



HARVARD LAW SCHOOL
Journal on Legislation

Online Volume 61

2023–2024

Policy Essay

- 1 The Need to Reform the Debt Limit
Representative Brendan Boyle

Articles

- 27 340B: The Shoulder of Frankenstein's Monster
Alicia Gilbert
- 51 Enhancing Public Access to Agency Law
*Bernard Bell, Cary Coglianese, Michael Herz,
Margaret Kwoka & Orly Lobel*
- 59 Taking on the Military Funeral Protest: A
Multifarious Statute Leans in
Derek P. Langhauser
- 70 Interpreting Code
Daniel B. Listwa & Adam Flaherty

THE NEED TO REFORM THE DEBT LIMIT

REPRESENTATIVE BRENDAN F. BOYLE*

I.	INTRODUCTION	1
II.	A HISTORY OF THE DEBT LIMIT	2
	A. <i>Founding–1917: Individual Authorization for Specific Projects.</i>	3
	B. <i>1917–1930: World War I and Complex Monetary Systems</i>	4
	C. <i>1930–Present: The Birth of the Modern Debt Limit</i>	4
III.	THE DEBT LIMIT HAS FAILED TO DRIVE FISCAL REFORM.	6
	A. <i>Initial Standoffs (1953)</i>	6
	B. <i>Sequestration (1980s)</i>	7
	C. <i>Government Shutdowns (1990s)</i>	8
	D. <i>The Budget Control Act (2010s)</i>	9
	E. <i>The Fiscal Responsibility Act (2023)</i>	12
IV.	THE DEBT LIMIT POSES A MAJOR THREAT TO THE U.S. AND GLOBAL ECONOMY	13
	A. <i>The Risks of Brinkmanship</i>	13
	1. <i>Financial Markets</i>	14
	2. <i>Households and Workers</i>	16
	B. <i>The Costs of Default</i>	16
	1. <i>Federal Programs.</i>	17
	2. <i>Macroeconomy</i>	18
	3. <i>Government Borrowing</i>	19
	4. <i>The Dollar</i>	20
	5. <i>National Security</i>	21
V.	THE DEBT LIMIT MUST BE REFORMED	22
VI.	CONCLUSION	25

I. INTRODUCTION

The statutory debt limit is one of the most misunderstood and misused pieces of legislation in modern history. Proponents of the debt limit have argued it is an effective means of fiscal control because it forces Congress to

*Member, U.S. House of Representatives (PA-2). Congressman Brendan F. Boyle is the Ranking Member of the House Budget Committee and has represented the Philadelphia area in the U.S. House of Representatives since 2015. The author of the Debt Ceiling Reform Act, he is a leading advocate for protecting the full faith and credit of the United States. From 2009 to 2015, Boyle served as a member of the Pennsylvania House of Representatives. The first in his family to attend college, he received his B.A. from the University of Notre Dame and his M.P.P. from the Harvard Kennedy School. The author would like to thank Leyla Mocan, Chief Economist for the House Budget Committee, for her expertise and valuable contributions and Jacob Sherer for his research assistance.

periodically pause and evaluate the national balance sheet. But as it stands, the debt limit accomplishes neither of these aims and instead poses a major threat to the country.

This Article argues for the complete overhaul of the debt limit for three reasons. First, history shows that the debt limit was created to make it easier for the Treasury to finance government obligations; attempts to use it to limit future spending is a misuse of the original intention rather than a deliberate policy choice by Congress. Second, standoffs about raising the debt limit have not led to meaningful fiscal reforms or substantially changed the fiscal trajectory of the nation because they have lacked revenue increases or entitlement reform and are easy for lawmakers to undo once the immediate debt limit crisis has passed. Third, the consequences of breaching the debt limit would be severe for both American and global economies and create extreme hardship for workers and families. The current form of the debt limit, which allows for political brinkmanship, imposes unjustifiable risks, which are only growing under an increasingly polarized Congress.

This Article advocates for the adoption of the Debt Ceiling Reform Act of 2023, which would neutralize the threat of default and return the statutory debt limit to its original intention. Under the Debt Ceiling Reform Act, Congress would have to make the active choice not to pay the United States's debts rather than allowing congressional inaction to create catastrophic consequences. The Act would give the Treasury Secretary the authority to raise the debt limit absent congressional override. It is well past time to adopt debt ceiling reform that preserves congressional oversight and power of the purse while preventing a global economic catastrophe.

II. A HISTORY OF THE DEBT LIMIT

The history of the debt limit demonstrates it was not created as a tool to control spending but instead evolved to empower the Department of the Treasury to practically manage debt and to alleviate Congress's involvement in the minute details of debt issuance. As the federal government has expanded, it has become more efficient for Congress to allow a blanket borrowing cap rather than authorizing individual pieces of spending.¹ The modern debt limit maintains congressional oversight of debt issuance while limiting the burden on Congress or Treasury to finance obligations every time debt needs to be issued.

¹ Many of these debt limit increases also occurred before the creation of the Congressional Budget Office in 1974, meaning that even had Congress wanted to use debt limit increases to control spending there was no formal scoring on how much new pieces of legislation would actually cost. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 201–202, 88 Stat. 297, 302–05 (1974) (creating Office and tasking with annual report on outlays and expenditures).

A. *Founding–1917: Individual Authorization for Specific Projects*

From the nation’s founding to the early versions of the debt limit in 1917, Congress authorized each issuance of debt, a tedious practice that was only feasible when government spending was relatively modest.² When large financing needs arose, Congress passed bills that indicated both the size of the debt issuance and the terms of the financial instruments.

From 1776 to 1920, Congress specified the terms of over 200 Treasury-authorized securities.³ Many of the major financing demands of this period were for war spending.⁴ For example, the Loan of July 1861 authorized the Treasury Secretary to borrow up to \$250 million to fund the Civil War.⁵ The Loan of July 1861 restricted how Treasury could finance the war effort by indicating the types of debt instruments Treasury could use and the terms of those instruments.⁶ In particular, the Loan gave Treasury the authority to issue bonds but stipulated that those bonds must be twenty-year issuances and could not have interest rates greater than seven percent.⁷

During the Spanish-American War, Congress again limited how Treasury could issue the debt needed to finance the war effort. Enacted in June 1898, the War Revenue Act financed the war through a series of tax increases and debt issuances.⁸ The bill allowed Treasury to borrow up to \$400 million dollars for the war and indicated that the debt should be issued in the form of twenty-year bonds at a three percent annual interest rate.⁹ Again, Congress was directly involved in how much money could be borrowed for the war and the exact terms of the debt. Congress gave Treasury authority to execute this order but not to determine the most efficient route for debt issuance.

Congress also issued specific borrowing limits and terms for large infrastructure projects. For example, Congress authorized debt issuance for the construction of the Panama Canal in 1902.¹⁰ Like the earlier debt issuances, this legislation limited the instruments Treasury could use and mandated ten-year Treasury bonds issued at a two-percent interest rate.¹¹ Because debt financing needs were relatively infrequent, Congress could maintain individualized oversight and control over the Treasury financing process.

² See Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 143 (2005) (explaining that until 1917, Congress “borrowed only when faced with the exigent circumstances of war or economic recession”).

³ See George J. Hall & Thomas J. Sargent, *Brief History of US Debt Limits Before 1939*, 115 PROCEEDINGS NAT’L ACAD. SCI. 2942, 2942 (2018).

⁴ See Krishnakumar, *supra* note 2, at 141–43 (describing use in wars).

⁵ Loan of July 1861, Pub. L. No. 37-5, 12 Stat. 259 (1861).

⁶ *Id.*

⁷ *Id.*

⁸ War Revenue Act of 1898, Pub. L. No. 55-448, 30 Stat. 448 (1898).

⁹ See War Revenue Act of 1898 § 33.

¹⁰ Spooner Act of 1902, Pub. L. No. 57-183, § 8, 32 Stat. 481, 484 (1902).

¹¹ *Id.*

B. 1917–1930: World War I and Complex Monetary Systems

The Second Liberty Bond Act of 1917, enacted to finance the United States's entry into World War I, signaled a shift in the Executive Branch's power to issue debt.¹² Like previous debt bills, the Second Liberty Bond Act limited the amount of debt Treasury could issue when it raised the limit to more than \$7 billion.¹³ But unlike earlier bills, it did not tie that debt issuance to one particular project or policy, and it did not contain restrictions on the type or conditions of that debt.¹⁴ This significant departure increased Treasury's flexibility to issue debt in the most efficient and affordable manner. But the Second Liberty Bond Act still did not create the modern aggregate debt limit because it did not override limits on previous debt issuance.¹⁵

The Second Liberty Bond Act of 1917 was also passed during several broad reforms to the U.S. financial system—in particular, the 1913 creation of the Federal Reserve system. As the financial system became more complex and demand for government assets grew, it became increasingly cumbersome for Congress to be involved in the terms and types of debt issuance. The Federal Reserve Act of 1913 established the Federal Reserve as the country's central bank and authority over monetary policy.¹⁶ The Federal Reserve provided the means for systematized and sophisticated government intervention in financial markets. Whereas previously Treasury had been the center of federal financial policy, the Federal Reserve became an institution with economic and financial market experts. Before the creation of the Federal Reserve, some worried that allowing Treasury to control the terms of debt issuance would affect credit conditions and thus drive monetary policy.¹⁷ By putting the power of monetary policy into the hands of the Federal Reserve, Congress separated monetary policy choices from fiscal policy financing and removed the concern that Treasury's freedom to determine the terms of debt issuance would negatively affect monetary policy.

C. 1930–Present: The Birth of the Modern Debt Limit

Congress created an early form of the aggregate debt limit in 1941 by amending the Second Liberty Bond Act.¹⁸ This amendment set the total

¹² See Krishnakumar, *supra* note 2, at 143–44 (describing World War I as a turning point).

¹³ Second Liberty Bond Act of 1917, Pub. L. No. 65-43, § 1, 40 Stat. 288, 288 (1917) (“Treasury . . . is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law, not exceeding in the aggregate \$7,538,945,460 and to issue therefore bonds of the United States.”).

¹⁴ *Id.*

¹⁵ See D. ANDREW AUSTIN, CONG. RSCH. SERVS., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 6 (2015).

¹⁶ Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (1913).

¹⁷ See D. ANDREW AUSTIN, CONG. RSCH. SERVS., *supra* note 15, at 5.

¹⁸ See Krishnakumar, *supra* note 2, at 147 (“[I]n early 1941, Congress made an important procedural change to the debt limit statute: . . . one aggregate limit for all types of debt issued by the Treasury.”).

debt limit at \$65 billion.¹⁹ And by removing constraints on the distribution of the debt between short-term and long-term issuance, the amendment gave Treasury freedom to decide which securities to offer when issuing debt.²⁰ This set a precedent for how Treasury manages debt: Treasury could choose the maturity length and type of the debt as long as it stayed under the aggregate cap and financed obligations as they were due. Importantly, amending the Second Liberty Bond Act was not intended to stop government spending or force a conversation around the fiscal future. Rather, the amendments gave Treasury the flexibility to manage debt issuance while still maintaining congressional oversight.²¹ In the following years, Congress regularly modified the Second Liberty Bond Act to increase the debt limit.²²

The debt limit in its current form was codified in 1982 at 31 U.S.C. § 3101.²³ Congress consolidated the debt limit, removed distinctions between permanent and temporary increases, and set an aggregate cap for debt subject to the statutory limit, which included debt held by the public and debt held by government accounts.²⁴ Since 1982, most debt limit increases have been modest, increasing by one to fifteen percent over existing limits.²⁵ In many years, increases were less than five percent.²⁶

Since the 1930s, government programs have expanded to reduce poverty, expand healthcare access, help Americans retire with dignity, and stabilize the economy in times of crisis.²⁷ The share of government spending on defense and war financing has also increased significantly.²⁸ And attempts to shrink the government's footprint through regressive tax cuts have further increased the deficit.²⁹

¹⁹ Public Debt Act of 1941, Pub. L. No. 77-7, § 2, 55 Stat. 7, 7 (1941).

²⁰ *Id.*

²¹ See H.J. Cooke & M. Katzen, *The Public Debt Limit*, 9 J. FIN. 298, 298 (1954).

²² See Krishnakumar, *supra* note 2, at 148.

²³ 31 U.S.C. § 3101.

²⁴ See *id.*; CONG. BUDGET OFF., *Federal Debt and the Statutory Limit, February 2023* (2023), <https://www.cbo.gov/publication/58945#footnote-005> [<https://perma.cc/2BCW-2UKV>].

²⁵ See Office of Management and Budget, *Table 7.3: Statutory Limits on Federal Debt: 1940-Current*, WHITE HOUSE (2023), <https://www.whitehouse.gov/omb/budget/historical-tables/> [<https://perma.cc/N9GU-6KQW>].

²⁶ *Id.* Though not all increases were without controversy, generally increasing the debt limit has been part of routine business for Congress as federal spending has increased. But even without increases in federal spending, the *nominal* value of the debt will grow, meaning that the need to increase the debt limit will remain.

²⁷ See Paul C. Light, *Government's Greatest Achievements of the Past Half Century*, BROOKINGS INST. (Dec. 1, 2000), <https://www.brookings.edu/articles/governments-greatest-achievements-of-the-past-half-century/> [<https://perma.cc/Q8QR-H5WM>].

²⁸ *Historical Budget Data – Feb 2023*, CONG. BUDGET OFF. (2023), <https://www.cbo.gov/data/budget-economic-data>. Table 4. Discretionary Outlays

²⁹ See Bobby Kogan, *Tax Cuts Are Primarily Responsible for the Increasing Debt Ratio*, CTR. FOR AM. PROGRESS (Mar. 27, 2023), <https://www.americanprogress.org/article/tax-cuts-are-primarily-responsible-for-the-increasing-debt-ratio/> [<https://perma.cc/ZTE2-BZDB>].

The merits or morality of these policy choices are separate discussions from how the Treasury should be allowed to finance decisions Congress has already made. This is especially true when the Treasury is financing debt that has accrued due to decisions Congress made in the past. Indeed, as the debt has grown, so too has the debt limit—since the creation of the modern debt limit, it has been lifted or suspended over 100 times.³⁰

III. THE DEBT LIMIT HAS FAILED TO DRIVE FISCAL REFORM

Although proponents of the debt limit justify its existence as a means to exercise fiscal control and reduce the deficit, the debt limit has never been a major driver of fiscal reform. The amount of federal debt has increased considerably over the last several decades.³¹ Sometimes this has been in response to crises like the 2008 financial crisis or the 2020 COVID-19 pandemic.³² In other cases, it has been due to policy choices to reduce revenues through reforms to the tax system.³³ The debt limit has often been used as a vehicle for riders: bills added to unrelated legislation to increase their likelihood of passing. But many of these riders include increased costs as well as spending reductions, leading to little or no deficit reduction.³⁴ The major standoffs around the debt limit, therefore, have not ultimately led to notable deficit reduction.

A. Initial Standoffs (1953)

In the summer of 1953, the country was fast approaching the debt limit.³⁵ Congress refused to raise the debt limit and forced Treasury to delay default via extreme actions like delaying payments to federal contractors and monetizing

³⁰ See Office of Management and Budget, *supra* note 25.

³¹ See *id.*

³² See M. Ayhan Kose, Peter Nagle, Franziska Ohnsorge & Naotaka Sugawara, *Does Government Debt Increase After Global Recessions?*, BROOKINGS INST. (Dec. 17, 2021), <https://www.brookings.edu/articles/does-government-debt-increase-after-global-recessions/> [<https://perma.cc/9BZC-U479>].

³³ See Kogan, *supra* note 29.

³⁴ For example, the House-passed Limit Save Grow Act of 2023 would have raised the debt limit while repealing energy tax credits, stopping student debt cancellation, expanding work requirements, rescinding some funds, permitting reform, and repealing IRS enforcement funding. Some of these additions would have reduced the deficit (e.g., repealing tax credits, ending student debt cancellation), and others would have increased the deficit (i.e., repealing IRS enforcement funding). See Phillip L. Swagel, CONG. BUDGET OFF., *Re: CBO's Estimate of the Budgetary Effects of H.R. 2811, the Limit, Save, Grow Act of 2023* (Apr. 25, 2023), https://www.cbo.gov/system/files/2023-04/59102-Arrington-Letter_LSG%20Act_4-25-2023.pdf [<https://perma.cc/G9NK-MEWD>].

³⁵ See TREASURY BULLETIN, OFF. OF SEC'Y, DEP'T OF TREASURY 21 (1953), https://fraser.stlouisfed.org/files/docs/publications/tbulletin/1953_07_treasurybulletin.pdf?utm_source=direct_download [<https://perma.cc/D3B5-HLJW>].

gold from the general fund.³⁶ In August 1954, Congress lifted the debt limit by \$6 billion without any fiscal reforms.³⁷ All this episode created was a set of increasingly nonsensical gimmicks, including requesting that federal agencies finance themselves, to allow Treasury to buy time to avoid default.³⁸

B. Sequestration (1980s)

In the 1980s, a debt limit impasse led to the introduction of sequestration, a tool intended to reduce future spending that has not meaningfully changed the fiscal trajectory. The national debt grew at a remarkable pace under the Reagan Administration, more than doubling from \$925 billion to \$2.19 trillion.³⁹ The debt limit was lifted or suspended twenty times during his presidency.⁴⁰ In 1985, the Gramm-Rudman-Hollings Act introduced sequestration: a mechanism that imposes automatic, across-the-board spending cuts if appropriations spending levels exceeded set levels.⁴¹ The Act, attached to a debt limit increase, required the elimination of budget deficits within six years.⁴²

Sequestration proposals since have created contention without meaningful fiscal control.⁴³ In part, this is because mandatory entitlement programs like Social Security and Medicare, which are major drivers of the national debt, are either not included in or face very modest cuts from sequestration. These exclusions help ensure that Americans get the benefits they have earned. But they also make it difficult—if not impossible—for across-the-board cuts to change the debt trajectory. Sequestration also fails to consider meaningful ways to increase revenues, which are an important part of reducing the national debt. And because legislators can, and usually do, lift spending caps, their original intention of reducing spending is circumvented. Indeed, after the 1985 introduction of sequestration, the national debt still increased by billions every year.⁴⁴

³⁶ See Kenneth D. Garbade, *The First Debt Ceiling Crisis*, FED. RSRV. BANK N.Y. (2016), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr783.pdf?la=en [<https://perma.cc/HHZ9-EV86>].

³⁷ See *id.*; Office of Management and Budget, *supra* note 25.

³⁸ Walter W. Heller, *Why a Federal Debt Limit?*, 51 NAT'L TAX ASS'N. 246, 247 (1958).

³⁹ See *Historical Budget Data – Feb 2023*, CONG. BUDGET OFF. (2023), <https://www.cbo.gov/data/budget-economic-data> [<https://perma.cc/6LTU-KK6C>] (measuring change in debt held by the public from 1982 to 1989).

⁴⁰ See Office of Management and Budget, *supra* note 25.

⁴¹ Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), Pub. L. No. 99-177, §§ 251–257, 99 Stat. 1037, 1063–93 (1985).

⁴² See MEGAN SUZANNE LYNCH, CONG. RSCH. SERVS., R41901, STATUTORY BUDGET CONTROLS IN EFFECT BETWEEN 1985 AND 2002 2 (2011).

⁴³ See *The Debt Ceiling: Congressional History and Consequences: Hearing on “Why Congress Needs to Abolish the Debt Ceiling” before the H. Budget Comm.*, 117th Cong. (2022) (statement of Laura Blessing, Senior Fellow, The Gov't Affs. Inst. at Georgetown Univ.).

⁴⁴ See CONG. BUDGET OFF., *supra* note 24.

C. Government Shutdowns (1990s)

During the Clinton Administration, Congress used the debt limit as an unsuccessful threat to force fiscal control and controversial policy changes. In 1995, the 104th Congress marked the first time Republicans controlled both chambers of Congress since 1955.⁴⁵ Led by House Speaker Newt Gingrich, House Republicans refused to increase the debt limit unless the increase was tied to a package that included spending cuts, welfare reform, restraints on Medicare and Medicaid, and a balanced budget within seven years.⁴⁶ House Republicans hoped that because the timely increase of the debt limit was critical to a functioning government and the fundamental plumbing of the U.S. financial system, the Clinton Administration would accept the demanded cuts to avoid delays.

In November 1995, House Republicans introduced H.R. 2586, which would have made these cuts and increased the debt limit only through December 1995.⁴⁷ President Bill Clinton vetoed the bill, and the government shut down.⁴⁸ In January 1996, Congress and the White House reached an agreement to extend the debt limit and keep the government open through March.⁴⁹ By that time, Moody's credit rating agency indicated that it was considering a downgrade of the U.S. credit rating because of the fears that brinkmanship had created.⁵⁰ Finally, in late March 1996, Congress raised the debt limit to \$5.5 trillion.⁵¹ In 1997, Congress again raised the debt limit, this time to nearly \$6 trillion.⁵² The conclusion of this saga was that the debt limit was lifted with some minor policy riders,⁵³ but without meaningful fiscal reform, and certainly without the cuts demanded by Speaker Gingrich and his associates.

⁴⁵ See Charles Apple, *In Control*, SPOKESMAN-REV., <https://www.spokesman.com/stories/2020/jun/25/control-house-and-senate-1900/> [<https://perma.cc/79GW-MEAC>].

⁴⁶ See Kara Brandeisky, *How Clinton Handled His Debt Ceiling Crisis Better Than Obama*, NEW REPUBLIC (Aug. 2, 2011), <https://newrepublic.com/article/93043/obama-clinton-debt-ceiling-crisis> [<https://perma.cc/9E4M-KYBF>].

⁴⁷ See H.R. 2586, 104th Cong. (1995).

⁴⁸ See Robert B. Reich, *Republicans Want to Destroy the Economy Over the Debt Ceiling. Let Them*, NEWSWEEK (Jan. 25, 2023), <https://www.newsweek.com/republicans-want-destroy-economy-over-debt-ceiling-let-them-opinion-1776478> [<https://perma.cc/VN9S-A2JE>].

⁴⁹ See Balanced Budget Downpayment Act of 1996, Pub. L. No. 104-99, § 106, 110 Stat. 26, 27 (1996); see also HOLLOWAY ET AL., U.S. GOV'T ACCOUNTABILITY OFF., GAO/AIMD-96-130, DEBT CEILING: ANALYSIS OF ACTIONS DURING THE 1995-1996 CRISIS (1996) (describing Treasury actions).

⁵⁰ David E. Sanger, *Moody's Says It Is Considering Lowering U.S. Credit Rating*, N.Y. TIMES (Jan. 25, 1996), <https://www.nytimes.com/1996/01/25/us/moody-s-says-it-is-considering-lowering-us-credit-rating.html> [<https://perma.cc/GYG4-R9AR>].

⁵¹ See Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 301, 110 Stat. 847, 875 (1996).

⁵² See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5701, 111 Stat. 251, 648 (1997) (raising to \$5.95 trillion).

⁵³ These riders included changes to the Medicare and Medicaid programs, auctions of licenses for electromagnetic spectrum, and increased excise taxes on cigarettes. See CONG. BUDGET OFF., CBO MEMORANDUM: BUDGETARY IMPLICATIONS OF THE BALANCED BUDGET ACT OF 1997 (Dec. 1997), <https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/>

D. The Budget Control Act (2010s)

In 2011, another harrowing debt limit debate increased government and taxpayer costs without meaningful fiscal reform. In February 2011, Speaker John Boehner and others made clear that the Republican-controlled House would not support any deal to raise the debt limit that did not include spending cuts.⁵⁴ On April 4, Treasury Secretary Timothy Geithner announced that Treasury would reach the debt limit and need to begin extraordinary measures to prolong default by May 16.⁵⁵ On May 16, Treasury announced its projected X-date, when the United States's borrowing authority would be exhausted, was August 2.⁵⁶ On July 31, President Obama and congressional leaders announced they had reached a deal to cut federal spending and increase the debt limit.⁵⁷ The Budget Control Act ("BCA") became law on August 2, the X-date.⁵⁸

The BCA imposed spending caps on discretionary programs from 2012 through 2021.⁵⁹ It also created the Joint Select Committee on Deficit Reduction, whose goal was to reduce the deficit by at least \$1.5 trillion by 2021.⁶⁰ The BCA stipulated that should the Committee fail to reduce the deficit by more than \$1.2 trillion, sequestration would impose \$1.2 trillion in spending cuts.⁶¹ Sequestration was intended to discourage Congress from enacting legislation that would breach the spending caps.⁶² On August 1, 2011, the Congressional Budget Office projected the legislation would reduce budget deficits by at least \$2.3 trillion.⁶³

reports/bba-97.pdf [https://perma.cc/UFD5-Q69K]. Some of these changes were undone in later legislation.

⁵⁴ See Anna Palmer, *Boehner: House Won't Extend Current Spending Beyond March 4*, ROLL CALL (Feb. 17, 2011), <https://rollcall.com/2011/02/17/boehner-house-wont-extend-current-spending-beyond-march-4/> [https://perma.cc/DE22-S6BX].

⁵⁵ See Timothy F. Geithner, *Secretary Geithner Send Debt Limit Letter to Congress*, U.S. DEP'T OF TREASURY (Apr. 4, 2011), <https://home.treasury.gov/secretary-geithner-sends-debt-limit-letter-to-congress-1> [https://perma.cc/68WR-N4L6].

⁵⁶ See Timothy F. Geithner, *Letter to Congress*, U.S. DEP'T OF TREASURY (May 16, 2011), <https://web.archive.org/web/20181226103435/https://www.treasury.gov/connect/blog/Documents/20110516Letter%20to%20Congress.pdf> [https://perma.cc/BPX7-GYMA].

⁵⁷ See Carl Hulse & Helene Cooper, *Obama and Leaders Reach Debt Deal*, N.Y. TIMES (July 31, 2011), <https://www.nytimes.com/2011/08/01/us/politics/01FISCAL.html> [https://perma.cc/2D7B-TE5D].

⁵⁸ Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011).

⁵⁹ *Id.* § 251.

⁶⁰ *Id.* § 401.

⁶¹ *Id.* § 251A.

⁶² See MEGAN S. LYNCH, CONG. RSCH. SERVS., IN12093, WERE THE DISCRETIONARY SPENDING CAPS EFFECTIVE? 1 (2023).

⁶³ See Douglas W. Elmendorf, CONG. BUDGET OFF., Letter to Congress 7 (Aug. 1, 2011), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/budgetcontrolactaug1.pdf> [https://perma.cc/RP5W-6TMU].

The bill also instituted the so-called “McConnell Rule,” which allowed for discrete increases in the debt limit.⁶⁴ The McConnell Rule authorized Treasury to borrow an additional \$900 billion once the President certified that the debt was within \$100 billion of the legal limit.⁶⁵ However, if Congress issued a joint resolution of disapproval within fifty calendar days of the President’s certification, the debt limit would only increase by \$400 billion, rather than \$900 billion.⁶⁶ An additional debt limit increase would occur if, after the debt limit had increased \$900 billion, the President again certified that the debt limit was within \$100 billion of the existing limit.⁶⁷ But this third increase was tied to the conditions of the Joint Select Committee’s actions.⁶⁸ If the Committee’s recommendations to reduce the deficit by at least \$1.2 trillion were enacted, the debt limit would be increased commensurate with the size of the cuts, up to a \$1.5 trillion increase.⁶⁹ If not, the debt limit would be increased by \$1.2 trillion.⁷⁰

The first increase occurred nearly immediately after passage of the law, and because there was no resolution of disapproval, the second increase became effective in September of 2011.⁷¹ And although the Committee met throughout the fall of 2011, they were unable to reach an agreement by the Committee’s deadline.⁷² The debt limit was therefore increased by \$1.2 trillion in January 2012.⁷³

Sequestration—across-the-board cuts of \$1.2 trillion—was therefore scheduled to go into effect beginning January 2, 2013.⁷⁴ These cuts would have included an annual \$55 billion cut in defense spending and \$55 billion cut in non-defense spending, and an approximately \$200 billion reduction in debt service costs from the reduced spending.⁷⁵

⁶⁴ See William G. Gale, *The Illogic of the McConnell Debt Limit Rule*, TAX POL’Y CTR. (Oct. 23, 2023), <https://www.taxpolicycenter.org/taxvox/illogic-mcconnell-debt-limit-rule> [https://perma.cc/M7N8-F8ED].

⁶⁵ See Budget Control Act of 2011 § 3101A(a)(1)(A).

⁶⁶ See *id.* §§ 3101A(a)(1)(B), (b)(1).

⁶⁷ *Id.* § 3101A(a)(2).

⁶⁸ *Id.*

⁶⁹ *Id.* § 3101A(a)(2)(iii).

⁷⁰ *Id.* § 3101A(a)(2)(i). The debt limit would also increase by \$1.5 trillion if the “Archivist of the United States ha[d] submitted to the States for their ratification” a constitutional amendment for a balanced budget. See *id.* § 3101A(a)(2)(ii).

⁷¹ See CONG. BUDGET OFF., *supra* note 24 (increasing debt limit to \$14.694 trillion on August 2, 2011, and then \$15.194 trillion, effective September 21, 2011).

⁷² See Press Release, Jeb Hensarling & Patty Murray, Statement from Co-Chairs of the Joint Select Committee on Deficit Reduction (Nov. 21, 2011), <https://cybercemetery.unt.edu/archive/deficit/20120113174936/http://www.deficitreduction.gov/public/index.cfm/2011/11/statement-from-co-chairs-of-the-joint-select-committee-on-deficit-reduction> [https://perma.cc/282U-GTHH].

⁷³ See CONG. BUDGET OFF., *supra* note 24 (increasing debt limit to \$16.394 trillion effective January 27, 2012).

⁷⁴ See Budget Control Act of 2011 § 251A.

⁷⁵ See MINDY R. LEVIT, CONG. RSCH. SERVS., R42675, THE BUDGET CONTROL ACT OF 2011: BUDGETARY EFFECTS OF PROPOSALS TO REPLACE THE FY2013 SEQUESTER CONGRESSIONAL 1 (2012).

But in the ensuing years, legislators routinely raised the spending caps and amended the sequester.⁷⁶ In 2012, the House passed the Sequester Replacement Reconciliation Act, which would have changed the Fiscal Year 2013 sequestration cuts by canceling the \$98 billion in scheduled cuts to discretionary defense, discretionary non-defense, and mandatory defense spending.⁷⁷ Instead, in September 2012, Congress handled government spending agreements through continuing resolution to fund the government at existing levels through March 2013.⁷⁸ In January 2013, Congress also passed the American Taxpayer Relief Act of 2012, which made many of the Bush tax cuts permanent and delayed some of the scheduled sequestration in the BCA, leading to reductions in revenues and an increase in the deficit.⁷⁹ This pattern of passing legislation that increased the BCA caps continued over the decade the BCA was in effect.⁸⁰

The 2011 BCA had modest effects on the fiscal trajectory of the United States.⁸¹ At the end of Fiscal Year 2011, the total debt subject to the limit stood at \$14.8 trillion.⁸² By the end of Fiscal Year 2022 this number would balloon to approximately \$31 trillion.⁸³ But the brinkmanship leading up to the BCA had serious consequences for the economy and taxpayers,⁸⁴ and those consequences would have been more extreme had lawmakers failed to raise the debt ceiling.⁸⁵ And the spending caps, which did remain in the early years of the BCA, damaged the economy, which was still recovering from the 2008 financial crisis.⁸⁶ Indeed, compared to a scenario in which outlays remained at

⁷⁶ See MEGAN S. LYNCH & GRANT A. DRIESSEN, CONG. RSCH. SERVS., R46752, EXPIRATION OF THE DISCRETIONARY SPENDING LIMITS: FREQUENTLY ASKED QUESTIONS 7 (2022).

⁷⁷ See LEVIT, *supra* note 77, at 7 (explaining bill would lower existing cap on discretionary budget authority and cut other mandatory non-defense programs instead); see also John Parkinson, *House Passes Bill Stemming Defense Cuts*, ABC NEWS (May 10, 2012), <https://abc-news.go.com/blogs/politics/2012/05/house-passes-bill-stemming-defense-cuts> [https://perma.cc/SFF6-TB5M].

⁷⁸ See Continuing Appropriations Resolution, Pub. L. 112-175, 126 Stat. 1313 (2013).

⁷⁹ See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

⁸⁰ See LYNCH & DRIESSEN, *supra* note 76, at 2–3.

⁸¹ See Office of Management and Budget, *supra* note 25 (showing continued increase in debt limit after 2011).

⁸² See *Historical Debt Outstanding*, U.S. DEP'T OF TREASURY (Oct. 4, 2022), <https://fiscaldata.treasury.gov/datasets/historical-debt-outstanding/historical-debt-outstanding> [https://perma.cc/26QU-AHRH].

⁸³ *Id.*

⁸⁴ See U.S. DEP'T OF TREASURY, THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP 1 (2013), <https://home.treasury.gov/system/files/276/POTENTIAL-MACROECONOMIC-IMPACT-OF-DEBT-CEILING-BRINKMANSHIP.pdf> [https://perma.cc/6N2S-6FKU] [hereinafter THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP].

⁸⁵ See Eric Engen, Glenn Follette & Jean-Philippe Laforte, *Possible Macroeconomic Effects of a Temporary Federal Debt Default*, FED. RSRV. (Oct. 4, 2013), <https://www.federalreserve.gov/monetarypolicy/files/FOMC20131004memo02.pdf> [https://perma.cc/PK32-QCPE].

⁸⁶ See *The Cost of Crisis-Driven Fiscal Policy*, MACROECONOMIC ADVISERS, LLC (Oct. 2013), https://www.pgpf.org/sites/default/files/10112013_crisis_driven_report_fullreport.pdf [https://perma.cc/W52V-C8CS].

the 2010 share of GDP, the spending cuts under BCA cut GDP growth by 0.7 percentage points in the following two years and increased the unemployment rate by 0.8 percentage points, meaning 1.2 million fewer jobs.⁸⁷ In exchange for a limited change in the fiscal trajectory, taxpayers got higher unemployment and a weaker economy.

E. *The Fiscal Responsibility Act (2023)*

In Spring 2023, members of Congress again used the debt limit as a bargaining chip to push for both policies that would supposedly reduce government deficits and a grab-bag of other unrelated policy items. The Biden Administration called for a clean increase of the debt ceiling, leaving the negotiations for fiscal policy to the budget and appropriations process.⁸⁸ But the House Republican majority, led by Speaker Kevin McCarthy, demanded a package of spending cuts and other riders attached to a debt limit increase.⁸⁹

On April 26, 2023, the House of Representatives passed the Limit, Save, Grow Act.⁹⁰ This bill would have cut Fiscal Year 2024 discretionary spending by \$142 billion, established a one percent growth cap for the following decade, rescinded unobligated funding from previous rescue packages, and substantially changed work requirements in welfare programs.⁹¹ It also would have repealed other Biden Administration policies, including student loan forgiveness and certain climate provisions of the Inflation Reduction Act.⁹² But even the threat of default could not ensure the passage of the demands in the Limit, Save, Grow Act. The Senate never even considered it.⁹³

As written, the Fiscal Responsibility Act is projected to reduce the deficit by \$1.5 trillion.⁹⁴ But as history has shown, Congress routinely overrides limits imposed by caps. And even if these restrictions hold, the deficit reduction in the Fiscal Responsibility Act is modest.

The Fiscal Responsibility Act, as well as the Budget Control Act, did not change revenues or the fiscal trajectory of entitlement programs like Social Security and Medicare, which make up the largest share of the national

⁸⁷ See *id.*; see also *The Employment Situation – January 2013*, BUREAU OF LAB. STATS. (Feb. 1, 2013), <https://www.bls.gov/news.release/archives/empst02012013.pdf> [<https://perma.cc/R2EW-444Y>] (explaining unemployment rate in January 2013 was 7.9%, well below pre-recession levels).

⁸⁸ See Adam Cancryn, Jennifer Haberkorn & Jonathan Lemire, *Biden Won't Move on Debt Ceiling Terms Even As He Seeks to Restart Talks*, POLITICO (May 1, 2023), <https://www.politico.com/news/2023/05/01/biden-ready-to-restart-debt-talks-but-wont-budge-on-conditions-00094780> [<https://perma.cc/WSX4-W45R>].

⁸⁹ *Id.*

⁹⁰ Limit, Save, Grow Act of 2023, H.R. 2811, 118th Cong. (2023).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023).

⁹⁴ See Phillip L. Swagel, *Letter to the House of Representatives*, CONG. BUDGET OFF. (May 20, 2023), https://www.cbo.gov/system/files/2023-05/hr3746_Letter_McCarthy.pdf [<https://perma.cc/RXN4-95RV>].

debt.⁹⁵ Ultimately, entitlement reforms and revenue increases must be part of any fiscal reform package if it is to meaningfully affect the national debt, but no debt limit crisis so far has produced such legislation. Perhaps one reason for this is that fiscal riders attached to debt limit legislation are usually passed under extremely tight timeframes and do not lend themselves to the space to create effective policy to address the future of the trust funds. Indeed, debt limit deliberations rarely lead to rational or thoughtful policy when it comes to deficit reduction.⁹⁶

Debt limit negotiations have not historically forced entitlement reform as the trust funds maintain a decade of solvency,⁹⁷ so lawmakers are not feeling the pressure to address what will be a challenging policy problem—and indeed, one that will only become more difficult to solve the closer Congress comes to the trust fund exhaustion date. As in the early 1980s, Social Security is rarely “saved” until the very last minute, and the existence of the debt limit is unlikely to change this basic fact of how the modern Congress functions.⁹⁸

IV. THE DEBT LIMIT POSES A MAJOR THREAT TO THE U.S. AND GLOBAL ECONOMY

While the statutory debt limit has failed to drive meaningful fiscal reform, it risks creating lasting and significant damage to the American and global economies. Crises around the debt limit have shown that a breach of the full faith and credit of the United States Government would be disastrous, and any delay in paying government debts could have widespread consequences.

A. *The Risks of Brinkmanship*

The U.S. government has never defaulted on its debt, but there have been several instances of brinkmanship around raising the debt limit in which the government comes within days of the X-date. These experiences have included a credible threat of default, even if it were to occur only by accident. Unfortunately, even brinkmanship alone incurs a real cost.

⁹⁵ Office of Management and Budget, *Table 8.4: Outlays by Budget Enforcement Act Category as Percentages of GDP: 1962-2028*, WHITE HOUSE (2023), <https://www.whitehouse.gov/omb/budget/historical-tables/> [https://perma.cc/B446-AV3L].

⁹⁶ See generally Heller, *supra* note 38.

⁹⁷ Xinzhe Cheng, *CBO's 2023 Long-Term Projections for Social Security*, CONG. BUDGET OFF. (June 29, 2023), <https://www.cbo.gov/publication/59184> [https://perma.cc/8363-89NF].

⁹⁸ See BARRY F. HUSTON & DAWN NUSCHLER, CONG. RSCH. SERVS., R47040, SOCIAL SECURITY: TRUST FUND STATUS IN THE EARLY 1980S AND TODAY AND THE 1980S GREENSPAN COMMISSION 1 (2022).

1. Financial Markets

The effects of the 2011 debt limit brinkmanship were primarily and initially felt in the stock market, which had spillover effects to other markets, along with household spending and credit. This tornado of uncertainty led to equity prices falling by approximately seventeen percent, which had consequential effects on individuals' stock market and retirement accounts.⁹⁹ This ultimately led to a \$2.4 trillion reduction in household wealth and a \$800 billion decline in retirement assets.¹⁰⁰ The S&P index lost four percent of its value in the week leading up to the X-date.¹⁰¹ The impasse also created substantial stock market volatility and increases in corporate risk spreads,¹⁰² heightening costs for borrowers and corporations.

Beyond equities, the 2011 brinkmanship also generated uncertainty in Treasury markets by creating higher premiums on Treasuries.¹⁰³ Treasuries constitute the backbone of the financial system; any disruption to this market has ripple effects across both the United States and global financial systems.¹⁰⁴ In 2011, investors' concerns led to money flowing out of Treasury repurchase agreements and Treasury bills and into deposits at financial institutions as part of a movement towards hoarding liquidity in the face of potential Treasury market dysfunction.¹⁰⁵ This created unnecessary distortions and higher costs in the market.¹⁰⁶ Additionally, approaching the debt limit makes the Treasury Department's job of cash management more difficult.¹⁰⁷ The government's proximity to the debt limit reduces the cash balance that the Treasury can hold and leads to reductions in bill issuance to stay under the debt limit.¹⁰⁸ Though the Treasury must take these necessary actions to prolong government

⁹⁹ See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP, *supra* note 84, at 3.

¹⁰⁰ *Id.*

¹⁰¹ Federal Reserve, Conference Call of the Federal Open Market Committee (Aug. 1, 2011) (on file with author), <https://www.federalreserve.gov/monetarypolicy/files/fomc20110801confcall.pdf> [<https://perma.cc/F8EQ-H2FF>].

¹⁰² See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP, *supra* note 84, at 3.

¹⁰³ See David Cashin, Erin Syron Ferris, Beth Klee & Cailey Stevens, *Take it to the Limit: The Debt Ceiling and Treasury Yields* (Federal Reserve Board of Governors, Working Paper, 2017), <https://www.federalreserve.gov/econres/feds/files/2017052pap.pdf> [<https://perma.cc/5QZX-8RTZ>].

¹⁰⁴ See Matthew Wells, *Averting a Treasury Market Crisis*, ECON FOCUS (2023), https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2023/q1/feature2.pdf [<https://perma.cc/S4PT-S5LM>].

¹⁰⁵ Federal Reserve, *supra* note 101.

¹⁰⁶ *Id.*

¹⁰⁷ See Assistant Secretary for Financial Markets Joshua Frost, Remarks by Assistant Secretary for Financial Markers Joshua Frost on the Historical and Current Perspectives on the Debt Limit at the Federal Reserve Bank of New York's Annual Primary Dealers Meeting (Dec. 1, 2022) (on file with U.S. Dep't of Treasury), <https://home.treasury.gov/news/press-releases/jy1136> [<https://perma.cc/STX8-S3SQ>].

¹⁰⁸ *Id.*

resources and avoid default, they ultimately create volatility in the financial system—volatility that can persist for weeks after the debt limit has been raised.¹⁰⁹ This pattern has persisted across impasses; in 2023, the Treasury Borrowing Advisory Committee wrote Secretary Janet Yellen weeks ahead of the projected X-date to say that investors were already demanding an increased premium for the risk of buying Treasury Bills.¹¹⁰ All of this leads to higher rates on government debt.¹¹¹ In 2011, the result of these higher rates on government debt amounted to an additional \$1.3 billion in borrowing costs for 2011 alone, with the potential for increased costs as they compounded across years.¹¹²

Taken together, financial market actors see debt limit impasses as creating system uncertainty and instability in government securities. For example, a month ahead of the X-date in 2011, the S&P credit ratings agency publicly stated that they were considering a credit downgrade of U.S. debt.¹¹³ Nearly a week after the crisis was resolved, S&P downgraded the U.S.'s credit rating from AAA to AA+, a decision that still has not been reversed.¹¹⁴ This has resulted in a decade of higher borrowing costs.¹¹⁵ After the 2023 debt limit impasse, Fitch Ratings also downgraded the U.S.'s credit rating from AAA to AA+, citing the standoff as the major driving factor.¹¹⁶ The great irony is that the debt limit creates impasses that increase borrowing costs for the government, irresponsibly exacerbating the fiscal problems that lawmakers claim it solves.

¹⁰⁹ *Id.*

¹¹⁰ Letter from Treasury Borrowing Advisory Committee Chairs and Vice Chairs, 1998-present to The Honorable Janet Yellen, Secretary, Dep't of the Treasury (May 9, 2023) (on file with Dep't of the Treasury), <https://home.treasury.gov/system/files/276/TBAC-Letter-to-Secretary-2023-05-09.pdf> [<https://perma.cc/CNM7-5CJF>].

¹¹¹ Wendy Edelberg & Noadia Steinmetz-Silber, *Debt Ceiling Brinksmanship Has Clear Negative Effects On Taxpayers*, BROOKINGS (May 23, 2023), <https://www.brookings.edu/articles/debt-ceiling-brinksmanship-has-clear-negative-effects-on-taxpayers/> [<https://perma.cc/QZE4-A655>].

¹¹² GOV'T ACCOUNTABILITY OFF., *DEBT LIMIT: ANALYSIS OF 2011-2012 ACTIONS TAKE AND EFFECT OF DELAYED INCREASE ON BORROWING COSTS* (2012), <https://www.gao.gov/assets/files/gao.gov/assets/gao-12-701.pdf> [<https://perma.cc/TPB7-SF3R>].

¹¹³ Damian Paletta, *Making the Call on U.S. Credit Rating*, WALL ST. J. (July 22, 2011), <https://www.wsj.com/articles/SB10001424053111903554904576460393248353976> [<https://perma.cc/5NSX-PXJX>].

¹¹⁴ Damian Peletta & Matt Phillips, *S&P Strips U.S. of Top Credit Rating*, WALL ST. J. (Aug. 6, 2011), <https://www.wsj.com/articles/SB10001424053111903366504576490841235575386> [<https://perma.cc/V99F-JJJD>].

¹¹⁵ Nikola G. Swann, *United States of America Long-Term Rating Lowered To 'AA+' On Political Risks And Rising Debt Burden; Outlook Negative*, STANDARD & POOR'S (Aug. 5, 2011), http://www.washingtonpost.com/wp-srv/politics/documents/spratingreport_080611.pdf. [<https://perma.cc/SWP9-PAQJ>].

¹¹⁶ Fitch Ratings, *Fitch Downgrades the United States' Long-Term Ratings to 'AA+' from 'AAA'; Outlook Stable*, FITCH RATINGS, (Aug. 1, 2023), <https://www.fitchratings.com/research/sovereigns/fitch-downgrades-united-states-long-term-ratings-to-aa-from-aaa-outlook-stable-01-08-2023> [<https://perma.cc/G4UR-6NFV>].

2. Households and Workers

The increased costs from partisan brinkmanship alone also have consequences for workers and households. In the 2011 crisis, household and business confidence both fell sharply up until the debt limit standoff—and then it still took months to recover.¹¹⁷ Decreases in consumer confidence mean less willingness to spend as consumers fear an impending economic downturn.¹¹⁸ This sentiment can become a self-fulfilling prophecy. As consumer spending makes up nearly seventy percent of the economy, even modest reductions in consumer spending can lead to broader economic contractions.¹¹⁹

Brinkmanship also affects the housing market, which is notable given that a home is the largest financial asset for most households.¹²⁰ In 2011 mortgage spreads increased seventy basis points during the height of the crisis and lasted throughout the year, leading to higher mortgage rates and monthly payments for families.¹²¹ Because these rates are locked in over decades-long contracts, the costs compound for families, adding potentially tens of thousands of dollars in additional borrowing costs over the lifetime of a loan.¹²² For example, had a family purchased a home in summer 2011 during the debt limit impasse, at an average price of \$235,000, the seventy basis point increase in mortgage rates would have meant payments that were about \$100 higher a month.¹²³ Overall, even approaching the debt limit and creating uncertainty around the negotiations has costs for both the macroeconomy and individual households.

B. The Costs of Default

Whatever the costs of brinkmanship around the debt limit, there is no doubt that a default would have substantially worse and farther-reaching

¹¹⁷ See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP, *supra* note 84, at 1–2.

¹¹⁸ Jeremy M Piger, *Consumer Confidence Surveys: Do the Boost Forecasters' Confidence?*, FED. RSRV. BANK OF ST. LOUIS (Apr. 1, 2003), <https://www.stlouisfed.org/publications/regional-economist/april-2003/consumer-confidence-surveys-do-they-boost-forecasters-confidence#:~:text=Consumer%20confidence%20serves%20as%20a,indicator%20of%20the%20economy's%20strength> [https://perma.cc/2XLY-63CY].

¹¹⁹ Press Release, Bureau of Economic Analysis, Gross Domestic Product (Third Estimate), Corporate Profits (Revised Estimate), and GDP by Industry, First Quarter 2023 (June 29, 2023) (on file with author), https://www.bea.gov/sites/default/files/2023-06/gdp1q23_3rd.pdf, [https://perma.cc/AMP9-QUZY].

¹²⁰ Neil Bhutta, Jesse Bricker, Andrew C. Chang, Lisa J. Dettling, Sarena Goodman, Joanne W. Hsu, Kevin B. Moore, Sarah Reber, Alice Henriques Volz & Richard A. Windle, *Changes in U.S. Family Finances from 106 to 2019: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL. (Sept. 2020), <https://www.federalreserve.gov/publications/files/scf20.pdf> [https://perma.cc/QR62-6QB9].

¹²¹ See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP, *supra* note 84, at 5.

¹²² *Id.*

¹²³ *Id.*

consequences. While it is impossible to predict exactly how the economic fallout would occur, best estimates suggest that it would be swift and painful for both Americans and economies around the world who rely on the U.S. as the bedrock of the global financial system.¹²⁴ Hundreds of economists across the ideological spectrum agree that a default would be catastrophic and would create higher borrowing costs for the U.S. government and for all Americans.¹²⁵ A default of any length has the potential to stymie U.S. economic growth for decades to come (to say nothing of the world), hurt households and workers, undermine the dollar's standing as the global reserve currency, and create opportunities for our adversaries.

1. *Federal Programs*

One immediate consequence of default would be the inability of the federal government to pay its various obligations. In the event of a default, Treasury would have insufficient cash flow to pay daily outflows, including checks to Social Security recipients, veterans, the Medicare and Medicaid programs, and government contracts. Regardless of the steps Treasury takes, some delay in payments would be inevitable.¹²⁶ And these delays would create ripple effects throughout the economy. The hardest hit groups would include those for whom government benefits comprise large portions of their income: for example, most of the 67 million people who receive Social Security payments each month.¹²⁷ Sixty-five million people receive healthcare coverage through Medicare, and 88.5 million are on Medicaid or the Children's Health

¹²⁴ Brad W. Setser, *The U.S. Has Every Reason It Needs to Drop the Debt Ceiling – Both at Home and Abroad*, COUNCIL ON FOREIGN RELS. (June 8, 2023), <https://www.cfr.org/blog/us-has-every-reason-it-needs-drop-debt-ceiling-both-home-and-abroad> [<https://perma.cc/6HD5-RHF6>].

¹²⁵ *More Than 200 Economists Tell Congress: Raise the Debt Ceiling to Avoid a 'Dangerous and Unnecessary' Economic Crisis*, WASH. CTR. FOR EQUITABLE GROWTH (2023), <https://equitablegrowth.org/press/more-than-200-economists-tell-congress-raise-the-debt-ceiling-to-avoid-a-dangerous-and-unnecessary-economic-crisis/> [<https://perma.cc/M3VP-3QVR>].

¹²⁶ In 2013, the Treasury Inspector General wrote a report detailing Treasury's planning during the 2011 crisis. See Letter from Eric M. Thorson, Inspector Gen., Dep't of the Treasury, to Senator Orrin G. Hatch, Ranking Member, U.S. Senate Comm. on Fin. (Aug. 24, 2012), https://oig.treasury.gov/sites/oig/files/Audit_Reports_and_Testimonies/OIG-CA-12-006.pdf [<https://perma.cc/59BB-N95W>]. The Department determined that the least bad in a series of bad options would be to batch payments in the case of a default. *Id.* at 6. In other words, they would wait until they had sufficient revenues to pay a full day's worth of payments. As a stylistic example to how this would work, imagine a default on a Monday. On Tuesday, there are \$100B in bills due but only \$50B in revenues. Treasury would hold the cash and make no payments on Tuesday. If another \$75B in revenue was received on Wednesday but another \$100B in payments were due on Wednesday, Treasury would make the \$100B of *Tuesday* payments and hold Wednesday payments. And so on. Under this scenario it is likely that payments to programs like Social Security and Medicare would be delayed. No formal plan was ever presented to the President, and it is unclear what would occur in a future default, but delay of some payments seems inevitable.

¹²⁷ SOC. SEC. ADMIN., FACT SHEET: SOCIAL SECURITY (2023), <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> [<https://perma.cc/RP7R-MRRJ>].

Insurance Program.¹²⁸ Disruptions to these programs would affect healthcare coverage for millions of people.

Millions of veterans who rely on the government for monthly payments, healthcare, and other support would also face delays.¹²⁹ And programs like the Supplemental Nutrition Assistance Program, school lunches, and housing support would experience interruptions to their funding.¹³⁰ Children would be disproportionately vulnerable to cuts driven by a debt limit default, as the majority of funding they receive comes from discretionary programs.¹³¹ These programs would likely be first on the chopping block if there is a need to quickly reduce federal expenditures.¹³² Combined, most Americans would experience at least some delay, if not a complete cut in government benefits due to default.

Outside of crises where government spending expands, government spending makes up about twenty percent of the United States's GDP.¹³³ Because this is a sizable portion of the United States economy, delays in payments would have wide reaching effects. These delays would not only hurt consumer sentiment but also make it difficult for families to pay their bills and afford basic necessities. This would create immediate economic hardship for those families, and it would create a sharp contraction in consumer spending, likely plunging the country into recession.¹³⁴

2. *Macroeconomy*

Estimates suggest that had even a short breach occurred during the 2023 crisis, when the economy was relatively healthy, GDP would have declined by 0.7 percentage points and 1.5 million jobs would have been lost.¹³⁵ If a debt limit breach took weeks to resolve, the consequences would be significantly

¹²⁸ CTR. FOR MEDICARE & MEDICAID SERVS., CMS FAST FACTS (2023), <https://data.cms.gov/sites/default/files/2023-03/CMSFastFactsMar2023.pdf> [<https://perma.cc/ZL3R-HEB3>].

¹²⁹ Katherine G. Giefer & Tracy A. Loveless, *Benefits Received by Veterans and Their Survivors: 2017*, U.S. CENSUS BUREAU (Nov. 10, 2021), <https://www.census.gov/library/publications/2021/demo/p70br-175.html> [<https://perma.cc/ZL3R-HEB3>].

¹³⁰ Caitlin Emma, *Here's Who Misses Checks if The U.S. Hits The Debt Brink in June*, POLITICO, (May 9, 2023), <https://www.politico.com/news/2023/05/09/debt-limit-white-house-00095867> [<https://perma.cc/49HQ-VPG8>].

¹³¹ Elaine Maag, *Breaching The Debt Limit Risks Hurting Children*, TAX POL'Y CTR. (Feb. 22, 2023), <https://www.taxpolicycenter.org/taxvox/breaching-debt-limit-risks-hurting-children> [<https://perma.cc/F838-YHMR>].

¹³² *Id.*

¹³³ Press Release, Joint Statement of Janet L. Yellen, Secretary of the Treasury, and Shalanda D. Young, Director of the Office of Management and Budget, on Budget Results for Fiscal Year 2023 (Oct. 20, 2023), <https://www.whitehouse.gov/omb/briefing-room/2023/10/20/joint-statement-of-janet-l-yellen-secretary-of-the-treasury-and-shalanda-d-young-director-of-the-office-of-management-and-budget-on-budget-results-for-fiscal-year-2023/>.

¹³⁴ See MARK ZANDI, ADAM KAMINS & BERNARD YAROS, MOODY'S ANALYTICS, DEBT LIMIT SCENARIO UPDATE 6 (2023), <https://www.moodyanalytics.com/-/media/article/2023/debt-limit-scenario-update.pdf> [<https://perma.cc/6DHF-6DC3>].

¹³⁵ *Id.*

more severe. The Federal Reserve estimated that a one-month-long breach in 2013 would have led to a spike in Treasury yields, a thirty percent decline in stock prices, and a ten percent drop in the value of the dollar, leading to a mild recession and an increase in the unemployment rate.¹³⁶ Had a one-month-long breach occurred during the 2023 impasse, more than 7.8 million jobs would have been lost—nearly ninety percent of the jobs lost during the 2008 Financial Crisis¹³⁷—and \$10 trillion in household wealth would have been eliminated.¹³⁸ And the effects would have been long-lasting. Had a long breach occurred, GDP would have been one percentage point lower a decade later and 1.2 million jobs would never be recovered.¹³⁹

It is important to consider that, in a future default, the fallout would be felt unequally. Parts of the country with a larger federal workforce would feel the effect of delayed payments more strongly, and areas with concentrations of Medicare, Medicaid, and Social Security recipients would be more likely to be quickly, and negatively, affected.¹⁴⁰ As is often the case in financial crises, it is the most vulnerable who will suffer disproportionately from these disruptions. A debt limit default will likely only exacerbate existing patterns of inequality.

3. *Government Borrowing*

Given the credit downgrade the United States experienced in 2011 from brinkmanship alone, in a full default situation a more extreme downgrading would make the cost of United States borrowing increase as investors would demand higher premiums for less-safe debt. Fitch's ratings agency in 2023 indicated that, were the United States to default on its debt, they would downgrade some securities to a 'D' rating (the lowest possible), and Treasury bills would receive ratings between 'CCC' and 'C.'¹⁴¹ Credit downgrades suggest that a security is no longer safe and that there is risk in the potential for timely and full repayment.¹⁴² Even though there is no obvious safe asset substitute

¹³⁶ See Engen et al., *supra* note 85.

¹³⁷ See ZANDI ET AL., *supra* note 134 (estimating 7.8 million jobs would have been lost); BRENDAN F. BOYLE, HOUSE COMM. ON BUDGET, DOMESTIC INVESTMENTS FUEL AMERICAN PROSPERITY – WHY ARE THEY UNDER ATTACK? 3 (Mar. 17, 2023), <https://democrats-budget.house.gov/sites/democrats.budget.house.gov/files/HBC%20REPORT%20-%20Domestic%20Investments%20Fuel%20American%20Prosperity%20-%20Why%20Are%20They%20Under%20Attack.pdf> [<https://perma.cc/QQG7-PS7B>] (explaining nearly nine million jobs lost in Great Recession).

¹³⁸ See ZANDI ET AL., *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Fitch Places United States' 'AAA' on Rating Watch Negative*, FITCH RATINGS (May 24, 2023), <https://www.fitchratings.com/research/sovereigns/fitch-places-united-states-aaa-rating-watch-negative-24-05-2023> [<https://perma.cc/2RCW-99J9>].

¹⁴² See Davide Barbuscia, *Fitch Cuts US Credit Rating to AA+; Treasury Calls It 'Arbitrary'*, REUTERS (Aug. 2, 2023), <https://www.reuters.com/markets/us/fitch-cuts-us-governments-aaa-credit-rating-by-one-notch-2023-08-01/> [<https://perma.cc/7VEF-NZJ7>].

for Treasury debt, a downgrade likely would lead to higher interest rates as investors demand compensation for increased risk, and these higher rates would ripple through the economy.¹⁴³

Even a short default, in which Treasury missed some payments but the debt limit was lifted after a few days, could have disastrous economic consequences. In 1979, Treasury briefly defaulted on the debt in a so-called “technical” default after a debt limit impasse resolved at the very last minute.¹⁴⁴ This turned into a perfect storm. At the same time as investors demanded an unusually large amount of Treasury bills, Treasury’s technical system faced a series of glitches.¹⁴⁵ Markets saw the short impasse as a sign that Treasury bills were perhaps not the riskless asset they were previously thought to be. This resulted in a permanent sixty basis point increase in Treasury bill rates, which created a \$12 billion annual increase in costs for the government.¹⁴⁶ In the case of a more substantial default, the risk premium on Treasuries would certainly be higher, leading to even greater government borrowing costs.

It is likely that if a default were to occur, investors would move assets out of government and into more liquid assets and that repurchase agreement markets would face significant deleveraging.¹⁴⁷ Foreign investors may also lose their appetite for holding the United States’s debt.¹⁴⁸ Even a small decline in foreign holdings would greatly increase Treasury’s costs for borrowing, and the government credit rating would surely be downgraded again.¹⁴⁹ Interest rates across the economy would spike, and the stock market would experience substantial losses.¹⁵⁰

4. *The Dollar*

The U.S. dollar is considered the global reserve currency. Nations and individuals around the world hold U.S. dollars as a safe store of value. More

¹⁴³ See Grace Segers, *Why It Matters If the U.S. Credit Rating is Downgraded – Again*, THE NEW REPUBLIC (May 26, 2023), <https://newrepublic.com/article/173039/debt-ceiling-fitch-ratings-downgrade> [<https://perma.cc/NPJ4-QBDB>].

¹⁴⁴ See Terry L. Zivney & Richard D. Marcus, *The Day the United States Defaulted on Treasury Bills*, 24 FIN. REV. 475, 475 (1989).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 488.

¹⁴⁷ See TERRY BELTON, MEERA CHANDAN, KIMBERLY L. HARANO, SRINI RAMASWAMY, ALEX ROEVER, J.P. MORGAN, *THE DOMINO EFFECT OF A US TREASURY TECHNICAL DEFAULT 2–4* (2011), <https://valkayec.files.wordpress.com/2011/04/morgan.pdf> [<https://perma.cc/5WFS-UFNF>] [hereinafter J.P. MORGAN REPORT].

¹⁴⁸ See Brad W. Setser, *The U.S. Has Every Reason It Needs to Drop the Debt Ceiling – Both at Home and Abroad*, COUNCIL ON FOREIGN RELS. (June 8, 2023), <https://www.cfr.org/blog/us-has-every-reason-it-needs-drop-debt-ceiling-both-home-and-abroad> [<https://perma.cc/6M3M-U3LG>].

¹⁴⁹ See J.P. MORGAN REPORT, *supra* note 147, at 5.

¹⁵⁰ See ZANDI ET AL., *supra* note 134.

than half of global currency reserves are held in U.S. dollars.¹⁵¹ A debt limit breach would surely cause the value of the dollar to drop and call into question the full faith and credit of the United States.¹⁵² Though some believe that the demand for U.S. dollars would not evaporate because there is no other currency that can replace it, default has the potential to create a lack of safe assets anywhere around the world.¹⁵³

5. *National Security*

Under default, the federal government's ability to provide for the common defense would be put into question. According to Secretary of Defense Lloyd Austin, a default would create delays in payments to military members, veterans, and contractors.¹⁵⁴ These delays will hurt military readiness, placing the country's ability to meet future crises at risk, an issue that only compounds with the default's duration. Because a default would have global ripple effects, it would have the potential to put pressure on strategic alliances and to create a path for the escalation of conflicts with our adversaries.¹⁵⁵ Indeed, such an event would likely embolden China and increase a perception of the U.S. as a declining global superpower.¹⁵⁶ Default would also limit the ability of the U.S. government to issue sanctions on our adversaries, as it would threaten the global demand for dollars.¹⁵⁷ There is precedent for these kinds of national security–related consequences. In 1957, a prolonged impasse in raising the debt limit forced the Eisenhower Administration to conduct a series of defense cuts, including prolonging production schedules, limiting overtime for workers, and delaying purchases; this is believed to have contributed to

¹⁵¹ See INT'L MONETARY FUND, CURRENCY COMPOSITION OF OFFICIAL FOREIGN EXCHANGE RESERVES (COFER) (2023), <https://data.imf.org/?sk=e6a5f467-c14b-4aa8-9f6d-5a09ec4e62a4> [<https://perma.cc/C7LT-3A54>].

¹⁵² See Mary E. Lovely & Kathryn Russ, *Opinion: Republicans are playing with fire*, CNN (Mar. 9, 2023), <https://www.cnn.com/2023/03/09/opinions/debt-limit-national-security-lovely-russ/index.html> [<https://perma.cc/5QT2-B67M>].

¹⁵³ See Brad W. Setser, *The U.S. Has Every Reason It Needs to Drop the Debt Ceiling – Both at Home and Abroad*, COUNCIL ON FOREIGN RELS. (June 8, 2023), <https://www.cfr.org/blog/us-has-every-reason-it-needs-drop-debt-ceiling-both-home-and-abroad> [<https://perma.cc/MJP6-DYZC>].

¹⁵⁴ See Press Release, Dep't of Defense, Statement by Secretary of Defense Lloyd J. Austin III on the Economic Consequences of Default on National Security and Military Families (Oct. 6, 2021) (on file with author).

¹⁵⁵ See Carlo J.V. Caro, *The Implications of a US Debt Default on National Security*, FOREIGN POL'Y RSCH. INST. (May 30, 2023), <https://www.fpri.org/article/2023/05/the-implications-of-a-us-debt-default-on-national-security/> [<https://perma.cc/R6ML-3AZK>].

¹⁵⁶ See Connor O'Brien, *Pentagon Chiefs: Debt Default is Bad for Troops, Good for China*, POLITICO (May 11, 2023), <https://www.politico.com/news/2023/05/11/pentagon-chiefs-debt-default-is-bad-for-troops-good-for-china-00096429> [<https://perma.cc/DGE8-MGR7>].

¹⁵⁷ See Mary E. Lovely & Kathryn Russ, *Opinion: Republicans Are Playing With Fire*, CNN (Mar. 9, 2023), <https://www.cnn.com/2023/03/09/opinions/debt-limit-national-security-lovely-russ/index.html> [<https://perma.cc/7A2V-NRMB>].

the 1957–58 recession and reduced the nation’s Cold War preparedness.¹⁵⁸ If brinkmanship alone had such consequences for military preparedness and the economy, default today would be even more disastrous.

Taken together, the combined effects of default would be catastrophic and have the potential to remake the role of U.S. financial markets in the global economy while putting American households through needless suffering. The debt limit has created no major fiscal reform, but the consequences of brinkmanship and default could fundamentally damage America and the world.

V. THE DEBT LIMIT MUST BE REFORMED

The statutory debt limit has led to a dysfunctional congressional process and unintended economic and legislative outcomes. The original intention of the debt limit was to make it easier for Treasury to pay the nation’s debts while following congressional spending policy. Some actors, however, have seen the status of the debt limit as “must-pass” legislation as a hostage and have tried to use threats of not lifting the debt limit as leverage in budget and spending agreements. None of those attempts has led to meaningful reform or a shift in the nation’s fiscal trajectory. However, the risk of default should Congress fail to raise the debt ceiling would be catastrophic for the U.S. and global economies. Even approaching the debt limit in increasingly intense and partisan episodes of brinkmanship has costs to federal borrowing, financial markets, and taxpayers.¹⁵⁹ Indeed, the modern debt limit has become a policy that forces the Executive Branch to scramble and make inefficient financing decisions because of a problematic congressional process.

It is clearly time to reform the debt limit. For decades, commentators have called for the removal of or reform to the debt limit; as early as 1958, economists such as Lester Chandler and Kenneth Galbraith called for such change.¹⁶⁰ In 1979, the Comptroller General of the United States said that the debt limit should be reformed to be increased as part of congressional budget resolutions.¹⁶¹ Six of the last nine Treasury Secretaries, from both Republican and Democrat administrations, have called for abolishing the debt limit.¹⁶² Ad-

¹⁵⁸ See Heller, *supra* note 38.

¹⁵⁹ See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKMANSHIP, *supra* note 84, at 1.

¹⁶⁰ JOINT ECON. COMM., JANUARY 1958 ECONOMIC REPORT OF THE PRESIDENT 489 (Jan. 27, 1958).

¹⁶¹ See COMPTROLLER GEN. OF THE U.S., A NEW APPROACH TO THE PUBLIC DEBT LEGISLATION SHOULD BE CONSIDERED (1979), <http://archive.gao.gov/f0302/110373.pdf> [<https://perma.cc/5659-NGAJ>].

¹⁶² This list includes Robert Rubin (Clinton), Larry Summers (Clinton), Paul O’Neill (W. Bush), Tim Geithner (Obama), Jack Lew (Obama), and Janet Yellen (Biden). See Alan Rappoport, *Janet Yellen Says She Supports Eliminating the Debt Limit*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/business/yellen-powell.html> [<https://perma.cc/87S4-TFY7>];

ditionally, in 2013, more than eighty percent of surveyed economists agreed that the debt limit creates unnecessary uncertainty.¹⁶³ Prominent policymakers, including Alan Greenspan, have called for its abolishment or reform.¹⁶⁴ Some have called for a complete abolishment of the debt limit, for example by striking the statute from law. However, some argue that it is still critical for Congress to maintain the power of the purse and have oversight over Treasury borrowing, and that completely removing the debt limit would remove Congress's ability to provide a check on the Treasury.

Previous Congresses have recognized the risks and made some attempts to soften the threat of the debt limit. For example, the introduction of a formalized budget process in the 1970s eliminated additional need for the debt limit to become the galvanizing point around which spending decisions were made; instead, the new process allowed for a setting in which members of Congress could negotiate about budgetary levels and appropriations. The 1974 Congressional Budget and Impoundment Control Act made substantial reforms to the budget process, including codifying the procedure for the adoption of a budget resolution.¹⁶⁵ It also established the Congressional Budget Office to help with the scoring of legislation and created other rules around budget points of order and the budget reconciliation process.¹⁶⁶ The Gephardt Rule of 1979 further declared the debt limit by mandating that any House vote for a budget resolution would automatically increase the debt ceiling by the same amount and without a separate vote.¹⁶⁷ The downside of the Gephardt Rule was that it existed as a rule, meaning that it must be passed as part of a House Rules package in every Congress and is not codified into law. As a result, the Gephardt

Annie Lowrey, *The Guys Who Sign the Checks*, SLATE (July 18, 2011), <https://slate.com/business/2011/07/is-the-debt-ceiling-necessary-we-asked-all-nine-living-former-treasury-secretaries.html> [<https://perma.cc/7EPH-LVFU>]; Clark Merrefield, *What's the Debt Ceiling and Why Should You Care? Former Treasury Secretary Jack Lew Explains.*, THE JOURNALIST'S RES. (Oct. 5, 2021), <https://journalistsresource.org/economics/debt-ceiling-jack-lew/> [<https://perma.cc/29AL-5JSC>]; Ezra Klein, *Robert Rubin: The Risk is Greater Today Than It Was in 1995*, WASH. POST (May 17, 2011), https://www.washingtonpost.com/blogs/wonkblog/post/robert-rubin-the-risk-is-greater-today-than-it-was-in-1995/2011/05/09/AF1Jqp5G_blog.html?itid=ik_inline_manual_20 [<https://perma.cc/J3AD-KBGT>]; Joseph J. Schatz, *Geithner: End Debt Ceiling for Good?*, POLITICO (Nov. 29, 2012), <https://www.politico.com/story/2012/11/timothy-geithner-end-debt-ceiling-for-good-084428> [<https://perma.cc/R7WN-7BM6>].

¹⁶³ Zachary A. Goldfarb, *Economists: Don't Mess Around with the Debt Ceiling!*, WASH. POST (Jan. 15, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/15/economists-dont-mess-around-with-the-debt-ceiling/> [<https://perma.cc/X339-FSBE>].

¹⁶⁴ See *Oversight on the Monetary Policy Report to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978: Hearing Before the Committee on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of Chairman Alan Greenspan), <https://www.govinfo.gov/content/pkg/CHRG-108shrg90930/pdf/CHRG-108shrg90930.pdf> [<https://perma.cc/PF3U-4J8X>].

¹⁶⁵ See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

¹⁶⁶ See *id.*

¹⁶⁷ See Public Debt Act of 1979, Pub. L. No. 96-78, 93 Stat. 589 (1979).

Rule has been sporadically included in some Rules packages.¹⁶⁸ Still, it was an important mechanism to deescalate the role of the debt limit as a bargaining chip in budget negotiations.¹⁶⁹

There are other reforms to the debt limit, however, that would maintain congressional oversight while removing the threat of catastrophic default. One such approach is to build off the so-called “McConnell Rule,”¹⁷⁰ named after the senator who proposed it when it was included as part of the 2011 Budget Control Act.¹⁷¹ Though the McConnell Rule was limited to only three debt limit increases as part of the BCA, such a mechanism offers a useful framework for broader debt limit reform. In my proposed legislation, the Debt Ceiling Reform Act, this process would become the norm for all debt limit increases. Every time that the debt subject to the limit is within a \$100 billion increment of the next whole \$1 trillion, the Treasury Secretary would certify to Congress the need to increase the debt limit by an additional \$1 trillion. Upon receiving the certification, Congress would have thirty days to pass a joint resolution of disapproval should it want to override this decision. This resolution would need to pass both the House and the Senate, and then would be sent to the president for approval or would need to contain a veto-proof majority. Should the resolution pass and be signed into law, no debt limit increase would be permitted. However, if Congress failed to pass a resolution of disapproval, Treasury would be authorized to borrow up to an additional \$1 trillion to finance the government’s needs.

Under current law, if Congress fails to raise the debt limit, the outcome is default and global economic catastrophe. My proposal would flip that process so that choosing not to pay our debts and suffer the resulting economic disaster would have to come from intentional congressional action, rather than inaction. Lawmakers would retain the power to override increased borrowing authority, but debt limit increases will occur in a smooth and timely manner otherwise. This maintains congressional oversight over the executive while ensuring that periods of dysfunctionality and partisanship in Congress would not lead to brinkmanship around the debt ceiling. As under current law, in my proposal, Treasury will finance only that debt necessary to cover the nation’s obligations. Congress retains the power over spending and taxation decisions, and decisions about those policies and long-term deficit reduction can occur during the normal order of the budget process.

The Debt Ceiling Reform Act returns the debt limit to its original intention by making it a tool that extends to the Treasury Department the flexibility

¹⁶⁸ See Bill Heniff Jr., *Debt Limit Legislation: The House “Gephardt Rule”*, CONG. RSCH. SERVS. (Feb. 13, 2019), <https://sgp.fas.org/crs/misc/RL31913.pdf> [<https://perma.cc/3Z4T-5ND5>].

¹⁶⁹ There is no Senate companion to the House Gephardt Rule.

¹⁷⁰ See The Editorial Board, Opinion, *How to Disarm the Debt-Ceiling Threat for Good*, N.Y. TIMES (Oct. 21, 2013), https://www.nytimes.com/2013/10/22/opinion/how-to-disarm-the-debt-ceiling-threat-for-good.html?_r=0 [<https://perma.cc/L5XF-PD9P>].

¹⁷¹ See Budget Control Act of 2011 § 3101A(a)(1)(A).

to make financing decisions, rather than a tempting hostage for Congress to use to force controversial policies. It also separates debt limit increases from the processes of spending and revenue decisions. My bill will deescalate the process of debt limit increases. It will abolish the threat of brinkmanship or default, saving money for both the federal government and the taxpayers who have incurred costs in previous impasses.

VI. CONCLUSION

Budget agreements should occur on the merits of the policy and the extent to which they reflect the will of the American people, not because the failure to accept unproductive and unpopular policy is better than the alternative of global economic calamity. Unfortunately, years of brinkmanship around the debt limit have led to many budget agreements brokered under duress that do not adequately address our long-term fiscal challenges. The debt limit must be reformed so that Congress can better serve the American people. By removing the threat of a self-inflicted economic catastrophe, my proposal to reform the debt limit will allow for a more prosperous future for all.

340B: THE SHOULDER OF FRANKENSTEIN’S MONSTER

ALICIA GILBERT, JD, RDN*

ABSTRACT

Like other components of our healthcare system, the 340B program has rapidly grown and evolved with the changing healthcare landscape, and questions not sufficiently addressed by the statute creating it have arisen. One such question, the focus of this Article, is whether hospitals participating in the program may use contract pharmacy arrangements (and if so, how many) and still be eligible for 340B drug discounts. The answer to this question profoundly impacts the income stream of hospitals that serve low-income populations because it affects hospitals’ very ability to participate in the 340B program, which in turn affects the ability of vulnerable populations to access affordable prescriptions and healthcare services. This Article is the first to articulate the limits of courts in resolving this question due to the statute’s ambiguity.

This Article also argues that Congress, rather than courts, is the best body to resolve the dispute. Much like shooting the shoulder of Frankenstein’s monster, shotgun litigation is a poor solution when clarity is needed across the 340B program. And legislative reform provides an effective means of addressing existing bipartisan policy goals of lowering prescription drug costs and spending due to the program’s impact, particularly for the un- or under-insured.

I. INTRODUCTION	28
II. OVERVIEW OF THE 340B PROGRAM	30
III. DISPUTE OVER CONTRACT PHARMACY ARRANGEMENTS	32
A. <i>Development of Contract Pharmacy Arrangements</i>	33
B. <i>Litigation Challenging Contract Pharmacy Arrangements</i>	35
IV. COURTS CANNOT RESOLVE THE DISPUTE OVER CONTRACT PHARMACY ARRANGEMENTS.	36
A. <i>Courts are unable to resolve this dispute because the 340B statute does not indicate whether Congress contemplated contract pharmacy arrangements.</i>	37
1. <i>HHS’s interpretation is not entitled to deference.</i>	37
2. <i>The 340B statute does not address contract pharmacy arrangements.</i>	38

*Alicia Gilbert is a registered dietitian and practicing attorney. After graduating as valedictorian from The University of Alabama School of Law, she clerked for the Honorable Patrick E. Higginbotham for The United States Court of Appeals for the Fifth Circuit. She then worked in-house for a large hospital system in her home state of Alabama. She currently works in The Tennessee Office of the Solicitor General, where she splits her time between appellate and healthcare law. Alicia writes on healthcare law, focusing on business and regulatory matters and healthcare access. Her work is informed by her experiences growing up in a rural community, providing nutrition counseling to vulnerable patients as a healthcare practitioner, and practicing law. Alicia’s work has been published in the *Tulane Law Review* and the *Harvard Journal on Legislation*.

3. It remains ambiguous whether Congress intended to recognize contract pharmacy arrangements in the 340B program when interpreting the 340B statute in relation to the overall statutory scheme.	40
4. While recognizing contract pharmacy arrangements furthers the statutory purpose, it is not clear how Congress would have weighed competing policy concerns.	42
5. The legislative history also does not indicate how Congress would have weighted competing policy concerns.	44
B. If Congress does not get involved, this piecemeal litigation will undermine the purpose of the 340B statute.	45
V. CONGRESSIONAL ACTION IS REQUIRED TO ADDRESS BROADER HEALTHCARE POLICY CONCERNS	46
VI. CONCLUSION	50

I. INTRODUCTION

Congress and the Biden administration have been working to address increasing prescription drug costs, particularly among vulnerable populations like the un- or under-insured.¹ While this has become a hot policy topic on both sides of the aisle leading to recent legislation to improve drug prices for Medicare beneficiaries,² Congress has yet to take up the second-largest drug pricing program measured by total drug reimbursement—the 340B program—in its reform efforts, though the program has recently taken the interest of members on both sides of the aisle.³

¹ See, e.g., Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818; Elijah E. Cummings Lower Drug Costs Now Act, H.R. 3, 117th Cong. (2021); HHS Press Office, *Biden Administration Announces Savings on 43 Prescription Drugs as Part of Cost-Saving Measures Under President Biden's Inflation Reduction Act*, U.S. DEP'T HEALTH & HUM. SERVS. (June 9, 2023), <https://www.hhs.gov/about/news/2023/06/09/biden-administration-announces-savings-43-prescription-drugs-part-cost-saving-measures-president-bidens-inflation-reduction-act.html> [<https://perma.cc/K4YB-4X7A>].

² See Inflation Reduction Act of 2022; see also Ashley Kirzinger, Alex Montero, Grace Sparks, Isabelle Valdes & Liz Hamel, *Public Opinion on Prescription Drugs and Their Prices*, KFF (Aug. 21, 2023), <https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/> [<https://perma.cc/763L-6FAA>].

³ Victoria Bailey, *Lawmakers Seeking Stakeholder Input to Improve 340B Drug Pricing Program*, REVCYCLE INTEL. (June 20, 2023), <https://revcycleintelligence.com/news/lawmakers-seeking-stakeholder-input-to-improve-340b-drug-pricing-program> [<https://perma.cc/PY33-RYSZ>]; see also Spanberger Leads Bipartisan 181-Member Effort Pressing Administration to Prevent Damaging Prescription Drug Price Hikes, Preserve Discounts for Virginia's Hospitals & Rural Healthcare Providers, CONGRESSWOMAN ABIGAIL SPANBERGER (July 18, 2022), <https://spanberger.house.gov/posts/spanberger-leads-bipartisan-181-member-effort-pressing-administration-to-prevent-damaging-prescription-drug-price-hikes-preserve-discounts-for-virginias-hospitals-rural-healthcare-provider> [<https://perma.cc/FS34-YW3X>].

The 340B program was intended to ensure that vulnerable populations have access to affordable prescription drugs by requiring drug manufacturers participating in the program to offer drug discounts to “covered entities.”⁴ Among other types of healthcare facilities and clinics, “covered entities” include certain safety net and critical access hospitals, which provide essential healthcare services to those in need.⁵ Some of these hospitals have their own in-house pharmacies and order the discounted drugs directly through them. Others contract with third-party pharmacies, and these “contract pharmacies” act as the hospitals’ “agents” in handling the hospitals’ 340B drug orders. Hospitals may pass the drug discounts they receive through the 340B program to low-income patients directly or use their profits from the discounted drugs to subsidize needed but belly-up healthcare services in marginalized communities.⁶

Measured by total sales of 340B discounted drugs, the 340B program is at least a \$38 billion program, though its exact financial impact on participating hospitals and entities is unknown.⁷ And importantly, because the program regulates “covered entities” rather than targeting certain programs such as Medicare Part D, legislative changes for the 340B program could impact drug prices for patients who have all types of insurance—government or private—or no health insurance at all.⁸ Given the 340B program’s impact, this Article notes the importance of addressing existing gaps in the 340B statute as well as policy concerns about the program in legislative efforts to decrease prescription drug costs among low-income populations. Not only would reform of the 340B program present an efficient means to address these policy concerns, but it would provide Congress with an opportunity to address a critical gap in the statute creating the 340B program, which is the focus of this Article—the issue of whether, and how many, contract pharmacy arrangements are allowed.

Of the various gaps in the 340B statute, the answer to this question most profoundly impacts the income stream of critical, safety net hospitals because it affects hospitals’ very ability to participate in the program. This in turn affects the ability of vulnerable populations to access affordable prescriptions.

⁴ See 42 U.S.C. § 256b.

⁵ *Id.* § 256b(a)(4)(L)(i) (“A . . . hospital . . . that—(i) is owned or operated by a unit of State or local government, is a public or private non-profit corporation which is formally granted governmental powers by a unit of State or local government, or is a private non-profit hospital which has a contract with a State or local government to provide health care services to low income individuals who are not entitled to benefits under title XVIII of the Social Security Act or eligible for assistance under the State plan under this subchapter”). This Article focuses on eligible hospitals under the 340B program and uses “hospital” and “covered entity” interchangeably.

⁶ See *infra* Part V.

⁷ Eleanor Blalock, *Measuring the Relative Size of the 340B Program: 2020 Update*, BERKELEY RSCH. GRP. (June 30, 2022), <https://www.thinkbrg.com/insights/publications/measuring-relative-size-340b-program-2020-update/> [<https://perma.cc/XV97-CZ8P>].

⁸ See 42 U.S.C. § 256b.

This Article asserts that Congress must address this question via legislative reform. First, this Article is the first to explore the limits of the judiciary's ability to resolve this question due to the statute's ambiguity. Second, due to the judiciary's limitation, this Article will demonstrate that if Congress does not intervene, the practical result will be that drug manufacturers will continue to impose restrictions on contract pharmacy arrangements. Finally, aside from the limitations of courts in addressing this issue, this Article asserts that reform of the 340B program could effectively be used to accomplish Congress's bipartisan goal of lowering prescription drug costs, particularly among vulnerable populations.

II. OVERVIEW OF THE 340B PROGRAM

The 340B program was created in 1992 as part of the Veterans Health Care Act, which was designed to improve healthcare services and access among veterans.⁹ The 340B program was intended to assist covered entities that serve vulnerable or low-income populations in accessing affordable prescriptions.¹⁰

Drug manufacturers must participate in the 340B program for their drugs to be covered by Medicaid.¹¹ Participating manufacturers cannot charge covered entities more than the applicable ceiling price for eligible drugs if they also make these drugs available to other purchasers at the wholesale acquisition cost, which is the price a manufacturer typically charges a wholesaler.¹² This results in potential drug cost savings for low-income patients when covered entities pass their savings directly on to these patients.¹³ And the program provides an additional revenue stream for hospitals who serve these patients, as hospitals continue to be reimbursed for the drugs at the non-discounted rate by insurers.¹⁴

But the financial benefit to hospitals is not unfettered. First, the 340B statute prohibits duplicate discounts. In other words, if the covered entity has already received a rebate via the Medicaid program, it cannot get a

⁹ See Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 602, 106 Stat. 4943, 4967–71.

¹⁰ See *Fact Sheet: The 340B Drug Pricing Program*, AM. HOSP. ASS'N (March 2023), <https://www.aha.org/fact-sheets/fact-sheet-340b-drug-pricing-program> [https://perma.cc/7QXH-5AJH].

¹¹ *Medicaid Drug Rebate Program (MDRP)*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/prescription-drugs/medicaid-drug-rebate-program/index.html> [https://perma.cc/PC2U-3MMW] (last updated Aug. 11, 2022).

¹² See 42 U.S.C. § 256b(a)(1). This discount is set by HHS and is calculated according to the average price paid by wholesalers to drug manufactures or off the best available price.

¹³ See *infra* Part V.

¹⁴ See *id.*

duplicate discount under the 340B program.¹⁵ Second, the 340B statute prohibits diversion: only “patients” of covered entities can receive discounted drugs.¹⁶

The 340B program is managed by the Health Resources and Services Administration (“HRSA”) within the Department of Health and Human Services (“HHS”).¹⁷ The 340B statute does not grant HHS general rulemaking authority.¹⁸ Rather, HHS has enumerated responsibilities—to enter agreements with drug manufacturers wishing to participate in the 340B program,¹⁹ to monitor and prevent overcharges by drug manufacturers,²⁰ to create a database to monitor and prevent duplicate discounts or rebates by covered entities,²¹ to establish the 340B prime vendor program,²² and to monitor and prevent diversion by covered entities.²³ HHS may impose civil monetary penalties on both covered entities and drug manufacturers if they violate the statute.²⁴ Finally,

¹⁵ 42 U.S.C. § 256b(a)(5)(A)(i) (“A covered entity shall not request payment under title XIX of the Social Security Act for medical assistance described in section 1905(a)(12) of such Act with respect to a drug that is subject to an agreement under this section if the drug is subject to the payment of a rebate to the State under section 1927 of such Act.”). To prevent duplicate discounts, HHS created the Medicaid Exclusion File (“MEF”) for covered entities taking the “carve in” approach, in which covered entities must register and keep up-to-date its entity and billing information used to bill manufacturers under the 340B program and Medicaid. *See 340B Medicaid Exclusion File*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/opa/updates/2015-october> [<https://perma.cc/A7PF-UKDX>] (last reviewed Apr. 2017).

¹⁶ 42 U.S.C. § 256b(a)(5)(B) (“With respect to any covered outpatient drug that is subject to an agreement under this subsection, a covered entity shall not resell or otherwise transfer the drug to a person who is not a patient of the entity.”). This is the only mention of the term “patient” in the 340B statute, and HHS has restricted its interpretation of who constitutes a patient over time. *See Notice Regarding Section 602 of the Veterans Health Care Act of 1992 Patient and Entity Eligibility*, 61 Fed. Reg. 55156, 55157–58 (Oct. 24, 1996) (currently recognized guidance); *cf.* 340B Drug Pricing Program Omnibus Guidance, 80 Fed. Reg. 52300, 52306–07 (Aug. 28, 2015) (“an individual will be considered a patient . . . if all of the following conditions are met . . .”). There has been a fight between covered entities and HHS on this definition, as it impacts when covered entities can receive discounted prices when a patient receives care from professionals that have contractual arrangements with the covered entity. *See Genesis Healthcare, Inc. v. Becerra*, 39 F.4th 253, 262–63 (4th Cir. 2022) (finding that there is standing to determine whether HRSA’s finding of diversion for a covered entity due to its definition of “patient” violated the APA).

¹⁷ For simplicity, this Article refers to the Department of Health and Human Services as “HHS.”

¹⁸ *See Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023).

¹⁹ *See* 42 U.S.C. § 256b(a)(1).

²⁰ *See id.* § 256b(d)(1).

²¹ *See id.* § 256b(a)(5)(A)(ii).

²² *Id.* § 256b(a)(8). HHS has contracted with Apexus to serve as the prime vendor tasked with negotiating additional drug discounts on top of 340B discounts with participating manufacturers while maintaining compliance with the 340B statute. *See The PVP Supports the 340B Drug Pricing Program*, 340B PRIME VENDOR PROGRAM, <https://www.340bvp.com/about-340b-and-pvp> [<https://perma.cc/2ESE-TDRB>].

²³ 42 U.S.C. § 256b(d)(2)(A).

²⁴ *Id.* § 256b(d)(1)(B)(vi).

HHS has been tasked with developing an alternate dispute resolution process to address overcharge claims between manufacturers and covered entities.²⁵

The 340B statute also provides some level of monitoring authority to drug manufacturers to ensure that covered entities remain compliant. Both HHS and drug manufacturers, “acting in accordance with procedures established by the Secretary relating to the number, duration, and scope of audits,” may audit a covered entity’s records to identify impermissible duplicate discounts or diversions.²⁶ Before auditing a covered entity, a manufacturer must first attempt to resolve the issue in good faith. It must also submit an “audit work plan” to HRSA and follow the Manufacturer Audit Guidelines.²⁷

But like other components of our healthcare system, the 340B program has rapidly grown and evolved with the changing healthcare landscape.²⁸ As a result, multiple questions not sufficiently addressed by the statute have arisen.²⁹ One such question, which is the focus of this Article, is whether hospitals participating in the 340B program may use contract pharmacy arrangements (and if so how many) and still be eligible for 340B drug discounts.

III. DISPUTE OVER CONTRACT PHARMACY ARRANGEMENTS

Not all hospitals have their own in-house pharmacies. Some contract with third-party pharmacies. Contract pharmacies act as the hospitals’ “agents” in handling the hospitals’ 340B drug orders. Other hospitals may have a combination of in-house and contract pharmacies to widen their geographic reach.³⁰ The only problem is that the 340B statute does not speak to whether drug

²⁵ See *id.* § 256b(d)(3).

²⁶ *Id.* § 256b(a)(5)(C).

²⁷ See Manufacturer Audit Guidelines and Dispute Resolution Process 0905–ZA–19, 61 Fed. Reg. 65406, 65409–10 (Dec. 12, 1996).

²⁸ See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. P, tit. I, subtit. C, § 121, 136 Stat. 49, 792–93 (temporarily expanding covered entity eligibility during COVID-19); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. VII, subtit. B, § 7101, 124 Stat. 119, 821–23 (2010) (expanding which facilities qualify as covered entities).

²⁹ One such issue is how discounts provided under the 340B statute should impact covered entities’ reimbursement rate under Medicare for these drugs. See, e.g., *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896, 1903–06 (2022) (holding unanimously that HHS may not vary its Medicare reimbursement rates only for 340B hospitals because HHS failed to conduct a survey of the hospitals’ acquisition costs as required by the Medicare Prescription Drug, Improvement, and Modernization Act and remanding to the lower courts to determine the appropriate remedy); see also *Am. Hosp. Ass’n v. Becerra*, No. 18-2084 (RC), 2023 WL 143337, at *2–*6 (D.D.C. Jan. 10, 2023) (addressing remedy for the underpayments to covered entities). Another is who is considered a “patient” under the 340B program, which impacts whether the covered entity is eligible for the drug discount. See *Genesis Healthcare, Inc. v. Becerra*, 39 F.4th 253, 256 (4th Cir. 2022).

³⁰ See Notice Regarding Section 602 of the Veterans Health Care Act of 1992, 61 Fed. Reg. 43549, 43550 (Aug. 23, 1996); *Fact Sheet: 340B Drug Pricing Program Contract Pharmacy Arrangements*, AM. HOSP. ASS’N (Apr. 2023), <https://www.aha.org/fact-sheets/2020-10-06-fact-sheet-340b-drug-pricing-program-contract-pharmacy-arrangements> [https://perma.cc/GE5G-CBTN].

manufacturers must offer 340B drug discounts to covered entities using contract pharmacy arrangements, or whether they are only required to offer discounted prices to hospitals' in-house pharmacies. In fact, contract pharmacy arrangements are not defined or addressed in the 340B statute at all.

HHS and covered entities claim that the 340B statute requires manufacturers to recognize and offer discount drug prices to an unlimited number of contract pharmacy arrangements. Many hospitals cannot afford in-house pharmacy arrangements, so these entities argue that allowing contract pharmacy arrangements better fulfills the program's purposes of stretching federal resources and helping the under- and un-insured access affordable prescriptions.³¹

Drug manufacturers have pushed back on the proliferation of contract pharmacy arrangements, citing concerns of an increase in diversion and duplicate discounts. To limit the use of these arrangements, manufacturers have unilaterally imposed distribution restrictions on covered entities, including requiring covered entities to provide patients' data on prescriptions ordered under the 340B program and limiting the number of contract pharmacies with which covered entities may contract.³² Because these restrictions have cost hospitals millions in lost revenue,³³ HHS has gotten involved, and litigation has ensued. This Part will explore HHS's shifting stance on contract pharmacy arrangements since the enactment of 340B statute, the actions the agency has taken against manufacturers imposing restrictions on contract pharmacy arrangements, and lawsuits brought by drug manufacturers against HHS in response.

A. *Development of Contract Pharmacy Arrangements*

Absent from the original 340B statute or subsequent amendments is any mention of a contract pharmacy arrangement, so it was not clear at the inception of the 340B program whether such arrangements were permissible. But, at the outset of the 340B program, often due to limited resources and cost, less than five percent of hospitals had in-house pharmacy arrangements, particularly critical access and safety net hospitals.³⁴ In an effort to increase program

³¹ See U.S. Dep't of Health & Hum. Servs., Advisory Opinion 20-06 on Contract Pharmacies Under the 340B Program (Dec. 30, 2020), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/340B-AO-FINAL-12-30-2020_0.pdf [<https://perma.cc/UM8N-UH7U>]; Notice Regarding Section 602, 61 Fed. Reg. at 43550.

³² See NAT'L ASS'N OF CMTY. HEALTH CTRS., 340B MANUFACTURER RESTRICTION ON CONTRACT PHARMACIES CHART 1-14 (2023), <https://www.nachc.org/wp-content/uploads/2022/05/NACHC-340B-Manufacturer-Restrictions-Chart.pdf> [<https://perma.cc/ZUX5-8Z6T>] (last updated Oct. 4, 2023).

³³ Rebecca Pifer, *Hospitals, PBMs Say Drugmaker Restrictions on 340B Discounts Stifling Finances*, HEALTHCARE DIVE (May 5, 2022), [healthcaredive.com/news/hospitals-pbms-drugmaker-restrictions-340b-discounts/623277/](https://www.healthcaredive.com/news/hospitals-pbms-drugmaker-restrictions-340b-discounts/623277/) [<https://perma.cc/XT83-9Y7A>].

³⁴ See Notice Regarding Section 602, 61 Fed. Reg. at 43550 ("During the early period of program implementation, it became apparent that only a very small number of the 11,500 covered entities used in-house pharmacies (approximately 500) . . .").

participation, HHS first addressed contract pharmacy arrangements in 1996, when it issued non-binding guidance allowing hospitals that did not have their own in-house pharmacies to contract with a single third-party pharmacy to dispense discounted drugs under the program to eligible patients on the hospital's behalf.³⁵

After additional projects testing multiple contract pharmacy arrangements,³⁶ in 2010, HHS issued additional guidance allowing hospitals to use a seemingly unlimited number of contract pharmacy arrangements, even if the hospitals had their own in-house pharmacies as well, causing this distribution arrangement to dramatically increase in popularity among covered entities.³⁷ As a result, between 2010 and 2020, contract pharmacy arrangements increased by 4,228% from 2,321 to 100,451 contract pharmacy arrangements.³⁸

While HHS conducts periodic audits of covered entities to ensure they are not receiving duplicate discounts,³⁹ it is largely up to covered entities to set up a system to ensure they do not receive duplicate discounts.⁴⁰ And, as participation in the 340B program continues to skyrocket—driven by these third-party arrangements that add another level of auditing complexity—manufacturers contend there is not adequate monitoring to police duplicate discounts.⁴¹ Citing concerns related to the vast increase of these arrangements and concerns that these arrangements do not adequately prevent duplicate discounts, over the past few years, drug manufacturers began unilaterally placing restrictions on allowing unlimited contract pharmacy arrangements.⁴²

In response to manufacturers' distribution restrictions,⁴³ HHS released its (since-removed) Advisory Opinion 20-06 ("Advisory Opinion") asserting that the 340B statute requires drug manufacturers to offer 340B drug discounts to an unlimited number of contract pharmacies.⁴⁴ HHS pulled this Advisory

³⁵ *Id.* at 43549–56.

³⁶ See AARON VANDERVELDE, KEVIN ERB & LAUREN HURLEY, BERKELEY RSCH. GRP., FOR-PROFIT PHARMACY PARTICIPATION IN THE 340B PROGRAM 3 (2020), https://media.thinkbrg.com/wp-content/uploads/2020/10/06150726/BRG-ForProfitPharmacyParticipation340B_2020.pdf [<https://perma.cc/3FV4-Z7AW>].

³⁷ See Notice Regarding 340B Drug Pricing Program, 75 Fed. Reg. 10272, 10272–73 (Mar. 5, 2010).

³⁸ VANDERVELDE ET AL., *supra* note 36, at 4.

³⁹ See 42 U.S.C. § 256b(a)(5)(C).

⁴⁰ See Karen Mulligan, *The 340B Drug Pricing Program: Background, Ongoing Challenges and Recent Developments*, USC SCHAEFFER (Oct. 14, 2023), <https://healthpolicy.usc.edu/research/the-340b-drug-pricing-program-background-ongoing-challenges-and-recent-developments/> [<https://perma.cc/GHM5-EKSA>].

⁴¹ *See id.*

⁴² See DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., MEMORANDUM REPORT: CONTRACT PHARMACY ARRANGEMENTS IN THE 340B PROGRAM, OEI-05-13-00431 2 (2014); NAT'L ASS'N OF CMTY. HEALTH CTRS., *supra* note 32.

⁴³ See NAT'L ASS'N OF CMTY. HEALTH CTRS., *supra* note 32.

⁴⁴ See U.S. Dep't of Health & Hum. Servs., Advisory Opinion 20-06, *supra* note 31. HHS relies on the "purchased by" provision in its Advisory Opinion, whereas it also asserts in violation letters that the "shall offer" provision unambiguously requires manufacturers to deliver to an

Opinion after litigation ensued, saying it wanted to “avoid[] confusion and unnecessary litigation.”⁴⁵

Around the same time, HHS sent multiple violation letters to drug manufacturers claiming the manufacturers’ restrictions violated the 340B statute and ordering them to reimburse covered entities for overcharges or face civil monetary penalties.⁴⁶ In other words, the violation letters imposed the same interpretation that HHS expressed in its original Advisory Opinion.⁴⁷

B. Litigation Challenging Contract Pharmacy Arrangements

Drug manufacturers challenged these actions in multiple forums.⁴⁸ AstraZeneca sued HHS in the District of Delaware.⁴⁹ Sanofi-Aventis and Novo Nordisk sued HHS in the District of New Jersey.⁵⁰ Eli Lilly sued HHS in the Southern District of Indiana.⁵¹ And Novartis Pharmaceuticals and United Therapeutics sued the agency in the District Court for the District of Columbia.⁵²

The Third Circuit is the only appellate court to weigh in thus far. In its review of two contrary district court decisions, the Third Circuit held that HHS’s violation letters and Advisory Opinion violated the Administrative Procedure Act (“APA”), favoring the District of Delaware’s resolution.⁵³ The District of Delaware had found that HHS’s actions violated the APA because the 340B statute did not “compel any particular outcome with respect to

unlimited number of contract pharmacy arrangements. For analytical completeness, this Article will wrestle with all arguments presented by HHS despite its voluntary removal of the Advisory Opinion, and it will refer to the violation letters and Advisory Opinion collectively as HHS’s challenged actions and interpretation.

⁴⁵ Ian Lopez, *HHS Pulls Policy on Drug Discounts for Contract Pharmacies*, BLOOMBERG L. (June 21, 2021), <https://news.bloomberglaw.com/health-law-and-business/hhs-pulls-policy-on-drug-discounts-for-contract-pharmacies> [<https://perma.cc/ZQT2-NBXN>].

⁴⁶ See *HRSA Issues Follow-Up Letters to Drug Manufacturers in Violation of 340B Statute*, AAMC (Sept. 24, 2021), <https://www.aamc.org/advocacy-policy/washington-highlights/hrsa-issues-follow-letters-drug-manufacturers-violation-340b-statute> [<https://perma.cc/T88K-KTSU>].

⁴⁷ See *id.*

⁴⁸ When litigation ensued in the District of Delaware, the court found that the Advisory Opinion constituted a final agency action. *AstraZeneca Pharms. LP v. Becerra*, 543 F. Supp. 3d 47, 57 (D. Del. 2021). While HHS rescinded its Advisory Opinion, the Third Circuit found that the manufacturer’s challenge to the Advisory Opinion was not moot because the court could still “enjoin HHS from reverting to the Advisory Opinion’s interpretation of Section 340B.” *Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023).

⁴⁹ *AstraZeneca Pharms.*, 543 F. Supp. 3d at 50.

⁵⁰ *Sanofi-Aventis U.S., LLC v. U.S. Dep’t of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 146 (D.N.J. 2021).

⁵¹ *Eli Lilly & Co. v. U.S. Dep’t of Health & Hum. Servs.*, No. 1:21-cv-00081-SEB-MJD, 2021 WL 5039566, at *1 (S.D. Ind. Oct. 29, 2021).

⁵² *Novartis Pharms. Corp. v. Espinosa*, No. 21-cv-1479, 2021 WL 5161783, at *1 (D.D.C. Nov. 5, 2021); *United Therapeutics Corp. v. Espinosa*, No. 21-cv-1686, 2021 WL 5161783, at *1 (D.D.C. Nov. 5, 2021).

⁵³ *Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 702–06 (3d Cir. 2023).

covered entities' use of [contract] pharmacies.”⁵⁴ But the District of New Jersey had found that while the text of the 340B statute was ambiguous, the statutory purpose, legislative history, post-enactment history, and overall statutory scheme supported HHS's interpretation that the 340B statute required contract pharmacy arrangements.⁵⁵ Similar cases are on appeal in the Seventh Circuit⁵⁶ and D.C. Circuit.⁵⁷

IV. COURTS CANNOT RESOLVE THE DISPUTE OVER CONTRACT PHARMACY ARRANGEMENTS

Federal courts are, of course, limited in their ability to resolve disputes, deciding only cases and controversies arising under the Constitution or statutes.⁵⁸ Because of this limitation, courts may not unilaterally weigh policy issues⁵⁹ or provide relief that extends beyond their authority.⁶⁰ While courts can certainly interpret statutes using traditional tools of interpretation,⁶¹ this Part will first demonstrate why applying these tools to the 340B statute will not resolve the dispute due to the statute's ambiguity, the competing policy concerns involved, and HHS's lack of authority to resolve this dispute via rulemaking. This Part will also articulate the practical implications resulting from the courts' limited ability to resolve this issue.

⁵⁴ *AstraZeneca Pharms.*, 543 F. Supp. 3d at 59.

⁵⁵ *Sanofi-Aventis*, 570 F. Supp. 3d at 192–202. But the court remanded to HHS the question of how many contract pharmacy arrangements are consistent with the 340B statute. *Id.* at 203–04.

⁵⁶ *Eli Lilly*, 2021 WL 5039566, *appeal docketed*, No. 21-3128 (7th Cir. Nov. 15, 2021). In the decision below, the Southern District of Indiana held that HHS's actions were arbitrary and capricious because, before issuing violation letters against manufacturers for not recognizing multiple contract pharmacy arrangements, HHS previously stated its 1996 and 2010 positions on contract pharmacies were “non-binding” but did not explain its changed policy. *Eli Lilly*, 2021 WL 5039566, at *25.

⁵⁷ *Novartis Pharms.*, 2021 WL 5161783, *appeal docketed*, No. 21-5299 (D.C. Cir. Dec. 30, 2021). The District Court set aside the agency's guidance because the “plain language, purpose, and structure of the statute do not prohibit the manufacturers from imposing any conditions on their offers of 340B-priced drugs to covered entities.” *Novartis Pharms.*, 2021 WL 5161783, at *9 (emphasis in original). However, the court declined the drug manufacturers' request to “declare that their policies [restricting contract pharmacy arrangements] are permissible under Section 340B.” *Id.*

⁵⁸ See U.S. CONST. art. III, § 2, cl. 1.

⁵⁹ See, e.g., *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 382 (2023) (“In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.”).

⁶⁰ See *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) (citing Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018)).

⁶¹ That said, scholars and judges debate the appropriate theory for statutory interpretation. See, e.g., Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 307 (2020) (“Scholars have long engaged with the battle between textualism and purposivism. Although this debate is important, it has overshadowed another important division: that between formalistic and flexible textualism.”).

A. *Courts are unable to resolve this dispute because the 340B statute does not indicate whether Congress contemplated contract pharmacy arrangements.*

A review of the various textual and structural arguments presented across the three jurisdictions reveals that the issue of whether manufacturers must recognize multiple contract pharmacy arrangements is best resolved by Congress.⁶² First, courts cannot look to HHS's interpretation as it is not entitled to deference. Second, the text of the 340B statute does not address contract pharmacy arrangements. Third, the statutory scheme of the Veterans Health Care Act of 1992 does not indicate whether Congress intended to recognize multiple contract pharmacy arrangements in the 340B program. Fourth, while the purpose of the 340B statute favors the recognition of a single contract pharmacy arrangement, due to competing policy concerns, it is unclear whether the statute's purpose is also furthered by recognizing multiple contract pharmacy arrangements. Finally, for this same reason, the legislative and post-enactment history does not indicate how Congress would weigh policy concerns like preventing duplicate discounts with the recognition of contract pharmacy arrangements.

1. *HHS's interpretation is not entitled to deference.*

Aside from ongoing uncertainty regarding *Chevron's* survival,⁶³ HHS's interpretation that the 340B statute requires drug manufacturers to recognize multiple contract pharmacy arrangements is not entitled to deference. HHS has limited authority under the 340B statute that does not extend to the 340B distribution arrangements at issue here.⁶⁴ Because of this and the 340B statute's ambiguity, the courts that have considered this issue thus far have uniformly

⁶² Whether this issue also invokes the major questions doctrine, a claim that the District of New Jersey quickly dismissed, is beyond the scope of this Article, as its application supports the same conclusion that Congress must resolve this dispute but is not commonly applied. *See* *Sanofi-Aventis U.S., LLC v. U.S. Dep't of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 200–01 (D.N.J. 2021); *cf.* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 *CONN. L. REV.* 355, 392–93 (2016) (Some arguments in favor of the major questions doctrine "are based on the proposition that legislatures should decide major questions or, at least, that agencies should not.").

⁶³ *See* *Loper Bright Enters., Inc. v. Raimondo*, No. 22-451, 143 S. Ct. 2429, 2023 WL 3158352 (2023) (mem.) (granting certiorari to consider whether *Chevron* should be overruled). For a discussion on how the *Chevron* doctrine has been applied (or avoided) by the Supreme Court for HHS's action in setting Medicare reimbursement rates for 340B hospitals in *American Hospital Association v. Becerra*, see Leading Case, *American Hospital Ass'n v. Becerra*, 136 *HARV. L. REV.* 480, 483 (2022).

⁶⁴ *See* *Pharm. Rsch. & Mfrs. of Am. v. U.S. Dep't of Health & Hum. Servs.*, 43 F. Supp. 3d 28, 41 (D.D.C. 2014) ("Within section 340B, Congress specifically authorized rulemaking in three places . . ."); *Pharm. Rsch. & Mfrs. of Am. v. U.S. Dep't of Health & Hum. Servs.*, 138 F. Supp. 3d 31, 39 (D.D.C. 2015) ("[E]ven though this Court concluded that HHS lacks the authority to promulgate the rule as a binding statement of law, HHS is not forbidden altogether from proffering its interpretation of the statute.").

held that HHS's interpretation is not entitled to *Chevron* deference.⁶⁵ And, as the courts uniformly held, nor is *Skidmore* "deference" applicable given the 340B statute does not define or mention contract pharmacies.⁶⁶

2. *The 340B statute does not address contract pharmacy arrangements.*

In its Advisory Opinion, HHS relied on two provisions of the 340B statute to support its interpretation that the statute requires drug manufacturers to honor multiple contract pharmacy arrangements. First, the "purchased by" provision requires the Secretary of HHS to enter agreements with manufacturers of covered drugs under the statute, capping the prices of these drugs.⁶⁷ Second, the "shall offer" provision directs that a drug manufacturer "shall . . . offer each covered entity covered outpatient drugs for purchase at or below the applicable ceiling price if such drug is made available to any other purchaser at any price."⁶⁸

HHS interpreted the "shall offer" provision to require manufacturers to offer the discounts to covered entities using multiple contract pharmacy arrangements, interpreting "shall" as a command and reasoning that covered entities still receive the benefit of the discounted drugs even if they are purchased

⁶⁵ *Sanofi Aventis U.S. LLC v. U.S. Dep't of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023); *Eli Lilly & Co. v. U.S. Dep't of Health & Hum. Servs.*, No. 1:21-cv-00081-SEB-MJD, 2021 WL 5039566, at *16 (S.D. Ind. Oct. 29, 2021); *Novartis Pharms. Corp. v. Espinosa*, No. 21-cv-1479, 2021 WL 5161783, at *5 (D.D.C. Nov. 5, 2021); *cf. United States v. Mead Corp.*, 533 U.S. 218, 236–37 (2001) ("[T]he range of statutory variation has led the Court to recognize more than one variety of judicial deference . . .").

⁶⁶ *Sanofi Aventis*, 58 F.4th at 703; *Eli Lilly*, 2021 WL 5039566, at *20 n.15 ("Having used the tools of statutory interpretation to arrive at what we believe is the appropriate and correct interpretation of the 340B statute, we need not discuss whether the agency's interpretation is entitled to *Skidmore* deference . . ."); *Novartis Pharms.*, 2021 WL 5161783, at *5–*8; *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

⁶⁷ *See* 42 U.S.C. § 256b(a)(1) ("The Secretary shall enter into an agreement with each manufacturer of covered outpatient drugs under which the amount required to be paid (taking into account any rebate or discount, as provided by the Secretary) to the manufacturer for covered outpatient drugs (other than drugs described in paragraph (3)) purchased by a covered entity on or after the first day of the first month that begins after November 4, 1992, does not exceed an amount equal to the average manufacturer price for the drug under title XIX of the Social Security Act in the preceding calendar quarter, reduced by the rebate percentage described in paragraph (2). Each such agreement shall require that the manufacturer furnish the Secretary with reports, on a quarterly basis, of the price for each covered outpatient drug subject to the agreement that, according to the manufacturer, represents the maximum price that covered entities may permissibly be required to pay for the drug (referred to in this section as the 'ceiling price'), and shall require that the manufacturer offer each covered entity covered outpatient drugs for purchase at or below the applicable ceiling price if such drug is made available to any other purchaser at any price.").

⁶⁸ *Id.* This latter provision was added by Congress in 2010 via the Affordable Care Act when Congress expanded the covered entities eligible to participate in the 340B program. Patient Protection and Affordable Care Act, 124 Stat. at 827.

through a third-party contract pharmacy arrangement.⁶⁹ And it interpreted the “purchased by” provision to require manufacturers to offer discounts to covered entities using multiple contract pharmacy arrangements because a contract pharmacy merely acts as the covered entity’s agent.⁷⁰ In other words, HHS reasoned the covered entity is still purchasing the discounted drugs, so the fact that it does so through a third-party arrangement is irrelevant.⁷¹ But the text of the 340B statute is silent as to whether multiple contract pharmacy arrangements are required.

Neither of these statutory provisions discuss details of drug distribution or mention contract pharmacies; the language of the statute only discusses the relationship among covered entities and manufacturers.⁷² So the statute simply does not address whether manufacturers must treat contract pharmacy arrangements the same as they do in-house pharmacy arrangements, allowing covered entities to receive discounted drug prices even on drugs ordered through multiple contract pharmacy arrangements.⁷³

For example, the “shall offer” provision discusses manufacturers’ obligation not to discriminate between offering covered drugs to covered entities under the 340B program if it makes that same drug available to other purchasers.⁷⁴ “Offer” means “[t]he act or an instance of presenting something for acceptance.”⁷⁵ Of course, manufacturers could “offer” discounted drugs to covered entities through contract pharmacy arrangements, as articulated by HHS.⁷⁶ But, on the other hand, manufacturers are still arguably offering discounted drugs to covered entities even with their restrictions, as there is at least one distribution method by which covered entities can purchase discounted drugs under the 340B program—in-house pharmacy arrangements.⁷⁷

Nor does the “purchased by” provision offer additional clarity. The “purchased by” provision directs HHS to enter an agreement with manufacturers to cap prices for covered drugs. The distribution arrangement between covered entities and manufacturers is not addressed by this provision.⁷⁸ In finding the statute ambiguous, the Third Circuit observed that the “purchased by” provision “imposes only a price term for drug sales to covered entities, leaving all

⁶⁹ See U.S. Dep’t of Health & Hum. Servs., Advisory Opinion 20-06, *supra* note 31.

⁷⁰ *Id.* (“The situs of delivery, be it the lunar surface, low-earth orbit, or a neighborhood pharmacy, is irrelevant.”).

⁷¹ See *id.*

⁷² See 42 U.S.C. § 256b(a)(1).

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ *Offer*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023) (quoting *Offer*, BLACK’S LAW DICTIONARY (11th ed. 2019)) (“‘Offer’ means ‘to present[] something for acceptance.’ Even if drug makers limit where they will deliver drugs, they still present the drugs for covered entities’ acceptance.” (citation omitted)).

⁷⁶ See U.S. Dep’t of Health & Hum. Servs., Advisory Opinion 20-06, *supra* note 31.

⁷⁷ See NAT’L ASS’N OF CMTY. HEALTH CTRS., *supra* note 32.

⁷⁸ See 42 U.S.C. § 256b(a)(1).

other terms [such as what drug distribution arrangements manufacturers must recognize] blank.”⁷⁹ “[W]hen Congress’s words run out, covered entities may not pick up the pen.”⁸⁰ Distribution arrangements not addressed in the statute’s text therefore cannot be unambiguously mandated.

However, declining to put words in the mouth of Congress when none are there should go both ways.⁸¹ The Third Circuit asserted that “Congress’s use of the singular ‘covered entity’ in the ‘purchased by’ language suggests that it had in mind one-to-one transactions between a covered entity and a drug maker without mixing in a plethora of pharmacies.”⁸² But just because the statute does not mention third-party transactions does not mean that Congress intended to *prohibit* such transactions, or to give manufacturers the power to restrict such transactions, especially when the statutory purpose is arguably furthered by recognizing contract pharmacy arrangements.⁸³ The Third Circuit therefore should have resisted the urge to gap-fill by speculating that Congress contemplated only direct transactions.

The 340B statute does not mention distribution details—whether Congress intended for a covered entity to receive the discounted drugs themselves or whether third-party distribution arrangements are permissible. Because the 340B statute is silent as to drug distribution arrangements, it is ambiguous.⁸⁴

3. *It remains ambiguous whether Congress intended to recognize contract pharmacy arrangements in the 340B program when interpreting the 340B statute in relation to the overall statutory scheme.*

While something akin to a contract pharmacy arrangement is referenced in a neighboring statute, it is still unclear whether Congress intended for manufacturers to recognize multiple contract pharmacy arrangements in the 340B program given the differences in the two statutes.

“A statutory ‘provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme’”⁸⁵ While some structural clues may lean in favor of an interpretation that Congress did not intend to require the recognition of multiple contract pharmacy arrangements, a

⁷⁹ *Sanofi Aventis*, 58 F.4th at 704.

⁸⁰ *Id.*

⁸¹ *See, e.g., United States v. Shimer*, 367 U.S. 374, 381–82 (1961) (considering the limits of a court’s scope of review when there are conflicting policy choices).

⁸² *Sanofi Aventis*, 58 F.4th at 704.

⁸³ *See infra* Part IV.A.4.

⁸⁴ “When a statute does not include even a single reference to the pertinent word (e.g., ‘pharmacy’), it is highly unlikely (if not impossible) that the statute conveys a single, clear, unambiguous directive with respect to that word.” *AstraZeneca Pharms. LP v. Becerra*, 543 F. Supp. 3d 47, 59 (D. Del. 2021); *see also Sanofi-Aventis U.S., LLC v. U.S. Dep’t of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 193 (D.N.J. 2021) (quoting *AstraZeneca Pharms.*, 543 F. Supp. 3d at 59).

⁸⁵ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

holistic review of the statutory scheme indicates that the 340B statute remains ambiguous as to legislative intent.

The Third Circuit reasoned that Congress could have written third-party distribution arrangements in the statute, as evidenced by its inclusion of a similar type of distribution arrangement in a separate statute in the Act by which the government could obtain discounted drug pricing, but Congress chose not to do so for the 340B statute.⁸⁶ “[N]egative implications raised by disparate provisions are strongest’ in those instances in which the relevant statutory provisions were ‘considered simultaneously when the language raising the implication was inserted.’”⁸⁷ Here, the 340B statute’s “statutory neighbor” in the Veterans Health Care Act of 1992, which “started on the very page of the Act where Section 340B ended,”⁸⁸ provides discounted drugs to certain federal agencies.⁸⁹ Much like the 340B statute, this neighboring provision directs the HHS Secretary to enter agreements with drug manufacturers to offer the discounted drug prices.⁹⁰ But unlike the 340B statute, Congress offered more clarity on the distribution arrangement, noting that agencies could obtain the drugs via “depot contracting systems.”⁹¹ Thus, the statutory scheme suggests that perhaps Congress’s silence on drug distribution in the 340B statute means it did not intend to allow a third-party distribution arrangement under the 340B statute as it did for its neighbor.

At the same time, there is an important distinction between the 340B statute and its neighbor. “As the word ‘generally’ indicates, this rule is not absolute. Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute.”⁹² Because the neighboring provision concerns discounted drug purchases by federal agencies, presumably it would be more common for these government entities to rely on third-party drug distribution arrangements. The 340B statute, on the other hand, concerns a broader range of both public and privately owned

⁸⁶ *Sanofi Aventis*, 58 F.4th at 704–05; cf. *Badgerow v. Walters*, 596 U.S. 1, 11 (2022) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate.” (internal quotation omitted)).

⁸⁷ *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)).

⁸⁸ *Sanofi Aventis*, 58 F.4th at 704.

⁸⁹ See 38 U.S.C. § 8126.

⁹⁰ See *id.* § 8126(a).

⁹¹ *Id.* § 8126(a)(2). “The term ‘depot’ means a centralized commodity management system through which covered drugs proceed by an agency of the Federal Government are . . . received, stored, and delivered through . . . a commercial entity operating under contract with such agency; or . . . delivered directly from the commercial source to the entity using such covered drugs.” *Id.* § 8126(h)(3).

⁹² *Bartenwerfer v. Buckley*, 598 U.S. 69, 78 (2023); see also *King v. Burwell*, 576 U.S. 473, 493 n.3 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (“[T]he presumption of consistent usage readily yields to context,” and a statutory term may mean different things in different places. That is particularly true when . . . ‘the Act is far from a *chef d’oeuvre* of legislative draftsmanship.” (internal citation omitted))).

entities—including some governmental entities as well as covered hospitals and clinics.⁹³ Some of these entities may be more likely to use in-house pharmacies; some may rely on third-party arrangements; and still others may use some combination of the two. And in recognizing these differences and not wanting to limit a covered entity's distribution arrangement options, perhaps Congress intentionally failed to mention the distribution arrangement in the 340B statute.

In other words, there is enough difference in the context of these statutes to raise doubt that Congress omitted language regarding contract pharmacy arrangements in the 340B statute because it intended to prohibit such arrangements.⁹⁴ In fact, had Congress wished to prohibit or limit contract pharmacy arrangements under the 340B statute, it could have just as easily written such a limitation in the statute. Therefore, in interpreting the statutory scheme, it remains ambiguous as to whether Congress intended to require manufacturers to recognize contract pharmacy arrangements in the 340B program.

4. While recognizing contract pharmacy arrangements furthers the statutory purpose, it is not clear how Congress would have weighed competing policy concerns.

Even if the purpose of the 340B statute is furthered by recognizing contract pharmacy arrangements, there are competing policy concerns such that it is not clear how many contract pharmacy arrangements Congress intended to permit.⁹⁵

The primary purposes of the 340B statute are to (1) “enable[] covered entities to stretch scarce federal resources as far as possible, reaching more eligible patients and providing more comprehensive services” and (2) ensure the un- and under-insured can access affordable prescriptions.⁹⁶ Contract pharmacy arrangements allow covered entities to avoid the startup and operating costs of in-house pharmacies, instead leveraging existing pharmacy infrastructure within their community to increase financial and geographic

⁹³ See 42 U.S.C. § 256b.

⁹⁴ See *Sanofi-Aventis U.S., LLC v. U.S. Dep’t of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 200 (D.N.J. 2021) (“Sections 340B and 8126(h)(3) appear to have sufficiently different contexts and purposes to warrant different meanings, despite their shared enactment history.”); cf. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002) (The “presumption that the presence of a phrase in one provision and its absence in another reveals Congress’s design[] grows weaker with each difference in the formulation of the provisions under inspection.”).

⁹⁵ If the text of a statute remains ambiguous, “the doubt would be resolved by a consideration of the purpose and history of the act” *Prussian v. United States*, 282 U.S. 675, 678 (1931); cf. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749–50 (2020) (“[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose”).

⁹⁶ See *340B Drug Pricing Program*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/opa> [<https://perma.cc/87AW-RZXU>] (last reviewed Oct. 2023).

access, particularly among vulnerable populations.⁹⁷ Access not only concerns financial accessibility, but also the geographical accessibility of healthcare services. Contract pharmacy arrangements allow covered entities to offer the discounted drugs across multiple pharmacies that are closer to the rural or low-income populations they serve.⁹⁸

The Third Circuit acknowledged that because “few covered entities had in-house pharmacies” when the 340B statute was passed, “Congress might have expected that a covered entity without its own in-house pharmacy could instead use one contract pharmacy.”⁹⁹ But the court then shied away from wrestling with the statutory purposes further, other than refuting that Congress allowing a single contract pharmacy arrangement “is a far cry from the government’s current position that covered entities may use an unlimited number of contract pharmacies.”¹⁰⁰

It seems unlikely that Congress would seek to address its policy concerns by drafting legislation that would only impact less than five percent of entities covered by the legislation.¹⁰¹ Perhaps recognizing this, lower courts that have considered the contract pharmacy question have determined that recognizing contract pharmacy arrangements allows the 340B program to reach more vulnerable populations.¹⁰² But even accepting that Congress intended to allow contract pharmacy arrangements in the 340B statute, as such a reading best supports Congress’s statutory purpose, the question becomes how many contract pharmacies Congress intended to allow due to the competing congressional concerns in the 340B statute.

While Congress wanted to ensure vulnerable populations had greater access to affordable prescriptions, it was also concerned about preventing covered entities from receiving duplicate discounts.¹⁰³ And it was HHS’s expansion from recognizing one contract pharmacy arrangement to recognizing unlimited contract pharmacy arrangements that caused manufacturers to

⁹⁷ See *Fact Sheet: 340B Drug Pricing Program Contract Pharmacy Arrangements*, *supra* note 30; see also *infra* Part V.

⁹⁸ See *Fact Sheet: 340B Drug Pricing Program Contract Pharmacy Arrangements*, *supra* note 30.

⁹⁹ *Sanofi Aventis U.S. LLC v. U.S. Dep’t of Health & Hum. Servs.*, 58 F.4th 696, 706 (3d Cir. 2023).

¹⁰⁰ *Id.*

¹⁰¹ See Notice Regarding Section 602, 61 Fed. Reg. at 43550.

¹⁰² As the District of New Jersey recognized, “[a]bsent contract pharmacy arrangements, § 340B may be ‘a dead letter in’ many of its applications ‘from the very moment of its enactment,’ given the number of covered entities which cannot afford to create or maintain in-house pharmacies.” *Sanofi-Aventis U.S., LLC v. U.S. Dep’t of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 197 (D.N.J. 2021) (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009)). And the Southern District of Indiana determined that “[t]he fairest and most reasonable interpretation of the 340B statute would not authorize drug manufacturers to impose unilateral restrictions on the distribution of the drugs that ‘would frustrate Congress’ manifest purpose’ in enacting the statute.” *Eli Lilly & Co. v. U.S. Dep’t of Health & Hum. Servs.*, No. 1:21-cv-00081-SEB-MJD, 2021 WL 5039566, at *19 (S.D. Ind. Oct. 29, 2021) (quoting *Hayes*, 555 U.S. at 426–27).

¹⁰³ See 42 U.S.C. § 256b(a)(5)(A)(i).

become concerned about the associated increase in risk of duplicate discounts and drug diversion.¹⁰⁴ So even if the statutory purpose is furthered by interpreting the 340B statute to require manufacturers to recognize contract pharmacy arrangements, it is still not clear how Congress would have balanced its competing policy concern of preventing duplicate discounts and whether it would have limited a covered entity's use of contract pharmacy arrangements. "[T]here may be a point at which the number of contract pharmacy arrangements ceases to advance Program goals, such as making drugs as cheap as possible for underinsured communities, undermines Congress' other statutory priorities, such as preventing fraud and abuse, or squares better with the needs and characteristics of certain covered entities over others."¹⁰⁵ As the next Part further explores, only Congress can clarify these competing policy questions.¹⁰⁶

5. *The legislative history also does not indicate how Congress would have weighted competing policy concerns.*

To the extent a court even looks to legislative history as an indicator of legislative intent,¹⁰⁷ the same problem that arose when looking to statutory purpose arises here.

One draft of the 340B statute specified a dispensing mechanism, permitting both in-house and contract pharmacy arrangements, but the final statute lacked this specification.¹⁰⁸ The Third Circuit asserts that this omission could be because Congress intended to prohibit any contract pharmacy arrangement. Otherwise, specifying an on-site pharmacy dispensing mechanism would be superfluous.¹⁰⁹ It is hard to read this drafting history as the Third Circuit suggests because, had Congress intended to prohibit contract pharmacy arrangements, it was capable of including language that did so more directly.¹¹⁰ Indeed, one lower court reached the opposite result when considering legislative history.¹¹¹ Regardless of what one gleans from a review of legislative history, however, it again does not provide any insight as to whether Congress

¹⁰⁴ See Mulligan, *supra* note 40.

¹⁰⁵ *Sanofi-Aventis*, 570 F. Supp. 3d at 205.

¹⁰⁶ "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

¹⁰⁷ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (considering how courts approach legislative history as an interpretive tool).

¹⁰⁸ See S. REP. NO. 102-259, at 2 (1992) ("... and dispensed by, or under a contract entered into for on-site pharmacies services with ...").

¹⁰⁹ See *Sanofi-Aventis U.S. LLC v. U.S. Dep't of Health & Hum. Servs.*, 58 F.4th 696, 705 (3d Cir. 2023).

¹¹⁰ Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹¹¹ See *Sanofi-Aventis U.S., LLC v. U.S. Dep't of Health & Hum. Servs.*, 570 F. Supp. 3d 129, 195 (D.N.J. 2021).

would have placed a limit on contract pharmacy arrangements had it expressly considered them due to the competing policy concerns of preventing duplicate discounts and drug diversion.

Nor does the 340B statute's post-enactment history offer additional clarity. Congress expanded 340B in 2003 and 2010.¹¹² One might argue that Congress's failure to expressly prohibit contract pharmacy arrangements in these expansions after hospitals had been utilizing this distribution indicates its intent to allow such arrangements.¹¹³ However, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."¹¹⁴ And, regardless, the same thorn returns—whether Congress would have limited the number of contract pharmacy arrangements due to its competing concern of preventing duplicate discounts and drug diversion. Until 2010, HHS only allowed one such arrangement under its guidance,¹¹⁵ so Congress did not have an opportunity to consider the effects of multiple contract pharmacy arrangements on drug diversion and duplicate discounts at the time it passed amendments to the 340B statute. A single contract pharmacy arrangement is a far cry from the current prolific use of this distribution arrangement among hospitals, and only Congress can weigh and decide these competing policy concerns.

Traditional tools of statutory interpretation thus leave stakeholders with a dissatisfying result for this multi-billion-dollar question. The 340B statute does not support HHS's interpretation that Congress intended to require drug manufacturers to offer discounts to covered entities using contract pharmacy arrangements. But neither does the statute support the manufacturers' interpretation that the statute does not recognize contract pharmacy arrangements. Due to HHS's lack of general rulemaking authority as well as the limited role of the judiciary, this is a gap that only Congress can fill.¹¹⁶

B. If Congress does not get involved, this piecemeal litigation will undermine the purpose of the 340B statute.

A second dissatisfying result stems from the courts' limited ability to resolve this issue. Because these lawsuits involved challenges to HHS's actions

¹¹² See generally Nicholas C. Fisher, *The 340B Program: A Federal Program in Desperate Need of Revision After Two-And-A-Half Decades of Uncertainty*, 22 J. HEALTH CARE L. & POL'Y 25, 26–31 (2019) (surveying major congressional reforms).

¹¹³ See *Sanofi-Aventis*, 570 F. Supp. 3d at 195.

¹¹⁴ *United States v. Price*, 361 U.S. 304, 332 (1960).

¹¹⁵ See Notice Regarding Section 602, 61 Fed. Reg. at 43549.

¹¹⁶ See *supra* Part IV.A. State legislatures could also potentially pass legislation to resolve this ambiguity. See ARK. CODE ANN. §§ 23-92-601–06 (2023); LA. STAT. ANN. §§ 40:2881–86 (2023); H.B. 6669, 2023 Leg., Jan. Sess. (Conn. 2023). However, state legislative action is vulnerable to constitutional challenges by drug manufacturers and, of course, leads to inconsistent approaches across jurisdictions. See *Pharm. Rsch. & Mfrs. of Am. v. McClain*, 645 F. Supp. 3d 890, 897–98 (E.D. Ark. 2022), *appeal docketed*, No. 22-3675 (8th Cir. Dec. 30, 2022).

under the APA which were not supported by the 340B statute,¹¹⁷ unless HHS determines another statutory provision supports its interpretation that manufacturers must recognize an unlimited number of contract pharmacy arrangements, it cannot prohibit manufacturers from imposing conditions on these arrangements.¹¹⁸ So even if courts expressly declined to adopt manufacturers' interpretation that the 340B statute prohibits covered entities from using contract pharmacy arrangements,¹¹⁹ because manufacturers are not prohibited from restricting these arrangements unilaterally, it leads to the same result. Many covered entities will be forced to limit the reach of their 340B program or spend considerable resources to create and operate their own in-house pharmacies.¹²⁰ And due to the prolific use of contract pharmacy arrangements, these practical realities will undoubtedly impact vulnerable populations' ability to access prescriptions through the program.¹²¹

As explored in the next Part, not only do the limits of the courts support the need for Congress to resolve the ambiguity surrounding contract pharmacy arrangements, but the 340B program also provides Congress with an effective means to address both criticisms that the program has faced as well as further legislative efforts to lower prescription drug costs, particularly among vulnerable populations.

V. CONGRESSIONAL ACTION IS REQUIRED TO ADDRESS BROADER HEALTHCARE POLICY CONCERNS

The 340B program as a whole highlights broader healthcare policy issues, including critical access hospitals' decreasing ability to generate

¹¹⁷ See *supra* Parts III.B–IV.A. For example, because HHS failed to acknowledge that its interpretation that the statute requires the recognition of multiple contract pharmacy arrangements constituted a change in its position from its 1996 guidance, which only allowed hospitals to have one contract pharmacy arrangement, its actions stemming from its interpretation that manufacturers must recognize an unlimited number of contract pharmacy arrangements were arguably arbitrary and capricious. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). Review under the arbitrary and capricious standard is “not toothless” but has “serious bite”: agencies must reasonably consider relevant issues and reasonably explain their decisions. *Data Mktg. P’ship, LP v. U.S. Dep’t of Lab.*, 45 F.4th 846, 855–56 (5th Cir. 2022) (internal quotations omitted).

¹¹⁸ *Novartis Pharms. Corp. v. Espinosa*, No. 21-cv-1479, 2021 WL 5161783, at *9 (D.D.C. Nov. 5, 2021) (“The plain language, purpose, and structure of the statute do not prohibit the manufacturers from imposing *any* conditions on their offers of 340B-priced drugs to covered entities. . . . Nor do they *permit* all conditions.”).

¹¹⁹ See, e.g., *id.*

¹²⁰ See *supra* Part II.

¹²¹ See *id.*

profit,¹²² as well as the rising costs of prescriptions.¹²³ So in addition to judicial limitations in resolving the contract pharmacy arrangement dispute, this Part explores Congress's potential policy interests in 340B reform. First, 340B reform would provide an opportunity for Congress to weigh and resolve competing policy concerns within the 340B program. Second, due to its reach, the 340B program offers a viable opportunity for Congress to accomplish its policy efforts to decrease prescription drug costs and improve access to prescription drugs among vulnerable populations.¹²⁴

Congressional action is needed to weigh and resolve competing policy concerns within the 340B program.¹²⁵ One such concern is whether the program should recognize an unlimited number of contract pharmacy arrangements to ensure it reaches the most vulnerable populations possible, or whether such arrangements should be limited, or other regulations should be put in place, to prevent competing concerns of duplicate discounts and drug diversion.¹²⁶ Should drug manufacturers continue refusing to provide discounted

¹²² See Ron Southwick, *Hospitals Losing Billions in 2022, More Than Half Could Have Negative Margins*, CHIEF HEALTHCARE EXEC. (Sept. 16, 2022), <https://www.chiefhealthcareexecutive.com/view/hospitals-losing-billions-in-2022-more-than-half-could-have-negative-margins> [<https://perma.cc/NKW2-CZJB>].

¹²³ See Juliette Cubanski, Tricia Neuman, Meredith Freed & Anthony Damico, *How Will the Prescription Drug Provisions in the Inflation Reduction Act Affect Medicare Beneficiaries?*, KFF (Jan. 24, 2023), <https://www.kff.org/medicare/issue-brief/how-will-the-prescription-drug-provisions-in-the-inflation-reduction-act-affect-medicare-beneficiaries/> [<https://perma.cc/GN8U-TJXJ>] (“In 2020, 1.4 million Medicare Part D enrollees without low-income subsidies had annual out-of-pocket drug spending of \$2,000 or more, including 1.3 million enrollees who had spending above the catastrophic coverage threshold (which equaled roughly \$2,700 in out-of-pocket costs that year for brand-name drugs alone).”).

¹²⁴ Proposing specific legislative initiatives is beyond the scope of this Article. For specific legislative approaches for reducing prescription drug prices more broadly, see Fisher, *supra* note 112, at 66 (calling on Congress to increase HHS's rulemaking authority under the 340B statute); Ryan Knox, Note, *More Prices, More Problems: Challenging Indication-Specific Pricing as a Solution to Prescription Drug Spending in the United States*, 18 YALE J. HEALTH POL'Y, L. & ETHICS 191, 226–34 (2019) (arguing against indication-specific pricing in favor of other value-based pricing to control prescription drug spending and increase prescription drug access for low-income patients); Robin Feldman, *Perverse Incentives: Why Everyone Prefers High Drug Prices—Except for Those Who Pay the Bills*, 57 HARV. J. ON LEGIS. 303, 356–76 (2020) (arguing for increased drug price transparency and decreased market concentration of major drug manufacturers to control prescription drug spending).

¹²⁵ See *supra* Part IV.

¹²⁶ See, e.g., Richard P. Church & Victoria K. Hamscho, *Contract Pharmacy Restrictions, Legal Challenges, and Congressional Action: What to Expect from the 340B Drug Pricing Program*, 23 J. HEALTH CARE COMPLIANCE, Jan.–Feb. 2021, at 45, 77 (“Accordingly, most likely, it will be necessary for Congress to intervene if contract pharmacy arrangements are to be sustained. Drug manufacturers' contract pharmacy actions have attracted the attention of a number of policymakers in both the House and Senate, which have written to HHS and the pharmaceutical industry on this matter. It is possible, however, that Congress and President Joe Biden's administration may be hesitant to take action due to the pending litigation in federal court. Even if Congress works on a legislative fix to these actions, it would likely include overarching program authority for HRSA to better regulate all 340B Program stakeholders as well as program transparency requirements for participating providers. As such, any legislative fix should be closely watched by covered entities and will likely come with new compliance requirements for covered entities as well as manufacturers in the years ahead.”).

prices for contract pharmacy arrangements, “urban hospitals estimate their median loss from the restrictions at \$2.2 million a year . . . A tenth of them expect their losses to exceed \$21 million a year.”¹²⁷ And given that more than eighty percent of rural hospitals that serve vulnerable populations use contract pharmacy arrangements, this issue affects the survival of safety net and critical access hospitals as well as vulnerable populations’ ability to access health care services and affordable prescription drugs.¹²⁸ As policymakers, Congress is better suited at addressing this issue, as it is not limited to interpreting a statute that did not have contract pharmacy arrangements in mind. Rather, Congress has the option of addressing all policy concerns in its reform efforts, such as by permitting unlimited contract pharmacy arrangements but putting additional safeguards in place to prevent duplicate discounts and diversion.

But a broader policy concern surrounds whether the existing 340B program is doing enough to ensure vulnerable populations have access to affordable prescriptions and services, specifically regarding how hospitals use savings or profits generated through the program. Proponents of the 340B program claim that the program is essential for the survival of critical access and safety net hospitals that serve vulnerable populations.¹²⁹ So while these hospitals could pass drug discounts directly on patients, even for those that do not, they may use the cost savings or profits generated from the discounted drugs (as hospitals may pay discounted prices for the drugs but get reimbursed the full amount by insurers) to provide needed, but margin-draining health-care services to vulnerable communities.¹³⁰ According to a GAO report on the 340B statute’s effectiveness:

[A]ll covered entities reported that program participation allowed them to maintain services and lower medication costs for patients. Entities generating 340B program revenue that exceeded drug-related costs were also able to serve more patients and to provide additional services.¹³¹

Others criticize the lack of transparency and the lack of regulation surrounding how covered entities must use the cost savings and profits generated from the 340B program.¹³² And, due to a lack of reporting requirements, it

¹²⁷ Pifer, *supra* note 33.

¹²⁸ See *Fact Sheet: 340B Drug Pricing Program Contract Pharmacy Arrangements*, *supra* note 30.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-836, DRUG PRICING: MANUFACTURER DISCOUNTS IN THE 340B PROGRAM OFFER BENEFITS, BUT FEDERAL OVERSIGHT NEEDS IMPROVEMENT (2011), <https://www.gao.gov/products/gao-11-836> [<https://perma.cc/X479-NUN5>].

¹³² See Feldman, *supra* note 124, at 352 (“[340B] hospitals receive [drug] rebates even for those patients who have private insurance. Private plans generally reimburse for those drugs at rates even higher than Medicare, further increasing the spread. In theory, the amounts are intended to help those hospitals in their work for low-income or vulnerable patients, but the law does not require any showing that the funds are actually used in that manner. Some government

is difficult for researchers to determine the direct impact of the program on vulnerable populations.¹³³ Thus, in addition to clarifying gaps that exist in the 340B statute which have a direct impact on the costs that patients incur for healthcare services and drugs, 340B reform would provide an opportunity for Congress to weigh and resolve these competing policy concerns and to require greater transparency.

The reach of the 340B program also demonstrates the potential impact of 340B reform in congressional efforts to reduce drug prices for Americans.¹³⁴ First, the 340B program is the second-largest drug pricing program measured by total drug reimbursement¹³⁵ and almost one-third of hospitals in the United States participate in the 340B program despite all its uncertainties.¹³⁶ Second, because the 340B program provides indirect benefits to patients, in that the covered entity receives the discount,¹³⁷ reform efforts to the 340B program could impact vulnerable populations' ability to access discounted prescription drugs regardless of whether they have private insurance, insurance from a government program, or no insurance at all.

In other words, Congress must decide whether the program should be reformed to pass drug savings more directly on to patients, or whether allowing hospitals to decide how to use their revenue cushion accomplishes the program's purpose in other, more indirect ways. But no matter whether Congress opts for regulations that more directly pass the savings of the program on to patients, or for greater transparency and restrictions on how hospitals decide to use those savings for other services that benefit vulnerable populations, the 340B reform effort offers an effective opportunity for Congress to accomplish its policy efforts to decrease prescription drug costs and improve access to prescription drugs among vulnerable populations.

sources and commenters have questioned whether the spread simply increases hospitals' bottom lines and market shares. . . . Whenever spread exists, the economics create incentives for rising prices and agreements that entrench large drug companies and disfavor lower-cost or newer entrants.”).

¹³³ See, e.g., Fisher, *supra* note 112, at 72; John Michael O'Brien, *After 30 Years of 340B, It's Time for Data and an Honest Conversation*, STAT (Oct. 26, 2022), <https://www.statnews.com/2022/10/26/after-30-years-of-340b-time-for-data-honest-conversation/> [<https://perma.cc/XH62-PW7X>] (“The law neither prevents health systems from making a profit when a patient or their insurance company pays the full cost of penny-priced drugs, nor does it put any strings on what they actually do with the extra money. . . . The challenge to [researching the effectiveness of the 340B program] is the 340B program lacks even the simplest of transparency requirements. The federally funded health clinics, nonprofit hospitals, contract pharmacies, and third-party administrators that are part of the 340B pipeline don't disclose how many patients receive 340B drugs and whether or not they received the 340B discount, leaving researchers to come up with inventive methods to peer into this box of mysteries.”).

¹³⁴ See, e.g., Inflation Reduction Act of 2022.

¹³⁵ See Blalock, *supra* note 7, at 7.

¹³⁶ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 131, at 20.

¹³⁷ See 42 U.S.C. § 256b(a)(1).

VI. CONCLUSION

Due to ambiguity in the 340B statute, courts are ill-suited to resolve the question of whether manufacturers must offer discounted drug prices to hospitals who use contract pharmacy arrangements, the answer to which profoundly impacts the revenue of critical access hospitals that serve vulnerable populations. And piecemeal litigation and existing healthcare programs that fail to meaningfully address broader policy concerns only add to the inefficiencies in our healthcare system. The time has come for Congress to face this monster head on. Reform of 340B provides an opportunity for much needed statutory gap-filling. And as the second-largest drug pricing program, and the largest affecting patients with various forms of health insurance or no insurance at all, 340B reform also provides an opportunity for Congress to meaningfully address its broader healthcare policy concerns, including improving access to affordable prescription medications for vulnerable populations.

ENHANCING PUBLIC ACCESS TO AGENCY LAW

BERNARD BELL*
CARY COGLIANESE**
MICHAEL HERZ***
MARGARET KWOKA****
ORLY LOBEL*****

“Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible.”

- Administrative Conference of the United States (1973)[†]

It is axiomatic that in a just society the law must be broadly accessible.¹ This principle obviously applies to legislatures and courts, but it applies no less to administrative agencies which regularly make, interpret, and apply laws. Agencies should make the legal materials they produce open and accessible to the public. These materials include documents that establish, interpret, apply, explain, or address the legal rights and obligations of members of the public, along with any materials articulating legal constraints imposed upon agencies themselves. These are among the most important types of agency documents for the public to be able to access, precisely because they constitute the actual or working law that agencies administer.

The Freedom of Information Act (“FOIA”)² does require that agencies affirmatively disclose online some legal materials—such as agency rules.³ Other legal materials, though, must be disclosed only upon request.⁴ For decades, the Administrative Conference of the United States (“ACUS”) has made recommendations to agencies about how to ensure better access to all their legal materials so that the public can understand what agency-developed law means and how it is applied.⁵ But these recommendations have not been uniformly adopted across the federal government.

* Professor of Law and Herbert Hanooh Scholar, Rutgers Law School.

** Edward B. Shils Professor of Law, Professor of Political Science, and Director of the Penn Program on Regulation, University of Pennsylvania Carey Law School.

*** Arthur Kaplan Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University.

**** Lawrence Herman Professor in Law, Ohio State University Moritz College of Law.

***** Warren Distinguished Professor of Law, University of San Diego School of Law.

[†] Admin. Conf. of the U.S., Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19782, 19788 (July 23, 1973).

¹ LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (“[T]here can be no rational ground for asserting that a [person] can have a moral obligation to obey a legal rule that . . . is kept secret . . .”).

² 5 U.S.C. § 552.

³ *See id.* § 552(a)(2).

⁴ *See id.* §§ 552(a)(3)(A)–(E).

⁵ Admin. Conf. of the U.S., Recommendation 2023-1, *Proactive Disclosure of Agency Legal Materials*, 88 Fed. Reg. 42678 (July 3, 2023).

As a result, ACUS asked us to undertake a study to inform recommendations that the Conference could make to Congress about legislative reforms that would increase online accessibility of agency legal materials.⁶ Usually ACUS just directs its recommendations to administrative agencies. But recognizing that statutory reforms could better support implementation of its past recommendations across the federal government, ACUS's Council approved a project aimed at providing guidance to Congress on how to reform existing statutes to promote public accessibility to agency legal materials.

After a year-long study, we submitted a more than 150-page report to ACUS that recommended seventeen legislative changes to improve federal agencies' affirmative disclosure of their legal materials.⁷ Although our report was detailed and comprehensive, its conclusions and recommendations can be encapsulated in one simple, succinct principle: *All legal materials that agencies are obligated to disclose upon request by a member of the public should be affirmatively made accessible to the public on agency websites.*

We came to this conclusion—and our seventeen specific recommendations for legislative reform—after an extensive process of deliberation, legal research, engagement with agency officials, and solicitation of public comments. We conducted a series of meetings with a consultative group made up of more than sixty current ACUS members from within and outside of government, including representatives from fifty federal agencies. We also received and digested more than thirty written comments from ACUS members, consultative group members, and members of the public. We learned a great deal from this considerable input.

Many agencies currently disclose online different kinds of legal materials. Some even have impressive and comprehensive disclosure regimes in place. But overall, federal agencies can and should be doing much better. The bottom line is that, for standard reasons of good government, agencies should affirmatively disclose *all* their legal materials by posting them in readily findable locations on their websites. It is time for Congress to require federal agencies to take affirmative steps to disclose all legal materials that they are already obligated to disclose upon request—and to disclose them in an effective, user-friendly, and readily accessible manner.

Our recommendations can be divided into three parts: the first set of recommendations addresses what legal materials agencies should be required to disclose on an affirmative basis; the second set addresses how agencies should disclose these items; and the third set addresses ways of strengthening agencies'

⁶ *Request for Proposals—February 3, 2022, Disclosure of Agency Legal Materials*, ADMIN. CONF. OF THE U.S. (Feb. 3, 2022), <https://www.acus.gov/sites/default/files/documents/Disclosure%20RFP%20FINAL%20POSTED%20%203%202022.pdf> [<https://perma.cc/RCN4-4A7B>].

⁷ See BERNARD W. BELL, CARY COGLIANESE, MICHAEL HERZ, MARGARET B. KWOKA & ORLY LOBEL, *DISCLOSURE OF AGENCY LEGAL MATERIALS* (June 2, 2023). On the basis of our report, an ACUS committee generated its own set of eight recommendations, which ultimately led to ACUS's adopting a set of recommendations to Congress at its Plenary session in June 2023. Admin. Conf. of the U.S., Recommendation 2023-1, *supra* note 5. The present essay is drawn from the executive summary of our report to ACUS. A revised version of the full body of the report is forthcoming as Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Improving the Affirmative Disclosure of Agency Legal Materials*, MICH. J. ENV'T & ADMIN. L. (forthcoming 2024).

incentives for disclosure of all their legal materials and providing for thorough and accurate internal systems of records management and affirmative disclosure of this important legal information.⁸

The first set of recommendations identifies places where Congress should more precisely define or expand the materials subject to affirmative disclosure. Six of our recommendations call for amending FOIA to require affirmative disclosure of final opinions and orders, written enforcement decisions, settlement agreements that resolve actual or pending court litigation, Department of Justice Office of Legal Counsel opinions, certain opinions of agencies' chief legal officers, and inter-agency memoranda of understanding.⁹ Three other recommendations call for amending parts of the E-Government Act,¹⁰ the Federal Register Act,¹¹ and the Presidential Records Act¹² in ways that would promote disclosure of various other legal materials. We make clear that certain forms of presidential directives already either qualify as agency legal materials by statute or are subject to disclosure in response to public requests submitted to the agencies targeted by the directives.¹³ We recommend that these existing obligations be maintained but updated to place less weight on the label given to the directive and more on its substance and function.¹⁴ The Federal Register Act, for example, already requires that certain presidential directives labeled as "proclamations" or "executive orders" be published in the *Federal Register*.¹⁵ But many directives labeled as "presidential memoranda" are functionally indistinguishable from proclamations and orders, and they should be affirmatively disclosed as well.

We recognize that legislation clarifying that agencies must affirmatively disclose more categories of documents than they already do will in some instances impose substantial burdens in terms of processing voluminous sets of legal materials and then posting them online. This concern is especially salient,

⁸ By and large, ACUS formally adopted our recommendations in June 2023. Admin. Conf. of the U.S., Recommendation 2023-1, *supra* note 5; *see also* Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Affirmatively Disclosing Agency Legal Materials*, THE REG. REV. (Sept. 11, 2023), <https://www.theregreview.org/2023/09/11/bell-coglianese-herz-kwoka-lobel-affirmatively-disclosing-agency-legal-materials/> [<https://perma.cc/72GB-CLUC>]. Subsequently, ACUS convened a working group—comprising, among other ACUS members, some of the authors of this essay—which resulted in a concrete legislative package that was transmitted to Congress in December 2023. Letter from Andrew Fois, Chairman, Admin. Conf. of the U.S., to Committee Chairs and Ranking Members, U.S. Cong. (Dec. 11, 2023), https://www.acus.gov/sites/default/files/documents/23-12-11_Office%20of%20the%20Chair%20Transmittal%20to%20Congress.pdf [<https://perma.cc/9MUQ-FSKG>].

⁹ BELL ET AL., *supra* note 7, at ii.

¹⁰ Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified in scattered sections of 44 U.S.C., including § 101 (note), § 3501 (note), and §§ 3601–3606).

¹¹ 44 U.S.C. §§ 1501–11.

¹² 44 U.S.C. §§ 2201–09.

¹³ BELL ET AL., *supra* note 7, at 38–40, 112–16, 140–42.

¹⁴ *Id.* at 112–14, 141. To anyone who might wonder why recommendations about presidential documents are contained in a project on agency legal materials, we would simply note that the Executive Office of the President is defined as an "agency" in the Freedom of Information Act. *See* 5 U.S.C. § 551(f)(1). Those directives are also transmitted to agencies, whereby they can already be required of agencies to disclose to the public upon request.

¹⁵ *See* 44 U.S.C. § 1505.

for example, with respect to final adjudicatory opinions and orders and the results of enforcement actions. For some agencies, making these materials available online may necessitate an upfront investment in improved technologies or additional contractor or personnel time.¹⁶ Still, bodies of adjudicatory opinions have proven valuable to the public.

To balance the interests and burdens at stake, we recommend a novel statutory provision that would authorize agencies to exempt themselves, by notice-and-comment rulemaking, from an affirmative obligation to disclose any of these materials under limited conditions.¹⁷ Specifically, under our recommendation, agencies could exempt certain types of documents from affirmative disclosure when such disclosure would be both impracticable to the agency and of de minimis value to the public due to records' repetitive nature.¹⁸ That said, an agency should still be expected to set forth in any such exempting rule a plan for some kind of alternative disclosure of aggregate data, representative samples, or other information needed to inform the public about the legal materials being exempted.¹⁹ The notice-and-comment rulemaking process is important to effectuate such a self-exemption because it will allow members of the public to participate in a decision that will affect their access to basic components of agency law.²⁰

In terms of *how* agencies should disclose their legal materials—the second major focus of our proposals—we recommend that Congress direct agencies to develop detailed affirmative disclosure plans, which would enable each agency to customize its procedures and practices.²¹ This recommendation sets forth eleven key elements of such plans, drawn largely from prior ACUS recommendations.²² These elements include:

- Clear descriptions of the types of legal materials covered by an agency's affirmative disclosure plan;

¹⁶ For a discussion of the budgetary implications of expanding the affirmative disclosure of agency legal materials, see BELL ET AL., *supra* note 7, at 27–28. Of course, some of the upfront investment costs for improving the affirmative disclosure of agency legal materials will be recouped by savings on the processing of FOIA requests for such material.

¹⁷ BELL ET AL., *supra* note 7, at 133–34, 139–40.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.* On the value of public participation in the regulatory process more generally, see Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. U. L. REV. 924 (2009).

²¹ BELL ET AL., *supra* note 7, at 142–44. This recommendation would reinforce existing obligations under the E-Government Act. *See* 44 U.S.C. § 3501 note.

²² *See* Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61728, 61737 (Dec. 29, 2017) (recommending that policy statements be made available promptly); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927, 38929 (Aug. 8, 2019) (recommending that interpretive rules be made available promptly); Admin. Conf. of the U.S., Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*, 77 Fed. Reg. 47810, 47812 § 3(b) (Aug. 10, 2012) (recommending that MOUs with implications for the public be affirmatively disclosed); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019) (recommending that agencies develop procedures for management and disclosure of guidance documents).

- Listings of the locations on an agency’s website where legal material can be found;
- Document labeling and numbering practices used to track agency legal materials;
- Practices or procedures to ensure the accuracy and currency of disclosed legal materials;
- Practices or procedures for online archiving of amended, inoperative, superseded, or withdrawn agency legal materials;
- Employee training to ensure that the affirmative disclosure plan will be carried out;
- Plans or procedures for the periodic review and updating of the plan; and
- Opportunities for members of the public to provide feedback on the agency’s affirmative disclosure plan and its implementation.

These elements of an affirmative disclosure plan reflect a well-established management-based governance approach, in which entities are directed to produce plans that satisfy general criteria designed to promote an intended goal.²³ These plans should of course also themselves be made public, which will inform the public of what materials the agency produces and where it can be found. Unfortunately, members of the public are too often unaware of what legal materials agencies produce.²⁴ It is hard to find something one does not know exists.

Our recommendations as to the manner of disclosing legal materials also include recommendations to amend the E-Government Act to encourage agencies to provide cross-links on relevant portions of their agency websites to enable members of the public to find relevant legal materials more easily.²⁵ Furthermore, we call on Congress to direct the Office of Management and Budget to update its website guidance for agencies and the Office of Federal Register to study how best to make presidential directives searchable online.²⁶ Finally, we recommend that the Federal Register Act²⁷ be amended to allow a permanent digital record to become the official version of the Federal Register—replacing the current requirement that only the print version be the official one.²⁸

To provide agencies with appropriate incentives to maintain functioning disclosure practices for their legal materials—the third major area of proposed

²³ See NAT’L ACADS. OF SCIS., DESIGNING SAFETY REGULATIONS FOR HIGH-HAZARD INDUSTRIES 124–39 (2018); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC. REV. 691 (2003); Cary Coglianese & Shana M. Starobin, *Management-Based Regulation*, in POLICY INSTRUMENTS IN ENVIRONMENTAL LAW 292–307 (Kenneth R. Richards & Josephine van Zeben eds., 2020).

²⁴ See JOSHUA GALPERIN & E. DONALD ELLIOTT, PROVIDING EFFECTIVE NOTICE OF SIGNIFICANT REGULATORY CHANGES 36–41 (May 17, 2022), <https://www.acus.gov/report/providing-effective-notice-significant-regulatory-changes-final-report> [<https://perma.cc/8PT8-FJR5>]; Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENV’T & ADMIN. L. 243, 261–69 (2020).

²⁵ BELL ET AL., *supra* note 7, at 44–46, 145.

²⁶ *Id.* at 43–44, 146–47.

²⁷ 44 U.S.C. §§ 1501–1511 (originally enacted as Federal Register Act of 1935, ch. 417, 49 Stat. 500).

²⁸ BELL ET AL., *supra* note 7, at 32–35, 147.

reforms—we recommend some modest modifications to judicial review provisions and fee reimbursement policies with respect to the disclosure of agency legal materials. In particular, we recommend that Congress explicitly allow suits to enforce agencies’ affirmative disclosure provisions (after, of course, appropriate administrative exhaustion).²⁹ This would resolve a current split in the circuits³⁰ and provide an essential vehicle for enforcement of agencies’ disclosure obligations. Without the assurance that someone can obtain judicial enforcement of affirmative disclosure requirements, agencies lack little intrinsic or self-reinforcing incentives to maintain comprehensive and current online repositories of all of their legal materials.³¹ In addition, we also recommend that when individuals seek specific legal materials that an agency should have, but has not, affirmatively disclosed, the agency should provide the materials to the requester on an expedited basis and without charging fees.³²

Importantly, all of our recommended legislative reforms can be adopted without Congress needing to reconsider the substantive value choices underlying FOIA’s current tradeoffs between public access to information and other values such as individual privacy, protection of confidential business information, and the preservation of some modicum of secrecy surrounding law enforcement practices and internal governmental deliberations. These reforms, in other words, can be adopted while taking FOIA’s existing disclosure exemptions as given. Indeed, in our report to ACUS, we made clear that we were taking no position with respect to any ongoing debates about the scope of particular exemptions.³³ Congress can adopt our recommendations and so meaningfully enhance transparency without touching any existing FOIA exemption. Likewise, our recommendations are also fully compatible with any revision of FOIA’s exemptions that Congress wishes to make.

The point is that whatever one thinks about the reach of FOIA, there is much that Congress and agencies can do to improve the affirmative disclosure of those agency legal materials that would already have to be released in response to a FOIA request. This is important because it ensures that such new requirements will be practical and feasible for agencies to implement. Our recommendations, it bears repeating, also do not extend to *all* agency information—they are focused on agency *legal* materials. Legal materials, unlike some other materials, are documents that agencies must regularly rely upon in their ongoing operations to comport with the rule of law. For that reason, they are both more important, and more feasible to disclose affirmatively (if for

²⁹ See *id.* at 130, 147–48.

³⁰ Compare *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that reviewing court can order agency only to provide documents to individual requestor, not compel it to make documents publicly available), with *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 224–25 (2d Cir. 2021) (holding that courts have authority to compel compliance with affirmative disclosure obligations), and *Animal Legal Def. Fund v. USDA*, 935 F.3d 858, 874 (9th Cir. 2019) (same).

³¹ See *BELLE ET AL.*, *supra* note 7, at 127–34.

³² See *id.* at 133, 148–49.

³³ See *id.* at iii (“Importantly, this report takes FOIA’s existing disclosure exemptions as a given and does not take a position in any ongoing debates about the contours of particular exemptions.”); see also *id.* at 14 (“[I]n formulating our recommendations in this Report, we have simply taken FOIA’s existing exemptions as a given.”).

no other reason than that they are fewer in number), than *all* agency documents otherwise releasable under FOIA.

In addition, almost all our recommendations have some prior precedent in some federal agencies' current practices.³⁴ As a result, our recommendations are merely an attempt to “level up” all agencies to engage in disclosure practices that have already proven feasible.

We do recognize that agencies have varied types of legal materials and distinctive capacities for managing these materials and proactively making them available online. That is why we urge Congress to direct agencies to customize their own planning for affirmative disclosure and even exempt themselves from what would otherwise be applicable disclosure obligations. New legislation can provide some flexibility for agencies in light of their unique circumstances. But Congress should ensure that agencies are at least fully transparent about any customization that excludes certain types of legal materials from affirmative online disclosure.

Public availability of agency legal materials must be comprehensive. In the digital era, it is unacceptable for the full suite of agency legal materials not to be available online to the public.³⁵ But mere online availability is itself no longer sufficient. Members of the public should be able to locate legal materials easily and use them effectively.³⁶ By recommending that Congress direct agencies to prepare clear affirmative disclosure plans, provide them to the public, and ensure that materials are indexed and searchable, we are building on past ACUS guidance to agencies.³⁷ Although that guidance acknowledges that agencies can differ in how and where they place their legal materials online, it is well past time for all agencies to do more to make transparency meaningful and real.

The legal materials produced by administrative agencies are of paramount importance to regulated entities, regulatory beneficiaries, and members of the public at large. Like all law, these materials must be available to all. Except when a valid FOIA exemption applies, agencies already have a clear obligation to release any information upon request by a member of the public. Yet when it comes to agencies' *legal materials*, the public should not need to file a request with the agency. All these materials should already be disclosed in a readily accessible location on agencies' websites.

³⁴ See *id.* at 9, 12–13, 30–32, 41–43, 128.

³⁵ See MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* 181–200 (2021); Bernard W. Bell, *Making Soup from a Single Oyster? CREW v. DOJ and the Obligation to Publish Office of Legal Counsel Opinions*, *YALE J. REG.: NOTICE & COMMENT* (May 13, 2019), <https://www.yalejreg.com/nc/making-soup-from-a-single-oyster-crew-v-doj-and-the-obligation-to-publish-office-of-legal-counsel-opinions-part-i/> [<https://perma.cc/9ZXT-5LDL>] (three-part series); Coglianesse et al., *supra* note 20, at 936–37; Cary Coglianesse, *Illuminating Regulatory Guidance*, 9 *MICH. J. ENV'T & ADMIN. L.* 243, 259–69, 271–72 (2020); Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 *CARDOZO PUB. L. POL'Y & ETHICS J.* 577 (2009).

³⁶ See Cary Coglianesse, *A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*, 44 *ENV'T L. REP.* 10660 (2014).

³⁷ See CARY COGLIANESE, *PUBLIC AVAILABILITY OF AGENCY GUIDANCE DOCUMENTS* 35–44 (May 15, 2019).

TAKING ON THE MILITARY FUNERAL PROTEST: A MULTIFARIOUS STATUTE LEANS IN

DEREK P. LANGHAUSER*

I. INTRODUCTION

In 2005, the Westboro Baptist Church (“Westboro”) from Topeka, Kansas, began protesting the funerals of American soldiers killed in action.¹ Typically, the protestors would carry signs with messages like “God Hates Fags” and “Thank God for Dead Soldiers.” In 2011, the Supreme Court of the United States ruled in *Snyder v. Phelps*² that Westboro’s protests were protected under the First Amendment of the United States Constitution.³ Five weeks after *Snyder*, United States Senator Olympia J. Snowe (R-Me.)⁴ introduced a bill, the Sanctity of Eternal Rest for Veterans (“SERV”) Act,⁵ to increase protections for grieving funeral attendees. The bill was signed into law in 2012.

The law amended two existing funeral protest statutes that provided time and distance buffers by expanding the previous zones of protection. The law also substantially strengthened the existing laws by adding a series of provisions imported from Article I of the Constitution and, oddly enough, the Racketeer Influenced and Corrupt Organizations (“RICO”) and Copyright Acts. The effect was to shift costs and risks of litigation from innocent families awash in grief to intentional agitators. Before this law took effect, Westboro actively protested and litigated its right to engage in such protests. Since the new law was signed, Westboro has declined to litigate, and the law has not been challenged even though the United States remained engaged in Afghanistan until 2021.

Although the First Amendment limits how far Congress can go in addressing these protests,⁶ this new law helped to provide a more effective counterbalance. This Article tells the story of how this unique law known as SERV came to be. The antecedent to “how a bill becomes a law” is how an idea becomes a bill. This Article illustrates how a thoughtful legislator can take a difficult

* Derek P. Langhauser is a Maine attorney who counseled Senator Snowe on the statute discussed here. He served as chief legal counsel to two Maine Governors, one Democrat and one Republican, and as a law clerk to two Maine Supreme Judicial Court Justices. He is also a member of the Council of the American Law Institute and a Fellow of the American Bar Foundation and the National Association of College and University Attorneys.

¹ See *Westboro Baptist Church*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church> [<https://perma.cc/87S7-PSHF>].

² 562 U.S. 443 (2011).

³ *Id.* at 447.

⁴ Senator Snowe served in the United States Senate from 1995 until 2013; before that, she served in the United States House of Representatives from 1979 until 1995. See Dana Bash & Paul Steinhauser, *Citing Partisanship, Maine’s Snowe Says She’ll Leave the Senate*, CNN (Feb. 28, 2012), <https://www.cnn.com/2012/02/28/politics/senate-snowe-retiring/index.html> [<https://perma.cc/C588-Q8VH>].

⁵ Filed as S. 815, 112th Cong. (Apr. 13, 2011).

⁶ See U.S. CONST. amend. I.

problem and probe complex ideas to create a bipartisan bill that can become law, survive legal challenges, and meaningfully address a problem.

II. WESTBORO AND THE SUPREME COURT

Fred Phelps founded Westboro in 1955⁷ and a law firm representing Westboro in its civil suits in 1964.⁸ In 1991, Westboro began protesting to promote its beliefs.⁹ Westboro claims to have picketed more than 40,000 times since then.¹⁰ At its protests, Westboro members have held inflammatory signs bearing messages like “God Hates Fags,” “God Hates Jews,” “Thank God for Dead Soldiers,” and “Thank God for AIDS.”¹¹

In 2005, Westboro began targeting the funerals of American soldiers killed in Iraq and Afghanistan and claimed that God was punishing America for tolerating homosexuality and persecuting Westboro.¹² In a 2005 interview, Fred Phelps said, “God is visiting the sins upon America by killing their kids with IEDs . . . and the more the merrier.”¹³

In 2006, Westboro picketed at the Maryland National Veterans Cemetery at the funeral of Lance Corporal Matthew Snyder, who was killed in the line of duty in Iraq.¹⁴ Westboro members held signs with messages such as “Thank God for dead soldiers,” “Fag Troops,” and “You’re going to hell.”¹⁵ After the service, Matthew’s father, Albert Snyder, sued Westboro in the United States District Court for the District of Maryland for defamation, invasion of privacy, and emotional distress.¹⁶ Westboro countered that its signs were protected speech and free exercise of religion under the First Amendment.¹⁷

A jury agreed with Snyder and awarded him \$10.9 million, but the trial judge lowered the award to \$5 million.¹⁸ The United States Court of Appeals for the Fourth Circuit reversed, holding that Westboro members’ speech and religious views were protected “[n]otwithstanding the distasteful and repugnant nature of the words[.]”¹⁹ Worse yet, the Fourth Circuit ordered Albert Snyder to pay \$16,510 for Westboro’s court costs.²⁰ Snyder appealed to the Supreme Court, which held for

⁷ See *Westboro Baptist Church*, *supra* note 1.

⁸ See *id.* In 1979, the Kansas Supreme Court disbarred Phelps, finding that he had disregarded the ethics of the legal profession. See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193 (2010), <http://yalelawjournal.org/forum/snyder-v-phelps-the-supreme-courts-speech-tort-jurisprudence-and-normative-considerations> [<https://perma.cc/CW8E-HWFD>].

¹⁵ See *id.* (citing *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009)).

¹⁶ See *id.* (citing *Snyder*, 580 F.3d at 210–11).

¹⁷ See *Snyder*, 580 F.3d at 214.

¹⁸ See Sacks, *supra* note 14 (citing *Snyder*, 580 F.3d at 211).

¹⁹ *Snyder*, 580 F.3d at 226.

²⁰ See Sacks, *supra* note 14.

Westboro, ruling that the First Amendment immunized Westboro from tort damages under Maryland law.²¹

III. THE SENATOR RESPONDS

As noted in the Introduction, the antecedent to “how a bill becomes a law” is how an idea becomes a bill—that is, how an event becomes identified as a problem, how that problem generates ideas for redress, how those ideas for redress find roots in the reach and limits of existing laws, and how an effective, bipartisan, and constitutionally viable bill can be drafted and passed. The process always starts, as it must, with an earnest and skilled legislator who is willing to put in the work to make it happen.

Senator Snowe, a long-respected protector of veterans’ rights, expressed her deep disappointment with the *Snyder* decision and asked me whether the decision left any room for statutory protections of military funerals. At first blush, there did not appear to be much room. The decision specifically addressed a military funeral protest, and it was grounded in sound constitutional analysis. However, the decision did not discuss, and consequently did not test, the two existing federal statutes governing military funerals and burials.²² By extension, the decision also did not address the limits of Forum Analysis under those statutes.²³ And of course, the case applied only the remedies that were then available to the plaintiffs.

The case also exposed the relatively weak litigation position of grieving families. The families were up against passionate actors, trapped by constitutional limitations, and lacked leverage and procedural advantages. Accordingly, financial recovery was a relatively long shot, worsening the families’ already severely weakened emotional state. All of this was exacerbated when Snyder not only lost his case but was also ordered to pay Phelps’s costs. But if the buffers in existing statutory and constitutional law could be expanded and litigation devices could be developed to help shift litigation risks, the precedential effect of the decision could be limited.

The Senator asked me to brainstorm ideas and develop a draft. As her lead counsel, I had experience in First Amendment law and, more specifically, Forum Analysis. For assistance, I recruited a long-time colleague, Robert S. Frank, Esq.,

²¹ The Court held that Phelps and his followers were speaking on matters of public concern on public property and thus were entitled to protection under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011). Even though some of the picket signs arguably targeted only the Snyder family, most of them addressed issues regarding Americans’ moral conduct, the fate of the United States, and homosexuality in the military. *See id.* As such, the “overall thrust and dominant theme” of the speech related to broader public issues. *Id.* at 454. Furthermore, Westboro was picketing on public land adjacent to a public street. *See id.* at 456. Finally, there was no pre-existing relationship between Westboro’s speech and Snyder that might suggest that the speech on public matters was intended to mask an attack on Snyder over a private matter. *See id.* at 455.

²² One statute governs military funerals at cemeteries owned by the United States. 38 U.S.C. § 2413. The other statute applies to any other cemetery where a federal soldier is being buried. 18 U.S.C. § 1388.

²³ Forum Analysis is the doctrine under the First Amendment that permits limitations on the time, place, and manner—as distinguished from the content or message—of speech. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

an excellent private practitioner with deep experience as a federal court litigator and former assistant attorney general prosecuting unfair trade practices.

We met over coffee at 6:30 on a Sunday morning in Maine. In seventy minutes, we identified the type of speech and litigation concepts required. We looked for mechanisms that in the aggregate would have a meaningful practical impact. We discussed importing verbatim standards from other established laws that had already been tested. We identified the places to use both a belt and suspenders for reinforcement, and we sketched how the pieces would work together to provide a substantive holistic approach. Within three weeks of our initial meeting, we completed our research and analysis and felt that we had a substantive approach to offer. The drafting flowed easily because many of the concepts were already developed in other laws.

During that same time, the Senator commented on the developing draft and identified prospective supporters in both the Senate and the House of Representatives. Widely respected for her bipartisan approach, commitment to detail, and previous experience in the House, the Senator knew where and how to find support, and how to marshal that support to action. She quickly attracted thirty-seven bipartisan Senate co-sponsors for her Senate bill and secured submission of an identical House bill with its own thirty-four bipartisan House sponsors.²⁴ The Senator then drew upon her thirty-two years of congressional experience (sixteen years each in the House and Senate) to chart the anticipated procedural paths through the House and Senate committees.²⁵ By April 15, 2011, just five weeks after the Court's decision, our and the Senator's work was done, and she filed the legislation.²⁶

IV. CONGRESS TAKES ACTION

SERV sought to strengthen several existing protections and add several others. In short, the proposed bill would:

²⁴ Nineteen Democrats, seventeen Republicans, and one Independent co-sponsored the Senate bill. *See Cosponsors: S.815—112th Congress (2011–2012)*, CONGRESS.GOV (Nov. 14, 2011), <https://www.congress.gov/bill/112th-congress/senate-bill/815/cosponsors?s=1&r=73> [<https://perma.cc/6WUH-CCR7>]. Representative Charlie Bass (R-N.H.) introduced the House bill with twenty-five Republican and nine Democratic co-sponsors. *See Cosponsors: H.R. 1591—112th Congress (2011–2012)*, CONGRESS.GOV (Jan. 23, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1591/cosponsors> [<https://perma.cc/NK8A-DE7T>].

²⁵ The Senate bill was referred to the Senate Committee on Veterans' Affairs and the House bill to three House Committees: Judiciary, Veterans' Affairs, and Armed Services. The chair of the Senate Committee on the Judiciary also wanted to review the bill. Senator Snowe answered the chair's questions, and I answered the committee attorneys' questions, and the legislation moved forward.

²⁶ The Senate bill was introduced on April 13, 2011, *see All Actions: S.815—112th Congress (2011–2012)*, CONGRESS.GOV (June 8, 2011), <https://www.congress.gov/bill/112th-congress/senate-bill/815/all-actions?s=1&r=73> [<https://perma.cc/Z77C-8CMH>], and the House bill on April 15, 2011, *see All Actions: H.R. 1591—112th Congress (2011–2012)*, CONGRESS.GOV (Jan. 23, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1591/all-actions> [<https://perma.cc/4PJJ-NCFK>].

- Expand the class of protected veterans from the Armed Forces to include National Guard veterans employed in the service of the United States.²⁷
- Expand funeral locations from federal²⁸ and non-federal²⁹ cemeteries to include other locations such as churches, funeral homes, or residences of immediate family members where the funerals are held.³⁰
- Expand the distance buffer zones during the service and the time buffer zones before and after the service.³¹
- Limit prohibited conduct to that undertaken with the intent and effect of disrupting, obstructing, or disturbing; and establish a rebuttable presumption of that intent and effect if the violator lacked reasonable grounds to believe, from the attention or publicity the violator sought, that their conduct would not be disruptive.³²
- Establish criminal penalties, civil remedies for actual and statutory damages, and the right of the Attorney General to institute proceedings to seek statutory damages.³³
- Provide that a final judgment or decree rendered in favor of the United States in any criminal proceeding estop a defendant from denying in any subsequent civil proceeding the essential allegations of the criminal offense.³⁴

The Committees only modestly amended Senator Snowe's proposal and folded her proposal, along with several other related measures, into a broader bill on veterans' benefits.³⁵ In the spring of 2012, the House passed that full bill 380–0, and in the summer, the Senate responded with unanimous consent.³⁶ The enacted measure was then presented to President Barack H. Obama, who signed the bill into law on August 6, 2012, and commented:

[One] part of this bill that I want to highlight—prohibit protesting within 300 feet of military funerals during the two hours before and two hours after a service. . . . I am very pleased to be signing this bill into law. The graves of our veterans are hallowed ground. And obviously we all defend our Constitution and the First Amendment and free speech, but we also believe that when men and women die

²⁷ See S. 815, 112th Cong. § 3 (2011) (amending 18 U.S.C. § 1388(f)(1) and adding federally activated National Guard to the definition of Armed Forces otherwise set forth in 10 U.S.C. § 101).

²⁸ These include, for example, Arlington National Cemetery and cemeteries under the control of the National Cemetery Administration, which are governed by 38 U.S.C. § 2413.

²⁹ These are governed by 18 U.S.C. § 1388.

³⁰ See S. 815, 112th Cong. § 3 (2011) (amending 18 U.S.C. § 1388(a)(3)).

³¹ See *id.* (amending 18 U.S.C. § 1388(a)).

³² See *id.* (amending 18 U.S.C. § 1388(e)).

³³ See *id.* (amending 18 U.S.C. §§ 1388(b)–(d)).

³⁴ See *id.* (amending 18 U.S.C. § 1388(c)(4)).

³⁵ The law was enacted as the Honoring America's Veterans and Caring for Camp Lejeune Families Act, Pub. L. No. 112-154, §§ 601–602, 126 Stat. 1165, 1195–1201 (Aug. 6, 2012) (amending 18 U.S.C. § 1388 and 38 U.S.C. § 2413).

³⁶ See *Actions Overview: H.R. 1627—112th Congress (2011-2012)*, CONGRESS.GOV (Aug. 6, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1627/actions> [<https://perma.cc/JRS2-RKCH>].

in the service of their country and are laid to rest, it should be done with the utmost honor and respect. . . . I think all Americans feel we have a moral, sacred duty towards our men and women in uniform. They protect our freedom, and it's our obligation to do right by them. This bill takes another important step in fulfilling that commitment.³⁷

Three days after the President signed SERV, *Politico* reported that an American Civil Liberties Union (“ACLU”) litigation policy adviser objected that the new measures stifled free speech: “This law is about making the message a federal crime, and that’s a violation of the Constitution to which members of the military swear their oath.”³⁸

The ACLU, however, did not challenge SERV. The only reported case discussing SERV said this: “[I]ts passage by unanimous vote indicates a congressional consensus surrounding the communal importance of funerals and the need to protect mourners at such a particularly vulnerable time in their lives.”³⁹ Likewise, scholarly commentary has been scarce.⁴⁰ And while there is no way to measure with certainty the direct causal impact of the law, it is noteworthy that reports of such protests have withered since SERV took effect, even though the United States remained engaged in Afghanistan until 2021.

V. HOW SERV WAS BUILT

SERV amended two existing funeral protest statutes with two primary goals: (1) to strengthen the position of families who were subject to disruption and disparagement; and (2) to protect the Act itself from First Amendment challenges. To these ends, SERV employed a creative approach. As discussed with details and citations below, the speech-related components drew from the governmental interest embedded in the express military powers of Congress from Article I of the Constitution; the time, place, and manner jurisprudence of the First Amendment; and long-standing principles governing disturbances of the peace. The remedy components were taken from RICO (the cause of action, estoppel, and attorneys’ fees provisions) and Copyright Acts (the damages, rebuttable presumption, and attorneys’ fees provisions).

³⁷ *Remarks by the President at Signing of the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012*, WHITE HOUSE (Aug. 6, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/08/06/remarks-president-signing-honoring-americas-veterans-and-caring-camp-lej> [<https://perma.cc/U6X2-BFZV>].

³⁸ Kevin Cirilli, *ACLU: New Funeral Law Stifles Speech*, POLITICO (Aug. 8, 2012), <https://www.politico.com/story/2012/08/aclu-new-funeral-law-stifles-speech-079498> [<https://perma.cc/54LK-6WVR>].

³⁹ See *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 690 (8th Cir. 2012) (evaluating city ordinance similar to SERV). Based on a Westlaw search of reported cases citing 18 U.S.C. § 1388 and 18 U.S.C. § 2413 after their amendment.

⁴⁰ See, e.g., Margaret Greco, *Take A Step Back: The Constitutionality Of Stricter Funeral-Picketing Regulations after Snyder v. Phelps*, 23 B.U. PUB. INT. L.J. 151 (2014); Nicholas Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313 (2014).

The Compelling Governmental Interest. Anticipating First Amendment challenges, SERV cited Congress' compelling governmental interest for its enactment. Congress stated that SERV was enacted to:

provide necessary and proper support for the recruitment and retention of the Armed Forces and militia employed in the service of the United States by protecting the dignity of the service of the members of such Forces and militia, and by protecting the privacy of their immediate family members and other attendees during funeral services for such members.⁴¹

Congress also named its express powers for enactment:

Congress finds that this section is a necessary and proper exercise of its powers under the Constitution, Article I, Section 8, Paragraphs 1, 12, 13, 14, 16, and 18, to provide for the common defense, raise and support armies, provide and maintain a navy, make rules for the government and regulation of the land and naval forces, and provide for organizing and governing such part of the militia as may be employed in the service of the United States.⁴²

Focus on the Intent and Effect of the Conduct Instead of the Content of the Speech. Generally speaking, protected speech begins to lose its protection when the effect of the speech is to disrupt or obstruct.⁴³ SERV only prohibited conduct undertaken with the intent and effect of disrupting, obstructing, or disturbing, regardless of the content. To that end, SERV proscribed (1) "willfully making or assisting in the making of any noise or diversion" that intends to and does in effect "disturb[] or tend[] to disturb the peace" of the funeral;⁴⁴ (2) "willfully and without proper authorization" intending to and in effect "impeding or tending to impede the access to or egress from" the funeral location;⁴⁵ or (3) "willfully making or assisting

⁴¹ See Honoring America's Veterans and Caring for Camp Lejeune Families Act, Pub. L. No. 112-154, § 601(a)(1), 126 Stat. 1165, 1195 (2012).

⁴² *Id.* at § 602(a)(2). These paragraphs from Article I, § 8 are, in order, the express powers of Congress to "provide for the common defense and general welfare of the United States," "raise and support armies," "provide and maintain a navy," "make rules for the government and regulation of the land and naval forces," "provide for calling forth the militia," "provide for organizing, arming, and disciplining, the militia," and "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." See U.S. CONST. art. I, § 8.

⁴³ "[S]peech that promotes or produces an unlawful end is [generally] not protected by the First Amendment." Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J. COLL. & UNIV. L. 481, 492 (2005). "This class includes expression that promotes the imminent prospect of actual violence or harm, fighting words, terrorist threats, hate speech and speech that constitutes or promotes gross disobedience of legitimate rules." *Id.* at 492-93 & nn.96-100 (footnotes omitted) (citing cases). "This class also includes expression that constitutes criminal or severe harassment, defamation, obscenity, false advertising, criminal trespassing and the use of public resources to promote partisan political activities in violation of state or federal law." *Id.* at 493-94 & nn.101-06 (footnotes omitted) (citing cases).

⁴⁴ 18 U.S.C. § 1388 (a)(3); see also 38 U.S.C. § 2413(a)(2)(A)(ii).

⁴⁵ 18 U.S.C. § 1388 (a)(2); see also 38 U.S.C. § 2413(a)(2)(B)(ii).

in the making of any noise or diversion” that intends to and in effect “disturbs or tends to disturb the peace of” the home of immediate family members.⁴⁶

Time and Distance Buffers. Generally speaking, reasonable time, place, and manner restrictions that are content neutral do not violate the First Amendment.⁴⁷ SERV, therefore, reasonably expanded both the time and distance buffers. As regards the distance, SERV expanded the previous distance buffers from 300 feet to 500 feet from the boundary of the location of the funeral,⁴⁸ and from 150 feet to 300 feet from the intersection between the boundary of the location of the funeral and any access route to that location.⁴⁹ As regards the time, SERV expanded the previous time buffer from 60 minutes to 120 minutes before and after the funeral.⁵⁰ SERV also added time and distance buffers on or near the boundary of the residence of the soldier’s immediate family.⁵¹ This provision was supported by the Supreme Court’s decision in *Frisby v. Schultz*,⁵² wherein the Court upheld a city ordinance banning protests outside residential homes because the government had a legitimate interest in protecting the homes of its residents.⁵³

Civil Remedies. SERV provided two civil causes of action. First, to enable the United States to directly vindicate its compelling governmental interest, SERV conferred upon the United States Attorney General a cause of action for statutory damages.⁵⁴ This option, imported from RICO,⁵⁵ relieved the aggrieved family members of the sole burden of addressing their harm through legal action. Second, to enable an aggrieved person to vindicate their personal interests, SERV provided a civil cause of action for actual damages,⁵⁶ statutory damages between \$25,000 and \$50,000,⁵⁷ and attorneys’ fees.⁵⁸ This right to recover actual or statutory damages was imported from the time-tested Copyright Act.⁵⁹ Actual damages depend on the specifics of a case, and, while the damages can be high, they can also

⁴⁶ 18 U.S.C. § 1388(a)(1)(B).

⁴⁷ See *supra* note 23.

⁴⁸ See 38 U.S.C. § 2413(a)(2)(B)(i).

⁴⁹ See 18 U.S.C. § 1388(a)(1)(A).

⁵⁰ See 38 U.S.C. § 2413(a)(2); 18 U.S.C. § 1388(a).

⁵¹ See 18 U.S.C. § 1388(a)(3).

⁵² 487 U.S. 474 (1988).

⁵³ *Id.* at 488. Schultz opposed abortion and gathered others to picket at the home of a doctor who performed abortions. *Id.* at 476. In response, the City of Brookfield, Wisconsin banned all picketing in front of residential homes for “the protection and preservation of the home.” *Id.* at 477. By a 6–3 vote, the U.S. Supreme Court upheld the ordinance as facially valid under the First Amendment. *Id.* at 488. Although the street constituted a traditional public forum, the City’s ban survived the Court’s scrutiny because the ban was content neutral, left open ample alternative channels of communication, served a significant government interest in protecting the homes of its residents, and did so without favoring one idea over another or wholly eliminating the ability to communicate an idea. See *id.*

⁵⁴ 18 U.S.C. § 1388(c)(2); 38 U.S.C. § 2413(c)(2).

⁵⁵ 18 U.S.C. § 1964.

⁵⁶ 18 U.S.C. §§ 1388(c)–(d); 38 U.S.C. §§ 2413(c)–(d).

⁵⁷ 18 U.S.C. §§ 1388(c)–(d); 38 U.S.C. §§ 2413(c)–(d).

⁵⁸ 18 U.S.C. § 18(c)(3)(B); 38 U.S.C. § 2413(c)(3)(B).

⁵⁹ 17 U.S.C. §§ 504(b)–(c).

be difficult to determine, such as in the case of actual compensable value for one's emotional distress. By contrast, statutory damages can be limited, but they can also ease recovery in cases where actual damages are in fact difficult to determine. Finally, SERV provided an individual with access to attorneys' fees, which is a right imported from both RICO⁶⁰ and the Copyright Act.⁶¹

Criminal Penalties. To further reflect the seriousness of the proscribed conduct, SERV also prescribed criminal penalties. Violators could be fined, imprisoned for no more than one year, or both.⁶²

Evidentiary Rule: A Rebuttable Presumption. To draw a clearer focus on the intent and effect of the agitator's conduct, SERV provided a rebuttable presumption that a violation is willful if the violator lacked "reasonable grounds to believe, either from the attention or publicity sought by the violator or other circumstance, that the conduct of the violator would not" disrupt the service, impede access to or exit from the service, or disturb any immediate family member at their home on the day of the service.⁶³ This concept of a rebuttable presumption drew, again, from the Copyright Act.⁶⁴

Collateral Estoppel. Finally, to foreclose any unnecessarily protracted litigation, SERV provided that a "final judgment or decree rendered in favor of the United States in any criminal proceeding . . . under this section" would estop a defendant from "denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by a person or by the United States."⁶⁵ This concept was also imported from RICO.⁶⁶

VI. CONCLUSION

This Article has told the story of how a series of sophisticated ideas became a bill, and how that bill became a law. The First Amendment limited how far Congress could go in addressing these protests, but Senator Snowe provided a counterbalance by expanding zones of protection and significantly shifting costs and risks of litigation from innocent grieving families to intentional professional agitators. While respecting the Constitution, the statute has become a lasting effort to honor Lance Corporal Matthew Snyder and all other veterans who gave to our country their last full measure of devotion.

⁶⁰ 18 U.S.C. § 1964(c).

⁶¹ 17 U.S.C. § 505.

⁶² 18 U.S.C. § 1388(b); 38 U.S.C. § 2413(b).

⁶³ 18 U.S.C. § 1388(e); 38 U.S.C. § 2413(e).

⁶⁴ 17 U.S.C. § 504(c)(3)(A).

⁶⁵ 18 U.S.C. § 1388(c)(4); 38 U.S.C. § 2413(c)(4).

⁶⁶ 18 U.S.C. § 1964(d).

INTERPRETING CODE

DANIEL B. LISTWA* & ADAM FLAHERTY†

ABSTRACT

In recent years, a scholarly movement has arisen focused on developing a more detailed understanding of the institutions and actors that shape the creation and propagation of statutory law. Part of that project has involved taking a closer look at the U.S. Code and drawing out from the shadows the people—the codifiers—who have a hand in creating it. Contrary to expectations, the typical role of the federal codifiers is far from ministerial. In carrying out their congressionally entrusted task of “revising” and “restating” the law, the codifiers substantially alter the statutory text: shifting placements, inserting headings, and even drafting new provisions altogether. Accordingly, this scholarship has argued, the U.S. Code—even those titles that have been enacted into positive law—must be construed in a way that is responsive to the codifiers’ role, acknowledging that certain editorial decisions cannot meaningfully (or, at least, simply) be ascribed to Congress. In sum, statutory interpretation demands a “codifier’s canon.”

*And yet, despite academic advances, it appears that these insights have largely yet to penetrate the judiciary. Perhaps moving cautiously in the face of objections to the broader “process-based turn” in statutory interpretation, courts continue to overlook the significance of the codification process for accurately drawing meaning from statutory text. In this Essay, we take on this oversight, focusing on two cases from the Supreme Court’s most recent term—*Dubin v. United States* and *Pugin v. Garland*—to illustrate how an understanding of the process by which the U.S. Code is assembled is essential to faithful textualism. In particular, we show that while overlooking codification is occasionally innocuous (*Dubin*), in other cases (*Pugin*), a failure to engage meaningfully can undermine the entire edifice of an opinion’s legal reasoning. We conclude by discussing the broader implications of the Court’s failure to develop a robust framework for addressing editorial changes introduced through codification—including for difficult cases involving the future of qualified immunity that are already being raised in the lower courts.*

* Daniel B. Listwa is a litigation associate at Wachtell, Lipton, Rosen & Katz and a nonresident fellow of the Center for Private Law at Yale Law School.

† Adam Flaherty is a member of the Yale Law School class of 2024.

I.	INTRODUCTION	70
II.	CODIFIER’S CANON UNCOVERED.....	73
III.	THE EASY CASE: <i>DUBIN</i>	79
IV.	THE HARD CASE: <i>PUGIN</i>	82
V.	CODIFICATION AND THE FUTURE OF QUALIFIED IMMUNITY.....	87
VI.	CONCLUSION.....	91

I. INTRODUCTION

Walk into any federal judge’s chambers and you will be sure to find at least one shelf-lined wall filled with the volumes of the United States Code. Totalling over 40,000 pages in length and divided into fifty-four titles,¹ the Code is the official compendium of federal statutory law—the primary authority by which judges and lawyers access the law as it has been enacted by Congress. The Code has been a central tool for legal practitioners for nearly a century, the prism through which we have come to view our modern “republic of statutes.”² And yet, throughout that time, little thought has been given to how that prism has come to be—how the multitude of bills passed by Congress and signed by the President find their way into the Code’s bound volumes. Except in the extraordinary case in which a provision is left out of the Code (*United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*³) or new language added (*Maine v. Thiboutot*⁴), one is hard-pressed to find acknowledgement that the Code is anything other than the law as Congress “intended.”⁵

But that has begun to change in recent years as a scholarly movement has arisen focused on developing a more nuanced understanding of the institutions that shape the creation and propagation of statutory law. This movement has, for example, revealed details about the practices of those actually tasked with drafting legislation and the congressional procedures that structure the way in which laws are made.⁶ Termed the “process-based turn” in legislative studies by now-Justice

¹ Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 653–54 (2020).

² JOHN FERREJOHN & WILLIAM ESKRIDGE, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

³ U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993).

⁴ *Maine v. Thiboutot*, 448 U.S. 1, 7–9 (1980).

⁵ *Id.* at 8.

⁶ See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2014); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014); Victoria F. Nourse, *A Decision Theory of*

Amy Coney Barrett,⁷ this movement has broken past the “Schoolhouse Rock!” model of legislation to detail a more accurate picture of Article I’s institutions, uncovering lessons for statutory interpreters in so doing.

One portion of this broader project has involved a closer look at the codification process and the significant role that unelected officials have in shaping the law as it ultimately appears in the U.S. Code. Contrary to what one might expect, the typical role of the federal codifiers is far from ministerial. The codifiers have been statutorily entrusted with drafting “a complete compilation, restatement, and revision of the general and permanent laws of the United States,”⁸ a task that has, in practice, involved grouping and subdividing laws based on their subject matter, inserting headings, and even drafting new provisions altogether.⁹ As a result, the U.S. Code—even those titles that have been enacted into positive law—must be construed in a way that is responsive to the codifiers’ role, acknowledging that certain editorial decisions cannot meaningfully (or, at least, simply) be ascribed to Congress.

Despite the scholarly advances made, it appears that these insights have largely yet to penetrate the judiciary. Perhaps moving cautiously in the face of objections to this “new empiricism” as non-textualists,¹⁰ courts continue to overlook the significance of the codification process for accurately drawing meaning from statutory text.¹¹ This, we think, is a mistake. Cases frequently arise in which the details of codification are necessary to engage in faithful textualism, yet courts and litigants alike do not seem to notice. In this Essay, we take on this oversight, engaging in an effort to translate recent revelations regarding codification into more practical guidance for resolving difficult cases of statutory interpretation. To do so, we focus on two cases from the Supreme Court’s October Term 2022—*Dubin v. United States*¹² and *Pugin v. Garland*¹³—both of which involved codification-related issues that went unacknowledged by the Court.

In particular, these two cases, decided only two weeks apart, directly implicated a much-overlooked rule of construction found in Title 18—mirroring

Statutory Interpretation: Legislative History by the Rules, 122 YALE L.J. 70 (2012); ROBERT A. KATZMANN, JUDGING STATUTES (2014).

⁷ Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017).

⁸ 2 U.S.C. § 285b(1).

⁹ See Shobe, *supra* note 1, at 660–68 (discussing work of dividing, omitting, and changing laws, as well as incorporation of notes that can shape Code’s meaning).

¹⁰ John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1916 (2015) (arguing that “the new empiricism does not undermine the intent skepticism”); see also Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 985–86 (2017) (arguing that “the nuances of the legislative process are largely irrelevant for the purpose of interpretation”).

¹¹ There are exceptions, of course. A recent decision of the Second Circuit, for example, explicitly addressed the role of codification in explaining why it was appropriate to rely on a particular provision’s caption when construing the provision’s scope. See *Cunningham v. Cornell Univ.*, 86 F.4th 961, 976–77 n.8 (2d Cir. 2023).

¹² 599 U.S. 110 (2023).

¹³ 599 U.S. 600 (2023).

similar rules found in eleven other titles—that seems to prohibit relying on a statutory provision’s placement or caption in the Code when interpreting the statute. However, as one of us has argued, when this instruction is placed in the larger codification context, its meaning transforms. It is not a broad limitation on relying on various (important) markers of textual meaning, but rather a tailored direction—a codifier’s canon—intended to warn interpreters not to rely on particular editorial decisions made by the codifiers, as opposed to Congress.¹⁴ Applying this insight to the Court’s analyses in *Dubin* and *Pugin*, we illustrate how the Court overlooked this canon, relying heavily on captions and placements without grappling with the role played by the codifiers. As we explain, this matters not just for the resolution of the particular issues involved in those cases. By engaging directly with how interpreters should consider editorial decisions introduced by the codifiers, the Court—and the judiciary more generally—can help develop a more sophisticated form of textualism, building the tools that will shape modes of statutory interpretation in the future.

To address these arguments, this Essay proceeds in four Parts. Part II begins by discussing the idea of a codifier’s canon and contextualizing it within broader developments in how scholars have come to understand the process by which Congress’s enactments get assembled into a cohesive statutory text. Parts III and IV, respectively, then discuss the relevance of these insights to two particular cases. Part III examines a comparatively easy case, *Dubin*, in which the codifier’s canon helps make clear why it was appropriate for the Court to rely on the caption of 18 U.S.C. § 1028A(a)(1), “aggravated identity theft,” to narrow the provision’s seemingly broad reach. The analysis of *Dubin* is relatively straightforward on our approach because it involved an editorial decision that Congress made when later amending a title that it had already enacted into positive law. Part IV takes on a harder case, *Pugin*, which we use to illustrate how an understanding of the codification process calls into question the manner in which all of the opinions in that case invoked the set of offenses codified within Chapter 73 of Title 18, entitled “Obstruction of Justice,” to construe the scope of that same phrase as it appears in an immigration-related statute. Finally, we conclude in Part V by discussing the broader implications of the Court’s failure to develop a robust framework for addressing editorial changes introduced through codification—including for difficult cases involving the future of qualified immunity that are coming down the pike. Specifically, we consider the challenge posed by language apparently intended to abrogate common law immunity defenses that was originally included in section 1983 but inadvertently dropped during the codification process. Any account of the continuing relevance of such language requires, we argue, a deeper understanding of the relationship between the codification process and statutory interpretation.

¹⁴ Daniel B. Listwa, Comment, *Uncovering the Codifier’s Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 467 (2017).

II. CODIFIER’S CANON UNCOVERED

To understand the codifier’s canon, it helps to begin with the Supreme Court’s 2015 decision in *Yates v. United States*,¹⁵ a case that has already become a “legislation-course chestnut.”¹⁶ *Yates* presented the rather memorable question of whether a fish is a “tangible object” for purposes of the evidence destruction provision, 18 U.S.C. § 1519, of the Sarbanes-Oxley Act. A majority of the Court answered the question in the negative, with Justice Ginsburg writing a plurality opinion that emphasized section 1519’s placement and captioning in Title 18 of the U.S. Code, noting that the provision’s heading refers specifically to “records” and that the provision appeared alongside rules relating to specific kinds of—decidedly un-fishlike—evidence.¹⁷

The *Yates* decision garnered a great deal of attention in the months after it came down, not the least of which because of Justice Kagan’s citation to Dr. Seuss’s classic *One Fish Two Fish Red Fish Blue Fish* in her dissent.¹⁸ But an article by Tobias Dorsey zeroed in on an issue that other commentators had missed: it appeared that the Justices had overlooked, and indeed violated, a specific instruction from Congress barring courts from considering the headings and placement of provisions in Title 18 of the Code.¹⁹ As Dorsey noted, when Congress enacted the first federal code, the re, it included a section that read as follows:

The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed.²⁰

Later codification efforts have included similar provisions. Most pertinently, when Congress enacted Title 18 in 1948, it included a provision—section 19 of the 1948 Act—which stated: “No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure . . . in which any particular section is placed, nor by reason of the catchlines used in such title.”²¹

This language, seemingly barring reliance on headings (that is,

¹⁵ 574 U.S. 528 (2015).

¹⁶ Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1668 (2020).

¹⁷ *Yates*, 574 U.S. at 539–40.

¹⁸ *Id.* at 553 (Kagan, J., dissenting). Justice Kagan’s Dr. Seuss citation has recently been joined by Justice Jackson’s citation to *If You Give a Mouse a Cookie* in the pantheon of children’s book references in the U.S. Reports. See *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 758 (2023) (Jackson, J., dissenting).

¹⁹ Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 382 (2015).

²⁰ Repeal Provisions, § 5600, 18 Stat. 1085 (1874).

²¹ Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5).

“catchlines”²²) and placement in the Code, is hard to locate, but you can still find it in the text of Title 18 today buried in small print in the title’s front matter.²³ And, in Dorsey’s view, Justice Ginsburg violated this congressional instruction by expressly relying on 18 U.S.C. § 1519’s caption and placement in the Code to construe the scope of the phrase “tangible object.”²⁴

Responding to Dorsey’s piece, one of us offered a different view, arguing that Title 18’s headings and placement rule—and the many similar rules found in other titles of the U.S. Code—must be understood in light of the codification process. Specifically, one of us explained that these instructions “ought not to be read as broad rejections of citing structural placement or caption,” but rather “should be understood as signaling to courts that placement and caption choices within the Code should be respected and considered when they originate in the decisions of Congress, but not when those choices are the result of intervention by the office that codifies the United States Code.”²⁵ In other words, the prohibition is a specific warning about relying on post-enactment editorial decisions made by the codifiers—hence, the “codifier’s canon.”

But why would such a warning be necessary? An overview of the codification process makes this clear. When a bill is first enacted, it is assigned a Public Law number based on the session of Congress and when it was enacted within that session.²⁶ At the end of each session of Congress, the Government Publishing Office compiles all the laws enacted within a session into a single volume known as the Statutes at Large. The Statutes at Large are “a chronological compilation of the laws exactly as they were enacted by Congress, with the same organization and content as the bill approved by Congress.”²⁷ But what the Statutes at Large possess in fidelity, they lack in readability. Because the Statutes at Large simply compile the law as it is enacted, figuring out the current form of any given federal law would require reading every volume of the Statutes at Large and piecing together original provisions with, in some cases, decades of amendments.²⁸

To address this problem, Congress has authorized the creation of the U.S. Code, a formal codification of federal statutory law. Under the present regime, the

²² OFF. OF L. REVISION COUNS., *U.S. Code: Frequently Asked Questions and Glossary* <https://uscode.house.gov/faq.xhtml> [<https://perma.cc/M2VJ-2RHZ>].

²³ 18 U.S.C. Front Matter at 5.

²⁴ Dorsey, *supra* note 19, at 386.

²⁵ Listwa, *supra* note 14, at 467.

²⁶ Shobe, *supra* note 1, at 649.

²⁷ *Id.* The Statutes at Large reproduce each statute essentially as it appeared before Congress upon enactment, though some modifications are made. Specifically, certain citation information is added, along with some marginal and legislative history notes, and marginal information (such as signatures) is removed. See Jesse M. Cross, *Where is Statutory Law?*, 108 CORNELL L. REV. 1041, 1051 n.40 (2023).

²⁸ For example, the Immigration and Nationality Act, 8 U.S.C. § 1104, further discussed in Part IV, was first enacted in 1952, but has since been subject to numerous amendments. See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952); see, e.g., The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996).

work of creating the Code falls within the ambit of the Office of the Law Revision Counsel (“OLRC”), a nonpartisan office within the U.S. House of Representatives created by Congress in 1974.²⁹ The key role of the OLRC is to create the individual subject matter titles that form the U.S. Code. This work is done essentially on a title-by-title basis, as the OLRC surveys and synthesizes the vast body of enacted federal statutes and organizes them into a coherent and accessible whole.³⁰ At first, these codified titles are referred to as “nonpositive law” titles, meaning they are not themselves the law as enacted by Congress.³¹ However, part of the OLRC’s commission is to propose draft bills that enact these codifications into law—repealing the underlying Statutes at Large in the process—and thus turning the compiled title into “positive law.” It is a slow but steady process. Today, twenty-seven of the fifty-four titles of the U.S. Code have been enacted into positive law, though those titles comprise only about twenty-five percent of the U.S. Code’s pages.³²

In preparing these proposed codifications, the OLRC is tasked with making editorial changes that clarify the law while preserving congressional intent. As the OLRC’s organic statute instructs, the OLRC should “remove ambiguities, contradictions, and other imperfections both of substance and of form,” but leave unchanged “the understood policy, intent, and purpose of the Congress in the original enactments.”³³ This is a tall order. Even the most punctilious codifier is bound to make an occasional mistake. And given how a small editorial choice can have major implications in individual cases, it is inevitable that the OLRC’s codification efforts will unintentionally alter the meaning of a given law.

This is not a new concern. The history of official codification in this country goes back at least 150 years, when, in 1866, Congress authorized President Andrew Jackson to appoint three “commissioners[] to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature.”³⁴ And the resulting Revised Statutes, enacted in 1874, were not without faults. In addition to leaving out some laws altogether,³⁵ the Revised Statutes inadvertently introduced various substantive changes—including, most remarkably, the addition of the words “and laws” to section 1983, which led the Court to extend the cause of action from constitutional rights to statutory ones in

²⁹ Supplemental Appropriations Act, 1975, Pub. L. No. 93-554, 88 Stat. 1771, 1777 (1974).

³⁰ OFF. L. REVISION COUNS., *About the United States Code and This Website*, http://uscode.house.gov/about_code.xhtml [<http://perma.cc/2NYW-32U3>].

³¹ OFF. L. REVISION COUNS., *Positive Law Codification*, <http://uscode.house.gov/codification/legislation.shtml> [<https://perma.cc/5B5N-HQXH>].

³² Shobe, *supra* note 1, at 654.

³³ 2 U.S.C. § 285b(1).

³⁴ Act of June 27, 1866, ch. 140, 14 Stat. 74, 74 (1866).

³⁵ RICHARD J. MCKINNEY, UNITED STATES CODE: HISTORICAL OUTLINE AND EXPLANATORY NOTES 1 (2013), <https://www.llsdc.org/assets/sourcebook/us-code-outline.pdf> [<https://perma.cc/XDU3-CXAA>].

Maine v. Thiboutot.³⁶ Subsequent codification efforts, including a 1926 attempt that left out several hundred provisions of permanent law, did not fare much better.³⁷

Title 18 was enacted into positive law against the backdrop of this comedy of errors. Accordingly, it is not a surprise that Congress appended to the newly codified law a note of caution (one not unlike those included in previous codifications): do not draw inferences of legislative intent from the placement and captioning decisions made by the codifiers.³⁸ But this instruction should not be overread, as a broader understanding of the codification process makes clear. Once a title is enacted into positive law, the role of the codifiers diminishes substantially. Typically, when amending a provision in a positive law title, Congress will include specific instructions regarding codification, “directing where the amendment should be placed and how it should be captioned.”³⁹ The codifiers’ role is ministerial, carrying out the decisions made by Congress.⁴⁰

This distinction between codification decisions pre- and post-enactment into positive law has direct implications for understanding the scope of Congress’s instruction not to rely on placement and headings in the Code. Although editorial decisions made by the codifiers during codification cannot be relied on, there is no issue when placement or heading is instead the result of Congress’s direct amendment of the statute after that statute has been enacted into positive law.⁴¹

Accordingly, the general procedure for deciding whether interpretive reliance on caption and placement of a provision in the United States Code is appropriate is as follows. First, the court must ask whether the title in question has been enacted into positive law. If not, then any caption and placement decisions that differ from those reflected in the Statutes at Large cannot be relied upon—those editorial changes are not part of the law. If, however, the title has been enacted into positive law, the court must then ask whether the caption or placement originated with the codifiers during the process of enacting the title into positive law or with Congress in a subsequent amendment to an existing positive law title. Reliance on the former

³⁶ 448 U.S. 1 (1980); see also Daniel B. Listwa, *An “Unusual Jurisdictional Argument”: The Codifier’s Canon in Ayestas v. Davis*, 35 YALE J. ON REG. BULL. 51, 53 (2018) (discussing the case in connection to the codification process). We discuss this case further in Part V.

³⁷ Listwa, *supra* note 14, at 477.

³⁸ Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5). The codifiers preceded the OLRC.

³⁹ Listwa, *supra* note 14, at 478.

⁴⁰ One tricky question is what the OLRC should do when Congress enacted a law that appears to relate to or modify a positive law title but does not explicitly amend it. As Shobe has described, because the OLRC cannot add the statute to the main text of the positive law title, it has only two second-best options: it can add the provision to the main text of a related nonpositive law title, or it can place the provision in the notes or appendix of the implicated positive law title. See Shobe, *supra* note 1, at 677. The result can be to obscure a very significant new law, such as the First Step Act, a recent piece of criminal justice legislation, which was placed in the notes of Title 18 because the enacting statute did not explicitly amend the positive law title. See Shawn Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. LIBR. J. 213, 225 (2020) (citing First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018)).

⁴¹ Listwa, *supra* note 14, at 480.

sort of editorial decisions is generally proscribed⁴² while reliance on the latter sort is usually permissible, subject to further complexities we explore in Parts IV and V below.

Applying this insight to *Yates*, there was (contrary to Dorsey’s suggestion) no violation of the codifier’s canon. The relevant provision, 18 U.S.C. § 1512, was added to Title 18 in 2002, long after positive law codification of the title in 1948, in a statute that specified each new provision’s placement and heading in the Code.⁴³ The case thus was not an instance of the Court accidentally relying on editorial changes introduced by the unelected codifiers to infer the statute’s meaning.⁴⁴

In recent years, subsequent scholarship has further developed and expanded upon the core insight of the codifier’s canon—that is, the idea that the codification process should inform interpretation.⁴⁵ Professor Jarrod Shobe, for example, has provided a much more comprehensive account of the role of the OLRC, describing, among other things, the sorts of editorial changes frequently introduced by the OLRC that go well beyond placement and headings.⁴⁶ This includes, *inter alia*, modifying internal references in enacted statutes (such as “this chapter” or “this Act”) to make sense in the context of the Code’s organization and terminology.⁴⁷ Because the OLRC typically changes these references to refer to organizational units of the Code, rather than the bill Congress enacted, there is a risk of the modified reference being either over- or underinclusive.⁴⁸ Shobe also described how the codification process obscures large portions of enacted text, either by relegating it to the notes section of the Code or leaving it out entirely.⁴⁹ Professor Shawn Nevers and Lecturer Julie Graves Krishnaswami have developed this point further, discussing how the Code contains tens of thousands of notes, with some containing entire statutes.⁵⁰

In an important article contextualizing the OLRC in the broader “congressional bureaucracy” of nonpartisan legislative offices, Professor Jesse Cross and Professor Abbe Gluck uncovered additional details regarding the sorts

⁴² Usually, such proscription is found explicitly in a legislated canon; however, even in the absence of such an explicit instruction, it is appropriate to be skeptical of changes introduced by the codifiers.

⁴³ Listwa, *supra* note 14, at 486 (citing H.R. 3763, 107th Cong. (2002) (as passed by the Senate with amendments on July 15, 2002)).

⁴⁴ As Russell Bogue has argued, additional support for the propriety of Justice Ginsburg’s limiting interpretation can be found in the placement of section 1519 not only in the U.S. Code, but also in the Sarbanes-Oxley Act. See Russell C. Bogue, Note, *Statutory Structure*, 132 YALE L.J. 1528, 1553 (2023).

⁴⁵ See, e.g., Shobe, *supra* note 1; Cross, *supra* note 27; Cross & Gluck, *supra* note 16, at 1667; Nevers & Graves Krishnaswami, *supra* note 40, at 222.

⁴⁶ See Shobe, *supra* note 1, at 662–63.

⁴⁷ See *id.*

⁴⁸ See *id.* at 663.

⁴⁹ See *id.* at 664–66.

⁵⁰ See Nevers & Graves Krishnaswami, *supra* note 40, at 224.

of editorial interventions made by the OLRC.⁵¹ These included the insertion of what OLRC staffers refer to as “no source” provisions, provisions that did not exist in any congressionally enacted law but rather are created by the OLRC “out of whole cloth” and added to positive law titles—typically defining new terms that are then used throughout the title, but sometimes making explicit obligations or entitlements that the codifiers believed were inferred.⁵² As Cross and Gluck noted, although these substantive changes are formally enacted by Congress, they originate in a manner that is far removed from the “core legislative process.”⁵³ Indeed, legislative history of recent codification bills as well as interviews with congressional staffers suggest that members of Congress are not even aware that the OLRC is engaged in such muscular editing.⁵⁴ More broadly, reflecting on the fact that little legislative attention is paid to the technical work of the OLRC in carrying out codification, Cross and Gluck endorse the codifier’s canon—at least as applied to structure and placement within the Code—as an appropriate “anti-deference” canon.⁵⁵

In his most recent article, Cross pushes these concepts further, describing how the codification process calls into question the very notion that there is a given “statutory text.”⁵⁶ As Cross notes, “the Supreme Court is fond of declaring that it always begins with ‘the text of the statute.’”⁵⁷ This manner of interpretation, Justice Gorsuch has explained, “honors only what’s survived bicameralism and presentment.”⁵⁸ But—and here’s Cross’s trenchant observation—“the bicameralism-and-presentment process does not produce *assembled statutory texts*.”⁵⁹ Instead, it produces what is, in a very real sense, an unwieldy mess of fragmented texts. The task of synthesizing those texts is a nontrivial one, and it is one that has been largely outsourced to a combination of Congress’s in-house codifiers (today, the OLRC) and third-party publishers like Westlaw and Lexis.⁶⁰ In this context, interpreters cannot just accept the synthesized texts as given. Rather, they must understand the process by which those assembled texts come to be, because to do otherwise would severely compromise their ability to draw out statutory meaning in a faithful manner. In practice, this makes an understanding of the codification process essential to statutory interpretation.

And yet, despite the importance of understanding the role of the codifiers in crafting our statutory texts, awareness of the codification process continues to elude

⁵¹ See Cross & Gluck, *supra* note 16, at 1664.

⁵² See *id.* at 1664–66; see, e.g., 31 U.S.C. § 9101 (noting no-source provision defining “Government corporation”); 51 U.S.C. § 10101(2) (providing no-source provision defining the “Administrator” of NASA); see also 10 U.S.C. § 1315 (describing provision as added to “make explicit” an entitlement for warrant officers to retired pay).

⁵³ See Cross & Gluck, *supra* note 16, at 1662.

⁵⁴ See *id.* at 1667.

⁵⁵ See *id.* at 1675 n.651, 1679–80.

⁵⁶ See Cross, *supra* note 27, at 1049.

⁵⁷ *Id.*; see also *id.* at 1049 n.30 (collecting quotes).

⁵⁸ NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019).

⁵⁹ Cross, *supra* note 27, at 1057 (emphasis in original).

⁶⁰ See Shobe, *supra* note 1, at 684.

courts and litigants. To see this illustrated, one need look no further than the Supreme Court’s most recent term. Two cases—one easy, one hard—presented prime opportunities for the Court to engage with the relevance of codification to interpretation, and in both cases, such arguments were left unaddressed.

III. THE EASY CASE: *DUBIN*

Writing in dissent in *Yates*, Justice Kagan observed that she “[knew] of no other cases” in which the Court “relied on a title to override the law’s clear terms,” citing the “wise rule” that “the heading of a section cannot limit the plain meaning of the text.”⁶¹ Whether Justice Kagan was right at the time to suggest *Yates*’s reliance on section 1519’s heading was an aberration,⁶² such invocations of a provision’s caption are far from unusual today. In recent terms, statutory headings have come to play an increasingly prominent role in the Court’s statutory interpretation jurisprudence.⁶³

The Court’s 2022 term was no exception to this embrace of the statutory heading. In fact, the Court decided one case—*Dubin v. United States*—in a manner that put a statutory caption firmly at the center of its analysis. But, as Part II discussed, relying on captions to derive statutory meaning can be a fraught exercise, particularly when carried out without any sensitivity to either the role of the codifiers or congressional instructions regarding the propriety of relying on such types of text. In *Dubin*, the Court did not address these concerns, failing to engage with either. This is, in our view, a mistake—but, as we explain below, a relatively innocuous one. That is because, like *Yates*, *Dubin* exemplifies an instance in which the codifier’s canon permits the use of the provision’s caption as an interpretive resource.

The case involved David Dubin, who was convicted of health care fraud for overbilling Medicaid while working as the managing partner of a psychological services company. Dubin submitted a claim for psychological testing by a licensed psychologist when, in fact, the employee who performed the testing was only a licensed psychological associate, resulting in an overcharge of approximately

⁶¹ *Yates v. United States*, 574 U.S. 528, 559 (2015) (Kagan, J., dissenting) (quoting *Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528–29 (1947)).

⁶² Though one could perhaps argue that it is the exception that proves the rule, the Court’s decision in the well-known case of *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), would appear inconsistent with Justice Kagan’s statement. *See id.* at 462–63 (considering the provision’s title, “[a]n act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States,” in order to narrow the law’s plain meaning).

⁶³ Not even Justice Kagan herself has been immune. In her opinion for the Court in *Wooden v. United States*, 595 U.S. 360 (2022), an October Term 2021 case that asked whether the serial burglary of ten different storage units in a one-building storage facility constituted separate “occasions” for purposes of the Armed Career Criminal Act (“ACCA”), Justice Kagan referenced—albeit somewhat indirectly—“the very ‘title of the Act’” in concluding the scope of the word “occasion” should be construed in light of Congress’s purpose in enacting ACCA “to address the ‘special danger’ posed by the eponymous ‘armed career criminal.’” *See id.* at 373–75.

\$100.⁶⁴ In addition to charging healthcare fraud, 18 U.S.C. § 1347, the government also charged Dubin with “aggravated identity theft,” pursuant to 18 U.S.C. § 1028A(a)(1), which carries a mandatory two-year prison sentence.⁶⁵

Section 1028A(a)(1) applies when a defendant, “during and in relation to any [predicate offense], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.”⁶⁶ The predicate offenses include, among many others, healthcare fraud.⁶⁷ The Government argued at trial that section 1028A(a)(1) was “satisfied because [Dubin’s] fraudulent billing included [and thus “use[d]”] the patient’s Medicaid reimbursement number (a ‘means of identification’).”⁶⁸ The district court (reluctantly) denied the post-trial challenge to the conviction, relying on established circuit precedent, and the Fifth Circuit (first as a panel, then en banc) affirmed.⁶⁹ As the Supreme Court noted in its opinion, the Fifth Circuit’s broad reading of the statute was an outlier, as many other lower courts had read the statute in a more restrained manner.⁷⁰

In an opinion by Justice Sotomayor, the Supreme Court vacated the judgment and embraced a narrower reading of the statute.⁷¹ Specifically, instead of reading the statute as extending to any incident involving a fraudulent document that includes identifying information of another person, even if incidentally, the Court construed the statute to mean that “[a] defendant ‘uses’ another person’s means of identification ‘in relation to’ a predicate offense when this use is at the crux of what makes the conduct criminal.”⁷² The Court cited the Sixth Circuit’s test as a “helpful guide”⁷³ to understanding when the use of the person’s identity is at the “crux”⁷⁴ of the offense: “The relevant language in § 1028A(a)(1) ‘covers misrepresenting *who* received a certain service,’ but not ‘fraudulent claims regarding *how* or *when* a service was performed.’”⁷⁵ Applying that “heuristic”⁷⁶ to the present case illustrates why no “aggravated identity theft” occurred, as Dubin misrepresented the nature of the services provided, rather than who received those services.⁷⁷

Central to the Court’s narrow interpretation of section 1023A was the statute’s caption. The Court “[s]tart[ed] at the top, with the words Congress chose for § 1028A’s title: ‘Aggravated identity theft.’”⁷⁸ As Justice Sotomayor explained,

⁶⁴ Transcript of Oral Argument at 3, *Dubin v. United States*, 599 U.S. 110 (2023) (No. 22-10).

⁶⁵ *Dubin v. United States*, 599 U.S. 110, 114–15 (2023).

⁶⁶ 18 U.S.C. § 1028A(a)(1).

⁶⁷ *Dubin*, 599 U.S. at 115.

⁶⁸ *Id.* at 115.

⁶⁹ *Id.*

⁷⁰ *Id.* at 116.

⁷¹ *See id.*

⁷² *Id.* at 131.

⁷³ *Id.* at 132.

⁷⁴ *Id.* at 114.

⁷⁵ *Id.* at 117 (citing *United States v. Michael*, 882 F.3d 624, 628 (6th Cir. 2018)).

⁷⁶ *Id.*

⁷⁷ *See id.* at 132.

⁷⁸ *Id.* at 120.

this caption “suggests identity theft is at the core of § 1028A(a)(1).”⁷⁹ And identity theft “has a focused meaning” that supports “a reading of ‘in relation to’ where use of the means of identification is at the crux of the underlying criminality.”⁸⁰ This meaning also supports “a more targeted definition of ‘uses’” according to which “identity theft is committed when a defendant uses the means of identification itself to defraud or deceive.”⁸¹ By contrast, “[t]he Government’s broad reading,” the Court explained, “bears little resemblance to any ordinary meaning of ‘identity theft.’”⁸²

The focus on the caption in the Court’s analysis is not unexpected. In a previous generation, the Court likely would have relied heavily on the statute’s legislative history, particularly the House Report, which explicitly describes the statute as intended to “address[] the growing problem of identity theft,” defined as “crimes in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception.”⁸³ Indeed, when the Court addressed a different issue involving section 1023A over a decade ago, the House Report figured prominently.⁸⁴ But times have changed. In the Court’s statutory interpretation jurisprudence, legislative history has been largely relegated to an afterthought, at best—a consequence, no doubt, of certain Justices’ unwillingness to join an opinion that explicitly relies on such evidence.⁸⁵ And in accordance with this textualist turn, the *Dubin* opinion mentions the House Report only in a brief footnote, prefaced with a warning that its contents were only for “[t]hose who find legislative history helpful.”⁸⁶

In its stead, more “textual” evidence of meaning has shifted to central stage, including headings. But is any given statutory heading actually part of the statutory “text” in the relevant sense? As already discussed, that the heading was included in a bill that passed through bicameralism and presentment is not enough to settle that question. Particularly in light of the version of the codifier’s canon included in Title 18, we must also ask whether the heading was added by the OLRC during the positive law codification process or added as part of a subsequent enactment by Congress. As it happens, *Dubin* is an instance—like *Yates*—in which the relevant criminal provision was added to Title 18 as an amendment to the positive law and, as a result, the heading can be confidently attributed to Congress, as opposed to the codifiers.⁸⁷

⁷⁹ *Id.* at 124.

⁸⁰ *Id.* at 123.

⁸¹ *Id.*

⁸² *Id.* at 122.

⁸³ H.R. Rep. No. 108–528, at 4–5.

⁸⁴ *See Flores-Figueroa v. United States*, 556 U.S. 646, 655 (2009) (citing H.R. Rep. No. 108–528, at 4–5).

⁸⁵ For example, in *Wooden v. United States*, Justices Thomas, Alito, and Barrett signed on to all of Justice Kagan’s majority decision other than the section discussing legislative history. *See* 595 U.S. 360, 379–83 (2022).

⁸⁶ *Dubin*, 599 U.S. at 125 n.7.

⁸⁷ *See* Pub. L. No. 108-275, 118 Stat. 831.

In our view, it was thus not an error for the Court to rely on the title of section 1023A in the way that it did. But that does not mean nothing was lost by the Court's failure to acknowledge Title 18's codifier's canon. Not every case will be one in which the question of the appropriateness of reliance of a heading will be so easily resolved. The easy cases—like *Dubin* and *Yates*—nevertheless provide the Court with an opportunity to develop the analytical frameworks necessary for identifying which text really constitutes the relevant “statutory text,” as Cross has framed the question.⁸⁸ Indeed, it is not hard to imagine that had the Court been more deeply engaged in these questions in *Dubin*, it might have differently decided the harder cases implicating codification. It is to one such case we now turn.

IV. THE HARD CASE: PUGIN

Decided just two weeks after *Dubin*, *Pugin v. Garland*⁸⁹ is a deceitfully tricky case. To the casual observer, the only unusual thing about the decision would seem to be its vote count: although a 6-3 decision on an immigration issue, the Justices' votes do not track expected ideological lines—instead we see an unusual switch, with Justice Jackson joining the majority opinion written by Justice Kavanaugh, and Justice Gorsuch joining the more liberal Justices, Sotomayor and Kagan, in dissent. But to focus on the voting would be to overlook the more interesting issues lurking below the surface—hard questions regarding the interaction between the legislative process, codification, and statutory interpretation. To understand why, some background is necessary.

Under the Immigration and Nationality Act (“INA”), noncitizens are removable from the United States if they are convicted of an “aggravated felony.”⁹⁰ The INA defines “aggravated felony” as covering an array of federal and state crimes.⁹¹ In 1996, Congress enacted legislation—codified at 8 U.S.C. § 1101(a)(43)(S)—that expanded the definition of “aggravated felony” to include offenses “relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.”⁹² At issue in *Pugin* was whether an offense “relate[s] to obstruction of justice” within the meaning of section 1101(a)(43)(S) even when the offense does not require that an investigation or proceeding be pending at the time the offensive conduct occurs.⁹³ The question arose from the immigration proceedings of two permanent residents, Jean Francois Pugin and Fernando Cordero-Garcia; Pugin was convicted of being an accessory after the fact to a felony, while Garcia was convicted of dissuading a witness from reporting a crime.⁹⁴

⁸⁸ Cross, *supra* note 27, at 1049.

⁸⁹ 599 U.S. 600 (2023).

⁹⁰ 8 U.S.C. § 1227(a)(2)(A)(iii).

⁹¹ *Id.* § 1101(a)(43).

⁹² *Id.* § 1101(a)(43)(S); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, § 440, 110 Stat 1214, 1276 (1996).

⁹³ *Pugin*, 599 U.S. at 604.

⁹⁴ *Id.* at 602.

Under the Court’s precedent, whether a noncitizen has been convicted of an offense relating to obstruction of justice within the meaning of section 1101(a)(43)(S) depends on an application of “a categorical approach,” meaning the court must ask whether the elements of the convicted offense establish that the conviction was for an offense relating to obstruction of justice.⁹⁵ Accordingly, the question for the Court was whether the pendency of an investigation or proceeding is an *element* of “obstruction of justice” as Congress used the phrase when it enacted the 1996 amendments to the INA.⁹⁶ In his majority opinion, Justice Kavanaugh answered that question using an omnivorous approach, looking at such sources as dictionary definitions, state statutes, and the Model Penal Code as indicators of contemporaneous meaning—ultimately determining that there was no pendency requirement.⁹⁷ In reaching this conclusion, Justice Kavanaugh considered, as one revealing factor, the types of offenses included within Chapter 73 of Title 18 of the U.S. Code, which, the opinion notes, is “[e]ntitled ‘Obstruction of Justice.’”⁹⁸ Within this chapter are two offenses that do not require a pending federal investigation or proceeding—18 U.S.C. § 1512, which covers witness tampering,⁹⁹ and 18 U.S.C. § 1519 (the provision at issue in *Yates*), which forbids destroying, altering, or falsifying records.¹⁰⁰ Though acknowledging that one of these provisions, section 1519, was enacted in 2002, after the 1996 amendments, Justice Kavanaugh nonetheless takes the inclusion of these offenses within the “Obstruction of Justice” chapters as indicative of the broader scope that phrase should be understood to possess.¹⁰¹ Despite the centrality of the “Obstruction of Justice” caption to the majority opinion, the Court left the questions of whether and why such interpretive reliance was permissible under Title 18’s codifier’s canon unaddressed.

This omission is even more glaring in Justice Jackson’s concurrence, according to which the textual evidence supplied by the caption is dispositive. Justice Jackson wrote separately to suggest that the arguments based on placement within the Code should be the *only* ones the Court ought to consider.¹⁰² The key question, Justice Jackson wrote, is what “Congress meant” when it added “obstruction of justice” to the definition of aggravated felony, not “some platonic, judicially divined meaning of Congress’s chosen words”; and, as such, the most definitive evidence is not dictionaries or state statutes, but rather evidence of how Congress itself uses the relevant term.¹⁰³ She then explains that Congress’s “description of Chapter 73 of Title 18 as concerning ‘obstruction of justice’” constitutes Congress’s “longest standing and most significant use of the phrase . . .

⁹⁵ *Id.* at 603 (citing *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017)).

⁹⁶ *Id.* at 604.

⁹⁷ *Id.* at 602–11.

⁹⁸ *Id.* at 605; *see also* 18 U.S.C. Chapter 73.

⁹⁹ *See* 18 U.S.C. § 1512.

¹⁰⁰ *See* 18 U.S.C. § 1519.

¹⁰¹ *See Pugin*, 599 U.S. at 605.

¹⁰² *See id.* at 611–13 (Jackson, J., concurring).

¹⁰³ *Id.* at 612.

in the Statutes at Large,” thus giving rise to the inference that when Congress amended the INA in 1996, it was likely using the offenses within that chapter as a “benchmark with respect to what qualifies as an ‘offense relating to obstruction of justice.’”¹⁰⁴ Noting, as the opinion for the Court did, that section 1517 does not require a pending proceeding, Justice Jackson concludes that this “resolve[s] the question before us”—ending with a note suggesting that “[t]he issue of whether such an approach [focused on Chapter 73] best tracks Congress’s intent can be reserved for future consideration.”¹⁰⁵ The threshold question of why the Court could rely on that caption at all in light of Title 18’s apparent proscription remained unanswered, as it did in the majority opinion.

Nor did the dissent discuss the codifier’s canon of Title 18 despite criticizing the majority’s reliance on Code-based considerations on other grounds. Specifically, Justice Sotomayor called attention to the fact that when Congress “codified chapter 73 in 1948, the chapter contained six provisions, each of which requires a connection to a pending proceeding or investigation.”¹⁰⁶ Only later did Congress add to that chapter offenses—most notably section 1512, relating to witness tampering—that did not require such a connection; and, even then, section 1512 was an outlier among the nine narrow additions to the original six offenses of Chapter 73, as the majority of these additions also contemplated pending proceedings.¹⁰⁷ Arguing that the categorical approach requires focusing only on the “heartland” of the identified offense, Justice Sotomayor relies on this evidence to support her position that, in the context of section 1101(a)(43)(S), “obstruction of justice” necessarily involves a pending proceeding.¹⁰⁸

Given that the majority, concurrence, and dissent all discuss at some length the heading of Chapter 73 of Title 18 and the placement of offenses within it, one would expect at least some mention of the legislated instruction in Title 18 regarding reliance on such evidence in the context of statutory interpretation. And yet, no mention is to be found. Blame can be at least partly laid at the feet of the parties, none of which engaged with the congressional instruction in depth.¹⁰⁹ Indeed, only the Solicitor General’s brief noted the provision at all, albeit in a short aside and without elaboration.¹¹⁰ But this raises some obvious questions: What does the instruction in Title 18 imply for the resolution of this case? And, more broadly, what would a more careful analysis of the processes that went into building the relevant statutory text suggest about the Justices’ reasoning? Answering these questions requires an account of how provisions like that in Title 18 should be construed. We thus turn to assessing the reasoning of the various opinions in *Pugin* in light of our account of these legislated canons.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 613.

¹⁰⁶ *Id.* at 621 (Sotomayor, J., dissenting).

¹⁰⁷ *See id.* at 622.

¹⁰⁸ *Id.* at 628.

¹⁰⁹ Brief for Petitioner, *Pugin*, 599 U.S. 600 (2023) (No. 22-23); Brief for the Attorney General, *Pugin*, 599 U.S. 600 (2023) (No. 22-23).

¹¹⁰ *See* Brief for the Attorney General at 24, *Pugin*, 599 U.S. 600 (2023) (No. 22-23).

The account offered by Dorsey takes a literal and maximal view of legislated canons like those in Title 18, taking them to universally prohibit any considerations of caption or placement, whatever their providence. As already noted, under Dorsey's view, the answer to the first question above is easy—the Court should not have discussed the organization and caption of Chapter 73 at all.¹¹¹ Yet Dorsey's approach is not the only option. A more nuanced look at the codification and statutory enactment history presents a different answer. The core insight of the codifier's canon is that the initial organization and chapter titling of the original positive law version of Title 18, as enacted in 1948, reflected decisions by the codifiers (the OLRC's predecessors)—not Congress—and thus should not be taken as indicative of Congress's intent. This would suggest that little weight (or perhaps none at all) should be given to the fact that the original six offenses included in Chapter 73 did not include a pendency requirement.¹¹² On the other hand, the same could not be said with regard to the later additions to Chapter 73; as previously described, the placement of such subsequent additions to a previously enacted positive law title must come from Congress, not the codifiers. For example, the statute enacting section 1512—the witness tampering provision—specifies both how the provision should be numbered and that it should be added to “Chapter 73 of [T]itle 18 of the United States Code.”¹¹³ In contrast to Dorsey's view of these canons, this account treats the providence of an editorial decision as determinative of whether courts can interpretively rely upon it.

Thus, in our view, that these subsequent additions originated with Congress, rather than the codifiers, renders their placement within Chapter 73 fair game from a statutory interpretation perspective, unhindered by the placement and captions instructions of Title 18. On the whole, this would seem to lend greater support to Justice Jackson's argument, which focuses on the addition of section 1512, as opposed to Justice Sotomayor's, which places relatively more emphasis on the original six offenses grouped by the codifiers under the “Obstruction of Justice” heading.

That said, we are unconvinced that these organizational decisions can bear the very substantial interpretive weight that Justice Jackson seems to contemplate. As Shobe has discussed, failure by Congress to identify where in a positive law title a new provision should go makes it likely that the new law will be relegated to notes in the U.S. Code—causing the provision to nearly disappear from the public eye.¹¹⁴ Indeed, Cross and Gluck have observed that such notes are not even visible when one pulls up a page of the Code on Westlaw or Lexis.¹¹⁵ For this reason, it might be wise to assume that Congress's codification directions are not necessarily intended to carry extra meaning beyond that which is inferable from the main text

¹¹¹ See generally Dorsey, *supra* note 19.

¹¹² Act of June 25, 1948 §§ 1501–1506, 62 Stat. at 769–70.

¹¹³ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a)–(b), 96 Stat. 1248, 1249–53 (1982).

¹¹⁴ See Shobe, *supra* note 1, at 677.

¹¹⁵ Cross & Gluck, *supra* note 16, at 1657.

of the enacted provision, but are instead merely efforts to maintain a convenient and accessible U.S. Code.

This latter interpretation gains support when one views the enacted version of the law bill containing section 1512. Although the heading “Obstruction of Justice” is salient when one accesses section 1512 within the Code, the phrase does not appear once in the version of the law as enacted by Congress, which instead references the relevant chapter of Title 18 only by number.¹¹⁶ Taken together with the codification history, described above, we believe this suggests that it would be erroneous to take the placement of section 1512 with Chapter 73 as a definitive guide to the scope of the phrase “obstruction of justice” as used elsewhere within the U.S. Code.

But as we previously noted, this case is particularly tricky. That is because, here, we are not asked to interpret the scope of any particular offense within Title 18, but rather the breadth of a term that appears in a wholly different context, namely an “aggravated felony” as defined by the INA to include offenses relating to “obstruction of justice.” And while the above arguments provide strong grounds against drawing inferences of congressional intent with regard to the placement of specific offenses within Chapter 73 of Title 18, one might still argue that when Congress later—that is, in 1996—used the phrase “obstruction of justice,” it did so intending to cross-reference those offenses collected under that heading within the U.S. Code.

We have already discussed the problem with inferring a longstanding congressional view from the organization of Chapter 73. But inferring an intentional cross-reference is subtly distinct from the argument that—regardless of what Congress might have thought it was doing in the past—when it amended the definition of “aggravated felony” in 1996 to include “obstruction of justice,” it intended to do so in a manner that tracked the set of offenses included in Chapter 73. But Congress made no explicit reference to Chapter 73 within its definition of aggravated felony, even though it did explicitly reference various other criminal provisions from the U.S. Code.¹¹⁷ To nonetheless read in such a reference would suggest that Congress, *sub silentio*, intended for the chapter to serve as a sort of constructive definition of obstruction of justice. That strikes us as unlikely, pushing the “whole code” canon beyond its appropriate limitations.¹¹⁸

Our analysis here addresses only one aspect of the majority’s reasoning in *Pugin*, but, given Justice Jackson’s suggestion that litigants and courts should center their arguments on what she refers to as the “Chapter 73-focused approach”¹¹⁹ in future cases, our notes of caution—informed by a nuanced look at

¹¹⁶ See Victim and Witness Protection Act of 1982 § 4(a)–(b), 96 Stat. at 1249–53.

¹¹⁷ See 18 U.S.C. § 1101(a)(43).

¹¹⁸ See WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 121–22 (2016) (cautioning with regard to the assumption that terms used in different parts of the Code mean the same thing); see also Gluck & Bressman, *supra* note 6, at 908 (noting that different congressional committees employ different drafting styles rendering cross-statute comparisons unreliable).

¹¹⁹ *Pugin v. Garland*, 599 U.S. 600, 613 (2023).

the codification and legislative processes—are significant. But there is also a broader lesson: interpreters cannot just take the U.S. Code as *the* statutory text. Before one can do textualism, one needs to assemble what the relevant texts are and how they fit together. And to do that, one needs—among other things—an understanding of the codification process. That is what the codifier’s canon is all about.

V. CODIFICATION AND THE FUTURE OF QUALIFIED IMMUNITY

That the codification process is relevant to statutory interpretation is, in a sense, nothing new. As noted in Part II, in *Maine v. Thiboutot*,¹²⁰ a seminal case on the scope of 42 U.S.C. § 1983, a central question was the significance that should be accorded to words added—seemingly unbeknownst to Congress—by the codifiers.¹²¹ Ultimately, the Court rejected the position that the provenance of the statutory language mattered, vastly expanding the scope of Section 1983’s cause of action in the process.¹²² *Thiboutot* is often taught of as a fringe case, an unusual instance of a technical oversight shaping the substantive law. But the scholarly efforts over these last few years to dig deeper into the manner by which the enacted statutory text is assembled into the U.S. Code call into question such a characterization. To be sure, *Thiboutot* is a particularly dramatic instance of the codifiers’ intervention bearing on issues of statutory interpretation, but these types of issues are far from rare.

As this Essay has discussed, the Court encountered two such cases—*Dubin* and *Pugin*—in the last term alone, failing in each to grapple with the codification issues lurking below the surface. We think this was a mistake. Direct engagement with questions of how interpreters should weigh editorial decisions made by the codifiers might not only have impacted the result (or at least the reasoning) in *Pugin* but would also have allowed the Court to help build a more sophisticated textualist toolbox. And such tools are very much in need, particularly as litigants continue to respond to the federal courts’ textualist turn by developing new and creative modalities of arguably “textual” argumentation.

To take one example, lower courts have already begun grappling with the argument that Section 1983 should be read as nullifying all common-law defenses, including qualified immunity, on the basis of language originally included in the statute but then dropped, seemingly as an oversight, by the codifiers.¹²³ The Supreme Court recognized the doctrine of qualified immunity as a defense to Section 1983 damages actions more than fifty years ago in *Pierson v. Ray*,¹²⁴

¹²⁰ 448 U.S. 1 (1980).

¹²¹ *See id.* at 7–8.

¹²² *See id.* at 8.

¹²³ *See, e.g.,* *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willet, J., concurring) (discussing Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 235 (2023)); *Price v. Montgomery Cnty., Ky.*, 72 F.4th 711, 727 (6th Cir. 2023) (Nalbandian, J., concurring) (same).

¹²⁴ 386 U.S. 547 (1967).

holding that Section 1983 incorporated “the defense of good faith and probable cause, which [was] available to [police] officers in the common-law action for false arrest and imprisonment.”¹²⁵ According to the Court, had Congress intended to abrogate this sort of common law immunity with Section 1983, it would have done so explicitly, and the text of the provision lacks any such explicit abrogation.¹²⁶

This was an at least plausible reading of the text of Section 1983 available to the *Pierson* Court to the extent that one accepts the canon that statutes in derogation of the common law should be strictly construed. The text of the law, as codified at 42 U.S.C. § 1983, reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Nothing in this language explicitly abrogates common law immunities, so the derogation canon implies that these immunities persist in actions under Section 1983.

The problem for this derogation argument is that the text of the law as codified at Section 1983 is not the text of the Civil Rights Act of 1871—that is, the text that the Reconstruction Congress enacted consistent with bicameralism and presentment. And that text, as Professor Alexander A. Reinert has uncovered, did include language explicitly abrogating common law defenses. It read,

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.¹²⁷

The reason that this text was never included in the codified version of Section 1983 “is the product of a decision by the first Reviser of Federal Statutes to, for unclear reasons, remove the italicized language when the first edition of the Revised Statutes of the United States was published in 1874.”¹²⁸ This was one of many codification errors in the Revised Statutes, which were supplemented and corrected gradually over time.¹²⁹ Yet the flaw in Section 1983 was neither caught nor

¹²⁵ *Id.* at 557 (1967).

¹²⁶ *Id.* at 554–55.

¹²⁷ Reinert, *supra* note 123, at 235 (quoting the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871)).

¹²⁸ *Id.* at 237.

¹²⁹ *See id.*

corrected before the publication of the first United States Code in 1926, which then inherited the defective version of the law that we know today.¹³⁰

Lower courts have begun to draw attention to this potentially foundational flaw in the doctrine of qualified immunity. As Judge Don Willett recently observed in his *Rogers* concurrence, textualism is more dominant now than it was when the Court spelled out the qualified immunity doctrine in *Pierson*; the possibility that “the doctrine does not merely complement the text” that Congress enacted but “brazenly contradicts it” should thus be especially concerning to the modern Court.¹³¹ The fundamental premise of textualism is “that, under Article I, only the text voted upon by the House of Representatives and the Senate and signed by the President (or passed over a presidential veto) constitutes the law.”¹³² But what if the text that survives bicameralism and presentment is inadvertently modified by a revision effort? That is the question raised by the statutory record implicating qualified immunity.

This presents the Court with a redux of *Thiboutot*, raising the question of whether now, decades later, what we have learned about the codification process should lead courts to a different approach. Indeed, the codification issues raised by qualified immunity may be even thornier than those in *Pugin* and highlight the complexities that an understanding of the codification process introduces for faithful textualism. These are challenging questions, with answers that implicate the relationship between Congress and the judiciary. If the Court is to chart a new course from *Thiboutot*, it must do so with these difficulties in full view.

Perhaps the Court should embrace a super-muscular version of the codifier’s canon—a “codifier’s error” canon¹³³—and read the statute as originally enacted. This would mean ignoring that Congress enacted the Revised Statutes into positive law in 1874, repealing the abrogation language in the process. Such a move might draw inspiration from the dissent in *Thiboutot*, which emphasized that Congress directed the Reviser of Federal Statutes to not introduce substantive changes in compiling the statutes.¹³⁴ In light of this and other efforts that Congress took to expunge any substantial changes during codification, the legislature enacted the Revised Statutes with the understanding that it was not altering the substance of the law. While one might worry that a codifier’s error canon would shift Congress’s responsibility to check its own work to the courts, the saga of Section

¹³⁰ *See id.*

¹³¹ *Rogers v. Jarrett*, 63 F.4th 971, 981 (2023) (Willett, J., concurring).

¹³² Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020); *see also* GORSUCH, *supra* note 58.

¹³³ *See* William Baude, *Codifiers’ Errors and 42 U.S.C. 1983*, REASON: VOLOKH CONSPIRACY (June 12, 2023), <https://reason.com/volokh/2023/06/12/codifiers-errors-and-42-u-s-c-1983/> [<https://perma.cc/D7L9-V4NZ>]; *cf.* Jesse M. Cross, *The Staffer’s Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 124–25 (2019) (proposing a “staffer’s error” doctrine, which would “direct judges to identify instances in which the work product of staffers (*viz.*, statutory text) undermined rather than advanced decisions made directly by members of Congress (*viz.*, the selection of overarching policy goals)”).

¹³⁴ *Maine v. Thiboutot*, 448 U.S. 1, 17 (1980) (Powell, J., dissenting).

1983 shows that even diligent legislative efforts will not unfailingly prevent the codifiers from errantly altering the law.

Whether such a canon should apply to the question of qualified immunity under Section 1983 might turn on the fact that Title 42 is not among the handful of positive law titles that include broader, if somewhat ambiguous, statutorily enacted language indicating that the codification process was not intended to make “substantive change[s]” to existing law.¹³⁵ As Cross has observed, these provisions “seem to direct interpreters to look to the underlying enactments” but “have been used inconsistently in codifications,” which “raise[s] the question of whether a negative inference is intended for titles lacking such provisions.”¹³⁶

Put differently, this raises the “question of whether the *inclusio unius* canon is useful” for understanding titles like Title 42 that lack a textual codifier’s canon.¹³⁷ According to Cross, Congress had “little reason . . . to believe that” it was “giving permission against the backdrop of a blanket prohibition” in enacting textual codifier’s canons.¹³⁸ There was, historically, a “default judicial practice [of] look[ing] to pre-codification enactments for controlling evidence of statutory law,” and “in the titles where Congress omitted these provisions, it consistently included them in committee reports or Reviser’s Notes and Members issued similar assurances on the chamber floor.”¹³⁹ This suggests, to Cross at least, that the *inclusio unius* canon’s utility might be limited in this context. Of course, for the strictest textualists on today’s Court, some of these arguments might fall flat. On the other hand, the argument that textual provisions—including rules of construction—must be understood against broader legal practices and understandings is one that has been gaining increased purchase in recent years.¹⁴⁰ In any event, understanding the significance of the presence or absence of a textual codifier’s canon seems critical to building a textualism rich enough to account for the codification process.

Similar questions arise even for those titles that do have such provisions. The language of the “codifier’s canons” found in these titles is not uniform. Some have language providing that the laws therein “may not be construed as making a substantive change” to existing law or announcing that the purpose of the title is “to restate existing law ‘without substantive change.’”¹⁴¹ Others specify that “the intent is to conform to the understood policy, intent, and purpose of Congress in the original enactments.”¹⁴² This latter language, Cross notes, echoes the statutory

¹³⁵ See Cross, *supra* note 27, at 1099 (identifying the titles that include such provisions).

¹³⁶ *Id.* at 1099.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1099–1100.

¹⁴⁰ See, e.g., William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL’Y 1331, 1336–43 (2023) (discussing the role of “unwritten law” in textualist interpretation).

¹⁴¹ Cross, *supra* note 27, at 1098 (quoting Titles 5, 10, 31, 32, 36, 37, 40, 44, and 49 of the U.S. Code).

¹⁴² *Id.* (quoting Titles 41, 46, 51, and 54 of the U.S. Code).

mandate of the OLRC, aligning the construction of codified titles with the scope of the codifiers' statutory authority.¹⁴³ Whether and how to give effect to the variation between the codifiers canons in different titles is yet another question for a robust textualism. Perhaps the Court will interpret the provisions to uniformly proscribe reliance on substantive changes from the Statutes at Large. Alternatively, the Court might distinguish between substantial changes and structural features such as captions and placement.

Still other questions remain. The Court might grapple with whether these provisions reach codification decisions made before the creation of the U.S. Code or only those decisions made since these provisions were enacted as part of the process of compiling the Code. After all, the error in the Revised Statutes at the heart of the qualified immunity question occurred before Congress began including notes of caution in the codified law. Moreover, the Court must decide how much, if any, weight to give Congress's apparent acquiescence to its qualified immunity decisions.¹⁴⁴

These are just a few of the many thorny questions that the codification of Section 1983 implicates, and they point to how codification can raise more questions still in other settings. But the first step toward answering them is far more mundane. It involves acknowledging the ways in which an understanding of codification is essential to a robust approach to statutory interpretation.

VI. CONCLUSION

We may all be textualists now,¹⁴⁵ but we do not yet all agree on how to assemble and interpret the relevant statutory texts. As scholars continue to uncover how the language with which courts work is shaped in ways that complicate the relationship between those words and the will of Congress as enacted through bicameralism and presentment, courts need pay heed if they want to be faithful to their own interpretive commitments.

As we have shown, understanding the codification process is crucial to interpreting the positive law titles compiled in the United States Code, and Congress has legislated guidance cautioning courts to be attentive to how codification might change the substance of the law. Yet, as its latest term illustrates, the Supreme Court continues to decline opportunities to address the relationship between codification and interpretation. The questions raised by the codification process are only set to multiply in quantity, complexity, and importance as scholarship advances our understanding of the law assembled in the United States Code. By acknowledging and answering these questions, the Court can build a richer and more robust textualism to guide litigants and lower courts.

¹⁴³ See *id.* (citing 2 U.S.C. § 285b).

¹⁴⁴ See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

¹⁴⁵ Cf. *West Virginia v. EPA*, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting).