats in ways that might threaten speech. That is not surprising at the federal level, because the Federal Government did not prohibit threats until the early 20th century. *Elonis*, 575 U.S. at 760, 135 S.Ct. 2001 (THOMAS, J., dissenting). Some States, however, both regulated threats and guaranteed the right to free speech in their own constitutions. *Id.*, at 760–761, 135 S.Ct. 2001. Yet even at the state level, there was apparently no discussion about the implications of these statutes for the constitutional right.

That void notwithstanding, the state threat statutes are the evidence on which Counterman seizes. He argues that they imposed a subjective *mens rea*, demonstrating that the founding generation thought that threats could be punished on no less. But as Justice THOMAS has already discussed in detail, this is incorrect. See *id.*, at 760–765, 135 S.Ct. 2001. Rather than a subjective *mens rea*, these statutes used an objective standard resembling Colorado's.

Even if they did require a heightened *mens rea*, though, these statutes would not carry the day for Counterman. The enactment of a statute against the backdrop of a free speech guarantee tends to show that the legislature thought the statute consistent with that guarantee. Thus, if the question were whether such statutes *violated* the First Amendment, their existence would be evidence to the contrary. But the question here is whether a subjective intent requirement is the constitutional floor. And because the legislature is always free to exceed the floor, the enactment of legislation does not necessarily reflect the legislature's view of the constitutional minimum.

***117** At the end of the day, then, the best historical case for Counterman does not add up to much. He is plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one.

D

Even if a subjective test had a historical pedigree, the Court's chosen standard of recklessness certainly does not. Where does recklessness come from? It was not raised by the parties. Only the Solicitor General noted this possibility—and briefly at that. Brief for United States as *Amicus Curiae* 28–31. Nor did the courts below address recklessness; indeed, very few courts (of the many that have taken up the question) have settled on recklessness as the constitutional floor for true threats. See, *e.g.*, *State v. Mrozinski*, 971 N.W.2d 233, 243–245 (Minn. 2022); *In re J. J. M.*, 265 A.3d 246, 269–270 (Pa. 2021). Still, the Court adopts recklessness as "the right path forward." *Ante*, at 2117. Its rationale is, at best, unclear.

The Court begins by acknowledging the " 'competing value[s]' " of "free expression" on one hand, and "profound harms ... to both individuals and society" on the other. *Ante*, at 2117. But why do these considerations point to recklessness? A knowledge or purpose standard would allow more free expression, so maybe we should go higher. See *ante*, at 2127 (SOTOMAYOR, J., concurring in part and concurring in judgment) ("chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech"). An objective standard would cause less harm to victims, so perhaps lower is better. The optimal balance strikes me as a question best left to the legislature, which could calibrate the *mens rea* to the circumstance—for example, higher for the criminal context and lower for the civil. See Brief for Illinois et al. as *Amici Curiae* 28–30 (States "have a range of policy ***118** reasons for using subjective standards for penalizing threats of ****2140** violence" and many "choose to require proof of a speaker's subjective mental state" in some situations but not others).

Nor does our First Amendment precedent buttress the Court's preferred standard. A recklessness requirement currently applies only to public-figure defamation claims. Incitement to violence calls for more. Fighting words, private-figure defamation, false commercial speech, and obscenity require less. I fail to see why, of all these categories of unprotected speech, public-figure defamation is the best analog for true threats. The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead "just right."

III

Some may find Colorado's statute harsh, and the Court's decision seems driven in no small part by the heavy hammer of criminal punishment. See *ante*, at 2125 - 2126; *ante*, at 2126 - 2127, 2130 - 2131 (opinion of SOTOMAYOR, J.). While an objective test is "a familiar feature of civil liability in tort law," the " 'conventional requirement for criminal conduct' " is " '*awareness* of some wrongdoing.' " *Elonis*, 575 U.S. at 737–738, 135 S.Ct. 2001. In keeping with this convention, we generally presume that "federal criminal statutes that are silent on the required mental state" nonetheless impose the "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.*, at 736, 135 S.Ct. 2001 (internal quotation marks omitted). That is why we rejected an objective standard for the federal threat prohibition, 18 U.S.C. § 875(c). 575 U.S. at 737–739, 135 S.Ct. 2001. It is "the threatening nature of the communication" that "makes the conduct 'wrongful' "; thus, the statute is best interpreted to require that the defendant be aware of the impact of his speech. *Id.*, at 737, 135 S.Ct. 2001.

But this case is about the scope of the First Amendment, not the interpretation of a criminal statute. Accordingly, ***119** the Court's holding affects the *civil* consequences for true threats just as much as it restricts criminal liability. And the civil context underscores the danger of adopting a *Sullivan*-style buffer zone for true threats.

Consider, for example, threat victims who seek restraining orders to protect themselves from their harassers. See, *e.g.*, *United States v. Elonis*, 841 F.3d 589, 593 (C.A.3 2016) (defendant's wife sought a restraining order after he wrote on Facebook, "I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts"). Civil orders can also keep individuals away from particular geographic areas. Imagine someone who threatens to bomb an airport, *State v. Johnston*, 156 Wash.2d 355, 358–359, 127 P.3d 707, 708–709 (2006), or "shoot up [a] courthous[e]," *State v. Draskovich*, 2017 S.D. 76, ¶3, 904 N.W.2d 759, 761. The speaker might well end up barred from the location in question—for good reason. Yet after today, such orders cannot be obtained without proof—not necessarily easy to secure—that the person who

issued the threat anticipated that it would elicit fear. See Tr. of Oral Arg. 92–93.

The government can also opt to counteract true threats by means of civil enforcement actions. For instance, 18 U.S.C. § 248 prohibits "threat[s] of force" against any person "obtaining or providing reproductive health services" or "seeking to exercise the First Amendment right of religious freedom at a place of religious worship." The statute imposes a range of civil penalties, and it allows enforcement suits by both private persons and government officials. See, *e.g.*, ****2141** *United States v. Dillard*, 795 F.3d 1191, 1196–1197 (C.A.10 2015) (Government brought § 248 action after defendant warned a health provider, "[y]ou will be checking under your car everyday—because maybe today is the day someone places an explosive under it"); *McCullen v. Coakley*, 573 U.S. 464, 491, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (noting that several States have similar laws). After today, these civil enforcement actions face a higher constitutional hurdle.

***120** In addition, employers and school administrators often discipline individuals who make true threats. Consider the student who was expelled after "draft[ing] two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend. *Doe v. Pulaski Cty. Special School Dist.*, 306 F.3d 616, 619 (C.A.8 2002) (en banc). Or the one who was suspended after " 'talking about taking a gun to school' to 'shoot everyone he hates.' " *D. J. M. ex rel. D.M. v. Hannibal Public School Dist. No. 60*, 647 F.3d 754, 758 (C.A.8 2011); *Lovell v. Poway Unified School District*, 90 F.3d 367, 369, 372–373 (C.A.9 1996) (similar); *Haughwout v. Tordenti*, 332 Conn. 559, 561–562, 211 A.3d 1, 3–4 (2019) (similar). True threats can also be expressed by a parent, a teacher, or an employee in another context altogether. See, *e.g.*, *Taveras*, 342 Conn. at 567–569, 578, 271 A.3d at 126–128, 133 (parent); *Smith v. New York City Dept. of Ed.*, 109 App.Div.3d 701, 702–703, 972 N.Y.S.2d 221, 222 (2013) (teacher); *Diggs v. St. Louis*, 613 S.W.3d 858, 862, 864 (Mo. App. 2020) (correctional officer).

Barring some reason why the speech receives lesser constitutional protection, *e.g.*, *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ——, —— – ——, 141 S.Ct. 2038, 2044–2045, 210 L.Ed.2d 403 (2021), the Court's new rule applies to all of these situations. That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on.

* * *

The bottom line is this: Counterman communicated true threats, which, "everyone agrees, lie outside the bounds of the First Amendment's protection." *Ante*, at 2113. He knew what the words meant. Those threats caused the victim to fear for her life, and they "upended her daily existence." ***121** *Ante*, at 2112. Nonetheless, the Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result. I respectfully dissent.

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Footnotes	
*	The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
*	Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.
1	The statute Counterman was charged with violating is titled a "stalking" statute and also prohibits "[r]epeatedly follow[ing], approach[ing], contact[ing], [or] plac[ing] under surveillance" another person. § 18–3–602(1)(c). But the State had no evidence, beyond what Counterman claimed, that he actually had followed or surveilled C. W. For example, C. W. had never noticed anything of that kind. So the prosecution based its case solely on Counterman's "[r]epeated[ ] ... communication[s]" with C. W. *Ibid.*

2	A preliminary clarification may be useful, concerning the difference between awareness of a communication's contents and awareness of its threatening nature. Everyone agrees, again, that the State must prove the former—and Colorado law appears to hold as much. See Colo. Rev. Stat. § 18–3–602(1)(c); Brief for Respondent 18. So, for example, if a defendant delivers a sealed envelope without knowing that a threatening letter is inside, he cannot be liable for the communication. So too (though this common example seems fairly preposterous) if a "foreigner, ignorant of the English language, who would not know the meaning of the words," somehow manages to convey an English-language threat. *Elonis v. United States*, 575 U.S. 723, 738, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) (internal quotation marks omitted). The question in this case arises when the defendant (unlike in those hypotheticals) understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for a true-threats prosecution to succeed?
3	The concurrence relies on *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), to argue that the category of true threats itself incorporates a *mens rea* element. See *post*, at 2123 - 2125, 2126 - 2127 (SOTOMAYOR, J., concurring in part and concurring in judgment). But that claim is based on a misreading. The statements the concurrence quotes merely reflect that the statute involved in the case required a showing of intent. *Black* did not address whether the First Amendment demands such a showing, or why it might do so. See *United States v. Jeffries*, 692 F.3d 473, 479–480 (C.A.6 2012) (SUTTON, J.); see also *post*, at 2137 - 2139, and n. 4 (BARRETT, J., dissenting) (explaining that *Black* concerned a different part of the statute, preventing consideration of contextual factors in assessing whether a statement was a threat).
4	The dissent, in urging an objective standard here, reads the obscenity decisions as requiring merely that the defendant know "what the material depicts" (as a speaker must know a communication's contents). *Post*, at 2136 (opinion of BARRETT, J.) (relying on *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887). But see the statements quoted above: That is not what they say. And indeed, this Court recently rejected the dissent's revisionist reading, explaining in detail—and in response to a near-identical argument—that the obscenity decisions demand awareness of "the *character* of [the materials,] not simply [their] contents." *Elonis*, 575 U.S. at 739–740, 135 S.Ct. 2001 (discussing *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887, and *Mishkin*, 383 U.S. at 510, 86 S.Ct. 958). The dissent's use of two other First Amendment categories—fighting words and false commercial speech—to support an objective test also falls flat. See *post*, at 2134 - 2135 (opinion of BARRETT, J.). This Court has not upheld a conviction under the fighting-words doctrine in 80 years. At the least, that doctrine is today a poor candidate for spinning off other First Amendment rules. False commercial speech is also a poor analog, though for different reasons. Put aside that the line of cases the dissent invokes has never been listed among the historically unprotected categories of speech. See, *e.g.*, *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); see *supra*, at 2113 - 2114. Yet more relevant, the Court has often noted that commercial speech is less vulnerable to chill than most other speech is. See, *e.g.*, *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 481, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). And it is the fear of chill that has led to state-of-mind requirements in the context of unprotected speech.
5	Just to complete the *mens rea* hierarchy, the last level is negligence—but that is an objective standard, of the kind we have just rejected. A person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. See *Borden*, 593 U. S., at ——, 141 S.Ct., at 1823–1824 (plurality opinion). That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature. See *Elonis*, 575 U.S. at 738, 135 S.Ct. 2001 ("Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability ... to negligence" (internal quotation marks omitted)).
6	Our obscenity decisions are of no help in this inquiry, because the Court has never determined the precise *mens rea* needed to impose punishment. In arguing to the contrary, the concurrence relies mainly on *Hamling*. *Post*, at 2129 - 2130 (opinion of SOTOMAYOR, J.). But if the dissent is wrong in saying that *Hamling* (and other obscenity decisions) allowed an objective inquiry, see *supra*, at 2116, n. 4, the concurrence is wrong in suggesting that it required use of a purpose or knowledge standard. As to the concurrence's claim, *Hamling* held only that a statute with that standard was "constitutionally sufficient." 418 U.S. at 123, 94 S.Ct. 2887. The decision said nothing about whether it was constitutionally necessary, or instead whether a recklessness standard would suffice as well.

7	The dissent accuses the Court of making a "Goldilocks judgment" in favoring a recklessness standard. *Post*, at 2140 (opinion of BARRETT, J.). But in law, as in life, there are worse things than being "just right."
1	The statute of conviction applies to someone who "[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person ... in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c) (2022).
2	For these reasons, stalking prosecutions that do not rely on the content of communications would raise even fewer First Amendment concerns.
3	Intent requirements are common, including for incitement that results in actual violence, not just the threat of it. See *infra*, at 2127 - 2129. For that reason there are longstanding frameworks for determining when someone is not guilty by reason of insanity, and when delusions do (and do not) defeat a showing of intent. See, *e.g.*, 1 W. LaFave, Substantive Criminal Law §§ 7.1(a), (b) (3d ed. 2018); 2 *id.*, § 9.2.
4	The lead dissent asserts that the *Black* plurality's decision was based on how the statute " 'ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning' was covered by the statute." *Post*, at 2138 (opinion of BARRETT, J.) (quoting 538 U.S. at 367, 123 S.Ct. 1536 (plurality opinion)). But some context is missing from this reading itself. The full sentence is "all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*." *Id.*, at 367, 123 S.Ct. 1536 (emphasis added). The plurality was thus concerned with context to the extent it was relevant to the *mens rea* requirement needed to render the statute constitutional. *Id.*, at 365–366, 123 S.Ct. 1536.
5	According to the Court today and the lead dissent, however, *Black* somehow managed not to say anything about the First Amendment *mens rea* requirement for true-threats prosecutions—while striking down a true-threat conviction under the First Amendment for an insufficient *mens rea* requirement. On this reading, *Black* only discussed intent because "the statute involved in the case required a showing of intent." *Ante*, at 2114, n. 3; *post*, at 2138, n. 4 (discussion of intent was "a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements"). This puzzling interpretation does not explain why an illusory *mens rea* requirement in a Virginia law would pose any First Amendment problems if the Amendment did not impose a *mens rea* requirement of this kind. After all, "[w]hy would the First Amendment care how a jury goes about finding an [intent] element that is a matter of indifference to the Amendment?" *United States v. Heineman*, 767 F.3d 970, 980 (C.A.10 2014). The obvious answer, from *Black*'s reasoning to its holding, is that such a *mens rea* requirement was necessary for the statute to target true threats.
6	Nor is this limited to decisions by this Court. Threats cases sweep in political speech. See, *e.g.*, *State v. Taylor*, 379 N.C. 589, 590, 866 S.E.2d 740, 744 (2021). Incitement cases can sweep in nonpolitical speech. See, *e.g.*, *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 264, n. 11, 267 (C.A.4 1997). And still other cases show how incitement and threats can often go hand in hand. See, *e.g.*, *State v. Carroll*, 456 N.J.Super. 520, 544–545, 196 A.3d 106, 120–121 (2018).
7	Analogously, the Court's civil defamation case law recognizes that heightened liability can require a heightened *mens rea*; even as to nonpublic figures, a higher standard must be met for punitive damages in certain cases. See, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

8	The Court has held, however, that recklessness is sufficient for child pornography. See *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). This Court has emphasized time and again how child pornography is "a special case" because "[t]he market for child pornography [is] 'intrinsically related' to the underlying abuse" and thus " 'an integral part of the production of such materials, an activity illegal throughout the Nation.' " *United States v. Stevens*, 559 U.S. 460, 471, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 759, 761, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)); see also *Osborne*, 495 U.S. at 110–111, 110 S.Ct. 1691. Child pornography, with its integral ties to separate criminal conduct, is not a strong analogue for threats, which can be fleeting statements in total isolation from any other criminality (though it is a stronger analogy to threats as part of an unlawful course of stalking). Yet the Court's decision today puts child pornography on a First Amendment par with overheated political speech or violent song lyrics.
9	There is a further safeguard in obscenity cases. Something is obscene if "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). An intent requirement can provide a similar safeguard for threats. As *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), explained, requiring intent distinguishes between speech intended to intimidate and speech intended to express a political statement. *Id.*, at 365–366, 123 S.Ct. 1536 (plurality opinion); *id.*, at 372, 123 S.Ct. 1536 (opinion of SCALIA, J.).
10	The lead dissent headlines its analysis by pointing to this Court's case law on "fighting words." *Post*, at 2134 - 2135 (opinion of BARRETT, J.). This is an unlikely candidate for a broader theory of the First Amendment. For "nearly three-quarters of a century ... the Court has never ... upheld a fighting words conviction" and "[t]he cumulative impact of [the Court's] decisions is to make it unlikely that a fighting words law could survive." E. Chemerinsky, The First Amendment 1094 (6th ed. 2019). It is not hard to see why such convictions would be unlikely to pass First Amendment muster; the leading case involved a Jehovah's Witness distributing literature who was arrested for breach of the peace for calling a public official a " 'damned Fascist.' " *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573–574, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Drawing upon a conviction like the one in *Chaplinksy* as the proper model for criminalizing political speech is proof itself of the serious risks with the lead dissent's approach. In any event, as to the question at hand, when such breach of the peace offenses involved threats, intent to threaten was required. See 2 R. Anderson, Wharton's Criminal Law and Procedure § 803, pp. 659–660 (1957).
1	Indeed, the Colorado Legislature considered these very harms when it enacted the statute at issue here. The statutory findings explain that stalking, harassment, and threats have "an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim." Colo. Rev. Stat. §§ 18–3–601(1)(f), 18–3–602(1) (2022). So the legislature passed the statute to "encourag[e] and authoriz[e] effective intervention" before the covered conduct could "escalate into behavior that has even more serious consequences." § 18–3–601(2).
2	The Court also cites *Elonis* v. *United States*, 575 U.S. 723, 732, 734, 135 S.Ct. 2001, 192 L.Ed.2d 1, which Counterman argues puts a "gloss" on obscenity doctrine, Tr. of Oral Arg. 6–7. While *Elonis* briefly discusses the necessary *mens rea* for a conviction under a federal obscenity statute, it does so only in dicta. 575 U.S. 723, 739–740, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). *Elonis* does not alter the doctrinal framework for assessing the constitutionality of obscenity laws: That case involves true threats, not obscenity, and it interprets a federal statute, not the Constitution.
3	Colorado's test provides a good example. Juries must apply the following nonexhaustive factors to determine whether a statement is a true threat: "(1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (*e.g.*, anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s)." *People in the Interest of R. D.*, 464 P.3d 717, 721–722 (Colo. 2020).

4	As Justice SOTOMAYOR emphasizes, *ante*, at 2124 - 2125, n. 4, the plurality said that context informs "whether a particular cross burning is *intended to intimidate*," 538 U.S. at 367, 123 S.Ct. 1536 (emphasis added). But this was a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements—the Virginia statute covered only threats made " 'with the intent of intimidating any person or group of persons.' " *Id.*, at 348, 123 S.Ct. 1536. At no point did the Court hold that the First Amendment demands specific intent; on the contrary, it recognized that a statement made "with the intent of placing the victim in fear of bodily harm or death" is "*a* type of true threat." *Id.*, at 360, 123 S.Ct. 1536 (emphasis added).

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146 S.Ct. 2356
Supreme Court of the United States.

Alan M. DERSHOWITZ
v.

CABLE NEWS NETWORK, INC.

No. 25–770
|
Decided June 29, 2026

Case below, 153 F.4th 1189.

Opinion

The petition for a writ of certiorari is denied.

Justice THOMAS, with whom Justice GORSUCH joins, dissenting from the denial of certiorari.

Alan Dershowitz sued respondent, a major news network, alleging that it defamed him. Because Dershowitz is a "public person," our precedents required him to prove not only the elements of common-law defamation, but also that the network acted with "actual malice." See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 327–328, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Predictably, Dershowitz did not prevail under that exacting standard, which this Court created in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Dershowitz now asks this Court to overrule *Sullivan* and related precedents.

The "actual malice" standard for public figures "bears 'no relation to the text, history, or structure of the Constitution.' " *Berisha v. Lawson*, 594 U. S. ——, ——, 141 S.Ct. 2424, 2425, 210 L.Ed.2d 991 (2021) (THOMAS, J., dissenting from denial of certiorari) (quoting *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (CADC 2021) (Silberman, J., dissenting); emphasis deleted); see also *Gertz*, 418 U.S., at 370–371, 380–381, 94 S.Ct. 2997 (White, J., dissenting); 153 F.4th 1189, 1206 (CA11 2025) (case below) (Lagoa, J., concurring). Instead, the founding generation believed that, if anything, public figures had stronger claims for damages when they were defamed. See *McKee v. Cosby*, 586 U.S. 1172, 1177, 139 S.Ct. 675, 203 L.Ed.2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). I and others have thus called for reconsideration of the actual-malice standard for public figures. See, *e.g.*, *Berisha*, 594 U. S., at ——, 141 S.Ct. at 2425 (GORSUCH, J., dissenting from denial of certiorari); *Tah*, 991 F.3d at 251 (opinion of Silberman, J.); *Gertz*, 418 U.S., at 370–371, 94 S.Ct. 2997 (opinion of White, J.). I would have granted certiorari to do so in this case.

All Citations

609 U.S. ----, 146 S.Ct. 2356 (Mem), 31 Fla. L. Weekly Fed. S 1076

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KeyCite Yellow Flag
Called into Doubt by Jones v. BuzzFeed, Inc., N.D.Ala., March 15, 2022

84 S.Ct. 710
Supreme Court of the United States

The NEW YORK TIMES COMPANY, Petitioner,
v.
L. B. SULLIVAN.
Ralph D. ABERNATHY et al., Petitioners,
v.
L. B. SULLIVAN.

Nos. 39, 40.
|
Argued Jan. 6 and 7, 1964.
|
Decided March 9, 1964.

Synopsis
A New York newspaper published an 'editorial' advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the Negro right-to-vote movement and the Negro student movement. An elected commissioner of the City of Montgomery, Alabama, brought a civil libel action against the publisher of the newspaper and against Negro and Alabama clergymen whose names appeared in the advertisement. The Circuit Court, Montgomery County, Alabama, entered a judgment on a verdict awarding $500,000 to the plaintiff and the defendants appealed. The Supreme Court of Alabama, 273 Ala. 656, 144 So.2d 25, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct, and that under the proper safeguards the evidence presented in the case was constitutionally insufficient to support the judgment for the plaintiff.

Reversed and remanded for further proceedings.

West Headnotes (29)

[1]	**Federal Courts**Particular Cases, Contexts, and Questions
	The Supreme Court granted certiorari in case involving the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct. U.S.C.A. Const.Amends. 1, 14. 20 Cases that cite this headnote

[2]	**Federal Courts**Review of state courts
	The contention of defendant, a foreign corporation, that assumption of jurisdiction over its corporate person by Alabama courts overreached territorial limits of due process clause was foreclosed from Supreme Court review by ruling of Alabama courts that defendant entered a general appearance in the action and thus waived its jurisdiction objection. U.S.C.A.Const. Amend. 14. 10 Cases that cite this headnote

[3]	**Constitutional Law**Applicability to Governmental or Private Conduct; State Action
	The proposition that Fourteenth Amendment is directed against state action and not private action is inapplicable in case presenting question of extent to which constitutional protections for speech and press limit a state's power to award damages in libel action brought by public official against critics of his official conduct; it matters not that state courts have applied state law in a civil action and that it is common law only, though supplemented by statute; the test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. U.S.C.A.Const. Amend. 14; Code of Ala., Tit. 7, §§ 908–917. 82 Cases that cite this headnote

[4]	**Constitutional Law**Public employees and officials

	If allegedly libelous statements criticizing official conduct of public officers would otherwise be constitutionally protected from state court judgment awarding damages, protection is not forfeited because they were published in the form of a paid advertisement, where the advertisement was not a "commercial" advertisement but was an "editorial" advertisement which communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives were matters of the highest public interest and concern. U.S.C.A.Const. Amends. 1, 14. 214 Cases that cite this headnote

[5]	**Constitutional Law**Defamation
	Libel can claim no talismanic immunity from constitutional limitations; it must be measured by standards that satisfy the First Amendment. U.S.C.A.Const. Amend. 1. 68 Cases that cite this headnote

[6]	**Constitutional Law**Matters of public concern
	Freedom of expression upon public questions is secured by the First Amendment. U.S.C.A.Const. Amend. 1. 88 Cases that cite this headnote

[7]	**Constitutional Law**Freedom of Speech, Expression, and Press

	The constitutional protections for speech and press were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people. U.S.C.A.Const. Amend. 1. 127 Cases that cite this headnote

[8]	**Constitutional Law**Political speech, beliefs, or activity in general
	The maintenance of opportunity for free political discussion to the end that government may be responsive to will of people and that changes may be obtained by lawful means is a fundamental principle of the constitutional system. U.S.C.A.Const. Amend. 1. 59 Cases that cite this headnote

[9]	**Constitutional Law**False reports against public employees and officials
	There is a national commitment to principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. U.S.C.A.Const. Amend. 1. 1152 Cases that cite this headnote

[10]	**Constitutional Law**False Statements in General

	The constitutional protections for speech and press do not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered; there is no exception for any test of truth, whether administered by judges, juries, or administrative officials, and especially not one that puts the burden of proving truth on the speaker. U.S.C.A.Const. Amend. 1. 54 Cases that cite this headnote

[11]	**Constitutional Law**False Statements in General
	Factual error affords no warrant for repressing speech that would otherwise be free; the same is true of injury to official reputation. U.S.C.A.Const. Amend. 1. 24 Cases that cite this headnote

[12]	**Constitutional Law**False reports against public employees and officials
	Criticism of official conduct of government officials, such as elected city commissioners, does not lose its constitutional protections for speech and press merely because it is effective criticism and hence diminishes their official reputations. U.S.C.A.Const. Amend. 1. 24 Cases that cite this headnote

[13]	**Constitutional Law**False reports against public employees and officials **Constitutional Law**Public employees and officials

	If neither factual error nor defamatory content suffices to remove constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. U.S.C.A.Const. Amend. 1. 71 Cases that cite this headnote

[14]	**Insurrection and Sedition**Offenses and prosecutions
	There is a broad consensus that the Sedition Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with First Amendment. Sedition Act of 1798, 1 Stat. 596; U.S.C.A.Const. Amend. 1. 47 Cases that cite this headnote

[15]	**Constitutional Law**First Amendment
	The Fourteenth Amendment made the First Amendment applicable to the states. U.S.C.A.Const. Amends. 1, 14. 110 Cases that cite this headnote

[16]	**Libel and Slander**Constitutional and statutory provisions
	What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. 32 Cases that cite this headnote

[17]	**Double Jeopardy**Civil or criminal nature

	There is no double jeopardy limitation applicable to civil lawsuits. 1 Case that cites this headnote

[18]	**Constitutional Law**Public employees and officials **Constitutional Law**Speech, press, assembly, and petition
	The Alabama rule of law that words published of and concerning a person are libelous per se if they tend to injure a person in his reputation and that this standard is met if words injure him in his public office or impute misconduct to him in such office and that public officer's reputation is affected by statements that reflect on agency of which he is in charge is inconsistent with First and Fourteenth Amendments, even though the rule allows defense of truth. U.S.C.A.Const. Amends. 1, 14. 149 Cases that cite this headnote

[19]	**Constitutional Law**Public employees and officials
	The constitutional protections for speech and press require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. U.S.C.A.Const. Amends. 1, 14. 4165 Cases that cite this headnote

[20]	**Constitutional Law**False reports against public employees and officials **Constitutional Law**Speech, press, assembly, and petition **Libel and Slander**Character and conduct of public officers and employees

A conditional privilege immunizing honest mistakes of fact in publication concerning official conduct is required by the First and Fourteenth Amendments. U.S.C.A.Const. Amends. 1, 14.

257 Cases that cite this headnote

[21] **Constitutional Law**Public employees and officials

The Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct. U.S.C.A.Const. Amends. 1, 14.

62 Cases that cite this headnote

[22] **Libel and Slander**Implied

The Alabama rule that malice is presumed where general damages are concerned in libel action by public official against critics of his official conduct is inconsistent with federal rule prohibiting public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that statement was made with actual malice.

1070 Cases that cite this headnote

[23] **Federal Courts**Particular cases

Where trial judge did not instruct jury in libel case to differentiate between general and punitive damages, and it was impossible to know, in view of the general verdict returned, whether the verdict was wholly an award of one or the other, the judgment would be reversed and the case remanded.

33 Cases that cite this headnote

[24]	**Federal Courts**Questions of fact, verdicts, and findings
	The Supreme Court's duty is not limited to elaboration of constitutional principles; the court must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. 12 Cases that cite this headnote

[25]	**Constitutional Law**Scope of inquiry in general **Federal Courts**Review of State Courts
	In cases where the line between speech unconditionally guaranteed and speech which may legitimately be regulated must be drawn, the rule is that the Supreme Court must examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the due process clause of the Fourteenth Amendment, protect; the Supreme Court must make an independent examination of the whole record so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression; the Seventh Amendment does not preclude such an examination by the court. U.S.C.A. Const.Amends. 1, 7, 14. 413 Cases that cite this headnote

[26]	**Federal Courts**Questions of fact, verdicts, and findings
	The Seventh Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law," is applicable to state cases coming to the Supreme Court; but its ban on reexamination of facts does not preclude the Supreme Court from determining whether governing rules of federal law have been properly applied to the facts. U.S.C.A. Const.Amend. 7. 9 Cases that cite this headnote

[27]	**Constitutional Law**Public employees and officials **Libel and Slander**Intent, malice, or good faith
	The evidence, in Alabama libel action by public official against critics of his official conduct, did not support finding of actual malice and hence did not constitutionally sustain judgment for public officer. U.S.C.A.Const. Amends. 1, 14. 459 Cases that cite this headnote

[28]	**Constitutional Law**Public employees and officials **Libel and Slander**Weight and Sufficiency
	The evidence, in Alabama libel action by public official against critics of his official conduct, was constitutionally defective in that it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" public officer. U.S.C.A.Const. Amends. 1, 14. 50 Cases that cite this headnote

[29]	**Constitutional Law**Speech, press, assembly, and petition **Libel and Slander**Criticism and comment on public matters and publication of news
	Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatement of fact in publication concerning official conduct, a defense of fair comment must also be afforded in libel case for honest expression of opinion based upon privileged, as well as true, statements of fact; both defenses are defeasible if the public official proves actual malice. U.S.C.A.Const. Amend. 14. 1593 Cases that cite this headnote

Attorneys and Law Firms

***255 **713** William P. Rogers and Samuel R. Pierce, Jr., New York City, for petitioner in No. 40.

Herbert Wechsler, New York City, for petitioners in No. 39.

M. Roland Nachman, Jr., Montgomery, Ala., for respondent.

Opinion

***256** Mr. Justice BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was 'Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.' He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960.[1] Entitled 'Heed Their Rising Voices,' the advertisement began by stating that 'As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.' It went on to charge that 'in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. * * *' Succeeding ***257** paragraphs purported to illustrate the 'wave of terror' by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their ****714** activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading 'We in the south who are struggling daily for dignity and freedom warmly endorse this appeal,' appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South,' and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:
Third paragraph:

'In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.'

Sixth paragraph:

'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have ***258** assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years. * * *'

Although neither of these statements mentions respondent by name, he contended that the word 'police' in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of 'ringing' the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.[2] As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement 'They have arrested (Dr. King) seven times' would be read as referring to him; he further contended that the 'They' who did the arresting would be equated with the 'They' who committed the other described acts and with the 'Southern violators.' Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with 'intimidation and violence,' bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not 'My ***259** Country, 'Tis of Thee.' Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on ****715** a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring' the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

***260** Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.[3] One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he 'would want to be associated with anybody who would be a party to such things that are stated in that ad,' and that he would not re-employ respondent if he believed 'that he allowed the Police Department to do the things that the paper say he did.' But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, 'We in the south * * * warmly endorse this appeal,' and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability ***261** Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it ****716** bore the endorsement of 'a number of people who are well known and whose reputation' he 'had no reason to question.' Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, s 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that

'we * * * are somewhat puzzled as to how you think the statements in any way reflect on you,' and 'you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.' Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with 'grave misconduct and * * * improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama.' When asked to explain why there had been a retraction for the Governor but not for respondent, the ***262** Secretary of the Times testified: 'We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman * * *.' On the other hand, he testified that he did not think that 'any of the language in there referred to Mr. Sullivan.'

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were 'libelous per se' and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made 'of and concerning' respondent. The jury was instructed that, because the statements were libelous per se, 'the law * * * implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.' An award of punitive damages—as distinguished from 'general' damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that 'mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages.' He refused to charge, however, that the jury must be 'convinced' of malice, in the sense of 'actual intent' to harm or 'gross negligence and recklessness,' to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' contention ***263** that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

****717** In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So.2d 25. It held that '(w)here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt,' they are 'libelous per se'; that 'the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff'; and that it was actionable without 'proof of pecuniary injury * * *, such injury being implied.' Id., at 673, 676, 144 So.2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made 'of and concerning' respondent, stating: 'We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.' Id., at 674—675, 144 So.2d at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' 'irresponsibility' in printing the advertisement while 'the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement'; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and 'the matter contained in the advertisement was equally false as to both parties'; and from the testimony of the Times' Secretary that, ***264** apart from the statement that the dining hall was padlocked, he thought the two paragraphs were 'substantially correct.' Id., at 686—687, 144 So.2d, at 50—51. The court reaffirmed a statement in an earlier opinion that 'There is no legal measure of damages in cases of this character.' Id., at 686, 144 So.2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that 'The First Amendment of the U.S. Constitution does not protect libelous publications' and 'The Fourteenth Amendment is directed against State action and not private action.' Id., at 676, 144 So.2d, at 40.

[1] [2] Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946, 83 S.Ct. 510, 9 L.Ed.2d 496. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[4] ****718** We ***265** further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

[3] We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, ss 908—917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See Ex parte Virginia, 100 U.S. 339, 346—347, 25 L.Ed. 676; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

[4] The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement. The argument relies on Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in Chrestensen reaffirmed the constitutional protection for 'the freedom of communicating ***266** information and disseminating opinion'; its holding was based upon the factual conclusions that the handbill was 'purely commercial advertising' and that the protest against official action had been added only to evade the ordinance.

The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See N.A.A.C.P. v. Button, 371 U.S. 415, 435, 83 S.Ct. 328, 9 L.Ed.2d 405. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205; cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584. Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013. ****719** To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.[5]

***267** II.

Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person * * * in his reputation' or to 'bring (him) into public contempt'; the trial court stated that the standard was met if the words are such as to 'injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust * * *.' The jury must find that the words were published 'of and concerning' the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. Alabama Ride Co. v. Vance, 235 Ala. 263, 178 So. 438 (1938); Johnson Publishing Co. v. Davis, 271 Ala. 474, 494—495, 124 So.2d 441, 457—458 (1960). His privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not

negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. Johnson Publishing Co. v. Davis, supra, 271 Ala., at 495, 124 So.2d, at 458.

***268** The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

[5] Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.[6] Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in Pennekamp v. Florida, 328 U.S. 331, 348—349, 66 S.Ct. 1029, 1038, 90 L.Ed. 1295, that 'when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants,' implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and 'liable to cause violence and disorder.' But the Court was careful to note that it 'retains and ****720** exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel'; for 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.' Id., at 263—264, 72 S.Ct. at 734, 96 L.Ed. 919 and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. Schenectady Union Pub. Co. v. Sweeney, 316 U.S. 642, 62 S.Ct. 1031, 86 L.Ed. 1727. ***269** In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. Like insurrection,[7] contempt,[8] advocacy of unlawful acts,[9] breach of the peace,[10] obscenity,[11] solicitation of legal business,[12] and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

[6] [7] [8] The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117. '(I)t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v. California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. ***270** The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v. Associated Press, 52 F.Supp. 362, 372 (D.C.S.D.N.Y.1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375—376, 47 S.Ct. 641, 648, 71 L.Ed. 1095, gave the principle its classic formulation:

'Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, ****721** hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

[9] Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131; ***271** De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

[10] Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U.S. 513, 525—526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' N.A.A.C.P. v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, the Court declared:
'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression ***272** are to have the 'breathing space' that they 'need * * * to survive,' N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:
'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The interest of the public here outweighs the interest of appellant ****722** or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate.'[13]

[11] [12] Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and ***273** reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. This is true even though the utterance contains 'half-truths' and 'misinformation.' Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 345, 66 S.Ct. 1029, 90 L.Ed. 1295. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546; Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' Craig v. Harney, supra, 331 U.S., at 376, 67 S.Ct., at 1255, 91 L.Ed. 1546, surely the same must be true of other government officials, such as elected city commissioners.[14] Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

[13] [14] If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 et seq.; Smith, Freedom's Fetters (1956), at 426, 431 and passim. That statute made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish * * * any false, scandalous and malicious ***274** writing or writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.' The Act allowed the defendant the defense of truth, and provided that the jury were ****723** to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it
'doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress * * *. (The Sedition Act) exercises * * * a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.' 4 Elliot's Debates, supra, pp. 553—554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.' The structure of the government dispersed

power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects. 'Is ***275** it not natural and necessary, under such different circumstances,' he asked, 'that a different degree of freedom in the use of the press should be contemplated?' Id., pp. 569—570. Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands * * *.' 4 Elliot's Debates, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.[15]

***276** Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e.g., Act of July 4, 1840, c. 45, 6 ****724** Stat. 802, accompanied by H.R.Rep.No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter 'which no one now doubts.' Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: 'I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.' Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173; Jackson, J., dissenting in Beauharnais v. Illinois, 343 U.S. 250, 288—289, 72 S.Ct. 725, 96 L.Ed. 919; Douglas, The Right of the People (1958), p. 47. See also Cooley, Constitutional Limitations (8th ed., Carrington, 1927), pp. 899—900; Chafee, Free Speech in the United States (1942), pp. 27—28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

[15] There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and ***277** that Jefferson, for one, while denying the power of Congress 'to controul the freedom of the press,' recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in Dennis v. United States, 341 U.S. 494, 522, n. 4, 71 S.Ct. 857, 95 L.Ed. 1137 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, e.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138; Schneider v. State, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155; Bridges v. California, 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192; Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697.

[16] [17] What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.[17] The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N.E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, s 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. ***278** And since there is no double-jeopardy limitation applicable to civil ****725** lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584.

[18] The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, we held indispensiable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

'For if the bookseller is criminally liable without knowledge of the contents, * * * he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. * * * (H)is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally ***279** suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.' (361 U.S. 147, 153—154, 80 S.Ct. 215, 218, 4 L.Ed.2d 205.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A.6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v. Randall, supra, 357 U.S., at 526, 78 S.Ct. at 1342, 2 L.Ed.2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is ****726** inconsistent with the First and Fourteenth Amendments.

[19] [20] The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made ***280** with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,[20] is found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

'where an article is published and circulated among voters for the sole purpose of giving what the defendant ***281** believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.'

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P., at 286):

'(I)t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The ****727** public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.'

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

'In such a case the occasion gives rise to a privilege qualified to this extent. Any one claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends to a great variety of subjects and includes matters of ***282** public concern, public men, and candidates for office.' 78 Kan., at 723, 98 P., at 285.

Such a privilege for criticism of official conduct[21] is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen. In Barr v. Matteo, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434, this Court held the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.[22] But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' Barr v. Matteo, supra, 360 U.S., at 571, 79 S.Ct., at 1339, 3

L.Ed.2d 1434. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (concurring opinion of Mr. Justice Brandeis), quoted supra, pp. 720, 721. As Madison said, see supra, p. 723, 'the censorial power is in the people over the Government, and not in the Government over the people.' It would give public servants an unjustified preference over the public they serve, if critics of official conduct ***283** did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

[21] [22] [23] We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable. While ****728** Alabama law apparently requires proof of actual malice for an award of punitive damages,[24] where general damages are concerned malice is 'presumed.' Such a presumption is inconsistent ***284** with the federal rule. 'The power to create presumptions is not a means of escape from constitutional restrictions,' Bailey v. Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191; '(t)he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff * * *.' Lawrence v. Fox, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959).[25] Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. Stromberg v. California, 283 U.S. 359, 367—368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. North Carolina, 317 U.S. 287, 291—292, 63 S.Ct. 207, 209—210, 87 L.Ed. 279; see Yates v. United States, 354 U.S. 298, 311—312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356; Cramer v. United States, 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, 940, 89 L.Ed. 1441.

[24] [25] [26] Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine ***285** whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of ****729** the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295; see also One, Inc., v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352; Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.[26]

[27] Applying these standards, we consider that the proof presented to show actual malice lacks the convincing ***286** clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was 'substantially correct,' affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a 'cavalier ignoring of the falsity of the advertisement (from which), the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.' The statement does not indicate malice at the time of the publication; even if the advertisement was not 'substantially correct'—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not

adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the ***287** necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the ****730** explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing 'attacks of a personal character';[27] their failure to reject it on this ground was not unreasonable. We think ***288** the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 618, 116 A.2d 440, 446 (1955); Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 277—278, 312 P.2d 150, 154—155 (1957).

[28] We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

'The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor * * *; a real estate and insurance man * * *; the sales manager of a men's clothing store * * *; a food equipment man * * *; a service station operator * * *; and the operator of a truck line for whom respondent had formerly worked * * *. Each of these witnesses stated that he associated the statements with respondent * * *.' (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word 'They,' it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts ***289** in question. The statements upon which respondent ****731** principally relies as referring to him are the two allegations that did concern the police or police functions: that 'truckloads of police * * * ringed the Alabama State College Campus' after the demonstration on the State Capitol steps, and that Dr. King had been 'arrested * * * seven times.' These statements were false only in that the police had been 'deployed near' the campus but had not actually 'ringed' it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.[28] This reliance on the bare ***290** fact of respondent's ****732** official position[29] was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court 'did not err in overruling the demurrer (of the Times) in the aspect that the libelous ***291** matter was not of and concerning the (plaintiff,)' based its ruling on the proposition that:

'We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.' 273 Ala., at 674—675, 144 So.2d, at 39.

[29] This proposition has disquieting implications for criticism of governmental conduct. For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' ***292** City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, 'reflects not only on me but on the other Commissioners and the community.' Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[30] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

****733** The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

***293** Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins (concurring).

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that 'the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' Ante, p. 727. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if 'actual malice' can be proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the City's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail ***294** to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called 'outside agitators,' a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been ****734** awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which ***295** might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be

possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state news-papers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.[1] This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United ***296** States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.[2] Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798,[3] which made it a crime—'seditious libel'—to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, ante, pp. 722—723, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.
We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of our elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as 'obscenity,' ****735** Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, and 'fighting words,' Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1061, are not expression within the protection of the First Amendment,[4] freedom to discuss public affairs and public officials ***297** is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. 'For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.'[5] An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.[6]

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

Mr. Justice GOLDBERG, with whom Mr. Justice DOUGLAS joins (concurring in the result).

The Court today announces a constitutional standard which prohibits 'a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ***298** 'ACTUAL MALICE'—THAT IS, WITH KNOWLEDGe that it was false or with reckless disregard of whether it was false or not.' Ante, at p. 726. The Court thus rules that the Constitution gives citizens and newspapers a 'conditional privilege' immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history[1] and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right 'to speak one's ****736** mind,' cf. Bridges v. California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, about public officials and affairs needs 'breathing space to survive,' N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405. The right should not depend upon a probing by the jury of the motivation[2] of the citizen or press. The theory ***299** of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is

said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that 'prosecutions for libel on government have (no) place in the American system of jurisprudence.' City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88, 28 A.L.R. 1368. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily 'of and concerning' the governors and any statement critical of the governors' official conduct is necessarily 'of and concerning' the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.[3] As the Court notes, although there have been ***300** 'statements of this Court to the effect that the Constitution does not protect libelous publications * * * (n)one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.' Ante, at p. 719. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no ****737** conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisments dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. Farmers Educational & Coop. Union v. WDAY, Inc., 360 U.S. 525, 530, 79 S.Ct. 1302, 1305, 3 L.Ed.2d 1407. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms ***301** in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that '(m)en who injure and oppress the people under their administration (and) provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.' The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721—722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect 'the obsolete doctrine that the governed must not criticize their governors.' Cf. Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458.

Our national experience teaches that repressions breed hate and 'that hate menaces stable government.' Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:
'(I)mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.' De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defendant has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not ***302** abridge the freedom of public speech or any other freedom protected by the First Amendment.[4] This, of course, cannot be said 'where ****738** public officials are concerned or where public matters are involved. * * * (O)ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, The Right of the People (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e.g., Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; City of Chicago v. Tribune Co., 307 Ill., at 610, 139 N.E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:
'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the ***303** case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its

outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. * * *' Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581.

***304** If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and 'fearless, vigorous, and effective administration of policies of government' not be inhibited, Barr v. Matteo, supra, 360 U.S. at 571, 79 S.Ct. at 1339, 3 L.Ed.2d 1434, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will ****739** be free 'to applaud or to criticize the way public employees do their jobs, from the least to the most important.'[5] If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.[6]

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. 'Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment * * * of free speech * * *.' Wood v. Georgia, 370 U.S. 375, 389, 82 S.Ct. 1364, 1372, 8 L.Ed.2d 569.
The public ***305** official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that 'the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, (certain) liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.' Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213. As Mr. Justice Brandeis correctly observed, 'sunlight is the most powerful of all disinfectants.'[7]

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

****740** (APPENDIX.)

All Citations

376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, 1 Media L. Rep. 1527

Footnotes

1	A copy of the advertisement is printed in the Appendix, pages 740 and 741.
2	Respondent did not consider the charge of expelling the students to be applicable to him, since 'that responsibility rests with the State Department of Education.'
3	Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.
4	Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks 'fair or substantial support' in prior Alabama decisions. See Thompson v. Wilson, 224 Ala. 299, 140 So. 439 (1932); compare N.A.A.C.P. v. Alabama, 357 U.S. 449, 454—458, 78 S.Ct. 1163, 2 L.Ed.2d 1488.
5	See American Law Institute, Restatement of Torts, s 593, Comment b (1938).
6	Konigsberg v. State Bar of California, 366 U.S. 36, 49, and n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105; Times Film Corp. v. City of Chicago, 365 U.S. 43, 48, 81 S.Ct. 391, 5 L.Ed.2d 403; Roth v. United States, 354 U.S. 476, 486—487, 77 S.Ct. 1304, 1 L.Ed.2d 1498; Beauharnais v. Illinois, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919; Pennekamp v. Florida, 328 U.S. 331, 348—349, 66 S.Ct. 1029, 90 L.Ed. 1295; Chaplinsky v. New Hamphire, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031; Near v. Minnesota, 283 U.S. 697, 715, 51 S.Ct. 625, 75 L.Ed. 1357.
7	Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066.
8	Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295.
9	De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.
10	Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.
11	Roth v. United States, 354, U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.
12	N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405.

13	See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47: '* * * (T)o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.'
14	The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: 'Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.' Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875 (1949). For a similar description written 60 years earlier, see Chase, Criticism of Public Officers and Candidates for Office, 23 Am.L.Rev. 346 (1889).
15	The Report on the Virginia Resolutions further stated: '(I)t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; * * * which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt * * * that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty. 'Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.' 4 Elliot's Debates, supra, p. 575.
16	The Act expired by its terms in 1801.
17	Cf. Farmers Educational and Cooperative Union of America v. WDAY, 360 U.S. 525, 535, 79 S.Ct. 1302, 3 L.Ed.2d 1407.
18	The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.
19	Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol. II, at 561.

20	E.g., Ponder v. Cobb, 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962); Lawrence v. Fox, 357 Mich, 134, 146, 97 N.W.2d 719, 725 (1959); Stice v. Beacon Newspaper Corp., 185 Kan. 61, 65—67, 340 P.2d 396, 400—401, 76 A.L.R.2d 687 (1959); Bailey v. Charleston Mail Assn., 126 W.Va. 292, 307, 27 S.E.2d 837, 844, 150 A.L.R. 348 (1943); Salinger v. Cowles, 195 Iowa 873, 889, 191 N.W. 167, 174 (1922); Snively v. Record Publishing Co., 185 Cal. 565, 571—576, 198 P. 1 (1921); McLean v. Merriman, 42 S.D. 394, 175 N.W. 878 (1920). Applying the same rule to candidates for public office, see, e.g., Phoenix Newspapers v. Choisser, 82 Ariz. 271, 276—277, 312 P.2d 150, 154 (1957); Friedell v. Blakely Printing Co., 163 Minn. 226, 230, 203 N.W. 974, 975 (1925). And see Chagnon v. Union-Leader Corp., 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), cert. denied, 369 U.S. 830, 82 S.Ct. 846, 7 L.Ed.2d 795. The consensus of scholarly opinion apparently favors the rule that is here adopted. E.g., 1 Harper and James, Torts, s 5.26, at 449—450 (1956); Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 891—895, 897, 903 (1949); Hallen, Fair Comment, 8 Tex.L.Rev. 41, 61 (1929); Smith, Charges Against Candidates, 18 Mich.L.Rev. 1, 115 (1919); Chase, Criticism of Public Officers and Candidates for Office, 23 Am.L.Rev. 346, 367—371 (1889); Cooley, Constitutional Limitations (7th ed., Lane, 1903), at 604, 616—628. But see, e.g., American Law Institute, Restatement of Torts, s 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, s 1041(2) (1936)); Veeder, Freedom of Public Discussion, 23 Harv.L.Rev. 413, 419 (1910).
21	The privilege immunizing honest misstatements of fact is often referred to as a 'conditional' privilege to distinguish it from the 'absolute' privilege recognized in judicial, legislative, administrative and executive proceedings. See, e.g., Prosser, Torts (2d ed., 1955), s 95.
22	See 1 Harper and James, Torts, s 5.23, at 429—430 (1956). Prosser, Torts (2d ed., 1955), at 612—613; American Law Institute, Restatement of Torts (1938), s 591.
23	We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. Barr v. Matteo, 360 U.S. 564, 573—575, 79 S.Ct. 1335, 1340—1341, 3 L.Ed.2d 1434. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the 'They' who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.
24	Johnson Publishing Co. v. Davis, 271 Ala. 474, 487, 124 So.2d 441, 450 (1960). Thus, the trial judge here instructed the jury that 'mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel.' The court refused, however, to give the following instruction which had been requested by the Times: 'I charge you * * * that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, * * * and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant * * * was motivated by personal illwill, that is actual intent to do the plaintiff harm, or that the defendant * * * was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights.' The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

25	Accord, Coleman v. MacLennan, supra, 78 Kan., at 741, 98 P., at 292; Gough v. Tribune-Journal Co., 75 Idaho 502, 510, 275 P.2d 663, 668 (1954).
26	The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,' is applicable to state cases coming here. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 242—243, 17 S.Ct. 581, 587, 41 L.Ed. 979; cf. The Justices v. Murray, 9 Wall. 274, 19 L.Ed. 658. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. '(T)his Court will review the finding of facts by a State court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' Fiske v. Kansas, 274 U.S. 380, 385—386, 47 S.Ct. 655, 656—657, 71 L.Ed. 1108. See also Haynes v. Washington, 373 U.S. 503, 515—516, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513.
27	The Times has set forth in a booklet its 'Advertising Acceptability Standards.' Listed among the classes of advertising that the newspaper does not accept are advertisements that are 'fraudulent or deceptive,' that are 'ambiguous in wording and * * * may mislead,' and that contain 'attacks of a personal character.' In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that 'as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated,' it had been approved for publication.

28	Respondent's own testimony was that 'as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it (a statement) is associated with me when it describes police activities.' He thought that 'by virtue of being Police Commissioner and Commissioner of Public Affairs,' he was charged with 'any activity on the part of the Police Department.' 'When it describes police action, certainly I feel it reflects on me as an individual.' He added that 'It is my feeling that it reflects not only on me but on the other Commissioners and the community.' Grove C. Hall testified that to him the third paragraph of the advertisement called to mind 'the City government—the Commissioners,' and that 'now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary.' It was 'the phrase about starvation' that led to the association; 'the other didn't hit me with any particular force.' Arnold D. Blackwell testified that the third paragraph was associated in his mind with 'the Police Commissioner and the police force. The people on the police force.' If he had believed the statement about the padlocking of the dining hall, he would have thought 'that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position.' 'I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility.' Harry W. Kaminsky associated the statement about 'truckloads of police' with respondent 'because he is the Police Commissioner.' He thought that the reference to arrests in the sixth paragraph 'implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that.' Asked whether he would associate with respondent a newspaper report that the police had 'beat somebody up or assaulted them on the streets of Montgomery,' he replied: 'I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it.' In general, he said, 'I look at Mr. Sullivan when I see the Police Department.' H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: 'I would just automatically consider that the Police Commissioner in Mortgomery would have to put his approval on those kind of things as an individual.' William M. Parker, Jr., testified that he associated the statements in the two paragraphs with 'the Commissioners of the City of Montgomery,' and since respondent 'was the Police Commissioner,' he 'thought of him first.' He told the examining counsel: 'I think if you were the Police Commissioner I would have thought it was speaking of you.' Horace W. White, respondent's former employer, testified that the statement about 'truck-loads of police' made him think of respondent 'as being the head of the Police Department.' Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: 'Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it.' He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was 'the fact that he allowed the Police Department to do the things that the paper say he did.'
29	Compare Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).
30	Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), s 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.
1	See cases collected in Speiser v. Randall, 357 U.S. 513, 530, 78 S.Ct. 1332, 1344, 2 L.Ed.2d 1460 (concurring opinion).
2	See, e.g., 1 Tucker, Blackstone's Commentaries (1803), 297—299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

3	Act of July 14, 1798, 1 Stat. 596.
4	But see Smith v. California, 361 U.S. 147, 155, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (concurring opinion); Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498 (dissenting opinion).
5	1 Tucker, Blackstone's Commentaries (1803), 297 (editor's appendix; cf. Brant, Seditious Libel: Myth and Reality, 39 N.Y.U.L.Rev. 1.
6	Cf. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).
1	I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, 'has carried the day in the court of history,' ante, at p. 723, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were 'false, scandalous and malicious.' (Emphasis added.) For prosecutions under the Sedition Act charging malice, see e.g., Trial of Matthew Lyon (1798), in Wharton, State Trials of the United States (1849), p. 333; Trial of Thomas Cooper (1800), in id., at 659; Trial of Anthony Haswell (1800) in id., at 684; Trial of James Thompson Callender (1800), in id., at 688.
2	The requirement of proving actual mallice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in United States v. Ballard, 322 U.S. 78, 92—93, 64 S.Ct. 882, 889, 88 L.Ed. 1148, is relevant here: '(A)s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen.' See note 4, infra.
3	It was not until Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, decided in 1925, that it was intimated that the freedom of speech guaranteed by the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108. In 1931 Chief Justice Hughes speaking for the Court in Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, declared: 'It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.' Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.
4	In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly, of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the injury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, supra.
5	Mr. Justice Black concurring in Barr v. Matteo, 360 U.S. 564, 577, 79 S.Ct. 1335, 1342, 3 L.Ed.2d 1434, observed that: 'The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.'
6	See notes 2, 4, supra.

7	See Freund, the Supreme Court of the United States (1949), p. 61.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NEW YORK TIMES COMPANY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 25-04218 (PLF)
DEPARTMENT OF DEFENSE, et al.	)	
Defendants.	)	

OPINION

Proposed by Congress in 1789, and ratified in 1791, the First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The First Amendment empowers the press to publish what it will and the public to read what it chooses, free of official proscription. In the words of Justice Black:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . .

N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). As the Supreme Court recently affirmed, "[t]he First Amendment is no word game. And the rights it protects cannot be renamed away or their protections nullified by 'mere labels.'" Chiles v. Salazar, 607 U.S. ____, 2026 WL 872307, at *9 (Mar. 31, 2026) (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)).

On the evening of Friday, March 20, 2026, this Court entered an Order declaring specific provisions of a policy newly issued by the Department of Defense (the "Department) regarding Pentagon Facilities Alternate Credentials ("PFACs") (the "Policy") to be unlawful and in violation of the First and Fifth Amendments to the United States Constitution. See Order of March 20, 2026 ("Order") [Dkt. No. 34].[1] The Court vacated and set aside those provisions (the "Challenged Provisions") as to The New York Times Company ("The Times") and Julian E. Barnes, a long-time national security reporter with The Times, as well as all regulated parties. Id. at 1-3. The Court also permanently enjoined the defendants from implementing or enforcing

[1] The documents reviewed by the Court in connection with the pending motion include: Plaintiffs' Motion to Compel Compliance with the Court's Order ("Pls. Mot.") [Dkt. No. 37]; Second Supplemental Declaration of Theodore J. Boutrous ("Second Supp. Boutrous Decl.") [Dkt. No. 37-1] and Exhibits [Dkt. Nos. 37-2 to -9]; [Corrected] Brief of Pentagon Press Association as Amicus Curiae in Supp. of Pls.' Mot. to Compel Compliance [Dkt. No. 39]; Defendants' Opposition to Plaintiffs' Motion to Compel Compliance with the Court's Order ("Defs. Opp.") [Dkt. No. 41]; Declaration of Michael Bruns ("Bruns Decl.") [Dkt. No. 41-1]; Declaration of Joel Manuel Valdez [Dkt. No. 41-3]; Plaintiffs' Reply to Opposition to Plaintiffs' Motion to Compel Compliance with the Court's Order ("Reply") [Dkt. No. 44]; Supplemental Declaration of Julian E. Barnes ("Supp. Barnes Decl.") [Dkt. No. 44-1]; Second Supplemental Declaration of Julian E. Barnes [Dkt. No. 45]; Supplemental Declaration of Joel Manuel Valdez ("Supp. Valdez Decl.") [Dkt. No. 46]; Plaintiffs' Post-Hearing Brief in Support of Plaintiffs' Motion to Compel Compliance with the Court's Order ("Pls. Supp. Br.") [Dkt. No. 48-1]; Third Supplemental Declaration of Julian E. Barnes ("Third Supp. Barnes Decl."); Defendants' Response to Plaintiffs' Supplemental Brief ("Defs. Supp. Br.") [Dkt. No. 51]; Second Supplemental Declaration of Joel Manuel Valdez ("Second Supp. Valdez Decl.") [Dkt. No. 51-1]; and Transcript of Oral Argument on Plaintiffs' Motion to Compel Compliance with the Court's Order ("OA Tr.").

those provisions "to deny, suspend, revoke, or not renew the PFAC of" any journalist from The Times, and it ordered the immediate reinstatement of the PFACs previously held by The Times' reporters. Id. at 3.

Four days later, the plaintiffs returned to Court to file the instant motion to compel compliance with the Court's Order. See Pls. Mot. The plaintiffs assert that the Department has attempted an "end-run around this Court's ruling" by hastily issuing a new "interim" policy that defies the Court's Order in both "letter and spirit." Id. at 1-2. In response, the defendants argue that the Department has refrained from implementing or enforcing the Challenged Provisions, as the Court's Order required. See Defs. Opp. at 1-2. But the defendants maintain that the Order does not preclude the Department from issuing a new policy, which they contend is what the Department has done. See id. After considering the parties' written submissions, their oral arguments, and the relevant caselaw, the Court concludes that the defendants have failed to comply with its Order.

I. BACKGROUND

The Court discussed the background of this case at length in its Opinion issued on March 20, 2026. See Opinion of March 20, 2026 ("Op.") [Dkt. No. 35]. For purposes of the instant motion, it is sufficient to note the following. On March 21, 2026, the day after this Court issued its Order and Opinion, the plaintiffs sent a letter to the Department asking how the seven Times reporters identified by name in the Order could obtain their reinstated PFACs. See Second Supp. Boutrous Decl. at Ex. 4. Counsel for amici the Pentagon Press Association also wrote to the Department to ask "when and how the Department will return the revoked PFACs and restore the access it revoked on October 15, 2025." Id. at Ex. 3. Following a few additional inquiries, counsel for the Department emailed counsel for the plaintiffs late in the afternoon of

Monday, March 23, providing contact information for The Times' journalists to "schedule pickup" of their physical credentials. Id. at Ex. 5. In that same email communication, the Department provided the plaintiffs with a "revised policy, in accordance with the Court's decision." Id.

The "revised policy" consists of a "Memorandum for Senior Pentagon Leadership" from Chief Pentagon Spokesman Sean Parnell (the "Memorandum" or "Mem."), a "Pentagon Reservation In-Brief for Media Members" (the "In-Brief"), and an Appendix (together with the In-Brief, the "Interim Policy"). See Second Supp. Boutrous Decl. at Ex. 1 [Dkt. No. 37-2]. The Memorandum states that the Department "disagrees with the Court's decision and is pursuing an appeal." Mem. at 1.[2] But "[i]n the interim," the Memorandum explains, the Interim Policy will be in effect to "preserv[e] the Department's legitimate security interests and its statutory obligation to ensure the safe, efficient, and secure operation of the Pentagon Reservation." Id. The Memorandum further states that the Interim Policy "addresses the provisions the Court vacated while retaining all physical access restrictions, conduct requirements, and security measures that were not at issue in the litigation." Id. In addition, the Memorandum asserts that "[t]he Court characterized the original Policy's provisions in ways the Department believes were inaccurate" and that the Interim Policy "includes targeted clarifications to correct these mischaracterizations." Id.

The In-Brief provides in pertinent part that "PFACs may be denied, revoked, or not renewed if a person meets any of the criteria set forth in Appendix A." Interim Policy at 6. Appendix A outlines certain conviction-based grounds for a PFAC denial, revocation, or

[2] As of the date of this Opinion, no appeal from the Court's March 20, 2026 Order has been filed.

non-renewal, as well as "[c]onduct-[b]ased [g]rounds." Id. at 12-13. The conviction-based grounds are not at issue. Relevant here, the conduct-based grounds include the "inducement of unauthorized disclosure as defined in" the In-Brief. Id. at 12. The In-Brief, in turn, states that "[t]o correct the Court's mischaracterization" of the Policy, "the Department has replaced the term 'solicitation' with 'intentional inducement of unauthorized disclosure.'" Id. at 10. "[I]ntentional inducement of unauthorized disclosure" is defined as "intentionally encouraging, inducing, or requesting that a specific Department employee disclose classified national security information or [controlled unclassified information] that the journalist knows that the specific Department employee is not authorized to disclos[e] under" one of three specified statutes. Id. The In-Brief then states that "[a] journalist's offer of anonymity or privacy protection to a Department employee in exchange for information shall create a rebuttable presumption that the journalist knew the employee was not authorized to disclose the information sought." Id.

The same section of the In-Brief outlines six "safe harbors" that "do not constitute 'intentional inducement of unauthorized disclosure' under" the Interim Policy. Interim Policy at 11; see Defs. Opp. at 6. Those safe harbors are:

> (a) Asking questions of Department personnel who are authorized to speak with the press, including Public Affairs Officers, designated spokespersons, and other personnel speaking on the record in their official capacity, regardless of the subject matter of the question;
>
> (b) Receiving unsolicited information, including classified national security information or controlled unclassified information;
>
> (c) Publishing calls for tips or other general appeals to the public at large that are not specifically directed at Department personnel;
>
> (d) Developing source relationships outside the Pentagon through independent reporting;
>
> (e) Communicating with Department personnel through official channels for public disclosure of information, including press

> briefings, press conferences, interviews arranged through public affairs offices, and Freedom of Information Act requests;
>
> (f) Asking questions of any Department employee where the journalist does not know that the employee is not authorized to disclose the information sought.

Interim Policy at 11.

Finally, the Interim Policy provides that the Correspondents' Corridor—the designated space in the Pentagon for reporters to work, Supp. Barnes Decl. ¶ 12—is closed effective immediately. Interim Policy at 3. According to the Interim Policy, "[a] new press workspace will be established" at some point in the future "in an annex facility outside the Pentagon," and PFAC holders will be notified once that space is "operational." Id. That space is not yet available for journalists to use, and the Interim Policy does not say when it will be. See id. In the meantime, PFAC holders are permitted to work from a building separate from the Pentagon that contains a library and conference center. See Supp. Valdez Decl. ¶ 12; Supp. Barnes Decl. ¶ 9. The Memorandum further states that PFAC holders will be able to access the Pentagon only "for scheduled press briefings, press conferences, and interviews arranged through public affairs offices" and only if they are "escort[ed] by authorized [Department] personnel at all times." Mem. at 2. The Memorandum provides as the reason for this change that "following the Court's vacatur of the PFAC Policy's security screening provisions, the Department determined that unescorted access to the Pentagon cannot be responsibly maintained without the ability to screen PFAC holders for security risks." Id.

On Tuesday, March 24, 2026, the plaintiffs filed a motion to compel compliance with the Court's Order. See Pls. Mot. The defendants filed an opposition on March 27, see Defs. Opp., and the plaintiffs filed a reply on March 29, see Reply. The Court heard oral argument on the motion to compel on March 30. With the Court's permission, the plaintiffs filed

a post-hearing brief on April 3, see Pls. Supp. Br., and the defendants filed a response on April 6, see Defs. Supp. Br.

II. LEGAL STANDARD

This Court has the "jurisdiction" and "inherent power to enforce its judgments." Peacock v. Thomas, 516 U.S. 349, 356 (1996); see Order at 4 (retaining "jurisdiction to enforce this Order"). That authority is grounded in "the interest of the judicial branch in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." Int'l Ladies' Garment Workers' Union v. Donovan ("Donovan"), 733 F.2d 920, 922 (D.C. Cir. 1984). Fundamental to that authority is the power of the Court "to construe and interpret the language of the judgment." Anglers Conservation Network v. Ross, 387 F. Supp. 3d 87, 93 (D.D.C. 2019) (quoting Heartland Hosp. v. Thompson, 328 F. Supp. 2d 8, 11-12 (D.D.C. 2004)). In determining whether an agency has complied with the terms of an order, "the Court is guided not only by the text of that order but also by its relevant opinions." Id.; see also, e.g., Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Rubio, No. 18-CV-1388 (TSC), 2026 WL 322996, at *4 (D.D.C. Feb. 6, 2026). "Success on a motion to enforce a judgment gets a plaintiff only the relief to which the plaintiff is entitled under its original action and the judgment entered therein." Anglers Conservation Network v. Ross, 387 F. Supp. 3d at 93 (citation modified).

III. DISCUSSION

The plaintiffs challenge two aspects of the Interim Policy: the prohibition on the "inducement of unauthorized disclosure" and the closure of the Correspondents' Corridor coupled with the escort requirement. See Pls. Mot. at 5-15. The defendants contend as a threshold matter that neither challenge is appropriately raised in a motion to compel. See Defs.

Opp. at 3-4.[3] In the defendants' view, the Department was prohibited from retaining and enforcing the language of the Challenged Provisions but was otherwise free to act as it saw fit. See id. at 4-5. The defendants maintain that if the plaintiffs wish to challenge the substance of the Interim Policy, they must do so by amending their complaint and filing a new substantive motion rather than by moving to compel compliance with the Court's Order. See id. at 2. The Court disagrees.

To be sure, the defendants are correct that once a court has invalidated an agency's policy, the agency is empowered to "deal[] with the problem afresh by taking new agency action that [i]s consistent with the legal principles as articulated in the [c]ourt's opinion." Neguse v. U.S. Immigr. & Customs Enf't, Civil Action No. 25-2463 (JMC), 2026 WL 137017, at *1 (D.D.C. Jan. 19, 2026) (citation modified); see also NAACP v. Donovan, 737 F.2d 67, 72 (D.C. Cir. 1984). The problem for the defendants, however, is that the Department has not in fact taken "new" action, at least with respect to the proscription on the "inducement of unauthorized disclosure." To the contrary, as explained in detail below, that proscription contained in the Interim Policy amounts to—in the Department's words—a "clarification[]" of the prohibitions contained in the original Policy that this Court held to be unconstitutional. Mem. at 1. The Department cannot simply reinstate an unlawful policy under the guise of taking "new" action and expect the Court to look the other way. See Donovan, 733 F.2d at 922

[3] The defendants also assert that the plaintiffs did not confer in good faith prior to filing their motion to compel, in violation of Local Civil Rule 7(m). See Defs. Opp. at 3; see also LCvR 7(m) ("Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement."). The record reflects, however, that the plaintiffs sought the defendants' position on their anticipated motion to compel and provided the substantive basis for their requested relief. See Bruns Decl. at Ex. A. The plaintiffs thus have satisfied their obligations under Rule 7(m).

(holding that enforcing a prior judgment against the application of a new agency policy "is particularly appropriate . . . where an administrative agency plainly neglects the terms of [an order], and the case then returns to the court—under the same docket number and involving the same parties—on a motion to enforce the original [order]"); United States v. Christie Indus., Inc., 465 F.2d 1002, 1007 (3d Cir. 1972) (explaining that a litigant cannot "avoid[] . . . [an] injunction through a mere change of terminology").

Nor can the Department take steps to circumvent the Court's injunction and expect the Court to turn a blind eye. But that is exactly what the defendants have done by closing the Correspondents' Corridor and imposing an escort requirement. The Court's Order requires the Department to restore the plaintiffs' access to the Pentagon. Rather than comply with that Order, the Department has cut off all PFAC holders' meaningful access to the Pentagon. When assessing a litigant's compliance in the posture of an enforcement motion, a court need not accept a "dubious literal interpretation of the injunction, particularly where that interpretation is designed to evade the injunction's goals." Epic Games, Inc. v. Apple Inc., 781 F. Supp. 3d 943, 990-91 (N.D. Cal.), aff'd in relevant part, 161 F.4th 1162 (9th Cir. 2025). Where an enjoined party engages in such evasive conduct, a motion to compel is the proper means of bringing that party into compliance. See id. at 990-92 (granting a motion to enforce an injunction where the court "prohibited certain of [the enjoined party's] policies that prevented meaningful competition" and the enjoined party "rewrote those policies by choosing a different anticompetitive path"); AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State, 768 F. Supp. 3d 1, 3 (D.D.C. 2025) (granting a motion to enforce a temporary restraining order where the government "ha[d] continued . . . the very action that the [order] enjoined").

At bottom, the defendants ask this Court to hold that so long as the Department does not reinstate the exact words of the Challenged Provisions, and so long as it restores The Times' reporters' physical credentials, it has done enough.[4] If the Department immediately uses new words to do the same thing? Too bad. The plaintiffs need to start over while the Court stands idly by. If the Department immediately takes steps to undermine the purpose of the reporters' credentials, namely, entry to the Pentagon? Again, too bad. The Court need not embrace such a narrow interpretation of its authority and permit such a blatant attempt to circumvent a lawful order of the Court to succeed. See Donovan, 733 F.2d at 923; Epic Games, Inc. v. Apple Inc., 781 F. Supp. 3d at 991 (observing that such an "approach would require courts to effectively engage in a 'whack-a-mole' game to require compliance").

A. Inducement of Unauthorized Disclosure

The Court carefully considered the Policy's constraint on "solicitation" and the arguments for and against its permissibility. In the context of the plaintiffs' Fifth Amendment void for vagueness argument, the Court determined that the constraint was unacceptable because it encompassed "obtaining or attempting to obtain any information that the Department has not approved for release, regardless of whether that information is classified." Op. at 20-21. The Court recognized that "obtaining and attempting to obtain information is what journalists do" and that "[a] primary way in which journalists obtain information is by asking questions." Id. at 21. Punishing journalists for requesting and receiving non-public information thus would chill and penalize "essential journalistic practices that the plaintiffs and others engage in every day."

[4] Ironically, the defendants' own brief makes clear that the Department continues to use many of the words of the Challenged Provisions that this Court vacated. See Defs. Opp. at 8-12.

Id. In no uncertain terms, the Court rejected the Department's assertion that the Policy was permissible because it proscribed only criminal solicitation, concluding that the Policy punished "plainly lawful journalistic practices." Id. at 22; see also id. at 21 (explaining that the defendants' argument that the Policy's prohibition on solicitation was acceptable because it "simply proscribe[s] criminal solicitation . . . is just plain wrong"). The Court also held in the context of the plaintiffs' First Amendment forum argument that the Policy's restrictions on journalists seeking information were unreasonable in light of the purpose of the Pentagon's press spaces and that the Policy amounted to viewpoint discrimination "based on editorial viewpoint—that is, whether the individual or organization is willing to publish only stories that are favorable to or spoon-fed by Department leadership." Id. at 30-36. In rejecting the defendants' argument that the Court should simply remand to the Department for clarification rather than vacate the Challenged Provisions in their entirety, the Court concluded that in light of the Policy's "extremely serious" constitutional defects, "'additional explanations' on remand would not suffice." Id. at 38 (citation omitted).

Because the Court vacated the Challenged Provisions, it was appropriate for the Department to issue a new policy, so long as the new policy "was consistent with the legal principles as articulated in the Court's opinion." Neguse v. U.S. Immigr. & Customs Enf't, 2026 WL 137017, at *1. But the Department has done precisely what this Court expressly forbade it from doing: it has endeavored to "cure" the impermissible restrictions on a journalist seeking information not authorized for release by providing "targeted clarifications." Mem. at 1; see Op. at 38. Specifically, the Interim Policy replaces the prohibition on "soliciting" non-public or unauthorized classified or unclassified information with a prohibition on "encouraging, inducing, or requesting" the disclosure of that non-public or unauthorized information. Interim Policy

at 10. That is simply using revised language to proscribe the same "lawful journalistic practices" that the vacated provisions encompassed. Op. at 23. Remarkably, even the Department acknowledges as much. For example, the Interim Policy explains that the wording change was simply an effort "[t]o correct the Court's mischaracterization" of the Policy. Mem. at 1; Interim Policy at 10. Commander Timothy Parlatore, Special Advisor to the Secretary of Defense, similarly explained that the Interim Policy responds to the Court's Order by "us[ing] more words to say the same thing and to foreclose creative misinterpretations." Second Supp. Boutrous Decl. at Ex 6.

The defendants suggest that the Department has solved the constitutional problems identified in the Court's Opinion by inserting a "scienter requirement": an adverse PFAC determination will be triggered only if the journalist attempts to obtain information that the journalist "knows" the Department employee is forbidden to disclose by law. Defs. Opp. at 15-16; see Interim Policy at 10. This addition, however, does not render the Interim Policy permissible. For one, the supposed requirement is illusory—in the plaintiffs' words, "a mirage," Reply at 6—because it presumes scienter and provides no clear path to rebut that presumption. The Interim Policy provides that a journalist's knowledge is presumed if the journalist offers a Department employee "anonymity or privacy protection." Interim Policy at 10. The Department thus need not establish that a journalist actually knows anything to find the journalist presumptively in violation of the Interim Policy. See id. Considering that journalists "frequently" grant anonymity to sources, see Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981), including sources authorized to speak to the press on the Department's behalf, see Supp. Barnes Decl. ¶ 18, every Pentagon reporter routinely will be presumptively in violation of the

Interim Policy.[5] While that presumption ostensibly is rebuttable, it is unclear just how a journalist would go about rebutting it. The Interim Policy certainly does not indicate what evidence would suffice for journalists to prove what they did not know. And as the plaintiffs point out, the Interim Policy "expressly provides that any doubts will be resolved in the Department's favor." Reply at 7; see Interim Policy at 13-14.

The defendants attempt to justify the presumption by asserting that "the most obvious reason to offer anonymity to a Department employee is because the journalist knows the employee is not authorized by law to disclose the information sought." Defs. Opp. at 19. That contention is unsupported and simply wrong. There are myriad reasons why a source may wish to remain anonymous—most apparently, a source may fear retaliation for disclosing information that is "unflattering," even if not unauthorized by law. Cf. Op. at 35 n.7 (observing "that the Pentagon has barred press photographers from briefings on the ongoing U.S.-Israeli war with Iran after they published photos of Secretary Hegseth that his staff deemed 'unflattering'"). As Mr. Barnes suggested, "[t]here are various reasons why a source may wish not to have their name published in connection with the information they provided, and honoring those preferences is often integral to [his] ability to gather and report the news." Supp. Barnes Decl. ¶ 17; see also Zerilli v. Smith, 656 F.2d at 710-11 (explaining that interference with a journalist's use of "confidential source raises obvious First Amendment problems" because "journalists

[5] The Court gives little credence to the assurances of Deputy Press Secretary Joel Manuel Valdez that the Department will enforce the Interim Policy only upon a complaint by a Department employee. See Supp. Valdez Decl. ¶¶ 30-33. The plaintiffs correctly point out that Mr. Valdez's proffered interpretation of the Interim Policy is not grounded in its text. See Pls. Supp. Br. at 4. Like the plaintiffs, the Court has "no reason to trust that officials will not follow the Interim Policy's express language and revoke PFACs based on information in [the] [p]laintiffs' reporting whenever it is not tied to a specific, authorized source." Id. In any event, the Court struggles to see how the enforcement regime that Mr. Valdez promises changes the illusory nature of the scienter requirement.

frequently depend on" such sources "to gather news, and confidentiality is often essential to establishing a relationship with" a source).

The defendants also emphasize the addition of six "safe harbors" as evidence that the Interim Policy is distinct from the original Policy in a way that complies with this Court's Opinion and Order. See Defs. Opp. at 16. But like the scienter "requirement," the safe harbors do not make clear that engagement in lawful journalistic practices will not trigger the revocation of a PFAC. See Op. at 21-22. As this Court has explained, asking questions is fundamental to the role of a journalist, and a journalist's ability to ask questions is protected. See id. at 21; see also id. at 22 ("[A] journalist asking questions is not a crime!"). Yet the "safe harbors" explicitly leave open the possibility that "[a]sking questions" on certain topics and to certain officials could trigger the revocation or denial of a PFAC. Interim Policy at 11. They provide, for example, that asking questions about any subject to a Department official who is "authorized to speak with the press" is permissible. Id. But how is a journalist to know who is authorized to speak? That uncertainty and lack of clarity is precisely what this Court held to be unacceptable.

In sum, there is little daylight between the Policy's unconstitutional "solicitation" prohibition and the Interim Policy's "inducement" prohibition, and the latter is impermissible for the same reasons as the former. Simply put, the Department's attempt to "clarif[y]" the Policy did not cure its constitutional infirmities. That, of course, is exactly why this Court determined it was necessary to vacate the Policy and "re-establish the status quo" as it existed prior to "the unlawful agency action." Las Ams. Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec., 783 F. Supp. 3d 200, 233 (D.D.C. 2025) (quoting Texas v. United States, 40 F.4th 205, 219-20 (5th Cir. 2022) (per curiam)). The Court explained that the Policy's deficiencies were so entrenched that there was no alternative but to require the Department to scrap its prior approach and start

afresh. See Op. at 38-39. By failing to do so, the Department has violated this Court's explicit mandate.

B. Expulsion of PFAC Holders from the Pentagon

In its March 20, 2026 Order, the Court directed the defendants to "immediately reinstate the PFACs of" Julian Barnes and six other Times journalists, "all of whom held a PFAC as of October 6, 2025." Order at 3. Before doing so, the Court carefully considered the defendants' argument that the plaintiffs had not established their entitlement to injunctive relief. The Court ultimately disagreed with the defendants, concluding in relevant part that the plaintiffs had shown irreparable injury because "[w]ithout their PFACs, the plaintiffs lack 'the access to pursue [journalistically productive] conversations.'" Op. at 36. (quoting Karem v. Trump, 404 F. Supp. 3d 203, 217 (D.D.C. 2019)). The Court observed that "the only way to remedy the injury [from the loss of a press credential] is to return the [credential] and the access that comes with it." Id. at 36-37 (first alteration in original) (quoting Karem v. Trump, 404 F. Supp. 3d at 217).

The Department did not comply with the Court's Order. Rather, the very next business day, the Department announced that it was immediately closing the "Correspondents' Corridor"—the area in the Pentagon from which journalists had worked for years. See Mem. at 2; Interim Policy at 3; see also Supp. Barnes Decl. ¶ 12. Instead, PFAC holders would be relegated to work from a space outside the Pentagon building. See Supp. Valdez Decl. ¶ 12; Supp Barnes Decl. ¶ 9. The Department further announced that journalists would no longer be permitted to access the Pentagon building at all without a Department escort and that even escorted access would be limited to specific events. See Interim Policy at 3. The justification offered by the Department for this sudden change is that this Court's Order "remov[ed] . . . all

security screening authority" and that "unescorted access to the Pentagon cannot be responsibly maintained without the ability to screen credential holders for security risks." Second Supp. Boutrous Decl. at Ex. 7; see also id. at Ex. 6 (Commander Parlatore stating that the Court's ruling "excised all of the security provisions and enforcement mechanisms and ordered that [the Department] immediately issue press passes under the revised, toothless policy"); Mem. at 2.

In short, this is nonsense. The Court did not "remove" or "excise" the Department's authority to screen PFAC holders. For one, The Times' journalists named in the Court's Order have already been screened by the Department—for example, prior to the issuance of the Policy, Mr. Barnes had held a PFAC without issue for more than twenty years. See Op. at 4; Supp. Barnes Decl. ¶ 11. Moreover, the Court was clear in its Opinion that it was leaving intact the security measures that previously existed for PFAC holders and that "served [the Department's] proffered interests in safety and security for decades." Op. at 39. Based on the undisputed facts, the Court found that "[t]he regular presence of PFAC holders at the Pentagon has enhanced the ability of journalists and news organizations to keep Americans informed about the U.S. military while posing no security or safety risk to Department property or personnel." Id. at 5 (emphasis added). There is no evidence whatsoever that the facts have changed in the weeks since this Court issued its summary judgment decision. The rote invocation of "security" or "national security" has never been enough "to abrogate the fundamental law embodied in the First Amendment." N.Y. Times Co. v. United States, 403 U.S. at 719 (Black, J., concurring). As Judge Leon observed in a recent decision, "[b]ald assertions of 'national security' cannot excuse the Government's failure to follow the law." Nat'l Trust for Historic Pres. in the U.S. v. Nat'l Park Serv., __ F. Supp. 3d ___, 2026 WL 877779, at *16 (D.D.C. Mar. 31, 2026).

In their opposition brief, the defendants state that the "relocation of the press workspace" is unconnected to the Court's ruling and instead simply "fulfills a commitment announced . . . before this lawsuit was filed." Defs. Opp. at 20; see also Mem. at 2. That assertion is undermined by the timing of the announced closure. The Court cannot ignore the fact that the decision to bar all journalists from the Pentagon came the next business day after the Court ordered the Department to restore the plaintiffs' access to the Pentagon. Further, the testimony of Mr. Barnes supports that Department officials were ill-prepared to facilitate this "relocation," suggesting that the Department had scrambled to close the Correspondents' Corridor in direct response to this Court's directives. See Supp. Barnes Decl. ¶ 9; Third Supp. Barnes Decl. ¶ 6.[6]

In light of all this, the Court has no choice but to conclude that the Department's abrupt closure of the Correspondents' Corridor and its ban on credentialed journalists traveling unescorted through the Pentagon are not security measures or efforts to make good on prior commitments but rather transparent attempts to negate the impact of this Court's Order. The point of the Court's injunction was to restore The Times journalists' access to the Pentagon, not merely to ensure that they have possession of a physical credential. See Op. at 37. But the access now available to PFAC holders in the wake of this Court's Order is not even close to as meaningful as the broad access that PFAC holders had previously been afforded. The PFACs

[6] Deputy Press Secretary Joel Manuel Valdez submitted a declaration purporting to refute Mr. Barnes' account of his interactions with Pentagon Press Office staff on the day he went to pick up his PFAC. See Supp. Valdez Decl. But Mr. Valdez's declaration does not contradict Mr. Barnes' testimony about his conversations with Department staff, for which Mr. Valdez was not present. See id.; see also Third Supp. Barnes Decl. ¶ 3. The only thing Mr. Valdez's declaration establishes is that some of the information given to Mr. Barnes was inaccurate. See Supp. Valdez Decl. ¶¶ 15-21. If anything, that fact supports the notion that Department officials were unsure of the parameters of the Interim Policy and were unprepared to implement it. See id.

issued to Mr. Barnes and his colleagues permit them to access only a building separate from the Pentagon. See Supp. Valdez Decl. ¶ 12. PFAC holders may enter the Pentagon only for limited purposes approved by the Department, and only if the holder is accompanied by an escort at all times. See id. ¶¶ 22-25; see also Interim Policy at 3. These restrictions make it exceedingly difficult to cover the Department and the U.S. military from the Pentagon grounds, as the April 2, 2026 declaration from Mr. Barnes illustrates:

> Going through a sometimes-lengthy process of scheduling official appointments in order to ask even one or two questions to an official—even assuming that request is granted and that official does not have to reschedule—does not allow for meaningful engagement with Department personnel on a timeline consistent with news reporting. As I stated in a prior declaration, reporting from the Pentagon has historically necessitated speaking to upwards of a dozen officials and other personnel from different press offices in a given day, sometimes in response to rapidly developing events. While I used to be able to walk from press office to press office throughout the day, I now would have to return to the library, call or email for an appointment, and wait for a response and approval, and for arrangement for and arrival of an escort. That means I will be spending hours of my day just waiting and walking back and forth—assuming I can get ahold of press offices and individuals and arrange interviews and be approved for an escort at all. That process will dramatically interfere with my ability to meaningfully engage with anyone from the Department on Pentagon grounds, or to obtain the information necessary to inform the public in a timely manner.

Third Supp. Barnes Decl. ¶ 8.[7] For decades, the plaintiffs and other reporters were permitted to move throughout the building and engage with Pentagon press officials and other personnel to

[7] On Monday, March 30, in response to a request that he had made three days earlier, on Friday, March 27, Mr. Barnes received an invitation to interview a Department official at the Pentagon the following day, Tuesday, March 31, at 12:45 p.m. Third Supp. Barnes Decl. ¶ 5. Mr. Barnes explained:

> On Tuesday, March 31, 2026, I arrived at the Pentagon at 12:10 p.m. and entered the Visitor Center security area. I showed the attendant behind the glass my driver's license and the PFAC. I entered my social security number upon his request. I was advised that individuals holding PFACs must enter through corridor 8. I replied

provide timely reporting to the American people. See, e.g., Op. at 5-6. That undisputedly is no longer the case.

In short, the Department has responded to the Court's express instruction to return the PFACs previously held by The Times' journalists and restore the access to the Pentagon that came with those credentials by instead cutting off that access for all journalists. That response flouts the Court's explicit directives and disregards the constitutional principles at the heart of its Opinion.

***

The Court cannot conclude this Opinion without noting once again what this case is really about: the attempt by the Secretary of Defense to dictate the information received by the American people, to control the message so that the public hears and sees only what the Secretary and the Trump Administration want them to hear and see. The Constitution demands better. The American public demands better, too. Over the past few weeks, the Court has received dozens of letters and postcards from people across the country explaining what the First Amendment means to them. To quote one such letter:

> that I had an appointment and the escort was going to meet me in the Visitor's Center. The supervisor repeated that anyone with a PFAC could enter only through corridor 8. This was despite the fact that I was told to meet my escort in the Visitor's Center and the fact that before I could have simply entered through the main gate using my PFAC. After I arrived at the Pentagon, the interview was postponed, and I was immediately escorted out of the building.

Id. ¶ 6. This scenario exemplifies precisely the Kafkaesque nature of the Department's implementation of the Interim Policy that the Court raised during oral argument. See OA Tr. at 37. The only response to Mr. Barnes's declaration: "Mr. Barnes's escort had not been fully briefed on the access procedures for PFAC holders under the Interim Policy." Second Supp. Valdez Decl. ¶ 9. Really?

> A free press is essential to the success of our democratic republic. The people are the government, and they cannot make good well-informed choices without all the facts. . . . A free press is an excellent place to start.

The protection of the freedoms enshrined in the First Amendment "is a fundamental principle of the American government. The First Amendment means that [g]overnment has no power to thwart the process of free discussion, to abridge the freedoms necessary to make that process work." Kleindienst v. Mandel, 408 U.S. 753, 775-76 (1972) (Marshall, J., dissenting) (citation modified); see also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (observing that the "free trade in ideas . . . [is] the best test of truth"). Less than three weeks ago, this Court rejected the defendants' efforts to abridge those freedoms. With the issuance of the Interim Policy, the Department has invoked slightly different language to achieve that same unconstitutional result. The curtailment of First Amendment rights is dangerous at any time, and even more so in a time of war. Suppression of political speech is the mark of an autocracy, not a democracy—as the Framers recognized when they drafted the First Amendment.

IV. CONCLUSION

For the foregoing reasons, the Court will grant the plaintiffs' motion to compel. An Order consistent with this Opinion will issue this same day.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 4/9/26

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 162963/2025

THE NEW YORK TIMES COMPANY,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

WAYFARER STUDIOS LLC,

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33

were read on this motion for SUMMARY JUDGMENT.

New York Times Company, New York, NY (David McCraw and Jackson Busch of counsel), plaintiff pro se.
Meister Seelig & Schuster PLLC, New York, NY (Kevin Fritz and Mitchell Schuster of counsel), for defendant.

Gerald Lebovits, J.:

In this anti-SLAPP action, plaintiff, The New York Times Company (NYT Co.) seeks an award of attorney fees from defendant, Wayfarer Studios LLC, following a ruling in NYT Co.'s favor in an earlier federal defamation action that Wayfarer had brought against it.

NYT Co. now moves for summary judgment in its favor; Wayfarer cross-moves to stay this action pending the resolution of trial-court proceedings in the related federal action. NYT Co.'s motion is granted with respect to liability, and granted in part and denied in part with respect to damages. Wayfarer's cross-motion is denied as academic.

BACKGROUND

On December 21, 2024, *The New York Times* published an article called "'We Can Bury Anyone': Inside a Hollywood Smear Machine," accompanied by a video discussing actor Blake Lively's sexual-harassment and workplace-retaliation complaint arising out of working on the film "It Ends With Us," produced by Wayfarer. (NYSCEF No. 1 at ¶ 11.) Lively had filed the complaint in California state court against Justin Baldoni, the director of the film and Wayfarer's co-founder, and James Heath, Wayfarer's CEO and the film's head producer. (*Id.*) The *Times* article and video relied solely on Lively's complaint (filed with the California Civil Rights Department), in which "she alleged that Mr. Baldoni and Mr. Heath engaged in misconduct on

the set of the film and that Mr. Baldoni subsequently engaged a 'crisis PR' specialist, Melissa Nathan, to tarnish her reputation." (*Id.*)

On December 31, 2024, Wayfarer and its affiliates sued NYT Co., also in California state court, for defamation and false light, but did not serve the complaint on NYT Co. (NYSCEF No. 1 at ¶ 12.) On the same day, Lively sued Wayfarer in the U.S. District Court for the Southern District of New York, also suing various other defendants, including Steve Sarowitz, 'It Ends With Us Movie, LLC,' Melissa Nathan, 'The Agency Group PR LLC,' and Jennifer Abel, Baldoni's publicist. (*Id.* at ¶ 13.) On January 16, 2025, Wayfarer, along with various other plaintiffs, sued Lively and related parties, also in the Southern District of New York. (*Id.* at ¶ 14.) That court consolidated Lively's lawsuit and Wayfarer's countersuit on January 30, 2025. (*Id.*) On January 31, 2025, Wayfarer amended the consolidated complaint to add NYT Co. as a defendant, asserting claims for defamation, false light, promissory fraud, and implied breach of contract. (*Id.* at ¶¶ 15-19.)

NYT Co. moved to dismiss on February 28, 2025. On June 9, 2025, the district court dismissed all claims against NYT Co. with prejudice. The district court rejected the fraud and contract claims as "meritless"; and it dismissed the defamation and false-light claims on privilege, actual-malice, and non-cognizability grounds. (NYSCEF No. 1 at ¶¶ 20–26; NYSCEF No. 3 at 56.)

After the district court's dismissal of those claims, NYT Co. brought this action on September 30, 2025. NYT Co. is seeking attorney fees under New York's anti-Strategic Lawsuits Against Public Participation (SLAPP) statute, Civil Rights Law §§ 70-a and 76-a. (NYSCEF No. 1 at ¶¶ 1, 27.)

NYT Co. now moves under CPLR 3212 for summary judgment in its favor, seeking attorney fees in the amount of $181,622.70. (NYSCEF No. 9 at 1.) Wayfarer cross-moves for a stay of proceedings in this action pending a possible appeal in the federal action. (NYSCEF No. 21.)

After briefing on the current motion and cross-motion, the underlying federal action largely settled. (*See* NYSCEF No. 33 at 1-2 [request to take judicial notice].) As part of the settlement, the settling parties irrevocably waived any right to appeal orders entered in the federal action, including the order dismissing Wayfarer's claims against NYT Co. (*Id.* at 3-4 [notice of settlement and joint stipulation].) NYT Co. asks this court to take judicial notice of the federal settlement. (*Id.* at 1-2.) Wayfarer does not oppose this request.

DISCUSSION

I. Wayfarer's Cross-Motion for Stay

Wayfarer cross-moves for a stay under CPLR 2201 pending the results of the underlying lawsuit. (*See* NYSCEF No. 21.) Wayfarer argues that this action is premature and should be stayed because the anti-SLAPP claim rests on an interlocutory federal dismissal order that Wayfarer intends to appeal upon the eventual entry of final judgment in the district court. (*See* NYSCEF No. 30.) Wayfarer also contends that proceeding in this action creates a risk of

inconsistent rulings and wasted judicial resources if the dismissal is later reversed. (*Id.*) In opposing the cross-motion, NYT Co. responds that a stay is unwarranted because Wayfarer's appeal is merely hypothetical, would be meritless, and is assertedly a delay tactic rather than a genuine basis for pausing this action. (*See* NYSCEF No. 31.)

Regardless of the merits of the parties' respective arguments in briefing the cross-motion (on which the court expresses no opinion), that briefing has since been overtaken by events. In particular, NYT Co. has put before this court a so-ordered stipulation waiving all parties' right to appeal rulings rendered in the federal action; and NYT Co. asks this court to take judicial notice of the stipulation. (*See* NYSCEF No. 33.) Wayfarer has not objected to NYT Co.'s judicial-notice request. And this court may properly take judicial notice of court filings in other actions. (*See* CPLR 4511; *RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207 [1st Dept. 2009], *revd on other grounds* 17 NY3d 397 [2011].)

Wayfarer's cross-motion to stay is premised on the possibility that Wayfarer would later appeal (and obtain reversal of) the dismissal of its claims against NYT Co. in the federal action. Because the settlement in the federal action waives Wayfarer's right to appeal that dismissal, the settlement obviates any possible need for a stay of proceedings in this action. Wayfarer's cross-motion is therefore denied as academic.

II. NYT Co.'s Motion for Summary Judgment

On its motion for summary judgment, NYT Co. argues that it has established as a matter of law that it is entitled to attorney fees under New York's anti-SLAPP law. In particular, NYT Co. contends that the anti-SLAPP law applies because Wayfarer "filed suit in federal court over a newspaper article and video that concern a matter of public interest . . . without a substantial basis in fact and law." (NYSCEF No. 10 at 4.) Crucially, Wayfarer's cross-motion papers do not offer any arguments on the merits of the anti-SLAPP claim—only arguments in support of the now-academic stay request discussed above.[1] This court agrees with NYT Co. that it has shown as a matter of law that it is entitled to summary judgment on liability on its anti-SLAPP claim.

As an initial matter, this court concludes that NYT Co. may bring this action for anti-SLAPP damages based on the resolution in NYT Co.'s favor of defamation claims against it in a prior federal action. Although anti-SLAPP arguments are most commonly raised in the form of a defense or counterclaim to a defamation suit, New York's anti-SLAPP statute is not so limited. Rather, the statute provides that a "defendant in an action involving public petition and participation may maintain an *action*, *claim*, cross claim or counterclaim" to recover damages, including attorney fees. (Civil Rights Law § 70-a [1] [emphases added].) That is, as long as a party is a defendant in *a* SLAPP suit (like NYT Co. was in Wayfarer's federal action), the party may bring a separate, freestanding action for anti-SLAPP attorney fees (as NYT Co. has done here).

[1] At most, Wayfarer's papers provide that Wayfarer "reserves the right to substantively oppose the Times's summary judgment motion after the final resolution of the SDNY Action." (NYSCEF No. 22 at 1 n 1 [attorney affirmation].) But following entry of the stipulation in the federal action, Wayfarer neither filed papers opposing the merits of NYT Co.'s request for summary judgment nor sought leave of court to do so.

For NYT Co. to recover attorney fees under Civil Rights Law § 70-a [1], it must first establish that the underlying lawsuit consisted of an action involving "public petition and participation" under Civil Rights Law § 76-a [1] [a]. An action will involve public petition and participation for these purposes if the action is based on "any communication in a place open to the public or a public forum in connection with an issue of public interest." (*Id.* § 76-a [1] [a] [1].)

If plaintiff meets the public-participation requirement, then § 70-a [1] [a] allows it to maintain a claim to recover damages. This provision mandates the award of attorney fees "upon a demonstration . . . that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." A motion for summary judgment on an anti-SLAPP claim under § 70-a [1] [a] "shall be granted unless the party responding to the motion demonstrates" that the asserted SLAPP "action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law." (CPLR 3212 [h].)

A. Whether NYT Co. was a Defendant in an Action Involving Public Petition and Participation

NYT Co. argues that the federal action concerns a matter of public interest for Civil Rights Law § 76-a purposes because Wayfarer's lawsuit against NYT Co. resulted from the publication of a news article and a video, and that news websites like that of *The New York Times* are "quintessential public forum[s]." (NYSCEF No. 10 at 5, citing *Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 19 [1st Dept 2024], *lv to appeal dismissed* 44 NY3d 990 [2025].) This court agrees.

The underlying federal action here arose from publicly posted media coverage (in the form of both text and video) about a legal proceeding brought by a prominent actress, in which the (administrative) complaint alleged sexual harassment and workplace retaliation on the set of a highly publicized movie. These are matters of public interest. (*See Reeves*, 232 AD3d at 19 [holding that the public-interest element under anti-SLAPP law was satisfied because the article was published on a public news forum and addressed domestic violence and criminal allegations, both recognized matters of public interest].) The court's conclusion on this point is further bolstered by the expansive scope of "matters of public interest" under New York precedent. (*See Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 29-31 [1st Dept 2022] [in anti-SLAPP action, collecting cases illustrating the "broad interpretation" that New York courts have "generally applied . . . to what constitutes a matter of public concern"].) And Wayfarer offers no arguments to the contrary.

Accordingly, because the underlying action arose from communications in a public forum concerning a matter of public interest, NYT Co. has satisfied Civil Rights Law § 70-a's first requirement for anti-SLAPP protection.

B. Whether Wayfarer's Federal Claims Against NYT Co. had a Substantial Basis in Fact and Law

NYT Co. next argues that Wayfarer brought the underlying claims against it "without a substantial basis in fact and law," as evidenced by the district court's dismissal of those claims. (*See* NYSCEF No. 10 at 6; Civil Rights Law § 70-a [1] [a].) This court agrees.

The Appellate Division has made clear that when a given claim is subject to dismissal under CPLR 3211 (a) (7) for failure to state a cause of action, that claim necessarily lacks a "substantial basis" in fact and law. (*See Reeves*, 232 AD3d at 24.) And Federal Rule of Civil Procedure 12 (b) (6) places at least as demanding a pleading burden on plaintiffs as CPLR 3211 (a) (7)—if not a more-demanding burden. (*Compare e.g. Bell Atl. Corp. v Twombly*, 550 US 544, 570 [2007] [holding that to survive a Rule 12 [b] [6] motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face"], *with Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021] [explaining that on a CPLR 3211 [a] [7] motion, the court "must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference," and determine whether, "accepting the allegations and affording these inferences, plaintiff can succeed upon any reasonable view of the facts stated"].)

Given the dismissal of Wayfarer's federal claims against NYT Co., those claims lack a substantial basis in fact and law for Civil Rights Act 70-a purposes. And again, Wayfarer has not attempted to dispute this conclusion. The branch of NYT Co.'s motion seeking summary judgment in its favor on liability is granted.

C. Whether NYT Co. is Entitled to its Claimed Attorney Fees

NYT Co. moves for summary judgment not only on liability, but also on its claimed damages of $181,622.70. That amount comprises $153,074.70 in fees billed by NYT Co.'s outside counsel in the underlying federal action, and $28,548 in fees incurred by NYT Co.'s in-house counsel in this action. NYT Co. supports its fee request with a detailed affirmation from its deputy general counsel (*see* NYSCEF No. 11), accompanied by outside-counsel invoices (*see* NYSCEF No. 16) and in-house-counsel hours logs (*see* NYSCEF No. 19).

Wayfarer does not contest NYT Co.'s fee request. This court nonetheless has an independent obligation to determine whether NYT Co. has established that the amount claimed "is reasonable and warranted for the services actually rendered." (*SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986, 987 [2d Dept 2006] [vacating and remanding an uncontested attorney-fee award in light of the inadequacy of plaintiff's proof of the amount of its reasonable attorney fees].) This court determines that NYT Co. has shown that it is entitled to most, but not all, of the fees claimed.

With respect to the underlying federal action, this court is satisfied that, given the complex and high-profile nature of that action, the claimed attorney rates and hours billed on NYT Co.'s motion to dismiss are reasonable. However, NYT Co. also seeks to recover amounts in fees billed *after* the district court dismissed Wayfarer's claims against it—primarily fees billed in the course of preparing NYT Co.'s motion for entry of partial judgment under Federal Rule of

Civil Procedure 54 (b) to facilitate appellate review of the district court's dismissal order. (*See* NYSCEF No. 16 at 3-8.) This court is unpersuaded that these post-dismissal fees were reasonable for purposes of defending against the underlying anti-SLAPP lawsuit, so as to make them recoverable now as anti-SLAPP damages. Excluding these fees, NYT Co. is entitled to $143,068.20 in damages for the costs of defending the federal action.

With respect to this action, the question is whether NYT Co. should be entitled to recover fees incurred in preparing the fee-request branch of this motion, so-called "fees on fees." This court concludes that given the Legislature's intent in enacting Civil Rights Law § 70-a in its current form—to protect speakers on matters of public concern from being silenced by meritless litigation—awarding fees on fees to prevailing anti-SLAPP defendants will appropriately enable them to recoup fully the costs of their successful defenses. This court therefore agrees with the conclusion of the motion court in *Golan v Daily News* that fees on fees are compensable damages on anti-SLAPP claims. (*See* 2023 NY Slip Op 33135[U], at *2 [Sup Ct, NY County 2023] [Sattler, J.].) And this court is persuaded that both the billing rates and hours logged in this action are reasonable.

NYT Co. is therefore entitled to a total amount in damages of $171,616.20.

D. Whether NYT Co. is Entitled to Interest on the Damages Awarded

NYT Co. has not requested prejudgment interest on its claimed damages—whether in its complaint or on this motion. This court concludes that NYT Co. is nonetheless entitled to interest.

CPLR 5001 (a) provides that "[i]nterest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." For these purposes, "property" encompasses both tangible property and intangible property such as money. (*See De Long Corp. v Morrison-Knudsen Co.*, 20 AD2d 104, 110 [1st Dept 1963].) A party suing under Civil Rights Law § 70-a is seeking damages for interference with the possession or enjoyment of intangible property in the form of money—namely the amount of the fees that the party has had to pay its attorneys to defend against (and seek compensation for) a SLAPP suit. (*See Isaly v Garde*, 2024 NY Slip Op 34311[U], at *1 [Sup Ct, NY County 2024] [reaching this conclusion].)

Thus, CPLR 5001 (a), by its terms, requires the award of interest on damages awarded under Civil Rights Law § 70-a. The next question is whether it matters that NYT Co. has never requested interest. The court concludes that it does not matter.

The Court of Appeals has held that pre-verdict interest under CPLR 5001 should be awarded notwithstanding the absence of a demand for interest in the complaint. (*See Dietrick v Kemper Ins. Co.*, 76 NY2d 248, 254 [1990].) The Appellate Division has also held that post-verdict/pre-judgment interest under CPLR 5002 must be awarded "as a matter of right," regardless whether movant has made "a specific demand" for interest in the motion being resolved. (*Dermigny v Harper*, 127 AD3d 685, 686 [2d Dept 2015] [internal quotation marks omitted].) But there appears to be a curious dearth of New York authority on whether a plaintiff

(or counterclaimant) that has successfully moved for the award of a money judgment in its favor is entitled to prejudgment interest under CPLR 5001 notwithstanding the absence of a demand in the motion.[2] This court concludes that a plaintiff must be awarded interest under CPLR 5001 regardless of demand.

The relevant language of CPLR 5001 and 5002—providing that interest "shall be recovered"—is the same. The principle underlying pre-verdict and post-verdict interest is the same: That "the breaching party should compensate the wronged party for the loss of use of the money" awarded in damages. (*J. D'Addario & Co. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012].) And the Court of Appeals held in *Flamm v Noble* that when the award of interest is a matter of right, a plaintiff's failure at trial to request timely an award of interest, before or after the verdict, does not affect the plaintiff's entitlement to interest.[3] (*See* 296 NY 262, 268 [1947].) These authorities all point in the same direction: A plaintiff otherwise entitled to an award of prejudgment interest under CPLR 5001 (a) as a matter of right does not lose that entitlement by failing to ask for interest.

As for that interest's accrual date, this court concludes, by analogy to attorney-fee awards made under Real Property Law § 234, that interest should accrue from the date on which Wayfarer's claims are determined to have lacked a substantial basis in fact or law within the meaning of Civil Rights Act § 70-a—*i.e.*, the date of this order. (*See Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226-227 [1st Dept 2005] [holding that for purposes of an award of prejudgment interest "on an award of attorneys' fees pursuant to a residential lease and Real Property Law § 234," interest accrues on the date "on which the party seeking fees was determined to be the prevailing party"].[4])

Accordingly, it is

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[2] In *Isaly*, the court concluded that interest on anti-SLAPP damages could properly be awarded sua sponte, albeit without an extended discussion of the issue. (*See* 2024 NY Slip Op 34311[U], at *1 n 2.)

[3] Although *Flamm* was applying Civil Practice Act § 480 of the Civil Practice Act, rather than CPLR 5001, the distinction is immaterial for present purposes. Indeed, CPLR 5001 introduced a new provision to eliminate confusion about the entitlement of a successful plaintiff at trial to pre-verdict interest. (*See* CPLR 5001 [c]; Advisory Comm Notes, reprinted following CPLR 5001 [discussing addition of CPLR 5001 [c]].)

[4] In a circumstance in which substantial time elapses between the determination of liability on an anti-SLAPP claim and the determination of the amount of attorney fees to which the plaintiff is entitled to as damages, a question might arise about which point in time is the appropriate accrual date. (*Compare e.g. Miller Realty Assocs. v Amendola*, 51 AD3d 987, 990 [2d Dept 2008] [awarding interest under CPLR 5001 at the midpoint between the motion court's prevailing-party determination and the court's determination of the amount of fees to be awarded the prevailing party], *with Love v State*, 78 NY2d 540, 544 [1991] [holding that under CPLR 5002, interest awarded following a bifurcated trial runs from the determination of liability, not the later determination of damages].) Because this decision addresses both liability and damages, though, this court need not resolve that question here.

ORDERED that Wayfarer's cross-motion for a stay is denied as academic; and it is further

ORDERED that the branch of NYT Co.'s motion seeking summary judgment on liability is granted; and it is further

ORDERED that the branch of NYT Co.'s motion seeking summary judgment on damages is granted in part and denied in part as set forth above; and it is further

ORDERED that plaintiff The New York Times is awarded a judgment against defendant Wayfarer Studios LLC of $171,616.20, with interest running at the statutory rate from July 27, 2026, plus costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that NYT Co. serve a copy of this order with notice of its entry on Wayfarer and on the office of the County Clerk (using the NYCEF filing event "Notice to the County Clerk - CPLR § 8019 (c)"), which shall enter judgment accordingly.

7/27/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE


Davis Wright
Tremaine LLP