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MILLIONAIRE TAXES: CHARTING A PATH FORWARD BY EXAMINING THE MASSACHUSETTS MILLIONAIRE TAX

Benjamin F. Russell

ABSTRACT

In 2023, Massachusetts enshrined a 4% surtax on all income realized over one million in the state constitution. Although the tax has generated more than \$2 billion in revenue, concerns linger regarding its scope and impact on the migration patterns of Massachusetts residents. A lack of concrete data undermines arguments for and against the surtax, exacerbating the contentious disagreements present in the discourse. This Article asserts that Massachusetts should take more effective measures to collect and disseminate data raised from the surtax. Based on the results of this hypothetical data, this Article proposes several adjustments. With the costs and benefits clearly laid out, other jurisdictions can look to Massachusetts as an example to model or modify their tax codes, maximizing benefits while minimizing unintended side effects.

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INTRODUCTION

Taxes are a touchy subject in Massachusetts.¹ While the glamour of the Revolution is over, and never again may drunken Bostonians turn Boston Harbor into the world's largest cup of tea, Massachusetts still knows how to turn taxes into something to talk about. The Fair Share Amendment ("the Amendment"), passed in November of 2022, amended the state constitution to include a "millionaire tax."² Like other millionaire taxes, the Amendment imposes an additional 4% tax on *any* income over one million dollars sourced to Massachusetts.³ In true Massachusetts fashion, the Amendment has sparked both praise and outrage, placing cranberry farmers, Florida snowbirds, and Bill Belichick himself on the front lines of a colorful debate of Massachusetts state tax policy.⁴

Besides Massachusetts, millionaire taxes have been enacted in states around the country. California, New Jersey, and New York have implemented millionaire taxes, while several other states have put forth proposals for millionaire taxes in recent legislative sessions.⁵ Despite their

¹ See e.g., Erica York, *What's the Tea? 250 Years since the Boston Tea Party* (Dec. 14, 2023),

<https://taxfoundation.org/blog/boston-tea-party-history/>.

² MASS. CONST. art. XLIV, amend CXXI (2022).

³ See MASS. GEN. LAWS. ch. 62, § 4(b) (2024).

⁴ See discussion *infra* Section II.B.

⁵ N.Y. TAX LAW § 601(c)(1)(B)(vii) (2024); N.J. STAT. ANN. § 54A:2-1(a)(7) (West 2024); CAL. REV. & TAX. CODE § 17043 (West 2024); *see also* S.B. 774, 2023 Gen. Assemb., Jan. Sess. (Conn. 2023); CONN. GEN. STAT. § 12-700(a)(9) (2024); Kiel Porter, *Millionaire Tax Backed by Illinois Voters in Threat to Chicago*, Bloomberg Tax (Nov. 6, 2024, 2:11 P.M.), <https://www.bloomberg.com/news/articles/2024-11-06/illinois-voters-support-3-tax-proposal-on-1-million-incomes?embedded-checkout=true>; Francine J. Lipman & Steven Reinecker, *Wealth Taxes, Past and Present*, 115 *Tax Notes State* 273 (Jan. 27, 2025) (describing in detail the most recent wealth tax

growing prominence, nothing is novel about taxing millionaires. Progressive income taxes are a staple in American tax policy. They are the primary source of federal tax revenue and have been for over a century.⁶ Historically, the wealthiest individuals have been subject to extreme tax rates.⁷ For example, in the mid-1900s, the wealthiest Americans could face a federal marginal rate of up to ninety percent.⁸ Although ninety percent rates are no longer the norm, some lawmakers have been calling for higher taxes on the country's top earners.⁹ Likely in part due to wealth and income inequality and tax avoidance strategies like "buy, borrow, die," some feel that the rich are not paying enough.¹⁰ The gap between the wealthiest and poorest Americans has never been higher, and studies show that most Americans favor raising taxes on the rich.¹¹ Despite general support, millionaire taxes are hotly contested.¹² In Massachusetts, opponents of the Amendment argue the scope of the tax is too broad and will push taxpayers to leave the state,

developments in the United States) (reviewing recent legislation on wealth and millionaire taxes); Joseph Johns et al., *State Tax Changes Taking Effect January 1, 2025*, Tax Found. (Dec. 19, 2024), <https://taxfoundation.org/search/all/state/2025-state-tax-changes/>; H.B. 1, 2025 Reg. Sess. (Miss. 2025); H.B. 775, 2025 Reg. Sess. (Ky. 2025); H.B. 111, 2025 Reg. Sess. (Ga. 2025); H.B. 1200, 2025 Reg. Sess. (Okla. 2025).

⁶ See Scott Greenberg, *How Has Federal Revenue Changed Over Time?*, TAX FOUNDATION (Nov. 18, 2015), <https://taxfoundation.org/data/all/federal/how-has-federal-revenue-changed-over-time/>.

⁷ See *Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021*, TAX FOUND. (Aug. 24, 2021), <https://taxfoundation.org/data/all/federal/historical-income-tax-rates-brackets/>.

⁸ *Id.*

⁹ Richard Rubin, *Trump Rejects Millionaire Tax Hike*, WALL ST. J., Apr. 23, 2025, <https://www.wsj.com/politics/policy/trump-shoots-down-millionaires-tax-trial-balloon-b7df0475>.

¹⁰ See discussion *infra* Section I.A.

¹¹ See sources *infra* Section I.B.

¹² See discussion *infra* Section II.A.

a phenomenon called tax flight.¹³ Proponents argue the opposite.¹⁴ Research is muddled on whether tax flight is real, and whether voters really do “move with their feet” based on taxes.¹⁵ However, regardless of the reason, recent research clearly shows that people are leaving northern, blue states in favor of southern, warmer states with friendlier tax policies, with politicians pointing to various explanations without evidence to support.¹⁶

Massachusetts recently concluded its inaugural fiscal year with the surtax. Surpassing projections, the tax raised approximately \$2.2 billion in revenue, most of which is allocated to educational and transportation programs such as free community college and renovating public transit systems.¹⁷ Revenues were so significant that, as of April 2025, much of it remains unallocated in the state treasury. Public sentiment on the tax is divided.¹⁸ The Amendment was approved by a tight margin of 52% to 48%, and the debate shows no signs of waning. Some groups are cautioning that an economic exodus is imminent, while others claim the tax measures are insufficient.

This Article argues that, to resolve this discussion, clear and authoritative data is essential, especially as the past five years have been challenging. The lasting impacts of inflation, increasing housing prices, and a global pandemic are yet to be fully understood. To grasp how Massachusetts residents have responded to this tax in the current context, this Article

¹³ See discussion *infra* Section I.C.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See discussion *infra* Section II.B.

¹⁸ *Id.*

contends that the state government should act swiftly to gather and share relevant information. This improved data is essential for evaluating the costs and benefits of the tax in Massachusetts and other jurisdictions with analogous taxes, or those contemplating its enactment. Part I outlines common challenges with taxing the wealthy at the state level and common arguments for and against raising taxes on the wealthy. Part II describes the Amendment and the public sentiment leading up to the passage of the bill, as well as summarizes the mechanics of the bill, how much revenue it has raised, and questions that are still unanswered. Part III argues that a path forward cannot be paved without clearer data, and that the Massachusetts government is in the perfect position to provide the data that policymakers (and voters) need to determine whether the tax should be repealed, adjusted, or kept the same. This Article offers several possible solutions depending on the data, including introducing a bracketed structure to the surtax, excluding certain transactions from calculating income for purposes of the surtax, limiting the types of income the surtax targets, or a combination. Part IV concludes and argues that if Massachusetts can successfully gather clear and authoritative data, the rest of the country can benefit and adjust its tax policies accordingly.

I. CHALLENGES OF TAXING THE RICH AT THE STATE LEVEL

A. Why do we want to tax the rich?

The United States' progressive tax systems are built on a simple philosophy—those with a greater ability to pay should be taxed at a higher rate.¹⁹ Taxing those with a greater ability to

¹⁹ See Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 452-53 (2005); see also Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV.

pay promotes vertical equity, a taxation principle stating “people in unequal position should pay different amounts related in a meaningful fashion to differences in position.”²⁰ By taxing based on an ability to pay, we preserve neutrality in the tax system and collect revenues more efficiently.²¹ Parallel to vertical equity is the concept of horizontal equity, which posits that those “in equal positions should pay equal amounts of tax.”²² To simplify, our tax system should impose higher rates on those who earn more and lower rates on those who earn less.

Taxes are a means to raise revenue; however, taxation can accomplish other goals.²³ For much of the last century, a widely supported purpose of our tax system has been to redistribute resources.²⁴ Many believe that large concentrations of wealth within a small percentage of the

1323, 1371-77 (2008) (arguing that the “ability to pay” is the least problematic principle to base a tax system attempting to achieve fairness).

²⁰ R. A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967).

²¹ Galle, *supra* note 19, at 1371.

²² Musgrave, *supra* note 20, at 45. (Horizontal equity is sometimes characterized as a corollary of vertical equity, arguing it is a natural result of promoting vertical equity); *See generally* James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135 (2012).

²³ Galle, *supra* note 19, at 1327 (the tax code has “three purposes, raising revenue, redistributing wealth, and enacting other policy goals”).

²⁴ *See* Edward J. McCaffery, *The Paradox of Taxing the Rich*, 26 FLA. TAX REV. 130, 134–38 (2023) (“We start with the widely accepted idea that the tax system should be used to “redistribute” wealth, that is, broadly, to take from the rich and give to the poor.”); John R. Brooks, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 142 (2014) (“Ultimately, redistribution is a central goal of tax policy”). The debate as to what extent distributive justice should in fact redistribute wealth is out of the scope of this paper. STEPHANIE HUNTER MCMAHON, *PRINCIPLES OF TAX POLICY* 520 (3rd ed. 2023) (“the question [of redistribution] for most people boils down to their personal sense of obligation to those who are less fortunate”). For

population is detrimental to long-term economic growth.²⁵ Research also suggests that large wealth inequality contributes to health and social issues among a country's inhabitants.²⁶

a thorough review of the literature, *see McCaffery, supra*, at 137 n.11 (summarizing the economic theories and literature of the policy goals of modern tax systems).

²⁵ Gladriel Shobe, *Subsidizing Economic Segregation Through the State and Local Tax Deduction*, 11 U.C. IRVINE L. REV. 539, 545 (2020); ANDREW BERG & JOHNATHAN OSTRY, INEQUALITY AND UNSUSTAINABLE GROWTH 3 (Int'l Monetary Fund, SDN/11/082011) (“We find that longer growth spells are robustly associated with more equality in the income distribution.”); Amir Rubin & Dan Segal, *The effects of economic growth on income inequality in the US*, 45 J. OF MACROECON. 258 (2015) (finding that economic growth benefits the wealthiest 1% the most); *But see* Kristin J. Forbes, *A Reassessment of the Relationship Between Inequality and Growth*, 80 THE AM. ECON. R. 869 (2000) (finding a positive relationship between economic growth and income inequality). Some scholars also argue that our tax system, especially regressive state tax systems, are perpetuating racial inequality. *See* Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J. L. & SOC. POL'Y 265 (2020).

²⁶ RICHARD G WILKINSON & KATE PICKETT, THE SPIRIT LEVEL 49-72 (2009). *But see* Karen Rowlingson, *Does income inequality cause health and social problems?*, JOSEPH ROWNTREE FOUNDATION (Sept. 22, 2011), <https://www.jrf.org.uk/savings-debt-and-assets/does-income-inequality-cause-health-and-social-problems> (finding evidence that wealth inequality causes harm past a certain threshold, while also arguing more research is needed); CHRISTOPHER SNOWDEN, THE SPIRIT LEVEL DELUSION: FACT-CHECKING THE LEFT'S NEW THEORY OF EVERYTHING (2010) (refuting the findings of ‘The Spirit Level’).

In the United States, wealth inequality has grown in recent years.²⁷ In 2012, the top 0.1% of families owned the equivalent of the bottom 90%.²⁸ Certain studies indicate that the United States has the highest levels of wealth inequality among developed nations, with inequality skewed on racial lines.²⁹ Not only do the wealthiest in America own more, but they generally pay less in taxes. From 2010 to 2018, it is estimated that the 400 wealthiest families paid on average 8.2% of \$1.8 trillion in income.³⁰

²⁷ Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. ECON. PERSPS. 3, 10–11 (2020) (“the period from 1980 to 2020 has been an era of extraordinary wealth accumulation among the rich in the United States. Not only has wealth become more concentrated, wealth itself has been growing faster than income and output.”)

²⁸ Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 551–52 (2016).

²⁹ Edward N. Wolff, *The Decline of African-American and Hispanic Wealth Since the Great Recession* 31–33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25198, 2018), <https://www.nber.org/papers/w25198>.

³⁰ Greg Leiserson & Danny Yagan, *What is the Average Federal Individual Income Tax Rate on the Wealthiest Americans?*, THE WHITE HOUSE (Sept. 23, 2021), <https://bidenwhitehouse.archives.gov/cea/written-materials/2021/09/23/what-is-the-average-federal-individual-income-tax-rate-on-the-wealthiest-americans/>; Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PRO PUBLICA (June 8, 2021, 5:00 AM), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax>. But see Scott Hodge, *The Super-Rich Pay Super-Amounts of Taxes, New Treasury Report Finds*, TAX FOUNDATION (Nov. 7, 2024), □HYPERLINK "<https://taxfoundation.org/blog/super-rich-pay-effective-tax-rates/>" (finding that the super-rich can pay up to 60% in their annual income in taxes).

Most Americans favor raising taxes on the wealthy.³¹ A recent study found that 58% of Americans support raising taxes on households earning more than \$400,000 a year.³² Therefore, the question is generally not whether the rich should be taxed, but rather centers on how much the wealthy should be taxed.³³

³¹ Andy Cerdá, *Most Americans continue to favor raising taxes on corporations, higher-income households*, PEW RSCH. CTR. (March 19, 2025), <https://www.pewresearch.org/short-reads/2025/03/19/most-americans-continue-to-favor-raising-taxes-on-corporations-higher-income-households/>. The study also found that 68% of Americans support raising taxes on large businesses and corporations. *Id.* The survey results vary between political affiliations and income, with 81% of Democrats supporting higher taxes for the wealthy and corporations. *Id.*

³² *Id.*; see also Frank Newport, *Average American Remains OK With Higher Taxes on Rich*, GALLUP (Aug. 12, 2022), <http://news.gallup.com/opinion/polling-matters/396737/average-american-remains-higher-taxes-rich.aspx>; Juliana Horowitz et al., *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RSCH. CTR., (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/> (finding that most Americans believe that wealth inequality is an issue, but not a top priority).

³³ Compare Jessica Riedl, *The Limits of Taxing the Rich*, MANHATTAN INST. (Sept. 21, 2023), <https://manhattan.institute/article/the-limits-of-taxing-the-rich#notes> (finding that the highest tax rates produce little revenue and slow economic growth), with Meg Wiehe et al., *Who Pays? A Distributional Analysis of the Tax Systems in all 50 States*, THE INST. ON TAX'N AND ECON. POL'Y 1-2 (6th ed. 2018), <https://itep.sfo2.digitaloceanspaces.com/whopays-ITEP-2018.pdf> (finding that taxes in the United States are becoming increasingly regressive).

B. State Income Taxes

Progressive tax systems are the dominant tax regime around the world and in the United States.³⁴ The federal government and most state jurisdictions levy personal income taxes on their citizens.³⁵ Forty-two states in the U.S. levy some form of personal income tax.³⁶ Individual income tax alone accounts for 22.8% of state and local tax (“SALT”) revenues nationwide.³⁷ State revenues primarily fund K-12 education, with a significant portion also allocated to healthcare and higher education.³⁸ In 2020, an estimated \$1.13 trillion was spent on education,

³⁴ See Klara Sabirianova Peter et. al, *Global Reform of Personal Income Taxation, 1981-2005: Evidence from 189 Countries*, 63 NAT’L TAX J. 447, 463-64 (2010); see Jason S. Oh, *Are Progressive Tax Rates Progressive Policy?*, 92 N.Y.U. L. REV. 1909, 1910-12 (2017).

³⁵ See *Progressive Tax*, TAX FOUND., <https://taxfoundation.org/taxedu/glossary/progressive-tax/> (last visited Apr. 27, 2025); Cristina Enache, *A Comparison of the Tax Burden on Labor in the OECD*, 2024, TAX FOUND. (May 31, 2024), <https://taxfoundation.org/data/all/global/tax-burden-on-labor-oecd-2024/>.

³⁶ Andrey Yushkov & Katherine Loughead, *State Individual Income Tax Rates and Brackets*, 2025, TAX FOUND. (Feb. 18, 2025), <https://taxfoundation.org/data/all/state/state-income-tax-rates/>.

³⁷ Katherine Loughead, *Unpacking the State and Local Tax Toolkit: Sources of State and Local Tax Collections (FY 2020)*, TAX FOUND. Fiscal Fact No. 797 at (Aug. 25, 2022), <https://files.taxfoundation.org/20220825103108/Unpacking-the-State-and-Local-Tax-Toolkit-Sources-of-State-and-Local-Tax-Collections-FY-2020.pdf> (noting property taxes accounted for 32.2% of all state tax revenue in 2020, while corporate income tax accounted for 3.3% of all state revenue).

³⁸ *Policy Basics: Where Do Our State Tax Dollars Go?*, CTR. ON BUDGET AND POL’Y PRIORITIES, [https://www.cbpp.org/research/policy-basics-where-do-our-state-tax-dollars-go#:~:text=spent%20that%20year.\)-By%20far%20the%20largest%20areas%20of%20state%20spending%2C%20on%20average,low%2Dincome%20families%20has%20declined](https://www.cbpp.org/research/policy-basics-where-do-our-state-tax-dollars-go#:~:text=spent%20that%20year.)-By%20far%20the%20largest%20areas%20of%20state%20spending%2C%20on%20average,low%2Dincome%20families%20has%20declined) (last updated Jul. 25, 2018).

with ninety percent of education spending coming from non-federal sources.³⁹ State and local government spending employs fifteen percent of our nation's workforce⁴⁰ and accounts for fifteen percent of the nation's gross domestic product.⁴¹

State jurisdictions can be fertile ground to experiment with new tax provisions,⁴² and allowing states the ability to respond to their citizens' own needs and concerns provides them with the opportunity to effectively allocate resources.⁴³ Overall, state tax autonomy is viewed positively by scholars and courts.⁴⁴ In Charles Tiebout's seminal article, "A Pure Theory of Local Expenditures," Tiebout asserts that citizens would benefit from a decentralized federal

³⁹ McMahon, *supra* note 24, at 382.

⁴⁰ Audrey Watson, *Occupational Employment and Wages in State and Local Government*, U.S. BUREAU OF LAB. STAT. (Dec. 2021), <https://www.bls.gov/spotlight/2021/occupational-employment-and-wages-in-state-and-local-government/> .

⁴¹ See *Id.*

⁴² Brian Galle et al., *Money Moves: Taxing the Wealthy at the State Level*, 113 CAL. L. REV. 635 (2025) [hereinafter *Money Moves*]; See also John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 382-83 (2003) (finding that because businesses will likely not give up a sale just to avoid a tax).

⁴³ *Money Moves*, *supra* note 42, at 16-17.

⁴⁴ *Id.*, at 15-18.; Brian Galle, *THE ROLE OF CHARITY IN A FEDERAL SYSTEM*, 53 WM. & MARY L. REV. 777, 828-29 (2012); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005) (finding that states contribute significant value through their perspective and experimentation regarding taxation systems). *But see* Brian Galle & Joseph Leahy, *Laboratories of Democracy - Policy Innovation in Decentralized Governments*, 58 EMORY L. J. 1333, 1398-1400 (2009) (finding that states are not "ideal planners" and doubting state value in tax "experimentation").

government.⁴⁵ He contends that by reallocating more resources to local governments, these entities can offer a more tailored selection of public services to specific segments of the population.⁴⁶ This assertion, known as the Tiebout Hypothesis, has woven its way into modern philosophies on the roles of federal and state governments,⁴⁷ including those of the Supreme Court:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.⁴⁸

Increasing local tax autonomy, however, does not necessarily achieve all tax goals, as local governments cannot excel at all types of taxation. Instead, utilizing consumption taxes as “user fees” is likely the most effective state tax implementable.⁴⁹ States and local governments have a comparable disadvantage in implementing personal income taxes compared to centralized governments. This is because, as explained below, residents may choose to relocate when states

⁴⁵ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

⁴⁶ *Id.* at 418.

⁴⁷ Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L. J. 481, 481-83 (2004) (“It would be exceedingly difficult to find nine pages of scholarship that have exerted a greater impact on the ongoing debate about federalism and the ideal distribution of power between the state and federal governments.”). For a general summary, history, and discussion of the hypothesis, *see Vicki Been, Exit As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 506-09, 514-28 (1991).

⁴⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

⁴⁹ *Money Moves*, *supra* note 42, at 646-47.

impose excessive tax burdens on their citizens. They may simply leave, potentially after taking advantage of local public services, transferring any value gained from one state to another.⁵⁰

Before discussing tax flight, it is necessary to acknowledge the recent conversations regarding wealth taxes.⁵¹ As of March 2025, no state has successfully passed a wealth tax on unrealized gains, although many have been proposed.⁵² States have generally been cautious with taxing

⁵⁰ See discussion *infra* Section I.C; see also Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L. J. 481 (2004) (arguing that state and federal roles are more complicated than the Tiebout hypothesis makes them seem); Cf. Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 570–72, 601 (1983) (examining how states use severance taxes and subsidies to influence industry and how interstate competition constrains both strategies).

⁵¹ Lipman, *supra* note 5 (describing, in detail, the most recent wealth tax developments in the United States). By wealth tax, I refer to “a levy on the hypothetical maximum amount of present consumption,” and do not mean what this article discusses as millionaire taxes. Robin Morgan, *Are there Differences Between Wealth and Income Taxation? Yes, but Less Than We Think*, 76 TAX. L. REV. 325, 336 (2023). Some commentators group millionaire taxes and wealth taxes together. See generally Lipman, *supra* note 5 (treating income taxes on the rich as wealth taxes). Treating income taxes as wealth taxes overlooks the realization differences between the two, or more simply, the timing issue—an issue hotly debated by experts. Asa Hansson, *Is the Wealth Tax Harmful to Economic Growth?*, 2010 WORLD TAX J. 19 (February 2010) (finding “robust support for the contention that taxes on wealth dampen economic growth”); Cristina Enache, *The High Cost of Wealth Taxes*, TAX FOUNDATION EUROPE (Jun. 26, 2024), <https://taxfoundation.org/research/all/eu/wealth-tax-impact/> (finding that wealth taxes in Europe hurt local economies). The taxation of unrealized wealth is far from new. See e.g., Deborah H. Schenk, *An Efficiency Approach to Reforming a Realization-Based Tax*, 57 TAX L. REV. 503 (2004).

⁵² See [A.B. 259](#), 2023-24 Leg., Reg. Sess. (Cal. 2023) (would have applied a 1.5% tax to net worth over a threshold); [S.B. S1570](#), 2023-2024 Leg., Reg. Sess. (N.Y. 2023) (would have applied a mark-to-market tax of unsold assets at the end of each taxable year); [S.B. 925](#), 2023 Leg., Reg. Sess. (Haw. 2023) (a 1% tax on net worth exceeding 20 million); [H.B. 3039](#), 2023 Gen. Assemb. Reg. Sess. (Ill. 2023). But see [Texas Proposition 3, Prohibit](#)

unrealized wealth, instead opting to raise personal income taxes on the wealthy instead, as seen above.⁵³

C. Tax Flight

When people move, their money moves with them.⁵⁴ Until the physical location of a person ceases to be the basis for state taxation, a state's revenue is nearly entirely dependent on economic activity that occurs physically within its borders.⁵⁵ Tax flight, the fleeing of citizens from their high-tax states to low-tax states, has therefore been a concerning consequence for states contemplating millionaire taxes.⁵⁶ This is especially worrisome for high-tax states that generate most of their revenue from a small percentage of their population.⁵⁷ Tax flight is not

Taxes on Wealth or Net Worth Amendment (2023), BallotPedia,
[https://ballotpedia.org/Texas_Proposition_3,_Prohibit_Taxes_on_Wealth_or_Net_Worth_Amendment_\(2023\)](https://ballotpedia.org/Texas_Proposition_3,_Prohibit_Taxes_on_Wealth_or_Net_Worth_Amendment_(2023)) (last visited Apr. 27 2025) (Passing Constitutional Amendment banning the passage of any wealth tax in the state).

⁵³ See *supra* note 5.

⁵⁴ See Andrew Appleby, *No Migration without Taxation: State Exit Taxes*, 60 HARV. J. ON LEGIS. 55, 56 (2023) (“The movement of people and the movement of money are often discrete. As such, governments can address the effects of each separately. Because residence provides a general jurisdictional basis for state personal income taxation, however, money often moves with people.”).

⁵⁵ *Id.*

⁵⁶ Chris Edwards, *Tax Reform and Interstate Migration*, CATO INST. Tax and Budget Bulletin No. 84, at Table 1 (Sept. 6, 2018), <https://www.cato.org/tax-budget-bulletin/tax-reform-interstate-migration> (estimating 33 billion in net revenue moved from 25 states with the highest tax rates to the 25 states with the lowest).

⁵⁷ See, e.g., Justin Garosi & Jason Sisney, *Top 1% pay half of California's Income taxes*, LEGISLATIVE ANALYST'S OFFICE (Dec. 4, 2014), <https://lao.ca.gov/LAOEconTax/Article/Detail/7> (finding that the top 1% of earners pays more than half of California's state income tax).

only limited to the movement of a person from one taxable jurisdiction to another, but also to the strategic movement of money from one taxable jurisdiction to another.⁵⁸ These behaviors, here respectively coined Physical and Fiscal tax flight,⁵⁹ are important considerations when determining how best to tax the wealthy.

i. Physical Tax Flight

If the premise is true, that higher taxes encourage taxpayers to leave, then tax flight should be a convincing argument against implementing high state tax rates. Although interstate migration occurs in large numbers,⁶⁰ debate has persisted as to whether state tax rates influence this.⁶¹ In fact, whether state progressive taxes work at all depends on how easily funds can move between state lines.⁶²

Two major theories segment the conversation regarding physical tax flight: the elite embeddedness theory and the transitory millionaire hypothesis. The elite embedded hypothesis asserts that most individuals in the top 1% are not in a position to move. These individuals are married residents with families who are either employed with high salaries or business owners whose income is intimately connected to the surrounding community, whose circumstances

⁵⁸ *Money Moves*, *supra* note 42, at 662.

⁵⁹ Also coined exploitive migration and exploitive money moves. *See Money Moves*, *supra* note 42, at 662.

⁶⁰ *State-to-State Migration Flows*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html> (last visited Apr. 27, 2025).

⁶¹ *See Money Moves*, *supra* note 42, at 649 (“states should mostly not impose progressive taxes, but that this conclusion depends on an empirical question about the extent of taxpayer mobility.”).

⁶² *Id.*

prevent them from easily migrating to low-tax jurisdictions.⁶³ Conversely, the transitory Millionaire Hypothesis asserts that millionaires are hyper vigilant to local tax rates and have the means and motivation to migrate at a moment's notice.⁶⁴

So, do high taxes cause migration? The answer is a muddled yes. The plethora of research conducted to test the validity of these theories is clouded by political disagreements that make a black-and-white answer elusive.⁶⁵ However, the studies generally conclude that migration is occurring,⁶⁶ but disagree on the reason for the migrations, to what extent state

⁶³ Cristobal Young et al., *Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data*, 81 AM. SOC. REV. 421, 425 (2016) [hereinafter *Administrative Data*] (explaining the elite indebtedness theory). However, many of these theories were developed before COVID-19 and the rise of telework, both of which have opened the door for many Americans to work remotely in positions they would not have been able to before 2020. *See, e.g., id.* (“Despite modern communications technology, distance is still an impediment to communication, collaboration, information-sharing, and trust[.]”).

⁶⁴ *Administrative Data*, *supra* note 63, at 424.

⁶⁵ Compare *e.g.*, Michael Mazerov, *State Taxes have a Minimal Impact on People’s Interstate Moves*, CTR. ON BUDGET AND POL’Y PRIORITIES, Report, 8 (Aug. 9, 2023), <https://www.cbpp.org/research/state-budget-and-tax/state-taxes-have-a-minimal-impact-on-peoples-interstate-moves> (attacking the WSJ for cherry picking studies that high tax states have high levels of migration), and Robert Tannwald, *Why Did Massachusetts’s Millionaire’s Tax Pass (Barely)?*, 107 TAX NOTES STATE 529, 531-33 (2023), with GREGORY SULLIVAN ET AL., *BACK TO TAXACHUSETTS?: HOW THE PROPOSED CONSTITUTIONAL TAX AMENDMENT WOULD UPEND ONE OF THE BEST ECONOMIES IN THE NATION* (2022).

⁶⁶ Cristobal Young & Charles Varner, *Millionaire Migration and State Taxation of Top Incomes: Evidence From a Natural Experiment*, 64 NAT’L TAX J. 255, 265-78 (2011) (finding high taxes on millionaires had a small, but observable impact on the migration of the millionaire tax base); *Administrative Data*, *supra* note 63, at 433-39 (finding that consistent millionaires were responsive to millionaire taxes, but not in a statistically significant way); Roger S. Cohen et al., 43 PUB. FIN, REV 206 (2014) (replicating the 2011 Cristobal Young study and casting doubts

taxation plays a role,⁶⁷ and for how long the increased out-migration lasts after a new tax is implemented.⁶⁸ Other research on different types of taxes and taxpayers reach similar conclusions regarding how high tax rates affects mobility.⁶⁹

on the original findings); Traviss Cassidy et. al., *The Introduction of the Income Tax, Fiscal Capacity, and Migration: Evidence from US States*, 16 AM. ECON. J.: ECON. POL'Y 359 (2024) (finding that higher state income taxes eventually lowered revenues and increased out-migration); *see generally* E.J. McMahon, *Tracking the Increased Outflow of NY Taxpayers in 2019-20*, EMPIRE CTR. (May 25, 2022), <https://www.empirecenter.org/publications/new-york-taxpayer-migration-surged-in-2019-20-irs-data-show/> (reporting record numbers of high-income New Yorkers leaving the state); Chris Edwards, *Tax Reform and Interstate Migration*, CATO INST. (2018) (finding people are moving from high-income states to low-income southern states).

⁶⁷ Mazerov, *supra* note 65, at 8-11 (arguing that migration cannot be explained solely with changes in tax policy, and that various other factors such as housing, jobs, and family are the most significant reasons for interstate moves as recorded by the U.S Census); *but see* Edwards, *supra* note 66 (pointing out that the U.S census does not give ‘tax’ as an option for people to give for moving).

⁶⁸ *The Blue-State Wealth Exodus Continues*, WALL ST. J. (July 3, 2024, 6:24 PM), <https://www.wsj.com/articles/blue-state-exodus-irs-data-income-7c878e40> (arguing post-pandemic migration from high-tax to low-tax states is only increasing).

⁶⁹ Enrico Moretti & Daniel J. Wilson, *Taxing Billionaires: Estate Taxes and the Geographical Location of the Ultra-Wealthy*, 15 AM. ECON. J.: ECON. POL'Y. 424, 425 (2023)) (concluding “that billionaires’ geographical location is highly sensitive to state estate taxes”). Research done on careers suggests certain groups are highly prone to tax flight. *See* Henrik J. Kleven et al., *Taxation and International Migration of Superstars: Evidence from the European Football Market*, 103 AM. ECON. REV. 1892 (2013) (finding that international soccer players exhibit strong responses to tax rates); Ufuk Akcigit, *Taxation and the International Mobility of Inventors*, 106 AM. ECON. REV. 2930 (2016) (finding “superstar” inventors’ home choices are significantly affected by tax rates); Enrico Moretti & Daniel Wilson, *The Effect of State Taxes on the Geographical Location of Top Earners: Evidence from*

A notable study used state data from the California Franchise Tax Board and found that the passage of Proposition 30 in California, which added three new tax brackets for high-income individuals, correlated with significant out-migration.⁷⁰ The study found that there were strong responses to higher income taxes from high-earning individuals, leading to significant erosion of the revenue base.⁷¹ The study speculates that the Tax Cuts and Jobs Act of 2017 (“TCJA”), specifically the SALT cap deduction, could potentially exacerbate the Proposition’s effects by increasing high-income taxpayers’ tax burden.⁷²

Star Scientists, 107 AM. ECON. REV. 1858, 1901 (2017) (finding “that state taxes have a significant effect on the geographical location of star scientists and possibly other highly skilled workers”). *But see* Henrik Kleven et. al., *Taxation and Migration Evidence and Policy Implications*, 34 J. OF ECON. PERSP. 119 (2020) (doubting the applicability of specific career data to the general population when analyzing tax flight as a whole).

⁷⁰ Joshua Rauh & Ryan Shyu, *Behavioral Responses to State Income Taxation of High Earners: Evidence from California*, 16 AM. ECON. J.: ECON. POL’Y. 34, 83-84 (2024); *see* CAL. LEGIS. ANALYST’S OFF., *Proposition 30* (Nov. 8, 2022 Ballot), <https://lao.ca.gov/BallotAnalysis/Proposition?number=30&year=2022>.

⁷¹ *See* Rauh & Shyu, *supra* note 70, at 84 (“Using the more conservative levels result from 2013 compared to the similar-states sample, the estimates imply an elasticity of taxable income with respect to the marginal net of tax rate of 3.0. Under the Diamond and Saez (2011) formulation, an elasticity of taxable income of 3 with respect to the marginal net-of-tax rate would translate into a total revenue-maximizing marginal tax rate of only 18% (= 1 + 1.5 × 3), although the translation of the taxable income elasticity into a revenue-maximizing rate would depend heavily on the pareto parameter and functional form assumptions. Using a simple calculation of dissipation based on the average value of taxable income for high-income households of different filing statuses implies significant but not complete erosion of the state’s windfall gains from behavioral responses.”).

⁷² *Id.* at 31 (“the TCJA increased incentives (in terms of the level of the average tax rate gap) to leave California for zero-tax states by 2.15 times the amount of Proposition 30 for those earning over \$5 million, and by a factor of 2.43 for those earning from \$2-5 million. Based on these scaling factors, we would predict an out-migration effect of 1.46% of those earning \$2-5 million, and 1.51% of those earning \$5 million.”). The implementation of the

Further distinctions can be made between research conducted before and after the COVID-19 pandemic.⁷³ The Pioneer Institute—a Massachusetts-based public policy research institution—has published research highlighting large rates of migration out of Massachusetts. Blaming the recent implementation of Millionaire taxes, the Pioneer Institute based its research on the United States Internal Revenue Service's ("IRS") data, concluding that net-out migration quintupled from 2012 to 2021, resulting in a net AGI migration from \$900 million to \$4.3 billion in the same time period.⁷⁴ The Institute links the migration to Massachusetts' economic unawareness, particularly emphasizing the growth of remote work, the SALT cap deduction under the TCJA, and observing that, unlike other states that offered tax relief, Massachusetts increased taxes.⁷⁵ The study points to data showing that Massachusetts residents are moving to

TCJA has exasperated the increased tax burden on state residents with high incomes. *See also* Chris Edwards, *Tax Reform and Interstate Migration*, CATO INST. (2018) ("Millions of households will feel a larger bite from state and local taxes and will thus become more sensitive to tax differences between the states."). The reduction in the number of household claim the SALT deduction was projected to decrease from 42 to 17 million from 2017 to 2018. Joint Committee on Taxation, "Tables Related to the Federal Tax System as in Effect 2017 through 2026," JCX-32R-18, April 24, 2018, Table 7. By capping the deduction to 10k, high earners cannot use their paid state income taxes to reduce their federal taxable income.

⁷³ Andrew Wilford, *Is Remote Work Accelerating Out-Migration From High-Tax States?*, 110 TAX NOTES STATE 491, 493 (2023) (finding taxpayers moved from high to low tax states during the pandemic); *The Great Pandemic Migration*, WALL ST. J. (Dec. 28, 2021, 7:02 PM), <https://www.wsj.com/articles/covid-states-migration-lockdowns-census-11640733268> (arguing migration rates increased during the pandemic, not started); To see a review of all mobility research through 2020, *see* Kleven, *supra* note 69, at 121.

⁷⁴ JIM STERGIOS ET AL., TAX REALITY SETS IN, 3 (Pioneer Inst. 2023), <https://pioneerinstitute.org/wp-content/uploads/PNR-521-TaxReality-PB-v03.pdf>.

⁷⁵ *Id.* at 1-2.

New Hampshire and Florida, states with lower tax liability.⁷⁶ A separate study by the Fiscal Policy Institute found that during COVID-19, New York experienced large out-migration, with high levels among the top 20% of earners.⁷⁷ However, the study also found that these rates lowered in 2022.⁷⁸ The study found that higher earners subject to New York's Millionaire taxes of \$1, \$5, and \$25 million, which went into effect in 2021, left at lower rates than they had previously in 2020.⁷⁹

As reported by the census, it is a well-established fact that high-income states, particularly Massachusetts, Connecticut, California, and New York, have seen substantial out-migration, while states with lower taxes have witnessed significant growth in-migration.⁸⁰ Billionaires across the world have been relocating to tax-friendly jurisdictions.⁸¹ Advocates

⁷⁶ *Id.* at 6.

⁷⁷ Emily Eisner & Andrew Perry, WHO IS LEAVING NEW YORK STATE? 4 (The Fiscal Pol'y Inst. 2023).

<https://fiscalpolicy.org/wp-content/uploads/2023/12/FPI-Who-is-Leaving-Full-Report-Dec-2023.pdf>.

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 11.

⁸⁰ Katherine Loughead, *Americans Moved to Low-Tax States in 2024*, TAX FOUND. (Jan. 7, 2025), <https://taxfoundation.org/data/all/state/americans-moving-to-states/>; Michael Mazerov, *State Taxes have a Minimal Impact on People's Interstate Moves*, CENTER ON BUDGET AND POLICY PRIORITIES, REPORT, 14-15 (Aug. 9, 2023), <https://www.cbpp.org/sites/default/files/8-9-23sfp.pdf> (summarizing the data, many experts report this to be the result of pandemic remote working conditions).

⁸¹ *Tax exodus: Norway's super-rich fleeing country as govt tightens tax noose*, FIRSTPOST., (Jun. 14, 2024, 1:58 PM), <https://www.firstpost.com/world/tax-exodus-norways-super-rich-fleeing-country-as-govt-tightens-tax-noose-13782393.html>; Lance Lambert & Lucinda Shen, *Why Would Elon Musk Move to Texas? The Answer Could be in the Billions*, FORTUNE (Dec. 5, 2021, 12:00 AM), <https://fortune.com/2020/12/04/elon-musk-moving-texas-from-california-capital-gains-taxes/>; Robert Frank, *Jeff Bezos Will Save Over \$600 Million in Taxes by Moving to*

against high taxes generally point to this as clear evidence that high taxes directly cause tax flight.⁸² Proponents of high state taxes caution that this is a red herring, representing an oversimplification of a more complex issue.⁸³ Generally, IRS migration data demonstrates that high-income individuals leave and are not replaced at an equal level.⁸⁴

ii. Fiscal Tax Flight⁸⁵

Tax avoidance can cost governments and society heavily. A study conducted by the IRS between 2011-2013 noted that tax avoidance strategies reduced revenues by \$441 billion.⁸⁶ When resources are expended to shift capital for tax avoidance, “nothing is gained.”⁸⁷ Tax planning imposes indirect costs on society by pushing costs from those who avoid taxes to those who do not.⁸⁸ Some researchers propose that widespread tax avoidance could be exacerbated by

Miami, CNBC (Feb. 12, 2024, 12:37PM), <https://www.cnbc.com/2024/02/12/jeff-bezos-move-to-miami-will-save-him-over-600-million-in-taxes.html>.

⁸² See Sullivan, *supra* note 65, at 49-51.

⁸³ Michael Mazerov, *State Taxes have a Minimal Impact on People's Interstate Moves*, CTR. ON BUDGET AND POL'Y PRIORITIES, 8-11 (Aug. 9, 2023) (pointing to other factors, such as climate as the reason for the move), <https://www.cbpp.org/research/state-budget-and-tax/state-taxes-have-a-minimal-impact-on-peoples-interstate-moves>.

⁸⁴ *Id.* at 11.

⁸⁵ Or more lovingly named, ‘tax planning.’

⁸⁶ Internal Revenue Serv., U.S. Dep’t of the Treasury, Pub. No. 5364, Tax Gap Estimates for Tax Years 2011-2013 1 (2019) <https://www.irs.gov/pub/irs-prior/p5364--2019.pdf>.

⁸⁷ David A. Weisbach, *Ten Truths about Tax Shelters*, 55 TAX L. REV. 215, 222 (2002).

⁸⁸ *Id.* at 217-22 (“[a]nytime anyone alters his behavior because of taxes . . . the changed behavior imposes costs on others that the person does not take into account.”); *See also* Joshua D. Rosenberg, *Tax Avoidance and*

low taxpayer morale.⁸⁹ Nonetheless, tax planning is allowed and remains common practice.⁹⁰

The ability to plan around taxes arises from the structure of our tax codes—Professor Galle notes that

Profits and losses are intellectual concepts, not natural things. They do not exist in any one place, but instead arise through a series of transactions between parties who may be far apart from one another. Thus, law must impose somewhat arbitrary rules to tie any given bit of profit to a particular taxable location.⁹¹

Presuming that physical tax flight is a myth created to discourage state taxation, fiscal tax flight remains; these arbitrary rules that tie profit to a physical location cannot account for funds moved to a location outside of that state's jurisdiction.⁹² Consequently, money can

Income Measurement, 87 MICH. L. REV. 365 (1988) (noting that tax avoidance has widespread effects on nearly unlimited actors); Thomas J. Brennan, *Taxation of Corporations and Shareholders: A Discussion of Dean Schizer's Recent Proposal*, 117 COLUM. L. REV. ONLINE 90, 94 (2017) (noting the difficulties in determining the costs or benefits of tax avoidance). *But see* David Elkins, *Embracing Tax Avoidance*, 34 U. FLA. J. L. & PUB. POL'Y 327, 349-52 (2024) (arguing tax avoidance demonstrates inequities in the tax system).

⁸⁹ For a brief discussion on the topic *see* Joshua D. Blank & Daniel Z. Levin, *When is Tax Enforcement Publicized*, 30 VA. TAX REV. 1, 6-7 (2010).

⁹⁰ *Gregory v. Helvering*, 293 U.S. 465 (1934); *See generally*, Weisbach, *supra* note 87, at 217-22 (discussing the right to tax plan in caselaw).

⁹¹ *Money Moves*, *supra* note 42, at 663 (citation omitted).

⁹² Ronald A. Pearlman, *Fresh from the River Styx: The Achilles' Heels of Tax Reform Proposals*, 51 NAT'L TAX J. 569, 569-70 (1998) (explaining that many “loopholes” are difficult to predict because translating tax theory into legislation can have unintended consequences.).

be moved easily,⁹³ particularly by those possessing the resources to employ accountants and attorneys that aid in tax planning strategies.⁹⁴

At the state level, the affluent can employ numerous strategies to avoid taxation, including but not limited to moving their estate to a low-tax state,⁹⁵ gifting appreciated assets,⁹⁶ placing their wealth in protected trusts,⁹⁷ and taking advantage of certain business entities to recharacterize their income.⁹⁸ The most notorious of these strategies, “buy, borrow, die,” allows the affluent to *completely* avoid paying income tax by utilizing the realization requirement in the federal tax code.⁹⁹

⁹³ Henrik Kleven et al., *Taxation and Migration: Evidence and Policy Implications*, 34 J. ECON. PERSP. 119, 133 (2020) (“we would expect capital to be more mobile than people, because it is less affected by the possibly strong and idiosyncratic preferences for specific locations.”).

⁹⁴ David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 396-98 (2015) (finding that more sophisticated taxpayers make use of loopholes more easily and this behavior is highly responsive to changes in tax systems).

⁹⁵ See Enrico Moretti & Daniel J. Wilson, *Taxing Billionaires: Estate Taxes and the Geographical Location of the Ultra-Wealthy* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26387, 2020).

⁹⁶ Jay A. Soled & Mitchell Gans, *Sales to Grantor Trusts: A Case Study of What the IRS and Congress Can Do to Curb Aggressive Transfer Tax Techniques*, 78 TENN. L. REV. 973 (2011).

⁹⁷ Mitchell M. Gans, *Kaestner Fails: The Way Forward*, 11 WM. & MARY BUS. L. REV. 651, 656 (2020); N.C. Dep't of Rev. v. The Kimberley Rice Kaestner 1992 Family Trust, 588 U.S. 262 (2019).

⁹⁸ Galle, *supra* note 42, at 646, 663, 677.

⁹⁹ See Colin J. Heath, *Taxing "Borrow" in "Buy/Borrow/Die"*, 99 N.Y.U. L. REV. 717, 720-21 (2024); Edward J. McCaffery, *Taxing Wealth Seriously*, 70 TAX L. REV. 305, 306 (2017); *see also*, I.R.C. § 1001(b); Tazra Mitchell, *How Wealthy Households Use a "Buy, Borrow, Die" Strategy to Avoid Taxes on Their Growing Fortunes*,

Generally, individuals should be able to transfer themselves and their funds between states to reach their lifestyle goals.¹⁰⁰ However, mobility becomes problematic when it is used to evade tax liabilities owed to a state whose amenities they have utilized to amass their wealth. A variety of solutions have been offered to solve the issues resulting from tax flight, but few, if any, have been undertaken by any state jurisdiction.¹⁰¹ Instead, many states continue to raise progressive income taxes on the rich.¹⁰²

DC FISCAL POL'Y INST. (April 29, 2024), <https://www.dcfpi.org/all/how-wealthy-households-use-a-buy-borrow-die-strategy-to-avoid-taxes-on-their-growing-fortunes/>.

¹⁰⁰ See David Schleicher, *The City as Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1511-12 (2010).

¹⁰¹ Other solutions include: Appleby, *supra* note 54 (arguing that state exit taxes could help states effectively tax income generated in their jurisdiction if certain constitutional and logistical challenges are overcome); *see also* David Scheichler, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 78 (2017) (arguing state and local governments have enacted policies that lower interstate mobility rates, causing economic harm to the country), Galle, *supra* note 42, at 643 (wealth and mark-to-market Taxes); Natasha Sarin et al., *Rethinking How We Score Capital Gains Tax Reform* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28362, 2021) (reforming the capital gains tax); David Kamin, *How to Tax the Rich*, 146 TAX NOTES 119, 120-27 (2015) (minimum taxes, realization on bequest or gift, and transfer taxes).

¹⁰² See *supra* note 5.

II. THE MASSACHUSETTS MILLIONAIRE TAX

The language of the Amendment is clear, and accounts for inflation in the years subsequent to 2023.¹⁰³ The Amendment accompanied the passage of an addition to the Massachusetts tax code, which delineates the mechanics of the tax and confers upon the tax commissioner the authority to promulgate regulations regarding the tax's implementation.¹⁰⁴ At its core, the tax itself is

¹⁰³ The Amendment in full:

To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the commonwealth's highest income taxpayers, this \$1,000,000 (one million dollars) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2023.

MASS. CONST. art. CXXI

¹⁰⁴ MASS. CONST. art. CXXI; MASS. GEN. LAWS. ch. 62, § 4(d) as amended 2023 Mass. Acts c.28 § 28. The pertinent language of the statute is as follows:

Where the sum of Part A taxable income, Part B taxable income and Part C taxable income exceeds \$1,000,000 in a taxable year, the portion of such taxable income exceeding \$1,000,000 shall be taxed at the rates specified in subsections (a) to (c), inclusive, plus an additional 4 per cent. In determining such sum, any negative amount or loss in any part of taxable income shall not be applied to reduce income in any other part or otherwise be applied to reduce

straightforward, raising the tax rate on all income over one million dollars by four percent.¹⁰⁵

The following is a breakdown of how Massachusetts personal income tax is calculated:

Determining a person's tax liability in Massachusetts begins with their federal gross income.¹⁰⁶

This amount is modified slightly to reach Massachusetts gross income.¹⁰⁷ Massachusetts gross income is divided into three parts: A, B, and C. Part A includes interest, dividends, short-term capital gains, and collectibles.¹⁰⁸ Part C includes income from long-term capital assets.¹⁰⁹ Part B includes any income not taxed in Part A or Part C.¹¹⁰ For 2024, Part A income is taxed at several rates: interests and dividends at 5.95%, short-term capital gains at 8.5%, and collectibles at

such sum. Annually, the \$1,000,000 taxable income threshold referenced in this subsection shall be subject to the cost-of-living adjustment as provided by subsection (f) of section 1 of the Code. The commissioner may promulgate regulations or issue other guidance as necessary or appropriate to implement this paragraph.

MASS. GEN. LAWS. ch. 62, § 4(b) (2024).

¹⁰⁵ MASS. CONST. art. CXXI; MASS. GEN. LAWS ch. 62, § 4(d) (2024) (as amended 2023 Mass. Acts c.28 § 28).

¹⁰⁶ MASS. GEN. LAWS ch. 62, § 2(a) (2024).

¹⁰⁷ *Id.*

¹⁰⁸ MASS. GEN. LAWS ch. 62, §2(b)(1) (2024); *see also Massachusetts Gross, Adjusted Gross, and Taxable Income* MASS DEP'T OF REVENUE, (Dec. 12, 2024), <https://www.mass.gov/info-details/massachusetts-gross-adjusted-gross-and-taxable-income>.

¹⁰⁹ MASS. GEN. LAWS ch. 62, § 2(b)(3) (2024).

¹¹⁰ *Id.* § 2.

twelve percent.¹¹¹ Part C income is generally taxed at five percent.¹¹² Part B income is taxed at five percent.¹¹³ To determine whether a taxpayer is subject to the Amendment, the taxable income from Parts A, B, and C is added together. Any amount more than one million dollars is taxed at an additional four percent.¹¹⁴

Any deductions or exclusions already permitted by Massachusetts law are allowed to decrease income to determine taxable income under the surtax. The Massachusetts government, under their FAQ provides guidance, stating:

Where income is otherwise included in a taxpayer's taxable income, it is included for purposes of determining the 4% surtax. Likewise, income that is otherwise excluded from a taxpayer's taxable income is excluded when determining the 4% surtax. Income that is exempt from Massachusetts tax, such as interest on federal and Massachusetts obligations, is not included in the 4% surtax determination.¹¹⁵

Therefore, certain deductions are already included. For example, per Massachusetts statute, the excludable value from the sale of a principal residence under IRC § 121 is excludable

¹¹¹ *Id.* § 4(a).

¹¹² See *id.* § 4(c); MASS. DEP'T OF REVENUE, *Personal Income Tax for Residents*, MASS.GOV, <https://www.mass.gov/guides/personal-income-tax-for-residents> (last visited Sep. 26, 2025).

¹¹³ MASS. GEN. LAWS ch. 62, §4(b)(2024).

¹¹⁴ *Id.* § 4(d); see also 4% Surtax on Taxable Income: The Basics, MASS. DEP'T OF REVENUE (Jan. 26, 2024), <https://www.mass.gov/news/4-surtax-on-taxable-income-the-basics#:~:text=What%20is%20the%204%25%20surtax,for%20the%20tax%20year%202023> see generally *Schedule 4% Surtax*, MASS. DEP'T OF REVENUE (2024), <https://www.mass.gov/doc/2024-schedule-4-surtax/download> [hereinafter *Surtax*] (tax form used to calculate the amount taxed under the surtax)

¹¹⁵ 4% Surtax on Taxable Income Over \$1,000,000, MASS. DEP'T OF REVENUE, [https://www.mass.gov/info-details/4-surtax-on-taxable-income-over-1000000#which-taxpayers-are-subject-to-the-4%-surtax?-](https://www.mass.gov/info-details/4-surtax-on-taxable-income-over-1000000#which-taxpayers-are-subject-to-the-4%-surtax?) (last visited Apr. 28, 2025).

from the calculation of Massachusetts gross income.¹¹⁶ Consequently, this suggests that either \$250,000 or \$500,000 is excluded from the calculation of Massachusetts gross income and not considered for the surtax.¹¹⁷ Similarly, government pensions, which are generally excludable from tax, are still exempted from the calculation of the surtax, while most other retirement benefits, which are subject to tax in some way¹¹⁸

The surtax broadly applies to most groups of Massachusetts taxpayers, including married couples.¹¹⁹ Starting in 2024, married couples must generally begin filing their taxes jointly, and no preferential rate is given to them.¹²⁰ The tax also equally applies to residents and nonresidents alike.¹²¹ Besides individuals, the Massachusetts Department of Revenue (“DOR”) has clarified that other entities are subject to the tax, including trusts and estates, exempt trusts and unincorporated associations, and clubs and other organizations not engaged in business for profit.¹²²

¹¹⁶ MASS. GEN. LAWS ch. 62 § 2(a)(3)(B).

¹¹⁷ *Id. § 4(b)*; *Surtax*, *supra* note 114.

¹¹⁸ See *id.* § 2(a)(3)(C); *Surtax*, *supra* note 114; see also Tax Treatment of Non-Government Pensions in Massachusetts, MASS. DEP’T OF REVENUE, <https://www.mass.gov/info-details/tax-treatment-of-non-government-pensions-in-massachusetts> (Dec. 5, 2024) (stating, generally, that non-government pensions are taxable in MA).

¹¹⁹ See *Surtax*, *supra* note 114 (“There is no exception for such married couples that are subject to the 4% surtax based on their combined Massachusetts income”).

¹²⁰ MASS. GEN. LAWS ch. 62C § 6(a)(2) (2024).

¹²¹ *Surtax*, *supra* note 114

¹²² *Id.*

A. Sentiment Before The Bill Passed

The Amendment passed by a narrow margin of 52% to 48%.¹²³ Over the past sixty years, the state of Massachusetts has rejected implementing a graduated income tax on five occasions.¹²⁴ What changed? Robert Tannenwald, an expert closely following the Amendment's development, contributed its passage to four factors: (1) increased fundraising; (2) better organization from supporters; (3) a simpler worded bill; and (4) little public resistance until late in the cycle from prominent opposition members, like Republican Governor Charlie Baker.¹²⁵ A plethora of speculation and personal accounts attempt to shed light on Massachusetts' motivation to embrace higher taxes. The indifference of the local business community,¹²⁶ a

¹²³ Steve LeBlanc, *Massachusetts voters approve millionaire tax ballot question*, WBZ NEWS (Nov. 9, 2022, 6:23 PM), <https://www.cbsnews.com/boston/news/massachusetts-millionaire-tax-ballot-questions-election-results/>; Marc Fortier, *The Massachusetts Millionaire's Tax Passed. So what happens now?*, NBC 10 BOSTON (Nov. 10, 2022, 7:08 PM), <https://www.nbcboston.com/news/local/the-massachusetts-millionaires-tax-passed-so-what-happens-now/2889705/>.

¹²⁴ Robert Tannenwald, *Why Did Massachusetts's Millionaire Tax Pass (Barely)?*, 107 TAX NOTES STATE, 529, 529 (2023), [hereinafter *Why Did It Pass?*].

¹²⁵ *Id.*

¹²⁶ Shirley Leung & Larry Edelman, 'They just didn't care': *Why More Business Leaders Didn't Fight the Millionaires Tax*, BOS. GLOBE (Nov. 11, 2022, 11:16 AM), <https://www.bostonglobe.com/2022/11/11/business/they-just-didnt-care-why-more-business-leaders-didnt-fight-millionaires-tax/?event=event12>.

failure from local pollsters,¹²⁷ and campaign marketing blunders,¹²⁸ have been cited as potential reasons for the Amendment's passage. Robert Tannenwald believes the passage was a response to hard-line Republican policies in the greater political sphere, combined with a simple truth—Massachusetts residents were simply ready to make the Amendment a reality.¹²⁹ Opposition was still fierce against the Amendment.¹³⁰ The Pioneer Institute published a thorough 263-page critique of the Amendment, echoing many of the arguments discussed by academics on millionaire taxes.¹³¹ The report points to Connecticut, one of the wealthiest states in the nation that is currently experiencing “stagnant” corporate growth.¹³² The report lays the blame for Connecticut’s economic struggles at the feet of their tax code, pointing to high taxes as the root cause for slow economic growth, corporate “exodus,” and Connecticut residents out-migration.¹³³

¹²⁷ Brian Wynne, *Pollsters Should Look Hard at Their Question 1 Misfire*, BOS. GLOBE (Dec. 2, 2022, 3:00 AM), <https://www.bostonglobe.com/2022/12/02/opinion/pollsters-should-look-hard-their-question-1-misfire/>.

¹²⁸ Yvonne Abraham, *The Face of Opposition to Question 1 Admits Proposed Tax Wouldn’t Hurt Him Much: ‘I’m Not Struggling,’* BOS. GLOBE (Oct. 29, 2022, 3:27 PM), (noting that a local cranberry farmer who was framed as a potential victim of the Amendment later publicly admitted he wouldn’t be harmed very much).

¹²⁹ *Why Did it Pass?*, *supra* note 124, at 530; Marcela Garcia, *Why the Rich Should Pay More in Taxes*, BOS. GLOBE (May 8, 2021, 1:33 PM), <https://www.bostonglobe.com/2021/05/28/opinion/why-rich-should-pay-more/>.

¹³⁰ Jon Chesto, *Millions Flow into ‘Millionaires Tax’ Campaigns as Opponents Launch TV Ad Campaign*, BOS. GLOBE (Sept. 12, 2022, 8:01 AM), <https://www.bostonglobe.com/2022/09/12/business/millions-flow-into-millionaires-tax-campaigns-opponents-launch-tv-ad-campaign/>.

¹³¹ See Sullivan, *supra* note 65, at 21.

¹³² See *id.*

¹³³ *Id.* at 28.

In their report, the Pioneer Institute argues that the tax not only targets the most affluent but also broadly targets homeowners, small-business owners, and retirees.¹³⁴ They assert that individuals who sell their homes and small businesses, along with the upper-middle class and retirees, are pushed into the Amendments' scope, along with the extremely affluent.¹³⁵ The Pioneer Institute also argues that higher rates would slow investment and hurt small businesses, as pass-through businesses are taxed at the personal level.¹³⁶

Finally, the Pioneer Institute argues that the rise of remote work "will accelerate tax flight" given that worker productivity at home is nearly equivalent to that in an office setting.¹³⁷ Furthermore, they posit that remote work is becoming a more acceptable method of work, especially in the northeast.¹³⁸ This increases the risk that workers will move nearby to New Hampshire, which just lowered its taxes, or to other states with tax incentives, to escape increased tax liability while maintaining close geographical ties to Massachusetts.¹³⁹

¹³⁴ *Id.* at 100-120.

¹³⁵ *Id.* at 99-107.

¹³⁶ *Id.* at 86.

¹³⁷ See Sullivan, *supra* note 65, at 155-64.

¹³⁸ See *id.*

¹³⁹ *Id.* at 168-81; Nik DeCosta-Klipa, *The Massachusetts Millionaire's Tax Is Back, and It's a Bit Different This Time*, BOSTON.COM (May 5, 2021), <https://www.boston.com/news/politics/2021/05/05/massachusetts-millionaires-tax-ballot-question-2022/>; Michael Lucci, *Millionaire's Tax Take Two: Massachusetts Legislature Moves Forward Millionaires Tax*, TAX FOUND. (June 24, 2019), <https://taxfoundation.org/blog/massachusetts-millionaire-tax/#:~:text=Millionaires%20Tax%20Take%20Two%3A%20Massachusetts%20legislature%20moves%20forward%20Millionaires%20Tax,->
[June%202019&text=A%20joint%20constitutional%20convention%20of,annual%20income%20beyond](https://www.boston.com/news/politics/2021/05/05/massachusetts-millionaires-tax-ballot-question-2022/)

Research from The Center for State Policy Analysis (CSPA) at Tufts University painted a different picture. CSPA published two reports in 2022 and found that out-migration will likely be small, but that tax avoidance could be widespread. Taken together, the amount of revenue reduced by tax flight and tax avoidance could decrease by thirty-five percent. Without any flight or avoidance, the estimated revenue collected was \$2.1 billion.¹⁴⁰

B. The After-Effects

In the first year, the surtax generated over \$2.2 billion in revenue, surpassing expectations.¹⁴¹ Some experts speculate that this sharp increase in revenue stems from a large increase in the population of individuals subject to the tax, akin to California's revenue from their first millionaire tax in 2013.¹⁴² According to IRS data, the wealth concentrated in the top 1% of taxpayers in Massachusetts grew by twenty-seven percent in 2023, which may have

[%20%241%20million.](#); Jeff Jacoby, *Millionaire's Tax Is Unwise and Unworthy*, Bos. GLOBE (July 27, 2022 3:00 AM), <https://www.bostonglobe.com/2022/07/27/opinion/millionaires-tax-is-unwise-unworthy/>; Kari Jahnsen, *Millionaire's Tax Would Revive 'Taxachusetts,'* TAX FOUND. (June 13, 2017) (“[I]t is sound to assume that [the proposed surtax] will not spur an immediate exodus from Boston townhomes . . . In the medium term it becomes far more likely that the wealthy will relocate to lower-cost areas if the income tax becomes too burdensome.”).

¹⁴⁰ Ctr. for State Pol'y Analysis, *Evaluating the Massachusetts Millionaires Tax* (Jan. 2022), (https://cspa.tufts.edu/sites/g/files/lrezom361/files/2022-01/cSPA_Evaluating_MA_Millionaires_Tax.pdf).

¹⁴¹ Anjali Huynh, *Massachusetts 'Millionaires Tax' Generated \$2.2 Billion in First Year, But Budget Gap Remains*, BOS. GLOBE (Aug. 9, 2024), <https://www.bostonglobe.com/2024/08/09.metro/massachusetts-budget-millionaires-tax-revenue-fiscal-year-2024/>.

¹⁴² Robert Tannewald, *Wait Until Next Year: The Red Sox and the Millionaire's Tax*, 115 TAX NOTES STATE 7, 8 (2025).

contributed to an expansion of the revenue pool.¹⁴³ More interesting, when the bill was passed, Massachusetts fell from 34th to 46th on the Tax Foundation's state tax competitiveness index.¹⁴⁴ The money raised from the tax is specifically allocated to education and transportation,¹⁴⁵ and Massachusetts quickly assigned funding to new programs. In the fiscal years 2024 and 2025 combined, over \$1 billion dollars was allocated to the construction and repair of public transportation and infrastructure across the state.¹⁴⁶ The use of some public transportation is now completely free,¹⁴⁷ and some public transit systems have seen large increases in ridership.¹⁴⁸

¹⁴³ *Id.* at 9 n.16.

¹⁴⁴ Compare Janelle Fritts & Jared Walczak, *2023 State Business Tax Climate Index*, TAX FOUND. <https://files.taxfoundation.org/20221025125311/2023-State-Business-Tax-Climate-Index1.pdf> (Apr. 29, 2025) (ranking Mass. 34), with Jared Walczak et al., *2024 State Business Tax Climate Index*, TAX FOUND. (Oct. 24, 2023), <https://taxfoundation.org/research/all/state/2024-state-business-tax-climate-index/> (ranking Mass. 46); *see also* Andrey Yushkov et al., *2025 State Tax Competitiveness Index*, TAX FOUND. (Oct. 31, 2024), <https://taxfoundation.org/research/all/state/2025-state-tax-competitiveness-index/> (ranking Mass. 41).

¹⁴⁵ See *supra* text accompanying note 103.

¹⁴⁶ *Fair Share Amendment — FY24 Final Budget Update*, FAIR SHARE FOR MASS., https://www.fairsharema.com/_files/ugd/8c7649_fa364f6a147545d7bb7235d35f56a3e2.pdf (last visited Apr. 29, 2025); *Fair Share Amendment — FY25 Final Budget Update*, FAIR SHARE FOR MASS., https://www.fairsharema.com/_files/ugd/8c7649_97f21a27bdcf410283d04cad5656dde2.pdf (last visited Apr. 29, 2025).

¹⁴⁷ Jason Lewis & James J. O'Day, *Fair Share Amendment Is Working as Intended*, COMMONWEALTH BEACON, (Sept. 3, 2024), <https://commonwealthbeacon.org/opinion/fair-share-amendment-is-working-as-intended/>.

¹⁴⁸ Dan Medeiros, *Report: SRTA Buses See Big Gains in Ridership Since Going Fare-Free, and Service Is Faster*, HERALD NEWS (Jan. 13, 2025, at 04:08 ET), <https://www.heraldnews.com/story/news/2025/01/13/srta-sees-gains-in-bus-ridership-on-time-service-since-going-free/77659015007/>.

Public schools have similarly seen an increase in support.¹⁴⁹ Nearly \$150 million has been allocated to construction and green energy infrastructure for public schools.¹⁵⁰ Tens of millions have been allocated to tuition assistance programs, free community college for anyone over the age of twenty-five, and salary increases for educators.¹⁵¹

The Amendment achieved its revenue goals. By raising \$2.2 billion in revenue, the Amendment demonstrated that there is a pool of untapped revenue accessible to the Massachusetts state government to fund state programs such as public education and transportation. However, many questions and considerations remain regarding tax flight and the demographic of the taxable base, as evidenced by recent reports and conversations occurring in Massachusetts.

Several groups have conducted research on taxpayer migration since the Amendment passed, arriving at contradictory conclusions.¹⁵² According to Massachusetts Budget and Policy Center (the “Policy Center”), there has not been an exodus from the state by the wealthy.¹⁵³ The Policy Center acknowledges that out-migration is occurring, but argues that the cause cannot

¹⁴⁹ See FAIR SHARE FOR MASS., *supra* note 146.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Kurt Wise, *Data Do Not Show Massachusetts Facing a Crisis of Outmigration*, MASS. BUDGET & POL’Y. CTR. (Sept. 17, 2024), <https://massbudget.org/2024/09/17/outmigration-facts/>; Aidan Enright, *Mass Out-Migration: Outflux of Wealth and Residents Continues*, PIONEER INST., White Paper No. 27 (Nov. 2024), <https://pioneerinstitute.org/wp-content/uploads/PNR-Mass-Out-Migration-Paper-1192024.pdf>; Omar Ocampo, *New Data Shows Wealth Expands After Higher State Taxes on High-Income Earners*, INST. FOR POL’Y STUDIES (Apr. 28, 2025), <https://ips-dc.org/report-wealth-expands-after-higher-state-taxes-on-high-income-earners/>.

¹⁵³ Wise, *supra* note 152.

accurately be determined.¹⁵⁴ The Policy Center states that only one in six of out-migrants had incomes greater than \$200 thousand.¹⁵⁵ Concluding that, “[b]ased on the current data, however, calls to cut taxes for very high-income households, the ultrawealthy, and big corporations are misguided.”¹⁵⁶

The Pioneer Institute conducted its own research on the first effects of the Amendment.¹⁵⁷ The report argues for a holistic analysis of economic competitiveness and warns that if the state is not careful with its tax policy, its economic competitiveness will weaken.¹⁵⁸ The Pioneer Institute highlights taxpayers’ out-migration with \$200 thousand or more in income, along with residents aged 26-34, as an indication of a slipping competitive edge.¹⁵⁹ The report points to other states that have lost their high earners to lower-income tax states as evidence that Massachusetts will lose top economic talent.¹⁶⁰

Anecdotal stories and extrapolations by private groups are prevalent in the current discussion. Ex-Patriots Coach Bill Belichick made headlines after criticizing the surtax, claiming

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Enright, *supra* note 152.

¹⁵⁸ *Id.* at 5 (“In the case of Massachusetts, the confluence of several recent tax-policy changes and a lack of affordability, together with unforeseen social phenomena, are leading to a sharp increase in the number of taxpayers leaving the state.”).

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 16.

it hurt the New England Patriots' ability to attract talent.¹⁶¹ In response, Mike Connolly told Belichick to "leave the tax policy to the experts."¹⁶² A survey of local accounts found that most tax professionals have at least one client who has left Massachusetts to avoid taxes.¹⁶³ A recent report found that the number of individuals with one million dollars in adjusted gross income in Massachusetts increased 36% between 2018 and 2022, totaling around twenty-seven thousand taxpayers.¹⁶⁴ Further, the report found that the number of millionaires by net worth increased by 38.6% between 2022 and 2024, currently 612,109 individuals.¹⁶⁵ Some millionaire tax proponents were quick to point out that this is evidence that millionaires are not leaving and

¹⁶¹ Michael P. Norton, *'It's Taxachusetts': Belichick Fuels Debate Over Massachusetts Millionaires tax*, NBC 10 Bos. (Aug. 28, 2024, 3:16 P.M.), <https://www.nbcboston.com/news/local/its-taxachusetts-belichick-fuels-debate-over-massachusetts-millionaires-tax/3472420/>.

¹⁶² *Lawmaker Hits Back At Belichick's Claim That 'Taxachusetts' Keeps Players Away From Patriots*, NBC 10 Bos. (Sept. 6, 2024, 9:03 A.M.), <https://www.nbcboston.com/news/sports/lawmaker-hits-back-at-belichicks-claim-that-taxachusetts-keeps-players-away-from-patriots/3480232/>.

¹⁶³ Jon Chesto, *Are Millionaires Leaving Massachusetts? Survey (by Their Accountants) Says Yes*, Bos. GLOBE (Jun. 21, 2024), <https://www.bostonglobe.com/2024/06/21/business/millionaires-tax-survey-accountants/>.

¹⁶⁴ Ocampo, *supra* note 152.

¹⁶⁵ *Id.*

instead staying in Massachusetts.¹⁶⁶ Others argue that people are fleeing Massachusetts not only because of taxes, but also due to the high cost of living.¹⁶⁷

Questions and concerns regarding the scope of the surtax are well-founded. Because the Amendment applies a surtax to all income over a million dollars, effectively raising all other tax rates in Massachusetts by four percent, the tax base includes more than those making one million dollars a year in wages. Those falling under the Amendment must pay regardless of whether they are one-time millionaires or if they make that money every year, with no distinctions.¹⁶⁸ This includes retirees, small-business owners selling assets during the taxable year, and those selling their homes.¹⁶⁹ There is no data to determine which groups of taxpayers are falling under this tax, or how many of them there are. As the report from the Institute for Policy Studies shows, the

¹⁶⁶ Michael P. Norton, *Amid Debate Over Mass. 'Millionaires Tax,' Report Finds the Number of Millionaires Here Has Surged*, BOST. GLOBE (Apr. 28, 2025, 12:41 P.M.),

<https://www.bostonglobe.com/2025/04/28/business/millionaires-massachusetts-tax/> (“This is further evidence that multimillionaires are not fleeing the state in response to the new tax — they are staying here, paying more in taxes, and enjoying the stronger transportation and public education systems that Fair Share dollars are funding,’ said Shanique Rodriguez . . . ”)..

¹⁶⁷ Jonathan Cohn, *Fear Not, the Millionaires Tax is Bearing Fruit*, BOST. GLOBE (Apr. 28, 2025, 2:30 A.M.), <https://www.bostonglobe.com/2025/04/28/opinion/letters-to-the-editor-mass-millionaires-tax/>. But see Chesto, *'This Is Really Good News for Us': People Are Still Leaving Massachusetts, But the Exodus Is Slowing Down*, BOST. GLOBE (Jan. 9, 2025), <https://www.bostonglobe.com/2025/01/09/business/people-leaving-massachusetts-slowing-outmigration/> (reporting that outmigration is actually slowing down).

¹⁶⁸ See *supra* text accompanying notes 100, 102. A sharp debate exists on the prevalence of one-time millionaires. Compare Phineas Baxandall, *The Myth of the One-Year Middle Class Millionaire*, MASS. BUDGET AND POL’Y CTR. (Oct. 25, 2022) with Sullivan, *supra* note 65, at 49-51.

¹⁶⁹ See *supra* Section II (discussing scope of Massachusetts millionaire tax).

number of millionaires in Massachusetts has been growing quickly, even before the passage of the surtax.¹⁷⁰

This significant increase in the tax base raises concerns regarding the distributional impact of the millionaire tax. The surtax, established at one million dollars in 2023, following the considerable rise in the number of millionaires in Massachusetts, and prior to the availability of relevant data, underscores a lack of understanding regarding which groups are most affected by this tax. The Amendment is adjusted for inflation, beginning with one million dollars in 2023.¹⁷¹ However, the enactment of the millionaire tax followed several years of the highest inflation the United States has seen in the 21st century.¹⁷² Many proponents of millionaire taxes believe that the richest should pay more in taxes.¹⁷³ Since 1990, inflation has increased the value of the dollar

¹⁷⁰ Ocampo, *supra* note 152.

¹⁷¹ See MASS. CONST. art. CXXI.

¹⁷² See generally *A Visual Guide to Inflation from 2020 through 2023*, CONG. BUDGET OFF. (Sept. 2024), <https://www.cbo.gov/system/files/2024-09/60480-Inflation.pdf#page=31.00>.

¹⁷³ Omar Ocampo, *Want More Equality of Opportunity and Social Justice? Copy Massachusetts' Millionaire's Tax*, INEQUALITY.ORG, (Oct. 29, 2024) <https://inequality.org/article/massachusetts-millionaires-tax/>. See e.g., Rep. Grayson Lookner & Rep. Cheryl Golek, *Opinion: A Lobsterman Should Not Pay Higher Taxes Than A Wall Street Speculator*, SUN J. (April Apr. 9, 2025), <https://www.sunjournal.com/2025/04/09/opinion-a-lobsterman-should-not-pay-higher-taxes-than-a-wall-street-speculator/>; Amanda Vinicky, *Illinois Voters Voiced Support For A Theoretical Tax on Millionaires' Incomes. What Effect Will It Actually Have?*, WTTW (Nov. 6, 6 2024) <https://news.wttw.com/2024/11/06/illinois-voters-voiced-support-theoretical-tax-millionaires-incomes-what-effect-will-it>; Omar Ocampo, *Want More Equality of Opportunity and Social Justice? Copy Massachusetts' Millionaire's Tax*, INEQUALITY.ORG, (Oct. 29, 2024) <https://inequality.org/article/massachusetts-millionaires-tax/>.

by 144.1%, and since 2000, by 85%.¹⁷⁴ More people than ever are millionaires.¹⁷⁵ In Boston, a six-figure salary, a previously revered milestone for many professionals, now possesses the purchasing power equivalent to that of \$50,000.00.¹⁷⁶ Our country has entered an era characterized by the emergence of super billionaires.¹⁷⁷ Extreme wealth has escalated to levels that are nearly inconceivable.¹⁷⁸ Although earning one million dollars annually in wages still places a taxpayer within the top one percent, this Article contends that it is crucial to target a tax base intentionally, and this cannot happen without reliable access to relevant state data.¹⁷⁹

Other recent developments, such as the rising home prices, raise similar concerns. The average price of a home in Massachusetts since January of 2020 has increased from \$438,150 to

¹⁷⁴ See CPI Inflation Calculator, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm; see *Historical Inflation Rates: 1914-2025*, U.S. INFLATION CALCULATOR <https://www.usinflationcalculator.com/inflation/historical-inflation-rates/> (last visited Apr. 29, 2025) (calculating the value of a dollar as of Jan 2025 compared to Jan 1990 and 2000).

¹⁷⁵ Grant Welker, *Boston's Millionaire Count Has Grown 55% In A Decade. Here's How It Compares.*, BOS. BUS. J. (Mar. 31, 2024), <https://www.bizjournals.com/boston/news/2024/03/31/how-boston-s-millionaire-count-has-grown.html>; Robert Frank, *The U.S. Added 500,000 New Millionaires Last Year As AI Fueled Markets*, CNBC (June 10 2024, 1:07 PM), <https://www.cnbc.com/2024/06/07/us-millionaire-population.html>.

¹⁷⁶ Jaclyn DeJohn, *What \$100K Is Worth in the Largest U.S. Cities – 2024 Study*, SMARTASSET (Feb. 20, 2024, 7:00 ET), <https://smartasset.com/data-studies/100k-202>.

¹⁷⁷ Katherine Clarke, *Meet the World's 24 Superbillionaires*, WALL ST. J. (Feb. 25, 2025, 9:00 ET), <https://www.wsj.com/real-estate/meet-superbillionaires-worlds-ultra-rich-cb7a797c>.

¹⁷⁸ See, e.g., *Profile: Elon Musk*, FORBES, <https://www.forbes.com/profile/elon-musk/> (last visited Apr. 29, 2025) (Elon Musk's net worth is currently 392.1 billion dollars).

¹⁷⁹ See generally Julie Kagan, *How Much Income Puts You in the Top 1%, 5%, 10%*, INVESTOPEDIA (Nov. 7, 2024), <https://www.investopedia.com/personal-finance/how-much-income-puts-you-top-1-5-10/>.

\$650,206, potentially placing more taxpayers in the surtax's range.¹⁸⁰ Further, if a taxpayer recognizes more than one million dollars a year in income, this money is also taxed federally. The current TCJA provisions prevent unlimited SALT deductions, increasing the burden of any high state tax. An outstanding question of how much influence this has on state taxpayers remains, but early reports show it does affect migratory patterns.¹⁸¹

Significantly, one group remains unaffected: the affluent who do not recognize income. As discussed above, tax avoidance strategies for many wealthy individuals take advantage of the realization requirement and avoid income tax altogether.¹⁸² While Americans generally support raising taxes on these groups, raising income taxes may not target these individuals. Whether a resident will completely leave the state in the traditional tax flight sense is hotly debated. As it stands today, people are leaving Massachusetts, but it is difficult to pin down a singular reason as to why these residents are moving to other states.¹⁸³ Contradictory studies by various researchers make it difficult to determine who is leaving and why. Further, an absence of data makes it difficult to engage in nonspeculative discourse. Despite these uncertainties, one thing is clear: the financial implications of the Amendment are significant. Revenue from the millionaire tax surpassed expectations, and this money has been used in successful education and transportation programs. To continue these programs, revenue from the tax must be consistent.

¹⁸⁰ See *Massachusetts Housing Market Overview*, ZILLOW, <https://www.zillow.com/home-values/26/ma/> (last visited Apr. 29, 2025).

¹⁸¹ See Rauh & Shyu, *supra* note 70, at 31.

¹⁸² See *supra* Section I.C.ii.

¹⁸³ See Kurt Wise, *Data Do Not Show Massachusetts Facing a Crisis of Outmigration*, MASS. BUDGET & POL'Y CTR. (Sept. 17, 2024), <https://massbudget.org/2024/09/17/outmigration-facts/>.

Better data can help determine the reliability of future funding, and if the data indicates there are no negative side effects, it could even be allocated to reduce the strain on other areas of the budget.

III. MOVING FORWARD

In order to ascertain whether the Amendment results in tax flight or economic harm, some commentators contend that the sole course of action is to wait and see.¹⁸⁴ However, this Article contends that Massachusetts can enact measures now to determine the validity of these concerns or to alleviate any unintended negative repercussions. Based on that data, the discourse could be resolved, allowing Massachusetts and other states to progress without speculation obstructing the discourse. To initiate this process, the first step must involve the systematic collection and analysis of state tax data.

A. The need for better data

Much of the discussion regarding the Amendment stems from the debate over whether the tax targets the wealthy and whether it encourages those impacted by the tax to leave.¹⁸⁵ As it stands, the Amendment applies to income over one million dollars in a taxable year, regardless of where that income comes from. This has raised concerns that the tax does not just target the

¹⁸⁴ Larry Edelman, *Let's Just Shut Up About the 'Millionaires Tax' for a While*, *Bos. GLOBE* (May 23, 2024, at 5:50 AM), <https://www.bostonglobe.com/2024/05/23/business/massachusetts-millionaires-tax-revenues/>; Robert Tannenwald, *Wait Until Next Year: The Red Sox and the Millionaire's Tax*, 115 TAX NOTES STATE 7, 8 (2025).

¹⁸⁵ See discussion *supra* Part II.

most affluent but also those who are realizing their life's wealth in a single event, such as small business owners, retirees, and homeowners who are selling their assets after years of work.¹⁸⁶ To properly assess the tax, the Massachusetts state government should compile data and release it to the public so that an objective analysis can be conducted on which demographics are affected by the tax, and the migratory behaviors of those groups. Once this objective information is gathered, appropriate follow-up action can be taken.

The best entity to collect this type of data is the Massachusetts government, specifically the Massachusetts Department of Revenue (DOR). Many studies on physical tax flight use small sample sizes, take inferences from administrative data, or only look at specific taxes or occupations.¹⁸⁷ Data published for use by academics originating directly from the state would be the most beneficial. Some studies do use state data to draw conclusions, but are limited in their conclusions and scope.¹⁸⁸ For example, the Rauh and Shyu study took California administrative tax data to determine whether state out-migration increased after their millionaire tax was imposed.¹⁸⁹ However, criticism has been drawn against this study because the data cannot account for other factors that influence a taxpayer's migratory decision.¹⁹⁰ Further, no analysis was done on the type of people affected by the tax and what occupations they are in.¹⁹¹ Census data could be used to determine migration and occupation, but due to the long time frame

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* Section I.C.i.

¹⁸⁸ Rauh & Shyu, *supra* note 70.

¹⁸⁹ See *id.*

¹⁹⁰ Mazerov, *supra* note 65, at 8-11.

¹⁹¹ Rauh & Shyu, *supra* note 70.

between census reports, insights from the data would either come too late or be influenced broadly by other life factors. Further, for the purposes of migration, the census survey does not list “taxes” as one of the reasons why a person taxpayer might leave a state.¹⁹²

Massachusetts is uniquely positioned to gather data on individuals who file personal income taxes in the state. Each year, residents earning income in Massachusetts must submit a tax return. Massachusetts likely already has the needed data in its records from previously filed tax returns and information from taxpayers’ federal tax returns.¹⁹³ Even if they do not, asking questions of taxpayers on their tax returns is the perfect opportunity to survey taxpayers to get a better sense of who is paying the tax and to assess where the taxable personal income originates. The potential data sample size could be the entire Massachusetts taxpayer base, as the great majority of citizens in Massachusetts are required to file a state tax return. Surveying the population in this way would reveal trends among the current population that have been speculated on. Releasing the data gathered from such a large and representative pool of taxpayers would allow independent researchers, and most importantly, the voters, access to pertinent data on any future referendums.

To provide academics and voters with the objective data needed to adequately evaluate the Amendment, four key pieces of information are needed, most of which are already being collected indirectly. First, the taxpayer’s occupation is needed to determine which occupations are most targeted by the surtax. Those who are self-employed are required to report their

¹⁹² See Edwards, *supra* note 66.

¹⁹³ See IRS, *Federal Information Sharing*, <https://www.irs.gov/government-entities/governmental-liaisons/federal-information-sharing> (last accessed May 13, 2025).

occupation on their Massachusetts Schedule C.¹⁹⁴ Those who are employed should be asked about their occupation on their tax returns, or Massachusetts can request any employment information available from the IRS through their information sharing initiatives.¹⁹⁵ Second, whether the taxpayer fell under the scope of the Amendment in any of the last five years to determine if they are a “one-time” millionaire. Determining the number of one-time taxpayers could help identify the tax effects on retirees and those selling their homes or businesses. Massachusetts should have this information readily accessible by reviewing who filed a surtax form in previous tax years. The third piece of information that is needed is the number of taxpayers who pay the surtax have moved out of Massachusetts. This can be determined from the Massachusetts tax Form 1-NR/PY¹⁹⁶ which is used specifically for taxpayers that are either nonresidents or have moved out of or into Massachusetts during the tax year. Fourth, data regarding the percentages of non-resident taxpayers that carry the tax burden should be made publicly accessible to determine if Massachusetts residents are the group most affected by the tax.

In addition to disclosing the aforementioned information, an addition to tax Form 1-NR/PY should be made. Appended to the form should be a survey inquiring why the former resident left Massachusetts. Simply asking people why they moved could assist in determining

¹⁹⁴ MASS. DEP’T OF REVENUE, *Schedule C Massachusetts Profit or Loss from Business*, <https://www.mass.gov/doc/2024-schedule-c-massachusetts-profit-or-loss-from-business/download> (last accessed May 13, 2025).

¹⁹⁵ See IRS *supra* note 193.

¹⁹⁶ MASS. DEP’T OF REVENUE, *Form 1-NR/PY*, <https://www.mass.gov/doc/2024-form-1-nrpy-massachusetts-nonresidentpart-year-tax-return/download> (last accessed May 13, 2025).

the factors that contributed to their migratory decision. A substantial body of work and research has been conducted to predict and extrapolate how taxes affect migratory patterns. By asking this question, we can shed light on the reasons residents are departing from Massachusetts directly from the source. While some data may have been lost from the initial tax years, any current data could help settle this issue. This survey should consist of an open-ended question, allowing taxpayers to communicate all the relevant factors that influenced their decisions to move. To ensure honest feedback, it is essential to emphasize that responses will remain confidential and cannot be held against them. Any requested survey must be kept anonymous and distinct from a taxpayer's other forms and schedules, ensuring that the responses are not used as evidence in tax proceedings.

Research has shown that transparency from government institutions can increase taxpayer morale.¹⁹⁷ Boosting taxpayer morale can lead to improved compliance and greater satisfaction with governmental institutions.¹⁹⁸ In Massachusetts, collecting and publishing data on the surtax could lead to an increase in Massachusetts taxpayer morale, potentially increasing revenues and reducing avoidance, a particularly challenging problem to solve at the state level.¹⁹⁹ The debate

¹⁹⁷ Christian Daude et al., *What Drives Tax Morale?* 20-23 (OECD, Working Paper No. 315, 2012) (summarizing research and concluding in part that taxpayer morale is influenced by government transparency); *see* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1463-70 (2020) (arguing that FOIA requests and ease of access to government records is crucial to effective democracies); Gordana Ilic Popov, *Tax Culture: A Big Step toward Voluntary Tax Collection*, 13 IUSTINIANUS PRIMUS L. REV. 1, 9 (2022) (arguing that transparency in government is crucial in maintaining a healthy “tax culture” which in turns helps collect revenues).

¹⁹⁸ *See e.g.*, Kirsty Unger, *Ethics Codes and Taxpayer Charters: Increasing Tax Morale to Increase Tax Compliance*, 12 EJOURNAL OF TAX RSCH. 483, 484 (2014).

¹⁹⁹ *See supra* section II.B.ii.

around millionaire taxes is largely driven by unwarranted uncertainty rather than evidence-based arguments.

The importance of objective data extends beyond the need for assessing the distributional impact at a scholarly level. At the federal level, Congress has access to information from the Joint Committee on Taxation, the Joint Committee on Taxation, the Congressional Budget Office, and the Treasury Department's Office of Tax Analysis for guidance on drafting tax legislation.²⁰⁰ Instead of the Massachusetts legislature drafting an easily modifiable millionaire tax statute, the issue has been placed in front of the voters due to the Massachusetts millionaire surtax being enshrined in the state constitution.²⁰¹ Therefore, part of the legislature's drafting power has been limited, as well as the commissioner's discretion to promulgate rules per the Amendment.²⁰² The Massachusetts voter has been directly involved in conversations regarding the scope and rates of these taxes, and significant effort will need to be taken to educate the voter base if any future edits are to be made to the surtax.

Once objective data has been collected by the Massachusetts DOR, meaningful discussions can begin. This Article does not advocate for taxing any specific group more than others; instead, this Article offers several recommendations for moving forward based on the anticipated

²⁰⁰ McMahon, *supra* note 24, at 24-25.

²⁰¹ MASS. CONST. art. CXXI; *Massachusetts Question 1, Tax on Income Above \$1 Million for Education and Transportation Amendment* (2022), BALLOTPEDIA, [https://ballotpedia.org/Massachusetts_Question_1,_Tax_on_Income_Above_%241_Million_for_Education_and_Transportation_Amendment_\(2022\)](https://ballotpedia.org/Massachusetts_Question_1,_Tax_on_Income_Above_%241_Million_for_Education_and_Transportation_Amendment_(2022)) (last visited Oct. 11, 2025).

²⁰² Potential constitutional difficulties surrounding efforts to adjust the surtax are outside the scope of this article.

findings from our statistical analysis: (1) implement exclusions on the four percent surtax; (2) modify the tax brackets; and (3) either increase the tax or maintain the current rate.

B. Adjusting the income subject to the 4% increase

i. Excluding certain transactions from taxation

If data indicates that specific groups, like homeowners, retirees, and small business owners, are being disproportionately impacted, the scope of the tax might be modified to mitigate the effects on these groups. Massachusetts could restrict the transactions considered when determining a taxpayer's obligation to pay the surtax. For example, in 2021 Washington state signed a 7% capital gains tax into law on capital gains over \$250,000.²⁰³ The provision excludes any profits from family-owned small businesses, retirement accounts, and profits from the sale of real estate.²⁰⁴ While this tax achieves vertical equity by ensuring that taxpayers with a greater ability to pay contribute more, its most significant flaw is its violation of horizontal equity. This occurs because it allows those with large, exempted capital gains to avoid taxes, while others with the same amount of unexempted gains are taxed.

Currently, the Amendment satisfies both vertical and horizontal equity as it applies to all individuals earning above a certain income threshold. However, Massachusetts could consider following the example set by Washington by limiting the scope of certain income sources, such as small businesses, retirement accounts, and income from real estate. By exempting these

²⁰³ Zhuoli Axelton et al., *Washington State's New Capital Gains Tax*, 101 TAX NOTES STATE 127, 127 (2021).

²⁰⁴ WASH. REV. CODE §§ 82.87.050, 82.87.060 & 82.87.070 (2024); *Quinn v. State*, 526 P.3d 1 (Wash. 2023), cert. denied, 144 S. Ct. 680 (2024); *see* Axelton et al., *supra* note 204.

categories, Massachusetts could alleviate the burden on those with a lower ability to pay because these groups typically account for all this income in a single year, whereas those receiving a large income consistently each year have more resources. Nevertheless, horizontal equity would be compromised as individuals in similar situations would receive tax benefits. This violation of horizontal equity could be acceptable, considering that society generally encourages individuals to retire, buy homes, and start small businesses. The Amendment currently excludes the federally excludable amount of income from the sale of a principal residence under § 121.²⁰⁵ Given that the average home price in Massachusetts currently exceeds \$600,000,²⁰⁶ entirely excluding the sale of a principal residence from the tax may be justified due to high housing costs that could push homeowners into higher brackets, despite the existing exclusion. Improved data will be essential for a clearer understanding.

A caution to consider when limiting income from real estate is the potential for implicit taxes, which may emerge if exclusions are applied too broadly. Implicit taxes refer to value increases for one asset resulting from a tax disadvantage imposed on others.²⁰⁷ Exempting the real estate sale tax may motivate individuals to purchase homes for investment purposes, potentially driving up prices in Massachusetts. This unintended negative consequence leads this Article to advocate for limiting the real estate exception to the sale of primary residences, as defined by the IRS.

²⁰⁵ See *supra* text accompanying note 116.

²⁰⁶ See *Massachusetts Housing Market*, ZILLOW, <https://www.zillow.com/home-values/26/ma/> (last visited Apr. 29, 2025).

²⁰⁷ David A. Weisbach, *Implications of Implicit Taxes*, 52 S.M.U. L. REV. 373, 374 (1999) (“[Implicit taxes] are simply price adjustments in response to a tax benefit or detriment”).

By limiting the sources of income targeted, Massachusetts could ensure that the wealthiest of Americans are being targeted instead of retirees, small business owners, or those who sell their homes. There are several mechanisms to exclude targeted sources of income. The first consists of adding up all Parts A, B, and C income, as a taxpayer does now, to determine whether they are subject to the four percent surtax. Then, the taxpayer would subtract all excludable transactions, which would consist of the sale of a home, the sale of a small business, or retirement income.²⁰⁸ Functionally, this would exclude these transactions from determining whether the taxpayer is subject to the surtax. Under this proposal, those transactions will still be subject to the normal tax rates associated with their character, for example, homes would still be taxed at the usual capital gain rate. Another method could place limits on the excludable amount based on the average home price in Massachusetts. For example, the amount of income excluded could be capped at twice the average home price in Massachusetts, potentially bringing the sale of more expensive homes back within the scope of the surtax.

However, an addition like this would undercut one of the Amendment's key advantages: its simplicity. Rather than applying a straightforward four percent surtax on all taxable income, excluding certain incomes would complicate calculations. The Massachusetts DOR must ensure that taxpayers substantiate their exclusions and that revenue remains intact. Nonetheless, depending on the data and the affected groups, this minor increase in complexity could lead to beneficial changes.

²⁰⁸ We use these three examples because they are common to the discussion. Excludable transactions could consist of a wide variety of items.

ii. Selectively taxing parts, A, B, or C

Similarly, for example, if the data shows that homeowners are disproportionately affected by the surtax, Massachusetts could limit the Amendment's scope to mere income from parts A, B, or C. By restricting the scope of the tax to a category such as part B, which generally includes only wages and other types of income, the tax would be applied solely to those earning over one million in wages or profits from their business that year, not to those selling their homes or other long-term capital assets for retirement purposes. While this approach would simplify calculations, it could also distort behavior, as wealthier individuals might shift income between parts A, B, and C to modify their taxable income. Similar to Washington, Massachusetts could restrict the surtax to the taxation of capital gains in Parts A and C, excluding wage income altogether.

C. Increasing the number of tax brackets

Progressive tax systems are designed to ensure that those with lower incomes pay less, while those with higher incomes pay more. The more a taxpayer earns, the greater the capacity the taxpayer has to pay.²⁰⁹ Higher incomes generally are taxed at higher rates.²¹⁰

²⁰⁹ See *Progressive Tax*, TAX FOUND., <https://taxfoundation.org/taxedu/glossary/progressive-tax/> (last visited May 5, 2025); *see also* Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J. L. & SOC. POL'Y 265 (2020). *But see* Walter J. Blum & Harry Kalven Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952).

²¹⁰ See *Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021*, TAX FOUND. (Aug. 24, 2021), <https://taxfoundation.org/data/all/federal/historical-income-tax-rates-brackets/> (However, middle income earners had higher tax rates from 1988 to 1990).

In contrast to a proportional tax, which taxes all individuals at the same rate, a progressive tax raises the amount owed based on one's financial capacity. Introducing more tax brackets can better represent this capacity. Currently, Massachusetts classifies taxpayers into two categories regarding the surtax: those who can pay less and those who can pay more—specifically, those exempt from the 4% surtax versus those subjected to it. Expanding the number of brackets could lead to a more equitable distribution of the higher income tax burden. Other regions with millionaire taxes typically utilize multiple brackets that rise alongside increasing personal income. This approach in Massachusetts could either lessen the tax load for those with lower financial capacity or enhance it for those with higher capacity. Any data released might indicate that some wealthy individuals could be justifiably taxed at a higher rate than their current level.

Examples of various tax brackets can be found in New York State, California, and New Jersey. For the years between 2024 and 2028, New York State has nine tax brackets for ordinary income, ranging between 4% for taxable income less than \$8,500 and 10.9% for income over \$25 million.²¹¹ New York also taxes income over \$215,400 and less than \$1,077,550 at 6.85%; income over \$1,077,550 and less than \$5 million at 9.65%; and income over \$ 25 million at 10.9%. (filing single, adjusted for inflation).²¹² California taxes ordinary personal income at 1% at \$10,756 or below and 12.3% on amounts over \$721,314. Other brackets include: 10.3% for income between \$360,659 and \$432,787; 11.3% for income between \$432,787 and \$721,314.²¹³ An additional percentage point is applied for income over one million.²¹⁴ New Jersey

²¹¹ [N.Y. TAX LAW § 601\(c\)\(1\)\(B\)\(vii\)](#) (2024).

²¹² *Id.*

²¹³ [CAL. REV. & TAX. CODE § 17041\(h\)](#).

²¹⁴ CAL. REV. & TAX. CODE § 17043.

implements tax rates from 1.4% for income under \$20,000 to 10.75% for income over one million.²¹⁵ This includes six other brackets, including 6.37% on income over \$150,000 and less than \$500,000; and 8.97% for income over \$500,000 and less than one million.²¹⁶

Introducing brackets for the surtax may help smooth the distributional impact. Several implementation options are available, which could be combined with those mentioned earlier in Part IV(B). One approach would be for Massachusetts to reduce the surtax rate while distributing the total amount over a larger taxable income range. For instance, a surtax of an extra 1% could apply to combined A, B, and C incomes between \$500,000 and \$750,000; an additional 2% for incomes from \$750,000 to \$1 million; 3% for incomes from \$1 million to \$5 million; and 4% for incomes between \$5 million and \$25 million. Additionally, exclusions and possible limitations might be incorporated into these calculations. Although these changes could add complexity to the tax code, they may expand the tax base, reduce behavioral distortions, and potentially increase revenue by taxing those with a greater capacity to pay at a higher rate percentage.²¹⁷

D. Raising or keeping the tax

The Amendment may be functioning as intended. The discussions above should not overlook the significant revenue generated by this tax and the positive projects it has funded. Increasing personal income taxes likely remains the most effective strategy for states to generate

²¹⁵ [N.J. REV. STAT. § 54A:2-1\(a\)\(7\)](#).

²¹⁶ *Id.*

²¹⁷ See e.g. Arpit Gupta, *Tax Increases and Behavioral Responses*, MANHATTAN INST. (Dec. 2, 2010), <https://manhattan.institute/article/tax-increases-and-behavioral-responses>; David R. Henderson, *The Case Against Higher Tax Rates*, HOOVER INST. (Jan. 23, 2019), <https://www.hoover.org/research/case-against-higher-tax-rates>.

revenue in a progressive way. Progressive alternatives to income tax are often new and untested, potentially jeopardizing states like Massachusetts that need substantial annual revenue. Other solutions, such as exit taxes, may also face similar constitutional hurdles. Raising income taxes provides the simplest, safest, and most responsive approach for state legislatures to tackle issues related to resource inequality within their jurisdictions. If data indicates that the tax does not negatively impact the middle class or other unintended groups, and the citizens of Massachusetts are pleased with the outcomes, then maintaining or possibly increasing the tax is advisable.

IV. CONCLUSION

This Article's proposals do not end the discussion. If the Massachusetts DOR presents compelling data tomorrow, stakeholders will still uncover areas of contention. However, since Massachusetts has just started implementing the tax, it is uniquely positioned to evaluate the impacts and set a benchmark for other regions. The significant revenues directed towards essential state programs are notable. To enable similar advantages for other areas, a defined approach must be established, which involves precisely identifying the target tax base and assessing the indirect costs related to the revenue increase. Only then can we settle the debate.

WOLF IN CARD CLOTHING: BEWARE THE CASHLESS SOCIETY

Jef I. Richards, Anna R. McAlister, & Aileen T. Torrance

ABSTRACT

Wording printed on every U.S. dollar issued by the United States of America (i.e. “This Note is Legal Tender for All Debts, Public and Private”) could reasonably lead you to believe it must be accepted to satisfy any debt. But more and more businesses refuse to accept any “cash” settlement, instead requiring credit/debit cards or other electronic payment. No national law prohibits “cashless” mandates. Moving toward a cashless society is seductive, promising a variety of benefits. But there is a dark side, including major threats to consumer well-being. We explore the potential implications – and dangers – wrought by forced abandonment of cash transactions, concluding that brakes should be applied to address, in particular, a major threat to consumer privacy.

INTRODUCTION

Imagine you drive to a forest, park your car, and go out for what you intend to be a couple hour hike, only to find yourself lost for nearly two days. Finally, you spot bright colors and after moving that direction you recognize it as a fast-food sign. You haven't eaten since before the hike, and you literally are starving. Fortunately, you have a pocket full of cash. But, to your dismay, the restaurant refuses to accept cash (e.g., Figure 1). You locked your wallet in your car, so you

currently have no credit cards. Hope for the kindness of strangers. Unfortunately, cash-free retail businesses are becoming more common.

Admittedly, the lost hiker scenario is extremely rare, yet it does show just one sort of hardship someone might experience as we trot inexorably toward a cashless society. Just a few years ago, in 2018, some “experts” believed a truly cashless culture was still two or three generations into the future, according to a recent government report in Australia.¹ That same report then notes the COVID-19 pandemic just two years later changed everything. In fact, on March 24, 2023, Sweden became the first country to swear off cash, altogether.² That, we expect, is just the first domino to fall. Finland and the United Kingdom are expected to follow soon on its heels.³ The United States might not be far behind.

¹ The Future is Cashless, Queensland Government, <https://www.forgov.qld.gov.au/information-technology/digital-investment/queensland-government-digital-futures-and-foresight/signals/the-future-is-cashless#:~:text=Queensland%20perspective&text=As%20part%20of%20the%20strategy,improving%20access%20to%20digital%20technology> (last visited Nov. 3, 2025).

² *Id.*; See also, Susan Fourtané, *Sweden: How to Live in the World's First Cashless Society*, INTERESTING ENGINEERING, (June 19, 2023, 10:04 AM)., (<https://interestingengineering.com/innovation/sweden-how-to-live-in-the-worlds-first-cashless-society>).

³ Queensland Government, *supra*, note 1. The report notes that Poland seems to be moving in a different direction.

The truth is, cash use already has dropped to a minority of financial transactions. Even as early as 2017 the use of cash by U.S. consumers already was down to 32% of retail transactions and just 9% of all consumer payments.⁴ Globally, by 2020 cash accounted for only 20.5% of point-of-sale transactions.⁵ It has been a long time since cash was king. In fact, even back in 1990 checks were the most common payment method, outstripping both cash and credit cards.⁶

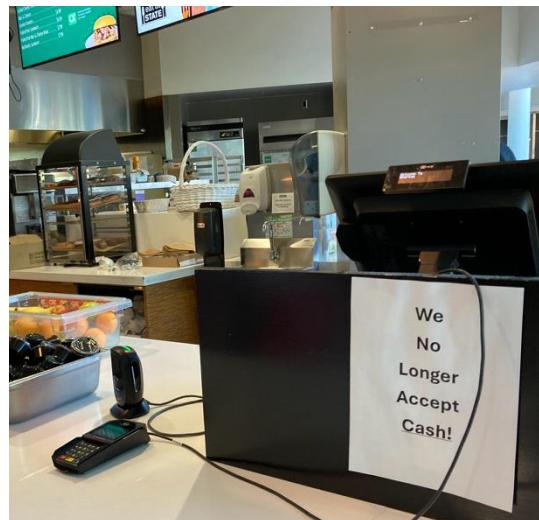


FIGURE 1

Photo taken at a Michigan convenience store

REASONS FOR DECLINE

These trends undoubtedly were spurred by personal preferences of consumers, along with cultural changes as we moved through successive consumer generations (Millenials, Gen X, Gen Z, etc.). This was further accelerated by emerging new technologies including cryptocurrency⁷,

⁴ Nicole Lindsey, *Privacy Implications and Path Forward of a Cashless Society*, CPO MAGAZINE, <https://www.cpomagazine.com/data-privacy/privacy-implications-path-forward-cashless-society/> (Oct. 9, 2017).

⁵ Liza Goldenberg, *Going Cashless: Privacy Implications for Gun Control in a Digital Economy*, 17 Pepp. J. BUS. ENTREPRENEURSHIP & L. 124 (2024).

⁶ Marc L. Roark, *Payment Systems, Consumer Tragedy, and Ineffective Remedies*, 88 ST. JOHN'S L. REV. 39, 40 (2014).

⁷ Cryptocurrency's roots go back much earlier, but it was Bitcoin in 2009 that popularized the use of Blockchain technology, making the use of this form of money secure. Robert Stanley Madey, A Study of the History of Cryptocurrency and Associated Risks and Threats (December 2017) (Master's Thesis, Utica College)(indicate where this is on file).

cashless purchasing systems like FreedomPay⁸, online digital payment systems such as PayPal⁹, Google Wallet¹⁰ and Apple Pay, and the vast expansion of Stored Value Products (SVP)¹¹ such as prepaid store or restaurant cards, and more.

The 2020 pandemic sped the transition to no-cash, as U.S. consumers (and those elsewhere) were encouraged by the government to use “contactless” payment methods. Technology now made it possible to simply wave credit cards over card readers, and Near Field Communication (NFC) technologies (e.g., Apple Pay) enabled waving a phone over a scanner, while cash was frowned

⁸ That system was promoted by the McDonald's restaurant chain, beginning in April 2001. Steve Martin,

Cashless retail pay system to expand, THE IDAHO BUSINESS REVIEW (May 6, 2002),

<https://idahobusinessreview.com/2002/05/06/cashless-retail-pay-system-to-expand/>.

⁹ PayPal was founded in 1998 under the name Confinity, in the middle of the dot-com boom. Emil Persson, *The PayPal Story: Online Payment Pioneers*, Quartr (Sept. 11, 2025), <https://quartr.com/insights/company-research/the-paypal-story-online-payment-pioneers>

¹⁰ The first digital wallet, prior to Apple Pay, was the Google Wallet. It was introduced in 2012, and had a rocky beginning. David Heun, *Search-Engine Giant Falters In Mobile Pay: Google Wallet Just Completed a Tough Year That Made Its Payments Technology Seem Less Attractive*, ISO & AGENT, Jan. 1, 2013, at 50.

¹¹ Roark, *supra* note 6, at 41. SVPs are devices, including cards, where money is preloaded on them, and the consumer simply uses the device to draw upon that deposit. For example, a \$50 card to the Cracker Barrel restaurants is an SVP, where one person preloads that card and then might use it as a gift, for use by a different person.

upon for its ability to spread germs.¹² Quick Response (QR) codes leading to online payment methods for a store or restaurant bill created yet another option for some sellers.¹³

Even prior to the pandemic, many vendors had discovered a myriad of benefits to this trend away from cash. Advantages include, at least, (1) efficiency (meaning, at least in part, saving the cost of cashiers with self-checkouts), (2) convenience (no need to make trips to the bank), (3) theft prevention (e.g., short-changing a cashier), (4) the store's security (i.e., no cash on hand means less reason for robbery), and (5) quicker service times.¹⁴ It also is argued that a cashless system can cut down on financial crimes, including tax evasion and money laundering.¹⁵ Given those advantages, alone, it is not surprising that some high-tech companies, financial institutions, and credit card promoters actually lobbied to nudge our society to drop its use of cash.¹⁶

¹² See e.g., Monica Calvillo-Chou, *Battle for Cash in a Cashless Society: Why Cash Should Remain King Redacted*, 51 W. St. L. Rev. 27, 29–31 (2024); Paul Brunkhorst, *Contactless Currency During COVID-19: How the Pandemic's Business Disruptions Will Change Franchise System Payment Standards*, 40 FRANCHISE L. J. 259, 259–265 (2020).

¹³ Muhannad Ebwini & Aby Sam Thomas, *Here's Why Businesses Should Invest In Cashless Payments Systems Now*, ENTREPRENEUR MIDDLE EAST (October 11, 2022), <https://www.entrepreneur.com/en-ae/growth-strategies/heres-why-businesses-should-invest-in-cashless-payments/436956#:~:text=By%20going%20cashless%2C%20businesses%20can,an%20ensure%20a%20high%20level>.

¹⁴ Calvillo-Chou, *supra* note 12.

¹⁵ Tamara Kurtzman, *Cashing Out*, LOS ANGELES LAWYER, Mar. 2019, at 22.

¹⁶ *Id.*; Jay Stanley, *Say No to the “Cashless Future” and to Cashless Stores*, AMERICAN CIVIL LIBERTIES UNION (August 12, 2019), <https://www.aclu.org/news/privacy-technology/say-no-cashless-future-and-cashless-stores>.

So, Starbucks coffee shops began trying out cashless stores in 2018.¹⁷ And Amazon introduced its Amazon Go stores that same year, which were entirely cash- and cashier-less.¹⁸ In early 2019 Mercedes-Benz Stadium in Atlanta went cashless.¹⁹ The change had begun.

CASH RELIANCE

Just over a year after Amazon Go opened its first stores, reversing its original approach, it began accepting cash. A 2019 study by Cardtronics PLC found most consumers (92%) wanted choices regarding payment method, that 73% claimed to use cash regularly, and 28% even preferred cash.²⁰ Consumers, it appeared, were not ready to go cashless. That was pre-pandemic, of course.

However, a post-pandemic 2022 study by Pew Research found that 41% of Americans claim they spend no cash in the typical week, compared to 29% in a similar study in 2018. In 2015 it was even lower, at 24%. And those who stated all or almost all their purchases were cash dropped from 24% in 2015 to 14% in 2022.²¹ They continue to use cash, but to a quickly diminishing

¹⁷ Ebwini, *supra* note 13.

¹⁸ Matt Day, *Amazon Go cashierless convenience store opens to the public in Seattle*, THE SEATTLE TIMES (January 22, 2018, at 7:00 AM), <https://www.seattletimes.com/business/amazon/amazon-go-cashierless-convenience-store-opening-to-the-public/>.

¹⁹ Allison Kretovic, *Prohibiting Cashless Retailers and Protecting the Impoverished*, 37 GA. ST. U. L. REV. 1045, 1047 (2021).

²⁰ David Jones, *Amazon Go: A case study in cashless retail pushback*, ATM MARKETPLACE (Apr. 16, 2019), <https://www.atmmarketplace.com/articles/amazon-go-a-case-study-in-cashless-retail-pushback/>.

²¹ Michelle Faverio, *More Americans Are Joining the 'Cashless' Economy*, PEW RESEARCH CTR. (Oct. 5, 2022), <https://www.pewresearch.org/short-reads/2022/10/05/more-americans-are-joining-the-cashless-economy/>.

extent. That same 2022 study, though, found that these statistics were income dependent. Those with incomes less than \$30K relied on cash for 30% of their purchases, while merely 6% of households earning \$50K or more relied so heavily on cash.²² It seems low-income consumers are more dependent on cash. But even the more financially secure still have not entirely abandoned it, as 58% claim they keep cash handy, though even that number relates to the consumer's age. The older ones are more likely to keep cash on hand.²³

A Gallup study, also in 2022, had a similar outcome. It found 11% of consumers made no cash purchases, compared with just 5% in 2017, and 49% made only a few cash purchases, compared with 27% in that earlier study.²⁴ It also found that 22% of adults earning less than \$40K make all or most of their purchases with cash, while just 5% of those earning \$100K or above did the same. Today, 73% of those Americans in higher income brackets purchase none or just a few items with cash, but 49% of the low-income consumers do the same.²⁵ The income divide seems real, no matter who does the study.

LEGAL LIMITATIONS

It is believed that less than one percent of brick-and-mortar stores were cashless in 2019.²⁶ Regardless, that is when State and city lawmakers began to react. Not everyone was happy with this new development. In the U.S., our paper money is emblazoned with the phrase “This Note is

²² *Id.*

²³ *Id.*

²⁴ Jeffrey M. Jones, *Americans Using Cash Less Often; Foresee Cashless Society*, GALLUP NEWS (Aug. 25, 2022), <https://news.gallup.com/poll/397718/americans-using-cash-less-often-foresee-cashless-society.aspx>.

²⁵ *Id.*

²⁶ Kretovic, *supra* note 19.

Legal Tender for All Debts, Public and Private.” To many Americans, this almost certainly means these dollars cannot be refused if we offer them in payment of our bills. What else could it mean? Well, the truth is more complicated. While we tend to take our currency for granted, the history of money is a long and sordid story. We will not attempt to explain it all here. Thankfully, that is unnecessary.

Think about this: while that “Legal Tender” phrase is on our paper money, it is not on our coins. It also is not on cryptocurrency, yet that is a form of money. Nor is it on our credit cards, bank transfers, or personal checks, but all these forms of payment can be used to settle debts. All are forms of money. “Legal Tender,” it turns out, has a specific legal meaning. As the Bank of England states, “Legal tender has a narrow technical meaning that will rarely come up in everyday life. The law ensures that if you offer to fully pay off a debt to someone in a form that is considered legal tender – and there is no contract specifying another form of payment – that person cannot sue you for failing to repay.”²⁷ That does not mean, however, that a seller is powerless to refuse it. The relationship between a buyer and seller is more like a contract, and U.S. consumers are free to craft the terms of their contracts. If they agree a purchase will be paid with gold, or with basketballs, they are free to make such a contract. Private businesses, therefore, are free to set their own payment policies.²⁸

²⁷ The Bank of England has a somewhat simplified description at *What is legal tender?*, BANK OF ENGLAND (Feb. 26, 2025), <https://www.bankofengland.co.uk/explainers/what-is-legal-tender>.

²⁸ Marcelo M. Prates, *Money in the Twenty-First Century: From Rusty Coins to Digital Currencies*, 15 OHIO ST. BUS. L. J. 164, 175 (2021). The U.S. Congress did not always have the authority to issue legal tender, which resulted in significant debate in the 19th Century. The Constitution does not grant such authority. *Hepburn v. Griswold*, 75 U.S. 603 (1870), was one of the landmark decisions at that time, and it held the government had no

Samuel Erlanger²⁹ gives an example to explain the basic characteristic of legal tender. He describes a driver who stops at a gas station and pumps \$20 worth of gas. Once pumped, he offers the station attendant cash. In that situation the attendant must accept it as legal tender. But if that same driver pulled into the station and the attendant asked for the \$20 before allowing the driver to pump, that attendant could refuse cash because no debt had yet been incurred. In that same example, we could add that the station has a prominent sign on the pump which states “credit or debit cards only.” This would set the contractual terms, putting the driver on notice *before* he is indebted.

Consequently, in most cases of cashless stores and restaurants, the “legal tender” argument is for naught. The consumer who carries only cash will have no choice but to find another store that will accept it. Of course, that may prove difficult in some geographic locations, and if the cashless trend continues there might be no cash-friendly stores to be found anywhere.

But the difference, described above, between cash dependency of low-income vs. high-income people has formed the foundation for an argument against refusing cash. And in a few cases, it has led to laws prohibiting cashless businesses.

such power. That is not to say, however, that there was *no* money. Some individual banks, for example, issued their own money. And Congress even issued paper money in 1862, without authority to issue legal tender. In the aftermath of the country's Civil War, the Supreme Court finally found an implied authority for Congress to create legal tender. *Juilliard v. Greenman*, 110 U.S. 421, at 449-50 (1884). *See also*, John M. Bickers, *Greenbacks, Consent, and Unwritten Amendments*, 73 ARK. L. REV. 669 (2021); Kurtzman, *supra* note 15.

²⁹ Samuel Erlanger, *A Cashless Economy: How To Protect The Low-Income*, 2019 CARDOZO L. REV. DE NOVO 167, 170 (2019).

It is interesting to note that the state of Massachusetts was first to require brick-and-mortar retailers to not “discriminate against a cash buyer by requiring the use of credit,” back in 1978.³⁰ But for 40 years it stood alone. Then, in March 2019, both the state of New Jersey³¹ and the city of Philadelphia³² joined the effort, signing cashless ban laws into effect. Within the next few months, both the city of San Francisco³³ and the state of Rhode Island³⁴ joined the club. And in 2020 New York City followed suit.³⁵ Since then, more have jumped in. Colorado³⁶ adopted a

³⁰ MASS. GEN. LAWS ANN. ch. 255D, §10A (2025). *See* Kira Hunter, *5 US cities and states leading the cashless retail backlash*, NEW HOPE NETWORK (May 15, 2019), <https://www.newhope.com/regulatory/5-us-cities-and-states-leading-the-cashless-retail-backlash>.

³¹ N.J. STATUTES, TITLE 56, P.L. 2019, c.50 (2025). *See also* New Jersey law bans pure cashless retail, RETAIL CUSTOMER EXPERIENCE (March 19, 2019), <https://www.retailcustomerexperience.com/news/new-jersey-law-bans-pure-cashless-retail/>.

³² PHILA. CODE §9-1132(1) (2019); *See also*, Hunter, *supra* note 30; Cohen Coberly, *Philadelphia bill bans cashless retail stores, throwing a wrench into Amazon's plans*, TECHSPOT/NEWSTEX (March 7, 2019), <https://www.techspot.com/news/79087-philadelphia-bill-bans-cashless-retail-stores-throwing-wrench.html>.

³³ S.F., CAL., POLICE CODE, art. 55, § 5503 (2025); *See also* David Jones, *San Francisco board oks ban on cashless retail*, RETAILCUSTOMEREXPERIENCE.COM (May 13, 2019), <https://www.retailcustomerexperience.com/articles/san-francisco-board-oks-ban-on-cashless-retail/>.

³⁴ 6 R.I. GEN. LAWS § 6-13.1-30 (2025); *see also* Aaron Nicodemus, *Rhode Island Retailers Must Take Cash Under New Law*, BLOOMBERG LAW: BANKING (July 1, 2019, 5:20 PM), <https://news.bloomberglaw.com/banking-law/rhode-island-retailers-must-take-cash-under-new-law>.

³⁵ N.Y.C. ADMIN. CODE § 20-840 (2025); *see also* NYC Council passes ban on cashless-only retail, RETAILCUSTOMEREXPERIENCE.COM (Jan. 24, 2020), <https://www.retailcustomerexperience.com/news/nyc-council-passes-ban-on-cashless-only-retail/>.

³⁶ H.B. 21-1048, 75th Gen. Assemb., Reg. Sess. (Colo. 2021).

similar law in 2021, as did Connecticut.³⁷ In 2023 Washington, D.C.,³⁸ Los Angeles,³⁹ and Arizona⁴⁰ passed similar ordinances. And the numbers kept growing. Even the Federal House of Representatives considered this in a Bill titled Payment Choice Act of 2019⁴¹, again introduced in 2021⁴², and it was reconsidered by the Senate two years later as the Payment Choice Act of 2023.⁴³ Still, there is no federal prohibition on refusing cash, and at last count 32 states still allow sellers to refuse cash.⁴⁴

³⁷ CONN. PUB. ACT NO. 21-60 (2021).

³⁸ Beth Braverman, *D.C. Is Now Enforcing Its Cashless Business Ban: What That Could Mean for You*, U.S. NEWS & WORLD REPORT, (Nov. 27, 2023, 9:27 AM), <https://money.usnews.com/money/personal-finance/articles/d-c-is-now-enforcing-its-cashless-business-ban-what-that-could-mean-for-you>.

³⁹ Vania Patino, *Cash remains king with LA city ban on cashless businesses*, SPECTRUM NEWS (Nov. 16, 2023, 8:50 AM), <https://spectrumnews1.com/ca/southern-california/business/2023/11/16/los-angeles-city-approves-ban-on-cashless-businesses->.

⁴⁰ Rep. Joseph Chaplik, *House Approves Representative Chaplik's Bill to Help Arizonans Who Rely on Using Cash*, NEWS RELEASE (Feb. 23, 2023), <https://www.azleg.gov/press/house/56LEG/1R/230223CHAPLIKHB2555.pdf>.

⁴¹ Payment Choice Act of 2019, H.R. 2650, 116th Cong. (2019).

⁴² H.R. 4395, 117th Cong. (2021).

⁴³ S. 1984, 118th Cong. (2023).

⁴⁴ Riley O'Hagan et. al, *Legislation Requiring Businesses to Accept Cash*, VERMONT LEGISLATIVE RESEARCH SERVICE (last visited Nov. 3, 2025), <https://www.uvm.edu/d10-files/documents/2025-01/Cashless-businesses.pdf>.

We should note that many of those laws do make exceptions for specific types of businesses, like sports arenas. And some businesses almost never have cash customers anyway, such as new car dealers and bespoke tailors, so the laws likely have had no effect on them.

Those newer statutes and ordinances almost uniformly were responses to concern for disadvantaging lower-income populations. Low-income consumers, some minority groups, and some immigrant populations tend to include many people who are “unbanked” or “underbanked.” Unbanked refers to someone who has no checking or savings account at a financial institution, while underbanked refers to a person who has had such an account but, for various reasons, needs to use the same type of services used by the unbanked (e.g. someone who has a checking account with no regular deposits servicing it).⁴⁵ Someone who has no bank account, or for some other reason is unable to qualify for credit, will not be carrying debit or credit cards. A 2023 national survey found that 4.2% of U.S. households – 5.6 million households – were without a bank or credit union account, making them unbanked, while 14.2% (19 million households) qualified as underbanked.⁴⁶

Any legislator with even a scintilla of compassion should have no trouble supporting a law to prevent businesses from effectively abandoning consumers in this situation. However, such a law would be unnecessary if a reasonable alternative were available to those unable to qualify for

⁴⁵ Cavillo-Chou, *supra* note 12, at 27-28.

⁴⁶ *FDIC Survey Finds 96 Percent of U.S. Households Were Banked in 2023*, FEDERAL DEPOSIT INSURANCE CORPORATION (Nov. 12, 2024), <https://www.fdic.gov/news/press-releases/2024/fdic-survey-finds-96-percent-us-households-were-banked-2023>.

credit or make use of digital payment options (e.g., consumers without smartphones are unable to use Venmo, Apple Pay, etc).

One promising mechanism to sidestep the need for a pro-cash law is the SVP, mentioned earlier.⁴⁷ These tend to be much like credit cards, except that they carry no credit. They are pre-loaded with value. At present it is possible in most jurisdictions to go into certain stores, like Walmart, and purchase a card like “Visa” with cash. So it could be preloaded with perhaps \$100, and could be used at no-cash stores. This isn't currently a very satisfactory solution, though, because (1) people may live in an area where such cards are not in any nearby stores, and the imposition to obtain such cards is additionally burdensome on those who have no transportation to such stores, or who cannot afford to have such cards shipped to them, (2) those cards typically have a surcharge on top of the amount loaded onto them, so it would cost more for the people relying on this payment method than for those who have credit cards, and (3) if stores that carry such cards also are no-cash, the SVP cards would be out of reach. Still, rather than passing laws restricting sellers, government might develop a method of distributing SVPs at no cost to consumers. That would address the low-income problem with a cashless society (but does not address other discrimination issues).

We should note, however, there is one aspect of that problem not generally discussed in the development of legal solutions: children. Banks do not normally issue credit or debit cards to juveniles. In a cashless world, gone will be the days of the tooth fairy leaving cash under the pillow. And providing an allowance to a child without a card is problematic. Mainly, teaching young children the basic lessons of financial management will be extremely difficult. As noted by the

⁴⁷ Roark, *supra* note 6.

Federal Deposit Insurance Corporation (FDIC), hands on experience with money is one of the best ways for a child to learn financial responsibility.⁴⁸

Numerous companies have seized the opportunity to offer parents and kids a solution in the form of applications on smartphones. For example, Greenlight touts its solution: “Both you and your kids download the Greenlight app — with tailored experiences. They check off chores, you automate allowance. They spend wisely, you set flexible controls. They build healthy financial habits, and you cheer them on.”⁴⁹ But such a solution comes with a price tag – currently starting at \$5.99 per month. Another similar service is Acorns Early, which likewise costs at least \$5 per month.⁵⁰ These app-based services are not accessible to all. They assume the parent and child each have a smartphone (which assumes a family can afford monthly cellular services), and getting set up starts with the parent establishing an account using their social security number (which creates an additional barrier for some immigrants or temporary visitors to the country – including tourists).

Another reason to halt the slide toward a cash-free norm is even more pragmatic: what happens when there is a power outage?⁵¹ The only realistic option would be to close a store the moment a power loss occurs, but that would not be very satisfactory for those pushing carts full of groceries. Nor would that be a good solution for a restaurant full of diners who already received their food. And a widespread outage, e.g., city-wide, could result in a complete economic shutdown

⁴⁸ , *Teaching Children About Money Now, Pays Dividends Later* (Sept. 21, 2020), <https://www.fdic.gov/consumer-resource-center/2020-09/teaching-children-about-money-now-pays-dividends-later>.

⁴⁹ This text appears on the splash page of the Greenlight website. Greenlight, <https://greenlight.com/> (last visited Oct. 15, 2025) [<https://perma.cc/EP3P-FEWL>].

⁵⁰ *Pricing*, ACORNS EARLY, <https://www.acorns.com/early/#gh-pricing-module> (last visited Oct. 15, 2025).

⁵¹ Cavillo-Chou, *supra* note 12, at 42-43.

of a city. This, too, could be solved with card readers having a battery backup. But the point is, going cashless is not without obstacles.

There remains one significant problem that is not so easily solved. And this is one that could affect anyone: Privacy.

PRIVATE PARTS

Our own information, from the everyday to the deeply personal, is being weaponized against us with military efficiency.

- Tim Cook, Apple CEO⁵²

We live in what has been termed a “data industrial complex.”⁵³ Data about consumers, their personal characteristics, their habits, their jobs, their likes and dislikes, all are being collected every moment of every day. Some of that data, like name and address, is quite easy for anyone to find, but much of it is the sort of information a consumer would not normally tell their friends or co-workers. Our lives, it seems, are anything but private.

Advertising Values Data

Direct mail advertising was an innovator in data collection. Even in 1900 practitioners of that art were building databases of consumer names and addresses.⁵⁴ But even before that the

⁵² Guardian Staff and Agencies, *Tim Cook Calls for US Federal Privacy Law to Tackle 'Weaponized' Personal Data*, THE GUARDIAN (Oct. 24, 2018), <https://www.theguardian.com/technology/2018/oct/24/tim-cook-us-federal-privacy-law-weaponized-personal-data>.

⁵³ Vincent Nguyen, *Shopping for Privacy: How Technology in Brick-and- Mortar Retail Stores Poses Privacy Risks for Shoppers*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 535 (2019).

⁵⁴ SAMUEL SAWYER, *SECRETS OF THE MAIL-ORDER TRADE* 35-36 (1900).

advertising industry had begun gathering data through survey research, starting in 1879.⁵⁵ Its research methods improved through the years, and expanded beyond surveys. In 1916 the J. Walter Thompson agency created a market research department, all about data collection.⁵⁶ And the A.C. Nielsen company, which today includes among its areas of expertise viewer ratings of television programs, actually was founded in 1923. It quickly became involved in data collection for the advertising industry.⁵⁷

The piles of data continued to grow, though it was quite modest by today's standards. By 1991, the year the Internet began to open to commerce, FTC Commissioner Mary Gardiner Jones mentioned that the American Express company claimed already to hold 410 pieces of information about each of the company's customers.⁵⁸ At the time, that seemed like an immense amount of data, but then the Internet made consumer data *far* more accessible.

An entire industry soon sprung up around data collection for advertising and marketing. Data brokers and data aggregators now are thriving businesses. The brokers collect, buy, and sell data about all of us, and the aggregators take databases from many different sources and merge them. This information comes from a wide range of sources, including websites, apps, software

⁵⁵ Paul Scipione, *How Far Back Does 'Modern Marketing Research' Really Date?* QUIRK'S MEDIA (Aug. 1, 2016), <https://www.quirks.com/articles/how-far-back-does-modern-mr-really-date>.

⁵⁶ DANIEL POPE, THE MAKING OF MODERN ADVERTISING 140 (1983).

⁵⁷ James Playsted Wood & Arthur C. Nielsen, *Leaders in Marketing*, 26 J. MARKETING 77, 77-78 (1962).

⁵⁸ Mary Gardiner Jones, *Privacy: A Significant Marketing Issue for the 1990s*, 10 J. PUB. POL'Y & MKTG. 133, 134 (1991).

“cookies,” software development kits, and public databases.⁵⁹ This has become a multi-billion-dollar industry.

For example, the top broker, Experian, holds data on 300 million people. It earns \$7 billion per year. Its data might include both “actual,” factual information about consumers, and “modeled” data derived from the actual data.⁶⁰ Experian sells data to “retailers, including online, storefront, and catalog sellers; consumer products manufacturers; charities and other nonprofit organizations; advertising agencies; media placement agencies; government agencies; Internet service providers; Internet portals; businesses offering services, especially local businesses; direct mail service providers; real estate agents; local, state, and federal politicians; and colleges and universities.”⁶¹

The second largest broker, Equifax, has data on 800 million individuals and earns \$5 billion per year, while the third largest, Epsilon, has data on 250 million people and earns \$1.9 billion per annum.⁶² Those are just three of several such companies. As you can see, data are valuable.

Collection of these data is facilitated by retail companies, particularly those with an online presence, from the largest, like Walmart, to the small neighborhood store. Some, like Facebook,

⁵⁹ Consumer Watchdog, *Data Stalkers: Data Brokers Know More Than Google but Californians Aren’t Opting. Here’s How That Could Change*, at 1-2 (Sept. 2024), available at <https://consumerwatchdog.org/wp-content/uploads/2024/09/Data-Stalkers-September-Report-.pdf>.

⁶⁰ MAJORITY STAFF OF OFFICE OF OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, *A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes*, at 22 (Dec. 18, 2013), available at <https://www.commerce.senate.gov/services/files/0d2b3642-6221-4888-a631-08f2f255b577>.

⁶¹ *Id.*

⁶² Consumer Watchdog, *supra* note 59, at 4.

Amazon, and Google, gather immense amounts of data, though not all share their data. Facebook, for example, claims not to sell its data to other companies even though its collection makes the brokers seem like small potatoes. Facebook's revenue is based almost solely on the sale of advertising space, which in turn is based on the data the company has collected. In 2023 Facebook's parent, Meta, claimed revenue of \$116.6 billion, and 97.5% of that was from advertising sales. In the fourth quarter of 2023 Facebook had 3.07 billion users, globally. At that same time the company's average return per user was \$13.12.⁶³ That represents a specific value of a specific person to this specific company. Other companies, including brokers, may gather the same information about that same person and reap separate profits from it. The total value of a person's information is unknown, and most certainly would vary depending upon their income, lifestyle, and more.

Advertising is the primary driver of this data universe, with other aspects of marketing (e.g., pricing, product design, and distribution) serving as secondary drivers. When you think about it, stalkers aside, there are few other reasons someone would pay to know your favorite beverage or your underwear color. Consumer data guides advertisers' choice of what to say in their ads, what media to use, the aesthetic design of the ads, to whom they will direct those ads, and more.

Since the 19th Century, advertising practitioners have sought to make their ads more cost effective. A major step in that effort was development of "target" marketing, as they recognized an ad seen by a broad audience included a lot of waste, reaching people who had no interest in the

⁶³ *Facebook Ad Revenue (2017-2024)*, OBERLO, <https://www.oberlo.com/statistics/facebook-ad-revenue> (last visited Oct. 17, 2025).

advertised product. Media with narrower audiences, such as a sewing magazine, allowed reaching people with a particular audience while avoiding the waste of paying to reach people who had no interest in sewing. So niche publications developed, and more recently niche television stations also facilitated such narrow-casting of an ad. But the greater access of consumer data made elimination of waste even more available, and today use of that data is central to almost any advertising campaign.⁶⁴ In fact, new specialties within the advertising profession have developed with the rise of data, facilitated by the Internet.

Programmatic Advertising is one such specialty.⁶⁵ This uses data, and computers, to quickly buy or sell space to place an ad, faster than could be done by a human being. It uses data, along with some degree of Artificial Intelligence, to deliver the right ads to the right consumers at the right time. A related specialty is Computational Advertising, which tends to focus more on the development of algorithms that might be used in Programmatic Advertising.⁶⁶

⁶⁴ A more extensive historical perspective can be found at JEF I. RICHARDS, *A HISTORY OF ADVERTISING: THE FIRST 300,000 YEARS*, 237-248 (2022).

⁶⁵ For those unfamiliar with Programmatic Advertising, this article provides a straightforward overview: Dylan A. Cooper, Taylan Yalcin, Cristina Nistor, Matthew Macrini & Ekin Pehlivan, *Privacy Considerations for Online Advertising: A Stakeholder's Perspective to Programmatic Advertising*, 40(2) J. CONSUMER MKTG. 235 (2023). See also, OLIVER BUSCH, *PROGRAMMATIC ADVERTISING: THE SUCCESSFUL TRANSFORMATION TO AUTOMATED, DATA-DRIVEN MARKETING IN REAL-TIME* (2014).

⁶⁶ A nicely done description of this specialty is found in: Joanna Strycharz, Ewa Maslowska & Su Jung Kim, *Computational Advertising: Where Are We and Where Are We Going? Note from Editors*, 45(3) J. CURRENT ISSUES & RES. IN ADV. 277 (2024). See generally, KUSHAL DAVE & VASUDEVA VARMA, *COMPUTATIONAL ADVERTISING TECHNIQUES FOR TARGETING RELEVANT ADS* (2014).

Algorithms used by advertisers, even years ago, could allow amazing modeled projections. Target stores provide an example, and a cautionary tale. In 2012 *The New York Times Magazine* told of an event from about a decade earlier.⁶⁷ Target developed a “pregnancy prediction model,” to identify pregnant customers who might be interested in baby clothes, bassinets, and such. About a year later, a man walked into his local Target, hands full of coupons the store had sent to his teenage daughter. “My daughter got this in the mail!” he said. “She’s still in high school, and you’re sending her coupons for baby clothes and cribs? Are you trying to encourage her to get pregnant?” This father obviously was upset. But the manager apologized and called the man a few days later to again apologize. The father, though, was the one who apologized, having since learned that his daughter was in fact pregnant. Target knew before the girl’s father, thanks to its data and algorithm. And that was long before the recent advancements in Artificial Intelligence, which promise to enhance the predictive capabilities of companies like Target.

Surveillance Data

All this data, arguably, can be helpful to consumers. Their greatest benefit is that their time is not wasted as much, since the data help put only ads of likely interest in front of them. Consumers are now not subjected to promotions for items they never would buy. That is a relatively small benefit, but the big benefit -- the financial benefit -- is to the businesses that are using those data.

It is easy to understand that when we fill in forms on the Internet, the recipient of that form is gaining the information we input. This also includes the search terms we put into Google and

⁶⁷ Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (February 16, 2012), <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>.

the websites we visit. Our “likes” in social media also provide data about us. But data collection has become so much more sophisticated.

Certainly, when posting pictures on social media, those pictures are data. If you post a picture of yourself in Bali and you caption it, “I’m on vacation,” you have provided data that you might not want a thief to know. But today Facial Recognition⁶⁸ and Voice Recognition⁶⁹ are technologies that allow computers to connect data. So, for example, when you post a picture of you with a friend, or even a voice recording of that friend, chances are the data about your friend will now include that your friend appears on your social media page.

Another fact of data collection today is the “Internet of Things” (IoT).⁷⁰ Many of today’s products are connected to the Internet, from the doorbell at your front door, to your house thermostat, your car, or your refrigerator that sends you an email when your milk runs low, and

⁶⁸ See Sharon Nakar and Dovv Greenbaum, *Now You See Me. Now You Still Do: Facial Recognition Technology and the Growing Lack of Privacy*, 23 B.U. J. SCI. & TECH. L. 88 (2017).

⁶⁹ Emma Ritter, Note, *Your Voice Gave You Away: The Privacy Risks of Voice-Inferred Information*, 71 DUKE L.J. 735, 739 (December, 2021), <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn%3acontentItem%3a6459-6TR1-JTNR-M2X1-00000-00&context=1519360&identityprofileid=3J6FXK51909>.

⁷⁰ See, e.g., Dalmacio V. Posadas, Jr. *After the Gold Rush: The Boom of the Internet of Things, and the Busts of Data-Security and Privacy*, 28 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 69, 79 (Fall, 2017), <https://advance-lexis-com.proxy2.cl.msu.edu/api/document?collection=analytical-materials&id=urn%3acontentItem%3a5RBH-PJY0-02C9-C0HV-00000-00&context=1519360&identityprofileid=3J6FXK51909>; Ekaterina Korneeva et al., *How Users Assess Privacy Risks in the Internet of Things: The Role of Framing, Comparing, and Educating*, 63(8) BUS & SOC’Y 1794 (2024), <https://journals-sagepub-com.proxy2.cl.msu.edu/doi/10.1177/00076503241255082>.

new connected “things” seem to appear almost daily. They allow you to access information or change settings from your computer or your phone. And that, too, likely is providing data to you, the manufacturer, and perhaps others. These also are data potentially subject to illicit access via “hacking” by nefarious people. All of these data might be provided to brokers, for sale to whomever has sufficient money.

Individual retailers in recent years seem addicted to loyalty programs (a/k/a frequent shopper or VIP programs). These programs promise shoppers discounts on products, if they will only join the program. Some shoppers are saddled with a dozen or more of the cards typically provided to program members. Whether the discounts are real or illusory is a matter of debate, but the real purpose of loyalty programs is twofold: (1) encourage customer loyalty with those discounts, and (2) gather data on those consumers.⁷¹ When the program member purchases an item, that action is recorded to the intelligence file the retailer keeps on that member.

Retailers' mobile apps, whether used for placing orders, browsing available options, searching for brick-and-mortar stores, or any number of other functions, also collect data about your behavior. They might be collecting information about your location when using the app, or even not using it.⁷² There is little to prevent that information from being used against the consumer's interests.

⁷¹ Adrian K. Felix, Kelly Ruane Melchiondo & Megan Barney, *Consumer Data Collection and Privacy: Best Practices and Risk Mitigation Strategies for Franchise Systems*, 42 FRANCHISE L. J. 435, 438–443 (Fall 2023), <https://www.bilzin.com/insights/publications/2023/11/consumer-data-collection-and-privacy>.

⁷² *Id.* at 439.

So data are valuable, the advertising industry is ravenous for it, the Internet has provided a bounty of methods for collecting it (thanks to a combination of technologies and algorithms it is possible to learn a consumer's most private secrets), and it might be used to the consumers' detriment. Whether we call this Consumer Surveillance⁷³, Surveillance Advertising⁷⁴, Commercial Surveillance⁷⁵, or Surveillance Capitalism⁷⁶, "surveillance" seems an appropriate descriptor.

The Value of Cash

With the rise of electronic commerce in the 1990s, the Federal Trade Commission (FTC) was rather slow to react to the changing marketplace. In 1999, after 8 years of a commercially active Internet, the agency finally addressed the need to regulate online advertising. It endorsed self-regulations authored by the Network Advertising Initiative (NAI), an advertising industry organization, in lieu of developing its own regulations.⁷⁷ The FTC has taken a more aggressive

⁷³ Dave Michaels & Inti Pacheco, *FTC to Examine if Companies Raise Prices Using Consumer Surveillance*, WALL ST. J., (July 23, 2024, 14:54 ET), <https://www.wsj.com/business/ftc-to-examine-if-companies-raise-prices-using-consumer-surveillance-d7921be1>.

⁷⁴ Consumer Federation of America, *Factsheet: Surveillance Advertising: How Does the Tracking Work?* (Aug. 26, 2021), https://consumerfed.org/consumer_info/factsheet-surveillance-advertising-how-tracking-works/#:~:text=On%20a%20mobile%20device%2C%20many,the%20data%20to%20individual%20consumers.

⁷⁵ Natasha Singer & Jason Karaian, *Americans Flunked This Test on Online Privacy*, N.Y. TIMES (Feb. 15, 2023), <https://www.nytimes.com/2023/02/07/technology/online-privacy-tracking-report.html>.

⁷⁶ Burt Helm, *Credit Card Companies Are Tracking Shoppers Like Never Before: Inside the Next Phase of Surveillance Capitalism*, FAST CO. (May 12, 2020), <https://www.fastcompany.com/90490923/credit-card-companies-are-tracking-shoppers-like-never-before-inside-the-next-phase-of-surveillance-capitalism>.

⁷⁷ The Associated Press, *U.S. Approves Internet Privacy Plan*, INT'L HERALD TRIB. 3 (July 28, 2000).

role in regulating online advertising and data collection in recent years⁷⁸, but for several years it relied on industry self-restraint and self-policing.

One consequence of this was that the industry developed the practice of *assuming* it had the right to collect a consumer's private data without their permission. Rather than asking consumers to "opt-in" to giving a business access, the default became that businesses could collect those data unless the consumer objected and chose to "opt-out." This prioritized business interests over consumer privacy interests.⁷⁹

Finally, in 2010 the industry – through the Digital Advertising Alliance (DAA) – decided to place a small icon in the corner of online banners and other advertisements that, if clicked, would take the consumer to a page where, after reading a lengthy sales pitch discouraging it, they finally could opt-out of having their data collected.⁸⁰ Businesses could collect and use a consumer's private information at leisure, unless the consumer (1) knew to click the tiny icon, (2) suffered through the sales pitch, and (3) clicked again to opt-out.

⁷⁸ See, e.g., Julia N. Mehlman, *If You Give a Mouse a Cookie, It's Going to Ask for Your Personally Identifiable Information: A Look at the Data-Collection Industry and a Proposal for Recognizing the value of Consumer Information*, 81 BROOK. L. REV. 32 (2015); see also Nguyen, *supra* note 53.

⁷⁹ An extensive discussion of the opt-in/opt-out debate can be found at Lynn Chuang Kramer, Comment, *Private Eyes Are Watching You: Consumer Online Privacy Protection - Lessons from Home and Abroad*, 37 TEX. INT'L L.J. 387 (2002).

⁸⁰ Jef I. Richards & Laleah Fernandez, *Can You Keep a Secret? Private Information in the Age of Online Behavioral Advertising*, (Australian Ass'n of Social Marketing 2014 Int'l Social Marketing Conf., 2014), <https://aasm.org.au/wp-content/uploads/2024/08/AASM-2014-ISM-Conference-Proceedings-FINAL.pdf>.

The whole purpose and promise of opt-out is to give consumers control over their data. Indeed, the argument of businesses, while defending against the opt-in approach, is that opt-out provides all the control needed because it is providing consumers “notice and consent.”⁸¹

However, this option is not always available. Companies can participate in the DAA self-regulation, which sponsors that tiny icon under its AdChoices program. Those companies are then expected to put that icon in their online ads and connect it to an opt-out page.⁸² The AdChoices icon approach provides at least some protection for consumers, though not every online business participates, so not all ads include the icon. It is too limited a solution. More to the point of the current topic, this mechanism only applies to ads. It does not include data collection and sharing where there is no ad to provide an out.

A shopper who enters a brick-and-mortar store, and purchases a product with a credit card, is feeding the insatiable data-consuming monster. And the checkout provides no privacy policy and no way to opt-out! At least the online shopper has some control and may be offered some notice their data is being taken.

In other words: *cash is the only option to limit data collection in non-online retail situations.* The moment a credit card, debit card, or alternate electronic payment is used for payment, data are collected. If you purchase with cash, it (currently) is unlikely any of your purchases will be attached to your name, or to all of that other private data (unless, of course, you

⁸¹ The Editorial Board, *America, Your Privacy Settings Are All Wrong*, N.Y. TIMES (March 6, 2021), <https://www.nytimes.com/2021/03/06/opinion/data-tech-privacy-opt-in.html>.

⁸² See *supra* note 80; see also Kyle Ferden, *The Swanson Paradox: Do-Not-Track and the Intersection of Data Autonomy and the Free Market*, 41:2 J. CORP. L. 493, 503-05 (2015).

choose to take the action of scanning a loyalty card or providing your cellphone number at checkout). Cash is an offline general opt-out switch.

Why Privacy Matters

Credit and debit cards typically carry little data, themselves. They include the user's name, account number, security code, and expiration date. Basically, it is the same information found printed on most cards. The real privacy issues are the purchase records that are attached to that data. If you purchase 30 items at a grocery store using a credit or debit card, the store's computers record every item, usually printing most of it on a receipt. The store now knows precisely what you purchased, what size, what brand, what store, what geographic location, what time of day, and more. When you return to the store to buy more, that new list is added to the old. After a few months, you can imagine how much some stores know about you. And the credit card company also is collecting those data. Those data are attached to your name and account number, so it is all information about you and your consumption habits.

That rich pile of data then can be used to make other connections, such as where you live and your general income level. From that, it could be possible to find you on social media and learn even more about you. In other words, the data from a card might open the door to all your secrets.

A few years ago, Google is reported to have bought credit card data from Mastercard for millions of dollars. So, your Gmail account, your Google Documents, your location history from Google Maps, the ads you have viewed on Google, and much more can be connected to your

private shopping habits.⁸³ As Geoffrey A. Fowler, writing for the Chicago Daily Herald, said, “Credit cards are a spy in your wallet....”⁸⁴

Some people, confronted with this situation, might respond, “So what?” They might care, though, if they knew some of the ways that data can be used. One such use is behavior-based pricing, also known as Algorithmic Personalized Pricing⁸⁵, Dynamic Pricing⁸⁶, or Differential Pricing.⁸⁷ This is where an advertiser recognizes, from the data, that a particular consumer would likely pay more for a product, so they are shown a higher price than is shown to other consumers. *The Wall Street Journal*, several years ago, reported that office supply retailers were displaying different prices for different customers, based on data about those customers.⁸⁸

Imagine, now, that your health insurance company has such algorithms and buys data from stores like Target. If an algorithm then recognizes that your purchase habits are those of someone

⁸³ Shannon Liao, *Google Reportedly Bought Mastercard Data to Link Online Ads with Offline Purchases*, THE VERGE (Aug. 30, 2018, 5:58 PM), <https://www.theverge.com/2018/8/30/17801880/google-mastercard-data-online-ads-offline-purchase-history-privacy>.

⁸⁴ Geoffrey A. Fowler, *The Spy in Your Wallet: Credit Cards Have a Privacy Problem*, CHI. DAILY HERALD (Aug. 27, 2019, 1:00 AM), <https://www.dailyherald.com/business/20190827/the-spy-in-your-wallet-credit-cards-have-a-privacy-problem>.

⁸⁵ Pascale Chapdelaine, *Algorithmic Personalized Pricing*, 17 N.Y.U. J. L. & BUS. 1, 1 (2020).

⁸⁶ Nguyen, *supra* note 53, at 557.

⁸⁷ Majority Staff of Office of Oversight and Investigations, Committee on Commerce, Science, and Transportation, *supra* note 60, at 6-7.

⁸⁸ Jennifer Valentino-DeVries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), <https://www.wsj.com/articles/SB10001424127887323777204578189391813881534>.

with a particular disease, the company might suddenly raise your rates or cancel your insurance altogether, drawing assumptions about your health from your private behavior. This could be especially devastating if the products were purchased by a healthy consumer to care for someone else who is sick. But none of this would ever happen, right?

It turns out automobile insurance companies in the past few years have encouraged consumers to sign up for “usage-based insurance plans,”⁸⁹ where you plug a dongle into your car and it reports your driving behavior to the company. The company promises if you are a good driver, this will drive down your rates. What it tends not to mention is that if you speed, brake suddenly, etc., this can lead to your rates increasing. These programs have not been all that popular, so insurance companies have found another approach: they buy the same sort of data from companies like General Motors.⁹⁰ And it turns out smartphone apps can collect such data, which also generally is available for sale.⁹¹

Identity theft is another legitimate concern. Stories of hackers breaching large databases seem all too common today. In 2024, Ticketmaster announced that a group of hackers pierced its security and stole personal data on 560 million of its customers. In 2019, First American Financial Corporation had records of 885 million customers stolen. Those seem like large numbers, but in

⁸⁹ Kashmir Hill, *Is Your Driving Being Secretly Scored?*, N.Y. TIMES (July 3, 2024), <https://www.nytimes.com/2024/06/09/technology/driver-scores-insurance-data-apps.html>.

⁹⁰ Connor Hart, *General Motors Reaches Settlement with FTC for Selling Consumer Data*, WALL ST. J. (Jan. 16, 2025, 5:24 PM ET), <https://www.wsj.com/business/autos/general-motors-reaches-settlement-with-ftc-for-selling-consumer-data-a5019464>.

⁹¹ See, Ekaterina Korneeva et al., *How Users Assess Privacy Risks in the Internet of Things: The Role of Framing, Comparing, and Educating*, 63 Bus. & Soc'Y 1794, 1799-1800 (2024).

2022 Alibaba, the Chinese electronic commerce company, had 1.1 billion customers' data stolen. In 2017, Yahoo had 3 billion users' data taken, and in 2020 a company called CAM4 had 10.88 billion stolen.⁹² And these are but a few of the many such instances.

One of the top concerns with breaches of this type is identity theft. In 2023, for instance, there were 3,205 data breaches. Of course, a main objective for data thieves is identity theft. Coincidentally, there were 353 million cases of identity theft that year.⁹³

Remember that we mentioned Experian as the top broker? Well, coincidentally, Experian also is one of just three major credit agencies in the U.S.⁹⁴ What you buy, how much you buy, and so much more already is available to that credit agency, given all the data it collects. This means that every purchase you make using a credit/debit card potentially can be reflected in your personal credit rating. While cash purchases will not aid one's credit rating, it allows sidestepping the entire process, so that frowned-upon behaviors are not incorporated into the credit agency's own algorithms.

This is far from an exhaustive list of reasons why a consumer might prefer to use cash. But on top of these, we should not forget that, historically, cash has played a role in protest. Paying a

⁹² Amber Jackson, *Top 10: Data Breaches*, CYBER MAGAZINE (July 31, 2024),

<https://cybermagazine.com/tp10/top-10-data-breaches>.

⁹³ Betty Lin-Fisher, *Data Breaches and ID Theft Are Still Hitting Records. Here's How to Protect Yourself*, USA TODAY (Jan. 25, 2024), <https://www.usatoday.com/story/money/2024/01/25/data-breach-id-theft-protection/72352690007/>.

⁹⁴ Alexandria White, *What Is A Credit Bureau?* CNBC (Nov. 1, 2024), <https://www.cnbc.com/select/what-are-the-three-credit-bureaus/>.

fine or hidden cost in small bills or coins⁹⁵ is a protest method with a long history. But, principally, given the enormous value of private data, consumers might reasonably assume that cashless check-out options are little more than an intentional ploy to *force* them to relinquish that intimate data.

CONCLUSION

Privacy is a valued human right, as noted in the 19th Century by Warren and Brandeis⁹⁶ and first confirmed in a Georgia court in *Pavesich v. New England Life Ins. Co.* (1905). Yet, today's privacy laws are best described as a hodgepodge, with laws that cover only small pieces of our privacy, and offer no general privacy protection. It is this, in fact, that has created today's data industry. As a recent law review article on data collection noted, "In the absence of meaningful protections, commercial surveillance has flourished and become the dominant business model of the Internet."⁹⁷ But it reaches beyond the Internet, since every aspect of our offline lives is being monitored by the Internet of Things, the growing number of cameras (including smartphone cameras), and other spy technologies.

The ability of consumers to protect their privacy, preventing some of their data from being collected, already is close to nonexistent. Sun Microsystems CEO Scott McNealy is renowned for saying, "You have zero privacy anyway. Get over it."⁹⁸ With all of our online behavior being

⁹⁵ Peter C. Alexander, *A Penny for Your Thoughts: Free Speech and Paying Fines with Coins*, 40 U. ARK. LITTLE ROCK L. REV. 389 (2018).

⁹⁶ Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁹⁷ Neil Richards, Woodrow Hartzog, & Jordan Francis, *A Concrete Proposal for Data Loyalty*, 37 HARV. J. LAW & TEC 1335, 1341 (2023).

⁹⁸ Polly Sprenger, *Sun on Privacy: 'Get Over It,'* WIRED (January 26, 1999), <https://www.wired.com/1999/01/sun-on-privacy-get-over-it/>.

tracked, and a growing and significant portion of our offline behavior being observed, collected, bought, and sold, McNealy is almost literally correct. And while consumers do have some (though minor) protection online, via the ability to opt-out of data collection in many cases, that option does not translate to offline shopping in brick-and-mortar stores. Cash is the only remaining defense regarding those activities, but that defense is vanishing where stores transition to being cash-free venues.⁹⁹

As Donald Trump recently began his second term as U.S. President, one of his first announced plans was to cease production of penny coins. It turns out that small coin actually costs 3.7 cents to produce. The nickel, too, costs more than its face value.¹⁰⁰ We raise this issue because it shows that the pressure to eliminate cash is on the rise, for a variety of reasons.

A cashless society probably is inevitable at some point in the future. Until that time comes, however, there is a significant threat to U.S. consumers' rights that is worth fighting against. Before abandoning cash, we desperately need a privacy law (or multiple laws) to offer far better protection for those consumers than is on the books today. We likewise need to ensure consumers understand the existing threats to their privacy.

⁹⁹ We did not mention the additional threat of in-store surveillance with technologies like beacons, that can interact with some phone apps as a shopper roams through a store, or the growing use of Radio Frequency Identification (RFID) technologies to track what a consumer buys. Both, when combined with card purchases certainly can add to the data collected. However, they both have limits when paying with cash, and the phone apps can be avoided/deleted by customers who understand the threat. *See* Nguyen, *supra* note 53.

¹⁰⁰ Ben Blatt, *Does It Make Sense to Stop Minting Pennies?* N.Y. TIMES (Feb. 19, 2025), <https://www.nytimes.com/2025/02/19/upshot/penny-trump-nickel-elimination.html?searchResultPosition=3>.

In addition to discrimination against certain populations and, of course, privacy, the elimination of the cash option removes another fundamental right of American citizens: freedom of choice. These rights are essential for both a democracy and a free market economy.

SEC v. JARKESY AND THE ASSAULT ON AGENCY ADJUDICATION

Patrick Vinchur

ABSTRACT

The Supreme Court's decision in SEC v. Jarkesy significantly alters the regulatory landscape for securities enforcement, striking at the heart of the SEC's authority to adjudicate cases in its in-house tribunals. The Court's ruling held that the SEC's enforcement actions seeking civil penalties must be tried before a jury in an Article III court, rejecting the agency's reliance on administrative law judges. This decision, grounded in the Seventh Amendment and public-rights doctrine, has far-reaching consequences for administrative enforcement mechanisms across federal agencies. By undermining the SEC's ability to efficiently prosecute securities fraud, Jarkesy threatens to weaken regulatory oversight, increase judicial caseloads, and provide corporate defendants with strategic advantages in litigation.

*This Note will analyze the Supreme Court's reasoning in Jarkesy and its implications for securities enforcement and administrative adjudication more broadly. Part I provides historical context, outlining the creation of the SEC and its enforcement mechanisms, the impact of the Dodd-Frank Act, and the constitutional challenges that followed. Part II details the Supreme Court's decision in Jarkesy. Part III critiques the Court's reasoning, arguing that its reliance on an overly formalistic public-rights analysis disregards established precedent, particularly *Atlas Roofing*. Finally, Part IV explores the broader implications of the decision, including its effect on SEC*

enforcement actions, other executive agencies that rely on administrative adjudication, and businesses subject to enforcement. This Note ultimately argues that Jarkesy represents a significant step toward dismantling the administrative state, threatening the SEC's ability to regulate financial markets effectively and increasing the risk of future economic instability.

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I. Background

A. The Creation of the SEC

On October 28, 1929, the Dow Jones Industrial Average dropped nearly thirteen percent, marking the beginning of the Great Depression.¹ An economic decline continued through the 1930s as thousands of banks collapsed and the unemployment rate skyrocketed to almost twenty-five percent.² As the stock market crashed, so too did the public's faith in Wall Street.³

Up until this point, the United States securities market had been relatively unfettered.⁴ Companies often abused the market; fraudulent activities and dangerous investments were a common occurrence.⁵ In many cases, companies and brokers would artificially promote the value of their company and promise returns that had little to no substantive basis.⁶ With investors relying

¹ *Stock Market Crash of 1929*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/stock-market-crash-of-1929>.

² John Cassidy, *The Real Cost of the 2008 Financial Crisis*, THE NEW YORKER (Sep. 17, 2018), https://www.newyorker.com/magazine/2018/09/17/the-real-cost-of-the-2008-financial-crisis?_sp=312b1f37-3685-4411-aeeb-677414c32008.1729788328132.

³ *The Role of the SEC*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec#> (last visited Oct. 24, 2024).

⁴ John H. Matheson, *Securities and Exchange Commission*, FREE SPEECH CENTER (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/securities-and-exchange-commission/>.

⁵ *Id.*

⁶ *Securities Law History*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/securities_law_history (last updated Oct. 2023).

on these false promises, “the market was in a state of speculative frenzy,” which culminated in the great stock market crash of 1929.⁷

In the following years, because investor confidence was at an all-time low, Congress held hearings to identify the major issues underlying the United States securities market.⁸ In light of its findings, Congress passed the Securities Act of 1933 (Securities Act) and Securities Exchange Act of 1934 (Securities Exchange Act), which created the Securities and Exchange Commission (SEC).⁹ Congress later passed the Investment Advisors Act of 1940 to regulate investment advisers.¹⁰

Each of these laws contains an antifraud provision: Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisors Act.¹¹ Section 17(a) of the Securities Act prohibits individuals from “obtain[ing] money or property by means of any untrue statement of a material fact,” as well as omitting material facts.¹² Section 10(b) of the Securities Exchange Act, as implemented by Rule 10b-5, prohibits “any device, scheme, or artifice to defraud,” making “untrue statement[s] of ... material fact,” causing certain material omissions, and “engag[ing] in any act ... which operates or would operate as a fraud.”¹³ And Section 206(b) of the Investment Advisers Act, as implemented by Rule 206(4)-8, prohibits

⁷ *Id.*

⁸ THE ROLE OF THE SEC, *supra* note 3.

⁹ *Id.*

¹⁰ *Laws and Rules*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/investment/laws-and-rules> (last updated May 13, 2020).

¹¹ 15 U.S.C. §§ 77q(a)(2), 78j(b), 80b-6(4).

¹² 15 U.S.C. § 77q(a)(2).

¹³ 17 C.F.R. § 240.10b-5 (2023); *see* 15 U.S.C. § 78j(b).

investment advisers from making “any untrue statement of a material fact” or engaging in “fraudulent, deceptive, or manipulative” acts.¹⁴ The main goals behind these federal-securities laws were disclosure and transparency, and the SEC was given the authority to enforce these acts to regulate the securities industry.¹⁵

The SEC has a three-part mission: (1) “protect investors,” (2) “maintain fair, orderly and efficient markets,” and (3) “facilitate capital formation.”¹⁶ To uphold this mission, the SEC’s Division of Enforcement investigates securities violations, bringing civil suits against any wrongdoers.¹⁷ Since the 1930s, the SEC has enforced securities law through two primary mechanisms: (1) federal court and (2) in-house administrative proceedings.¹⁸

B. Dodd-Frank and its Impact on Administrative Proceedings

In 2007, the United States was hit with the sharpest downturn in economic activity since the Great Depression; this period became known as the “Great Recession.”¹⁹ The Great Recession was avoidable, and the Financial Crisis Inquiry Commission identified government deregulation

¹⁴ 17 C.F.R. §§ 275.206(4)-8(a); *see* 15 U.S.C. § 80b-6(4).

¹⁵ CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, *supra* note 6.

¹⁶ *About*, U.S. SECURITIES AND EXCHANGE COMMISSION,

<https://www.sec.gov/about#:~:text=The%20SEC's%20mission%20is%20to.markets%3B%20and%20facilitate%20capital%20formation> (last updated Jan. 23, 2025).

¹⁷ Peter Gratton, *Securities and Exchange Commission (SEC): What It Is and How It Works*, INVESTOPEDIA (April 26, 2025) <https://www.investopedia.com/terms/s/sec.asp>.

¹⁸ *Id.*

¹⁹ *Great Recession: What it Was and What Caused It*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/great-recession.asp> (last updated April 30, 2025).

as the number one cause of the crash.²⁰ To respond to this concern, and prevent future crises from occurring, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).²¹

Dodd-Frank significantly expanded the SEC's authority to bring administrative proceedings against a broader range of individuals.²² Previously, the SEC could only pursue administrative actions involving civil penalties against those registered with the Commission.²³ Now, it had the authority to pursue action for civil penalties against "any person" associated with securities law violations.²⁴ "Any person" includes those "not directly regulated by the agency," such as corporate officers, employees, and individuals associated with unregistered entities.²⁵

Administrative law judges (ALJs) are central to these in-house administrative proceedings.²⁶ During a proceeding, the ALJ acts as both judge and jury.²⁷ The ALJ "considers evidence presented..., makes credibility determinations, and issues an initial decision with

²⁰ *Id.*

²¹ Gratton, *supra* note 17.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ John J. Carney et al., *Litigation, Professional Perspective - Navigating a Litigated SEC Administrative Proceeding*, BL (Jan. 2021)

<https://www.bloomberglaw.com/external/document/XB356GR4000000/litigationprofessional-perspective-navigating-a-litigated-sec-a>.

findings of fact and conclusions of law.”²⁸ Because the ALJ makes factual determinations, discovery is greatly limited, and the defense’s time to prepare its case is shortened.²⁹

Once the ALJ has issued an initial decision, both the Enforcement Division and the defendant can appeal to the SEC Commission, where the decision is subject to de novo review.³⁰ If the Commission upholds the in-house decision in favor of the SEC, the defendant may appeal to the U.S. Court of Appeals.³¹ On appeal to the circuit, “[t]he findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.”³² Because in-house adjudication was more efficient and provided the SEC with procedural advantages, Dodd-Frank gave the SEC a powerful incentive to bring more cases as administrative actions.

C. Lucia v. SEC

Because of its inherent advantages, the SEC’s in-house proceedings faced several constitutional challenges in recent years.³³ In *Lucia v. SEC*, the SEC charged Raymond Lucia with violating securities laws and assigned ALJ Cameron Elliot to adjudicate the case.³⁴ Judge Elliot issued an initial decision against Lucia and imposed sanctions, including civil penalties of \$300,000.³⁵

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 15 U.S.C. § 78y(a)(4).

³³ See generally *Lucia v. SEC*, 585 U.S. 237 (2018).

³⁴ *Id.* at 242.

³⁵ *Id.*

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot was not constitutionally appointed.³⁶ His claim stemmed from the fact that “ALJs are ‘Officers of the United States’ and thus subject to the Appointments Clause.”³⁷ Under this Clause, “only the President, ‘Courts of Law’, or ‘Heads of Departments’ can appoint ‘Officers.’”³⁸ While the Commission does indeed count as a “Head[] of Department[],” the SEC staff members in charge of appointing the ALJs do not.³⁹

The Commission rejected Lucia’s argument and held that the SEC’s ALJs are not “Officers of the United States.”⁴⁰ Instead, the Commission held that ALJs are employees and fall outside the purview of the Appointments Clause.⁴¹ The Court of Appeals affirmed the Commission’s ruling and agreed with the Commission’s reasoning that ALJs do not exercise significant independent authority.⁴²

Lucia then petitioned to the Supreme Court which reversed the holding of the Court of Appeals.⁴³ The Court held that ALJs are “Officers” within the meaning of the Appointments Clause.⁴⁴ In its analysis, the Court determined ALJs exercise “significant discretion” when

³⁶ *Id.* at 243.

³⁷ *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2.).

³⁸ *Id.*

³⁹ *Lucia*, 585 U.S. at 243.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 252.

⁴⁴ *Id.*

carrying out “important functions.”⁴⁵ The holding in *Lucia* reshaped the landscape for ALJs within the SEC by clarifying that they must be appointed according to the Appointments Clause; it marked a significant step in limiting administrative authority. The *Lucia* decision paved the way for the *Jarkesy* decision that followed.

II. SEC v. Jarkesy

A. Facts and Procedural Background

Shortly after the passage of Dodd-Frank, the SEC began investigating George Jarkesy, Jr. (Jarkesy) and Patriot28, LLC (Patriot28) for securities fraud.⁴⁶ Between 2007 and 2010, Jarkesy launched two hedge funds, raising about \$24 million from accredited investors including financial institutions, investment professionals, and high net worth individuals.⁴⁷ Patriot28, which Jarkesy managed, was selected as the hedge funds’ investment adviser.⁴⁸ According to the SEC, Jarkesy and Patriot28 misled investors in three ways: “(1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds’ auditor and prime broker, and (3) by inflating the funds’ claimed value so that Jarkesy and Patriot28 could collect larger management fees.”⁴⁹ The SEC commenced an enforcement action seeking civil penalties and alleging a violation of the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act⁵⁰

⁴⁵ *Id.* at 248 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991)).

⁴⁶ SEC v. Jarkesy, 603 U.S. 109, 117 (2024).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Relying on the new authority under Dodd-Frank, the SEC opted to enforce the matter in-house as opposed to federal court.⁵¹ In 2014, the presiding ALJ issued an initial decision against Jarkesy and Patriot28.⁵² The Commission then reviewed the decision and released its final order in 2020.⁵³ The final order “levied a civil penalty of \$300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.”⁵⁴

Next, Jarkesy and Patriot28 filed a petition for review in the Fifth Circuit.⁵⁵ A divided panel granted their petition and ultimately vacated the final order of the Commission.⁵⁶ The petitioners raised three constitutional challenges before the Fifth Circuit, and that court held: (1) the SEC’s decision to adjudicate the matter in-house violated Jarkesy’s and Patriot28’s Seventh Amendment right to a jury trial; (2) Congress violated the nondelegation doctrine by authorizing the SEC to choose its forum without providing an intelligible principle in its authorization; and (3) statutory removal restrictions on SEC ALJs violate Article II and the separation of powers.⁵⁷ The Fifth Circuit denied rehearing en banc, and the Supreme Court granted certiorari.⁵⁸

⁵¹ *Id.* at 119.

⁵² *Jarkesy*, 603 U.S. at 119.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022).

⁵⁸ *Jarkesy*, 603 U.S. at 120.

B. Court's Analysis

To conduct its analysis, the Supreme Court focused on the first certified question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud.⁵⁹ The threshold question was whether the action implicated the Seventh Amendment.⁶⁰ The Court answered that it did because the claim is “legal in nature”.⁶¹

Because the action implicated the Seventh Amendment, the second question became whether the “public-rights” exception to Article III jurisdiction applies.⁶² The exception allows Congress to assign cases to agencies for adjudication without jury trials if they involve matters of public rights.⁶³ The Court held that the exception did not apply here, and a jury is required. Because the Seventh Amendment questions resolved the case, the Court did not reach the issues on nondelegation and removal that were before the Fifth Circuit.⁶⁴

1. Seventh Amendment

First, the Court reasoned why the action implicates the Seventh Amendment.⁶⁵ The Seventh Amendment guarantees that in “[s]uits at common law... the right of trial by jury shall be preserved.”⁶⁶ The framers wrote the term “common law” into the Amendment to serve as a

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 122.

⁶² *Id.* at 127.

⁶³ *Id.*

⁶⁴ *Jarkesy*, 603 U.S. at 121.

⁶⁵ *Id.* at 121.

⁶⁶ U.S. CONST. amend. VII.

“contradistinction to equity, and admiralty, and maritime jurisprudence.”⁶⁷ The Amendment therefore demands a right to a jury trial in “all suits which are not of equity or admiralty jurisdiction.”⁶⁸

The court postured that the Seventh Amendment extends to a claim that is “legal in nature” regardless of whether that claim is statutory.⁶⁹ In *Tull v. U.S.*, the Supreme Court held that “[a]ctions by the Government to recover civil penalties under statutory provisions historically ha[d] been viewed as [a] type of action in debt requiring trial by jury.”⁷⁰ To conduct its analysis in *Tull*, the court considered the cause of action and remedy it provided; the more important consideration of the two was the remedy because some causes of action sound in law and equity.⁷¹

In the present case, the SEC seeks civil penalties, which can be legal or equitable.⁷² A monetary remedy is considered legal if it “punish[es] or deter[s] the wrongdoer” as opposed to solely restoring the “status quo.”⁷³ The Securities Exchange Act and the Investment Advisers Act condition the availability of civil penalties on six statutory factors: (1) whether the alleged misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, (2) whether it caused harm, (3) whether it resulted in unjust enrichment, accounting for any restitution made, (4) whether the defendant had previously violated securities laws or

⁶⁷ *Parsons v. Bedford*, 28 U.S. 433, 446 (1830).

⁶⁸ *Id.* at 447.

⁶⁹ See *Tull v. U.S.*, 481 U.S. 412, 417-25 (1987).

⁷⁰ *Id.* at 418-19.

⁷¹ See *id.* at 417-25.

⁷² *SEC v. Jarkey*, 603 U.S. 109, 123 (2024).

⁷³ *Id.*

regulations, or had previously committed certain crimes, (5) the need for deterrence, and (6) other ‘matters as justice may require. These factors concern culpability, deterrence, and recidivism, and deal with punitive measures.⁷⁴ Furthermore, the SEC is not obligated to return any money to victims.⁷⁵ The SEC’s civil penalties are designed to “punish and deter, not to compensate.”⁷⁶ Thus, the Court concluded, they are a remedy at common law and a defendant should be entitled to a jury.⁷⁷

Furthermore, the Court argues the SEC’s causes of action are similar to that of common law fraud, an action that is “legal in nature,” which confirms the above conclusion.⁷⁸ Both causes of action target the misrepresentation or concealing of material facts.⁷⁹ When drafting the Securities Act, Securities Exchange Act, and Investment Advisers Act, Congress deliberately used the word “fraud” and other common law terms to incorporate common law fraud prohibitions into federal securities law.⁸⁰ The SEC followed suit in drafting its rules.⁸¹ “[W]hen Congress transplants a common-law term, the old soil comes with it.”⁸² The majority concludes that the

⁷⁴ *Id.*

⁷⁵ *Tull*, 481 U.S. at 422-23.

⁷⁶ *Jarkesy*, 603 U.S. at 125.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Compare 15 U.S.C. §§ 77q(a)(2), 78j(b), 80b-6(4) and 17 C.F.R. §§ 240.10b-5(b), 275.206(4)-8(a)(1), with Restatement (Third) of Torts: Liability for Economic Harm, §§ 9, 13 (2018).

⁸⁰ *Jarkesy*, 603 U.S. at 111.

⁸¹ See 17 C.F.R. §§ 240.10b-5(a), (c).

⁸² *Jarkesy*, 603 U.S. at 125 (quoting *United States v. Hansen*, 599 U.S. 762, 778 (2023)).

close relationship between federal securities fraud and common law fraud—as demonstrated through Supreme Court precedent—shows this action legal is in nature.⁸³

2. Public-Rights Exception

Even though this cause of action implicated the Seventh Amendment, the “public-rights” exception could still apply; the Court explained that it does not. As stated above, this exception allows Congress to assign matters concerning public rights to an agency without a jury.⁸⁴ A public right is one that “historically could have been determined exclusively by [the executive and legislative] branches.”⁸⁵ By contrast, matters concerning private rights may not be removed from Article III courts.⁸⁶ A private right is one that “is in the nature of an action at common law.”⁸⁷

The majority conceded that the distinction between public and private rights is not “definitively explained.”⁸⁸ They listed out examples of decisions recognizing the public-rights

⁸³ *Id.* at 126-27; *see, e.g.*, Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 343–44 (2005) (evaluating pleading requirements in light of the “common-law roots of the securities fraud action”); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 (1985) (“The meaning the Court has given the term ‘manipulative’ [in § 10b of the Securities Exchange Act] is consistent with the use of the term at common law” (footnote omitted)); *Chiarella v. United States*, 445 U.S. 222, 227–29 (1980) (explaining that insider trading liability under Rule 10b-5 is rooted in the common law duty of disclosure); *Basic Inc. v. Levinson*, 485 U.S. 224, 253 (1988) (White, J., concurring in part and dissenting in part) (“In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.”).

⁸⁴ *Jarkesy*, 603 U.S. at 126–27.

⁸⁵ *Id.* at 128 (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 131 (quoting *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018)).

exception, including the Treasury's power to hold summary proceedings to collect revenue and Congress's administrative power over immigration prohibition.⁸⁹ But they also asserted that because the public-rights exception is an *exception*, there is a presumption that matters fall within the jurisdiction of Article III courts.⁹⁰

Next, the Court heavily relied on the holding in *Granfinanciera, S.A. v. Nordberg* to show that securities fraud is a private right.⁹¹ There, a trustee sued a corporation for fraudulent conveyance in bankruptcy court.⁹² In 1984, Congress authorized non-Article III bankruptcy judges to hear fraudulent conveyance actions without juries.⁹³ The court in *Granfinanciera* held that the public-rights exception did not apply and the matter must be held in an Article III court.⁹⁴

Applying the reasoning in *Granfinanciera*, this Court concluded "even when an action 'originate[s] in a newly fashioned regulatory scheme,' what matters is the substance of the action, not where Congress has assigned it.⁹⁵ In *Jarkesy*'s case, the Court asserted, the substance of the

⁸⁹ See, e.g., *id.* at 127–32 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 274–75 (1856); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 331–34 (1909)); Ex parte Bakelite Corp., 279 U.S. 438, 446 (1929) (the assessment of tariffs does not implicate Article III); United States v. Jicarilla Apache Nation, 564 U.S. 162, 174 (2011) (relations with Indian tribes does not invoke Article III); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (the administration of public lands does not invoke Article III).

⁹⁰ *Jarkesy*, 603 U.S. at 131 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 548–49, and n. 21 (1962)).

⁹¹ *Id.*; see *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 53–55 (1989).

⁹² See *Granfinanciera*, 492 U.S. at 36.

⁹³ *Id.* at 50.

⁹⁴ *Id.*

⁹⁵ *Jarkesy*, 603 U.S. at 134 (quoting *Granfinanciera*, 492 U.S. at 52).

claim is rooted in common law.⁹⁶ The antifraud provisions of the federal securities laws “provide civil penalties... target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles.”⁹⁷ Because of this, the action involves a private right as opposed to a public right, and Congress may not strip the judiciary of its power to oversee the action.⁹⁸

III. Critique of the *Jarkesy* Decision

A. Introduction

The majority erred in holding that the antifraud provisions of the securities laws are private rights. As the dissent notes, the two constitutional provisions at issue here are the Seventh Amendment and the Article III Vesting Clause.⁹⁹ Under the Vesting Clause, the “judicial Power of the United States... shall be vested” in federal Article III courts.¹⁰⁰ The Seventh Amendment is only implicated *if* the matter is litigated in an Article III court. If the matter proceeds in a non-Article III forum, the relevant issue becomes whether “Congress properly assign[ed] the matter” to that forum consistent with separation of powers.¹⁰¹ If the non-article III adjudication is permissible, the Seventh Amendment should be ignored.¹⁰²

⁹⁶ *Id.* at 134.

⁹⁷ *Id.* at 134.

⁹⁸ *Id.*

⁹⁹ *Id.* at 171 (Sotomayor, J., dissenting).

¹⁰⁰ U.S. Const. art. III, § 1.

¹⁰¹ *Jarkesy*, 603 U.S. at 172 (Sotomayor, J., dissenting) (quoting *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 345 (2018)).

¹⁰² *Granfinanciera, S.A. v. Nordberg*, 492 U. S. 33, 53-54 (1989).

So, the only real issue is whether Congress has the authority to “assign a particular matter to a non-Article III factfinder.”¹⁰³ The Supreme Court has consistently answered this question by analyzing whether the matter concerns public rights—if it does, it can be assigned outside of Article III courts.¹⁰⁴ The majority contends that the distinction between public and private rights is confusing.¹⁰⁵ While this is “true for cases involving wholly private disputes, it is not for cases where the Government is a party.”¹⁰⁶ Even *Granfinanciera*, which the majority uses to bolster its public-rights analysis, recognizes this notion.¹⁰⁷

B. The Government as a Party and *Atlas Roofing*

For over almost 200 years, the Supreme Court has repeatedly emphasized the principle that the public-rights exception applies when the Government is a party.¹⁰⁸ The most relevant of those cases is *Atlas Roofing Co v. Occupational Safety and Health Review Commission*; this was the last time the Supreme Court addressed whether in-house adjudication of claims brought by the

¹⁰³ *Jarkesy*, 603 U.S. at 173 (Sotomayor, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 130.

¹⁰⁶ *Id.* at 173 (Sotomayor, J., dissenting).

¹⁰⁷ See *Granfinanciera*, 492 U.S. at 68-69 (Scalia, J., concurring in part and concurring in the judgement).

¹⁰⁸ See, e.g., *Den Ex Dem Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 284 (1855) (holding that the Government’s in-house assessment of penalizing a federal customs collector was constitutional because public rights were at issue, and the government was a party); *Oceanic Steam Navigation Co.*, 214 U.S. 320, 338-40 (1909) (upholding a customs official’s adjudication and imposition of a penalty on a steamship company that violated immigration laws); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (the administration of public lands does not invoke Article III).

Government was constitutional.¹⁰⁹ The Court there concluded that the Seventh Amendment permitted Congress to assign the adjudication of a civil cause of action to an administrative agency.¹¹⁰

In *Atlas Roofing*, two employers were separately cited for violating the Occupational Safety and Health Act of 1970 (OSHA).¹¹¹ In both instances, an employee had died due to a violation of a mandatory occupation safety standard.¹¹² In its opinion, the Court first explained the history of OSHA.¹¹³ In 1970, Congress concluded that “work-related deaths and injuries had become a ‘drastic’ national problem.”¹¹⁴ Because state statutory remedies and common-law actions for negligence and wrongful death were inadequate to protect employees, Congress enacted OSHA.¹¹⁵ OSHA allowed the Secretary of Labor to promulgate health and safety standards and the Occupational Safety and Health Review Commission (OSHC) to impose civil penalties on employers.¹¹⁶

The employers claimed that the Seventh Amendment granted them the right to a jury trial, and Congress could not assign the matter to be adjudicated by OSHC.¹¹⁷ The Court, however,

¹⁰⁹ See *Atlas Roofing Co v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977).

¹¹⁰ *Id.* at 461.

¹¹¹ *Id.* at 447.

¹¹² *Id.*

¹¹³ See *id.* at 444-47.

¹¹⁴ *Id.* at 444.

¹¹⁵ *Atlas Roofing*, 430 U.S. at 444-45.

¹¹⁶ *Id.* at 445-46.

¹¹⁷ *Id.* at 448.

upheld OSHA's statutory scheme.¹¹⁸ It relied on the long-standing tradition of public-rights cases which affirmed Congress's authority to assign civil actions—in which the Government is a party—to in-house adjudication.¹¹⁹ Based off historical precedent, the Court determined that when Congress “create[s] a new cause of action, and remedies therefor,” it has the discretion to “plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.”¹²⁰ “This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law.”¹²¹

In its analysis of *Jarkesy*, the majority fails to articulate a coherent legal principle for why only certain areas (taxation, immigration, customs) fall under the public-rights doctrine, but securities regulation does not.¹²² Instead of applying a clear analytical framework, the majority selectively picks historical examples without explaining why they define the doctrine's boundaries.¹²³ The majority seems to suggest that a common thread underlying these cases is that “the political branches had traditionally held exclusive power over th[ese] field[s] and had exercised it.”¹²⁴ But *Atlas Roofing* “expressly rejected the argument that the public-rights doctrine is limited to particular exercises of congressional power.”¹²⁵

¹¹⁸ *Id.* at 450.

¹¹⁹ *See id.* at 450-55.

¹²⁰ *Id.* at 461.

¹²¹ *Atlas Roofing*, 430 U.S. at 455.

¹²² *See SEC v. Jarkesy*, 603 U.S. 109, 130 (2024)

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 184 (Sotomayor, J., dissenting).

The employers in *Atlas Roofing* tried to argue that the public-rights doctrine observed in historical cases such as *Murray's Lesse* “is inapplicable where the Government exercises other powers that [they] regard[ed] as less fundamental, less exclusive, and less vital to the existence of the Nation, such as the power to regulate commerce among the several States, the latter being the power Congress sought to exercise in enacting [OSHA].”¹²⁶ But the court rejected this argument, explaining that nothing in those cases turned on those particular exercises of the Government’s authority.¹²⁷ Rather, all that mattered was if the government was a party to the action.¹²⁸

The majority’s disregard for *Atlas Roofing* “significantly undermines this Court’s commitment to stare decisis and the rule of law.”¹²⁹ While the statutes in *Atlas Roofing* and this case are different, the schemes are markedly similar. Just as Congress’s identification of a nationwide workplace safety problem led to the inception of OSHA,¹³⁰ here, Congress identified a lack of transparency and accountability in the securities market which led to the creation of the SEC.¹³¹ Moreover, both OSHA and federal securities laws do not require an actual injury to occur; they are prophylactic regimes that can penalize violators before anyone is harmed.¹³²

Most importantly, Congress authorized the SEC to initiate administrative enforcement proceedings to resolve potential violations of federal law and impose civil penalties on private

¹²⁶ *Atlas Roofing*, 430 U.S. at 456.

¹²⁷ See generally *id.* at 456-57.

¹²⁸ See *id.* at 457-58.

¹²⁹ *Jarkesy*, 603 U.S. at 178 (Sotomayor, J. dissenting).

¹³⁰ *Atlas Roofing*, 430 U.S. at 444.

¹³¹ INVESTOR.GOV, *supra* note 3.

¹³² See *Atlas Roofing*, 430 U.S. at 445; *SEC v. Life Partners Holdings, Inc.* 854 F.3d 765, 779 (CA5 2017).

parties for those violations, all while ensuring that the agency's final decision remains subject to judicial review by an Article III court.¹³³ The same procedure to appeal to a federal court exists in OSHA's framework for employers who are not satisfied with the initial judgment by OSHC.¹³⁴ Also, the SEC enforces violations that are "committed against the United States rather than an aggrieved individual," which "is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution."¹³⁵ Essentially, the SEC seeks to "remedy harm to the public at large."¹³⁶ The Government seeks the same when enforcing OSHA's statutory framework.¹³⁷ Because of these marked similarities in the facts of the cases, *Atlas Roofing* should control and the Court should have held that the SEC's in-house enforcement regime fell within the public-rights exception.

C. Misguided Reliance on *Tull* and *Granfinanciera*

Instead of relying on *Atlas Roofing* or the relevant public-rights cases, the majority claimed to follow *Tull* and *Granfinanciera*.¹³⁸ However, the majority ignored critical distinctions between those cases and *Jarkesy*.

The court in *Tull* concluded that statutory claims for civil penalties were "a type of remedy at common law" that entitled a defendant to a jury trial.¹³⁹ The majority in *Jarkesy* treated this

¹³³ *Jarkesy*, 603 U.S. at 181-82 (Sotomayor, J. dissenting).

¹³⁴ *Id.*

¹³⁵ *Kokesh v. SEC*, 581 U.S. 455, 463 (2017).

¹³⁶ *Id.*

¹³⁷ *Jarkesy*, 603 U.S. at 181 (Sotomayor, J. dissenting).

¹³⁸ *See id.* at 121-29.

¹³⁹ *Tull v. United States*, 481 U.S. 412, at 422 (1987).

holding as "all but dispositive."¹⁴⁰ But the Court's analysis in *Tull* occurred in an entirely different context: the Government sued a real estate developer for civil penalties under the Clean Water Act in *federal court*.¹⁴¹ *Tull* did not address the question considered in *Atlas Roofing* and other cases involving the initial non-Article III adjudication of government claims. Instead, it simply establishes the unremarkable principle that when the government seeks civil penalties in federal district court, the Seventh Amendment guarantees the defendant "a jury trial to determine his liability on the legal claims."¹⁴²

That conclusion has no bearing on the constitutionality of the SEC's in-house adjudicative system. *Atlas Roofing* and its predecessors made this point unmistakably: Congress has the authority to assign claims to be heard for in-house adjudication "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency."¹⁴³ Although "the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," the Government "could also validly opt for administrative enforcement, without judicial trials."¹⁴⁴

Using the reasoning of *Granfinanciera*, the majority next argues that the "close relationship" between the federal-securities laws and common-law fraud "confirms that this action

¹⁴⁰ *Jarkesy*, 603 U.S. at 121-129.

¹⁴¹ See *Tull*, 481 U.S. at 414.

¹⁴² *Id.* at 425.

¹⁴³ *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 455 (1977).

¹⁴⁴ *Id.* at 460 (citing *Oceanic Stream Navigation Co. v. Stranahan*, 214 U. S. 320, at 339 (1909)).

is ‘legal in nature,’” and entitles respondents to a jury trial.¹⁴⁵ *Granfinanciera*, however, establishes its public-rights analysis only for “disputes to which the Federal Government is not a party in its sovereign capacity.”¹⁴⁶ For cases such as *Jarkesy* that involve the Government as a party to the action, the *Granfinanciera* Court concluded that “Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable.”¹⁴⁷ But, mistakenly relying on *Granfinanciera*’s holding, the majority still asserted that the federal securities laws are grounded in common law.¹⁴⁸

D. Majority’s Attempt to Distinguish *Atlas Roofing*

Both cases cited by the majority, *Tull* and *Granfinanciera*, reaffirm that *Atlas Roofing* governs precisely in circumstances like those presented in *Jarkesy*. This is why the majority’s last-minute attempt to distinguish *Atlas Roofing* is unconvincing.¹⁴⁹ The majority’s primary argument—that the OSHA scheme in *Atlas Roofing* “did not borrow its cause of action from the common law” but was instead a “self-consciously novel” framework—is flawed.¹⁵⁰

The relationship between federal securities laws and common-law fraud is materially indistinguishable from the relationship between OSHA and the common-law torts of wrongful

¹⁴⁵ *Jarkesy*, 603 U.S. at 126-127.

¹⁴⁶ *Granfinanciera v. Nordberg*, 492 U.S. 33, at n.10 (1989).

¹⁴⁷ *Id.* at 52.

¹⁴⁸ *Jarkesy*, 603 U.S. at 132-34.

¹⁴⁹ See *id.* at 139.

¹⁵⁰ *Id.* at 136-37.

death and negligence.¹⁵¹ Unlike their common-law counterparts, neither statute requires proof of actionable harm to an individual.¹⁵² The majority pointed to OSHA's granularity, but securities laws are filled with highly specific and intricate requirements that implement the statute's disclosure and antifraud provisions just the same.¹⁵³

As mentioned above, the majority relied on the idea that Congress drew from the common law when crafting the antifraud provisions of federal securities laws, whereas OSHA's statutory duty was entirely novel and unconnected to common-law principles.¹⁵⁴ However, both statutes incorporate elements of common-law claims that Congress found insufficient to address the national challenges that led to their enactment.¹⁵⁵ The majority's distinction of *Atlas Roofing* is without merit.

Ultimately, the majority departed from established precedent by failing to adhere to the Supreme Court's long-standing framework for determining when administrative adjudication is permissible. Instead of applying *Atlas Roofing*, which squarely governs the issue, the majority attempted to distinguish it based on flawed reasoning. It misconstrued the holding of *Tull* and *Granfinanciera*, which reaffirmed that *Atlas Roofing* remains controlling in such cases. By selectively reading precedent and elevating formalistic distinctions over substantive analysis, the majority undermined the Court's prior holdings and introduced uncertainty into the constitutional limits on administrative enforcement.

¹⁵¹ *Id.* at 194-95 (Sotomayor, J. dissenting).

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Jarkesy*, 603 U.S. at 136-37.

¹⁵⁵ *See id.* at 194-95 (Sotomayor, J., dissenting).

IV. Implications of *Jarkesy* and the Reasons Behind it

The Supreme Court's decision in *Jarkesy* carries significant consequences for the SEC's enforcement authority, the federal court system, the broader administrative state, and the businesses and practitioners who operate within the regulatory framework. By curtailing the SEC's ability to adjudicate fraud cases through its in-house tribunals, the Court has fundamentally reshaped how the agency can pursue enforcement actions.¹⁵⁶ The ruling may also lead to an increase in the federal-court caseload, placing greater strain on an already burdened judiciary and potentially leading to delays in resolving both regulatory and non-regulatory disputes.¹⁵⁷

Beyond its effect on the SEC and the federal court system, this decision raises broader questions about the viability of similar adjudicatory mechanisms across other federal agencies. As agencies reassess their enforcement strategies in light of *Jarkesy*, the ruling may prompt a wider reconsideration of administrative adjudication in the United States.¹⁵⁸ More broadly, *Jarkesy* reshapes the balance of power between agencies and the judiciary, reinforcing Article III adjudication and raising concerns under the Seventh Amendment. The decision fits squarely within the current administration's unitary executive philosophy, which seeks to consolidate executive

¹⁵⁶ See DANIEL T. SHEDD, CONG. RSCH. SERV., LSB11229, SEC v. JARKESY: *Constitutionality of Administrative Enforcement Actions* 4 (2024) (“The immediate impact of the Court’s decision in *Jarkesy* is to prevent the SEC from seeking civil monetary penalties for securities fraud before its own in-house tribunals.”).

¹⁵⁷ See *id.* (explaining that the SEC must bring securities fraud cases in federal court where they are seeking civil penalties).

¹⁵⁸ See *id.* (“As the Court’s decision is not framed in language cabining it to SEC enforcement actions, the decision could impact other agencies’ authority to pursue civil monetary penalties through administrative adjudication.”).

authority and limit the independence of administrative agencies.¹⁵⁹ By undermining agency adjudication, *Jarkesy* aligns with a broader trend of decisions that weaken independent agency power, further shifting the landscape of administrative governance.¹⁶⁰ In doing so, the ruling reflects the Court's growing skepticism toward agency authority and could serve as precedent for further challenges to administrative adjudication.

This jurisprudential shift also creates uncertainty for regulated businesses, who now face a more complex enforcement landscape. As administrative enforcement actions increasingly move to Article III courts, businesses may encounter higher litigation costs, prolonged proceedings, and greater unpredictability in outcomes.¹⁶¹ However, many businesses will welcome this shift, as they may find more favorable treatment in federal court.¹⁶² The following section explores these implications in greater depth, while also explaining potential motivations behind the decision.

¹⁵⁹ See Cass R. Sunstein, *This Theory Is Behind Trump's Power Grab*, N.Y. TIMES (Feb. 26, 2025), <https://www.nytimes.com/2025/02/26/opinion/trump-roberts-unitary-executive-theory.html> (“Mr. Trump is operating under the theory that the executive branch is unitary, in the sense that Article II of the Constitution places executive power in a single person, the president, who gets to control every high-level official who executes federal law (and plenty of lower-level ones, too”)).

¹⁶⁰ See generally, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

¹⁶¹ See Meghan E. Flinn et al., *Jarkesy's Impact on Agency Enforcement Proceedings: Potential Implications for the SEC and Beyond*, K&L GATES (July 3, 2024), <https://www.klgates.com/Jarkesys-Impact-on-SEC-In-House-Proceedings-Potential-Implications-for-SEC-Enforcement-and-Beyond-7-3-2024> (“Administrative proceedings can be more cost-effective than federal court review (for both the government and defendants... [t]he SEC may bring more contested actions in federal court, thereby increasing the time it takes for resolution.”).

¹⁶² See *infra* Part IV.D.

A. Impact on the SEC and Federal Courts

The *Jarkesy* decision directly impacts the SEC by limiting its ability to bring enforcement actions through administrative proceedings, forcing the agency to pursue action in federal court.¹⁶³ This shift fundamentally alters the SEC's enforcement strategy, potentially reducing its efficiency and stretching its resources thin as it navigates the procedural complexities of Article III litigation.¹⁶⁴ Reallocating enforcement responsibilities raises significant concerns about the SEC's ability to police financial markets effectively and the judiciary's capacity to absorb a growing docket of complex regulatory disputes.¹⁶⁵

First, it is important to note that “the SEC has avoided bringing in-house actions while awaiting” the decision of the Supreme Court.¹⁶⁶ And cases like *Lucia* had already questioned the constitutionality of ALJs, so the SEC has prepared to litigate many of its claims in federal court.¹⁶⁷ If anything, the enforcement scheme at the SEC will likely resemble the agency’s practices prior to [Dodd-Frank]” when the SEC lacked authority to bring these claims in house.¹⁶⁸

Nonetheless, the decision could influence the SEC’s approach to enforcement actions long term. Pursuing cases in an Article III court is more costly than adjudicating them in-house, so the

¹⁶³ See SHEDD, *supra* note 156, at 4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Lucia v. SEC*, 585 U.S. 237, 243-44 (2018); Joel M. Cohen et al., *Supreme Court Rules SEC Use of In-house Tribunals is Unconstitutional in Potentially Far-reaching Decision*, WHITE & CASE (July 1, 2024), <https://www.whitecase.com/insight-alert/supreme-court-rules-sec-use-house-tribunals-unconstitutional-potentially-far-reaching>.

¹⁶⁸ SHEDD, *supra* note 156, at 4.

SEC will have to be more selective in bringing securities fraud actions.¹⁶⁹ Not to mention that federal courts are already overcrowded.¹⁷⁰ An increase in federal judges would be necessary to handle the surge of new cases, potentially chilling enforcement actions and extending case timelines.¹⁷¹

As expected, the SEC had significantly greater success in its administrative proceedings than in federal court.¹⁷² In fiscal year 2014—the year the SEC began its yearlong streak of winning 100% of its administrative proceedings—the Commission prevailed in only 61% of its federal court cases.¹⁷³ A Wall Street Journal study found that between October 2010 and March 2015, the SEC won 90% of contested cases before an administrative law judge, compared to a 69% success rate in federal court over the same period.¹⁷⁴ Simply put, a shift to adjudicating these matters to federal courts will decrease the SEC's success rates, leading to a less regulated securities market.

¹⁶⁹ *Id.*

¹⁷⁰ See Margaret D. Farrell & Kaitlin M. Humble, *Fifth Circuit's Jarskey v. SEC Decision Calls into Question SEC's Adjudication Powers*, HINCKLEY ALLEN (June 10, 2022), <https://www.hinckleyallen.com/publications/fifth-circuits-jarskey-v-sec-decision-calls-into-question-secs-adjudication-powers/> (“In the absence of the ALJ-based system, such actions would instead proceed in federal court and additional federal judges would be needed to address the influx of new cases.”).

¹⁷¹ *See id.*

¹⁷² Ryan Jones, Comment, *The Fight over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 519 (2015).

¹⁷³ *Id.*

¹⁷⁴ *See id.* (citing Jean Eaglesham, *In-House Judges Help SEC Rack Up Wins –Success rate for agency is 90%, and if it loses, it can appeal to its commissioners*, WALL ST. J. (May 6, 2015) (<https://www.wsj.com>)).

Keep in mind that it was the Dodd-Frank Act that granted the SEC the authority to adjudicate securities fraud cases seeking civil penalties in-house.¹⁷⁵ This legislation was enacted in response to the 2008 financial crisis to help prevent similar crises in the future.¹⁷⁶ With the SEC facing reduced capacity to enforce securities violations, bad actors in U.S. stock markets will have greater opportunities to manipulate investment prices and engage in fraudulent securities offerings.¹⁷⁷ As a result, the likelihood of another major economic crisis rises significantly.

Moreover, the Supreme Court's handling of the Fifth Circuit's holdings creates uncertainty about the extent to which the lower court's ruling remains valid. Recall that the Fifth Circuit held: (1) the SEC's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial; (2) Congress violated the nondelegation doctrine by authorizing the SEC to choose its forum without providing an intelligible principle in its authorization; and (3) statutory removal restrictions on SEC ALJs violate Article II and the separation of powers.¹⁷⁸ But, because the Seventh Amendment question resolved the case, the Supreme Court never reached the nondelegation and removal issues.¹⁷⁹ Since the Court neither explicitly affirmed nor rejected those aspects of the Fifth Circuit's ruling, the issues will likely remain subject to litigation.¹⁸⁰ Although,

¹⁷⁵ See Gratton, *supra* note 17.

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022).

¹⁷⁹ SEC v. Jarkesy, 603 U.S. 109, 119-22 (2024).

¹⁸⁰ Cohen, *supra* note 167.

because the nondelegation and seventh amendment issue are so intertwined, it is likely that other circuits will follow the Fifth Circuit in regards to the nondelegation question.¹⁸¹

B. Effect on Other Executive Agencies

Beyond SEC enforcement actions, the Court's decision could have broader implications for the administrative state.¹⁸² Because the ruling is not expressly limited to SEC proceedings, it may affect other agencies' ability to impose civil monetary penalties through administrative adjudication.¹⁸³ Congress has structured numerous enforcement frameworks based on the understanding that agencies could impose such penalties before their own in-house adjudicators.¹⁸⁴ As Justice Sotomayor warned in her dissent, "the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."¹⁸⁵ Whether these agency enforcement mechanisms withstand constitutional scrutiny will likely depend on whether they fall within the public-rights exception.¹⁸⁶ If they do, adjudication within the agency may still be permitted.¹⁸⁷

¹⁸¹ See Will Yeatman, *Nondelegation in SEC v. Jarkesy: Flying Under the Radar*, YALE J. ON R. (Nov. 21, 2023), <https://www.yalejreg.com/nc/nondelegation-in-sec-v-jarkesy-flying-under-the-radar-by-will-yeatman/> ("Crucially, the SEC's nondelegation violation cannot be viewed in isolation; instead, it is bound with the jury trial question also presented in Jarkesy.").

¹⁸² See SHEDD, *supra* note 156, at 4.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ SEC v. Jarkesy, 603 U.S. 109, 201 (2024). (Sotomayor, J. dissenting).

¹⁸⁶ SHEDD, *supra* note 156, at 4.

¹⁸⁷ *Id.*

Determining which actions fall under the public-rights exception in the wake of the Court’s *Jarkesy* decision may prove challenging.¹⁸⁸ The Court acknowledged that its prior rulings have “not ‘definitively explained’ the distinction between public and private rights” and explicitly stated that its *Jarkesy* decision did not resolve this ambiguity.¹⁸⁹ However, the Court identified certain subject areas—such as revenue collection, immigration, and federal benefit programs—as falling within the public-rights exception.¹⁹⁰ Additionally, the Court declined to overrule *Atlas Roofing*, which held that civil monetary penalties for workplace safety violations fell under the public-rights exception.¹⁹¹ It distinguished the workplace safety statutory framework from SEC securities fraud enforcement, reasoning that the former was “unknown to the common law” and could therefore be adjudicated by a non-Article III tribunal.¹⁹²

Going forward, lower courts will likely need to assess the nature of claims brought against individuals to determine whether they closely resemble actions that existed at common law.¹⁹³ While claims incorporating elements of common law fraud may present clearer cases, uncertainty

¹⁸⁸ *Id.*

¹⁸⁹ *Jarkesy*, 603 U.S. at 131.

¹⁹⁰ See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (holding that the Government’s in-house assessment of penalizing a federal customs collector was constitutional because public rights were at issue, and the government was a party); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338-40 (1909) (upholding a customs official’s adjudication and imposition of a penalty on a steamship company that violated immigration laws); *Crowell v. Benson*, 285 U.S. 22, 51-52 (1932) (the administration of public lands does not invoke Article III).

¹⁹¹ *Jarkesy*, 603 U.S. at 134-36.

¹⁹² *Id.* at 138.

¹⁹³ SHEDD, *supra* note 156, at 4.

may persist regarding other types of claims.¹⁹⁴ One potential test courts may adopt is whether a claim is sufficiently “akin to [a] ‘suit[] at common law,’” or whether it more closely resembles OSHA’s workplace safety regulations, which were “unknown to the common law.”¹⁹⁵ Further judicial development may be necessary to clarify the degree of similarity required for a claim to preclude administrative adjudication.¹⁹⁶

If *Jarkesy* limits agencies’ ability to conduct in-house adjudications, the impact on a given agency will likely depend on the scope of its statutory enforcement authority.¹⁹⁷ While many agencies, like the SEC, can pursue civil penalties either in federal court or through in-house adjudication, some agencies have authority only to impose penalties administratively.¹⁹⁸ As Justice Sotomayor noted in her dissent, agencies such as the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, and the Department of Agriculture can impose civil penalties solely through agency enforcement proceedings.¹⁹⁹ If courts determine that these actions implicate the Seventh Amendment and fall outside the public-rights exception, those agencies may be unable to enforce violations at all without additional congressional authorization.²⁰⁰

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 4-5.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 5.

¹⁹⁸ *Id.*

¹⁹⁹ SEC v. *Jarkesy*, 603 U.S. 109, 198-201 (2024) (Sotomayor, J., dissenting).

²⁰⁰ See *id.* at 200 (“For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.”).

The inability to directly enforce statutory violations could significantly weaken an agency's ability to compel compliance with its regulatory framework.²⁰¹ In some cases, alternative enforcement mechanisms may still be available to address conduct that agencies previously sanctioned through in-house adjudications.²⁰² For example, federal criminal statutes prohibiting fraud and false statements might apply to certain activities that agencies could no longer address through civil penalties.²⁰³ However, the availability and practicality of such alternatives will depend on the specific conduct at issue and may vary widely across different regulatory schemes.²⁰⁴

Likewise, beyond agency enforcement actions against noncompliant actors, some statutes authorize private individuals to bring civil claims against other private parties before administrative tribunals.²⁰⁵ If such claims "implicate the Seventh Amendment" and do not fall within the public-rights exception, the constitutionality of these statutory provisions may be called into question.²⁰⁶

A potential preview of future litigation emerged in August 2024 when Perdue Farms and Comcast filed separate lawsuits against the Department of Labor (DOL), challenging the constitutionality of in-house adjudications under the whistleblower protection provisions of the

²⁰¹ SHEDD, *supra* note 156, at 5.

²⁰² *Id.*

²⁰³ *Id.*; see 18 U.S.C. § 47.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; see 21 U.S.C.A. § 399d (West).

²⁰⁶ See SEC v. Jarkesy, 603 U.S. 109, 119-121 (2024).

Food Safety Modernization Act and the Sarbanes-Oxley Act, respectively.²⁰⁷ In both cases, employees alleged unlawful retaliation for whistleblowing and pursued claims before the DOL administrative tribunals.²⁰⁸ Citing *Jarkesy*, the companies argued that requiring them to litigate these claims in an administrative forum violates their Seventh Amendment right to a jury trial.²⁰⁹ Similar statutory schemes may face legal challenges in the future.

C. The Broader Dissolution of the Administrative State

While this case introduces significant uncertainty for executive agencies, one thing remains clear: the decision aligns with the Supreme Court's push to expand its own authority and the current administration's efforts to dismantle the administrative state. In her dissent, Justice Sotomayor was very vocal about this point:

Make no mistake: Today's decision is a power grab. Once again, "the majority arrogates Congress's policymaking role to itself." It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. Its decision offends the Framers'

²⁰⁷ See *Perdue Farms Inc. v. Su*, No. 5:24-CV-594-BO-RJ, 2025 WL 338283 (E.D.N.C. Jan. 29, 2025); *see generally* Complaint, *Comcast Corp. v. U.S. Dep't of Labor*, No. 1:24-CV-01401 (E.D. Va. filed 2024)[hereinafter *Comcast Complaint*].

²⁰⁸ *See generally id.* (holding Perdue failed to make a showing that it would suffer irreparable harm through the administrative proceedings).

²⁰⁹ *See generally id.*

constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches.²¹⁰

Justice Sotomayor's warning resonates even more strongly in light of what came next. The day after the Supreme Court decided *Jarkesy*, it ruled on another case that severely reduced agency authority.²¹¹ In *Loper Bright Enters. v. Raimondo*, the Court overruled a foundational 1984 precedent known as the "Chevron doctrine" which required courts to defer to agencies' reasonable interpretations of ambiguous statutes.²¹² Now, courts have the power to interpret ambiguous statutes, making it more difficult for executive agencies to implement policy without explicit congressional authorization.²¹³

Justice Kagan expressed concern over the *Loper Bright* decision in her dissent: "Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not."²¹⁴ Despite these glaringly obvious issues, the Supreme Court once again consolidated power for itself and stripped away power from administrative agencies.

²¹⁰ *Jarkesy*, 603 U.S. 109 at 202 (Sotomayor, J., dissenting) (citations omitted).

²¹¹ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

²¹² *Id.* at 413.

²¹³ See generally *d.* at 413.

²¹⁴ *Id.* at 449 (Kagan, J., dissenting).

These decisions also precede President Trump's aggressive overhaul of the executive branch in his second term.²¹⁵ Through the newly-established Department of Government Efficiency (DOGE), President Trump and Elon Musk have "cut at least \$6.5 billion from the USAID, \$502 million from the Department of Education, \$232 million from the Social Security Administration and \$192 million from the General Services Administration."²¹⁶ President Trump is operating under the belief that the executive branch is unitary, asserting that Article II of the Constitution grants executive power to a single individual—the president—who has control over all high-ranking officials responsible for enforcing federal law.²¹⁷

The idea of one unitary executive is not new. Some distinguished scholars support the unitary executive theory, citing the text of the Constitution.²¹⁸ The opening sentence of Article II declares that "the executive power shall be vested in a president of the United States of America."²¹⁹ The same article grants the president exclusive authority to "take care that the laws be faithfully executed."²²⁰

²¹⁵ See Sunstein, *supra* note 159 ("In his opening weeks back in office, President Trump is asserting power in a way that pushes hard on, and sometimes past, the boundaries of executive authority. One of the most important of those boundaries involves his relationship with independent regulatory agencies.").

²¹⁶ Nik Popli, *What DOGE Is Doing Across the Federal Government*, TIME (Feb. 21, 2025), <https://time.com/7222251/doe-musk-federal-workers-government/>.

²¹⁷ Sunstein, *supra* note 159.

²¹⁸ *Id.*

²¹⁹ U.S. CONST. art. II, § 1, cl. 1.

²²⁰ See U.S. CONST. art. II, § 3.

Ironically enough, *Jarkesy* focused on the “Take Care Clause” to challenge the for-cause removal of ALJs.²²¹ The Supreme Court has ruled that this provision ensures the President retains a certain level of control over executive officers; the President must have sufficient authority over officers’ appointment and removal.²²² And the Fifth Circuit held the statutory removal restrictions for the SEC’s ALJs violated the Take Care Clause because the ALJs were too deeply insulated from presidential removal.²²³ Once again, the Supreme Court never directly addressed this issue, but it is likely that it will continue to be litigated as President Trump continues his war on the “deep state.”²²⁴ And despite that question remaining unanswered, the decision in *Jarkesy* aligns with President Trump’s agenda to dissolve the administrative state.

D. Support from the Business Community

The Supreme Court’s decision in *Jarkesy* carries significant implications for businesses navigating the regulatory landscape.²²⁵ By curbing the SEC’s ability to bring enforcement actions in its in-house tribunals, the ruling offers strategic advantages for corporations facing

²²¹ See *Jarkesy v. SEC*, 34 F.4th 446, 449 (5th Cir. 2022).

As mentioned earlier, this issue was not litigated in front of the Supreme Court.

²²² *Myers v. United States*, 272 U.S. 52, 117 (1926).

²²³ *Jarkesy*, 34 F.4th at 449.

²²⁴ Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534 (2018) (statement of Paul Verkuil) (“[T]he career bureaucracy is seen by many in the administration, and by the president himself, as sort of the problem.”) (quoting Charles Flavelle & Benjamin Bain, *Washington Bureaucrats Are Quietly Working to Undermine Trump's Agenda*, BLOOMBERG (Dec. 18, 2017, 1:00 AM), <https://www.bloomberg.com/news/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda>).

²²⁵ See *infra*.

enforcement.²²⁶ Businesses may now find themselves in lengthier and costlier federal court proceedings, potentially benefiting from greater procedural protections but also facing increased uncertainty.²²⁷

Many businesses are under the impression that the internal judicial forum was “rigged” in the SEC’s favor.²²⁸ In fact, twenty-four different amicus briefs were filed by companies and pro-business organizations in support of Jarkesy’s arguments that the SEC’s in-house proceedings are unconstitutional.²²⁹ In their briefs, several organizations emphasized that juries are a fundamental component of the American legal system and play a crucial role in safeguarding fairness and protecting individual liberties.²³⁰

The business community’s backing of both *Jarkesy* and the broader right to a jury trial runs counter to its long-standing aversion to juries. Corporate defendants and their defense attorneys

²²⁶ See *infra*.

²²⁷ See *infra*.

²²⁸ See Cohen, *supra* note 167 (“[T]he SEC must use the federal courts to litigate its fraud cases and cannot rely on an internal forum that many believe is “rigged” in the SEC’s favor.”).

²²⁹ See *Securities & Exchange Comm’n v. Jarkesy*, SCOTUSBLOG,

<https://www.scotusblog.com/cases/case-files/securities-and-exchange-commission-v-jarkesy/> (last visited Mar. 21, 2025) (listing briefs filed in the case).

²³⁰ See, e.g., Brief for Amici Curiae U.S. Chamber of Com. *et al.* in Support of Respondents at 8, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859) (describing jury trials as “indispensable to liberty” and “inherent and invaluable right,” and are necessary to protect “the life, liberty, or property of citizens”); ; Brief for Phillip Goldstein *et al.* as Amici Curiae in Support of Respondents at 16, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859) (explaining jury trials are “of such importance and occupy so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care”).

have traditionally believed that facing a jury is the last thing a business defendant would want. As one attorney stated:

In planning trials, lawyers who represent businesses often act as if their biggest problem were the [Seventh] Amendment's guarantee of a jury. If you asked most business people, and most of their lawyers, when they want a jury, the answer would be short: "Never!" There would follow the business bar's conventional wisdom, repeated over and over in the advice to clients: Juries are antibusiness. They cannot understand complex business transactions. They are emotional, biased, and unpredictable. A smart business litigant, according to this advice, will waive the jury and try its case to a judge.²³¹

Business defendants often argue that juries tend to favor sympathetic plaintiffs with excessive awards, struggle to grasp and apply complex business facts, and harbor bias against corporate defendants.²³² Businesses contend that jury verdicts are unpredictable, creating uncertainty that hinders innovation and weakens competitiveness.²³³ They argue that jurors may

²³¹ Bruce G. Merritt, *Does a Business Ever Want a Jury?*, 16 LITIG. 27 (1990).

²³² Richard Frankel, *Corporate Exceptionalism: What's Behind the Business Community's Newfound Love of Jury Trials*, 34 WIDENER COMMONWEALTH L. REV. 115, 129-130 (2024).

²³³ VALERIE P. HANS, *Business on Trial: The Civil Jury and Corporate Responsibility* 14 (Yale Univ. Press 2000).

perceive them as having "deep pockets" and, as a result, be more inclined to award large or disproportionate damages.²³⁴

This sentiment is expressed through corporations' actions. An increasing number of companies now incorporate mandatory arbitration clauses in their contracts with consumers and employees.²³⁵ These provisions specify that any disputes must be resolved through private arbitration rather than in court before a jury. An arbitrator, rather than a jury, determines the outcome of the case.²³⁶

This raises the question of why business groups are so strongly advocating for an expanded interpretation of the Seventh Amendment. The answer is quite simple. Businesses likely have little interest in the right to a jury trial itself. Rather, their focus is on weakening administrative agencies and making it harder to hold corporate wrongdoers accountable for their actions.²³⁷

As mentioned earlier, businesses generally oppose SEC in-house hearings due to concerns about fairness, due process, and procedural disadvantages.²³⁸ In administrative proceedings, the SEC acts as both prosecutor and judge, which defendants claim leads to bias and a lack of true judicial independence.²³⁹ Unlike in federal court, defendants in SEC administrative hearings have

²³⁴ *Id.* at 13.

²³⁵ Frankel, *supra* note 232, at 132.

²³⁶ *Id.*

²³⁷ See Rebecca Rainey et al., *Punching In: How Case on Agency Judges Impacts DOL, Immigration, BLOOMBERG LAW* (July 1, 2024, at 5:45 ET).

²³⁸ See Carney, *supra* note 27.

²³⁹ See *id.* ("Finding justice in an SEC administrative proceeding can feel unlikely when you are faced with the prospect of no jury, limited depositions, and a forum housed inside the very agency that is prosecuting your client, but defense victories can be secured by zealous advocacy.").

limited discovery rights, making it harder to obtain exculpatory evidence and cross-examine witnesses.²⁴⁰ These proceedings also tend to move much faster, leaving defendants less time to mount a robust defense while still facing severe penalties.²⁴¹ Another key issue is the limited appeal process—before reaching a federal court, appeals must first go through the SEC itself, raising concerns that the agency is effectively reviewing its own decisions.²⁴² Given these procedural disadvantages, it is easy to see why businesses support hearings in federal court. Federal court might be costlier, but it is a cost that businesses are willing to take on.²⁴³ *Jarkesy* will allow corporations to succeed in securities fraud matters at a much higher rate, and many businesses are welcoming this decision.

V. Conclusion

The Supreme Court's ruling in *Jarkesy* marks a pivotal moment in the ongoing battle over administrative adjudication and agency authority. By holding that the SEC's enforcement proceedings must be subject to jury trials, the Court has fundamentally altered the agency's ability to pursue securities fraud cases. While proponents of the decision argue that it restores

²⁴⁰ See *id.* (“Discovery is limited under the Rules, and effectively maximizing the tools available is one of the more critical aspects of the defense strategy that will require thoughtful planning.”).

²⁴¹ See *id.* (“In other words, 10 months is the longest possible time period for when the hearing must commence, leaving little time for prehearing motion practice, discovery, and trial preparation.”).

²⁴² See *id.* (“Once the ALJ has issued an initial decision, both the Division and the respondent may appeal all or any portion of the initial decision to the Commission. An ALJ's initial decision is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings... A respondent does not reach the circuit court until the action has first been appealed to the Commission. On appeal to the circuit, ‘[t]he findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.’”).

²⁴³ See Flinn, *supra* note 161.

constitutional protections and procedural fairness, its long-term consequences could be detrimental to regulatory enforcement.

The Court's holding in *Jarkesy* is flawed in several key respects. In reaching its decision, the majority misapplied the public-rights doctrine, failing to acknowledge that agency adjudication has long been recognized as a valid means of enforcing regulatory statutes. The Court's reliance on *Tull* and *Granfinanciera* ignored the critical distinction between cases where the government is a party and those involving private disputes. Further, the majority disregarded *Atlas Roofing*, which expressly affirmed Congress's authority to assign statutory enforcement actions to administrative tribunals. By elevating formalistic concerns over practical regulatory considerations, the Court undermined decades of precedent supporting agency adjudication.

The *Jarkesy* holding weakens the SEC's ability to efficiently enforce securities laws, forcing the agency to litigate more cases in federal court—a process that is both more expensive and time-consuming. Historically, administrative adjudication has allowed the SEC to act swiftly against bad actors, preventing fraud before it spreads and destabilizes financial markets. Now, as the *Jarkesy* ruling shifts enforcement to the judiciary, federal courts will face an influx of securities fraud cases, stretching judicial resources thin and delaying critical enforcement actions. The increased litigation burden may embolden bad actors, recognizing that regulators will be forced to be more selective in the cases they pursue.

Beyond its immediate effect on securities enforcement, *Jarkesy* represents part of a broader trend of Supreme Court decisions and executive actions aimed at curbing the power of administrative agencies. By restricting in-house adjudication, the Court has cast doubt on the legitimacy of agency enforcement mechanisms across the federal government. Agencies that rely on administrative law judges—such as the Occupational Safety and Health Review Commission

and the Federal Energy Regulatory Commission—may soon face similar constitutional challenges, further eroding the administrative state.

Ultimately, *Jarkesy* raises serious concerns about the future of agency enforcement and the federal government's ability to effectively regulate financial markets. If Congress and policymakers do not intervene, the consequences could extend far beyond the SEC, reshaping the balance of power between agencies, courts, and regulated industries in ways that threaten financial stability and consumer protection. In the long term, the erosion of administrative enforcement may create conditions for increased market manipulation, investor fraud, and economic downturns—repeating the very financial crises that led to the creation of the SEC in the first place.

RETURN TO SENDER: MISCLASSIFYING AMAZON DELIVERY WORKERS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Brendan Keane

ABSTRACT

None of Amazon's last-mile delivery drivers are considered Amazon employees—but should they? The Fair Labor standards Act of 1938 (FLSA) provides labor protections for employees of qualifying businesses. The FLSA, however, only protects “employees” as defined in the statute; non-traditional workers like independent contractors are excluded. Accordingly, federal labor protections hinge on worker classification regulations promulgated by the Department of Labor Wage-and-Hour Division (DOL-WHD). Such regulations, however, have shifted with the changing presidential administrations. President Trump’s first and current Administrations interpreted the FLSA to classify fewer workers as employees, while President Biden’s Administration interpreted the FLSA to classify more workers as employees. As a result, whether Amazon delivery drivers are “employees” under the FLSA remains unclear.

Amazon has seized on this ambiguity to grow its delivery network—and avoid FLSA employer obligations—by classifying its delivery drivers as independent contractors. But differing administrative interpretations of the FLSA may conclude that Amazon’s classification is wrong. This Note applies the Biden and Trump Administrations’ competing FLSA interpretations to analyze the possible misclassification of Amazon delivery workers. In the end, the Biden-era regulations probably result in employee classification for all ALI last-mile delivery workers, while Trump-era regulations favor independent-contractor classification. Further, a

certain sub-class of delivery drivers, DSP Delivery Associates, may also be considered ALI employees based on the FLSA's rule for joint-employer liability. Regardless, the unsteady legal landscape has the potential to shred ALI's delivery network if Amazon stays on its current course of ignoring growing worker misclassification concerns.

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I. Introduction

It was late in the 2024 holiday season and Miles was far behind schedule.¹ A recent snowstorm had made navigating the streets of Washington, D.C., his delivery zone, nearly impossible. The pile of Amazon Prime packages filling the back seat of his silver Toyota had not shrunk since he picked them up early that morning.² Miles checked the time; it was well into the afternoon. He sighed, realizing that his delivery block ended two hours ago.³ His phone chirped. The Amazon Flex App was alerting him that he had arrived at his next delivery stop. Grabbing his blue Amazon vest, Miles stepped out of his car and into the snowy street.

¹ This fictional narrative is based on articles describing the experience of Amazon delivery drivers during the busy holiday season. *See, e.g.*, Arielle Pardes, Amazon Delivery Drivers Say They Sacrifice Their Safety to Meet Holiday Rush, VICE (Dec. 19, 2023) <https://vice.com/en/article/amazon-delivery-drivers-say-they-sacrifice-their-safety-to-meet-holiday-rush/>; Amazon Delivery Drivers Face More Holiday Risks: Brace for "Holiday Hell", AMARO LAW FIRM (Nov. 22, 2023) <https://amarolawfirm.com/amazon-delivery-drivers-face-more-holiday-risks-brace-for-holiday-hell/#:~:text=2..corners%20and%20risk%20their%20safety>; Emily Ferguson, Amazon Delivery Driver Faces Nightmare Christmas as Driver Shortages Lead to Chaos, EXPRESS (Nov. 23, 2023) <https://www.express.co.uk/news/uk/1847925/amazon-delivery-driver-christmas-nightmare>.

²Lindsay VanSomeren, How to Make Money Driving for Amazon Flex, NERDWALLET (Oct. 9, 2023) <https://www.nerdwallet.com/article/finance/make-money-driving-amazon-flex>.

³A delivery block is the time period in which Amazon Flex Drivers sign up to deliver packages. Flex Drivers are only paid for the fixed hours of their delivery block. Amazon Flex FAQ, AMAZON <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Nov. 25, 2024).

A few blocks away, Samantha was frantically reorganizing packages in the back of a Mercedes Sprinter Van painted “Amazon Prime Blue”⁴ and adorned with the Prime logo. She worked for “Rapid Delivery Services,” a five-person and two-truck delivery company that her boss started last month. Like Miles, Samantha was struggling to complete her delivery route on time. She had worked 60 hours that week already, yet her boss often “forgot” to pay overtime.

Both Miles and Samantha deliver packages for Amazon Logistics, Inc. (“ALI”), the delivery-service subsidiary of Amazon.com.⁵ Miles works as a driver for Amazon Flex, an app-based service that allows individuals to sign up for and deliver Amazon packages similar to Uber or DoorDash.⁶ Samantha works for a Delivery Service Partner, or “DSP,” an intermediate delivery business Amazon contracts with to fulfill delivery orders.⁷ Together, they complete the “last mile” of Amazon’s delivery process, moving packages from fulfillment centers to customer’s doors. Both don Amazon uniforms, deliver Amazon-sold products along Amazon-

⁴Amazon has trademarked its blue logo as “Amazon Prime Blue.” Help Customer Service, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GCX77V9988LUPMB2> (last visited Nov. 25, 2024).

⁵ Joe Carroll & Maria Armental, Amazon Delivery Vans Outnumber UPS, FedEx Fleets, WALL ST. J. (Oct. 24, 2023) <https://www.wsj.com/business/amazon-vans-outnumber-ups-fedex-750f3c04> [https://perma.cc/6BBM-T3SR].

⁶ What is Amazon Flex?, AMAZON FLEX, <https://flex.amazon.com/> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁷ Delivery Service Provider Brochure, AMAZON, https://m.media-amazon.com/images/G/01/DSP2022/assets/desktop/DSP_Brochure_English_V7.pdf [https://perma.cc/8WMB-Z5NA] (last visited Sept. 9, 2025).

designed delivery routes, and have Amazon review the quality of their work. Neither, however, is an Amazon employee—at least according to the company itself.

In keeping with Amazon's growth-first model, ALI's Flex Driver and Delivery Service Partner programs maximize Amazon's delivery capacity while minimizing overhead costs.⁸ To achieve this end, Amazon Logistics labels its Flex Drivers and DSPs as independent contractors, whom Amazon *neither directly nor jointly employs*.⁹ This classification allows Amazon to avoid liability to its drivers for most labor statutes while benefiting from a robust delivery operation.

But all is not as settled as ALI would like. The Fair Labor Standards Act of 1938 (FLSA) requires qualifying employers to meet federal requirements for minimum wage, overtime standards, and business record-keeping.¹⁰ These requirements are pre-conditioned on a worker being considered an employee and an employer being liable to that employee under the statute.¹¹ As a result, much hinges on how workers are classified: if a worker is an independent contractor, employers do not need to meet FLSA wage-and-hour standards. If a worker is classified as an employee, an employer is liable for substantial statutory obligations. And even if a worker gains

⁸ Agnieszka McPeak, *The Gig Is Rigged: How Gig Companies Exploit Private Law to Entrench Power*, 57 U.C. DAVIS L. REV. 2235, 2259 (2024).

⁹ Amazon Flex FAQ, AMAZON FLEX <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025); Amazon Delivery Service Partner Program, AMAZON BUSINESS [https://business.amazon.com/en/discover-more/blog/amazon-delivery-service-partner-program#:~:text=Amazon%20Delivery%20Service%20Partner%20\(DSP\)%20program%20opportunities&text=Wor](https://business.amazon.com/en/discover-more/blog/amazon-delivery-service-partner-program#:~:text=Amazon%20Delivery%20Service%20Partner%20(DSP)%20program%20opportunities&text=Wor) [https://business.amazon.com/en/discover-more/blog/amazon-delivery-service-partner-program#:~:text=Amazon%20Delivery%20Service%20Partner%20\(DSP\)%20program%20opportunities&text=Wor](https://business.amazon.com/en/discover-more/blog/amazon-delivery-service-partner-program#:~:text=Amazon%20Delivery%20Service%20Partner%20(DSP)%20program%20opportunities&text=Wor) (last visited Sept. 9, 2025).

¹⁰ 29 U.S.C. §§ 206–07, 211 (2024).

¹¹ 29 U.S.C. § 203.

employee classification, a company still must be considered an employer under the relevant statutory test for direct or joint employer status.¹²

Further, regulatory guidance around worker classification is not immune to partisan divide. Tests for worker classification and employer liability under the FLSA have flipped back-and-forth in accordance with the party that occupies the White House. Over the past nine years, the Trump and Biden Administrations have sparred over how to determine independent contractor status and joint employer responsibility: the first Trump Administration implemented employer-friendly rules for worker classification,¹³ the Biden Administration vacated those rules and implemented tests of its own,¹⁴ and the second Trump Administration functionally rescinded those Biden-era worker classification rules and will likely promulgate new rules that may resemble those implemented under the First Administration.¹⁵ The upshot is that inconsistent administrative approaches have made worker classification a law in flux—and has the potential to upend Amazon Logistics' delivery network.

¹² See generally *id.*

¹³ See generally Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 187 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts 780, 788, and 795) (finalized Jan. 7, 2021) (rescinded May 6, 2021).

¹⁴ See generally Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (to amend 29 C.F.R. pts 780, 788, and 795) (finalized Mar. 11, 2024).

¹⁵ U.S. Dep't of Lab. Wage and Hour Div., Field Assistance Bull. No. 2025-1, FLSA Independent Contractor Misclassification Enforcement Guidance (May 1, 2025); Justin R. Barnes & Jeffrey W. Brecher, DOL Regulatory Roundup: What Employers Need to Know, JACKSONLEWIS (Aug. 26, 2025) <https://www.jacksonlewis.com/insights/dol-regulatory-roundup-what-employers-need-know>.

Generally, debate over worker classification in the modern independent-contractor industry is not new. Several notable publications¹⁶ have discussed the rise of independent contractors in the “gig economy”—a loose term for a nebulous labor market of independent contractors, seasonal workers, freelancers, and other non-traditional jobs.¹⁷ Within the gig economy, Uber has been frequently analyzed due to its international reach and limited regulatory restrictions.¹⁸ Further analysis has addressed the shifting landscape of independent-contractor status under the Fair Labor Standards Act.¹⁹ Specific to Amazon’s delivery services, publications

¹⁶ See generally Daniel Valenti, Comment, *A Flexible Solution to Worker Misclassification in the Modern Economy*, 39 U. LA VERNE. REV. 327 (2019); McPeak, *supra* note 11; John A. Pearce II & Johnathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1 (2018); David Kaplan, Comment, *Consumer Rights Are Gig Workers’ Rights? Regulating the Gig Economy at the Intersection of Consumer Protection Law and Employment Law*, 53 SETON HALL L. REV. 281 (2022); Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341 (2016).

¹⁷ *What is a Gig Economy*, INVESTOPEDIA, (July 22, 2024) <https://www.investopedia.com/terms/g/gig-economy.asp>.

¹⁸ See generally Bridget Nicole Gonzalez, Note, *Employment Classification and Human Dignity in the Gig Economy*, 34 ST. THOMAS L. REV. 52 (2021); Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?* 68 MERCER L. REV. 461 (2017).

¹⁹ See generally Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationships*, 2017 U. CHI. LEGAL F. 327 (2017); Jessie O’Brien, *The Back-and-Forth Battle of Defining Independent Contractors*, 89 MO. L. REV. 719 (2024); Benjamin F. Burry, *Civil Rights and the Low-Wage Worker: Testing Economic Reality: FLSA and Title VII Protection for Welfare Participants*, 2009 U. CHI. LEGAL F. 561 (2009).

have focused on whether the Amazon worker misclassification claims must be arbitrated,²⁰ if Amazon faces tort liability for accidents involving Amazon delivery workers,²¹ and whether state-level and common-law tests for independent-contractor status can result in reclassifying Flex Drivers and DSPs as employees.²²

This note fills a gap in the active discourse around Amazon worker misclassification specifically and the shifting regulatory landscape of worker classification generally. In doing so, this note analyzes three employer-worker relationships—ALI and Flex Drivers, ALI and DSP owners, and ALI and DSP “Delivery Associates”, or DSP employees—under the statutory and regulatory framework of the FLSA as defined both in the Trump and Biden administrations. Since the Trump Administration seems poised to reinstate its own tests for independent contractor and joint employer status,²³ this note also aims to provide some foresight into how

²⁰ See generally, Emina Sadic Herberger, Note, *The Gig Economy’s Short Reach: An Analysis of the Scope of the Federal Arbitration Act’s “Transportation Worker” Exemption*, 56 GA. L. REV. 299 (2021); Janice L. Sperow, *Arbitrating Gig Economy Mass Claims*, 76 AAA-ICDR 4 (2023).

²¹ See generally Keith Cunningham-Parmeter, *When Amazon Drivers Kill: Accidents, Agency Law, and the Contractor Economy*, 65 WM. & MARY L. REV. 581 (2024); Kenton H. Steele & Zachary B. Pyers, *A Prime Opportunity for Tort Law Developments: Liability Issues Related to Amazon’s Delivery Service Partner Program*, 50 CAP. U. L. REV. 395 (2022).

²² See generally Mary Martin, *When Flexibility Sacrifices Security: An Analysis of Amazon’s Flex Program*, 54 NEW ENG. L. REV. 131, 145–147 (2019).

²³ Justin R. Barnes & Jeffrey W. Brecher, *DOL Regulatory Roundup: What Employers Need to Know*, JACKSONLEWIS (Aug. 26, 2025) <https://www.jacksonlewis.com/insights/dol-regulatory-roundup-what-employers-need-know>.

Amazon's delivery apparatus will be classified under the second Trump era, and what Amazon can do to insulate itself from misclassification liability.

We proceed in three parts. Section II provides both a statutory and regulatory framework for analyzing employer status under the FLSA and contextual information about ALI's two last-mile delivery services. Section III analyzes ALI delivery services through the competing interpretations of the FLSA under the Biden and Trump Administrations. Here, I apply the First Trump Administration's regulatory guidance as a guidepost for what the 2025 Trump Administration may implement. Finally, section IV explores the ramifications of classifying Amazon delivery drivers as employees and how Amazon can avoid issues related to misclassification.

II. Background

A. The Fair Labor Standards Act of 1938

The FLSA, passed during the New Deal Era to address public demands for worker protections,²⁴ is codified at Title 29 Chapter 8 of the U.S. Code.²⁵ The statutory scheme of the FLSA is fairly typical for labor and employment legislation.²⁶ In effect, the Act establishes a current federal minimum wage of \$7.25 per hour,²⁷ requires time-and-a-half hourly pay for work-weeks

²⁴Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV. 1978, DOL <https://www.dol.gov/general/aboutdol/history/flsa1938#12> (last visited Sept 5, 2025).

²⁵ 29 U.S.C. §§ 201-219.

²⁶ Compare 29 U.S.C. §§ 209-219 with 29 U.S.C. §§ 151-169 (National Labor Relations Act), and 29 U.S.C. §§ 651-678 (Occupational Health and Safety Act), and 29 U.S.C. §§ 1001-1003 (Employment Retirement Income Security Act).

²⁷ 29 U.S.C. § 206(a)(1)(c).

exceeding 40 hours,²⁸ prohibits “oppressive child labor,”²⁹ requires employers to keep thorough records of employees, wage rates, and hours worked per week,³⁰ and requires employers to accommodate employees who need to breastfeed at work.³¹

These protections, however, are only extended to employees who are covered under the statute.³² This threshold requirement must satisfy two elements: first, a person must be considered an *employee* according to the terms of the statute; and second, that employee must be *covered* under the statute.³³

First, “employee” is “any individual employed by an employer,”³⁴ an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee,”³⁵

²⁸ § 207(a)(1)-(2).

²⁹ § 212(c).

³⁰ § 211(c).

³¹ 29 U.S.C. § 218d.

³² SARAH DONOVAN, CONG. RSCH. SERV. R42713, FAIR LABOR STANDARDS ACT (FSLA): AN OVERVIEW (2023).

³³ *Id.*; The FLSA categorically exempts certain types of work from some statutory protections. See 29 U.S.C. § 213(a)(1)-(19) (exempting various employees including but not limited to teachers, fishermen, switchboard officers, criminal investigators, computer programmers, and baseball players from minimum-wage and maximum-hour requirements); (b)(1)-(30) (exempting various employees including but not limited to rail carriers, seaman, farm agricultural workers, taxicab operators, movie-theater operators, national-park employees from maximum-hour requirements); (c)(1) (exempting minors from child-labor requirements if employed by parents, in agriculture, or older than twelve with parents permission).

³⁴ 29 U.S.C. § 203(e)(1).

³⁵ § 203(d).

and “employ” means to “suffer or permit to work.”³⁶ This language applies to private and public employees who are not explicitly exempted from coverage.³⁷ Second, employees are covered either through “enterprise coverage” or “individual coverage,” or both.³⁸ The FLSA covers employees that are employed in an “enterprise” if the enterprise is “engaged in commerce or in the production of goods for commerce” and grosses annual sales of \$500,000 or more.³⁹ Employees are also covered if they are individually engaged in interstate or foreign commerce, or in the production of goods for interstate or foreign commerce, including any closely related process or occupation directly essential to such production.⁴⁰

Classifying Employees under the FLSA

The definitions of “employee,” “employer,” and “employ” are unhelpful delineating employees and non-employees under the FLSA. “Employer” and “employee” cannibalize each other, resulting in a circular definition that affords no real clarity.⁴¹ Yet the use of expansive

³⁶ § 203(g).

³⁷ DONOVAN, *supra* note 32.

³⁸ DOL *Factsheet 14*, U.S. DEP’T OF LABOR (2009), <https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage>; O’Brien, *supra* note 19 at 722 (explaining that employees can be covered by either individual or enterprise status, or both).

³⁹ 29 U.S.C. § 203(s)(1)(A)(i)-(ii). Employees of enterprises that operate hospitals, care facilities, schools, or is an “activity of a public agency” are also covered. § 203(s)(1)(B)-(C).

⁴⁰ *Fair Labor Standards Act Advisor*, U.S. DEP’T OF LABOR ELAWS ADVISOR, <https://webapps.dol.gov/elaws/flsa.htm> (last visited Nov. 25, 2024).

⁴¹ Compare 29 U.S.C. § 203(e)(1) (ending the definition of employee with the term “employer”) with § 203(d) (ending the definition of employer with the term “employee”). See also Jennifer Pinsof, *supra* note 16, at 345 (“The Fair Labor Standards Act (‘FLSA’), for example, provides a circular definition of an employee as “any individual employed by an employer.”).

modifiers like “any,” indeterminate definitions, and a broad definition of “employ” indicates the FLSA was meant to cover almost all labor relationships.⁴²

But the tumultuous political landscape of the past eight years, and the foreseeable future, has turned that unclear statutory language into a partisan battlefield. The Wage-and-Hour Division (WHD) of the Department of Labor (DOL), which administers and oversees the FLSA, has shifted dramatically according to which political party is currently in power.⁴³ The Trump Administration Wage-and-Hour division (Trump-WHD) and the Biden Administration Wage-and-Hour division (Biden-WHD) have consistently reversed each other’s FLSA regulations with the executive change-over. This complexity is best represented in the chart below:

Independent Contractor Tests	Joint Employer Tests
<ul style="list-style-type: none"> - Pre-2021: No formal regulations, but applied the six-factor economic realities test from <i>Driscoll</i> - 2021: Trump-WHD promulgates a new five-factor test for classifying independent contractors - 2024: Biden-WHD vacates Trump test and institutes its own independent contractor test - 2025: Trump-WHD signals intent to revoke 2024 Biden-WHD Test. 	<ul style="list-style-type: none"> - Pre-2021: various WHD rules that have turned on the economic realities of an employer situation. - 2021: Trump-WHD introduces five-factor joint-employer test. - 2024: Biden-WHD vacates Trump-WHD joint-employer test but does not promulgate its own guidance. - 2025: Trump-WHD signals intent to pass a new joint-employer rule.

Independent Contractor Classification

⁴² E.g., *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (“This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.” (citation omitted)); *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (“A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”).

⁴³ For an in-depth analysis on this point, see O’Brien, *supra* note 19.

The FLSA's expansive definition of employee, similar to other New-Deal labor statutes,⁴⁴ has led to immediate uncertainty regarding whether independent contractors fell within the "employee" prong of FLSA coverage. The term "independent contractor", or "IC", generally means "a person or company providing a service or goods on a contractual basis, and not formally regarded as an employee or as the legal responsibility of those with whom the contract is made."⁴⁵ Disputes over independent-contractor status historically concerned vicarious tort liability.⁴⁶ There, courts applied common-law principles of agency that delineated between independent contractors and employees based on the level of control exercised by employers.⁴⁷ The introduction of labor statutes during the New Deal such as the FLSA, however, pushed the controversy over determining independent-contractor status into a new arena—the rights and obligations employers owed their employees.⁴⁸ And with this expanded importance of properly

⁴⁴ Compare 29 U.S.C. § 203(e)(1), with 29 U.S.C. § 152(3) ("employee" ... shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice") and 29 U.S.C. § 652(6) ("employee" means an employee of an employer who is employed in a business of his employer which affects commerce.").

⁴⁵ *independent contractor*, OXFORD ENGLISH DICTIONARY (3d. ed. 2004); see also *Independent Contractor*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2024) ("one that contracts to do work or perform a service for another and that retains total and free control over the means or methods used in doing the work or performing the service); *independent contractor*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it").

⁴⁶ Pearce & Silva, *supra* note 16 at 5-6.

⁴⁷ *Id.* (describing the use of common-law "right to control" tests to distinguish between independent contractors and employees) (citing Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523-24 (1889)).

⁴⁸ *Id.*

classifying workers, the Court soon decided the common-law “control” test was no longer sufficient in properly classifying workers.

In response, two Supreme Court cases decided on the same day in 1947 unmoored employee classification from the common law and defined a new standard for worker classification—the “economic-realities test.” In *United States v. Silk*, which concerned a dispute over employment-tax recovery under the Social Security Act of 1935, the Court established a five-factor test for worker classification:

The Social Security Agency and the courts will find that (1) degrees of control, (2) opportunities for profit or loss, (3) investment in facilities, (4) permanency of relation and (5) skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.⁴⁹ [numbers added for clarity].

In *Rutherford Food Corporation v. McComb*, the Court then applied the economic-realities test to a dispute over employee classification under the FLSA.⁵⁰

Circuit courts have since developed the test established in *Silk* and *McComb* to determine FLSA employee status. In 1979, the Ninth Circuit best articulated the standard economic-realities test that was applied until 2020:

1. The degree of the alleged employer’s right to control the manner in which the work is to be performed; 2. the alleged employee’s opportunity for profit or loss depending on his managerial skill; 3. the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; 4. whether the service rendered requires a special skill; 5. the degree of permanency

⁴⁹ *United States v. Silk*, 331 U.S. 704, 716 (1947).

⁵⁰ *Rutherford Food Corp v. McComb*, 331 U.S. 722, 730 (1947). Forty-five years later, the Supreme Court reaffirmed the use of the economic-realities test in delineating worker status under the FLSA while returning the NLRA and SSA to the common-law “control test.”; *see also* O’Brien, *supra* note 19, at 726 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-25 (1992)).

of the working relationship; and 6. whether the service rendered is an integral part of the alleged employer's business.⁵¹

The *Driscoll* test remained the most-applied common-law jurisprudential test of economic realities for nearly 40 years.⁵²

More recently, the WHD⁵³ has built, torn down, and rebuilt the economic realities test upon the foundation established in *Silk* and expanded in *Driscoll*.⁵⁴ In 2020, the Trump-WHD deviated from *Driscoll* and codified a five-factor economic-realities test that afforded two "core" factors decisive weight: (1) the degree of control an individual had over their work, and (2) a worker's opportunity for profit or loss based on skill, initiative, or business acumen.⁵⁵ The rule secondarily considers (3) the permanency of a working relationship, (4) whether the worker is an integrated unit of production, and (5) the skill required for such work. The Rule, implemented on

⁵¹ *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (citations omitted).

⁵² *Id.*; see, e.g. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985); *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984).

⁵³ The Wage and Hour Division (WHD) is a branch of the Department of Labor that regulates and enforces the Fair Labor Standards Act, as well as other labor and worker protection statutes. *See generally About Us, Wage and Hour Division*, U.S. DEP'T. OF LAB. <https://www.dol.gov/agencies/whd/about> (last visited Aug. 28, 2025).

⁵⁴ Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 187, 60604 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts 780, 788, and 795) (finalized Jan. 7, 2021) (rescinded May 6, 2021) ("Since at least 1954, WHD has applied a multifactor analysis when considering whether a worker is an employee under the FLSA or is instead an independent contractor.") (citing WHD Opinion letter (Aug. 13, 1954)).

⁵⁵ *Id.* at 60612-20 (articulating the following five factor test: "nature and degree of control, opportunity for profit or loss, skill required, permanence of working relationship, and whether the services rendered are integral part of an employer's business").

March 8, 2021, is employer-friendly because it narrows the scope of what workers are considered employees.⁵⁶

In response, the Biden-WHD rescinded the 2021 Rule and implemented its own final independent-contractor rule, made effective on March 11, 2024.⁵⁷ The 2024 Rule re-affirmed the independent-contractor test in *Silk* and *Driscoll* and considers six equally-weighted factors: (1) Opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the employer, (3) permanence of the work relationship, (4) nature and degree of control, (5) whether the work performed is integral to the employer’s business, and (6) skill and initiative.⁵⁸ These factors are also not exhaustive; courts can consider additional circumstances if they affect the employment relationship.⁵⁹ The specific provisions of the economic-realities test are further explained in Part III.

Joint-Employer Classification

The test for joint-employer status considers the other end of the circular FLSA employment analysis: whether “employer” status extends to third party actors sufficiently involved in the primary employer-worker relationship. As stated above, the FLSA extends employer status to “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁶⁰ Joint-employer status thus contemplates two types of employee-

⁵⁶ *Id.*

⁵⁷ *Id.*; Further administrative and judicial drama around the WHD IC test persisted from 2021 to 2024. The Biden-WHD rescinded the 2021 Trump-WHD Rule, only to be blocked by a Texas District Court. O’Brien, *supra* note 18 at 728.

⁵⁸ 29 C.F.R. § 795.110.

⁵⁹ *Id.*

⁶⁰ 29 U.S.C. § 203(d).

employer relationships involving a third party. First, vertical joint employment involves a direct employer and a third party who “simultaneously benefits from” an employee’s work. Second, horizontal joint employment applies when an employee works a separate number of hours for two different employers in a single workweek.⁶¹ Only the former is relevant here because ALI has a vertical joint-employer relationship that extracts a simultaneous benefit from DSP workers.

Further, the vaguely bounded language “directly or indirectly” from § 203(d) and “suffer or permit” from § 203(g) has led to variable administrative interpretations of the scope of joint-employer liability. In 1958, the WHD first established a rule that established joint-employer liability when two or more employers are benefitfitted simultaneously from an employee’s work.⁶² Subsequent court decisions, however, have partially ignored this principle and relied on “directly or indirectly” language, which is indicative of control.⁶³ In 2016, the WHD re-emphasized the importance of economic realities when determining FLSA joint-employer status through informal guidance.⁶⁴

⁶¹ 29 C.F.R. § 791.2(a)(1), (e)(1); *see also* Rescission of Joint Employer Status Under the Fair Labor Standards Act, 86 Fed. Reg. 40939, 40941-40942 (Sept. 28, 2021).

⁶² *Id.* at 40939-40.

⁶³ *See, e.g.*, Falk v. Brennan, 414 U.S. 190 (1973); Bonnette v. Cal. Heath & Welfare Agency, 704 F.2d 1465 (9th Cir. 1982).

⁶⁴ David Weil, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act*, Administrator’s Interpretation No. 2016-1, U.S. DEP’T OF LAB. (Jan. 20, 2016), https://shawe.com/wp-content/uploads/2021/07/administrators-interpretation-no.-2016-1_-joint-employment-under-the-flsa-and-mspa-.pdf.

In 2020, the Trump-WHD published a new rule for determining joint-employer status under the FLSA.⁶⁵ The 2020 Joint Employer Rule rejected the economic realities rationale and promoted an employer-friendly test that holds a third party is joint employer “only if [that person] is acting directly or indirectly in the interest of the employer in relation to the employee.”⁶⁶ The test weighs four factors to determine joint-employer status: whether (1) a possible employer “hires or fires the employee; (2) supervises and controls the employee’s work schedule or conditions of employment to a substantial degree; (3) determines the employee’s rate and method of payment; and (4) maintains the employee’s employment records.”⁶⁷ This test has been criticized for ignoring the legislative intent of the FLSA—to broadly protect employees—and unduly emphasizing control as the determinative factor for joint-employer status.⁶⁸

And just like the independent-contractor rule, the joint-employer rule suffered judicial scrutiny and executive-branch turnover that has since left the test uncertain. In 2020, a federal district court vacated the Trump-WHD joint employer test because it created an “impermissibly narrow” scope of joint-employer liability that rejected any consideration of economic realities.⁶⁹ Subsequently, the Biden-WHD rescinded the rule on the basis that the test both ignored the FLSA’s broad definition of “employ” in § 203(g) and applied a restricted interpretation of

⁶⁵ Katie Walker, *Feature, Joint Employer Liability*, 32 S. CAROLINA LAWYER 46 (2020); *see generally* 29 C.F.R. § 791 (2020).

⁶⁶ Walker, *supra* note 65, at 51-52

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 51-53

⁶⁹ *New York v. Scalia*, 490 F. Supp. 3d 748, 786-88, 790 (S.D.N.Y. 2020).

“employer” under 203(d).⁷⁰ Unlike the 2024 IC rule, the WHD has yet to replace the vacated 2020 Rule, so there is currently no uniform test for determining joint-employer status under the FLSA.⁷¹ Recently, the Trump Administration has signaled its intent to return to its first administration Joint Employer Rule.⁷² But it’s unclear if it will reinstate the rule in its entirety, which faced judicial criticism, or draft a more palatable rule for courts to follow.⁷³

Understanding the relevant law, let us now turn to the “facts”: The ALI delivery network.

B. The Amazon Delivery Chimera

Around Christmas of 2013, Amazon faced a massive threat to its retail operation. Amazon traditionally relied on external delivery companies like UPS and FedEx to handle delivery services for its large-scale retail operation.⁷⁴ However, the traditional business practices of those delivery companies, like closing on Sundays and holidays, clashed with Amazon’s “customer first” mantra that required uncompromisingly fast delivery.⁷⁵ This dissonance came to

⁷⁰ Rescission of Joint Employer Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 40939, 40944, 40946, 40954 (July 30, 2021).

⁷¹ Andrew McKinley, Eric Lloyd & Kyle Winnick, *Employers Need Clarity on FLSA Joint Employer Liability*, LAW 360, (May 12, 2023, 5:18 PM), <https://www.law360.com/articles/1607095/employers-need-clarity-on-flsa-joint-employer-liability> [https://perma.cc/Q4T5-TWHD].

⁷² Anne Batter et al., *Back to Business: Trump’s Second Term and the Four Major Shifts Employers Should Expect*, BAKER MCKENZIE (Nov. 26, 2024), <https://www.theemployerreport.com/2024/11/back-to-business-trumps-second-term-and-the-four-major-shifts-us-employers-should-expect/> [https://perma.cc/8FVA-4543].

⁷³ *Id.*

⁷⁴ Clint Finley, *Christmas Delivery Fiasco Shows Why Amazon Wants its Own UPS*, WIRED (Dec. 30, 2013), <https://www.wired.com/2013/12/amazon-ups/> [https://perma.cc/E76C-74UL].

⁷⁵ BRAD STONE, AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE 195 (2021).

a head during the 2013 holiday season when UPS and FedEx were unable to keep up with Amazon's delivery schedules—resulting in delayed packages and missing holiday presents.⁷⁶

To avoid repeating this disaster, Amazon created its Amazon Flex Driver and Delivery Service Partner programs.⁷⁷ Flex and DSP are the two primary prongs of Amazon's delivery apparatus.⁷⁸ This section describes the hiring processes and operations of both delivery services, as well as Amazon's involvement with overseeing and managing these entities.

1. Amazon Flex

Amazon Flex requires few prerequisites before a driver can sign up. A driver must live in an area where Flex operates; be 21 or older; and have a valid driver's license, a mid-sized or larger vehicle with personal auto insurance, a smartphone, and a bank account.⁷⁹ After this, applicants download the Amazon Flex App where they are prompted to select the area they want to work, preferred working days, and preferred times of delivery.⁸⁰ Applicants also select the number of hours they want to deliver per week and provide the make and model of their vehicle so Amazon can determine their delivery capacity.⁸¹ Like other gig apps, Amazon then selects

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Requirements*, AMAZON FLEX, <https://flex.amazon.com/requirements> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁸⁰ *Lets Drive*, AMAZON FLEX, <https://flex.amazon.com/lets-drive> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁸¹ *Id.*

drivers based on an area's need and availability; chosen drivers proceed to Amazon onboarding.⁸²

During onboarding, applicants are asked to provide information and documents like a Driver's License, Social Security number, banking details, and an auto insurance policy.⁸³ Amazon then reviews these materials, conducts background checks, and either approves or rejects drivers.⁸⁴ Approved drivers are not required to go through any specific job training, but are provided instructive videos to review on their own.⁸⁵

After onboarding, Flex Drivers sign up for "blocks," or delivery windows developed and issued by Amazon to complete its last-mile delivery services. Drivers submit requests for delivery blocks that Amazon confirms and schedules in the Flex App calendar.⁸⁶ Drivers then collect their slated packages from Amazon delivery stations, typically warehouses or fulfillment centers,⁸⁷ and begin their routes.⁸⁸ Using Amazon-provided maps and navigational services, Flex

⁸² *Id.*

⁸³ FAQ, *Interest List & Onboarding*, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁸⁴ *Id.*

⁸⁵ See *What it's really like to gig for Amazon Flex*, BLOOMBERG NEWS (Nov. 1, 2018), <https://3af737eecd277cb70d8e5e94d06d68ec.safeframe.googlesyndication.com/safeframe/1-0-38/html/container.html> [https://perma.cc/9MP6-TB5F].

⁸⁶ FAQ, *Scheduling Delivery Blocks*, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁸⁷ See Amazon Flex, *supra* note 83.

⁸⁸ FAQ, *Scheduling Delivery Blocks*, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

Drivers follow optimized delivery routes during their four-to-eight hour blocks.⁸⁹ While on the route, Amazon provides services that connect drivers with Flex support staff who provide ordinary and emergency assistance.⁹⁰ Drivers unable to complete their routes within their scheduled blocks face two choices: continue without any additional pay, or return the packages to an Amazon delivery station if permitted by Flex staff.⁹¹ Flex Drivers also may return packages that were undeliverable at the end of their shifts to delivery stations.⁹²

Amazon permits Flex Drivers to choose when and where they work. But Amazon also uses that information to dictate drivers' *standing*—a metric which affects their status and job prospects at Flex.⁹³ Flex Drivers are rated either as Fantastic, Great, Fair, or At Risk, which are determined by driver reliability and delivery quality.⁹⁴ Driver reliability considers whether a driver consistently arrives for their blocks on time or improperly cancels their block.⁹⁵ Delivery quality considers whether a driver attempts all possible deliveries on their route or returns

⁸⁹ *Id.*

⁹⁰ *Amazon Flex delivery driver safety*, AMAZON Flex, <https://flex.amazon.com/safety> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁹¹ Harry Campbell, *Amazon Flex Driver Review 2025*, RIDE SHARE GUY (Sept. 1, 2020) <https://therideshareguy.com/amazon-flex-review/> [https://perma.cc/V9GN-NB76].

⁹² FAQs, Making Deliveries, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁹³ FAQs, Standing, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

⁹⁴ *Amazon Flex ratings: About standing, reliability, & metrics*, RIDESHARING DRIVER (Dec. 13, 2024) <https://www.ridesharingdriver.com/amazon-flex-standing-reliability-deactivations/> [https://perma.cc/2ZTC-YT4L].

⁹⁵ FAQs, Standing, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

undelivered packages to pick-up locations.⁹⁶ The standing system is incredibly sensitive to driver errors—one or two bad ratings can plummet a driver’s rating.⁹⁷ And standing is consequential because it is directly correlated with job opportunities: the worse a driver’s standing, the harder it is to consistently sign up for delivery blocks.⁹⁸ Further, at-risk drivers may have their Flex accounts deactivated by ALI, which can also remove accounts at will based on major incidents or customer complaints.⁹⁹

Delivery Service Partners

The Delivery Service Partner program shifts delivery workers even further from Amazon’s central business. Through the DSP program, Amazon contracts with small delivery companies to fulfill last-mile delivery services.¹⁰⁰ Amazon does not consider these entities “employees” of Amazon logistics.¹⁰¹ As a result, DSP owners are solely responsible for meeting FLSA standards for their employees.

Amazon requires prospective DSP-owners to undergo a rigorous application process. Applicants must submit resumes and prove that they have at least \$30,000 in liquid assets to

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Amazon DSP Program*, AMAZON LOGISTICS <https://logistics.amazon.com/marketing/opportunity>

[<https://perma.cc/T2NQ-JD2A>] (last visited Sept. 9, 2025).

¹⁰¹ Letter from Amazon Vice President of Public Policy Brian Huseman to Senator Murphy, (Feb. 9, 2024), https://www.murphy.senate.gov/imo/media/doc/amazon_response_to_sen_murphy_dsp_inquiry_feb_2023.pdf [<https://perma.cc/Q8MJ-S83W>].

cover start-up costs and personal expenses.¹⁰² Amazon then conducts background screening and two rounds of interviews before approving or rejecting a DSP.¹⁰³ Even then, Amazon does not immediately approve DSPs but may funnel a prospective DSP owner to its “Future DSP Program.”¹⁰⁴ This diversion allows Amazon to control the number of DSPs in operation in a certain area and use “Amazon Business Development Managers” to oversee DSPs launching their delivery service.¹⁰⁵ Amazon also requires prospects to attend several weeks of training on how to manage and operate a DSP.¹⁰⁶

Even when ALI authorizes a DSP to begin operating, it remains involved in overseeing these intermediary businesses. At a high level, ALI dictates how much work DSPs receive and if its contracts continue. For example, ALI provides DSPs a flat rate per route, akin to the block route payment for Flex Drivers, which determines how much business a DSP does during a certain week.¹⁰⁷ Additionally, ALI can unilaterally cancel contracts with DSPs—as it has done in

¹⁰² *Financials*, AMAZON LOGISTICS, <https://logistics.amazon.com/marketing/financials>

[<https://perma.cc/T2NQ-JD2A>] (last visited Sept. 9, 2025).

¹⁰³ *FAQ*, AMAZON LOGISTICS <https://logistics.amazon.com/marketing/faq> [<https://perma.cc/T2NQ-JD2A>]

[<https://perma.cc/T2NQ-JD2A>] (last visited Sept. 9, 2025).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Amazon Delivery Brochure*, AMAZON LOGISTICS https://m.media-amazon.com/images/G/01/DSP2022/assets/desktop/DSP_Brochure_English_V7.pdf (last visited Sept. 9, 2025).

¹⁰⁷ Caroline O’Donovan & Ken Bensinger, *Amazon’s Next-Day Delivery Has Brought Chaos and Carnage to America’s Streets—But the World’s Biggest Retailer has a System to Escape the Blame*, BUZZFEED NEWS (Aug. 31, 2019), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths> [<https://perma.cc/97A7-V2HN>].

response to attempted DSP unionization.¹⁰⁸ At a more granular level, ALI oversees aspects of DSP's everyday operations. ALI leases branded delivery vehicles to drivers, directs and monitors Delivery Associate routes through its own specialized GPS and inventory software, and imposes penalties on DSPs if packages are not delivered on time.¹⁰⁹ ALI also retains the authority to unilaterally fire Delivery Associates from DSPs without owner consent.¹¹⁰

DSP owners have some administrative control over their businesses. DSPs are generally responsible for hiring and managing their own teams of drivers, developing their fleet of delivery vehicles, and complying with state and federal employer regulations like the FLSA.¹¹¹ Yet Amazon is authorized to access DSP business records, vet potential delivery associates (DA), and monitor driving and delivery behavior.¹¹²

III. Discussion

¹⁰⁸ Mimi Whittaker & Dan Ocampo, *As a Delivery Worker Union Campaign Takes Off, Amazon Tries to Dodge Labor Law*, NATIONAL EMPLOYMENT LAW PROJECT: NEWSROOM BLOG, (Nov. 22, 2024) <https://www.nelp.org/as-a-delivery-worker-union-campaign-takes-off-amazon-tries-to-dodge-labor-law/> [https://perma.cc/35G7-QP9E].

¹⁰⁹ Steele & Pyers, *supra* note 21 at 407-08.

¹¹⁰ Fried Goldberg LLC, *Amazon's Delivery Deception—The Delivery Service Partner (DSP) Program*, LAW.COM (July 16, 2024) <https://lawyers.law.com/article/amazons-delivery-deception-the-delivery-service-partner-dsp-program.html#:~:text=Amazon's%20DSP%20Advertising,of%20driving%20and%20delivery%20behavior> [https://perma.cc/X94W-CNDR].

¹¹¹ *Delivery Service Partner Brochure*, AMAZON LOGISTICS, https://m.media-amazon.com/images/G/01/DSP2022/assets/desktop/DSP_Brochure_English_V7.pdf [https://perma.cc/8WMB-Z5NA] (last visited Sept. 9, 2025).

¹¹² Fried Goldberg LLC, *supra* note 110.

As explained above, the relevant independent-contractor and joint-employer tests have shifted with the political winds. The 2021 Trump-administration IC Test was replaced by the 2024 Biden-administration Test, which the current Trump administration has replaced with guidance from 2008.¹¹³ The 2020 Trump-administration joint-employer test, rescinded during President Biden's term, will likely be re-enacted in some form.¹¹⁴ So what does this mean for ALI and its workers? The subsequent discussion applies these varied tests to three ALI-worker relationships: the relationship between Amazon and Flex Drivers, Amazon and DSP owners, and Amazon and DSP employees.

A. Independent Contractor vs. Employee Classification—Amazon Flex.

This section first compares the two discordant independent contractor tests as applied to Amazon Flex Drivers. The result is that Flex Drivers are likely classified as independent contractors under the 2021 Test, but are arguably Amazon employees subject to FLSA benefits under the 2024 Test.

1. 2021 IC Test.

In 2021, the Trump-Administration Department of Labor implemented a five-factor test that considered the nature and degree of an individual's control over their work, opportunity for profit or loss, the skill required for the position, permanence of working relationship, and

¹¹³ Keith E. Kopplin et al., *Trump Administration to Rescind Biden-Era Independent Contractor Rule – What Could a New Rule Look Like?* Ogletree Deakins Blog (Oct. 17, 2025) <https://ogletree.com/insights-resources/blong-posts/trump-administration-to-rescind-biden-era-independent-contractor-rule-what-could-a-new-rule-look-like/>.

¹¹⁴ Anne Batter et al., *Back to Business: Trump's Second Term and the Four Major Shifts Employers Should Expect*, BAKER MCKENZIE (Nov. 26, 2024) <https://www.theemployerreport.com/2024/11/back-to-business-trumps-second-term-and-the-four-major-shifts-us-employers-should-expect/> [https://perma.cc/8FVA-4543].

whether the services rendered are integral part of an employer's business.”¹¹⁵ This test notably prioritizes two prongs—control and opportunity for profit and loss—over the rest of the factors. If these dispositive factors align, then “their combined weight is substantially likely to outweigh the combined weight of other factors that may point towards the opposite classification.”¹¹⁶ When the dispositive factors are ambiguous, the remaining non-dispositive factors become critical for determining independent contractor status.

Dispositive Factors: Control and Opportunity for Profit or Loss

Turning first to “opportunity” and “control,” these factors narrowly favor categorizing Flex Drivers as independent contractors. As a result, Amazon’s odds of keeping Flex Drivers at arm’s length under the 2021 IC Test—and avoiding FLSA liability—are strong.

First, Flex Drivers dictate their own opportunity for profit or loss. This prong closely considers whether a worker makes economic investments or takes personal initiative with an eye towards potential profit and an assumption of potential risk.¹¹⁷ Here, Flex Drivers’ personal investment into their work pushes this factor towards IC classification. Drivers provide their own vehicles, pay for fuel, maintenance, and delivery equipment, and take their own initiative to

¹¹⁵ U.S. Dep’t of Lab., Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60612-18 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, & 795), (finalized 86 Fed. Reg. 1168 (Jan. 7, 2021)), (rescinded 86 Fed. Reg. 24,303 (May 6, 2021) [hereinafter “2021 IC Test”]). Note that subsequent references refer both to the proposed 2021 rule under 85 Fed. Reg. 60600 and the finalized rule under 86 Fed. Reg. 1168.

¹¹⁶ *Id.* at 60618.

¹¹⁷ *Id.* at 60614 (citing *Sec. of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1540-41 (7th Cir. 1987) (Easterbrook, J., concurring) (arguing that the investment of human capital favors independent contractor status)).

register for working blocks during the day.¹¹⁸ Drivers can improve their ratings by providing prompt and consistent delivery services, further building their individual value as a driver.¹¹⁹ Drivers accordingly assume the risk of loss from such investments.

Second, the “control” prong, which overlaps slightly with the “opportunity” prong, favors independent-contractor classification. This factor considers whether an employee sets their own work schedule, chooses their own assignments, works under supervision, and works for competitors.¹²⁰ Further, a worker is not considered an employee under this prong merely because an employer imposes some “contractual warranties of quality” through monitoring and oversight.¹²¹ Here, Flex Drivers can choose their own driving blocks and are technically permitted to work for competitor delivery services.¹²² Further, while Amazon does monitor driver routes for efficiency and safety, which it then uses to determine driver ratings, that monitoring can be attributed more to a guarantee of contractual compliance than favoring employee classification.¹²³ Taken as a whole, this factor narrowly favors IC classification due to the discretion Flex Drivers operate with.

Non-Dispositive Factors: Skill Required, Permanence of Working Relationship, Integrated Unit

¹¹⁸ *Amazon Flex FAQ*, AMAZON FLEX, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

¹¹⁹ *Id.*

¹²⁰ 2021 IC Test, *supra* note 115, at 60612.

¹²¹ *Id.* at 60613 (quoting *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 75 (2d Cir. 2003)).

¹²² AMAZON FAQ, <https://flex.amazon.com/faq> [https://perma.cc/U9P9-CUCB] (last visited Sept. 9, 2025).

¹²³ 2021 IC Test, *supra* note 115, at 60613 (citing *Moreau v. Air France*, 356 F.3d 942, 950-51 (9th Cir. 2003)).

The dispositive factors under the 2021 Test tilt towards independent-contractor classification. As a result, the remaining factors—skill, permanence, and “integrated unit”—are applied with skepticism towards employee classification.¹²⁴ Surprisingly, the non-dispositive factors seem to favor employee classification for Flex Drivers. Yet because the test is unbalanced, courts will still likely classify Flex Drivers as independent contractors.

To start, the “skill required” factor supports an employee classification. The 2021 Test considers skill as it was originally stated in *Silk*, which evaluated whether an employee has specialized skill or training *independent* from the employer.¹²⁵ For example: web designers, freelance writers, engineers, and artists typically satisfy this prong because they possess independent specialized skills that are not developed under the employer.¹²⁶ In contrast, Flex Drivers have little specialized training or skill.¹²⁷ They follow pre-calculated delivery routes designed by Amazon to maximize efficiency, complete deliveries under ALI’s watchful eye, and any further delivery training received by the Flex Drivers comes from Amazon directly.¹²⁸ Indeed, following delivery directions is hardly comparable to the skill possessed by traditional independent contractors. All said, this prong supports employee classification.

Additionally and relatedly, the “permanence” factor favors employee status. This factor indicates independent-contractor status when a working relationship with an employer is either

¹²⁴ *Id.* at 60618.

¹²⁵ *Id.*

¹²⁶ *What is Employee vs. Independent Contractor vs. Corp-to-Corp*, INNOVATIVE EMP. SOL. (Feb. 9, 2023), <https://www.innovativeemployeesolutions.com/blog/what-is-employee-vs-independent-contractor-vs-corp-to-corp/> [https://perma.cc/V8NB-Z7QN].

¹²⁷ AMAZON FAQ, *supra* note 122.

¹²⁸ *Id.*

definite in duration or sporadic.¹²⁹ In contrast, working relationships that are durationally indefinite or continuous favor employee classification.¹³⁰ Amazon states that Flex Drivers do not need to consistently work to remain eligible under the Flex program.¹³¹ Moreover, Flex Drivers that fall below acceptable standing requirements may be terminated.¹³² Both of these facts indicate that a Flex Driver contract remains continuous and indefinite in scope, because they are perpetually employed yet may be fired at will. And while Amazon may argue that Flex Drivers can be considered sporadically-employed seasonal employees because of delivery demand surges around the holidays, even consistent seasonal work may nevertheless obtain employee classification.¹³³

The final “integrated unit” factor departs from the WHD’s prior test, and indeed most courts, because it distinguishes between “the importance of the services rendered” by a worker to a company’s business and whether a worker operates in an “integrated unit” of production.¹³⁴ The 2021 Test adopts the latter interpretation. It considers “whether an individual works in circumstances analogous to a production line”, returning to the initial understanding of this factor under *McComb* and its analysis of meat-processing workers.¹³⁵ The Trump-WHD considers this test more appropriate than the integral unit test because, to quote Judge Easterbrook in his *Lauritzen* concurrence, “[e]verything the employer does is ‘integral’ to its business—why else do

¹²⁹ 2021 IC Test, *supra* note 115 at 60616.

¹³⁰ *Id.* at 60639.

¹³¹ AMAZON FAQ, *supra* note 122.

¹³² *Id.*

¹³³ See *Acosta v. Paragon Contrs. Corp.*, 884 F.3d 1225, 1236-37 (10th Cir. 2018).

¹³⁴ 2021 IC Test, *supra* note 115 at 60616-18.

¹³⁵ *Id.* at 60617-18.

it?”¹³⁶ Applying the Trump-WHD interpretation, the “last-mile” delivery services provided by Amazon Flex Drivers are precisely akin to working at the end of Amazon’s production line. Without Flex Drivers, Amazon cannot fulfill its final stage of production: delivering packages to its consumers. This interpretation therefore favors employee classification.

While three of the five 2021 IC factors favor employee classification for Amazon Flex Drivers, the two dispositive factors still probably dictate the outcome of any FLSA challenge brought by Flex Drivers. As a result, courts will likely classify Flex Drivers as independent contractors. This result will insulate ALI and Amazon from employer liability under the FLSA.

2024 IC Test

We turn next to the Biden-WHD 2024 Test for worker classification. Departing from the employer-friendly 2021 test,¹³⁷ the 2024 Test reinvigorates the economic realities test articulated in *Driscoll*.¹³⁸ In this, the 2024 Test weighs six equal factors: Opportunity for profit or loss, investments made by the worker and potential employer, degree of permanence, nature and degree of control, whether performed work is integral to the potential employer’s business, and skill and initiative.¹³⁹ This totality-of-the-circumstances test is generally considered more worker

¹³⁶ *Id.* at 60616-17 (quoting *Lauritzen*, 835 F.2d at 1541).

¹³⁷ AG Shapiro Leads Coalition Fighting Trump Administration’s Attempts to Undermine Workplace Protections as COVID-19 Continues to Decimate Economies, Penn. Att’y Gen., <https://web.archive.org/web/20250311072147/https://www.attorneygeneral.gov/taking-action/ag-shapiro-leads-coalition-fighting-trump-administrations-attempts-to-undermine-workplace-protections-as-covid-19-continues-to-decimate-economies/> (last visited Mar. 11, 2025).

¹³⁸ *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (citations omitted).

¹³⁹ 29 C.F.R. § 795.110 (2024).

friendly than its 2021 predecessor, giving courts more leeway to classify workers as employees.¹⁴⁰

The first “opportunity” factor under the 2024 Test considers certain relevant factors unaddressed in the 2021 IC Test:

whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.¹⁴¹

Under this updated language, which focuses more on the opportunity for profit or loss instead of managerial skill,¹⁴² this factor becomes a closer call. While Flex Drivers have no opportunity to negotiate their block pay or hire other workers to assist with their routes, which supports an employee classification, Flex Drivers can still freely accept or decline jobs and generally may choose how and when their work will be completed. This factor, although closer, likely still favors independent-contractor classification because of the discretion Flex Drivers have to dictate their working schedule and correspondingly the amount of money they earn with Flex.

Second, the “investment” factor departs from the 2021 Test because it derives from the 2021 “opportunity” prong a new independent category: whether investments made by a worker are *entrepreneurial* in nature, which favors contractor status, or if they are *standard costs* simply

¹⁴⁰ Joshua R. Woodard et al, *U.S. Department of Labor Issues New Final Rule for Classifying Independent Contractors*, SNELL & WILMER (Jan 12, 2024) <https://www.swlaw.com/publication/us-department-of-labor-issues-new-final-rule-for-classifying-independent-contractors-effective-march-11-2024/> [https://perma.cc/K3YJ-GR8L].

¹⁴¹ 29 C.F.R. § 795.110(b)(1).

¹⁴² Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (to amend 29 C.F.R. pts 780, 788, and 795) (finalized Mar. 11, 2024) [Hereinafter “2024 IC Test”].

assumed by the worker, which favors employee status.¹⁴³ Again, Flex Drivers shift closer to employee status under this worker-friendly test. Certain equipment that Flex Drivers purchase for their work, such as delivery bags, inclement weather gear, and hand trucks¹⁴⁴ are not entrepreneurial in nature.¹⁴⁵ However, the analytical hinge point is whether the use of a private vehicle *itself* is an entrepreneurial investment. Unlike the 2021 IC Rule, the finalized 2024 Rule suggests that the purchase and use of unspecialized vehicles, like the types of everyday cars used by Flex Drivers, is likely not an entrepreneurial investment.¹⁴⁶ The DOL emphasized that the use and purpose of a vehicle is a highly fact-intensive matter, so a determination for Flex Drivers on this factor may depend on the type and use of a person's vehicle. This factor is at least inconclusive but can support employee classification if Flex Drivers purchase or use standard vehicles to carry out deliveries.

The third factor of the 2024 Test, "degree of permanence," is comparable to the 2021 Test with one major distinction: ". . . that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative."¹⁴⁷ In this way, the factor

¹⁴³ 29 C.F.R. § 795.110(b)(2).

¹⁴⁴ Sydney Brown, *Top 15 Essential Delivery Driver Accessories to Gear Up for the Holiday Season*, WORKSOLO (Oct. 7, 2024) <https://www.worksolo.com/blog/delivery-driver-accessories-for-the-holiday-season#:~:text=2.,Easy%20installation%20and%20removal> [https://perma.cc/43NL-42V3].

¹⁴⁵ See *Acosta v. Paragon Contrs. Corp.*, 884 F.3d 1225, 1236 (10th Cir. 2018); see also *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (considering the purchase of working gloves by seasonal workers to indicate employee status).

¹⁴⁶ 2024 IC Test, *supra* note 142.

¹⁴⁷ *Id.* at 1686.

weighs more favorably for employee status by extending to defined worker relationships—a previously determinative characteristic of IC classification.¹⁴⁸ Considering that the 2021 Test already favored employee status, the 2024 Test holds no different.

Fourth, the 2024 Test weighs the “nature and degree of control” an employer exercises over a worker.¹⁴⁹ This factor considers relevant elements such as if an “employer sets the worker’s schedule, supervises the performance of the work, sets the rates for work, or explicitly limits the worker’s ability to work for others.”¹⁵⁰ Unpacking these considerations further, flexibility in schedule setting, while indicative of IC status, is evaluated in concert with other types of control exercised by the employer.¹⁵¹ For example, if an employer allows for scheduling flexibility but then imposes some discipline for refusing certain work, that result indicates employee status.¹⁵² Moreover, electronic monitoring that is coupled with supervisory action on part of the employer to monitor and direct the performance of certain work indicates employee status, while general data collection and electronic supervision alone supports IC classification.¹⁵³ Additionally, this factor favors employee classification when the worker has no meaningful opportunity to set rates or prices for their services and are instead more likely to be “receiving the compensation the organization dictates,” and thus less likely to be in business for

¹⁴⁸ 29 C.F.R. § 795.110(b)(3).

¹⁴⁹ § 795.110(b)(4).

¹⁵⁰ *Id.*

¹⁵¹ 2024 IC Test, *supra* note 142.

¹⁵² Compare *Herman v. Express Sixty-Minutes Delivery Serv.*, 161 F.3d 299 (5th Cir. 1998), with *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 230 (3d Cir. 2019).

¹⁵³ 2024 IC Test, *supra* note 142 at 1698; 29 C.F.R. § 795.110(4).

themself.¹⁵⁴ Finally, whether an employer limits a worker's ability to work for others considers either explicit limits set by an employer about other work, or constructive limits based on an employer's expectations such as meeting certain hours.¹⁵⁵

Flex Drivers are likely classified as employees under this reconfigured control prong. To start, Flex Drivers are rated on a scale that determines whether a Flex Driver continues to receive work or even be qualified to deliver for Flex.¹⁵⁶ That disciplinary surveillance implicates the first two subcategories. First, it imposes penalties for refusing certain work—not taking delivery jobs—such as lowering workers' standing. This consideration may require some fact-intensive scrutiny over whether not taking jobs at all impacts standing but certainly indicates that Amazon exercises discretion over providing such jobs in the first place. Second, the close electronic surveillance that Amazon conducts over a Flex Driver's work, which monitors the time taken on a job, whether a Flex Driver attempts all deliveries, and the route a driver takes,¹⁵⁷ is coupled with direct disciplinary action for certain on-the-job mistakes.¹⁵⁸ That conduct supports employee classification because an employer closely controls the execution of an employee's

¹⁵⁴ 2024 IC Test, *supra* note 142 at 1703 (quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32 (1961)).

¹⁵⁵ See *id.* at 1706 (explaining how “on call” designations for workers or mandating that workers continuously accept jobs or be fired both favor employee status by constructively limiting the ability to work for competitors).

¹⁵⁶ *Amazon Flex Ratings: About Standing, Reliability, & Metrics*, RIDESHARING DRIVER (Dec. 13, 2024) <https://www.ridesharingdriver.com/amazon-flex-standing-reliability-deactivations/>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

work.¹⁵⁹ Further, Flex Drivers are unable to negotiate wages because Amazon provides set pay for blocks of time that drivers can either accept or reject—“receiving the compensation the organization dictates.”¹⁶⁰ That result again favors classifying Flex Drivers as employees. The only consideration in the control prong to cut against employee classification is the ability to work for others, as Amazon sets no explicit or constructive barriers on Flex Drivers’ ability to work for other competitors.¹⁶¹ Yet taken as a whole, the control prong will likely favor employee classification for Flex Drivers.

Fifth, the “integral unit” abandons the “production line” logic from the 2021 Test and instead considers whether an individual worker’s function is “critical, necessary, or central to the potential employer’s principal business.”¹⁶² To illustrate this difference, the WHD turns to the example of workers on a tomato farm. A worker who picks tomatoes during the harvest season invariably performs a job integral to a tomato farm’s business.¹⁶³ An accountant paid by the farm to provide payroll support, on the other hand, performs a service that is important but not necessary to the farm’s business.¹⁶⁴ That same distinction applies here. While Amazon itself is a diversified company servicing many different business sectors, Amazon Logistics is concerned with the discrete task of fulfilling Amazon delivery services. Flex Drivers are an integral

¹⁵⁹ 29 C.F.R. § 795.110(b)(4).

¹⁶⁰ 2024 IC Test, *supra* note 142 at 1703 (quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32 (1961)).

¹⁶¹ While not the focus of this note, Amazon’s contention here is interesting because it presumes a competitive market for app-based delivery services.

¹⁶² 29 C.F.R. § 795.110(b)(5).

¹⁶³ 2024 IC Test, *supra* note 142 at 1711.

¹⁶⁴ *Id.*

component in that business because they provide last-mile delivery services that bridge Amazon fulfillment centers with individual customers. The critical role that Flex has in ALI's integral business favors employee classification.

The last defined factor in the 2024 Test considers the skill and initiative exercised by a worker in completing the job assigned by the employer.¹⁶⁵ Under the 2024 interpretation, non-specialized training and specialized skills without any business-like initiative on the part of the worker indicates employee classification.¹⁶⁶ This factor closely mirrors the skill factor in the 2021 Test, but it is now weighed equally against all other factors.¹⁶⁷ Again, same as in the 2021 Test, the lack of skill involved in Flex driving militates against contractor classification. And even if a court did conclude that delivery transportation constituted a specialized skill, ALI's restrictive scheduling regime prevents Drivers from taking business-like initiatives. So, this factor favors employee classification.

Finally, the 2024 Test includes an “additional factors” section. This provision is essentially a catch-all for other relevant additional information not explicitly listed in the six proceeding factors.¹⁶⁸ This change more concretely established a recommended consideration under the former 2021 Test that considered only extra information that “help[ed] answer whether the individual is in business for him-or-herself, as opposed to being economically dependent on

¹⁶⁵ 29 C.F.R. § 795.110(b)(6).

¹⁶⁶ *Id.*

¹⁶⁷ See 2021 IC Test, *supra* note 115 at 60612-18 (dismissing concerns that minimizing the “skill required” factor against the dispositive factors of “control” and “opportunity” weakened employee protections); *see also* 2024 IC Test, *supra* note 142 at 1714 (explaining the importance of considering specialized skills in classifying employee status).

¹⁶⁸ 29 C.F.R. § 795.110(b)(7)(2021).

an employer for work.”¹⁶⁹ While the Biden-WHD declined to elaborate on what additional factors may be relevant under this final category,¹⁷⁰ this factor again revolves around economic dependence and allows courts to consider facts that do not fit neatly in a previously-defined category. When applying this catch-all provision to Amazon Flex Drivers, any analysis likely demands a fact-intensive inquiry into how economically dependent workers are on ALI to provide work. At the very least, this factor can help distinguish between circumstances where a Flex Driver may work for other app-based gig work, indicating contractor status, or works solely for Amazon, indicating employee status.

Without the core dispositive factors of the 2021 Test, the sum of the equally weighted factors under the 2024 Test, which have been further refined to favor employee classification, support classifying Flex Drivers as employees under the FLSA. The consequences of this classification—and how Amazon may adjust its business model to avoid liability—will be further reviewed in part IV.

B. Independent Contractor vs. Employee Classification—Delivery Service Partner Program

As explained above, DSPs are intermediary businesses that insulate Amazon from direct liability for its delivery services.¹⁷¹ Yet paradoxically, Amazon is even more involved in the management of its DSP contractors—individually-owned businesses—than it is with individual drivers in its Flex program. This section considers three questions: in general, can a business entity like a DSP be defined as an employee under the FLSA? If so, is it an employee or

¹⁶⁹ § 795.105(d)(2)(iv)(2021).

¹⁷⁰ 2024 IC Test, *supra* note 142 at 1717.

¹⁷¹ Fried Goldberg LLC, *supra* note 110.

independent contractor under the 2021 IC Test? And does that classification change under the 2024 Test?

1. Preliminary Issue: Can Corporate Entities be Classified as Employees under the FLSA?

Before applying the FLSA, there must be an employer-worker relationship. As stated in the FLSA and explained in Part II above, “‘employee’ means any individual employed by an employer.”¹⁷² On first glance, the definition of “employee” under the statute seems to foreclose DSPs from consideration under the statute. Yet the Supreme Court has consistently applied the broadest possible interpretation of “employee” to reach non-traditional worker relationships.¹⁷³ In several cases, the Court has weighed the content of the worker’s relationship with the employer by applying the economic realities test rather than relying on how the employer and worker technically characterize their working relationship.¹⁷⁴ The upshot is that the FLSA considers substance, not form, when considering worker classification.

Further, though not squarely addressed by the Supreme Court, several circuit courts have extended employee coverage to corporate entities. In *Acosta v. Jani-King of Oklahoma, Inc.*, a

¹⁷² 29 U.S.C. § 203(e)(1).

¹⁷³ *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (“A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”); *see Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959) (asserting that the FLSA is construed “liberally to apply to the furthest reaches consistent with congressional direction.”).

¹⁷⁴ *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see, e.g., Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301-02 (1985) (holding a religious foundation liable under the FLSA because its “associates”—unpaid religious devotees—acted as employees when considering the economic realities of the employer-worker relationship.”).

janitorial company required its workers to form corporate entities to avoid FLSA recordkeeping requirements.¹⁷⁵ Nevertheless, the Tenth Circuit concluded that these corporate entities fell under the “employee” definition of the FLSA.¹⁷⁶ Similarly, in *Safarian v. American DG Energy Inc.*, the Third Circuit held that the economic reality of the relationship between an employer and an individual operator of a corporate entity governed whether the FLSA applies.¹⁷⁷ As a result, the FLSA can apply to employer-worker relationships where a worker is represented by a corporate entity.

Applying that logic to the Amazon Logistics-DSP relationship, Amazon’s requirement that DSPs are registered as business entities does not mean that the independent contractor test is inapplicable. If these circuits have properly interpreted the FLSA to sweep in business entities, expanding upon foundational Supreme Court precedent on this issue, then DSPs can be considered “individuals” covered by the FLSA. As a result, we proceed to a second consideration: are DSPs employees or independent contractors under either the 2021 or 2024 independent contractor tests, or both? Additionally, if DSPs are considered employees under the statutory framework, would FLSA protections extend to both DSP owners and “Delivery Associates” (Amazon’s term for DSP employees).

2021 IC Test

Starting with the 2021 Trump-WHD Test, we will again deal first with the two dispositive factors: control and opportunity. This section will also apply the factual allegations

¹⁷⁵ *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018).

¹⁷⁶ *Id.* at 1160.

¹⁷⁷ *Safarian v. Am. DG Energy Inc.*, 622 F. App’x 149, 152 (3d Cir. 2015).

from *Fli-Lo Falcon, LLC v. Amazon.Com*, where a DSP accused Amazon of violating wage-and-hour rules under the FLSA, as a test case for how these DSP claims may be argued.¹⁷⁸

As explained above, the control prong weighs in favor of employee classification if the employer “exercises substantial control over key aspects of the work” done by the worker.¹⁷⁹ This further considers the ability for a worker to set their own schedule or workload and whether an employer prohibits workers from working for competitors.¹⁸⁰ Merely requiring compliance with legal obligations and other contractually-agreed upon quality control standards is not probative of employee status.¹⁸¹ Here, Amazon’s extensive control over and involvement in granular DSP operations makes this factor a closer call than in the Amazon Flex analysis. Amazon audits delivery service partners regularly, can physically inspect DSP businesses and access company data, and requires delivery associates to utilize a specific Amazon-controlled

¹⁷⁸ Class Action Complaint and Jury Demand, *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, No. 2:22-cv-00441 (W.D. Wash. May 20, 2022)

<https://1.next.westlaw.com/Document/I8a5d3a50b62a11eca998bccac2217b4d/View/FullText.html?navigationPath=%2FRelatedInfo%2Fv4%2Fkeycite%2Fnav%2F%3Fguid%3DI8a5d3a50b62a11eca998bccac2217b4d%26srh%3D%26kw%3Dt&listSource=RelatedInfo&list=Filings&rank=5&docFamilyGuid=I8c3f67d0b62a11ec94d79372013049fa&ppcid=c26d8b30892849c694f67d3d56001957&originationContext=filings&transitionType=FilingsItem&contentData=%28sc.Search%29> [hereinafter “*Fli-Lo* Complaint”]. *Fli-Lo* ultimately provides no precedential value because the court ultimately compelled arbitration under the claimant’s mandatory arbitration agreement with Amazon.

¹⁷⁹ 2021 IC Test, *supra* note 115 at 1179.

¹⁸⁰ *Id.* at 1179-80.

¹⁸¹ *Id.* at 1180.

application that monitors driving safety as well as the efficiency of delivery routes.¹⁸² Further, DSP claimants in recent civil suits have also asserted that Amazon controls the exact delivery routes offered by Amazon Drivers and the amount of packages DSPs can delivery, adjusts DSP delivery routes with minimal notice, and restricts DSP owners from hiring additional drivers without thorough and time-consuming vetting processes.¹⁸³ Additionally, Amazon requires DSPs to accept routes that DSPs would have otherwise rejected because of logistical delivery issues.¹⁸⁴

While Amazon can and has argued that these measures ensure compliance with local laws, safety standards, and contractual requirements, favoring IC classification,¹⁸⁵ the extensive oversight and control that Amazon exerts on DSPs supports an employee classification. Unlike ordinary employer-contractor relationships, where a contractor retains control over how they operate their business and complete their work, Amazon seems to overstep by dictating the

¹⁸² Josh Eidelson & Matt Day, *Drivers Don't Work for Amazon, But Company Has Lots of Rules for Them*, DET. NEWS (May 5, 2021) (<https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/> [https://perma.cc/8SL3-HRZB]); Annie Palmer, *Amazon Uses an App Called Mentor to Track and Discipline Delivery Drivers*, CNBC (Feb. 12 2021) <https://www.cnbc.com/2021/02/12/amazon-mentor-app-tracks-and-disciplines-delivery-drivers.html> [https://perma.cc/M9DS-Q3DQ].

¹⁸³ Fli-Lo Complaint, *supra* note 178, ¶¶ 36-41.

¹⁸⁴ *Id.* ¶¶ 42-47.

¹⁸⁵ Letter from Brian Huseman, Vice President, Public Policy, Amazon to Senator Chris Murphy (Feb. 9, 2024),

https://www.murphy.senate.gov/imo/media/doc/amazon_response_to_sen_murphy_DSP_inquiry_feb_2023.pdf [https://perma.cc/Q8MJ-S83W].

specific way that subcontracting DSPs must accomplish their work.¹⁸⁶ This factor may come down to fact-intensive scrutiny over specific instances where Amazon has interfered with DSP business operations, but it at least makes the control factor of the 2021 Test inconclusive.

Next, the “opportunity” prong also shifts closer to favoring employee classification when applied to the Amazon-DSP relationship. The opportunity prong does favor contractor classification when a worker can exercise managerial skill over their work and make meaningful capital expenditures for that work like employees and equipment.¹⁸⁷ However, the prong favors employee status when a worker is “unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.”¹⁸⁸ That point pushes DSPs over the line into employee classification. ALI unilaterally sets the price of routes, which DSPs cannot meaningfully negotiate, and Amazon has frequently forced DSPs to automatically accept routes, revoking the choice of freely selecting or rejecting work that tends towards contractor status.¹⁸⁹ Moreover, while DSPs are free to make capital expenditures on employees and equipment, that choice is qualified by Amazon’s oversight of hiring practices and vehicle use. Amazon must approve of new DSP delivery drivers, whom Amazon can unilaterally terminate, and requires that DSPs operate vehicles specifically approved of by Amazon and leased by Amazon affiliates.¹⁹⁰ While still a fact-intensive endeavor, this prong likely favors employee classification for DSPs.

¹⁸⁶ Letter from Sen. Chris Murphy to Andy Jassy, CEO, Amazon (Jan. 10, 2024)

https://www.murphy.senate.gov/imo/media/doc/amazon_dsp_letter.pdf [https://perma.cc/CZ73-J8PN].

¹⁸⁷ 2021 IC Test, *supra* note 115 at 1186.

¹⁸⁸ *Id.*

¹⁸⁹ Fli-Lo Complaint, *supra* note 178, ¶¶ 41-42.

¹⁹⁰ *Id.* ¶¶ 50-75.

Because the two weighted prongs now favor employee classification when construed favorably to DSPs, or at least are inconclusive when construed favorably to Amazon, the remaining three factors have real dispositive weight. And like in the Flex Driver analysis, these factors support classifying DSPs as employees under the FLSA.

First, the “skill required” factor favors employee classification for many of the same reasons as above. DSP owners must complete extensive business training and vetting from Amazon before starting their DSP businesses. Reliance on Amazon to “equip [DSP drivers] with any skills or training necessary” to operate as a DSP favors employee classification.¹⁹¹ Further, operating a delivery business does not require the same specialized skill that courts look to in favoring contractor status.¹⁹² Finally, DSPs solely contract with Amazon—they do not have the opportunity to work for other companies that require delivery services because Amazon dominates DSP scheduling.¹⁹³ As a result, DSPs have no meaningful opportunity to earn more by working with entities other than Amazon. Accordingly, this factor conclusively favors employee classification.

Second, the “permanence of the working relationship” also favors employee classification because Amazon and DSPs enter into functionally open-ended working agreements. While DSPs typically sign one-year contracts with Amazon, those contracts are

¹⁹¹ 2021 IC Test, *supra* note 178 at 1191.

¹⁹² See, e.g. *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 333 (5th Cir. 1993) (differentiating between pipe welding, a specialized skill, versus general welding); *Simpkins v. DuPage Hous. Auth.*, 893 F.3d 962, 966 (7th Cir. 2018) (reversing summary judgment in favor employer because the carpentry skills exhibited by plaintiff arguably did not undisputedly constitute specialized skill).

¹⁹³ Fli-Lo Complaint, *supra* note 178, ¶¶ 50-75.

unilaterally renewed by Amazon.¹⁹⁴ And as the 2020 WHD notes in its proposed rule, “an employer may have a permanent relationship with an employee despite requiring the employee to enter into annual employment contracts.”¹⁹⁵ This result favors employee classification.

Finally, as explained above, DSPs are a critical “integrated unit” of production because they complete last-mile delivery services—the touchstone of Amazon’s client-centered and efficiency-motivated business model. Under the 2021 interpretation, which defines “integrated unit” as a component of an employer’s “integrated production process for a good or service” and favors employee classification when such a component is inseparable from the employer’s production process, DSPs are undoubtedly employees.¹⁹⁶

On balance, the 2021 Test, as applied to DSPs, favors employee classification.

2024 IC Test.

Now applying the 2024 IC Test, the result does not change at all from the 2021 Test. The 2024 Test, as explained above, more heavily favors employee classification because it evenly weights all economic-realities factors broadens the acceptable scope of employee classification. Thus, DSPs are even more likely to be considered employees under the 2024 IC test. Because of this, I’ll spare any readers from yet another round of economic-realities analysis.

C. Joint Employer Test: Amazon Logistics—Delivery Service Partner Employees.

This final analysis concerns the direct relationship between Amazon Logistics and the Employees of Delivery Service Partners, referred to in this section as “Delivery Associates.” For this, it is necessary to turn away from the independent contractor test, and instead towards the

¹⁹⁴ *Id.*

¹⁹⁵ 2021 IC Test, *supra* note 115 at 1192.

¹⁹⁶ *Id.* at 1193.

FLSA's approach to joint-employer liability. As explained above, there is currently no regulation for joint employer status under the FLSA. However, Trump appointee Deputy Secretary of Labor Keith Sonderling has stated his interest in clarifying "joint employer" doctrine in a way that favors corporate interests.¹⁹⁷ Further, insiders anticipate the Trump-DOL to either reinstate its 2020 joint-employer test or promulgate a new rule that likely limits the scope of third-party employers liable under the FLSA.¹⁹⁸ As such, this section will apply the four-part 2020 Test in anticipation of its reinstatement.

2. 2020 Joint Employer Test

To reiterate, the 2020 Joint Employer Test considers whether a third-party employer exercises direct or indirect control over an employee of another. This test considers equally whether an employer can "(i) [h]ire[] or fire [its] employee[s]; (ii) [s]upervise[] and control[] the employee's work schedule or conditions of employment to a substantial degree; (iii)

¹⁹⁷ Sean Higgins, *Trump Labor Department Pick Signals Pro-Market Stance on Joint Employer, Independent Contractor Rules*, COMPETITIVE ENTER. INST. (Feb. 28, 2025) <http://cei.org/blog/trump-labor-department-pick-signals-pro-market-stance-on-joint-employer-independent-contract-rules/> [https://perma.cc/375M-YJV8]; see also *Looking Ahead: Spotlight on Employment*, BAKER MCKENZIE (Dec. 11, 2024) [https://perma.cc/PMR7-W6M4] (predicting that the Trump-DOL will reinstate its 2021 joint-employer test). <https://www.bakermckenzie.com/en/insight/publications/2024/12/trump-second-term-major-shifts-employers> [https://perma.cc/PMR7-W6M4] (predicting that the Trump-DOL will reinstate its 2021 joint-employer test).

¹⁹⁸ Tre'Vaughn Howard, Ian Kullgren & Rebecca Rainey, *Joint Employers, 401(k)s Eyed in First Trump 2.0 Rule Plan (2)*, BLOOMBERG LAW (Aug. 15, 2025), <https://news.bloomberglaw.com/daily-labor-report/joint-employers-401ks-eyed-in-first-trump-2-0-rule-plan> [https://perma.cc/EPT6-53LK].

[d]etermine[] the employee's rate and method of payment; and (iv) [m]aintain[] the employee's employment records.”¹⁹⁹

We first consider whether Amazon Logistics has authority over the hiring and firing of delivery associates. This factor does not result in direct or indirect control when the putative joint employer merely recommends a course of action, or when standard contractual language allows a company to reserve the right to dictate hiring or firing procedures.²⁰⁰ Here, this factor weighs in favor of joint-employer status for Amazon Logistics because of its direct involvement in DSP hiring practices.

First, ALI operates a job portal matching Associates with hiring DSPs,²⁰¹ directly involving itself in hiring practices. Second, DSP litigants have asserted that they cannot hire new drivers unless ALI approves them, and ALI dictates the hiring and training practices of the DSP, even though ALI outwardly markets that DSP owners are able to unilaterally hire drivers.²⁰² Third, DSPs have asserted that ALI can and has terminated DSP drivers by citing driver infractions through its route-monitoring software.²⁰³ And that termination was imposed by ALI, despite DSPs paying unemployment compensation.²⁰⁴ Assuming the veracity of these statements

¹⁹⁹ 29 C.F.R. § 791.2(a)(1)(i)-(iv) (2020) (Reserved 2021).

²⁰⁰ Joint Employer Labor Status Under the Fair Labor Standards Act, Wage and Hour Division, Department of Labor, 85 Fed. Reg. 2820, 2832 (proposed Jan. 16, 2020) (codified Mar. 16, 2020) (rescinded on July 30, 2021) [hereinafter “2020 Joint Employer Test”]; 29 C.F.R. § 791.2(a)(3)(i) (2020) (Reserved 2021).

²⁰¹ *Amazon Delivery Service Partner Driver, Job Overview*, AMAZON, <https://hiring.amazon.com/job-opportunities/delivery-driver-jobs#/> [https://perma.cc/M23S-NBUC] (last visited Sep. 9, 2025).

²⁰² Fli-Lo Falcon, *supra* note 178, ¶¶ 59-61.

²⁰³ *Id.* ¶ 66.

²⁰⁴ *Id.* ¶¶ 69-70.

and that they apply generally to most Amazon Logistics-DSP relationship, this factor likely favors joint employer classification.

Next, we ask whether ALI substantially controls the Delivery Associate's work schedule or conditions of employment.²⁰⁵ The "conditions of employment" consider (but do not require) if a putative employer is engaged in the day-to-day operation of a business, if the employer is extensively supervising work to see if the task was done properly, and if an employer directs workers while on the job.²⁰⁶ This factor too weighs in favor of joint-employer classification. ALI directly supervises the day-to-day operation of Delivery Associates through its "Flex" and "Mentor" applications, which permit it to track "delivery status, driver location, seat belt use, vehicle acceleration, braking, cornering, fuel efficiency, driver distractions, and damage to DSP vehicles."²⁰⁷ This also includes geo-tracking and camera recording.²⁰⁸ ALI can reprimand Delivery Associates who do not complete deliveries according to its standards, even down to minute details like accelerating too quickly or placing packages in the front seats of DSP delivery trucks.²⁰⁹ These considerations likely result in this factor favoring joint-employer classification.

²⁰⁵ 29 C.F.R. § 791.2(a)(1)(ii)(2020) (Reserved 2021).

²⁰⁶ *See, e.g.*, *In re Enterprise Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 468 (3d Cir. 2012); *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir. 2017); *Zampos v. W & E Commc'ns, Inc.*, 970 F. Supp. 2d 794, 806 (N.D. Ill. 2013).

²⁰⁷ *Fli-Lo Falcon, supra* note 178, ¶ 65.

²⁰⁸ *Id.* ¶ 64.

²⁰⁹ *Id.* ¶ 66.

Third, ALI would be considered a joint employer if it controls the employee's rate and method of payment.²¹⁰ Under this factor, things get a bit murkier. DSP owners directly delegate work to their Delivery Associates. Yet Amazon controls the flow of work to DSPs themselves. So, the general provision of paid work from Amazon to DSPs does not really push this factor in either direction. Looking further, Amazon sets the minimum wage that DSPs are required to pay their drivers.²¹¹ Amazon also sometimes agrees "to reimburse DSPs for drivers' base wages" to make DSPs competitive in high-wage markets.²¹² But because of the flat-rate pay that Amazon provides DSPs, DSPs are left to distribute wages if they comport with Amazon's minimum requirements. Additionally, ALI requires that DSPs use certain online payroll companies, controlling the method of payment for Delivery Associates.²¹³ These considerations favor joint-employer classification because ALI steps beyond its arms-length agreement with the DSPs, and into a financial manager position over Delivery Associates.

Finally, the joint-employer test considers whether a putative employer maintains employee's employment records. Under the 2020 interpretation, this factor likely cuts against joint employer status because ALI requires that DSPs maintain their own employment books.²¹⁴ ALI, however, still exercises some oversight because its DSP contracts typically include provisions that permit ALI unlimited access to DSP payroll, disciplinary records, working

²¹⁰ 29 C.F.R. § 791.2(a)(1)(ii) (2020) (Reserved 2021).

²¹¹ Fli-Lo Falcon, *supra* note 178, ¶ 62.

²¹² *Id.* ¶ 76.

²¹³ *Id.* ¶ 34-l.

²¹⁴ *FAQ: Can you help me better understand the financials of this opportunity?*, DELIVERY SERVICE PARTNERS, <https://logistics.amazon.com/marketing/faq> [https://perma.cc/M23S-NBUC] (last visited Sept. 9, 2025).

schedules, and DSP-Delivery Associate contracts.²¹⁵ Unlimited access to DSP books likely does not push this factor back towards joint-employer classification because ALI does not directly maintain or change those books.²¹⁶

Three of the four factors favor employer classification. Undoubtedly, this test requires a fact-intensive inquiry into how ALI engages with individual DSP entities. But taking the allegations in *Fli-Lo Falcon* as generally applicable to most Amazon-DSP relationships, a court could reasonably conclude that ALI acts as a joint employer of DSP Delivery Associates.

IV. Consequences

To recap, the results of the above analysis are organized in the chart below:

Employer	Worker	Independent Contractor: 2021 Test	Independent Contractor: 2024 Test	Joint-Employer: 2020 Test
ALI	Flex Drivers	Independent Contractor	Employee	N/A
ALI	DSP Owners	Employee	Employee	N/A
ALI	DSP Delivery Associate	Employee (derivative from owner)	Employee (derivative from owner)	Employee

Under this analysis, Amazon may face liability under the FLSA for misclassifying all three relationships according to the 2024 IC Test, for misclassifying the ALI-DSP owner and DSP associate relationships under the 2021 IC Test, and for joint-employer liability under the 2020 Test. This section describes the consequences of such classification in three parts: the practical threat that Amazon will face liability for worker misclassification, how the Trump

²¹⁵ *Fli-Lo Falcon*, *supra* note 178, ¶ 73.

²¹⁶ It's unclear if, as a product of its close monitoring, Amazon orders DSPs to change certain business practices or exerts further control over its books. If that were the case, this factor may ultimately favor joint-employer status.

Administration may further protect Amazon from liability, and how Amazon can limit its potential liability while maintaining its delivery operation.

3. Practical Outcomes

It's still unclear if ALI's misclassification of its workforce will practically affect its legal liability and business operation. A threshold inquiry is whether any court can take up these cases directly. Amazon subjects Flex and DSP workers to mandatory arbitration agreements.²¹⁷ As a result, there are 15,800 individual Flex Driver claims filed with the American Arbitration Association, brought by Cohen Milstein Sellers & Toll PLLC and Gibbs Law Group LLP.²¹⁸ Because arbitration is a confidential process, it's unclear how successful these arbitrations have been at recovering for worker misclassification.

But the shield of arbitration that Amazon guards itself with is also at risk of being breached. The Federal Arbitration Act permits employers to require mandatory arbitration in most cases, but not all.²¹⁹ The statute exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or *interstate commerce*" from

²¹⁷ Maya Pinto, Delivering Precarity: How Amazon Flex's Labor Model Harms Workers and What to Do about It, NAT'L ECON. L. PROJECT, 9 (July 2025) <https://www.nelp.org/app/uploads/2025/07/Delivering-Precarity-How-Amazon-Flex-Harms-Workers-and-What-to-Do-About-It.pdf>.

²¹⁸ Press Release, COHEN MILSTEIN, *Amazon Flex Drivers File Thousands of Wage & Hour Actions Against Amazon* (June 11, 2024) <https://www.cohenmilstein.com/amazon-flex-drivers-file-thousands-of-wage-hour-actions-against-amazon/> [https://perma.cc/Y399-WAEP]; see GIBBS MURA, *Amazon Flex Drivers Lawsuits and Arbitrations* (2025), <https://www.classlawgroup.com/amazon-flex-lawsuit> [https://perma.cc/C34G-DD3C] (last accessed Sept. 3, 2025).

²¹⁹ See generally 9 U.S.C. §§ 1-16 (2025).

mandatory arbitration.²²⁰ And two recent Supreme Court cases suggest that last-mile delivery workers, such as Flex Drivers and DSP operators, are covered by this “transportation worker” exemption from the FAA. First is *Southwest Airlines Co. v. Saxon*, where the Court held that cargo loaders at an airport were transportation workers engaged in interstate commerce, despite the workers not actually leaving the state of Illinois.²²¹ The Court extended this reasoning to transportation workers comparable to ALI delivery drivers in *Bissonnette v. LePage Bakeries*. In *Bissonnette*, the Court reversed the Second Circuit, which had applied mandatory arbitration to claimants who delivered baked goods made by massive food producer “Flowers Foods” from a Connecticut warehouse to local shops.²²² The Court instead held that the FAA exemption applied to such transportation workers since the drivers did not have to work for a company in the transportation industry to be exempt from the FAA.²²³ Since then, the First and Ninth Circuits in *Waithaka v. Amazon.com, Inc.*, and *Rittman v. Amazon.com, Inc.*, have explicitly held that Flex Drivers are exempted from the FAA under the transportation worker carveout.²²⁴

Accordingly, the floodgates of worker misclassification litigation against Amazon seem poised to open. If the Supreme Court were to take up a case involving Amazon, or other comparable gig services, it seems likely that it would extend the FAA exemption to all ALI

²²⁰ 9 U.S.C. § 1 (emphasis added).

²²¹ *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 459 (2022) (“In sum, text and context point to the same place: Workers, like Saxon, who load cargo on and off airplanes belong to a ‘class of workers in foreign or interstate commerce.’”).

²²² *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 248-50 (2024).

²²³ *Id.* at 252.

²²⁴ *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020); *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020).

delivery workers.²²⁵ For example, while the *Rittman* litigation has been repeatedly stayed as the Court refines its arbitration law, that stay was lifted in May of 2024.²²⁶ This result signals that ALI drivers can bring their claims with relative confidence that they will not be funneled to arbitration.

But what provisions under the FLSA would Amazon suffer substantial liability for, if litigation arises? First, considering the FLSA sets a low minimum wage at \$7.25 per hour, it seems like Amazon doesn't face liability for base wage pay.²²⁷ But many states have much higher minimum wage requirements,²²⁸ so Amazon may be liable for higher pay based on state law. Amazon touts that drivers are paid between \$18-25 per hour, but this figure is complicated by Amazon's "block pay" model, which often underestimates the number of hours it takes for drivers to complete delivery routes.²²⁹ This hourly number requires further factual investigation in case-by-case circumstances. Additionally, Amazon may face litigation for overtime

²²⁵ See generally Ella Klahr Bunnell, *How the Federal Arbitration Act's "Transportation Workers Exemption" Protects Last-Mile Delivery Drivers*, 2024 U. ILL. L. REV. ONLINE 37 <https://illinoislawreview.org/online/how-the-federal-arbitration-acts-transportation-workers-exemption-protects-last-mile-delivery-drivers/>.

²²⁶ Robert LaFolla, *Amazon Flex Drivers Case Tied Up as Courts Shape Arbitration Law*, BLOOMBERG LAW (June 26, 2024) <https://news.bloomberglaw.com/daily-labor-report/amazon-flex-drivers-case-tied-up-as-courts-shape-arbitration-law> [https://perma.cc/3QQW-PQ4H].

²²⁷ 29 U.S.C. § 206(a)(1)(C).

²²⁸ *State Minimum Wage Laws*, WAGE AND HOUR DIV., U.S. DEP'T OF LAB. <https://www.dol.gov/agencies/whd/minimum-wage/state#ga> [https://perma.cc/K8GL-JSCT] (last visited Mar. 13, 2025).

²²⁹ AMAZON FAQ, *supra* note 122.

requirements. The FLSA mandates time-and-a-half pay for workers exceeding forty hours per week, but Amazon has Flex and DSP drivers work in time block increments.²³⁰ Again, if delivery workers exceed those hours, Amazon may be on the hook for those overtime wages.

Amazon may also face liability over an innocuous problem: paperwork. The FLSA mandates that employers keep and preserve worker records, which must be produced to the WHD upon request.²³¹ While Amazon likely maintains records for their Flex Drivers, as their direct employer, that requirement gets complicated for DSPs. ALI generally monitors DSP books, and DSP owners are responsible for maintaining adequate records for their Delivery Associates under the FLSA, but ALI may also face joint liability for DSP recordkeeping violations.

Finally, the consequences of violating the FLSA are substantial. Section 216(a) imposes criminal fines of up to \$10,000 and imprisonment of up to six months for violation of most provisions of the FLSA.²³² Additionally, § 216(b) imposes civil remedies for employees affected by an employer's breach, as well as a provision shifting attorneys' fees to the employer.²³³ Further, the statute imposes special civil penalties for employers who violate the child labor and recordkeeping provisions of the statute, with up to \$50,000 in statutory penalties for violations that result in serious injury to certain employees.²³⁴

²³⁰ 29 U.S.C. § 207(a)(1); AMAZON FAQ, *supra* note 122.

²³¹ 29 U.S.C. § 211(c).

²³² § 216(a).

²³³ § 216(b).

²³⁴ § 216(e)(1)(a)(ii).

The practical consequences of reclassifying Amazon delivery workers are significant. Presumably without the protection of alternative dispute resolution, Amazon may be on the hook for significant damages, fines, and even criminal liability. Amazon should therefore seek to protect itself from such liability in two ways: externally involving itself in labor policymaking and internally addressing points of potential liability in its business practices.

4. Amazon's External Recourse.

First, Amazon may be able to avoid liability if the Trump administration develops new regulatory guidance under the DOL that broadens independent contractor status. Already, the Trump-DOL has signaled that it will rescind the 2024-IC Rule by postponing oral arguments in several cases applying the 2024 Test.²³⁵ As explained above, this would likely protect ALI from Flex Driver reclassification. But reverting to the 2021 Test will likely not save DSPs from reclassification due to the outsized control that ALI exercises over that prong of their delivery network. Therefore, Amazon may need to rely on Congress or the Executive Branch to provide new guidance that insulates them from liability for independent contractor classification.

In Congress, two bills have been introduced that would amend the FLSA and how it considers independent contractor status. The first, the “Modern Worker Empowerment Act” circumvents the Biden-WHD test by classifying workers as independent contractors when “such other person does not exercise significant control over the details of the way the work is performed by the individual” and “while performing the work, the individual has the

²³⁵ Katelynn M. Williams, *Trump Department of Labor Signals Likely Retreat from Biden Era Independent Contractor Classification Rule*, FOLEY & LARDNER LLP (Feb. 3, 2025) <https://www.foley.com/insights/publications/2025/02/trump-dol-retreat-biden-era-independent-contractor-classification-rule/> [https://perma.cc/7XU3-H5FB].

opportunities and risks inherent with entrepreneurship, such as the discretion to exercise managerial skill, business acumen, or professional judgment.”²³⁶ This revision to the FLSA undoubtedly favors independent contractor classification by qualifying certain language like “significant control” and broadening the test to mere “opportunities and risks” that are “inherent” to features of an independent contractor. The second bill is the “Modern Worker Security Act,” which allows hiring parties to provide benefits to independent contractors, like health insurance, paid leave, and retirement savings, without re-classification to employee status.²³⁷ This bill would also favor independent contractor classification for DSPs by allowing Amazon to provide work-related benefits, traditionally given to employees only, without shifting employee classification.

In the Executive Branch, Amazon may want to involve itself and other businesses reliant on contractor work in developing new regulatory guidance. The Department of Labor, like any other administrative agency, accepts public comments from any interested parties.²³⁸ Yet Amazon was largely absent from the 2024 proposed rulemaking process.²³⁹ Amazon should

²³⁶ Modern Worker Empowerment Act, H.R. 1319, 119th Cong. (Feb. 13, 2025).

²³⁷ Modern Worker Security Act, H.R. 1320, 119th Cong. (Feb. 13, 2025); *see generally* Gaetan J. Alfano & Tatyana M. Brehouse, *House Bills Proposing New Independent Contractor Status Test*, PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP (Feb. 26, 2025) <https://www.pietragallo.com/business-blog/house-bills-proposing-new-independent-contractor-status-test/>.

²³⁸ *How to Comment on a Notice of Proposed Rulemaking*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/how-to-comment-on-NPRMs#:~:text=Who%20can%20submit%20a%20comment, response%20to%20a%20proposed%20rule>.

²³⁹ *See generally* 2024 IC Test, *supra* note 142.

lobby for a friendlier IC rule, or alternatively should seek specific regulatory carveouts for certain employer-worker relationships like ALI–DSP.

Amazon should take the same approach regarding the Trump Administration's hypothetical 2025 Joint Employer Test. Under the 2020 Test, Amazon still likely faces joint employer liability because of the control it exercises over DSP operations. But the Trump Administration may not adopt its previous test in whole cloth, considering the legal challenges to its rule.²⁴⁰ Therefore, Amazon has a prime opportunity to influence a new rule that avoids joint-employer liability. Amazon can particularly focus on the first two prongs of the prior test (hiring and firing practices, and supervisory control of employee's work) which most strongly implicate joint-employer status for Amazon.²⁴¹ If it's able to push on those two factors, Amazon can likely avoid joint employer liability. Regardless, much of this remains speculative, as the Trump Administration has not publicly provided any guidance on how it will approach independent contractor and joint employer classification going forward.

5. Amazon's Internal Recourse.

While Amazon can look externally to changing legislative and executive policy, it can also adjust its own business practices to minimize its liability. This can be done in two primary ways: Amazon can relinquish some of its control over its delivery network, or it can formally adopt these workers as employees under the FLSA. Both options come with their own benefits and drawbacks

First, Amazon can step back from the day-to-day management of its Flex Drivers and DSPs. Currently, Amazon micromanages delivery routes, practices, and hiring and firing

²⁴⁰ See, e.g., *New York v. Scalia*, 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

²⁴¹ 29 C.F.R. § 791.2(a)(1) (2020).

processes for its delivery workers. Amazon needs to give up some of this control. Instead of mandating that drivers follow certain delivery routes through its Flex App, Amazon should instead provide “recommended” routes that drivers can deviate from. Amazon should also remove itself from DSP hiring practices. Perhaps the most damning to Amazon’s independent contractor or joint employer arguments is that it can unilaterally hire and fire DSP Delivery Associates. Instead, Amazon should leave hiring and firing practices to DSP owners completely.

Additionally, Amazon should allow DSPs more autonomy with how they brand and market their small delivery businesses. Currently, Amazon prohibits DSPs from branding their own vehicles with their company names and logos. Instead, DSPs must operate vehicles branded with Amazon decals. That requirement is inconsistent with Amazon’s insistence that the companies are independent businesses. Indeed, to the public DSPs are inseparable with ALI’s broader identity. As such, to avoid public scrutiny and the litigation that inevitably follows, Amazon should afford these businesses more individual autonomy in how they operate as separate businesses.

By doing so, Amazon can reduce its exposure to worker misclassification claims. But that would also require Amazon to relinquish control over its delivery operation. With that, a cost-benefit analysis arises: does the cost of liability from worker misclassification outweigh the benefit that Amazon gets from keeping its delivery network at arm’s length? That judgment will factor significantly into any choices that Amazon may make.

Alternatively, Amazon can step forward into the employer role and formally categorize Flex Drivers and DSPs as employees under the FLSA. In doing so, Amazon would obviously have to reclassify its delivery workers as employees and meet wage-and-hour requirements under the FLSA—a massive structural change in its current business structure. But the benefit of this

choice to Amazon is that it could exert more direct control over its delivery services than before. This would allow for Amazon to more consistently manage its delivery operation and avoid worker issues, as well as provide a benefit to Amazon's public image that would attract better potential workers. Additionally, by shifting to an employee-centric model Amazon can preempt legal risks and regulatory scrutiny—both of which can create substantial financial harm as explained above.

On the other hand, Amazon would face three primary issues if it leaned into employee classification. First, the administrative burden of managing Amazon's vast delivery employee network may result in unsustainable cost to the business. Second, reclassifying under the FLSA would have a rippling effect on other related labor statutes, such as the NLRA, OSHA, ERISA, and workers compensation statutes.²⁴² If Amazon were liable under these statutes, its individual expenses per worker would increase. Third, and related to the NLRA, Amazon would face more exposure to unionization efforts by Amazon delivery drivers. Amazon is plainly averse to unionization attempts, even going so far as cancelling DSP contracts in response to unionization.²⁴³ Again, this option has its own cost-benefit analysis that Amazon should consider when adopting a policy going forward.

Conclusion

²⁴² *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/aboutdol/majorlaws> (last visited Sept. 9, 2025).

²⁴³ Chris Mills Rodrigo, *The Campaign to Unionize Amazon Gains Momentum*, INEQUALITY.ORG (Oct. 1, 2024) <https://inequality.org/article/the-campaign-to-unionize-amazon-gains-momentum/#:~:text=Amazon%20has%20refused%20to%20recognize,major%20challenge%20for%20the%20Teamsters>.

Amazon's delivery network rests precariously on the line between non-employee and employee classification. Partisan divide over DOL regulations continues to shift that line, leaving employee classification in an uncertain state. While ALI's robust delivery system has produced windfalls for the company, it may also threaten ALI's continued viability in the delivery industry. Regardless of the approach it may adopt, Amazon should act quickly to solidify its position on either side of the line and stabilize its delivery network.