

ARTICLES

DELAWARE CORPORATE LAW AS GEOENGINEERING REGULATION 1
Luis Armando Martínez

EVALUATING BITCOIN MINING FROM A PERSPECTIVE OF 49
MISINFORMATION, DISINFORMATION, MALINFORMATION, AND
SUSTAINABILITY
John Olson & Paul Nylén

NOTES

THE MEDICAL JUDGMENT RULE: PRIVATE EQUITY IN HEALTHCARE 78
Priten Patel

CROSSRHODES: THE CULT-LIKE FORCE BEHIND TRADEMARKS 123
ORIGINATING FROM THE LIKENESS OF, AND SUBSEQUENT REGISTERED BY,
A CELEBRITY, AND THE IMPACT ON SMALL BUSINESSES FIRST TO USE THE
DESIGNATION
Cherlean Darko

DELAWARE CORPORATE LAW AS GEOENGINEERING REGULATION

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ABSTRACT

As climate impacts worsen, it is vital to identify the laws poised to govern corporate technological interventions. Arguably the most viable form of solar radiation modification, stratospheric aerosol injection (SAI) is rapidly entering the public fray but lacks tailored regulation.

This article is the first to analyze Delaware corporate governance law as the de facto legal regime set to regulate American corporate geoengineering. Delaware corporate law, specifically the duty of oversight rooted in fiduciary duty doctrine, ranks among the legal regimes likeliest to shape corporate SAI. It imposes information-gathering, risk-monitoring, and red-flag response requirements on corporate directors while also limiting liability through strict pleading standards. Thus, it could elicit both effective and problematic behaviors when mapped onto entities with varying levels of risk tolerance.

Part I shows that Delaware corporate law will prove dominant relative to other states' corporate, environmental, and tort law, and that federal and state law are unlikely to displace it in the near term. Part II delineates directors' obligations under *In re Caremark International Inc. Derivative Litigation* and *Marchand v. Barnhill*. Part III demonstrates this regime's potential to foster risk oversight under scenarios of optimal compliance. Part IV explains that judicial signaling, jurisdictional exit, and alternative options for entity formation may limit the law's ability to minimize SAI-related risks.

Delaware corporate fiduciary duty law provides SAI firms with a blueprint for both socially beneficial caution and socially costly opportunism. This article urges closer attention to how powerful yet often underrecognized areas of private law can shape corporate entities' climate-facing business activity.

Table of Contents

INTRODUCTION 4

I. DELAWARE CORPORATE GOVERNANCE LAW IS SET TO OPERATE AS THE DE FACTO LEGAL REGIME GOVERNING CORPORATE STRATOSPHERIC AEROSOL INJECTION..... 12

 A. As it currently exists, Delaware corporate law is dominant in its ability to govern SAI relative to business law in other states, environmental law, and tort law. 13

 B. Delaware corporate law will likely continue to influence private SAI given legislative stalemate and political hesitancy, and new schemes could even heighten its applicability. 20

II. THE RISK OF CAREMARK LIABILITY CAN SHAPE CORPORATE BEHAVIOR. 26

 A. The requirements for bringing shareholder derivative suits do not neutralize the risk of liability enough to dissuade reasonably cautious entities from attempting to comply with the law. 26

 B. *Caremark* imposes on boards of directors and officers information system and red flag duties, and reasonably cautious SAI corporations would likely implement a range of measures to comply with these duties because SAI is a high-risk mission-critical activity..... 29

III. UNDER SCENARIOS OF FULL OR SATISFACTORY COMPLIANCE, DELAWARE CORPORATE LAW COULD ENCOURAGE OVERSIGHT OF RISKS SPECIFIC TO STRATOSPHERIC AEROSOL INJECTION. 31

 A. Delaware’s duty of oversight would elicit from reasonably cautious entities risk-monitoring and response measures specific to SAI’s major risks. 31

 B. Reasonably cautious entities that have identified risks related to their SAI efforts would likely implement risk identification and management measures, especially after *Marchand*. 34

IV. DELAWARE CORPORATE FIDUCIARY DUTY LAW’S INFLUENCE OVER CORPORATE SAI MAY BE LIMITED BY JUDICIAL EMPHASIS ON THE IMPROBABILITY OF LIABILITY, JURISDICTIONAL EXIT, AND ALTERNATIVE CHOICES IN BUSINESS FORMS. 40

 A. The law expressing the duty of oversight emphasizes the improbability of liability and even potential insulation for illegal conduct..... 41

 B. Jurisdictional exit and alternative business forms may partly limit Delaware corporate law’s reach over SAI firms, but Delaware continues to attract incorporations at a significant rate and it is unlikely that SAI firms would categorically avoid the corporate form..... 44

CONCLUSION 47

INTRODUCTION

Geoengineering's glacial exterior in public discourse is thawing. Defined as technology meant to manipulate the atmosphere to counter climate change's most dire effects, geoengineering includes carbon dioxide removal (CDR) and solar radiation modification (SRM).¹ CDR methods aim to remove existing greenhouse gases from the atmosphere while SRM methods seek to reflect a fraction of the incoming sunlight that would otherwise remain trapped by existing emissions and continue to fuel excess heating.²

As with any socially impactful technology, good governance can maximize efficacy and minimize risk. Given the rise of CDR and SRM in academic and broader discussions, climate law has seen a surge in proposals and analyses to shape geoengineering's international and domestic governance.³ Rather than contribute another proposal to these discussions, this article singles out and analyzes an existing but unidentified lever poised to shape how entities engage in SRM: corporate governance law.⁴ Delaware corporate law is set to operate as a de facto lever influencing

¹ *The Harvard Solar Geoengineering Research Program*, SALATA INST. FOR CLIMATE & SUSTAINABILITY (2025), <https://salatainstitute.harvard.edu/research-initiatives/the-harvard-solar-geoengineering-research-program/> (last visited Mar. 8, 2026).

² *Id.*

³ See generally Ralph Bodle et al., *Options and Proposals for the International Governance of Geoengineering*, Umweltbundesamt Rep No. 2014/14 at 1, 105–10, 121–55 (2014), <https://www.umweltbundesamt.de/publikationen/options-proposals-for-the-international-governance> (discussing how European and German law partly fill the gap left by customary international environmental law with respect to geoengineering and refining options for geoengineering governance); Daniel Bodansky, *The Who, What, and Wherefore of Geoengineering Governance*, ARIZ. STATE UNIV. SANDRA DAY O'CONNOR COLL. OF L. (Oct. 30, 2013), <https://ssrn.com/abstract=2168850> (last revised Feb. 3, 2013) (discussing obstacles to coordination in geoengineering governance and questions relevant to international, national, and local implementation); Brian Citro & Patrick Taylor Smith, *A Human Rights Framework for Climate Engineering: A Response to the Limits of Cost-Benefit Analysis*, in CLIMATE GEOENGINEERING: SCIENCE, LAW AND GOVERNANCE 111, 111–44 (Wil Burns, David Dana & Simon James Nicholson eds., 2021) (applying human rights legal norms to geoengineering policy-making and regulation).

⁴ Existing scholarship has not considered corporate governance law's applicability to nonstate geoengineering efforts. The National Academies' 2021 report addressing existing regulatory schemes applicable to geoengineering reflects scholarship's current understanding of the issue: "Existing U.S. laws and regulations are potentially relevant to SG research but were not crafted with SG research in mind. Laboratory and modeling studies generally would not trigger the application of existing environmental laws. The application of environmental statutes to SG field research would depend on the nature of the research, its location, and the materials used and released. Tort law serves as another potential mechanism for governance of research. For any of these mechanisms, the focus is on physical impacts, not broader social or ethical concerns that frequently surround SG research. Current international

corporate SRM conduct by eliciting a full range of behaviors, from compliance to evasion. First, though, the obvious: Why discuss the application of a non-bespoke, albeit existing and influential, legal regime to an uncertain technology often met with hesitation or even severe criticism?

This analysis is necessary because the global environmental problems geoeengineering addresses and might itself represent without successful governance are far from hypothetical.⁵ Even if scholars, advocates, and others reject existing and imminent geoeengineering technologies, there is no guarantee that their opposition will stop these technologies from emerging or proliferating.⁶ Some states have passed laws restricting geoeengineering, but far from most have done so and the Environmental Protection Agency's (EPA) latest webpage on geoeengineering adopts a conventionally hesitant stance.⁷ Public hesitation and restrictions in some states⁸ have

law provides a general framework, but it does not explicitly promote, prohibit, or significantly limit SG research"). NAT'L ACAD. OF SCI., ENG'G, & MED., REFLECTING SUNLIGHT: RECOMMENDATIONS FOR SOLAR GEOENGINEERING RESEARCH AND GOVERNANCE 12 (Washington, DC: The Nat'l Acads. Press, 2021).

⁵ See, e.g., Sean Mowbray, *Geoeengineering Gains Momentum, But Governance is Lacking, Critics Say*, MONGABAY (Aug. 1, 2024), <https://news.mongabay.com/2024/08/geoeengineering-gains-momentum-but-governance-is-lacking-critics-say/>; Corbin Hiar, *Researchers Quietly Planned a Test to Dim Sunlight. They Wanted to 'Avoid Scaring' the Public*, POLITICO (July 27, 2025, 7:00 AM EDT), <https://www.politico.com/news/2025/07/27/california-sunlight-dimming-experiment-collapse-00476983>; James Temple, *A Startup Says It's Begun Releasing Particles Into the Atmosphere, in an Effort to Tweak the Climate*, MIT TECH. REV. (Dec. 24, 2022), <https://www.technologyreview.com/2022/12/24/1066041/a-startup-says-its-begun-releasing-particles-into-the-atmosphere-in-an-effort-to-tweak-the-climate/>; Michael Le Page, *Geoeengineering Could Avoid Climate Tipping Points, But Not If We Delay*, NEW SCIENTIST (July 8, 2025), <https://www.newscientist.com/article/2487346-geoeengineering-could-avoid-climate-tipping-points-but-not-if-we-delay/>.

⁶ Since the publication of a letter urging an international non-use agreement in 2022, the international community has not moved rapidly to ban or limit geoeengineering efforts and there remains a schism between states loath to employ the technology and states actively funding research. See *Frequent Questions*, ENV'T PROT. AGENCY, <https://www.epa.gov/geoeengineering/frequent-questions> (last visited July 11, 2025) (noting the absence of an "international framework for governing solar geoeengineering research or outdoor experiments and deployment" and that individual states have yet to ban the deployment of solar geoeengineering); Chris Bonasia, *African States Stand Firm Against Solar Geoeengineering, Urge Real Climate Solutions*, THE ENERGYMIX (July 31, 2025), <https://www.theenergymix.com/african-states-stand-firm-against-solar-geoeengineering-urge-real-climate-solutions/>; Damian Carrington, *UK Scientists to Launch Outdoor Geoeengineering Experiments*, THE GUARDIAN (Apr. 22, 2025), <https://www.theguardian.com/environment/2025/apr/22/uk-scientists-outdoor-geoeengineering-experiments>.

⁷ Evan Bush & Pilar Melendez, *EPA Head Promises 'Total Transparency' on Geoeengineering and Contrails as Weather Conspiracy Theories Swirl*, NBC NEWS (July 10, 2025), <https://www.nbcnews.com/science/science-news/epa-head-promises-total-transparency-geoeengineering-contrails-weather-rcna218029>.

⁸ The question of whether states would adequately detect and halt corporate geoeengineering activities is an additional matter to consider. See, e.g., Martin E. Comas, *Florida Bill Would Ban 'Chemtrails' and 'Geoeengineering.' But What Are They?*, PHYS.ORG (May 26, 2025), <https://phys.org/news/2025-05-florida-bill-chemtrails-geoeengineering.html>. Jurisdictional flight from the few jurisdictions limiting geoeengineering poses another barrier to isolated state-level efforts to limit the conduct without federal intervention.

not negated geoengineering's increasing momentum. Doubt is healthy and, as EPA and others state, greater clarity is vital. But barring discussion, as some prefer,⁹ may well leave global legal communities ill-equipped to devise or modify regulatory schemes when the time for large-scale deployment and risk mitigation arrives.

Indeed, academic and social momentum for geoengineering research and experimentation grows as the global community continues its trajectory of unambitious mitigation.¹⁰ In 2024, the Earth's average surface temperature exceeded 1.5 degrees Celsius above pre-industrial levels for the first time.¹¹ The Intergovernmental Panel on Climate Change (IPCC) has projected severe global temperatures for the end of the twenty-first century.¹² One intermediate mitigation scenario projects that, relative to 1850–1900, global mean surface temperature will likely exceed two degrees Celsius. Another scenario projects that, relative to 1986–2005, global mean surface temperature will likely increase by 1.4 to 3.1 degrees Celsius.¹³

What may prove to be the most viable form of SRM, an approach known as stratospheric aerosol injection (SAI), involves depositing sulphates in the stratosphere over time to increase atmospheric albedo, or the atmosphere's reflectivity. Specifically, these particles can prevent solar energy from (1) piercing the Earth's surface, (2) being reradiated outwards, and (3) getting trapped

⁹ See Jeremy Hance, *Don't Even Study It: Geoengineering Research Hits Societal Roadblocks*, MONGABAY (July 24, 2024), <https://news.mongabay.com/2024/07/dont-even-study-it-geoengineering-research-hits-societal-roadblocks/>; Lottie Limb, *Sun Blocking Technologies A No-Go For Now After UN Countries Voice Serious Concerns*, EURONEWS (Feb. 29, 2024), <https://www.euronews.com/green/2024/02/29/sun-blocking-technologies-a-no-go-for-now-after-un-countries-voice-serious-concerns>.

¹⁰ See, e.g., Saul Elbein, *Society Isn't Changing Fast Enough to Stop Climate Change: Study*, THE HILL (Feb. 1, 2023), <https://thehill.com/policy/energy-environment/3839348-society-isnt-changing-fast-enough-to-stop-climate-change-study/>; Brad Plumer & Nadja Popovich, *Yes, There Has Been Progress on Climate. No, It's Not Nearly Enough*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/interactive/2021/10/25/climate/world-climate-pledges-cop26.html>.

¹¹ Becky Dale, Mark Poynting & Erwan Rivault, *2024 First Year to Pass 1.5C Global Warming Limit*, BBC NEWS (Jan. 9, 2025), <https://www.bbc.com/news/articles/cd7575x8yq5o>.

¹² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 10 (R.K. Pachauri & L.A. Meyer eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

¹³ *Id.*

by greenhouse gases and contributing to global heating patterns.¹⁴ Though imperfect, SAI could prove cheap and effective.¹⁵ Just a few grams of sulphate in the stratosphere could “offset the radiative forcing of a tonne of atmospheric carbon dioxide,” and for only “about US\$1,000 a tonne for aerosol delivery.”¹⁶

Certainly, considerable uncertainties and risks remain. Research should address them, but some argue that SRM may be the only way to rapidly induce cooling at a global scale.¹⁷ The global community might not have the luxury to discard hastily such technology. Despite SAI’s promise and a growing body of research affirming its potential, people fear geoengineering and emphasize its perceived and real disadvantages.¹⁸ This article does not recycle these claims, but as an intervention it reflects the belief that the technology may continue proliferating absent a nationwide prohibition.¹⁹ To forgo research, legal or scientific, is unwise because SAI, its viability, and the set of incentives driving people to consider it²⁰ are widely known or easily knowable, and a state or entity could soon commence large-scale experiments. Small-scale SAI

¹⁴ NAT’L ACAD. OF SCI., ENG’G, & MED., *supra* note 4, at 20. Some have even proposed alumina and calcite instead of sulphates in a recent variant on traditional SAI. *See generally* Sandro Vattioni et al., *Injecting Solid Particles Into the Stratosphere Could Mitigate Global Warming but Currently Entails Great Uncertainties*, 6 COMM’NS EARTH & ENV’T, 1–10 (2025), <https://www.nature.com/articles/s43247-025-02038-1>.

¹⁵ David W. Keith, M. Granger Morgan & Edward A. Parson, *Research on Global Sun Block Needed Now*, 463 NATURE 426, 426.

¹⁶ *Id.*

¹⁷ *Id.* at 426–27.

¹⁸ Some voices perceive geoengineering-related discourse as increasing moral hazard risk, or the risk that geoengineering or mere discussion disincentivize emissions cuts. *See, e.g.*, Frank Biermann et al., *Solar Geoengineering: The Case for an International Non-Use Agreement*, 13 WIREs CLIMATE CHANGE 1, 1 (2021) (“To us, these proliferating calls for solar geoengineering research and development are cause for alarm, as they risk the normalization of these technologies as a future policy option.”); *cf.* TYLER FELGENHAUER ET AL., CARNEGIE CLIMATE GOVERNANCE INITIATIVE, *SOLAR RADIATION MODIFICATION: A RISK-RISK ANALYSIS* 1, 10–12 (2022) (introducing a “risk-risk” framework to evaluate comparatively the risks of climate change without SRM as opposed to climate change with SRM).

¹⁹ Even given a national ban on this technology, the absence of a comprehensive monitoring system may make any use difficult to detect. Further, bans are not necessarily permanent. Jurisdictions could cease banning the technology if doing so were deemed necessary.

²⁰ Some fear manipulating the climate at all, and some fear manipulating it given humanity’s strong influence on the climate since industrialization. Others seek to compare a world with geoengineering, however well-managed, and a world without it. A world without it or other interventions could, under projected scenarios, see temperature increases between two and four degrees Celsius above pre-industrial levels. *See generally* FELGENHAUER ET AL., *supra* note 18.

efforts are already underway.²¹ Considering how regulation can influence geoengineering is key to understanding the extent to which an entity engaged in experiments or deployment efforts will properly manage SAI and its attendant risks.²²

Rather than suggest or evaluate new regulatory schemes for geoengineering, this article analyzes why and how Delaware's existing law is already positioned to govern and influence corporate geoengineering, specifically SAI as what may be the most viable form of SRM. This article does not stop at positing that Delaware corporate law will merely influence corporate conduct. It argues that under highly plausible future scenarios this robust private legal regime could represent one of the few major influential levers governing corporate actors' SAI efforts.

²¹ With respect to SAI in the United States, current efforts are largely research-focused but some actors have undertaken small-scale outdoor experiments and even minor deployment. The most infamous example is Make Sunsets, a startup that has already drawn controversy for its attempts to launch weather balloons with small amounts of sulfur dioxide into the stratosphere over Mexico and the United States. *EPA Seeks Information From Make Sunsets*, ENV'T PROT. AGENCY, <https://www.epa.gov/so2-pollution/epa-seeks-information-make-sunsets> (last visited Aug. 23, 2025). Make Sunsets may have even fueled state legislative attempts to rein in SRM. *See, e.g., Governor Ron DeSantis Celebrates Action to Protect Floridians From Chemical and Technological Interference*, EXEC. OFF. OF THE GOVERNOR (May 6, 2025), <https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-celebrates-action-protect-floridians-chemical-and> (recounting Governor DeSantis's statement that "Florida is not a testing ground for geoengineering The Free State of Florida means freedom from governments or **private actors** unilaterally applying chemicals or geoengineering to people or public spaces." (emphasis added)).

As for research efforts, dedicated groups like Harvard's Salata Institute for Climate and Sustainability have conducted laboratory experiments and computer modeling to map the effects of sulphates' and non-sulphate solid particles' introduction into the stratosphere. Frank Keutsch, *New Directions in Solar Geoengineering Research*, SALATA INST. FOR CLIMATE & SUSTAINABILITY (Feb. 7, 2025), <https://salatainstitute.harvard.edu/new-directions-in-solar-geoengineering-research/>. Harvard halted its plans to execute its Stratospheric Controlled Perturbation Experiment (SCoPEX) amid opposition from civil society actors. *See, e.g., Indigenous Peoples Celebrate the Ending of Harvard's Geoengineering Experiment SCoPEX*, INDIGENOUS ENV'T NETWORK (Mar. 25, 2024), <https://www.ienearth.org/indigenous-peoples-celebrate-end-of-harvards-geoengineering-experiment-scopex/>. The National Oceanic and Atmospheric Administration (NOAA) conducted congressionally funded research finding that SAI would not only reflect sunlight back into space because of the injected particles' own albedo (the fraction of solar radiation reflected rather than absorbed upon incidence), but also increase marine clouds' albedo. *Injecting Light-Reflecting Particles Into the Stratosphere Could Also Make Marine Clouds Brighter*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA) (Mar. 24, 2025), <https://research.noaa.gov/injecting-light-reflecting-particles-into-the-stratosphere-could-also-make-marine-clouds-brighter/>. Marine cloud brightening efforts, especially on the Pacific Coast, have also proven controversial and activities, however public or covert, could continue to receive funding. *See, e.g., Controversial Trial of Technology That Could Be Used to Brighten Clouds Gets Voted Down in a California City*, NBC NEWS (June 5, 2024, 11:23 AM CDT), <https://www.nbcnews.com/science/environment/cloud-brightening-research-shut-down-california-rcna155516>; Corbin Hiar & Blanca Begert, *Flubbed Climate Test Won't Deter Rich Donors From Altering the Sky*, POLITICO (June 19, 2024, 7:00 AM EDT), <https://www.politico.com/news/2024/06/19/flubbed-climate-test-rich-donors-altering-sky-00164011>.

²² *See* NAT'L ACAD. OF SCI., ENG'G, & MED., *supra* note 4, at 12.

Delaware corporate governance law, including the requirements that boards of directors comply with the duty of corporate oversight, comprises enduring and behavior-molding rules that have so far eluded identification as critical to guiding corporate SAI conduct. This law is strongly applicable to SAI because it regulates major corporate decisions that may result in “corporate trauma” to the entity and shareholders,²³ as well as corporate decisions that affect public safety and the environment.²⁴

Certain final preliminary notes are in order. Some argue that nonstate geoengineering, including corporate activity, is unlikely to occur relative to state-led geoengineering because states would intervene to prevent it.²⁵ But it is not necessarily true that jurisdictions favoring deregulation will intervene to prevent corporate actors from making major decisions regarding new technologies, whether SRM or artificial intelligence (AI).²⁶ Large, wealthy corporations are not known for balking at cutting-edge ventures, they possess sweeping technological and financial

²³ See, e.g., *Lebanon Cnty. Emps.’ Ret. Fund v. Collis*, 311 A.3d 773, 779–80 (Del. 2023) (stating that *Caremark* claims typically follow a corporate trauma and concern directors’ responsibility to ensure that the corporation has a reporting system permitting adequate risk management).

²⁴ Carliss Chatman & Tammi S. Etheridge, *Federalizing Caremark*, 70 UCLA L. REV. 908, 971–72 (2023) (explaining that compliance with *Caremark* duties goes beyond the “requirement of mere legal obedience,” including influencing a culture of regulatory compliance, robust risk culture, and systematization of risk-monitoring and mitigation processes); Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, 2020 UTAH L. REV. 313, 377 (2020) (explaining that climate change implicates large legal and business-related risks triggering directors’ fiduciary duties, so corporate boards can no longer afford to ignore these risks and corporate law is decreasingly insulated from climate).

²⁵ Jesse L. Reynolds, *Solar Geoengineering to Reduce Climate Change: A Review of Governance Proposals*, 475 PROC. R. SOC’Y 20190255, 18 (2019) (arguing that states will “presumably consider” major decisions regarding climate engineering to be their prerogative, states that “tolerated non-state” deployment would come under international pressure to stop it, and sustained SRM would exceed nonstate actors’ capabilities).

²⁶ See, e.g., Nicole Alvarez, *The Senate’s AI Ban Applies to Every State, Not Just BEAD Recipients*, CTR. FOR AM. PROGRESS (June 13, 2025), <https://www.americanprogress.org/article/the-senates-ai-ban-applies-to-every-state-not-just-bead-recipients/> (describing federal legislators’ unsuccessful attempt to impose a ten-year ban on most states’ ability to regulate AI).

capabilities to endeavor as they wish,²⁷ and they could potentially act without detection,²⁸ especially in regulation-averse jurisdictions.

Others might argue that whether or not corporate entities could engage in geoengineering, they would have no incentive to pursue it. Governments, however, might contract for corporations to do so;²⁹ corporations could raise capital on stock exchanges and marketize their efforts through a concept as simple and deceptive as a “cooling credit”;³⁰ or they might receive large funds from private equity investors and opt out of the stock market entirely.³¹

And some might view this analysis as untenably speculative. But geoengineering is increasingly researched and discussed, and private entities are already engaging in either outdoor experimentation or deployment.³² Neglecting to understand how governance might increase the technology’s success or mitigate its risks is part of a broader failure to prepare for its onset. Failed or improvident use of the technology would be too costly and the costs of analytical preparedness too slight to abstain from this conversation. Just as the technology and its proliferation are

²⁷ Joseph Versen et al., *Preparing the United States for Security and Governance in a Geoengineering Future*, THE BROOKINGS INST. (Dec. 14, 2021), <https://www.brookings.edu/articles/preparing-the-united-states-for-security-and-governance-in-a-geoengineering-future/> (“An effective geoengineering governance regime must also adequately account for the behavior of non-state actors, as even a wealthy individual could theoretically perform solar geoengineering on their own.”).

²⁸ Under the Biden Administration, the United States began building an “early warning system” to detect geoengineering, but it is unclear whether this will continue. Christopher Flavelle, *The U.S. Is Building an Early Warning System to Detect Geoengineering*, N.Y. TIMES (Dec. 2, 2024), <https://www.nytimes.com/2024/11/28/climate/geoengineering-early-warning-system.html>.

²⁹ See, e.g., Alena Botros, *The True Genius of Elon Musk Is His ‘Subsidy Harvesting Strategy,’ Political Science Professor Says*, FORTUNE (Mar. 19, 2025), <https://fortune.com/2025/03/19/elon-musk-subsidy-harvesting-strategy-tesla-spacex-xai-doge/> (“Musk has reportedly collected \$38 billion in government funding over the years through contracts, loans, subsidies, and tax credits . . .”).

³⁰ See, e.g., *Cooling Credits: Subscription*, MAKE SUNSETS (2025), https://makesunsets.com/products/join-the-next-balloon-launch-and-cool-the-planet?srltid=AfmBOootL_VcldKMAe8E19fALozqqOfUIMaVM5XHjNjJ6pfuMWiI3qXw

³¹ Jonathan Ponciano, *Why Growth Companies Are Opting Out of the Stock Market—And What it Means for You*, INVESTOPEDIA (July 15, 2025), <https://www.investopedia.com/companies-opting-out-of-stock-market-11757107> (“SpaceX, OpenAI, and Stripe are among a growing number of high-profile companies opting to stay private longer, or indefinitely It reflects a deeper transformation in how companies fund growth, and where investors can try to find it Amid the dearth of IPOs, a booming private market has emerged as a popular funding source, with large private equity and venture capital funds leading the charge.”).

³² See *supra* note 21.

imminent, the area of law most strongly situated to govern corporate geoengineering already exists.³³

Part I examines why plausible scenarios in the United States over the next few decades feature Delaware corporate governance law as a primary legal regime governing corporate geoengineering. The corpus is likelier to govern geoengineering than other states' business law and non-business areas of law. And Delaware corporate governance law is unlikely to be displaced considering the absence of a federal statutory scheme tailored to geoengineering, obstacles to regulating subjects not contemplated by existing environmental statutes, and federal and state hesitation around regulating geoengineering. Even if a targeted regime emerged, Delaware corporate law would remain relevant as its applicability depends in part on a company's mission-critical area being highly regulated.³⁴ If non-bespoke but applicable, influential, and stable legal regimes count, then there is no actual American regulatory vacuum around geoengineering.

Although Delaware corporate governance law partly occupies this void, it does not necessarily do so effectively or in a manner that incentivizes companies to prioritize public safety.³⁵ In its discussion of how Delaware corporate law could regulate SAI, Part II focuses on procedural prerequisites to shareholder derivative suits and the substantive requirements under the duty of oversight stated in *In re Caremark International Inc. Derivative Litigation*³⁶ and developed in *Marchand v. Barnhill*.³⁷

³³ See Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail*, 74 BROOK. L. REV. 75, 75–76 (discussing old and novel theories why Delaware is still home to half of the American corporate economy).

³⁴ See *Marchand v. Barnhill*, 212 A.3d 805, 810, 822–24 (Del. 2019).

³⁵ See Cole A. Gray, *More Than Mission Critical: Climate Enterprise Risk As Socially Critical*, 57 U.C. DAVIS L. REV. 3169, 3197 (2024) (“Moreover, even if *Caremark* oversight liability is not an optimally efficient tool for holding boards accountable for oversight failures, ‘it may still be appropriate to apply *Caremark* liability to failures to manage risks, such as climate risks, that have systemic impacts because of the important social costs imposed by such systemic risks . . . that are not borne by the corporation's shareholders or its directors[.]’”).

³⁶ 698 A.2d 959 (Del. Ch. 1996).

³⁷ 212 A.3d 805 (Del. 2019).

Part III anticipates how SAI-focused³⁸ entities likely to fully or roughly comply with this law might identify risks specific to SAI and implement measures in accordance with their obligations under *Caremark* and *Marchand*. For corporations erring on the side of greater compliance, one might expect functional information and risk-monitoring systems that take account of SAI's potential for geopolitical volatility, geophysical disruptions, and perception-related corporate trauma.

Part IV identifies three limits on Delaware corporate fiduciary duty law's reach over corporate SAI. Delaware's case law interpreting the duty of oversight includes forceful language that could encourage risk-tolerant entities to shirk full implementation of their obligations. And entities could incorporate in other states or choose an alternative business form, either of which could reduce *Caremark*'s influence over their conduct.

This article calls on the U.S. legal and political communities to take a broader view of the areas of law relevant to private actors' geoengineering efforts. Fiduciary oversight obligations for directors and officers could elicit geoengineering activity running the gamut from conscientious compliance to full evasion. In underscoring Delaware corporate law's applicability, this article also asks lawyers to consider how areas of law other than those conventionally associated with the climate can encourage and constrain corporate behaviors.

I. DELAWARE CORPORATE GOVERNANCE LAW IS SET TO OPERATE AS THE DE FACTO LEGAL REGIME GOVERNING CORPORATE STRATOSPHERIC AEROSOL INJECTION.

To show that Delaware corporate law could constitute a major legal lever governing geoengineering companies' conduct in the United States, this article first shows in Part I.A. that the law as it already exists stands to influence nonstate geoengineering conduct. It further shows

³⁸ From this point on, this article generally refers to SAI rather than geoengineering broadly.

in Part I.B. that, for the foreseeable future, Delaware corporate governance law can maintain its grip as a highly influential legal regime—even if new schemes emerge to govern private geoengineering.³⁹

A. As it currently exists, Delaware corporate law is dominant in its ability to govern SAI relative to business law in other states, environmental law, and tort law.

Delaware corporate law is likelier to directly regulate SAI than corporate governance law in other states and non-business law. Assuming that all states' bodies of corporate law are equally applicable to corporate SAI, Delaware enjoys primacy because a large number of corporations reside in Delaware and thus fall within its reach.⁴⁰ But before exploring this primacy, it is helpful to consider relevant principles of corporate law.

First, the American law of corporate governance or corporate law is a subset of the law of business associations. Corporate law, for purposes of this discussion, is based largely on state legislation and common law. If a business entity does not elect to be incorporated (formed as a corporation) under the laws of its state, it will not be subject to corporate governance law, but rather to the state statutory, regulatory, and common law rules specific to the relevant entity.⁴¹

For readers unfamiliar with corporate law, it is vital to note that whether a corporation is the Hershey Company or an SAI startup, Delaware corporate law applies to its board of directors and officers if it is incorporated in Delaware. The Delaware General Corporation Law (the DGCL) applies to all Delaware corporations, shaping their formation, powers, registered offices, agents,

³⁹ As this article discusses later, if SAI were “subject to federal regulations” or “various state regulations,” a court would be likelier to find that Delaware fiduciary duty law applied to a company engaging in it. *See Marchand*, 212 A.3d at 810.

⁴⁰ *See Roe*, *supra* note 33, at 75–76.

⁴¹ The Delaware General Corporation Law (the DGCL) comprises the statutes governing corporate conduct, including formation, directors' and officers' obligations, and mergers and acquisitions. DEL. CODE ANN. tit. 8, §§ 101–398 (2024). The Delaware Limited Liability Company Act (DLLCA) governs limited liability companies (LLCs). DEL. CODE ANN. tit. 6, §§ 18-101 to 18-1208 (2024). And the Delaware Revised Uniform Partnership Act (DRUPA) covers general partnerships. DEL. CODE ANN. tit. 6, §§ 15-101 to 15-1307 (2024).

directors' and officers' conduct, stock and dividends, and more.⁴² A corporation's articles of incorporation and bylaws can vary some but not all of the default law under the statute.⁴³ In short, the DGCL does not need to be "amended" to apply to corporate entities engaging in SAI: It governs any Delaware corporation.

Finally, the internal affairs doctrine results in Delaware corporate law's applicability to Delaware corporations' internal governance even when they operate elsewhere. "In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."⁴⁴ Indeed, the law of the state of incorporation governs "matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders,"⁴⁵ often providing corporate directors and officers certainty regarding which state's law will govern corporate conduct. Mere incorporation in Delaware suffices for the law discussed in this article to govern directors' and officers' conduct with respect to internal corporate affairs.

Relative to other states' business law, Delaware's has proven historically dominant.⁴⁶ Frequently cited structural reasons why include Delaware's first mover's advantage; a judiciary with a dedicated trial court that adjudicates business law disputes (the Delaware Court of Chancery, abbreviated "Del. Ch."); efficient adjudication by the Court of Chancery and Supreme Court; carefully managed synergies between the legislature, bench, and bar; and robust, developed case law.⁴⁷ These factors attract incorporators seeking legal clarity, flexibility in private ordering,

⁴² DEL. CODE ANN. tit. 8, §§ 101–398 (2024).

⁴³ See e.g., DEL. CODE ANN. tit. 8, § 102(b)(1) (allowing certificate of incorporation to include any lawful provision regarding the management of the business and conduct of its affairs); DEL. CODE ANN. tit. 8, § 109(b) (allowing bylaws to contain any provision regarding various matters related to the business if such provision is not inconsistent with law or with the certificate of incorporation).

⁴⁴ *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081 (Del. 2011).

⁴⁵ *Id.* at 1082 (citing *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005)).

⁴⁶ Amy Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), <https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/>.

⁴⁷ *Id.*

and the self-reinforcing perception of Delaware’s “sophisticated bar and . . . law as a known currency.”⁴⁸

So, assuming that each state’s body of corporate law applies equally to SAI, Delaware corporate law’s primacy is clear. But the claim that Delaware corporate law could govern SAI more strongly than corporate law in other states depends on this assumption. For instance, specific aspects of another state’s corporate law might offer SAI corporations smoother governance or other attractive features.

Delaware, though, has already proven its attractiveness to a range of companies seeking to minimize avoidable legal and financial risk and cost. Its legislature moves quickly to secure the state’s status in the interstate incorporation competition.⁴⁹ The state’s law continues to offer corporations significant advantages,⁵⁰ and there is no apparent reason why this analysis would differ meaningfully for companies engaged in geoengineering. In fact, it is possible that some companies undertaking high-risk activities would prefer to incorporate in Delaware given clear, well-developed legal standards that could help them reduce the risk of liability.⁵¹

This discussion must also evaluate whether Delaware corporate law proves dominant in its ability to govern corporate SAI relative to other areas of law. Legal scholars have emphasized that

⁴⁸ *Id.*

⁴⁹ Following high-profile litigation involving Tesla, the Delaware General Assembly enacted Senate Bill 21 in March 2025 to retain corporations by limiting their exposure to claims of “conflicted controllers” and self-dealing transactions. Roger Barton, *Delaware Law Changes Parameters for Transactions Involving Interested Directors, Officers, and Controlling Stockholders*, REUTERS (May 8, 2025), <https://www.reuters.com/legal/legalindustry/delaware-law-changes-parameters-transactions-involving-interested-directors-2025-05-08>. This legislative reactivity evinces Delaware’s willingness to prevent “DExit,” or the corporate flight from Delaware toward other states. *See id.*

⁵⁰ Stephen M. Bainbridge, *DExit Drivers: Is Delaware’s Dominance Threatened?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 6, 2024), <https://corpgov.law.harvard.edu/2024/09/06/dexit-drivers-is-delawares-dominance-threatened/> (observing that the risk of litigation alone is unlikely to compel corporations to exit Delaware); Edward B. Micheletti & Jenness E. Parker, *Delaware Tells Companies: ‘Let’s Stay Together,’* HARV. L. SCH. F. ON CORP. GOVERNANCE (May 23, 2025), <https://corpgov.law.harvard.edu/2025/05/23/delaware-tells-companies-lets-stay-together/> (noting that Delaware remains appealing to corporations despite litigation-related risk).

⁵¹ *See* Bainbridge, *supra* note 50.

few regulatory barriers stand in the way of private SAI, whether field experiments or even isolated deployment efforts.⁵² Few nations or subnational jurisdictions have enacted legislation regulating climate geoengineering research or implementation,⁵³ but existing regimes that are unlikely to be invalidated or overhauled may operate as unintended sources of regulation. Among the areas of American law that could apply to corporate geoengineering, federal environmental law may seem like an obvious candidate. Alongside the federal environmental statutes are American tort law, federal securities law, and international environmental law. But each of these is weak or at least weaker in its applicability to corporate SAI than Delaware corporate law.

As for U.S. environmental law, statutes like the Clean Air Act and Endangered Species Act could govern a “wide variety of climate engineering activities” if American courts found them applicable.⁵⁴ But a federal agency seeking to promulgate a rule governing climate engineering must be able to identify a statutory basis for doing so.⁵⁵ Part I.B. addresses the viability of regulatory implementation, but here it suffices to note that most federal environmental statutes do not expressly support the administrative regulation of geoengineering without an amendment.⁵⁶

Limited statutory provisions as they exist could apply to geoengineering. For instance, relevant provisions in the Clean Air Act could regulate an SAI facility if it were deemed a major stationary source of pollution. But an SAI facility could likely avoid emitting the amount of

⁵² See, e.g., Antonia Eliason, *Avoiding Moonraker: Averting Unilateral Geoengineering Efforts*, 43 U. PA. J. INT’L L. 429, 456–57 (2022).

⁵³ Tracy Hester, *Liability and Compensation*, in CLIMATE ENGINEERING AND THE LAW 224, 238 (Michael B. Gerrard & Tracy Hester eds., 2018).

⁵⁴ *Id.* at 237.

⁵⁵ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (“Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires [C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).

⁵⁶ See *id.*

pollution required to trigger a Title V permit.⁵⁷ Under the Endangered Species Act's more aggressive provision prohibiting the taking of endangered species, any geoengineering corporation might face consequences but only where their activities specifically concern endangered species.⁵⁸

Less relevant statutes include the National Environmental Policy Act, which could apply to an SAI firm's project if a federal agency were involved in permitting, sponsoring, or otherwise participating in it, but the statute would not directly govern private entities.⁵⁹ Of limited note, the Weather Modification Reporting Act requires that individuals or entities engaging in a geoengineering activity notify NOAA in a yearly report, but the statute does not establish a comprehensive regulatory regime.⁶⁰ Some scholars have noted that nonstate governance itself could operate as a set of meaningful restraints on corporations, research institutions, and other private actors.⁶¹ On one hand, voluntary codes of conduct and other sources of self-governance might not shape corporate conduct as forcefully as external legal regimes. Yet they could still flow from reasonably cautious geoengineering-focused entities' risk-management systems to help supplement *Caremark* and other states' rules.

American tort law applies to corporate SAI to some extent. Corporate directors and officers might contemplate liability under theories of negligence or strict liability for ultra-hazardous conduct. But states may shield directors and officers from liability for corporate actions unless

⁵⁷ See 42 U.S.C. §§ 7661a–7661c (2021) (establishing requirements for the Title V permitting program covering major stationary sources); *id.* § 7602(j) (defining “major stationary source” and “major emitting facility” as sources that emit or have the potential to emit one hundred tons per year or more of any air pollutant); *Who Has to Obtain a Title V Permit*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit> (last visited Sept. 21, 2025) (explaining that Title V of the Clean Air Act applies to facilities emitting significant amounts of pollutants, such as power plants and refineries).

⁵⁸ See 16 U.S.C. § 1538(a)(1)(B) (2021) (setting forth the ESA's “take” prohibition, or the restriction on the “take of any [endangered species of fish or wildlife] within the United States or the territorial sea of the United States”).

⁵⁹ Reynolds, *supra* note 25, at 7.

⁶⁰ JESSE L. REYNOLDS, *THE GOVERNANCE OF SOLAR GEOENGINEERING: MANAGING CLIMATE CHANGE IN THE ANTHROPOCENE* 145–46 (2019).

⁶¹ *Id.* at 153; see generally Jesse L. Reynolds & Edward A. Parson, *Nonstate Governance of Solar Geoengineering Research*, 160 *CLIMATIC CHANGE* 323 (2020).

they personally direct or participate in the tortious conduct,⁶² and personal liability is rare because directors or officers are heavily insulated and seldom authorize conduct that would clearly expose them to personal liability.⁶³ Third parties may also urge a court to pierce the corporate veil to impose liability on shareholders (who may also be directors or officers, especially in smaller closely held corporations). But veil piercing is an extraordinary remedy, even in undercapitalized close corporations or those that disregard corporate formalities, and courts grant it only if the corporation itself incurs liability.⁶⁴

In addition to environmental and tort law, federal securities law might indirectly regulate corporate SAI. Scholars have debated whether publicly traded entities must disclose environmental, social, and governance (ESG) risks.⁶⁵ Congress and the Securities and Exchange Commission (SEC) have not mandated such disclosures, but ESG risks may qualify as “material” to a company’s financial performance under established securities law principles.⁶⁶ And while the SEC in 2024 announced the Climate-Related Disclosure Rules for publicly traded companies, it declined to defend the rules a year later.⁶⁷ Beyond federal securities law, corporate governance

⁶² See *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal. 3d 490, 503–04 (1986); *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1379–80 (2000); see also *Gantler v. Stephens*, 965 A.2d 695, 709 & n.37 (Del. 2009).

⁶³ See *Gagliardi v. TriFoods Int’l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (“Obviously, it is in the shareholders’ economic interest to offer sufficient protection to directors from liability for negligence . . . to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimal proceduralist standards of attention, they can face liability as a result of a business loss.”); see also *Teledyne Indus., Inc. v. Eon Corp.*, 401 F. Supp. 729, 736–37 (S.D.N.Y. 1975), *aff’d sub nom.*, *Teledyne Indus., Inc. v. Podell*, 546 F.2d 495 (2d Cir. 1976).

⁶⁴ *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1183–84 (Del. Ch. 1999) (explaining that veil piercing is rare and even circumstances indicating the entity’s domination by its owners may be insufficient absent fraud or similar injustice).

⁶⁵ See, e.g., David A. Katz & Laura A. McIntosh, *SEC Regulation of ESG Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 28, 2021) (discussing whether public companies must disclose ESG risks under federal securities law).

⁶⁶ Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 738–39 (2022).

⁶⁷ *SEC Votes to End Defense of Climate Disclosure Rules*, SEC. & EXCH. COMM’N (Mar. 27, 2025), <https://www.sec.gov/newsroom/press-releases/2025-58>.

law, including *Caremark*, could encourage corporations to monitor ESG-related issues, as they pose a “significant enough risk to a corporation’s profits” to require close attention.⁶⁸

International environmental law includes potentially applicable instruments and norms, but the United States has not ratified the most relevant treaties and has declined to follow several principles of customary international law. Yet even if the United States ratified the instruments most applicable to geoengineering or began to observe customary norms, these sources of law do not effectively constrain climate engineering.⁶⁹ On balance, the international governance of climate engineering is weak and focuses more on ex-post responses than preventive regulation.⁷⁰ Further, its capacity to govern private entities is especially limited under existing multilateral environmental agreements or the International Law Commission’s Draft Articles on State Responsibility.⁷¹ Customary international law could require states to regulate private actors’ SAI activity,⁷² whether through the duties to prevent transboundary harm⁷³ or carry out an environmental impact assessment.⁷⁴ But the United States is unlikely to recognize these norms and international environmental legal regimes are not especially applicable to corporate SAI conduct.⁷⁵

⁶⁸ Meryl Roux Jimenez, *ESG & Caremark: Shareholders Might Lack Adequate Tools to Voice ESG Concerns and to Hold Boards of Directors Accountable for ESG Oversight*, 32 U. MIAMI BUS. L. REV. 220, 222–24 (2024).

⁶⁹ See Edward A. Parson, *Climate Engineering in Global Climate Governance: Implications for Participation and Linkage*, 3 TRANSNAT’L ENV’T L. 89, 95 (2014).

⁷⁰ Bodle et al., *supra* note 3, at 155.

⁷¹ Bodansky, *supra* note 3, at 545 (“But, ordinarily, international law regulates the conduct of states and applies to individuals only indirectly, through national implementing legislation. For example, the UNFCCC, UNCLOS, ENMOD, CBD, and London Convention all apply to states rather than private actors, and the same is true of decisions made by the parties to the London Convention and CBD on ocean fertilization. To the extent that regulation of scientists or private companies is necessary to effectuate any of these international rules, it is up to states to do so.”); Alexander Proelss & Robert C. Steenkamp, *Geoengineering: Methods, Associated Risks and International Liability*, in CORPORATE LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM 419, 473 (Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach & Roda Verheyen eds., 2023).

⁷² Proelss & Steenkamp, *supra* note 71, at 469–74.

⁷³ Ralph Bodle, *Geoengineering and International Law*, 46 TULSA L. REV. 305, 306 (2010).

⁷⁴ *Id.* at 311.

⁷⁵ See U.N. ENV’T PROGRAMME, ONE ATMOSPHERE: AN INDEPENDENT EXPERT REVIEW ON SOLAR RADIATION MODIFICATION RESEARCH AND DEPLOYMENT 37–38 (Feb. 2023),

This Part I.A. has shown that Delaware corporate governance law as it now exists is more applicable to corporate SAI than other states' corporate governance law or than environmental, tort, securities, and international environmental regimes. Part I.B. considers why this dominance is unlikely to shift absent major changes in the U.S. legal terrain.

B. Delaware corporate law will likely continue to influence private SAI given legislative stalemate and political hesitancy, and new schemes could even heighten its applicability.

Given that Delaware corporate law will likely exert greater influence over corporate SAI than other legal regimes, this Part explains why the United States is unlikely to establish bespoke regimes regulating corporate SAI despite scattered state-level bans today. Federal statutory regimes are improbable considering federal legislative stalemate, a broadly deregulatory trajectory, and the political costs of legislating regarding geoengineering, itself intertwined with controversial climate politics.

First, a legislative shift toward either comprehensive regulatory controls or a full nationwide ban on geoengineering seems unlikely. Congress remains mired in structural gridlock, and absent one party's securing enough seats in the Senate to overcome the filibuster and other political obstacles, the odds of bespoke federal statutory enactments are low in the near to medium term.⁷⁶ The chances of federal legislation depend not only on Congress's willingness to regulate generally, but also on its willingness to address geoengineering specifically.⁷⁷ Even if Congress acquired an appetite for the issue, comprehensive regulation would depend on a statute's validity

https://wedocs.unep.org/bitstream/handle/20.500.11822/41903/one_atmosphere.pdf?sequence=3&isAllowed=y; FELGENHAUER ET AL., *supra* note 18, at 41.

⁷⁶ Some regulation could occur through appropriations or other legislative mechanisms. Ultimately, legislators could be likelier to regulate geoengineering once, and if, they acknowledge that climate-related impacts are grave enough to warrant an immediate antidote. See, e.g., Charles Pekow, *Will We Be Ready? Geoengineering Policy Lags Far Behind Pace of Climate Change*, MONGABAY (Aug. 26, 2024), <https://news.mongabay.com/2024/08/will-we-be-ready-geoengineering-policy-lags-far-behind-pace-of-climate-change/>.

⁷⁷ See, e.g., *supra* note 21.

and on how clearly its provisions granted federal agencies regulatory or other authority.⁷⁸

Moreover, geoengineering is a politically unpopular issue. Although the United States launched a five-year research plan⁷⁹ and the United Kingdom and Germany adopted new research initiatives,⁸⁰ there remains virtually no control or framework for governing state or nonstate actors' climate engineering efforts.⁸¹ Agencies like the National Aeronautics and Space Administration (NASA), the Department of Energy (DOE), and the National Science Foundation (NSF) could be loath to act without upper-level approval,⁸² and their superiors could be hesitant to push for regulation absent a greater perceived need for governance. Scholars have explained at length why SRM regulation is resistant to proactive governance, and a central reason is that politicians lack the incentives to act domestically or to cede sovereignty to an international body.⁸³

Geoengineering is also inseparable from climate change, another politically fraught issue. Part of the difficulty in rallying political will here is that governing geoengineering would necessarily involve legislation easily decried as *climate* policy. Fossil fuel industries and their allies have strongly opposed climate legislation and the subject provokes partisan conflict in U.S. politics.⁸⁴ Even if economically and technologically feasible forms of geoengineering promised to mitigate climate-related impacts at low economic cost relative to emissions cuts, proposed legislation would still face entanglement in climate politics.⁸⁵ Like comprehensive regulation, a

⁷⁸ Brooke Masters, *U.S. Supreme Court Rulings Usher in Era of Regulatory Caution*, FIN. TIMES (Dec. 10, 2024), <https://www.ft.com/content/97f4a3f4-ebc4-4437-8072-c6ff74606b35>.

⁷⁹ Jeremy Hance, *Don't Even Study it: Geoengineering Research Hits Societal Roadblocks*, MONGABAY (July 24, 2024), <https://news.mongabay.com/2024/07/dont-even-study-it-geoengineering-research-hits-societal-roadblocks/>.

⁸⁰ Ken Caldeira & David W. Keith, *The Need for Climate Engineering Research*, 27 ISSUES SCI. & TECH. 57 (2010).

⁸¹ Parson, *supra* note 69, at 95; U.N. ENV'T PROGRAMME, *supra* note 75, at 22.

⁸² Caldeira & Keith, *supra* note 80, at 57.

⁸³ Reynolds, *supra* note 25, at 6–7 (“Indeed, there has been little state involvement with solar geoengineering governance, and this seems unlikely to substantially change in the near future.”); Bodansky, *supra* note 3, at 548–49; Eliason, *supra* note 52, at 430.

⁸⁴ Susan S. Kuo & Benjamin Means, *Forcing Climate Change Compliance*, 48 HARV. ENVTL. L. REV. 437, 452–54 (2024).

⁸⁵ *Id.* at 453–54.

nationwide ban may also be unlikely. Regardless of whether affirmative regulation or prohibition is likelier, both face similar obstacles of legislative stalemate, deregulatory preferences, and potential controversy for addressing geoengineering or climate.

Having considered geoengineering governance by federal statute, this discussion turns to whether federal agencies could regulate geoengineering absent new legislation and whether states could regulate it absent a federal ban or preemption.⁸⁶ As for federal administrative regulation, law court would likely not uphold an administrative rulemaking that lacks a clear statutory basis.⁸⁷ This was true even before the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.⁸⁸ Before *Loper*, courts deferred to agencies' reasonable interpretations of ambiguous statutory questions under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁹ If a statute clearly did not confer regulatory authority on an agency, then rulemaking based on that statute would be vulnerable to legal challenges.⁹⁰

As noted earlier, few federal environmental statutes could directly govern private SAI, and those that could, like the Endangered Species Act, likely do not provide agencies with ample regulatory authority.⁹¹ Even where a statutory ambiguity may allow an agency to assert a grant of authority, *Loper Bright* instructs that the Administrative Procedure Act (APA) requires federal

⁸⁶ See *Noe v. Henderson*, 456 F.3d 868, 870 (8th Cir. 2006) (“Federal preemption occurs when (1) Congress explicitly prohibits state regulation; (2) Congress implicitly prohibits state regulation by pervasively occupying the regulatory field; (3) state law directly conflicts with federal law; or (4) a federal agency, acting within the scope of its delegated authority, intends its regulations to have preemptive effect.”).

⁸⁷ *Kuo & Means*, *supra* note 84, at 456–57.

⁸⁸ 603 U.S. 369, 389 (2024) (holding that the Administrative Procedure Act (APA) requires courts to use their “independent judgment” to decide whether an agency acted within its statutory authority and prohibiting courts from deferring to agencies’ interpretations merely because a statute is ambiguous).

⁸⁹ 467 U.S. 837, 842–43 (1984).

⁹⁰ See *id.* The Weather Modification Reporting Act, for instance, may be too skeletal to provide any basis for *comprehensive* regulation. See 15 U.S.C. §§ 330–330e (requiring reporting of weather modification activities to the Secretary of Commerce).

⁹¹ See text accompanying notes 57–59.

courts to determine statutory meaning.⁹² It is thus unlikely that a geoengineering-related rule would survive administrative litigation today. And this legal difficulty should be analyzed in the context of low political will to regulate at all and to regulate geoengineering itself.

Currently, states seem likelier to regulate geoengineering than Congress or federal agencies. Trifecta states, where one party controls the governorship and both legislative chambers, have proliferated in recent years.⁹³ Prior to the 2024 general election, only ten states retained a divided government.⁹⁴ This rise, combined with states' legislative vigor,⁹⁵ suggests that states could regulate geoengineering despite a federal vacuum. Indeed, trifectas are fertile terrains for lawmaking because of their legislative and executive partisan alignment.⁹⁶ This effect is even greater in more professionalized legislatures that have well-funded committees boasting policy expertise, legislative services commissions, and well-resourced agencies capable of robust enforcement.⁹⁷ Trifectas controlled by either major political party could thus serve as sites for new regulation, although some states have banned or have considered banning geoengineering.⁹⁸

Yet it is not obvious that most states will soon move to regulate or ban geoengineering. As of January 26, 2026, only three states have enacted geoengineering-related bans and at least seven

⁹² See 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, **the reviewing court shall decide all relevant questions of law**, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action” (emphasis added)). This APA provision underlay the Court’s analysis in *Loper Bright*. 603 U.S. at 389.

⁹³ Bill Kramer, *State Trifectas Hit a New Record in 2024 (Only 10 States Have Divided Government)*, MULTISTATE (Feb. 13, 2024), <https://www.multistate.us/insider/2024/2/13/state-trifectas-hit-a-new-record-in-2024-only-10-states-have-divided-government> (“This means 2024 has a new record level of state trifectas at 40, with only 10 states remaining with divided government. While this isn’t a significant change year over year, it does extend the downward trend of the number of states with divided government over the past few decades.”).

⁹⁴ *Id.*

⁹⁵ Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 382 (2023).

⁹⁶ *Id.* (explaining that trifecta states with greater legislative capacity frequently enact comprehensive statutes and do not face Congress’s level of gridlock).

⁹⁷ *Id.* at 385–86.

⁹⁸ See Ryan Stevens, *State-Level Geoengineering Bans: Florida, Montana, and Beyond*, DUANE MORRIS GOV’T STRATEGIES (May 14, 2025), <https://statecapitallobbyist.com/environment/state-level-geoengineering-bans-florida-montana-and-beyond/>.

proposed bans have died in legislative committees or failed to pass required votes.⁹⁹ And even if states restricted but still allowed geoengineering, this article's analysis of corporate governance law's influence would remain relevant.

If Congress or a state enacted a comprehensive regime regulating SAI, Delaware corporate fiduciary duty law would actually become more applicable to corporate SAI. In *Marchand v. Barnhill*, one of *Caremark*'s progeny, the Delaware Supreme Court did not state that a breach of fiduciary duty claim against corporate directors or officers must fail if an industry is not comprehensively regulated.¹⁰⁰ But it did imply that it sustained the stockholder's *Caremark* claim partly because Blue Bell Creameries' directors and executive officers flouted their duties in a heavily regulated industry.¹⁰¹ The fact that Blue Bell Creameries operated under federal regulatory oversight facilitated the plaintiff's suit in *Marchand*,¹⁰² and the presence of a regulatory scheme had a similar effect in shareholder derivative litigation involving Boeing and pharmaceutical companies.¹⁰³ Tailored regulation, even if unlikely, could therefore heighten rather than diminish Delaware corporate fiduciary duty law's relevance to an SAI firm's activities.

Separately from whether Delaware corporate law proves dominant in its applicability to SAI relative to existing or possible legal regimes, some question whether the legal community should continue to look to Delaware rather than other states. After *CTS Corp. v. Dynamics Corp. of America*, where the Supreme Court held that Indiana's anti-takeover statute was not preempted

⁹⁹ See *U.S. Proposals to Ban Solar Geoengineering*, SRM360, <https://srm360.org/us-bans/> (last visited Mar. 25, 2026).

¹⁰⁰ See generally *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019); Shapira, *supra* note 66, at 755–58.

¹⁰¹ *Marchand*, 212 A.3d at 809–10, 822–23.

¹⁰² *Id.* at 810 (“Not only is Blue Bell subject to federal regulations, but it must also adhere to various state regulations. At the time of the *listeria* outbreak, Blue Bell operated in three states, and each had issued rules and regulations regarding the proper handling and production of food to ensure food safety.”).

¹⁰³ *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *28 (Del. Ch. Sep. 7, 2021); *In re Clovis Oncology, Inc. Derivative Litig.*, No. CV 2017-0222-JRS, 2019 WL 4850188, at *13–15 (Del. Ch. Oct. 1, 2019).

under the Williams Act and did not violate the Commerce Clause,¹⁰⁴ Delaware's tardiness in enacting an anti-takeover statute called into doubt the state's legal reactivity.¹⁰⁵ But the Delaware legislature eventually rose to the challenge and made Delaware the twenty-eighth state to enact an anti-takeover scheme.¹⁰⁶ The Delaware Court of Chancery's decision in *Tornetta v. Musk* again prompted speculation around Delaware's first-place status. In *Tornetta*, the Court of Chancery rescinded a compensation package that would have allowed Tesla CEO Elon Musk "the potential to earn stock options with a value upwards of \$55.8 billion."¹⁰⁷ The pay package, a conflicted controller transaction, triggered and failed entire fairness review.¹⁰⁸

But Delaware has moved aggressively to maintain its position. The legislature enacted S.B. 21 to create a safe harbor for conflicted controller transactions and "preserve Delaware's status as a preeminent place to incorporate."¹⁰⁹ Tesla's move to Texas did little to undermine Delaware's systemic advantages, which "will undoubtedly keep Delaware in use for many business entities for years to come."¹¹⁰ And, perhaps most notably, the Delaware Supreme Court reversed the Court of Chancery's remedy in *Tornetta* because rescission was improper.¹¹¹ New federal or state regimes are thus unlikely to displace Delaware corporate law's applicability to private geoengineering and Delaware corporate law remains influential despite recent challenges.

¹⁰⁴ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987).

¹⁰⁵ Wachtell, Lipton, Rosen & Katz, *The Interco Case* (Nov. 3, 1988), <https://www.law.upenn.edu/live/files/7876-culled-martin-lipton-publicationspdf> ("The Interco case[,] and the failure of Delaware to enact an effective takeover statute, raise a very serious question as to Delaware incorporation. New Jersey, Ohio and Pennsylvania, among others, are far more desirable states for incorporation than Delaware in this takeover era. Perhaps it is time to migrate out of Delaware.").

¹⁰⁶ Wachtell, Lipton, Rosen & Katz, *The Proposed Delaware Takeover Statute* 299 (June 1, 1987), <https://www.law.upenn.edu/live/files/7876-culled-martin-lipton-publicationspdf>.

¹⁰⁷ *Tornetta v. Musk*, 250 A.3d 793, 797, 804 (Del. Ch. 2019).

¹⁰⁸ Corporate directors' decisions often benefit from the deferential business judgment rule, but this protective standard does not apply in the context of a conflicted controller transaction. *See id.* at 797, 807–10, 812–13.

¹⁰⁹ Cydney Posner, *Delaware SB 21 Signed Into Law*, COOLEY PUBCO (Mar. 26, 2025), <https://cooleypubco.com/2025/03/26/delaware-sb-21-signed-into-law/>.

¹¹⁰ Simmerman et al., *supra* note 46.

¹¹¹ *In re Tesla, Inc. Derivative Litig.*, No. 10, 2025, 2025 WL 3689114, at *13 (Del. Dec. 19, 2025).

II. THE RISK OF *CAREMARK* LIABILITY CAN SHAPE CORPORATE BEHAVIOR.

Delaware corporate fiduciary duty law, as developed in *Caremark* and *Marchand*, can influence corporate behavior despite difficult pleading standards that reduce the apparent likelihood of liability. Establishing the relevant requirements to bring shareholder derivative suits and *Caremark* claims helps to illustrate how the law may influence entities engaging in SAI.

A. The requirements for bringing shareholder derivative suits do not neutralize the risk of liability enough to dissuade reasonably cautious entities from attempting to comply with the law.

The duty of oversight in *Caremark* could heavily influence an SAI entity's behavior.¹¹² In *Caremark*, the Court of Chancery held that a corporate board of directors owes its corporation the duty to monitor operations and exercise appropriate attention.¹¹³ While a director may incur liability for a negligent or ill-advised decision that violates the duty of care, substantive corporate decisions typically receive deferential judicial review under the business judgment rule.¹¹⁴ To overcome the presumption that the business judgment rule applies, plaintiffs must show that the board's decision-making process lacked good faith or rationality.¹¹⁵ Delaware courts, however, have clarified that the duty of oversight in *Caremark* involves a "failure to act in good faith" and thus arises from the fiduciary duty of loyalty, not care.¹¹⁶

By contemplating accountability for directors and officers who act in bad faith, *Caremark*

¹¹² See *In re Caremark Int'l Inc. S'holder Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

¹¹³ *Id.* at 970 ("A director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable for losses caused by non-compliance with applicable legal standards.").

¹¹⁴ *Smith v. Van Gorkom*, 488 A.2d 858, 872 9Del. 1985) (holding that directors breached their duty of care by acting in a grossly negligent manner without adequate information, but noting that the business judgment rule protects informed, good-faith decisions).

¹¹⁵ *Caremark*, 698 A.2d at 967.

¹¹⁶ *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); *Marchand v. Barnhill*, 212 A.3d 805, 820–21 (Del. 2019).

sent important cautionary signals. The ruling broadened potential liability for directors’ “unconsidered failure[s]” to monitor operations—whether by failing to ensure that an “information and reporting system” exists or by failing to respond to red flags under the system.¹¹⁷ These are recognized as two independent avenues or prongs of *Caremark* liability¹¹⁸ and they now apply to directors and officers.¹¹⁹ Indeed, much of the United States’ corporate compliance today focuses on ensuring adequate internal controls and responses to red flags.¹²⁰

Hurdles to state a *Caremark* claim are nevertheless significant. Confusion over whether the duty of oversight derives from the duties of care or loyalty has led to poorly pleaded complaints,¹²¹ and this distinction determines whether an exculpatory provision under section 102(b)(7) of the DGCL can guard against liability. Section 102(b)(7) permits a corporation to include in its certificate of incorporation a clause waiving liability for directors’ breaches of the duty of care but not for their breaches of the duty of loyalty, for intentional misconduct, or for knowing illegality.¹²² Because Delaware courts now hold that oversight duties arise from loyalty,¹²³ exculpation clauses do not shield directors from *Caremark* liability.¹²⁴ Even so, plaintiffs asserting *Caremark* claims must clear a high bar by sufficiently pleading bad faith—

¹¹⁷ *Caremark*, 698 A.2d at 970–72.

¹¹⁸ See *In re Boeing Co. Derivative Litig.*, No. 2019-0907-MTZ, 2021 WL 4059934, at *33–34 (Del. Ch. Sept. 7, 2021).

¹¹⁹ *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343, 362 (Del. Ch. 2023) (“Everyone agrees that directors owe a fiduciary duty of oversight that includes both the Information-Systems Obligation and the Red-Flags Obligation. If officers owe the same duties as directors, then as to matters within their areas of responsibility, officers owe a duty of oversight.”).

¹²⁰ See, e.g., Shapira, *supra* note 66, at 750, 757–58.

¹²¹ See, e.g., *Segway Inc. v. Cai*, No. 2022-1110-LWW, 2023 WL 8643017, at *3 (Del. Ch. Dec. 14, 2023).

¹²² DEL. CODE ANN. tit. 8, § 102(b)(7)(i)–(ii) (2024).

¹²³ *Segway Inc.*, 2023 WL 8643017, at *3. Prior to the Court of Chancery’s ruling in *Segway*, the Delaware Supreme Court had also noted that “the *Caremark* standard for so-called ‘oversight’ liability draws heavily upon the concept of director failure to act in good faith.” Stone *ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369 (Del. 2006). Indeed, a fiduciary’s intentional failure to act “in the face of a known duty to act, demonstrating a conscious disregard for his duties,” violates the duty of loyalty. *Id.* (quoting *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006)).

¹²⁴ *In re Goldman Sachs Grp., Inc. S’holder Litig.*, No. 5215-VCG, 2011 WL 4826104, at *18 (Del. Ch. Oct. 12, 2011) (“A breach of oversight responsibilities is a breach of the duty of loyalty, and thus not exculpated under section 102(b)(7).”).

whether a failure to ensure the existence of “any reporting or information system or controls,” or a conscious failure to monitor corporate operations.¹²⁵

Likewise, the questions of who can sue and how they should do so are critical. Shareholder derivative suits provide a mechanism for shareholders to bring suit on behalf of the corporation against directors, but only if shareholders satisfy standing, adequacy, and demand requirements. To satisfy the demand requirement, shareholders must “demand that the directors pursue the claim and, if the directors decline, attempt to demonstrate that the directors wrongfully refused the demand.”¹²⁶ Alternatively, if shareholders do not make such a demand on the directors, they may attempt to establish demand futility by alleging “with sufficient particularity that demand is futile and should be excused due to a disabling conflict by a majority of the directors to consider the demand.”¹²⁷

For *Caremark* claims, Delaware courts apply the *Rales* test for demand futility.¹²⁸ This test allows plaintiffs to establish demand futility by calling into question the board’s disinterestedness through allegations of “board inaction” that exposes directors to a substantial likelihood of liability.¹²⁹ Establishing demand futility is a major obstacle to *Caremark* liability. Factually supported allegations that establish bad faith under *Caremark* could help plaintiffs satisfy demand futility; still, though, these inquiries are separate.

Even these obstacles do not neutralize *Caremark*’s risk to corporate entities, especially after *Marchand v. Barnhill*. In *Marchand*, the Delaware Supreme Court held that despite Blue

¹²⁵ *Segway Inc.*, 2023 WL 8643017, at *3.

¹²⁶ *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017).

¹²⁷ *Id.*

¹²⁸ *See Rales v. Blasband*, 634 A.2d 927, 933–34 (Del. 1993).

¹²⁹ *City of Birmingham Ret. & Relief Sys.*, 177 A.3d at 55; *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (“[T]o show demand futility where the subject of a derivative suit is not a business decision of the board, a plaintiff must allege particularized facts that ‘create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.’” (quoting *Rales*, 634 A.2d at 934)).

Bell's nominal compliance with food safety regulations, the plaintiff sufficiently pled a *Caremark* claim by alleging that Blue Bell's board did not "implement a system to monitor food safety," a mission-critical risk for the ice cream company, "at the board level."¹³⁰ Scholars view *Marchand* as an indicator of increased judicial oversight of corporate compliance and as a decision about managing critical risks, which can pose an existential threat to a corporation's brand and profitability "regardless of what the legal system has to say about these issues."¹³¹ The same logic extends to SAI: Failures to conduct adequate oversight could threaten an entity's reputation in addition to public safety. While *Caremark* claims present difficult preliminary obstacles like pleading demand futility, they present enough of a risk to influence corporate conduct. Next, Part III.B. explains the measures that the duty of oversight requires of directors and officers.

B. *Caremark* imposes on boards of directors and officers information system and red flag duties, and reasonably cautious SAI corporations would likely implement a range of measures to comply with these duties because SAI is a high-risk mission-critical activity.

To analyze how SAI corporations might respond to existing law, this discussion first provides a targeted overview of fiduciary duty obligations under *Caremark* and *Marchand*. As noted, even a corporation that opted to include an exculpatory provision in its certificate of incorporation has reason to guard against liability for violations of the duty of oversight.

Under *Caremark*'s information system requirement, a corporate board must assure itself that "information and reporting systems exist in the organization[.]"¹³² These systems should be "reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed

¹³⁰ *Marchand v. Barnhill*, 212 A.3d 805, 809, 823 (Del. 2019) (emphasis in original).

¹³¹ Shapira, *supra* note 66, at 753–54.

¹³² *In re Caremark Int'l Inc. S'holder Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

judgments concerning both the corporation's compliance with law and its business performance."¹³³ The board must make a "good faith effort" to implement a "reasonable board-level system of monitoring and reporting," so a director may be held liable "if she acts in bad faith in the sense that she made no good faith effort" to ensure that the company had any system of controls in place.¹³⁴

How stringently an entity implements these "information and reporting systems" is discretionary up to the limit of good faith, but a corporation striving for full compliance should consider adopting a wide array of measures.¹³⁵ These include arranging for auditing, ethics, and safety oversight committees to meet regularly,¹³⁶ as well as ensuring that the appropriate committees specifically discuss risks relevant to the corporation's primary mission (e.g., airplane safety rather than just accounting practices).¹³⁷ Entities might also increase management-level supervision of employees,¹³⁸ provide ongoing internal education,¹³⁹ establish a process and schedule allowing the board to remain regularly advised of any risks or issues,¹⁴⁰ and take board meeting minutes reflecting regular discussion of any risks or issues.¹⁴¹

To avoid red-flag liability, directors and officers should not only rely on the corporate information system to learn about any red flags indicating potential risk, but also refrain from consciously disregarding such flags and instead actively respond to them.¹⁴² Satisfactory

¹³³ *Id.*

¹³⁴ See *Marchand*, 212 A.3d at 821–22.

¹³⁵ See *Caremark*, 698 A.2d at 970.

¹³⁶ *Id.* at 963; *Guttman v. Huang*, 823 A.2d 492, 506–07 (Del. Ch. 2003); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 128 (Del. Ch. 2009); *Marchand*, 212 A.3d at 809; *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021).

¹³⁷ *Boeing*, 2021 WL 4059934, at *5.

¹³⁸ *Caremark*, 698 A.2d at 963.

¹³⁹ *Id.*

¹⁴⁰ *Marchand*, 212 A.3d at 809, 822; *Boeing*, 2021 WL 4059934, at *28, *30–31.

¹⁴¹ *Marchand*, 212 A.3d at 822; *Boeing*, 2021 WL 4059934, at *32.

¹⁴² *In re Citigroup S'holder Derivative Litig.*, 964 A.2d 106, 128 (Del. Ch. 2009); *In re Goldman Sachs Grp., Inc. S'holder Litig.*, No. 5215-VCG, 2011 WL 4826104, at *2, *22 n.217 (Del. Ch. Oct. 12, 2011); *Marchand*, 212 A.3d at 809. Being alerted to red flags multiple times but still failing to address them is fatal under the red flag theory. *In*

responses might include the board's advising or consulting with the relevant committee, conducting special meetings to address the issue, and adopting new policies and plans to resolve the issue or mitigate risk.¹⁴³ Red-flag liability could arise even where the corporation has no information monitoring system but receives notice of red flags, like news of a devastating event (e.g., an air crash for Boeing or a *listeria* outbreak for Blue Bell), the discovery of which does not depend on an information and risk-monitoring system.¹⁴⁴

Leaving both the information-system and red-flag liability theories intact, *Marchand* clarified that *Caremark* governs corporate risk-monitoring in an area "intrinsically critical to the company's business operation,"¹⁴⁵ in what is now known as the mission-critical doctrine.

III. UNDER SCENARIOS OF FULL OR SATISFACTORY COMPLIANCE, DELAWARE CORPORATE LAW COULD ENCOURAGE OVERSIGHT OF RISKS SPECIFIC TO STRATOSPHERIC AEROSOL INJECTION.

Delaware corporate law's duty of oversight could encourage SAI corporations to implement a host of information-gathering, risk-monitoring, and risk management measures. The following analysis applies Delaware law interpreting the duty of oversight to various stages of a corporation's possible SAI efforts, from small-scale research to large-scale deployment, to illustrate possible corporate responses under conditions of full or satisfactory compliance.

A. Delaware's duty of oversight would elicit from reasonably cautious entities risk-monitoring and response measures specific to SAI's major risks.

Because large-scale corporate SAI field research and operational deployment would implicate mission-critical risks for an SAI corporation, *Caremark* and *Marchand* would apply and

re Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *10, *13–15 (Del. Ch. Oct. 1, 2019).

¹⁴³ See *In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 683–84 (Del. Ch. 2023).

¹⁴⁴ *Boeing*, 2021 WL 4059934, at *34.

¹⁴⁵ *Marchand*, 212 A.3d at 822.

could encourage reasonably cautious entities to avoid corporate trauma and liability for failing to monitor or respond to risks.¹⁴⁶ Indeed, *Caremark* and *Marchand* could apply to these SAI efforts because directors and officers owe the corporation a duty to monitor high-risk activities implicating public safety.¹⁴⁷ But to understand how an SAI corporation would comply with this law by establishing information and risk-monitoring systems, it is necessary to identify the kinds of risks the corporation would have to monitor. As an ice cream company's information and risk-monitoring systems must relate to food safety risks,¹⁴⁸ an SAI company's monitoring systems would depend on SAI's major risks.

This article has discussed SAI broadly without distinguishing among indoor experimentation, small- and large-scale field experimentation, and deployment. Yet these distinct categories of SAI activity are relevant to the risks that an SAI corporation must monitor under *Marchand*.¹⁴⁹ As noted in the Introduction, this article focuses on stratospheric aerosol injection (SAI)—one form of solar radiation modification (SRM) and arguably the most viable type of SRM.¹⁵⁰ Indoor SAI experimentation typically involves theoretical analysis, social science research, computer simulation modeling, and laboratory experimentation.¹⁵¹ Small-scale outdoor (field) experiments involve the emission of “limited quantities of material” over short periods to examine SAI-related processes in the atmosphere without inducing significant climate impacts.¹⁵²

For these reasons, indoor experiments and small-scale outdoor activity are less likely to represent high-risk undertakings capable of causing corporate trauma on the level that typically

¹⁴⁶ See *id.* at 822, 824.

¹⁴⁷ See *id.* at 820–21.

¹⁴⁸ *Id.* at 809.

¹⁴⁹ See *id.* at 822.

¹⁵⁰ See Keith, Morgan & Parson, *supra* note 15, at 426–27.

¹⁵¹ U.N. ENV'T PROGRAMME, *supra* note 75, at 5.

¹⁵² *Id.*

invites *Caremark* or *Marchand* suits.¹⁵³ Moreover, these activities are less likely to implicate *Marchand*'s recognition of a risk to public safety.¹⁵⁴ But as for large-scale field experiments and deployment,¹⁵⁵ a geoengineering corporation conducting SAI could face at least three classes of risk: (1) geopolitical blowback; (2) environmental or geophysical effects; and (3) reputational fallout from perceived current or future environmental or geophysical effects. For SAI, these three risks are the equivalent of food safety risks for Blue Bell or aircraft and airspace safety risks for Boeing.

Principal among SAI's risks are geopolitical repercussions from state and nonstate actors responding to a corporate entity's SAI activity. Their responses could include retaliatory SAI deployment, military responses, or sanctions against the corporation or its jurisdiction.¹⁵⁶ Indeed, international or domestic censure for insufficiently coordinated or regulated SAI—or for any SAI use at all—could generate conflict, reputational damage, and financial losses.¹⁵⁷

Perhaps the most heavily cited issue in discussions of SAI-related risks,¹⁵⁸ physical and environmental effects of poorly prepared or managed large-scale experiments or deployment could

¹⁵³ See *Clem v. Skinner*, No. 2021-0240-LWW, 2024 WL 668523, at *1 (Del. Ch. Feb. 19, 2024); *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2020 WL 5028065, at *15–17 (Del. Ch. Aug. 24, 2020).

¹⁵⁴ See *Marchand*, 212 A.3d at 822, 824.

¹⁵⁵ It is reasonable to consider large-scale field experiments and operational deployment together because both involve similar risks given their magnitude. See U.N. ENV'T PROGRAMME, *supra* note 75, at 5.

¹⁵⁶ NAT'L INTEL. COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO U.S. NATIONAL SECURITY THROUGH 2040 11 (2021); FELGENHAUER ET AL., *supra* note 18, at 30; U.N. ENV'T PROGRAMME, *supra* note 75, at 19.

¹⁵⁷ See NAT'L INTEL. COUNCIL, *supra* note 156, at 11.

¹⁵⁸ See, e.g., *The Risks of Geoengineering: Accelerating Biodiversity Loss and Compounding Planetary Crises*, CTR. FOR INT'L ENV'T L. (2024), https://www.ciel.org/wp-content/uploads/2024/10/CIEL_briefing_The-Risks-of-Geoengineering_October2024.pdf.

disrupt earth systems and produce regionally heterogeneous impacts.¹⁵⁹ These outcomes could result in major corporate trauma fueling shareholder derivative suits.¹⁶⁰

The third risk merges the first two. Severe reputational and financial damage could arise from the perception—internationally or domestically—that the entity’s SAI has failed or caused harm. Such a perception might stem from the delayed onset of promised cooling effects or even from cooling effects’ short-term invisibility due to unrelated climate variability. For this third kind of risk (perceptions of environmental effects resulting in corporate trauma), the entity’s activity need not have even partly caused adverse impacts for the entity to incur losses.

B. Reasonably cautious entities that have identified risks related to their SAI efforts would likely implement risk identification and management measures, especially after *Marchand*.

First, to avoid information-system liability under *Caremark*, a corporation undertaking large-scale SAI field experimentation or deployment and seeking to enter into full compliance would implement an information and reporting system accounting for each major class of risk and enabling reporting up the corporate chain. Such an entity could require periodic scheduled audits and regular committee meetings devoted to monitoring relevant geopolitical or other social risks, environmental and security risks related to the mismanagement of SAI experiments or deployment, and risks of perceived failure.¹⁶¹

¹⁵⁹ Olivia Lazard et al., *Geoengineering: Assessing Risks in the Era of Planetary Security*, CARNEGIE ENDOWMENT FOR INT’L PEACE (July 16, 2025), <https://carnegieendowment.org/research/2025/07/geoengineering-assessing-risks-in-the-era-of-planetary-security?lang=en>.

¹⁶⁰ See Aisha Saad, *The Impact of Climate Litigation on Corporate Governance*, ECGI (Mar. 13, 2023), <https://www.ecgi.global/publications/blog/the-impact-of-climate-litigation-on-corporate-governance>; Patrick W. Keys et al., *Potential for Perceived Failure of Stratospheric Aerosol Injection Deployment*, 119 PROC. NAT’L ACAD. SCI. U.S. 1 (2022).

¹⁶¹ See *In re Caremark Int’l Inc. S’holder Derivative Litig.*, 698 A.2d 959, 963 (Del. Ch. 1996); *Guttman v. Huang*, 823 A.2d 492, 506–07 (Del. Ch. 2003); *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 128 (Del. Ch. 2009); *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019); *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021).

Of course, a company need not adopt this particular categorization of risks.¹⁶² Instead, it could design one information and risk-monitoring system for environmental, physical, or social impacts, and a parallel system for managing public relations and activity that could fuel domestic or international conflict. Alternatively, it could create one system dedicated to scientific and technological precision and related risk minimization, and another dedicated to monitoring public perception and reputational consequences. Ultimately, the entity retains discretion to structure its risk-monitoring bodies,¹⁶³ but it must ensure that risk-monitoring and notification systems exist so superiors are aware of critical SAI-related risks and do not rely only on generalized risk assessments.¹⁶⁴

Second, to avoid *Caremark*'s red-flag liability, the corporation must also ensure that these committees or bodies include operable channels to the board so that directors remain regularly advised of issues and can respond to red flags.¹⁶⁵ The board should be prepared to mitigate any detected risks or materialized impacts.¹⁶⁶ For domestic and international blowback over SAI's use—or perceived effects of its use—the board should consult with the relevant committee, conduct special meetings, and take concrete steps to reach out to affected constituencies and attempt to mitigate upheaval. For environmental effects such as unexpected results (e.g., regional variation, problems in experimentation or deployment, or apparent failure even after the expected observation period), the board should be prepared to implement remedial measures. These might

¹⁶² See *Caremark*, 698 A.2d at 970 (discussing directors' discretion in complying with the information and reporting systems requirement).

¹⁶³ *Marchand*, 212 A.3d at 821 (“As with any other disinterested business judgment, directors have great discretion to design context- and industry-specific approaches tailored to their companies’ businesses and resources.”).

¹⁶⁴ See *Boeing*, 2021 WL 4059934, at *5.

¹⁶⁵ See *Marchand*, 212 A.3d at 822; *Boeing*, 2021 WL 4059934, at *32.

¹⁶⁶ See *Citigroup*, 964 A.2d at 128; *In re Goldman Sachs Grp., Inc. S’holder Litig.*, No. 5215-VCG, 2011 WL 4826104, at *2, *22 n.217 (Del. Ch. Oct. 12, 2011); *Marchand*, 212 A.3d at 809; *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188, at *13–15 (Del. Ch. Oct. 1, 2019).

include coordinating with governmental or private entities engaged in SAI, as well as with scientific and legal experts, to determine a set of reasonable options.

To actually manage risks or resolve issues may be difficult, but Delaware corporate law does not require that a corporation's monitoring system or red-flag responses entirely eliminate risk or ensure successful outcomes.¹⁶⁷ Under *Caremark*, the minimum requirement is a good-faith effort to maintain a reporting system and to address red flags.¹⁶⁸ Thus, the absence of concrete measures to achieve risk reduction could prove legally perilous.¹⁶⁹

Some might claim that *Caremark*'s information-system and red-flag requirements would still prove insufficient to induce a legally sophisticated SAI corporation to implement precautionary measures, since liability also requires a showing that the board's or officers' failure to monitor proximately caused the corporate trauma, whether monetary or reputational. Yet this causal nexus is not especially difficult for shareholder plaintiffs to allege at the pleading stage.¹⁷⁰ Under some circumstances, plaintiffs could plausibly assert that an entity's use of geoenvironmental engineering sparked public backlash that damaged the entity's financial condition, or that its perceived environmental effects of its activity generated the backlash. They could allege that SAI activity caused reputational harm rather than environmental harm.

¹⁶⁷ See *Caremark*, 698 A.2d at 970 (“And obviously too, no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law.”); *Citigroup*, 964 A.2d at 126 (“It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the ‘right’ business decision. In any investment there is a chance that returns will turn out lower than expected, and generally a smaller chance that they will be far lower than expected. When investments turn out poorly, it is possible that the decision-maker evaluated the deal correctly but got ‘unlucky’ in that a huge loss—the probability of which was very small—actually happened. It is also possible that the decision-maker improperly evaluated the risk posed by an investment and that the company suffered large losses as a result.”).

¹⁶⁸ See *Caremark*, 698 A.2d at 970.

¹⁶⁹ See, e.g., *Clovis Oncology*, 2019 WL 4850188, at *10, *13–15.

¹⁷⁰ *Id.* at *15 (finding that allegations sufficed to show a causal nexus between a breach of fiduciary duty and corporate trauma).

Even if a plaintiff alleged that the corporation's SAI caused environmental harms that induced corporate trauma—analogueous to Blue Bell's food-safety mismanagement causing a *listeria* outbreak¹⁷¹—shareholders could draw on public information and their rights to access books and records to provide evidence.¹⁷² Such evidence could help support allegations of demand futility under *Rales* and breaches of the duty of oversight under *Caremark* and *Marchand*.¹⁷³

By applying *Caremark*'s duty of oversight to areas “intrinsically critical to the company's business operation,”¹⁷⁴ *Marchand* produced what some now refer to as the mission-critical doctrine. Scholars have parsed from *Marchand* three factors that heighten the risk of liability for failure to monitor mission-critical issues: being a monoline company (e.g., Blue Bell Creameries, focused on ice cream, or Boeing, focused on aircraft); operating in a highly regulated industry; and facing mission-critical issues implicating public safety or security.¹⁷⁵ As for Blue Bell's status as monoline, the Delaware Supreme Court emphasized the company's reliance on one main product and its failure to guard against food safety issues.¹⁷⁶ And the public safety factor justifies a heightened duty to monitor because directors' bad faith in such areas could cause mass harm.

Two of these three factors readily apply to corporate SAI efforts. A purely SAI-focused company would be monoline, and even a company engaged in climate engineering alongside other technologies could be deemed monoline if it focused primarily on climate engineering.¹⁷⁷ As for

¹⁷¹ See *Marchand*, 212 A.3d at 822.

¹⁷² See *id.* (“Here, the plaintiff did as our law encourages and sought out books and records about the extent of board-level compliance efforts at Blue Bell regarding what has to be one of the most central issues at the company: whether it is ensuring that the only product it makes—ice cream—is safe to eat. Using these books and records, the complaint fairly alleges that before the *listeria* outbreak engulfed the company . . .”).

¹⁷³ See *id.* at 818, 822.

¹⁷⁴ *Id.* at 822.

¹⁷⁵ H. Justin Pace & Lawrence J. Trautman, *Mission Critical: Caremark, Blue Bell, and Director Responsibility*, 2022 WIS. L. REV. 887, 914, 929–31 (2022); see Kelly S. O'Brien, *Analyzing the Post-Marchand 'Expansion' of Mission Critical Risks: Cybersecurity, Climate Change, and Caremark*, 57 U. RICH. L. REV. 109, 130 (2023).

¹⁷⁶ See *Marchand*, 212 A.3d at 809.

¹⁷⁷ See *id.*

public safety, mismanaged SAI could lead to international and domestic blowback for large-scale interference with the climate system, direct environmental or geophysical harms, or perceived effects of SAI deployment.

The sole factor derived from *Marchand* that does not readily apply to corporate SAI is whether a company operates in a highly regulated industry. As discussed in Part I, Delaware corporate governance law is likely to regulate geoengineering because few other legal regimes are applicable to geoengineering and new tailored regimes are improbable. Currently and so long as these assumptions hold, SAI is thus unlikely to be a highly regulated industry. Nevertheless, this is just one of three factors, and large-scale SAI experimentation and deployment satisfy the other two factors. Further, reasonably cautious corporate lawyers would still recommend that an SAI entity adopt protective measures to comply with the duty of oversight.

In fact, the Delaware Supreme Court's reasoning in *Marchand* suggests that operating in a highly regulated industry is not a formal prerequisite for the duty of oversight to apply. The court emphasized Blue Bell's "heavily regulated" industry, but also stated that "nominal[] compli[ance] with FDA regulations" did not clear the company's directors of their duty to monitor food safety.¹⁷⁸ Indeed, "[t]he mundane reality that Blue Bell is in a highly regulated industry and complied with some . . . regulations does not foreclose any pleading-stage inference" supporting the required showing of bad faith.¹⁷⁹

This suggests that a corporation operating in an unregulated industry could still face liability for failing to adopt monitoring systems or respond to red flags. While entities operating in unregulated industries are not the most vulnerable to *Caremark* liability, they remain exposed to liability under *Marchand* and a court could be receptive in a case where an SAI corporation,

¹⁷⁸ *Id.* at 823.

¹⁷⁹ *Id.*

operating in an unregulated industry, took insufficient precautions. Being unregulated and lacking information and reporting systems would logically counsel in favor of greater exposure to liability.¹⁸⁰ And other cases have implied that a violation of law from a failure to monitor legal risk rather than business or other substantive risk is not necessary for *Caremark* liability.¹⁸¹ Just as illegal conduct coupled with an adequate monitoring system could reduce the likelihood of liability under *Caremark*,¹⁸² the mere fact that conduct is legal does not shield directors or officers from liability under *Marchand*.¹⁸³

Scholars have already shown that the doctrine has evolved to require monitoring of reputational and public safety risks in addition to legal risks.¹⁸⁴ Some assert that there are “no

¹⁸⁰ One counterargument is that Congress or the states would have regulated the industry if it posed such risks to public safety. But geoengineering is not unregulated because it poses no risks to public safety—intervening political or social variables also fueling a dearth of climate-related legislation are likelier causes. See, e.g., *supra* Part I.B.

¹⁸¹ Gray, *supra* note 35, at 3183 (“As some commentators have noted, courts appear willing to expand the application of *Caremark* liability where boards fail to oversee the externalization of critical health and safety issues to the general public.”).

¹⁸² *Marchand*, 212 A.3d at 821 (“Thus, our case law gives deference to boards and has dismissed *Caremark* cases even when illegal or harmful company activities escaped detection, when the plaintiffs have been unable to plead that the board failed to make the required good faith effort to put a reasonable compliance and reporting system in place.”); *Boeing*, 2021 WL 4059934, at *28 (“As *Marchand* made plain, the fact that the company’s product facially satisfies regulatory requirements does not mean that the board has fulfilled its oversight obligations to prevent corporate trauma.”).

¹⁸³ *Marchand*, 212 A.3d at 823 (“But the fact that Blue Bell nominally complied with FDA regulations does not imply that the board implemented a system to monitor food safety at the board level.” (emphasis in original)); see also *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *5–7 (Del. Ch. Sept. 7, 2021) (discussing Boeing’s failure to implement board-level oversight procedures without emphasizing regulatory regimes or compliance deficiencies); *Firemen’s Ret. Sys. of St. Louis ex rel. Marriott Int’l, Inc. v. Sorenson*, No. CV 2019-0965-LWW, 2021 WL 4593777, at *12 (Del. Ch. Oct. 5, 2021) (noting that Delaware courts had not yet applied *Caremark* to business risks as opposed to legal risks, but implying that this could change given the “corporate harms presented by non-compliance with cybersecurity safeguards”). As one scholar states, “[f]ollowing *Marriott*, one can now say that the courts may actually apply *heightened* scrutiny of reputational risk oversight.” Shapira, *supra* note 66, at 756.

¹⁸⁴ Shapira, *supra* note 66, at 753–54 (“Viewed from this angle, *Marchand* is a case about oversight of critical reputational risks. Indeed, *Marchand*’s progeny—the successful *Caremark* claims that followed in 2020 and 2021—regularly invoked concepts of reputational risk management. *Boeing*, for example, calls on corporate boards to pay close attention to issues of product safety even when the regulators (there, the FAA) approve its products and procedures. Just like no one wants to eat the ice cream of a company that has poor food safety controls, no one wants to fly with a company that has poor airplane safety controls. **In other words, product failures can pose an existential threat to the company’s reputation and profitability, regardless of what the legal system has to say about these issues.** In Vice Chancellor Zurn’s words, ‘the fact that the company’s product facially satisfies regulatory requirements does not mean that the board has fulfilled its oversight obligations to prevent corporate trauma.’” (emphasis added)).

clear answers” on this point,¹⁸⁵ but absent a ruling that forecloses liability in the context of unregulated industries, the reasonable possibility of liability may suffice to shape corporate behavior. Mission-critical SAI activity could also be cast as implicating legal risk if it increases a company’s exposure to liability under tort theories or state regulatory regimes.

This section has illustrated that *Caremark*’s information and red flag duties are robust; *Caremark*’s causation requirements would not necessarily insulate SAI corporations; and *Marchand*’s mission-critical doctrine could apply even to a lightly regulated corporation focused on SAI. *Caremark* liability for SAI corporations is thus plausible, and SAI-related risks need not materialize for corporate counsel to advise their clients to adopt measures to comply with *Caremark* and *Marchand*. Corporate lawyers, recognizing non-trivial litigation risk, could advise their clients to implement these measures. Under these circumstances, a reasonably cautious SAI corporation might establish auditing committees, monitoring systems for relevant risks, clear reporting channels to the board, and proactive remedial procedures.

IV. DELAWARE CORPORATE FIDUCIARY DUTY LAW’S INFLUENCE OVER CORPORATE SAI MAY BE LIMITED BY JUDICIAL EMPHASIS ON THE IMPROBABILITY OF LIABILITY, JURISDICTIONAL EXIT, AND ALTERNATIVE CHOICES IN BUSINESS FORMS.

Delaware corporate fiduciary duty law does not enjoy full reach over corporate SAI activity. First, the case law itself could encourage imperfect compliance among risk-tolerant, cost-avoidant, uninformed, or unscrupulous SAI corporations. As the following analysis notes, this argument concerns how judicial language might influence regulated entities’ conduct—it is not a claim that the case law strategically frames doctrine to influence behavior or that the case law should change. This section operates under the assumption that any judicial signals are not

¹⁸⁵ Jimenez, *supra* note 68, at 240.

intentional, but rather necessary byproducts of judicial expression of the law. These signals, however, remain relevant to regulated entities' conduct: Entities might adopt only partial monitoring measures in response to case law indicating that certain behaviors would not give rise to liability or that liability is generally improbable. Separately, Delaware's demands on SAI corporations might cause some to incorporate elsewhere. And while the law will likely not cause widespread jurisdictional flight, options for entity formation could still diminish its influence over corporate SAI and result in decreased aggregate risk mitigation.

Ultimately, Part III showed that Delaware corporate governance law could indirectly regulate corporate SAI by encouraging at least some entities to comply with the duty of oversight. Yet it is critical to recognize these three limits on the law's reach. As a preliminary matter, it is helpful to note that compliance exists along a spectrum, so there may be a broad range of both compliant and noncompliant corporate behaviors in a given industry.¹⁸⁶ For purposes of this discussion, imperfect or suboptimal compliance refers to conduct falling below the line of legal tolerability—conduct potentially actionable under *Caremark* and its progeny.¹⁸⁷

A. The law expressing the duty of oversight emphasizes the improbability of liability and even potential insulation for illegal conduct.

Caremark, *Marchand*, and the decisions applying them often express directors' duty of oversight in a manner that may encourage imperfect compliance among more risk-tolerant SAI corporations. Part III explained why *Caremark* and *Marchand* would apply to a monoline SAI company's large-scale field research or operational deployment, so counsel might advise

¹⁸⁶ See Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 62 (2003).

¹⁸⁷ See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (discussing the "level of detail" appropriate for an information system and stating that the exercise of a "good faith judgment" regarding the corporation's information and reporting system is required); *In re Transunion Derivative S'holder Litig.*, 324 A.3d 869, 884 (Del. Ch. 2024) ("Though directors may strive to exceed this bar, they cannot be held liable unless their conduct falls beneath it.").

corporations to minimize risks of noncompliance. But not all entities hire legal counsel, and even well-advised entities may decide not to adopt or fully implement recommended measures. It is conceivable that some entities may simply have a greater risk tolerance, a desire to avoid costs, or the will to disregard or incompletely follow legal advice.¹⁸⁸ Assuming that these entities understand Delaware's relevant case law, language emphasizing that liability is improbable could increase the odds of their noncompliance or its severity.

This discussion does not quantify the frequency with which entities do not comply with *Caremark* and *Marchand*, either among Delaware corporations now or as projected for SAI corporations. It is clear from cases where plaintiffs have successfully stated *Caremark* claims that corporations might not always scrupulously honor the duty of oversight,¹⁸⁹ and it is far from clear that all SAI corporations would diligently adhere to the law. An attempt to quantify the frequency of noncompliance would be challenging because litigation data is not fully inclusive of all situations of noncompliance. Further, it would be difficult to draw inferences from unsuccessful lawsuits. For instance, a shareholder's failure to establish, say, standing, might have no bearing on whether the entity engaged in conduct that would have exposed it to liability for violating the duty of oversight.¹⁹⁰

Still, the law's text sends signals that could embolden imperfect compliance. Recall the earlier caveat about judicial signaling: This analysis assumes that current expressions of the law do not seek to distort corporate behavior. Keeping this in mind, Delaware case law heavily

¹⁸⁸ See *Transunion*, 324 A.3d at 886–87 (discussing that directors and officers may be held liable under a range of circumstances, including “extreme” cases of noncompliance, knowing failures to implement monitoring systems, and conscious failures to address identified risks).

¹⁸⁹ See, e.g., *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) (Blue Bell's board “failed to implement **any** system to monitor Blue Bell's food safety performance or compliance” (emphasis added)); *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *33 (Del. Ch. Sept. 7, 2021).

¹⁹⁰ See *Arkansas Tchr. Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 894 (Del. 2013) (discussing conditions precedent to having standing to initiate and maintain a derivative action).

emphasizes *Caremark*'s towering standard in a manner that stresses the difficulty of imposing liability.¹⁹¹ *Caremark* itself described a claim for violating the duty of oversight as “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,”¹⁹² and the Delaware Supreme Court and Court of Chancery have reiterated this characterization.¹⁹³ Delaware courts have also underscored that oversight liability arises only in cases of bad faith,¹⁹⁴ and that illegal conduct alone might not suffice.¹⁹⁵

Despite some forceful language imposing liability,¹⁹⁶ the Court of Chancery and Delaware Supreme Court often describe *Caremark*'s pleading requirements as difficult for plaintiffs to satisfy.¹⁹⁷ They have stressed that “‘only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.’”¹⁹⁸ Yet as Part III noted, *Caremark* is influential not because it is demanding, but because a nontrivial risk of liability, coupled with shareholders' willingness to bring derivative suits, may lead legally advised corporations to adopt meaningful monitoring and response measures.

¹⁹¹ See, e.g., *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370, 372 (Del. 2006).

¹⁹² *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

¹⁹³ See, e.g., *Stone*, 911 A.2d at 372; *Louisiana Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 358 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013); *Marchand*, 212 A.3d at 820 n.99 (collecting cases); *Transunion*, 324 A.3d at 884 n.134.

¹⁹⁴ See *Marchand*, 212 A.3d at 820–821 (“[T]he plaintiff must show that a fiduciary acted in bad faith—‘the state of mind traditionally used to define the mindset of a disloyal director.’” (quoting *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007))).

¹⁹⁵ See *id.* at 821 n.105 (collecting cases).

¹⁹⁶ See, e.g., *id.* at 823–24.

¹⁹⁷ See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) (discussing how a plaintiff suing a director for an oversight failure bears an “extremely high burden,” in part because of the “difficulty of proving a *Caremark* claim”); *Stone*, 911 A.2d at 372.

¹⁹⁸ *Stone*, 911 A.2d at 364 (quoting *In re Caremark Int'l Inc. S'holder Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)).

Liability is possible, as both doctrine and recent outcomes show,¹⁹⁹ but judicial language suggesting its improbability could encourage entities to underinvest in compliance or to decide against it altogether. However simple it may be for directors to ensure that an entity has information and reporting systems and respond to red flags, actionable and nearly actionable omissions still occur.²⁰⁰ And even infrequent violations in mission-critical areas can present grave risks to the public, including mass harm or death.²⁰¹ To be sure, many corporations appear to maintain “robust” cultures of legal compliance,²⁰² motivated not only by legal risk but also by strong reputational, financial, and ethical considerations.²⁰³ Nevertheless, the law’s emphasis on how difficult it is to hold directors or officers liable could encourage risk-tolerant or cost-avoidant entities to engage in suboptimal risk monitoring and response measures.

B. Jurisdictional exit and alternative business forms may partly limit Delaware corporate law’s reach over SAI firms, but Delaware continues to attract incorporations at a significant rate and it is unlikely that SAI firms would categorically avoid the corporate form.

This final discussion briefly addresses the second and third main limits on Delaware corporate fiduciary duty law’s ability to regulate corporate SAI: jurisdictional flight or

¹⁹⁹ See, e.g., *In re McDonald’s Corp. S’holder Derivative Litig.*, 291 A.3d 652, 683–84 (Del. Ch. 2023) (concluding that plaintiffs satisfied the first element of their red flag claim but failed to show that the defendants acted in bad faith by failing to respond to the red flags); *In re Clovis Oncology, Inc. Derivative Litig.*, No. CV 2017-0222-JRS, 2019 WL 4850188, at *1, *13–15 (Del. Ch. Oct. 1, 2019) (denying defendants’ motion to dismiss plaintiffs’ *Caremark* claim because the defendants consciously disregarded multiple compliance issues regarding the company’s most promising drug candidate despite having a monitoring system).

²⁰⁰ See, e.g., *Marchand*, 212 A.3d at 822–24; *Clovis Oncology*, 2019 WL 4850188, at *13–15; *McDonald’s*, 291 A.3d at 683–84; *Hughes v. Xiaoming Hu*, No. CV 2019-0112-JTL, 2020 WL 1987029, at *14–15 (Del. Ch. Apr. 27, 2020).

²⁰¹ See, e.g., *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *1, *33 (Del. Ch. Sept. 7, 2021); *Marchand*, 212 A.3d at 807, 824.

²⁰² *Chatman & Etheridge*, *supra* note 24, at 971–72.

²⁰³ Corporate law, including the duty of oversight, could incentivize corporate compliance because entities likely wish to avoid reputational harm from “having damning information . . . dug out for all other market participants to see” amid litigation. See *Shapira*, *supra* note 66, at 757–61. And while the threat of settling may not “incentivize boards to invest optimally in compliance, if only because directors are usually not the ones paying,” two other channels could pressure entities into compliance: law firm memos and reputational fallout. *Shapira*, *supra* note 66, at 762–65.

reincorporation from Delaware, recently referred to as “DExit,” and the availability of alternative business forms, especially limited liability companies (LLCs).

As discussed earlier, Delaware’s business law is historically and currently dominant relative to other jurisdictions’ business law. But one might still argue that, especially given the duty of oversight’s development in Delaware, entities subject to this requirement might leave the jurisdiction. One response is that corporations already willingly operate under these legal obligations and they have not fled Delaware en masse; in fact, Delaware saw more corporate formations in 2025 than it did in 2024.²⁰⁴ The law governing directors’ and officers’ duties of oversight already generates the compliance risks and incentives that would motivate corporations to leave if the law’s burdens were not outweighed by the benefits of remaining in Delaware.²⁰⁵ While firms that reincorporated from Delaware have cited litigation risk as a motivation for leaving and Delaware courts are known to stringently enforce corporate fiduciary duties, Delaware’s “systemic advantages and robust legal infrastructure will often outweigh these considerations”²⁰⁶ and recent incorporation statistics reflect Delaware’s continued strength.²⁰⁷ And, of course, a high

²⁰⁴ Matthew Gerber, Rick Carroll & Richard A. Forsten, *Reassessing “DExit”: Delaware Entity Formation Trends and Recent High-Profile Entity Conversions*, SAUL EWING (Feb. 2, 2026), <https://www.saul.com/insights/alert/reassessing-dexit-delaware-entity-formation-trends-and-recent-high-profile-entity> (“[N]ewly released incorporation data and recent entity conversion activity indicate that such concerns appear overstated, and that Delaware’s practical appeal as the leading home for corporate entities remains strong Delaware experienced significant growth in new corporation formations in 2025, outpacing other U.S. jurisdictions and exceeding its own 2024 formation levels[.]”); see Bainbridge, *supra* note 50 (“[T]he number of reincorporations from Delaware remains minimal compared to the vast number of new incorporations Delaware attracts annually. Given the strong inertia behind the initial incorporation decision and the weak drivers from DExit, it is unlikely to become widespread soon.”).

²⁰⁵ See Bainbridge, *supra* note 50 (explaining that, while Delaware imposes “more rigorous standards on directors and officers” than Nevada, Delaware remains dominant because its legal environment offers corporations significant advantages and the “benefits of reincorporating [in Nevada] are not compelling enough for most firms”).

²⁰⁶ See *id.*

²⁰⁷ See Gerber, Carroll & Forsten, *supra* note 204.

rate of new incorporations means that businesses are opting to become *corporations* in Delaware.²⁰⁸ Indeed, they are choosing to do so despite heightened fiduciary duty standards.²⁰⁹

But limited liability companies (LLCs) are popular relative to corporations and could allow businesses to avoid fiduciary duty-related compliance costs. In Delaware, LLCs were 73.7% of new formations in 2022 while corporations were 18.7%, and LLCs were 73.3% of new formations in 2023 while corporations were 20.0%.²¹⁰ LLCs are known for affording their members (and, if relevant, their managers) “the maximum amount of freedom of contract, private ordering and flexibility[.]”²¹¹ LLC statutes often allow their members to create a manager-managed LLC or a member-managed LLC.²¹² Notably, Delaware law permits LLCs to publicly trade their interests and to eliminate all fiduciary duties for managers.²¹³ While there is some evidence that at least publicly traded LLCs are not likely to eliminate all fiduciary duties,²¹⁴ it is also true that LLCs have reduced their own exposure to liability by exculpating directors or managers from liability for a wide range of conduct.²¹⁵

So while Delaware corporate fiduciary duty law can influence corporate SAI, jurisdictional flight and the ability to operate as LLCs may constrain its reach. Indeed, SAI firms could limit their exposure to *Caremark* by incorporating in other states or organizing themselves as Delaware LLCs. It is difficult to predict SAI-focused companies’ conduct. Entity choice could reflect a

²⁰⁸ For readers unfamiliar with corporate law, a corporation legally exists once it is *incorporated*. 51 AM. JUR. 2D *Corporations* § 70 (2026). A limited liability company, on the other hand, is referred to as formed or organized. See 51 AM. JUR. 2D *Limited Liability Companies* § 1 (2026).

²⁰⁹ See Gerber, Carroll & Forsten, *supra* note 204; Angela N. Aneiros & Karen E. Woody, *Caremark’s Butterfly Effect*, 72 AM. U. L. REV. 719, 770–71 (2023) (“The evolution of *Caremark*’s new standard has created an increased duty of director oversight, and with that increased duty brings increased risk.”).

²¹⁰ DEL. DIV. OF CORPS., DELAWARE DIVISION OF CORPORATIONS: 2024 ANNUAL REPORT 2 (2024), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2024-Annual-Report.pdf>.

²¹¹ 51 AM. JUR. 2D *Limited Liability Companies* § 1 (2026).

²¹² 51 AM. JUR. 2D *Limited Liability Companies* § 7 (2026).

²¹³ Mary Siegel, *Publicly-Traded LLCs: The New Kid on the Exchange*, 68 SMU L. REV. 885–86, 891–92 (2015).

²¹⁴ *Id.* at 891.

²¹⁵ See, e.g., *Wood v. Baum*, 953 A.2d 136, 141, 144 (Del. 2008).

combination of business needs, structural preferences, and risk tolerance. Yet it is also difficult to claim that the features still attracting corporations to Delaware and still attracting businesses to the corporate form would be inapplicable in the context of SAI. These variables could thus limit *Caremark's* and *Marchand's* influence over corporate SAI, but there is little reason to believe that SAI entities will behave radically differently than the firms faced with these options today.

CONCLUSION

This article has shown that Delaware corporate law partly occupies the U.S. regulatory space ahead of nonstate geoengineering, specifically SAI. While this discussion has focused only on Delaware corporate fiduciary duty law as it applies to corporations engaging in SAI efforts, Delaware law exerts outsized influence relative to other states' business and non-business legal regimes, and is unlikely to be displaced by new statutory schemes.

Through *Caremark's* information-system and red-flag duties and *Marchand's* mission-critical doctrine, Delaware law could elicit meaningful risk oversight measures among reasonably cautious SAI corporations. These measures could include regular audits, specialized monitoring committees, upward reporting mechanisms, and remedial protocols. Yet not all SAI corporations will minimize risks of corporate trauma or fiduciary liability. Delaware fiduciary duty law emphasizes the difficulty of succeeding in *Caremark* suits, which may tempt risk-tolerant entities to refrain from implementing information-gathering and risk-monitoring systems. And some entities may opt for other jurisdictions or non-corporate formation.

Ultimately, this article urges recognition of corporate fiduciary duty law as a key, albeit overlooked, lever for shaping corporate conduct in climate engineering. Future research should explore this regime's durability, its interplay with emergent statutory and regulatory frameworks, and the extent to which its behavioral incentives bear out in practice. By analyzing how Delaware

law may shape corporate SAI efforts, this article has aimed to contribute to a more prepared governance landscape. Paying closer attention to existing fiduciary duty regimes could help to avert suboptimally managed SAI and strengthen a discussion about the legal and corporate guardrails available to responsibly manage climate technologies with significant global stakes.

**EVALUATING BITCOIN MINING FROM A PERSPECTIVE OF
MISINFORMATION, DISINFORMATION, MALINFORMATION, AND
SUSTAINABILITY**

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ABSTRACT

Bitcoin Mining is one of the most misunderstood topics that occasionally makes its way into the mainstream media. The traditional narrative, from newspapers of record, is that Bitcoin is worthless, and by extension Bitcoin Mining wastes energy unnecessarily. This paper examines a variety of perspectives on Bitcoin Mining, often finding that the traditional narrative was either simply wrong, or was a product of misinformation, disinformation, or malinformation. In fact, the more closely one studies Bitcoin Mining, the easier it is to conclude that Bitcoin Mining has tremendous potential for stabilizing energy grids and playing a critical role in moving to a more energy sustainable future.

I. Introduction

Created on October 31, 2008 by Satoshi Nakamoto, Bitcoin has been the best performing asset over the past 13 years. It has also been the most volatile. To use cypherpunk Jameson Lopp's saying, however, "the price of Bitcoin is the least interesting aspect." Evaluating not just the value of the coin, but the effect of the Bitcoin *network*, in particular Bitcoin mining, is a far more complex and interesting topic. It is also the most misunderstood, and subject to a range of misinformation, disinformation, malinformation, and sustainability misunderstandings. This article seeks to define these subjects in the context of Bitcoin mining and further attempts to understand if the public's understanding, and the way in which it is reported, accurately reflects the reality of Bitcoin mining.

II. What is Bitcoin Mining?

To-date, Bitcoin is the first and most successful fully decentralized digital commodity the world has even seen. By almost every metric: market capitalization, usage, layer 2 activity, and network strength, Bitcoin has separated itself from the almost 20,000 other cryptocurrencies that can be bought on common crypto exchanges like Coinbase. Several aspects of Bitcoin make it decentralized, but one aspect protects it from hacks and corruption in ways other crypto can cannot be defended: Proof of Work. Proof of Work is the process by which any person or company can plug into the Bitcoin network, use real-world energy, and receive some amount of Bitcoin in exchange for their energy.

The Bitcoin protocol, in turn, uses the real-world energy to run a cryptographical algorithm known as SHA 256. SHA 256 is the backbone behind Bitcoin mining and allows miners to time-stamp peer-to-peer transactions in the same way a notary would stamp the physical signatures on a legal document. Without digital timestamping, users of Bitcoin could potentially double-spend Bitcoin and thus expose the entire network to fraud and abuse.

Since 2013, other cryptocurrencies have sought to replicate the aspects of Bitcoin, but through other timestamping means known as Proof of Stake. While the ideals of Proof of Stake are rooted in using less energy, the trade-offs are manifest. This can be seen by the centralization of companies that stake, as well as the counter-intuitive requirement that those who want to stake must give up the private keys to their own coins. This article does not seek to disqualify cryptocurrencies that use Proof of Stake. Those articles have already been written. Moreover, the authors of this article understand the Proof of Work process with Bitcoin to be a feature, not a bug. Instead, this article seeks to focus on Proof of Work, and evaluate the claims made about Proof of Work through a lens of misinformation, disinformation, malinformation, and sustainability.

III. Misinformation, Disinformation, and Malinformation

“Misinformation” has been defined as “inaccurate information,” often resulting from “an honest mistake, negligence, unconscious bias,” without intending to deceive.¹ “Disinformation” has been defined as “*deliberate* (often orchestrated)

¹ Don Fallis, *What Is Disinformation?*, 63 LIBR. TRENDS 401, 401–26 (2015), <https://doi.org/10.1353/lib.2015.0014>.

attempts [at mischief or] to confuse or manipulate people through delivering *dishonest* information to them.”² In some cases, it seems the intent might simply be mischief (wondering whether people might actually believe it). “Malinformation” has been defined as (a) “information, ... based on reality, but used to inflict harm on a person, organization or country.”, or (b) “genuine information ... shared to cause harm, often by moving information designed to stay private into the public sphere”.³

A. Examples of Misinformation

The following are three historical examples of misinformation:

1. The world is flat, not round.
2. The sun revolves around the earth.
3. Bloodletting is a viable and valuable medical practice.

The following are three more modern examples of misinformation:

1. The U.S. space program (NASA) did not actually land astronauts on the moon.⁴
2. Cooking with a microwave oven destroys the nutrients in the food.⁵
3. Humans need a minimum of 8 glasses of water per day.⁶

² G. Berger, Foreword, in *JOURNALISM, “FAKE NEWS” & DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING* (C. Ireton & J. Posetti eds., UNESCO 2018).

³ *Fake News: Misinformation, Disinformation, and Malinformation*, UNESCO/PACE, <https://libguides.pace.edu/fakenews>. (last visited Mar. 2, 2026).

⁴ Amanda Hess, *They Kinda Want to Believe Apollo 11 Was Maybe a Hoax*, N.Y. TIMES, (July 1, 2019), <https://www.nytimes.com/2019/07/01/science/moon-landing-hoax-conspiracy-theory.html>

⁵ Kris Gunnars, *Microwave Ovens and Health: To Nuke, or Not to Nuke?*, <https://www.healthline.com/nutrition/microwave-ovens-an>, HEALTHLINE, (JUNE 13, 2023), <https://www.healthline.com/nutrition/microwave-ovens-and-health>; G A Cross, D Y Fung, *The effects of microwaves on nutrient value of foods*, N.I.H., <https://pubmed.ncbi.nlm.nih.gov/7047080/>.

⁶ Peter Attia, *Do I really need 8 glasses of water a day?*, Jan. 17, 2021. <https://peterattiamd.com/d>, PETER ATTIA MD, (Jan. 17, 2021), <https://peterattiamd.com/do-i-really-need-8-glasses-of-water-a-day/comment-page-1/>.

The above six examples involve beliefs that have been genuinely held, and in some cases were shared in the well-intentioned belief of helping other people. None of the examples reflect an intent to misinform or to cause harm.

B. Examples of Disinformation

The following are three historical examples of disinformation:

1. Napoleon was killed in battle in 1814 (false - used to perpetrate the 1814 Stock Exchange Fraud; Napoleon died in 1821 of a stomach illness).⁷
2. The Allies were going to invade Norway, not Normandy (false - intended to deceive Hitler).
3. Sec. of Defense George Marshall (1950-51) was involved in anti-U.S. conspiracies (false - used for political purposes).⁸

The follow are modern examples of disinformation (all are false):⁹

1. Costco recalled its brand of toilet paper due to COVID-contamination.¹⁰
2. Legislation proposed in Congress would ban senior citizens from voting.¹¹

⁷ See Richard S. Dale, *Napoleon Is Dead: Lord Cochrane and the Great Stock Exchange Scandal* (Sutton Publishing, 2006).

⁸ 97 cong. rec. S6602-03 (daily ed. June 14, 1951), (statement of Sen. Joseph McCarthy).

⁹ Manjul Gupta et al., *Fake news believability: The effects of political beliefs and espoused cultural values*, <https://www.sciencedirect.com/science/article/pii/S0378720622001537>.

¹⁰ David Mikkelson, *Did Costco Issue a Recall Notice for Toilet Paper?*, SNOPEs (Mar. 14, 2020), <https://www.snopes.com/fact-check/costco-bath-tissue-recall/>.

¹¹ Dan MacGuill, *Did a Democrat Named 'Tara McClossoff' Introduce a Bill to Ban Senior Citizens From Voting?*, SNOPEs (Feb. 12, 2019), <https://www.snopes.com/fact-check/tara-mcclossoff/>.

3. Instead of a conventional name, parents used an emoji to name their baby.¹²

The above six examples involve efforts at mischief or tactical efforts to confuse or manipulate, usually to the recipient's detriment and/or the disseminator's gain. Defamation (e.g., libel or slander) would fall under the definition of disinformation.

C. Examples of Malinformation

The following are all examples of malinformation:

1. Editing a video to remove important context.”¹³
2. Wikileaks release of Hillary Clinton campaign emails one month prior to Election Day 2016.¹⁴
3. In the 2017 presidential election in France, certain emails of candidate (and eventual winner) Emmanuel Macron were leaked just prior to election day. Regarded as genuine, public release of these emails in the moments before a mandatory ban on campaign activities precluded a response from the candidate, and thus was

¹² David Emery, *Did a California Newborn Become the First Child with an Emoji for a Name?*, SNOPES (Feb. 5, 2019), <https://www.snopes.com/fact-check/california-newborn-named-emoji/>.

¹³ Cybersecurity & Infrastructure Security Agency, *Tactics of Disinformation*, https://www.cisa.gov/sites/default/files/publications/tactics-of-disinformation_508.pdf.

¹⁴ Kyle Cheney & Sarah Wheaton, *The Most Revealing Clinton Campaign emails in WikiLeaks*, POLITICO (Oct. 7, 2016), <https://www.politico.com/story/2016/10/john-podesta-wikileaks-hacked-emails-229304>.

regarded as a tactic “designed to cause maximum harm to the Macron campaign.”¹⁵

If one considers that a witness in a trial is sworn in by the bailiff to *tell the truth, the whole truth, and nothing but the truth*, one could see that testimony that is (a) misinformation (honestly believed) would not violate that oath, (b) disinformation certainly would be perjury, and (c) malinformation in some cases would raise the question of whether the witness told “the whole truth”. It is certainly conceivable that an article or book could contain a combination of misinformation, disinformation and malinformation.

IV. Applying Misinformation, Disinformation and Malinformation to Bitcoin Mining

A. “The Real-World Costs of the Digital Race for Bitcoin” - New York Times

Hundreds of articles have been written about Bitcoin and Bitcoin Mining by the mainstream media, and newspapers of record. It is the authors’ contention, however, that the New York Times (NYT) still largely carries the torch for the most widespread and trusted news source in America. While this statement is surely subject to disagreement, we believe that exploring how the New York Times, specifically, describes Bitcoin Mining is helpful because for many in society who are not intimately

¹⁵ Michelle Caruso-Cabrera, *In France, Strict Election Laws Mean There’s Near Silence on Massive Hack*. CNBC. (May 6, 2017), <https://www.cnbc.com/2017/05/06/frances-election-laws-mean-near-silence-on-massive-campaign-hack.html>.

focused on Bitcoin, their only knowledge of Bitcoin Mining may come from the New York Times.

The above-referenced New York Times article of April 9, 2023¹⁶ falls in the category of malinformation; in other words, the article contains a great deal of truth, but lacks necessary context that inevitably puts Bitcoin in a negative light. For example, with respect to electricity purchases, the piece starts off with a clearly antagonistic description of the Rockdale Bitcoin mine's energy usage practices. The article suggests that certain Bitcoin miners uniquely, deviously, and dangerously exploit a long-extant electricity purchase program,¹⁷ and that Bitcoin mining utilizes an immoral amount of energy that disproportionately contributes to greenhouse gas production. To the extent that the lack of context strongly implies that Bitcoin mining is a uniquely harmful consumer of energy without any redeeming social value suggests that the NYT article could also qualify as disinformation.¹⁸ What is more, there is evidence that the NYT doctored photos to make the air around a Bitcoin Mining facility look dirty, when in fact, it is one of the cleanest in the country.¹⁹ The following are claims made by the NYT that we chose to further dissect.

i. Did Bitcoin Mining Contribute to the Electricity Shortages Caused by Winter Storm Uri?

¹⁶ Gabriel J.X. Dance, *The Real-World Costs of the Digital Race for Bitcoin*, N.Y. Times, (Apr. 11, 2023), <https://www.nytimes.com/2023/04/09/business/bitcoin-mining-electricity-pollution.html?searchResultPosition=3>.

¹⁷ *Load Participation in Ancillary Services Workshop*, U.S. Dep't of Energy (Oct. 25, 2011), <https://www.energy.gov/eere/analysis/load-participation-ancillary-services-workshop>.

¹⁸ Jake Simmons, *New York Times Attacks Bitcoin with Piece Full of Misinformation*, BITCOINIST (Apr. 10, 2023) <https://bitcoinist.com/ny-times-attacks-bitcoin-piece-misinformation/>.

¹⁹ *Id.*

“Winter Storm Uri ... caused numerous outages ... across the region. [ERCOT (the Electric Reliability Council of Texas)] ordered a total of 20,000 MW of rolling blackouts in an effort to prevent grid collapse; this represents the largest manually controlled load shedding event in U.S. history. More than 4.5 million people in Texas lost power – some for as long as four days.”²⁰

The NYT article makes the following comments:

“Texas was gasping for electricity. Winter Storm Uri had knocked out power plants across the state, [yet] in the husk of a onetime aluminum smelting plant an hour outside of Austin, row upon row of computers [the Bitdeer Bitcoin mining operations] were using enough electricity to power about 6,500 homes as they raced to earn Bitcoin, the world’s largest cryptocurrency.”

The NYT article goes on to note that, in the United States, the Bitcoin mine using the most electricity was a facility in Rockdale, Texas (owned by Riot Platforms), consuming about the same amount of power as 300,000 homes. All of the above would suggest that the Bitcoin operations used such a massive, inordinate quantity of electricity and that it was a primary factor in the deaths of 40 Texans during electrical outages caused by Winter Storm Uri. The loss of life during the storm was tragic, but to blame any of it specifically on Bitcoin mining seems spurious based on the following additional facts.

²⁰ *Final Report on February 2021 Freeze Underscores Winterization Recommendations*, FERC REPORTS (Nov. 16, 2021), <https://ferc.gov/news-events/news/final-report-february-2021-freeze-underscores-winterization-recommendations>.

First, ERCOT, being “the independent system operator (ISO) and balancing authority for the majority of Texas”²¹ manages “the flow of electric power to more than 26 million Texas customers -- representing about 90 percent of the state’s electric load.”²² Second, the Federal Energy Regulatory Commission (FERC), in its report on the 2021 storm (referred to as the “Event”), stated that a “confluence of two causes, both triggered by cold weather, led to the Event, part of a recurring pattern for the last ten years. The first cause, generating units unprepared for cold weather failed in large numbers. Second cause, in the wake of massive natural gas production declines, and to a lesser extent, declines in natural gas processing, the natural gas fuel supply struggled to meet both residential heating load and generating unit demand for natural gas, exacerbated by the increasing reliance by generating units on natural gas.” *Nowhere in the 316-page report is there a mention of bitcoin mining or cryptocurrency.*

The NYT article itself indicates that (a) when ordered by ERCOT under the Response Reserve Service (RRS), the Bitcoin mining operators shut down their operations, and (b) RRS is an agreement between ERCOT and RRS participants that allows ERCOT to issue such orders under its “demand response” (DR) program “if the [ERCOT] system was about to fail.” Participants in DR programs are compensated for agreeing to reduce their electricity consumption, presumably because it shuts

²¹ Christopher T. M. Clack, et al., ERCOT WINTER STORM URI BLACKOUT ANALYSIS 4 (2021), <https://docs.house.gov/meetings/IF/IF03/20210324/.111366/HHRG-117-IF03-20210324-SD023.pdf>.

²² *About ERCOT*, <https://www.ercot.com/about> (last visited Mar. 8, 2025).

down a portion of their business (money-making) operations. That is the way the system works and has worked for over 20 years.

Clearly, Winter Storm Uri was an overwhelming event for the entire state, and to criticize Bitcoin miners in the context of such an event is akin to blaming the last straw for breaking the camel's back, i.e., if Bitcoin mining did not exist in Texas, it is doubtful that the State or its residents would have fared any better during the storm.²³

ii. Does Bitcoin mining put immense pressure on the power grid?

The NYT article focused on 34 Bitcoin mining operations in the United States, asserting that they put “*immense pressure on the power grid*” by consuming almost 4,000 megawatts of electricity and using “*30,000 times as much power as the average U.S. home*” which required the operation of more costly power generators. Based on the article's assertions, the 34 Bitcoin mines used as much power as the nearest 3 million homes, with an average of about 115 megawatts per mine (with 10 of those mines using an average of at least 180 megawatts per mine). The article also stated that:

“As of last month [March 2023], ERCOT had approved plans to connect an additional 4,000 megawatts of Bitcoin operations this year, which would nearly triple their consumption in Texas. ... A one-megawatt mine consumes more energy each day than a typical U.S. home does in two years.”

²³ Note that RRS dates back to at least 2002, which predates the creation of Bitcoin (2009). Mark Patterson, Manager of Demand Integration, The History of Load Participation in ERCOT at DOE Workshop Washington, D.C. (Oct. 25, 2011). https://www.energy.gov/sites/prod/files/2015/06/f24/the_history_of_load_participation_in_ercot_mark_patterson.pdf. (last visited Mar. 2, 2026).

The article does not provide much in the way of specifics or context, other than equating mines' energy use to that used by households; for example, "*The electricity coursing through a 100-megawatt operation at a given moment could power about half the homes in Cleveland, according to federal data.*" No person, company or industry is above reproach if their actions create a dangerous situation, such as hindering life-critical access to electricity. However, the reference to household electricity data seems myopic and more like an apples-and-oranges comparison; for example, would we compare the auto industry or chemical industry's power usage to residential usage? In any event, the available data do not seem to support the idea that Bitcoin mining threatens to upend the nation's reliable access to electricity. Below are specific facts that add more context to the discussion of energy use.

In December 2020 (two months prior to Winter Storm Uri), ERCOT forecasted that "firm" peak demand for electricity during Winter 2021 would be 59,322 megawatts (MW).²⁴ ERCOT's forecasted capacity to supply during that time was 84,966 MW, a reserve margin of 25,644, equal to 43.2% of the forecasted demand. If the ten Texas mining facilities mentioned in the NYT article used 1,900 MW, that would represent less than 7.5% of the winter reserve and less than 2.3% of the overall

²⁴ ERCOT, *Report on the Capacity, Demand, and Reserves (CDR) in the ERCOT Region 2021-2030* (Dec. 16, 2020), https://www.ercot.com/files/docs/2020/12/16/CapacityDemandandReservesReport_Dec2020.pdf. See also Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008), <https://bitcoin.org/bitcoin.pdf>.

capacity. These figures do not paint a picture of a power grid that is under immense pressure or “gasping for electricity,” especially in the winter months.²⁵

The retail sales of electricity to major consuming sectors and percentage share of total electricity retail sales in 2022 totaled approximately 3.8 trillion kilowatt hours (kWh), as follows:²⁶

- Residential - 1.42 trillion kWh
- Commercial - 1.37 trillion kWh
- Industrial - 1.01 trillion kWh

Assuming the 34 Bitcoin mines use their 3,900 MW of demand 24 hours a day, 365 days a week, that would equate to about 34.2 billion kWh.²⁷ Of the Residential usage noted above, this would be approximately 2.41%; of the Commercial and Industrial usage listed above, that amount is approximately 1.44%; of the total usage, for all three categories, it would be less than 1%.²⁸ Looking at consumption, then: the U.S. Energy Information Administration estimates that 3,900 MW represents less than 4/10ths of one percent of available electricity production in the U.S.²⁹ These are

²⁵ Id. (Note that ERCOT indicates that there is both a winter peak and a summer peak. The December 2020 ERCOT forecast indicated that the forecasted 2021 summer peak was 75,173 MW, with ERCOT capacity of 86,842, resulting in a reserve margin of 15.5%. However, the May 2023 forecast anticipates summer reserve margins of between 34-44 percent for the period 2024-2033).

²⁶ *Electricity Explained*, U.S. Energy Information Administration, <https://www.eia.gov/energyexplained/electricity/>. (last updated March 26, 2024).

²⁷ 3.9 million x 24 x 365.25 (3,900 MW equals 3.9 million kilowatts (kW)).

²⁸ Note that each of these reflects a percentage of electricity consumed, not available production.

²⁹ 3,900MW ÷ 1,241,578.1MW; *Existing Capacity by Energy Source*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/electricity/annual/html/epa_04_03.html (2004).

figures that do not reflect a power grid that is in imminent danger of collapse due to the stresses placed on it by Bitcoin mining.³⁰

iii. Did Bitcoin Miners Use Novel or Corrupt Power Purchase Arrangements for Their Electricity Needs?

The NYT article also asserted that the 34 mines (mentioned above) “*are] finding novel ways to profit from [putting immense pressure on the power grid],*” as follows:

- During a four-day period, Bitdeer was paid in excess of \$18 million dollars to suspend operations (approximately \$175,000 per hour), with the article noting that this came from fees paid by Texas residents who had suffered the effects of Winter Storm Uri.
- Riot Platforms, a Bitcoin miner, had subscribed to the Responsive Reserve Service in Texas, a program designed to take the strain off the grid in overload situations, to help minimize or prevent blackouts. As part of this program, the article noted that the miner would receive payments for agreeing to shut down its power usage “upon request.”
- According to the article, Riot Platforms rarely had to shut down (less than four hours), yet in 2022 received almost \$9.3 million from the program.
- The article also states Riot Platforms took advantage of a program where they could suspend mining during periods of higher power prices and sell

³⁰ To be fair, other reputable organizations have also made wildly inaccurate guesses about Bitcoin Mining energy usage. For example, in 2017, the World Economic Forum predicted that by the year 2020, Bitcoin Mining would use more energy than the rest of the world combined. See, Adam Jezard, *In 2020 Bitcoin will consume more power than the world does today.*, World Econ. For F. 20. (Dec. 15, 2017) <https://t.co/6GPCmgoOHg>.

electricity into the grid, which allowed the miner to make approximately \$18 million in 2022.

- Finally, the article noted that *“Five of the six Texas mines in the power grid data participate in the Responsive Reserve program. All six chose to turn off nearly every time fees were assessed in 2022, saving an estimated \$62 million in fees.”*

The article goes on to insinuate that the Bitdeer mining facility continued to use electricity, despite an urgent need for power by residents who faced the threat of freezing to death. The article, using provocative terms like “windfall” and “voracious,” then goes on to suggest that Bitcoin miners participate preferentially (“miners *and other companies*”) and unethically in a long-standing Texas program that compensated them for temporarily cutting back on their power usage, allegedly to the detriment of residential users. Severin Bornstein, who studies electricity pricing and is a professor at the University of California, Berkeley, was quoted as saying “I think they’re exploiting the system.”

In fact, Bitdeer was participating in a program, known as a Response Reserve System (RRS) that is widely available to (and widely used by) multiple large electricity purchasers, and is a system that is intended to assist the utility in responding to emergencies, presumably to benefit the besieged residential consumers described in the NYT article. The NYT article provided no background on the development and intent of the response reserve system (RRS) and failed to acknowledge that Bitdeer’s participation in RRS may have actually helped restore

power to residential customers. The only allowance the NYT article provided was to again quote Bornstein: “But they will say, ‘You know, the system was already there,’ and I’m sympathetic to that in some ways.”

If the Bitcoin miners are using the Response Reserve Service (RRS), an ERCOT demand response program, in a way that was not intended by ERCOT, then it would behoove ERCOT (or the Public Utility Commission, or Texas legislature) to make the necessary adjustments (following any necessary authorizations to do so). However, as the NYT article notes, this was not a system set up or requested by the Bitcoin miners.

It seems as if the NYT wishes to crucify Bitcoin miners for participating in a program that dozens of non-Bitcoin companies make use of and profit from. The miners are not alone in taking advantage of RRS, and it is not entirely unreasonable to suggest that ERCOT has purposely set the RRS up to be taken advantage of. For example, NRG, a U.S. energy company,³¹ offers energy services that many businesses make use of, including the set-up of demand response with ERCOT. NRG describes demand response (DR) as a program that

“[A]llows you to get paid for being a smart, responsible energy user. Everyone wins when businesses reduce energy as the local grid approaches critical peak demand. Spikes level out. Supply and demand stay balanced. Brownouts are avoided. Emissions are reduced. And longer term, new power plants don’t have to be built ... When the time is right, we let you know when to take action. From here, your reduction action plan is put in place ... When DR season ends,

³¹ NRG is an American energy company that “brings the power of energy to customers by producing and selling energy and related products and services, nation-wide in the U.S. and Canada in a manner that delivers value to all of NRG’s stakeholders. NRG sells power, natural gas, and home and power services, and develops innovative, sustainable solutions, predominately under the brand names NRG, Reliant, Direct Energy, Green Mountain Energy, Stream, and XOOM Energy.” *See* NRG, Annual Report (Form 10-K) 9 (Feb. 24, 2022), https://investors.nrg.com/node/42036/html#i096cf9fefc2b403e9995cb7de61112a4_16.

you will receive a check. The amount is based on your preference and the programs in which your company was registered.”³²

What is more, other news outlets appear to be more accurately reporting the wide use of RRSs. For example, according to Reuters, in the wake of Winter Storm Uri, the

“[B]iggest winners were companies with access to supplies, including leading energy trader Vitol, gas suppliers Kinder Morgan (KML.N) [\$1 billion], Enterprise Products Partners (EPD.N) [\$250 million] and Energy Transfer (ET.N) [\$2.4 billion], oil giant BP plc (BP.L), and banks Goldman Sachs (GS.N), Bank of America (BofA) (BAC.N) and Macquarie Group (MQG.AX)”.³³

To put this in context of the NYT’s article, Bitdeer’s take (which was \$18 million, according to NYT) added up to a mere ½ of one percent of those reportedly reaped by Kinder Morgan, Enterprise and Energy Transfer, being just three of the eight companies cited by Reuters. And finally, it was not only energy companies that benefited from these agreements as Reuters further mentions that “[Bank of America] made hundreds of millions via its trading arm, according to a source with direct knowledge of the matter, but it is owed nearly \$480 million by Brazos Electric

³² Another energy company, Enel X, operates in the field of energy supply and energy management services. They describe the ERCOT demand response program as “a no-risk, no-cost opportunity for commercial, institutional, and industrial organizations to earn money while helping maintain reliable electricity throughout Texas [where] participants receive recurring capacity payments for agreeing to curtail electricity consumption in response to abnormally high electricity demand or electricity price spikes.” See *Demand Response*, NRG Energy, <https://www.nrg.com/business/all-products-and-services/demand-response.html>. (last visited March 2, 2026).

³³ Devika Krishna Kumar, Scott DiSavino, & Jessica Resnick-Ault. *Focus: Texas Freeze Delivers Billions In Profits to Gas and Power Sellers*, REUTERS, (May 6, 2021, at 1:07 ET), <https://www.reuters.com/business/energy/results-tally-up-billions-profit-texas-freeze-gas-power-sellers-2021-05-06/>.

Power Cooperative, which filed for bankruptcy.” In short, it appears the energy usage of Bitcoin mining is neither *pressure* nor *novel*.³⁴

iv. Does Bitcoin mining use an excessive or inordinate amount of electrical power?

There is no question that Bitcoin mining uses significant electrical power, but compared to what? The *Cambridge Bitcoin Electricity Consumption Index* (the "Cambridge Index") is aimed at providing useful energy comparison.³⁵ First, Bitcoin's share of the world's total yearly electricity production and consumption is 0.62%; electricity is just one subset of overall energy production and consumption, of which Bitcoin's share is 0.21%; Bitcoin's contribution to greenhouse gas (GHG) emissions is 0.14% of global GHG. Second, Bitcoin uses 5.6% more energy than gold mining annually. In terms of GHG emissions, Bitcoin produces less – just 70% of the amount produced by gold mining.³⁶ Other comparisons include global use of air conditioning (15.9 times more power than Bitcoin mining and produces 27.7 times more GHG than Bitcoin). Finally, the fashion industry produces 30 times more GHG than Bitcoin. In other words, if the fashion industry would reduce its GHG emissions by 5%, it would more than make room for the GHG emissions from Bitcoin.

³⁴ Gabriel J.X. Dance, *The Real-World Costs of the Digital Race for Bitcoin*, N.Y. TIMES, <https://www.nytimes.com/2023/04/09/business/bitcoin-mining-electricity-pollution.html> (Jan 3, 2024), (The NYT's article also raises questions about Bitcoin mining by referencing China's ban on Bitcoin mining due to energy use. This appears to be a novice understanding of Chinese policies, as China is equally, if not more, concerned with promulgating their own Central Bank Digital Currency, which would directly compete with Bitcoin).

³⁵ CAMBRIDGE BITCOIN ELECTRICITY CONSUMPTION INDEX, <https://ccaf.io/cbnsi/cbeci/comparisons>. (last visited Feb. 27, 2026).

³⁶ It is worth noting that few question whether society needs more gold mining.

As an aside, various writers enjoy quantifying Bitcoin energy usage by equating it to total energy use by some small countries, such as the Philippines³⁷ but, without context, this information is merely trivia; lacking context, this seems to be a case of malinformation. Perhaps now is the time to establish an equivalence measure that is objective and non-judgmental. For example, to quantify the climate impact of various greenhouse gases, the U.S. Environmental Protection Agency has developed a Greenhouse Gas Equivalencies Calculator to help “translate abstract measurements *into concrete terms you can understand*, such as the annual emissions from cars, households, or power plants. This calculator may be useful in communicating your greenhouse gas reduction strategy, reduction targets, or other initiatives aimed at reducing greenhouse gas emissions.”³⁸

B. Bitcoin and E-waste: False Comparisons

Before slicing into the pickle that is “e-waste,” consider that solid waste generally, and hazardous waste specifically, present daunting challenges.³⁹ U.S. EPA and the United Nations, among other agencies and organizations, have consistently warned of the mounting piles of waste that our modern world community produces. Some inroads have been made towards reducing the annual amount of waste production, and that effort needs to continue. For the most part, societies around the world accept that the burden of waste and the cost of its management, and the anxiety associated

³⁷ CAMBRIDGE BITCOIN ELECTRICITY CONSUMPTION INDEX, *supra* note 34.

³⁸ *Greenhouse Gas Equivalencies Calculator*, EPA, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> (Nov. 2024) (emphasis added and omitted).

³⁹ *Global Waste Management Outlook*, UN ENVIRONMENT PROGRAMME, ([Mar. 6, 2015](https://www.unep.org/resources/report/global-waste-management-outlook)), <https://www.unep.org/resources/report/global-waste-management-outlook>.

with it, is tolerable at the present time, but are concerned that it may not be sustainable.

“E-waste” is defined in Directive (2012)/19/EU as “electrical or electronic equipment which is waste within the meaning of Article 3(1) of Directive (2008)/98/EC, including all components, sub-assemblies and consumables which are part of the product at the time of discarding.”⁴⁰ It is estimated that more than 53 million tons of e-waste was created in 2019.⁴¹

Recent criticism attacking Bitcoin on sustainability grounds have centered on the issue of “e-waste” generated by the disposal of Bitcoin Mining Machines, known as Application Specific Integrated Circuits (ASICs), after they are no longer used.⁴² One study estimated that “Bitcoin's e-waste and found that it adds up to 30.7 metric kilotons annually, [which] is comparable to the amount of small IT and telecommunication equipment waste produced by a country like the Netherlands [and] the annual amount of e-waste may grow beyond 64.4 metric kilotons in the midterm, . . .”⁴³

E-waste is not unique to Bitcoin mining, and thus it raises the question of whether miners are being singled out for unfair criticism. In other words, if e-waste is a massive problem, do Bitcoin miners deserve special attention compared to other e-

⁴⁰ Chiara Frazzoli, et al., *E-WASTE Threatens Health: The Scientific Solution Adopts the One Health Strategy*, ENVIRONMENTAL RESEARCH, (September, 2022), <https://doi.org/10.1016/j.envres.2022.113227>

⁴¹ *Global E-Waste Surging: Up 21% in 5 Years*, UNITED NATIONS UNIVERSITY (Jul 2, 2020), <https://unu.edu/press-release/global-e-waste-surging-21-5-years>.

⁴² Alex de Vries & Christian Stoll, *Bitcoin's Growing E-Waste Problem. Resources, Conservation, and Recycling*. (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0921344921005103?via%3Dihub>

⁴³ *Id.* at 9.

waste generators? Consider that neither Apple nor Samsung seem to face scrutiny about what happens to old iPhones, computers, TVs, or appliances. From our research, besides Bitcoin, the biggest attention-getter has been Google, who is planning on halting all future software updates to older generation Chromebook, and in essence, forcing school districts to scrap their current Chromebook and buy new ones.⁴⁴ This is *forced* e-waste, as the Chromebook are completely unusable once Google stops upgrading the software.

Equating the quantity of Bitcoin e-waste to the amount of “small IT and telecommunications equipment waste” generated in The Netherlands is not necessarily helpful as it does not provide meaningful context. As noted above with respect to Greenhouse Gas Equivalencies, some sort of e-waste quantity equivalency should be established, so that abstract e-waste quantities can be put into a useful context. For example, using the data on e-waste mentioned above: would it be useful to note that a kiloton is equal to 1,000 tons?⁴⁵ And that 64.4 metric kilotons is equal to 64,400 metric tons which is approximately 71,000 short tons,⁴⁶ i.e., 0.071 million tons? When expressed as a percentage of the above-referenced 53 million pounds of e-waste generated in 2019, Bitcoin e-waste is about 0.14% of the global e-waste problem.

⁴⁴ Nicole Ngyuen, *Chromebooks Were Once a Good Deal for Schools. Now They’re Becoming E-Waste*, WSJ, (Aug. 30, 2023), https://www.wsj.com/tech/chromebooks-were-once-a-good-deal-for-schools-now-theyre-becoming-e-waste-dc93833b?reflink=desktopwebshare_permalink.

⁴⁵ Kiloton, MERRIAM-WEBSTER. <https://www.merriam-webster.com/dictionary/kiloton>.

⁴⁶ One short ton is equal to 2,000 pounds.

This is not to discount any particular stream of e-waste as inconsequential, because all e-waste (even a small quantity) needs to be handled in an environmentally sound manner. However, a summary that refers to the amount of waste generated by a small country (or that uses both “kilotons” and “millions of tons”), when describing the magnitude of various types of e-waste, makes it difficult for the casual reader to properly weigh the relative contribution of a particular waste stream.

Some commentators have pointed to a recent change by Ethereum (referred to as “The Merge”), another cryptocurrency, as an example that Bitcoin miners should follow. Ethereum switched from a “Proof-of-Work” model to a “Proof of Stake (PoS).” The idea is that PoS is not reliant on ASICs and therefore will result in less e-waste. However, if Bitcoin miners follow that approach, Bitcoin will no longer be Bitcoin. More on that (and The Merge) below.

There is an argument that Bitcoin miners are actually less likely to generate e-waste because, as long as miners continue to run their own node, and thus continue operating the SHA-256 protocol, Bitcoin ASICs will be able to run forever on the same software. This key difference highlights an important argument on the e-waste topic. Similar to how Bitcoin mining’s electricity-use (and related environmental impact) have been distorted, it thus seems that the Bitcoin e-waste perspective is similarly distorted. The reality is that Bitcoin mining may be the most environmentally friendly technology, and most hardware resistant (from an e-waste perspective), on the planet.

V. Bitcoin and Sustainability: “*I’m just a miner trying to do good, . . . I don’t want to be misunderstood*”⁴⁷

A. Bitcoin Drives Renewable Energy Production

As demonstrated in this article, Bitcoin mining has been subject to considerable misinformation, disinformation, and malinformation. Unfortunately, this has sparked further misunderstandings of Bitcoin’s place in the environment and the movement towards sustainable energy practices. Several points are worth raising. First, in order for renewable energy sources to be competitive in a free market society, there must be demand for that energy use. The larger the energy consumption, the more demand. Furthermore, the industries that rely heavily on energy, in terms of their recurring expenses, will have the largest incentive to use low-cost or free energy. Arguably, renewable energy is the lowest cost.⁴⁸ When evaluating Bitcoin miners’ profit and loss statements, it becomes evident that the lower the cost of energy, the more profitable the miners will be. In essence, Bitcoin miners, because of the direct incentive to use low-cost energy, will drive society to a *more sustainable future, not less.*

B. Bitcoin Mining and Productive Use of Energy (PUE)

⁴⁷ With apologies to Nina Simone, Horace Ott, Gloria Cladwell, Bennie Benjamin and Sol Marcus. Nina Simone, *Don’t Let Me Be Misunderstood*, (Phillips, Nov. 1964), <https://ig.ft.com/life-of-a-song/dont-let-me-be-misunderstood.html>.

⁴⁸ International Renewable Energy Agency, *Renewable Power Remains Cost-Competitive amid Fossil Fuel Crisis*, IRENA (July 13, 2022), <https://www.irena.org/news/pressreleases/2022/Jul/Renewable-Power-Remains-Cost-Competitive-amid-Fossil-Fuel-Crisis>.

Researchers have recently explored the question of whether Bitcoin could provide a path for underserved communities to obtain much needed energy, preferably through a sustainable and environmentally-friendly process. For example, a recent USAID-NREL⁴⁹ paper explained the situation as follows:

“Demand for electricity from small industry and businesses, which is defined as the productive use of energy (PUE), is a key success factor for mini- and micro-grids. Without linkage to and support for these users, micro-grids are likely to struggle to increase local commercial uptake of electricity or reach the critical level of sales necessary to secure their financial viability. Productive users are also an important part of enhancing the economic and social development impacts of micro-grids and rural electrification programs more broadly. Potential impacts of PUE include increased local economic activity, added value to products and services, job creation, and enhanced gender equality.”

In a subsequent paper, Hallinan, Hao, et al posited “an opportunity to leverage Bitcoin mining as a common PUE strategy applicable to new solar installations.”⁵⁰ The authors of that paper described four pilot cases “to demonstrate this potential throughout the world and at multiple scales.” One of the pilots is a “dedicated solar-powered Bitcoin mining mini-grids developed solely to create a funding stream for self-investment by communities for their benefit....” Although the authors are optimistic, they listed several limitations and obstacles that could derail the opportunity to leverage Bitcoin mining for PUE. However, their ultimate conclusion was that it was not unrealistic. As with so many new ideas that benefit mankind, we

⁴⁹ Samuel Booth et al., *Productive Use of Energy in African Micro-Grids: Technical and Business Considerations 1* (Nat'l Renewable Energy Lab. & Energy 4 Impact Aug. 2018), <https://www.nrel.gov/docs/fy18osti/71663.pdf>.

⁵⁰ Kevin P. Hallinan et al. *Review and Demonstration of the Potential of Bitcoin Mining as a Productive Use of Energy (PUE) to Aid Equitable Investment in Solar Micro- and Mini-Grids Worldwide*, 16 ENERGIES 120 (2023).

may have to allow its proponents the opportunity to fail many multiple times before concluding that it just will not work. Bitcoin mining may provide the missing seeds of economic development without which some communities have been unable to find a path toward growth and prosperity. Which leads us to the next topic, where we consider whether Bitcoin e-waste (as compared to, say, video game e-waste) negates any positives that Bitcoin may produce.

C. A Strong (and energy intensive) Bitcoin Network Supports a Strong Bitcoin Value; The Pros Outweigh the Cons

i. Utility of Bitcoin

Anxiety levels are much higher when it comes to individual freedom and economic opportunity. The world is full of hot spots, many of which have erupted into outright war (viz., Ukraine and Syria), not only plunging those regions into economic chaos but also threatening to destabilize neighboring regions and pit the superpowers against each other. Many of us chafe at the idea that in many countries around the world, people are being oppressed both physically and economically, often quite cruelly and with restrictions on their ability to leave and make a better life elsewhere. For example, some countries, if they even allow their citizens to emigrate, limit the amount of financial resources that they can take with them, effectively denying them

the opportunity to emigrate.⁵¹ As noted by Yan Pritzker,⁵² all that is required to access or “transport” Bitcoin is a simple set of words which you could write “on a piece of paper [or] even memorize ... and walk out of a failing economic regime like Venezuela with nothing on your person, no one being the wiser that you’re carrying your wealth in your head. . . . Never before has it been possible to carry your wealth in a way completely safe from seizure or theft.”⁵³

The Bitcoin Whitepaper⁵⁴, which laid out the blueprint for Bitcoin, provides the foundation on which this issue is debated, as follows:

“Commerce on the Internet has come to rely almost exclusively on financial institutions serving as trusted third parties to process electronic payments. ... Completely non-reversible transactions are not really possible, since financial institutions cannot avoid mediating disputes. ... With the possibility of reversal, the need for trust spreads. costs and payment uncertainties can be avoided in person by using physical currency, but no mechanism exists to make payments over a communications channel without a trusted party. What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each

⁵¹ Or, if currency is devalued the way that Argentina has devalued its currency, there would be no way to bring your net worth with you across borders because you would need a dump truck to carry all of the worthless currency. Monica de Bolle, *Argentina Is In Crisis. A US Rescue May Invite New Problems*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Sep. 22, 2025, 5:28 PM), <https://www.piie.com/blogs/realtime-economics/2025/argentina-crisis-us-rescue-may-invite-new-problems>. See also Int’l Monetary Fund, Country Report No. 25/95, Argentina (2025), <https://www.imf.org/-/media/files/publications/cr/2025/english/largea2025002-print-pdf.pdf>.

⁵² Yan Pritzker, *INVENTING BITCOIN: THE TECHNOLOGY BEHIND THE FIRST TRULY SCARCE AND DECENTRALIZED MONEY EXPLAINED*, at 74, (2019) (ebook).

⁵³ *Id.* at 87-88, (emphasis added) (For residents of Venezuela and Turkey, that volatility may be wholly acceptable when compared to other alternatives. According to XE.com, if a person converted \$69,000 to Venezuelan currency on November 1, 2021, that person would have received 30 billion Bolivars; as of October 1, 2023, 30 billion Bolivars were convertible to approximately \$8,800, less than one third of the current value of one Bitcoin (\$27,000). Turkish lira worth \$69,000 on November 1, 2020 was worth \$24,200 on October 1, 2023, a loss of ten percent compared to the value of Bitcoin on that day. Consider that those fortunate Venezuelans and Turks that purchased Bitcoin in August 202 (or at any time prior to December 20, 2020), and held it until September 30, 2023, actually maintained or improved their financial position (dollar-wise). These are just two examples of countries with residents who would gladly have had their money tied up in the “highly volatile” Bitcoin versus the local fiat currency).

⁵⁴ Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* 1–9 (Oct. 31, 2008), <https://bitcoin.org/bitcoin.pdf>.

other without the need for a trusted third party. Transactions that are computationally impractical to reverse would protect sellers from fraud, and routine escrow mechanisms could easily be implemented to protect buyers. In this paper, we propose a solution [where the] system is secure as long as honest nodes collectively control more CPU power than any cooperating group of attacker nodes.”

ii. Proof of Stake is not Equivalent to Proof of Work

The change that Ethereum made is referred to as “The Merge,” and here is how Forbes described it⁵⁵:

- Prior to the Merge, creation of Ethereum tokens (“ETH”) involved a process known as proof-of-work (PoW), “the original consensus mechanism for verifying transactions that bitcoin used.”
- PoW involves miners competing to solve complicated math problems, with the winner getting the ETH.
- This simultaneous, global competition among miners uses massive amounts of electric power.
- “Proof of Stake” (PoS), on the other hand, involves a process that uses far less energy, where the crypto user “stakes” their bitcoin (typically 32 ETH) with the expectation that, if the verification process that produces the crypto is accurate, the miner will receive the crypto (in this case, ETH); if the process is inaccurate, the miner will lose a portion of their stake.

⁵⁵ *Proof-Of-Stake: Will The Ethereum Merge Really Lead To A Rally?* FORBES, (Sep. 27, 2022), <https://www.forbes.com/sites/qai/2022/09/27/proof-of-stake-will-the-ethereum-merge-really-lead-to-a-rally/?sh=6105262f223d>.

According to Forbes, “Many Bitcoin supporters still feel that proof-of-work is more secure and that the blockchain shouldn’t switch over. Ethereum, on the other hand, has been talking about this move for many years now. Another concern with the PoS protocol is that the voting control could be in the hands of a few key players who are able to put up more Ether to stake in the first place.”

(emphasis added)

It is that last bit that would render Bitcoin something other than what it is today - and for many Bitcoin adherents, that would be unacceptable. In some ways, it’s just another version of the philosophical differences between gold bugs and T-bill holders, with the former asking if fiat currency can ever be trusted.⁵⁶ For Bitcoin supporters, PoS renders Bitcoin vulnerable to some of the very risks that Satoshi Nakamoto was seeking to address when creating Bitcoin.⁵⁷

Skepticism around the viability and legitimacy of Bitcoin abound. Governments are wary of Bitcoin.⁵⁸ Warren Buffett, investor par excellence, says Bitcoin “will come to a bad ending.”⁵⁹ Skepticism is a good thing, and we should all be wary of any financial instrument or tool whose proponents are averse to scrutiny. That said,

⁵⁶ See generally, The Customer’s Man, *The Gold Bugs*, TEX. MONTHLY (DEC. 1973), <https://www.texasmonthly.com/news-politics/the-gold-bugs/>.

⁵⁷The strongest argument against PoS is that the holders of the coins control the transaction validating process, which is the exact same position that the government imposes on its currency. Bitcoin, on the other hand, has transactions validated by miners. In order to mine Bitcoin, you need access to ASICs and energy, the number of Bitcoin one owns has no bearing on any control of the network.

⁵⁸ James McWhinney, *Why Governments Are Wary of Bitcoin*, INVESTOPEDIA (September 25, 2024), <https://www.investopedia.com/articles/forex/042015/why-governments-are-afraid-bitcoin.asp#citation-24>.

⁵⁹ Tae Kim, *Warren Buffet Says Bitcoin Is ‘Probably Rat Poison squared*, CNBC, (May 5, 2018), <https://www.cnbc.com/2018/05/05/warren-buffett-says-bitcoin-is-probably-rat-poison-squared.html>.

Galileo was scorned by many, including Urban VIII, when he promoted Copernicus' theory that the Earth moves around the Sun, rather than vice versa. And yet we now know that it is the Earth that moves, not the Sun. While Bitcoin may not offer the profound societal and technical advances for humankind that the discovery of heliocentrism engendered, it may be a beneficial development for millions of people who may have no other way to accumulate a store of value.

VI. Conclusion

Bitcoin is a powerful technology that includes a Proof of Work protocol. Proof of Work *requires* energy. As such, Bitcoin's use of energy is a feature, not a bug. Many, however, fail to understand the implication of energy use in the context of money and technology, and perhaps unknowingly, demonize its use through misinformation, disinformation, or malinformation. What is more, Bitcoin Mining, by being a demand side buyer of renewable energy, is driving society closer to a sustainable future, not further. And last, Bitcoin's use of hardware raises similar questions about e-waste to other technologies, but unlike other technologies such as Chrome Books, Bitcoin miners have never been vanquished to e-waste status due to corporate management choosing not to update the software. Collectively, these ideas reinforce the fact that Bitcoin is often held to a different standard than other technologies.

The Medical Judgment Rule: Private Equity in Healthcare

Priten Patel

Abstract

Private equity has become a dominant force in American healthcare, reshaping how services are delivered, who owns clinical practices, and how care decisions are made. While PE firms bring operational expertise and financial resources that can stabilize and grow struggling practices, their profit-driven models have also raised critical concerns about care quality, rising costs, and physician autonomy. This Note explores how existing legal frameworks, including corporate practice of medicine (CPOM) laws and federal antitrust enforcement, have failed to fully address the emerging risks posed by private equity's growing influence. Through analysis of empirical data and case studies, including the FTC's action against Welsh Carson and U.S. Anesthesia Partners, the Note highlights the legal and regulatory gaps that allow business incentives to distort clinical judgment. In response, this Note proposes the Medical Judgment Rule (MJR), an evaluative framework designed to identify when PE-backed business structures functionally compromise independent medical decision-making. By shifting the focus from formal ownership to operational influence, MJR provides courts and regulators with a new lens for assessing when private equity investments cross the line from support to interference, offering a pathway to safeguard physician autonomy while preserving room for responsible private capital in healthcare.

Table of Contents

1. Introduction.....80

2. Background Information and Key Terms.....82

a. Private Equity.....82

b. LBO Model.....84

3. Data on Healthcare Quality, Motivations Shifting, and Contributing Factors.....88

a. The Decline of Private Practice.....88

b. PE Impact on Patient Care Quality.....93

c. Analysis and Key Concerns from Data.....97

4. Relevant Case Law & Existing Tools.....99

a. Introduction..... 99

b. Anti-Trust Review.....100

i. *FTC v. Welsh Carson Anderson & Stowe*.....103

ii. Limitations with Anti-Trust Enforcement.....110

c. Corporate Practice of Medicine Doctrine.....111

5. Proposing the Medical Judgment Rule.....115

6. Conclusion.....120

Introduction

“Rosy tales of healthcare’s historically charitable and mission-driven nature have always been exaggerated. ... And so long as the United States treats healthcare as a market commodity, profit-seeking will persist.”¹ Physicians begin their careers with the desire to dedicate their efforts to patient care rather than managing the burdensome administrative aspects of healthcare.² Because young doctors lack interest in the business side, older physicians looking to retire are finding it difficult to sell their practices, leaving private equity as their most likely suitors.³ This economic decision from younger physicians is initially motivated by the financial burden of medical school. Many students take out loans to cover the full cost of living and tuition, notwithstanding prior undergraduate debt. The principal debt is a steep mountain to overcome- greater than \$200,000 for many.⁴ Understandably, this class of doctors does not have the entrepreneurial impetus after paying back their principal and interest balances. Instead, they would rather be employees of a larger network.⁵

¹ Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. 527, 578-79 (2024).

² Dave Muoio, *AHA: Administrative burdens and payer rates—not hospitals—are to blame for fewer independent physician practices*, FIERCE HEALTHCARE (June 8, 2023),

https://www.fiercehealthcare.com/providers/aha-administrative-burdens-and-payer-rates-not-hospitals-are-blame-rising-physician?utm_

³ Eloise May O’Donnell, Gary Joseph Lelli, Sami Bhidya, & Lawrence P. Casalino, *The Growth Of Private Equity Investment In Health Care: Perspectives From Ophthalmology*, 39 HEALTH AFFAIRS, June 2020, at 919, 1029.

⁴ Aaron Lapidus et al., *Medical Student Intentions to Practice Internal Medicine in Underserved Areas Associated with Debt, Identity and Extracurricular Participation*, 23 BMC MED. EDUC. 420 (2023), 420 (2023), <https://doi.org/10.1186/s12909-023-04392-0>.

⁵ Muoio, *supra* note 2.

This effect snowballs into private equity increasingly gaining market share in healthcare.⁶

In recent years, the transformation of the healthcare industry has been shaped not just by medical innovation, but by shifts in ownership and capital. Among the most significant of these changes has been the entrance and rapid expansion of private equity investment in clinical care settings. This development has triggered debate across the medical, legal, and policy communities: Can a system built to prioritize return on investment also preserve the integrity of medical decision-making? Private equity is not the first profit-motivated force to enter healthcare, but it is distinct in both scale and strategy- consolidating practices, streamlining operations, and reengineering the business of medicine. These trends demand a careful examination not of whether profit belongs in healthcare, but of how its pursuit reshapes the incentives and authority structures that ultimately affect patient care.

The economic incentives in healthcare are perverse, from top to bottom. Starting from when students begin medical school to when they are practicing physicians, the incentives create an inefficient system where the quality of patient care is compromised. This allows for parties who focus on profit-seeking to benefit at the expense of the overall efficiency and quality of our health system. This is not to say that private equity investment in healthcare cannot provide value and play a pivotal role in creating a better system. Rather, the rules and incentives that all stakeholders abide by create this perverse system. The central question, then, is how

⁶ See O'Donnell, *supra* note 3, at 1029.

do we leverage new or existing legal frameworks to enhance economic incentives and ensure private equity investments contribute positively to the healthcare system without compromising physician autonomy to focus on patient-care quality.

Background Information & Defining Key Terms

A.) Private Equity

Over the last few decades, private equity (PE) has grown its investments in various sectors and industries, such as entertainment, real estate, and technology.⁷ Healthcare, in particular, has become an attractive investment option to PE firms due to its profitability potential.⁸ Generally speaking, private equity is a form of partnership that invests clients' capital into various companies.⁹ Clients typically are required to commit their funds for a specified period of time before they are authorized to withdraw.¹⁰ The usual clients are not the general layperson; they are

⁷ Laila Maidan, *How to Invest in Sports Leagues and Betting Markets*, BUS. INSIDER (Nov. 26, 2024), <https://www.businessinsider.com/how-to-invest-in-sports-leagues-and-betting-markets-jpmorgan-2024-11>; *The Growing Role of Private Equity in Healthcare*, GRANT THORNTON (Sept. 26, 2023), <https://www.grantthornton.com/insights/articles/health-care/2023/the-growing-role-of-private-equity-in-healthcare>.

⁸ *The Growing Role of Private Equity in Healthcare*, GRANT THORNTON (Sept. 26, 2023), <https://www.grantthornton.com/insights/articles/health-care/2023/the-growing-role-of-private-equity-in-healthcare>.

⁹ John Gilligan & Mike Wright, PRIVATE EQUITY DEMYSTIFIED: AN EXPLANATORY GUIDE, 5, (4th ed. 2020).

¹⁰ *Id.*

institutions such as pension funds, sovereign wealth funds, insurance companies, or individuals with high net worths.¹¹

Upon the commitment of capital, PE firms invest in private companies, which are those that are not publicly traded on the stock market.¹² The targets are more mature and seasoned operations where the firm sees potential for increased revenues or total valuation growth.¹³ Firms tend to hold their investments for a period of three to five years, during which they seek to revamp a struggling company, improve operations and reduce costs, or complete restructuring.¹⁴ The ultimate goal is to increase the company's total value, so the PE firm can exit its position and gain a return for its investors.¹⁵

A private equity fund's structure is headed by a general partner (GP), who actively manages the firm.¹⁶ The GP makes all critical decisions, from deciding which companies the fund will invest capital into, to which strategies will be executed on an individual company basis, and when the optimal time to exit the investment position is.¹⁷ On the other hand, limited partners (LPs) are the investors in the private equity fund who provide capital.¹⁸ LPs are hands-off passive investors with limited liability,

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.* at 63.

¹⁵ *Id.* at 119–23.

¹⁶ James Chen, *Private Equity*, INVESTOPEDIA (Apr. 10, 2024), <https://www.investopedia.com/terms/p/privateequity.asp>.

¹⁷ *Id.*

¹⁸ *Id.*

compared to the GPs who are actively making management choices.¹⁹ The GPs are compensated by the industry standard, 2/20 rule, which entails a 2% management fee of the fund's total assets, in addition to 20% of profits once a hurdle or benchmark rate is reached.²⁰ The 20% profit is known as carried interest.²¹ The 2% yearly management fee allows the fund to operate by compensating its staff of investment professionals and covering overhead costs such as office space.²²

B.) LBO Model

PE firms often use a financial instrument called a leveraged buyout(LBO) when executing investments.²³ An LBO is a transaction where debt is used as the primary source of capital.²⁴ PE firms will use this highly leveraged deal- up to 70 or 80 percent of the purchase price consists of borrowed funds- to acquire their target companies.²⁵ The debt is subsequently placed on the company's balance sheet.²⁶

The LBO model is a highly attractive form for several reasons. First, PE firms can acquire a much larger portion of a company or a larger company than they

¹⁹ *Id.*

²⁰ Elvis Picardo, *Two and Twenty: Explanation of the Hedge Fund Fee Structure*, INVESTOPEDIA (Nov. 25, 2024), https://www.investopedia.com/terms/t/two_and_twenty.asp.

²¹ *Id.*

²² *Id.*

²³ *Leveraged Buyout (LBO)*, CORP. FIN. INST. (Mar. 4, 2020), <https://corporatefinanceinstitute.com/resources/valuation/leveraged-buyout-lbo/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

otherwise could while using a relatively small portion of their assets in comparison.²⁷ So, they can achieve a larger rate of return on their equity while putting in very little of their own capital.²⁸ However, this creates one of the major risk factors for LBOs: if the operating company's cash flows are less than expected and it cannot service the debt payments, it will have to restructure and likely wipe out any potential return.²⁹ Moreover, there is much less of a financial cushion to maneuver the business. It requires adept financial and operational managers, as it is extremely difficult to obtain any additional debt financing given the existing debt profile.³⁰

Leveraged buyouts have faced harsh criticism throughout their development and history over the years.³¹ LBOs were first popular in the 1980s and later in the early 2000s.³² Firms such as Kohlberg Kravis & Roberts (KKR), Blackstone Group, and The Carlyle Group were pioneers in the industry and have collectively amassed over \$2 trillion in assets under management.³³ Initially, LBOs were seen with glamour when they were booming and providing outsized returns for their

²⁷ Julien Fissette, *The Advantages and Risks of Leveraged Buyouts*, ROUNDTABLE (Mar. 20, 2024), <https://www.roundtable.eu/learn/the-advantages-and-risks-of-leveraged-buyouts>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ W. Carl Kester & Timothy A. Luehrman, *Rehabilitating the Leveraged Buyout*, HARV. BUS. REV. (May–June 1995), <https://hbr.org/1995/05/rehabilitating-the-leveraged-buyout>.

³² Jonathan Olsen, *Leveraged Buyouts: A Note on LBOs*, N.Y.U. STERN SCH. BUS. (2002), https://pages.stern.nyu.edu/~igiddy/LBO_Note.pdf.

³³ Rebecca Baldrige, *Best Private Equity Firms*, FORBES ADVISOR (Nov. 1, 2024), <https://www.forbes.com/advisor/investing/best-private-equity-firms/>.

investors.³⁴ However, the boom period didn't last forever as firms took on riskier investments.³⁵ After a wave of bankruptcies ensued, causing companies to go under and massive layoffs of staff, the public perception dramatically shifted.³⁶ Congressional hearings were held over the ethics of the practice and how they should be limited in response to the fall of prominent PE firm Drexel Burnham Lambert in 1990 and after the financial crisis of 2008.³⁷ The highly leveraged transaction is viewed by many as incredibly risky for the entirety of financial markets and carries the perception that the financiers enrich themselves at the expense of others.³⁸

In particular, the concerns over LBOs are centered around high-profile bankruptcies that followed the acquisitions of companies by PE firms. Multi-billion dollar companies like Caesars Entertainment, Toys “R” Us, and Chrysler filed for bankruptcy subsequent to PE takeovers.³⁹ The widescale economic impact, namely

³⁴ Olsen, *supra* note 32.

³⁵ Laura Femino, *Ex Ante Review of Leveraged Buyouts*, 123 Yale L.J. 1830, ___ (Apr. 15, 2014), <https://www.yalelawjournal.org/note/ex-ante-review-of-leveraged-buyouts>.

³⁶ *Id.*

³⁷ *Enhancing Investor Protection and the Regulation of Securities Markets -- Part II: Hearing on Further Examining What Went Wrong in the Securities Markets, How We Can Prevent The Practices That Led To Our Financial System Problems, and How to Protect Investors Before the Committee on Banking, Housing, and Urban Affairs, 111th Cong. (2009).*

³⁸ Kester, *supra* note 31.

³⁹ Elva Ramirez, *Chrysler Files for Bankruptcy and Loses CEO*, WALL ST. J. (Apr. 30, 2009), <https://www.wsj.com/video/chrysler-files-for-bankruptcy-and-loses-ceo/C8B8B22A-65F9-4D22-BF93-A5E2074C0A45>; Jacqueline Palank, *Judge Orders Apollo, TPG Founders to Turn Over Financial Information*, WALL ST. J. (Sept. 14, 2016, 5:49 PM), <https://www.wsj.com/articles/judge-orders-apollo-tpg-founders-to-turn-over-financial-information-1473884309>; Lillian Rizzo & Suzanne Kapner, *Toys ‘R’ Us, Once a Category Killer, Is Forced into Bankruptcy*, WALL ST. J. (Sept. 19, 2017, 12:51

devastating unemployment and the loss of a supplier in the market, concerns regulators about the true efficacy of LBOs.⁴⁰ Were these investments truly bringing value to the companies being acquired, or were they solely a form of extracting capital and providing a return to investors at the expense of the company's long-term health?

The management strategies and operational changes implemented by private equity are the main alterations scrutinized by observers. PE firms will immediately look to reduce costs in an attempt to improve efficiency and optimize supply chains.⁴¹ Moreover, assets not in use but highly valued, such as real estate, are sold off to improve balance sheets.⁴² Critics raise concerns about these strategies as it seems as though the PE firm is only focusing on short-term profitability to achieve quick returns instead of the company's long-term health.⁴³ This also brings into account possible breaches of fiduciary duties held by directors and managers.

AM), [n=AWetsqf92eEQ](https://www.wsj.com/articles/toM9wSczbSujybilcdj2KGWCqVKIRppQTCUSCmXYmqlfqbk1gnM9wSczbSujybilcdj2KGWCqVKIRppQTCUSCmXYmqlfqbk1gnVYMNlPr9w0zRFtknVJfdWqg%3D%3D) https://www.wsj.com/articles/toys-r-us-once-a-category-killer-is-forced-into-bankruptcy-1505792620?gaa_at=eafs&gaa_n=AWetsqf92eEQcPXBzkYwIxzohkb7ULEgo7dKcLaPfc4GuwC392oNolR6Aa9GYIwQ_rM%3D&gaa_ts=69c82657&gaa_sig=Swp7Stjx3z3qp_M9wSczbSujybiIcdj2KGWCqVKIRppQTCUSCmXYmqlfqbk1gnVYMNlPr9w0zRFtknVJfdWqg%3D%3D.

⁴⁰ Carrick Mollenkamp, Special Report: *How Fed Policy Enriches Private Equity, If Not Workers*, REUTERS (Dec. 6, 2013, 9:23 AM), <https://www.reuters.com/article/world/special-report-how-fed-policy-enriches-private-equity-if-not-workers-idUSBRE9B50GB>.

⁴¹ Curtis Farrow, *A Private Equity Firm's Guide to Operational Improvement*, CENTRI CONSULTING (July 1, 2024), <https://centriconsulting.com/news/blog/pe-operational-improvement-guide/>.

⁴² *Id.*

⁴³ Kaye Wiggins, *Private Equity's 'Layered Leverage' Needs More Scrutiny, Says PGIM Chief*, FIN. TIMES (Feb. 23, 2025), <https://www.ft.com/content/54b21fc2-96b7-43de-b98a-594d96a04af3>.

Data on Healthcare Quality, Motivation Shifts, and Contributing Factors

A.) The Decline of Private Practices

Examining empirical data reveals that while private equity investment may increase operational efficiency, it also leads to concerns over declining healthcare quality, higher patient costs, and diminished access to care. In recent years, the healthcare landscape has witnessed a significant shift as physicians are increasingly moving away from establishing private practices.⁴⁴ This decline is driven largely by the growing administrative burdens associated with running an independent practice.⁴⁵ From managing complex billing systems to navigating ever-evolving compliance requirements, physicians are finding it difficult to balance clinical care with the demands of practice ownership.⁴⁶ These challenges have opened the door for private equity (PE) firms to emerge as key players in the industry, offering financial relief and operational support to struggling practices. However, while PE may provide solutions to some immediate challenges, its growing presence raises critical questions about the long-term implications for healthcare delivery and physician autonomy.

Over the past decade, the number of physicians operating in private practice has declined sharply, signaling a major shift in how healthcare is delivered. According to the American Medical Association (AMA), the percentage of physicians in wholly

⁴⁴ Jeffrey Bendix, *Physician Abandonment of Private Practice Continues*, Urology Times (July 25, 2023), <https://www.urologytimes.com/view/physician-abandonment-of-private-practice-continues>.

⁴⁵ *Id.*

⁴⁶ See *Id.*

owned private practices dropped from 60% in 2012 to just 46.7% in 2022.⁴⁷ This decline is especially pronounced among younger physicians, who opt for salaried positions within hospital systems or corporate networks rather than taking on the financial and administrative burdens of running an independent practice.⁴⁸ These shifts reflect broader generational changes, as many physicians prioritize work-life balance and the stability of employment over the entrepreneurial risks of private practice.⁴⁹ This generational trend further amplifies the role of private equity, which often steps in to acquire practices from retiring physicians or those seeking relief from the pressures of ownership.

In addition, medical school debt influences physicians' career decisions which further adds to the decline of private practice. Many medical school students graduate with substantial debt, upwards of \$400,000.⁵⁰ This heavy weight on their shoulders steers physicians towards roles within larger health networks, as they often have the means of offering loan repayment packages exceeding \$100,000.⁵¹ Thus, the financial burden deters them from entering into private practice, and the case for more extensive hospital networks appears more compelling.

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ Te-Ping Chen, *Young Doctors Want Work-Life Balance. Older Doctors Say That's Not the Job.*, WALL ST. J. (Nov. 3, 2024), <https://www.wsj.com/lifestyle/careers/young-doctors-want-work-life-balance-older-doctors-say-thats-not-the-job-6cb37d48>.

⁵⁰ Brendan Murphy, *Say Goodbye to Physician Residency—and Medical Student-Loan Debt?*, AM. MED. ASS'N (Jan. 5, 2025), <https://www.ama-assn.org/medical-residents/medical-residency-personal-finance/say-goodbye-physician-residency-and-medical>.

⁵¹ *Id.*

Another significant deterrent for young physicians is the idea of managing administrative duties alongside patient care.⁵² In a study conducted by the American Hospital Association (AHA), eighty-four percent of employed physicians reported that administrative burden had an impact on their employment decision.⁵³ With ninety percent of medical students reporting they felt unprepared to some degree to handle the business side of their medical career, it comes as no surprise that final year students ranked hospital employment as their most preferred practice setting they wished to pursue.⁵⁴ Already, doctors report they spend 1 hour on administrative tasks per 3.5 hours spent on direct patient care, equating to roughly 8 hours of their average 58.6-hour work weeks.⁵⁵ This same study found that 20.9% of doctors reported they completed these tasks beyond the normal work hours, cutting into their personal time.⁵⁶ Consequently, physicians are experiencing increased burnout and decreased job satisfaction from having to allocate time to non-clinical duties, resulting in less of a desire to take on more tasks associated with running their own private practice.⁵⁷

⁵² Muoio, *supra* note 2.

⁵³ *Examining the Real Factors Driving Physician Practice Acquisition*, AM. HOSP. ASS'N (June 2023), <https://www.aha.org/system/files/media/file/2023/06/fact-sheet-examining-the-real-factors-driving-physician-practice-acquisition.pdf>.

⁵⁴ *Id.*

⁵⁵ Sara Berg, *Burnout on the Way Down, but 'Pajama Time' Stands Still*, AM. MED. ASS'N (Aug. 13, 2024), <https://www.ama-assn.org/practice-management/physician-health/burnout-way-down-pajama-time-stands-still>.

⁵⁶ *Id.*

⁵⁷ *Id.*

The steep financial barriers to overcome when starting a private practice further limit this route for many. Medical equipment, technology setup, and supplies are incredibly expensive outside of the typical business startup expenses, such as real estate space and staffing. For example, electronic health record systems can cost upwards of \$70,000.⁵⁸ Additionally, medical equipment, such as diagnostic tools and specialized devices, can range from \$50,000 to over \$150,000, depending on the practice's focus.⁵⁹ Leasehold improvements, including renovations to meet medical compliance standards, often add another \$10,000 to \$50,000.⁶⁰ Combined, these costs can easily exceed \$250,000 before a single patient is seen.

Alongside the prohibitive nature of the investment risk, there is a shift in mentality among younger physicians in regard to protecting their personal time.⁶¹ There's been a jump in interest in virtual work, providing telemedicine treatment for patients.⁶² Newer generations no longer accept punishing schedules or priding themselves on long hours, compared to the previous generations' workaholic culture.⁶³

⁵⁸ *How Much Is This Going to Cost Me?*, ASSISTANT SECRETARY FOR TECHNOLOGY POLICY (2024), <https://www.healthit.gov/faq/how-much-going-cost-me>.

⁵⁹ *The Hidden Costs of Building Your Own Private Healthcare Practice*, Symbiosis (Nov. 14, 2023), <https://joinsymbiosis.com/blog/the-hidden-costs-of-building-your-own-private-healthcare-practice>.

⁶⁰ *Id.*

⁶¹ Te-Ping Chen, *Young Doctors Want Work-Life Balance. Older Doctors Say That's Not the Job.*, WALL ST. J. (Nov. 3, 2024, 5:30 AM), <https://www.wsj.com/lifestyle/careers/young-doctors-want-work-life-balance-older-doctors-say-thats-not-the-job-6cb37d48>.

⁶² *Id.*

⁶³ *Id.*

Accordingly, physicians are owning practices at a decreasing rate as you sift through each generation. Between the initial investment costs, attempts to balance work-life schedules, and the heavy burden of medical school debt, the shift in preference to hospitals, health systems, and other large organizations for financial security and ease of mind follows reasonably. All of these contributing factors allow for private equity to find its space in healthcare.

While millennial-aged physicians are focused on their priorities, those of the baby-boomer era are approaching retirement and deciding how they will finance the next stage of their lives. The combination of a desire to sell practices for cash and a lack of interest from the younger generation has paved the way for private equity to have an open road of opportunities. PE's access to a great deal of capital also facilitates high- 8 to 12 times earnings before interest, taxes, depreciation, and amortization (EBITDA)- purchase price offers that are more attractive to sellers.⁶⁴ Additionally, the consolidation of local competition forces other firms to feed into the PE acquisition chain in order to remain competitive.⁶⁵ Specialties like ophthalmology are facing increased expenses, competition, and uncertainty, which lends itself into PE's hands as they continuously acquire local competitors.⁶⁶ For example, independent retinal specialists are threatened by PE-backed general all-encompassing ophthalmology practices that are acquiring retinal specialists to work

⁶⁴ O'Donnell et al., *supra* note 3, at 1030.

⁶⁵ *Id.*

⁶⁶ *Id.*

in-house.⁶⁷ Independent specialists depend on referrals for revenue, so PE restricting the flow of patients outside of their network puts pressure on independent physicians to be more inclined to sell their practices.⁶⁸

B.) PE Impact on Patient Care Quality

Critics of private equity investment in healthcare argue that the drive for short-term, above-market returns creates incentives to prioritize profitability over patient care.⁶⁹ These practices often involve increasing prices, performing higher volumes of lucrative but potentially unnecessary procedures, and replacing specialized physicians with less-supervised advanced practitioners, which can undermine care quality.⁷⁰ Furthermore, the financial burdens imposed by the leveraged buyout model have, in some cases, led to bankruptcies, disrupting access to care.⁷¹ This section will examine these concerns in detail, focusing on how private equity ownership impacts staffing, costs to patients, and overall care quality, ultimately raising questions about the long-term consequences for healthcare delivery.

Professors at Cornell Medical College conducted a comprehensive study that examined the prevalence of private equity acquisitions in the dermatology specialty and their impact on prices, spending, utilization, and volume of patients. In this

⁶⁷ *Id.* at 1029.

⁶⁸ *Id.*

⁶⁹ Robert T. Braun et al., *Private Equity in Dermatology: Effect on Price, Utilization, and Spending*, 40 HEALTH AFFAIRS 695, 728 (May 2021).

⁷⁰ *Id.*

⁷¹ *Id.*

study, the examiners found that the volume of patients per private equity dermatologist was up to 17 percent higher compared to their non-private equity counterparts.⁷² At 1.5 years after the acquisition, prices paid were 3-5 percent higher for PE dermatologists.⁷³ Additionally, expensive procedures such as Mohs micrographic surgery, biopsies, and cryotherapy increased in volume significantly after as little as one quarter or within eight quarters. However, total spending per patient saw no increase.⁷⁴

Another commonly targeted specialty by private equity is ophthalmology.⁷⁵ Private equity investment has significantly reshaped the field, with profound implications for pricing, patient care, and procedural trends. Private equity firms have acquired more than 8% of all ophthalmology practices in the United States, representing over 1,200 physicians as of 2021.⁷⁶ These investments are driven by a focus on maximizing returns through cost-cutting measures and increased revenue generation.⁷⁷ For instance, private equity-owned ophthalmology practices report a 20% increase in procedural volume, prioritizing high-margin services such as

⁷² *Id.* at 727.

⁷³ *Id.*

⁷⁴ *Id.* at 733.

⁷⁵ Eileen Appelbaum & Rosemary Batt, *Private Equity Buyouts in Healthcare: Who Wins, Who Loses?* 3, 60, 94 (Inst. for New Econ. Thinking, Working Paper No. 118, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593887.

⁷⁶ Chirag P. Shah & Jeremy D. Wolfe, *How Private Equity Achieves Return on Investment in Ophthalmology*, CURR. OPIN. OPHTHALMOL., Vol. 33, No. 5, pp. 362–365 (Sept. 2022), https://journals.lww.com/co-ophthalmology/fulltext/2022/09000/how_private_equity_achieves_return_on_investment.6.aspx.

⁷⁷ *Id.*

cataract surgeries and advanced diagnostic imaging, while reducing less profitable treatments.⁷⁸ Pricing structures have also shifted, with patients experiencing higher out-of-pocket costs; one study found that procedures performed at private equity-owned practices were billed 15–25% higher compared to non-private equity practices.⁷⁹ Critics argue that such changes may pressure providers to prioritize profitability over patient outcomes, potentially leading to an increase in unnecessary or redundant procedures.⁸⁰

Furthermore, the consolidation of smaller ophthalmology practices under private equity ownership often results in reduced autonomy for physicians and changes in staffing models.⁸¹ Many practices have reported an increased reliance on technicians or less-experienced providers, with ophthalmologists delegating routine patient care to non-physician staff.⁸² While these strategies may improve operational efficiency, they also raise concerns about the long-term impact on care quality and accessibility. The financial pressures associated with private equity acquisitions, such as debt repayment and investor returns, further exacerbate these challenges, highlighting the need for careful evaluation of their effects on both patients and providers in the field of ophthalmology.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Private equity investment has also made a substantial impact on the field of radiology, transforming its operational and financial dynamics.⁸³ By the end of 2021, private equity-backed firms had acquired approximately 10% of all radiology practices in the United States, with a strategic focus on consolidating high-performing groups.⁸⁴ These acquisitions often bring about structural changes aimed at boosting profitability, including an increase in service volumes for high-margin imaging procedures such as MRIs and CT scans.⁸⁵ For example, research shows that private equity-owned radiology practices see up to a 15% rise in procedural throughput due to heightened financial expectations from investors.⁸⁶ However, this emphasis on efficiency and procedural volume has raised concerns about care quality, as radiologists working in these settings may face stricter productivity targets, leaving less time for thorough case analysis and patient interaction.⁸⁷

Private equity ownership has also influenced staffing and billing practices within radiology. Many acquired practices maintain higher prices, leading to a 15.9% increase in charges for imaging services compared to non-private equity-owned facilities.⁸⁸ Staffing adjustments frequently include increased reliance on

⁸³ Marty Stempniak, *Practices Tied to Private Equity, Hospitals Charge Significantly More Than Independent Radiology Groups*, RADIOLOGY BUS. (Sept. 3, 2025), <https://radiologybusiness.com/topics/healthcare-management/healthcare-economics/practices-tied-private-equity-hospitals-charge-significantly-more-independent-radiology-groups>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

teleradiology or non-physician personnel for preliminary reads, which may compromise oversight and diagnostic accuracy.⁸⁹ While advocates argue that these changes improve operational efficiency and expand access to imaging services, critics highlight the potential risks of prioritizing financial performance over patient outcomes, raising broader concerns about the long-term implications for care standards in radiology.⁹⁰

C.) Analysis and Key Concerns from Data

The impact of private equity on patient care quality raises significant questions about the alignment of profit-driven business models with the core values of healthcare. Across specialties such as dermatology, ophthalmology, and radiology, private equity's operational strategies demonstrate a consistent emphasis on maximizing returns, often at the expense of traditional care standards. While procedural volumes and revenue generation have increased under private equity ownership, this comes with a noticeable shift in priorities, from patient-centered care to financial performance metrics.

In their push to boost revenues at acquired portfolio practices, PE firms may implement unlawful billing practices. These can include overutilization, improper billing, provision of medically unnecessary care, and banned self-referrals for

⁸⁹ *Id.*

⁹⁰ *Id.*

ancillary services.⁹¹ Efforts to maximize profitability can also lead to the avoidance of less profitable services or patients, or the improper substitution of nonphysician providers.⁹²

One of the most pressing concerns is the rise in unnecessary or overly aggressive procedures. In dermatology, for example, an uptick in procedures like biopsies and Mohs surgeries reflects the focus on profitable interventions rather than patient need. Similarly, ophthalmology practices have reported higher out-of-pocket costs for patients and a shift toward high-margin procedures, leaving less emphasis on less lucrative but necessary treatments. These trends, while economically beneficial for investors, risk eroding patient trust and undermining the overall quality of care.

Another critical issue is the restructuring of staffing models. Across specialties, private equity acquisitions frequently lead to increased reliance on non-physician staff and teleradiology services, which may compromise the level of oversight and precision required in fields such as radiology and ophthalmology. These cost-saving measures can dilute the expertise available to patients, potentially jeopardizing outcomes in complex cases. The pressure to meet productivity quotas further

⁹¹ See Suhas Gondi & Zirui Song, *Potential Implications of Private Equity Investments in Health Care Delivery*, 321 JAMA 1047, 1047-48 (2019); see also Jane M. Zhu & Daniel Polsky, *Private Equity and Physician Medical Practices Navigating a Changing Ecosystem*, 384 NEJM 981, 982 (2021), <https://perma.cc/S4DGY6YP>.

⁹² Jack S. Resneck Jr., *Dermatology Practice Consolidation Fueled by Private Equity Investment: Potential Consequences for the Specialty and Patients*, 154 JAMA DERMATOLOGY 13, 13-14 (2018).

exacerbates this issue, as clinicians are forced to balance financial expectations with the time and attention each patient deserves.

Finally, the financial burdens imposed by the private equity model present a structural challenge to the stability of healthcare delivery. Leveraged buyouts often saddle practices with significant debt, which can lead to bankruptcies and disruptions in care access. While private equity firms argue that their strategies improve operational efficiency, the associated risks to patient outcomes, cost accessibility, and provider autonomy cannot be overlooked. These developments highlight the need for robust legal and policy frameworks to ensure that private equity's growing presence in healthcare does not undermine the fundamental principles of patient care.

Relevant Case Law & Legal Tools

A.) Introduction

Legal disputes and judicial rulings have played a pivotal role in defining the boundaries of private equity's influence on healthcare. As private equity firms continue to acquire healthcare practices, questions arise regarding the legality and ethics of their actions, particularly in areas such as antitrust enforcement, the corporate practice of medicine, and fiduciary responsibilities. Courts are often tasked with balancing the financial motives of private equity investors against the public's interest in maintaining affordable, accessible, and high-quality healthcare.

This section examines key legal precedents that have emerged in response to these challenges. First, it explores an antitrust case that assesses whether private equity's consolidation of healthcare practices can violate competition laws. Second, it delves into disputes regarding the corporate practice of medicine, focusing on the tension between private equity ownership structures and state laws designed to protect physician independence. The final section proposes a framework for scrutinizing private equity investment in healthcare and its effects on patient-care quality by utilizing existing tools. These cases collectively highlight the complex legal landscape governing private equity's role in the healthcare sector and underscore the ongoing need for judicial clarity and regulatory oversight.

B.) Anti-Trust Review

Regulatory Agencies

The most obvious legal solution currently present against private equity firms negatively affecting the healthcare market is anti-trust review. Federal antitrust authorities, including the Federal Trade Commission (FTC) and the Department of Justice (DOJ), are empowered under Section 7 of the Clayton Act to sue and block mergers or acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”⁹³ To assess whether a transaction poses a threat to competition, antitrust agencies evaluate whether it would increase

⁹³ Clayton Antitrust Act of 1914, *Pub. L. No. 63-212*, § 7, *38 Stat. 730*, 731-32 (codified as amended at *15 U.S.C. § 18*).

the market power of the parties within a defined product and geographic market.⁹⁴ The resulting market power enables the merged entity to raise prices for consumers and may also produce harmful “non-price” effects, including reduced quality or limited access.⁹⁵ The FTC typically oversees health care acquisitions, beginning with pre-merger notification and a mandatory review period during which the transaction cannot close, after which the agency may clear the deal, request additional information, or move to challenge it.⁹⁶ Most contested transactions are settled through a negotiated consent agreement, allowing the deal to proceed under conditions like capping price increases, preserving access to essential services, and requiring divestitures to maintain or restore competition in the relevant market.⁹⁷

⁹⁴ See U.S. Dep’t of Just. & FTC, *Merger Guidelines*, DEPARTMENT OF JUSTICE 39-40 (Dec. 18, 2023) [hereinafter *2023 Merger Guidelines*], <https://www.justice.gov/atr/media/1329301/dl?inline>.

⁹⁵ See *id.* at 6-8, 50.

⁹⁶ *Health Care Competition*, FTC (Jan. 2024), <https://www.ftc.gov/news-events/topics/competition-enforcement/health-care-competition> [<https://perma.cc/4VW3-7CDD>]; Scott Hulver & Zachary Levinson, *Understanding the Role of the FTC, DOJ, and States in Challenging Anticompetitive Practices of Hospitals and Other Health Care Providers*, KFF (Aug. 7, 2023), <https://www.kff.org/health-costs/issue-brief/understanding-the-role-of-the-ftc-doj-and-states-in-challenging-anticompetitive-practices-of-hospitals-and-other-health-care-providers/> [<https://perma.cc/2F3W-XJW7>].

⁹⁷ See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture Of Consent*, FTC paras. 9-11 (Feb. 28, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf [<https://perma.cc/C9Z9-3BDX>]; *Frequently Asked Questions About Merger Consent Order Provisions*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/frequent> [<https://perma.cc/QLN3-PV7R>] (last visited Mar. 29, 2026).

If a settlement is not reached, the agency may pursue an injunction in federal court to block the transaction.⁹⁸

As an independent agency, the FTC conducts its own adjudications, but enforcement of its findings ultimately requires judicial involvement. Section 5(b) of the FTC Act grants the Commission the authority to initially challenge “unfair or deceptive act[s] or practice[s],” “unfair methods of competition,” or violations of laws enforced through the FTC Act, by commencing an administrative adjudication.⁹⁹ If the Commission has “reason to believe” a law has been violated, it can file a complaint that is adjudicated before an administrative law judge (ALJ) in a trial-style proceeding.¹⁰⁰ The ALJ upon conclusion of the hearing will make an “initial decision” recommending either entry of an order to cease and desist or dismissal of the complaint, which can be appealed by either party to the full Commission. On appeal of an initial decision, the Commission considers briefs and oral argument before issuing a final decision and order.¹⁰¹ A respondent subject to the order may appeal by filing a petition for review in the appropriate U.S. Court of Appeals under 15 U.S.C. § 45(c).¹⁰² If the court affirms the Commission’s order, it enters its own enforcement order, which may then be appealed to the Supreme Court.¹⁰³

⁹⁸ *2023 Merger Guidelines*, *supra* note 94, at 1.

⁹⁹ *Enforcement Authority*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (July 2025).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

Although the FTC has its own administrative process to determine whether conduct violates consumer protection or competition laws, it still relies on the courts to regulate effectively.¹⁰⁴ Under Section 13(b) of the FTC Act, the Commission may bypass administrative proceedings and go directly to federal court to seek preliminary or permanent injunctions when it believes a violation is occurring or imminent.¹⁰⁵ This alternative pathway allows the FTC to act swiftly, particularly in competition cases involving mergers, without first obtaining a final administrative ruling.¹⁰⁶

FTC v. Welsh, Carson, Anderson, & Stowe; U.S. Anesthesia Partners

In September of 2023, the FTC filed a complaint against U.S. Anesthesia Partners, Inc. (USAP) and private equity firm Welsh, Carson, Anderson & Stowe alleging the two had carried out an anti-competitive scheme, attempting to consolidate anesthesiology practices in Texas to drive up prices and boost profits in violation of the Sherman Act.¹⁰⁷ USAP was created in 2012 by Welsh Carson with the goal of dominating the Texas anesthesia market.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, FED. TRADE COMM'N (Sept. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>.

¹⁰⁸ Complaint at 2, *FTC v. U.S. Anesthesia Partners, Inc. & Welsh, Carson, Anderson & Stowe*, No. 1:23-cv-01581 (S.D. Tex. Sept. 21, 2023),

The FTC was particularly concerned with USAP engaging in a roll-up scheme.¹⁰⁹ A roll-up is a business strategy where PE firms acquire an established platform practice and then build control of the market with “tuck-in acquisitions” of smaller practices.¹¹⁰ USAP executed their plan by first acquiring Greater Houston Anesthesiology, the largest independent anesthesiology practice in Houston. Subsequently, USAP purchased two of the largest remaining independent practices in the city. After successfully piloting their strategy in Houston, USAP expanded to other Texas cities such as Dallas, San Antonio, and Austin, acquiring more practices.

While a roll-up is not inherently illegal, the FTC took issue with the market effects of USAP’s actions. Generally, insurance companies build networks of hospitals, outpatient facilities, physicians, and providers, like USAP, to control the costs of healthcare.¹¹¹ Providers and physicians “in-network” benefit with access to a large patient pool so they will typically agree to discount the prices of their services, called the reimbursement rate.¹¹² Whereas, providers “out-of-network” will charge higher reimbursement rates for the services they provide.¹¹³ If a provider in-

https://www.ftc.gov/system/files/ftc_gov/pdf/2010031USAPWelshCarsonComplaint.pdf [hereinafter *Welsh Carson Complaint*].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Yashaswini Singh et al., *Life Cycle of Private Equity Investments in Physician Practices: An Overview of Private Equity Exits*, 2 HEALTH AFFS. SCHOLAR, (Apr. 2024).

¹¹¹ *Welsh Carson Complaint*, *supra* note 108 at 3.

¹¹² *Id.*

¹¹³ *Id.*

network demands a high reimbursement rate, insurers will leverage rates with other providers during the negotiating process or replace the provider group altogether from the network.¹¹⁴ A problem naturally arises when a provider group dominates a geographical area and insurance companies have less of a market to negotiate with.

In the FTC's case against Welsh Carson and USAP, the primary claim was that the parties used a roll-up scheme to attain monopoly power in the market for anesthesiology services.¹¹⁵ As a result of their strategy, USAP controlled 40-50% of market share in Houston and Dallas which allowed them to charge the highest rates in the area to great success.¹¹⁶ USAP had this pricing power through their exclusive contracts with hospitals and because there were no close, local substitutes for patients undergoing procedures requiring anesthesia.¹¹⁷ Any competitors that may have attempted to offer better prices were neutralized by USAP acquiring them outright.¹¹⁸ In essence, the roll-up strategy left insurance companies unable to find suitable alternative providers to USAP who now had strong pricing and market leverage when negotiating reimbursement rates.

The FTC brought various charges against USAP and Welsh Carson, including multiple violations of Section 1 & 2 of the Sherman Act, the FTC Act, and

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Section 5(a) & 7 of the Clayton Act.¹¹⁹ Specifically, the FTC alleged their anticompetitive behavior constituted unlawful monopolization and unfair method of competition via price-setting arrangements.¹²⁰ Further, USAP and Welsh Carson's conduct consisting of a series of acquisitions allegedly was an attempt to substantially reduce competition.¹²¹ This case marked a pivotal point in challenging private equity influence on healthcare through government intervention as the first case brought in federal court against a private equity firm for their use of a roll-up strategy.¹²²

Although seemingly compelling, the Federal Trade Commission's (FTC) case against Welsh Carson was dismissed because the Court determined that existing antitrust laws do not extend liability to minority investors for anticompetitive behavior committed by companies in which they hold only a partial stake.¹²³ U.S. District Judge Kenneth Hoyt, presiding over the case in the Southern District of Texas, ruled that Welsh Carson's ownership interest, only 23% of USAP through a fund, was insufficient to hold the firm accountable for the company's alleged anticompetitive conduct.¹²⁴ The Judge found that Welsh Carson was merely an

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Brown & Hall, *supra* note 1, at 550-51.

¹²³ Chris Cumming, *Private-Equity Firm Welsh Carson Settles FTC Monopolization Case*, WALL ST. J. (Jan. 17, 2025), <https://www.wsj.com/articles/private-equity-firm-welsh-carson-settles-ftc-monopolization-case-6b378c5a>.

¹²⁴ *FTC v. United States Anesthesia Partners, Inc.*, No. 4:23-cv-03560, 2024 U.S. Dist. LEXIS 85714, at *14 (S.D. Tex. May 13, 2024).

investor, and there was no precedent in antitrust law that supported holding a minority investor liable for anti-competitive actions taken by a company it partially owns.¹²⁵

In his decision, Judge Hoyt emphasized that the FTC's argument sought to push the boundaries of antitrust law beyond what any court had previously upheld.¹²⁶ He stated that allowing the case to proceed against Welsh Carson would require a novel and expansive interpretation of liability that would hold minority investors responsible for the competitive decisions of their portfolio companies, even if those investors did not exert direct control over day-to-day operations.¹²⁷ Such an interpretation, he reasoned, would set a dangerous precedent by expanding liability to passive investors whose subsidiaries engage in potentially anticompetitive behavior.¹²⁸ The court refused to adopt this unprecedented legal theory, asserting that the FTC's attempt to extend its reach into private equity investments lacked a solid legal foundation.¹²⁹

Despite dismissing the case against Welsh Carson, Judge Hoyt allowed the FTC's lawsuit against USAP to move forward, finding that the agency had plausibly alleged anticompetitive conduct by the provider company itself.¹³⁰ The court

¹²⁵ *Id.* at *16.

¹²⁶ *Id.*

¹²⁷ *See* USAP, 2024 U.S. Dist. LEXIS 85714, at *16.

¹²⁸ *See id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at *25.

acknowledged that USAP's pattern of acquisitions and pricing strategies could have resulted in reduced competition and higher costs for patients, which warranted further examination.¹³¹ The judge specifically pointed to claims that USAP had engaged in a price-fixing and market allocation scheme with independent anesthesia providers, as well as allegations that the company paid a potential competitor to stay out of its market, reinforcing concerns about monopolistic practices.¹³² The court determined that these allegations were sufficient to survive a motion to dismiss, meaning the case against USAP will continue through the review process.¹³³

In response to the dismissal, a spokesperson for Welsh Carson praised the court's decision, asserting that the FTC's case against the firm was baseless from the beginning and that Welsh Carson had done nothing illegal in its investment strategy.¹³⁴ Similarly, Scott Holliday, a director at USAP, reaffirmed the company's belief that the FTC's claims lacked merit, expressing confidence that USAP would ultimately prevail in the ongoing litigation.¹³⁵ Despite this setback, the FTC has signaled no intention of retreating from its broader antitrust agenda. The agency has continued to investigate private equity's role in healthcare acquisitions and has

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at *28.

¹³⁴ Cumming, *supra* note 123.

¹³⁵ Mike Scarcella, *PE Firm Welsh Carson Dodges FTC Case over US Anesthesia Partners Acquisitions*, REUTERS (May 14, 2024), <https://www.reuters.com/legal/government/pe-firm-welsh-carson-dodges-ftc-case-over-us-anesthesia-partners-acquisitions-2024-05-14/>.

recently rewritten U.S. merger guidelines to enhance scrutiny over transactions that may raise competitive concerns.¹³⁶ This case, as the first major judicial test of the FTC's aggressive stance on roll-ups, could have far-reaching implications for how courts interpret the legality of private equity-driven consolidation in the future.

In January of 2025, the FTC announced that, although their federal case was dismissed, it had settled with Welsh Carson in their pending administrative case.¹³⁷ Under the proposed consent order, Welsh Carson agreed to “limit its involvement with USAP and notify the FTC of specified future acquisitions and investments in anesthesia and other hospital-based physician practices.”¹³⁸ Particularly, Welsh Carson will limit its involvement with USAP, freeze its investment at its current level, and reduce its board representation to a single, non-chair seat.¹³⁹ In addition, Welsh Carson would need to obtain prior approval for any future investments in the anesthesia market nationwide and 30-days advance notice for certain transactions involving other hospital-based physician practices across the country.¹⁴⁰

The FTC viewed this settlement as a victory, with FTC Chair Lina Khan saying it “establishes a valuable blueprint for future Commission orders involving

¹³⁶ Cumming, *supra* note 123.

¹³⁷ *FTC Secures Settlement with Private Equity Firm in Antitrust Roll-Up Scheme Case*, FED. TRADE COMM'N (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-secures-settlement-private-equity-firm-antitrust-roll-scheme-case>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

financially sophisticated actors.”¹⁴¹ Khan sees the settlement as a “novel” approach to private equity that can be applied in the future.¹⁴² Despite what appears to be a major setback, a Welsh Carson spokesperson “called the terms of the settlement ‘benign’ and . . . that it [would] not affect [their] business in any respect.”¹⁴³ Though Welsh Carson had its federal case and administrative case dismissed and settled respectively, USAP continues to be subject to both proceedings.

Limitations with Anti-Trust Enforcement

Judge Hoyt’s decision to dismiss the case against Welsh Carson highlights the legal limitations of this approach, suggesting that current antitrust laws do not support enforcement actions against private equity firms that maintain minority stakes in allegedly anticompetitive companies. The ruling signals that courts may be reluctant to impose liability on investment firms simply for holding a financial interest in a company that later engages in monopolistic behavior, unless there is clear evidence that the investor exercised direct control over the company’s business decisions. As a result, this decision could undermine future efforts by antitrust regulators to pursue similar cases against private equity firms unless new legal frameworks or legislative reforms expand the scope of liability for investors in consolidated industries.

¹⁴¹ Cumming, *supra* note 123.

¹⁴² *Id.*

¹⁴³ *Id.*

Ultimately, the court's ruling underscores the challenges that antitrust regulators face in proving that private equity firms should be held accountable for the actions of their portfolio companies. Unless the FTC can successfully argue that a private equity firm exerts direct influence over its subsidiaries' competitive behavior, courts may continue to reject efforts to impose liability on minority investors. With the case against USAP still ongoing, its outcome will likely provide further insight into whether the FTC's strategy of targeting healthcare roll-ups will gain traction in the courts or face continued judicial resistance.

C.) Corporate Practice of Medicine Doctrine

Alongside anti-trust review, another legal tool that can be used to combat private equity's growing involvement in healthcare is the corporate practice of medicine (CPOM) doctrine. The CPOM doctrine was originally developed by the American Medical Association to preserve physician autonomy and protect the integrity of the patient-physician relationship from commercial pressures.¹⁴⁴ Its core aim is to ensure that medical decisions are guided solely by patient care needs, free from corporate influence or profit-driven motives.¹⁴⁵ "Today, [most] states [maintain] some [form] of [restriction] on the corporate practice of medicine", though

¹⁴⁴ Wright W. Crawford, *Private Equity Investment and the Corporate Practice of Medicine in North Carolina*, 28 N.C. BANKING INST.

527, 532 (2024) (discussing importance of CPOM doctrine).

¹⁴⁵ *Id.*

the scope and enforcement of these laws vary widely.¹⁴⁶ For instance, while “the North Carolina Professional Corporation Act” mandates that “all shareholders in a professional corporation . . . hold . . . licenses in the [relevant] field, the [comparable] California statute requires only that at least 50% of shareholders . . . be . . . licensed” professionals.¹⁴⁷

In practice, CPOM laws are rarely enforced, and private equity groups have developed sophisticated strategies to circumvent them.¹⁴⁸ A common tactic involves the use of a management services organization (MSO) by a PE firm, which then contracts its services with a professional medical corporation (PC) for a fee.¹⁴⁹ To comply with CPOM restrictions, the MSO uses a friendly PC model where it designates a “friendly” or “captive” physician as the nominal owner of the PC.¹⁵⁰ However, this physician typically holds no real control: their ownership is constrained by contractual provisions such as stock restrictions and removal clauses, and they are often required to cede authority over clinical and operational decisions to the MSO.¹⁵¹ This structure enables corporate entities to remain

¹⁴⁶ Leah Davis & Sharon D'Souza, *Private Equity in Radiology – Why Aren't We More Concerned?*, 53 CURR. PROBS. DIAGN. RADIOL. 449, 450 (2024) (discussing enforcement of CPoM), <https://doi.org/10.1067/j.cpradiol.2024.04.001>.

¹⁴⁷ Crawford, *supra* note 144, at 541.

¹⁴⁸ *Id.* at 537, 540.

¹⁴⁹ *Id.* at 532.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 540-41.

technically compliant with CPOM laws while undermining their fundamental purpose.¹⁵²

Looking at CPOM cases on a state-by-state basis, there is no uniform standard. Recently, California saw a high-profile test of its CPOM doctrine in a lawsuit brought by the American Academy of Emergency Medicine Physician Group (AAEM-PG) against Envision Healthcare.¹⁵³ The complaint alleged that Envision, a private equity-backed entity, violated California's prohibition on the corporate practice of medicine by exercising de facto control over clinical decisions through a "friendly physician" model.¹⁵⁴ While the case initially moved forward in California Superior Court, it was stayed in 2023 after Envision filed for Chapter 11 bankruptcy protection.¹⁵⁵ Ultimately, Envision exited the California market and reached a confidential settlement with AAEM-PG, which included a partial reimbursement of legal fees.¹⁵⁶ The lawsuit was voluntarily dismissed in July 2024, leaving the underlying legal questions unresolved.¹⁵⁷ As a result, the case never produced a ruling on whether the "friendly physician" model constituted an

¹⁵² *Id.* at 541-42.

¹⁵³ Complaint at 5, *Am. Acad. of Emergency Med. Physician Grp., Inc. v. Envision Healthcare Corp.*, No. 22-cv-00421 (N.D. Cal. Jan. 21, 2022), ECF No. 1-1.

¹⁵⁴ Chirag P. Shah & Jeremy D. Wolfe, *How Private Equity Achieves Return on Investment in Ophthalmology*, *CURR. OPIN. OPHTHALMOL.*, Vol. 33, No. 5, pp. 362–365 (Sept. 2022), https://journals.lww.com/co-ophthalmology/fulltext/2022/09000/how_private_equity_achieves_return_on_investment.6.aspx.

¹⁵⁵ *AAEM-PG Lawsuit Against Envision Healthcare*, *AMERICAN ACAD. OF EMERGENCY MED.*, (last updated Sept. 26, 2023), <https://www.aaem.org/envision-lawsuit/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

impermissible form of corporate control, underscoring the fragility of CPOM enforcement even in states with relatively strong statutory prohibitions.

Conversely, Texas, a state with a strong prohibition against the corporate practice of medicine, and its courts have developed a fact-intensive approach to assessing whether non-physician entities exert impermissible control over medical practices.¹⁵⁸ In *Flynn Brothers, Inc. v. First Medical Associates*, a Texas court invalidated a management agreement between a group of investors and an emergency physician, finding that the physician had effectively become an employee of unlicensed business partners.¹⁵⁹ The investors, though not formally owners of the medical practice, retained the ability to control staffing, restrict the physician's ability to transfer ownership, pledge the practice's assets, and share in the profits, amounting to functional control that violated the Texas Medical Practice Act.¹⁶⁰ The court emphasized that the parties had structured the relationship to do “indirectly that which they... could not do directly,” thereby sidestepping the statutory prohibition.¹⁶¹

In a more recent case, *Xenon Health, L.L.C. v. Baig*, the Fifth Circuit concluded that a joint venture agreement granting a California professional corporation sweeping authority over the operations of a Texas PC- including hiring, billing, and financial decisions- constituted impermissible control, despite the

¹⁵⁸ Brown, *supra* note 1, at 569.

¹⁵⁹ See *Flynn Bros. v. First Med. Assocs.*, 715 S.W.2d 782, 785 (Tex. App. 1986).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

California PC being owned by a licensed physician.¹⁶² The court found that the agreement effectively transferred “total control” of the Texas practice and thus violated the Texas Medical Practice Act.¹⁶³

Read together, *Flynn Brothers* and *Xenon* demonstrate that Texas courts are willing to look beyond formal ownership and scrutinize whether management arrangements functionally reduce licensed physicians to agents or employees of unlicensed entities. This underscores the fact-intensive nature of the CPOM inquiry, in a state with a strong statutory prohibition, and highlights how private equity’s management-driven model often pushes up against, but does not always cross, the legal boundaries of impermissible influence.

Proposing the Medical Judgment Rule: A Framework for Evaluating Physician Autonomy in the Age of Private Equity

I. Rethinking Control: The Need for a Functional Standard

Private equity (PE) investment continues to expand its presence in healthcare, bringing renewed attention to how ownership structures may influence clinical decision-making. While the mechanics of models like the friendly PC have been discussed earlier in this paper, the key concern now is whether these arrangements preserve true physician independence or merely create the

¹⁶² *Xenon Health, L.L.C. v. Baig*, 662 F. App'x 270, 273-74 (5th Cir. 2016).

¹⁶³ *Id.* at 274.

appearance of it. Even where these models comply with the letter of corporate practice of medicine (CPOM) laws, the question remains whether financial incentives and business oversight erode a physician's ability to make patient-centered decisions.

To understand where current legal tools fall short, it is necessary to examine what CPOM and antitrust enforcement actually target. CPOM is a state-level doctrine designed to protect the patient-physician relationship by limiting corporate interference in medical judgment.¹⁶⁴ Its focus is on maintaining physician autonomy.¹⁶⁵ Antitrust law, by contrast, is a federal tool used to address market power and anticompetitive conduct, with an emphasis on pricing and consumer welfare.¹⁶⁶ CPOM addresses how care is delivered; antitrust addresses how markets are structured. Each framework serves a distinct role.

Together, CPOM and antitrust divide the field: one preserves autonomy, the other promotes competition. However, modern PE-backed models often fall through the cracks. CPOM enforcement varies widely across states, is often underdeveloped, and typically emphasizes formal control rather than operational influence.¹⁶⁷ Meanwhile, antitrust is not equipped to assess clinical effects or structural pressure

¹⁶⁴ Shah, *supra* note 154.

¹⁶⁵ *Id.*

¹⁶⁶ Jay B. Sykes, *Antitrust Law: An Introduction*, CONG. RSCH. SERV. (July 24, 2024), https://www.congress.gov/crs_external_products/IF/PDF/IF11234/IF11234.6.pdf (explaining a general overview of antitrust law and its goals from a legislative perspective).

¹⁶⁷ Crawford, *supra* note 144.

on medical decision-making. As a result, neither tool is capable of fully addressing the ways that financial incentives may undermine care quality.

This leaves a gap in how the law evaluates modern healthcare delivery. Business structures that are formally compliant may still compromise physician independence in practice. To fill this space, this paper introduces the Medical Judgment Rule (MJR), a framework for determining whether physicians are genuinely free to exercise independent clinical judgment within PE-backed structures.

II. The Medical Judgment Rule Explained

The Medical Judgment Rule (MJR) is a framework for evaluating whether a healthcare delivery model, particularly those backed by private equity, compromises physician autonomy in ways that may signal a violation of CPOM or suggest anticompetitive effects under federal law. MJR does not create new legal causes of action, but it provides a structured way to assess whether a business arrangement functionally undermines a physician's ability to act in the patient's best interest. If such erosion is found, it may offer support for a CPOM violation at the state level or indicate reduced product quality, a recognized concern under antitrust law, at the federal level.

At its core, MJR proposes a shift in focus: from formal legal control to functional clinical independence. Rather than presuming that a licensed physician is acting independently of external financial pressures, MJR prompts decision-makers to ask whether the structure around that physician enables or discourages

free medical judgment. One consideration is whether physicians are incentivized to prioritize volume or specific procedures through compensation structures, which may shift clinical decisions toward revenue-driven care. Another question is whether non-physician entities control key operational aspects of care, such as scheduling, referrals, staffing, or the clinical workflow itself. Additionally, the framework calls for scrutiny of any performance targets, bonuses, penalties, or restrictions that may limit a physician's discretion to act in a patient's best interest. Finally, it asks whether there is meaningful clinical oversight, such as an independent medical board or structural protections, that shield physician decision-making from business pressures.

If certain structural indicators suggest that care is being shaped by business priorities, the MJR framework enables a closer, fact-intensive inquiry. It does not presume independence, nor does it presume coercion. It creates a structured analysis to determine whether care decisions reflect medical standards or business directives.

III. How MJR Works Within Existing Legal Boundaries

MJR respects the jurisdictional lines of current legal tools. It does not attempt to regulate the practice of medicine or impose new federal standards. It offers courts a method to assess conduct within the boundaries of current law. In CPOM enforcement, it helps determine whether a structure amounts to impermissible control. In merger review, it gives antitrust agencies evidence for identifying vertical integration risks that affect care and prices.

This makes MJR flexible and enforceable. States can use it to modernize and clarify their CPOM rules, shifting the focus from formal ownership to operational influence. Federal agencies can incorporate it into merger reviews or consent decrees to assess whether a deal risks undermining patient care through business control. Overall, MJR offers a better, consistent way to apply existing principles.

IV. How MJR Could Be Used in Practice

The FTC's recent suit against Welsh Carson and USAP illustrates the limits of current antitrust enforcement. The court dismissed the case against Welsh not because the structure was harmless, but because antitrust law offers no clear basis to hold a minority investor accountable for designing a system that consolidated care and allegedly led to price increases.¹⁶⁸ MJR would not independently impose liability, but it could have helped the FTC argue that Welsh's involvement created a structure that predictably undermined physician autonomy, contributing to both care distortion and market effects. That, in turn, might have justified enhanced scrutiny, conditions, or enforcement.

Similarly, in Texas CPOM cases like Flynn Brothers and Xenon, courts already take a functional approach.¹⁶⁹ They ask whether business entities exercise control over medical practice, even if physicians retain formal ownership. MJR

¹⁶⁸ FTC v. United States Anesthesia Partners, Inc., No. 4:23-cv-03560, 2024 U.S. Dist. LEXIS 85714, at *14 (S.D. Tex. May 13, 2024).

¹⁶⁹ See Brown, *supra* note 1, at 569 (describing Texas' approach with a fact intensive inquiry that examines who has control over the decisions of the medical practice).

parallels this method and offers a structured way to extend it to states with weaker CPOM enforcement or less developed case law.

V. Why MJR Matters

MJR is grounded in the idea that physicians must be free to make decisions based solely on patient needs. That principle is central to medical ethics but is not consistently protected by current law. CPOM enforcement is often underdeveloped or narrowly interpreted.¹⁷⁰ Antitrust does not touch clinical dynamics. MJR fills that gap by offering a practical, structured way to evaluate physician autonomy in modern business models.

It also provides a useful path for reform. States struggling with vague or outdated CPOM statutes can adopt the MJR framework to target the real issue: functional control, not formal ownership. It gives courts, regulators, and agencies a shared language for evaluating how business incentives affect care.

Conclusion

Private equity is not inherently incompatible with the goals of healthcare. When appropriately limited and carefully structured, PE firms can bring valuable operational expertise, streamline administrative inefficiencies, and inject much-needed capital into a strained system. But as this Note has shown, the unchecked pursuit of returns, when coupled with opaque ownership models and indirect clinical influence, risks distorting the core function of healthcare delivery. Currently, the legal system divides enforcement between state-level corporate

¹⁷⁰ Crawford, *supra* note 144.

practice of medicine (CPOM) doctrines and federal antitrust law. While CPOM protects physician autonomy and antitrust guards against pricing harms, neither is well-positioned to address how modern PE-backed structures subtly undermine care by embedding financial incentives into clinical decision-making.

The Medical Judgment Rule (MJR) proposed here is not a rejection of profit in healthcare, but a recalibration. It recognizes that profit-seeking will remain a constant so long as the United States treats healthcare as a market commodity. The challenge, then, is to create a legal framework that draws a clearer line between financial management and medical judgment. MJR offers a flexible, functional, and fact-specific standard for courts and regulators to identify when that line has been crossed. This can be through excessive control by management service organizations, compensation models that reward overutilization, or structural decisions that limit physician discretion.

Ultimately, the goal is not to exclude private capital, but to attract the kind of investment that supports, rather than compromises, clinical integrity. By basing oversight on a focus on physician autonomy, MJR aims to protect patient care while preserving room for responsible innovation and sustainable profit. Addressing these challenges requires a legal framework that not only reflects the realities of modern healthcare financing but also reinforces the principle that clinical judgment must remain focused on patient welfare and not be shaped by financial actors.

Private equity can play a role in the future of American healthcare, but that role must be clearly bounded by law and ethics. The goal is not to eliminate

financial efficiency or growth but to ensure that those goals never override the fundamental duty to prioritize patient outcomes. MJR fills a much-needed gap in existing doctrine by offering a way to evaluate business arrangements not solely based on ownership or market share, but on how they influence the medical decisions being made. It provides courts with a method to assess structures that may otherwise appear legally compliant yet functionally compromise care. Importantly, MJR also offers a tool for modernizing CPOM enforcement at the state level, where under-enforced or outdated statutes fail to capture the nuance of PE-driven models.

As healthcare continues to evolve, so too must the frameworks we use to safeguard its integrity. MJR does not seek to reinvent regulation but to refine it by bringing much-needed clarity to the murky space where clinical ethics and corporate control intersect. By re-centering physician judgment as a regulatory touchstone, MJR offers an individualized, pragmatic, and structured way forward in balancing profit with patient care.

Acknowledgements:

I would like to express my gratitude to my advisor, Professor Matteo Gatti, for his guidance over the past two years and for helping me develop a deeper understanding of the intersection between business and law. I am also sincerely grateful to my colleagues Daniel Trocchia, Patrick Vinchur, Krina Shah, and Brianna Alvarez for their support and thoughtful feedback throughout the process.

CROSSRHODES: THE CULT-LIKE FORCE BEHIND TRADEMARKS ORIGINATING FROM THE LIKENESS OF, AND SUBSEQUENTLY REGISTERED BY, A CELEBRITY, AND THE IMPACT ON SMALL BUSINESSES FIRST TO USE THE DESIGNATION

Cherlean Darko¹

ABSTRACT: In response to the growing trend of celebrities trademarking names, words, and phrases in order to not only protect, but profit off of their image, this note analyzes the phenomenon of public figures acquiring trademarks that are already in use and the infringement suits that follow. Whilst such cases are typically framed under a forward confusion theory, this note highlights *Rhode* and the reverse confusion paradigm in order to analyze whether greater protections are required for small businesses.

¹ J.D. Candidate at Rutgers Law School–Newark, 2026, *Rutgers University Business Law Review*; New York University undergraduate. A special thanks to Professor Camilla Hrdy who took the time to offer her expertise and whose comments and guidance both motivated and inspired my passion for intellectual property law. A special thanks to my family and friends who have followed my law school journey.

TABLE OF CONTENTS

INTRODUCTION	125
I. TRADEMARK BASICS	127
A. What is a Trademark?	127
B. Application Process	129
C. Use-in-Commerce & Distinctiveness	131
D. Infringement	133
II. THE REVERSE CONFUSION THEORY	134
A. Reverse Confusion Involving Celebrity Actors	139
III. CASE STUDIES	141
A. Rhode-NYC, LLC v. Rhodedeodato Corp. (<i>Rhode</i>)	142
B. Veronica Morales (<i>Blue Ivy</i>) v. BGK Trademark Holdings, LLC (<i>Blue Ivy Carter</i>)	147
C. Evermore Park, LLC v. Taylor Swift (<i>Evermore</i>)	151
D. Blue Sphere Inc. (<i>Lucky 13</i>) v. Taylor Swift	153
IV. RHODEBLOCKS: SMALL BUSINESSES VERSUS CELEBRITY ACTORS	156
A. The Digital Rhode: <i>Social Media as a Business Tactic</i>	157
B. Moral Challenges Surrounding Celebrity Branding	159
V. A SECURE RHODE: HOW TO PROTECT SMALL BUSINESSES	161
A. Requiring Different Standards for High-Profile Figures	163
B. Under Construction: Shortcomings in the Current Reverse Confusion Framework	165
C. Other Rhodes to Recourse	169
D. Reaching A Level Rhode	172
1. The Right to a Name	173
2. Finding Balance	174
E. Damages	174
CONCLUSION	176

INTRODUCTION

Since its creation in 2022, Rhode has become a major name in the skincare and beauty industry.² The brand, which is Hailey Rhode Bieber's namesake, capitalizes on her popularity and influence to maximize product appeal to an oftentimes impressionable audience. In order to legitimize her company, Bieber applied for, and was granted, a trademark in the name of her clothing brand.³ According to recent data, there are over three million active trademarks registered with the United States Patent and Trademark Office.⁴ Within those registrations lies evidence of a growing trend whereby influential individuals trademark words and phrases uniquely associated with their image—including their names—to market and monetize themselves, and effectively, their brand, in an effort to leverage a uniqueness that only they themselves can offer.⁵

Celebrities obtain trademarks for various goods and services in a myriad of categories such as clothing, cosmetics, marketing and entertainment services, and jewelry.⁶ Hailey Bieber is one amongst dozens of public figures who have been successful in trademarking their name or a phrase associated with their image or likeness.⁷ The increasing prevalence can be ascribed to the underlying purpose of a trademark: allowing consumers to connect a product with its' owner.⁸ By launching her skincare and makeup brand under the name 'Rhode,' Bieber explicitly connected

² James Manso, *Hailey Bieber's Rhode Names Lauren Ratner President, Chief Brand Officer*, WWD (Dec. 4, 2023, 12:00 AM), <https://wwd.com/beauty-industry-news/beauty-features/hailey-bieber-rhode-names-lauren-ratner-president-chief-brand-officer-1235984998/>.

³ RHODE, Reg. No. 7,242,953 (U.S. Pat. & Trademark Off.).

⁴ *Trademarks Data Q3 2024 at a Glance*, U.S. Pat. & Trademark Off. (Jan. 22, 2025), <https://www.uspto.gov/dashboard/trademarks/>.

⁵ Rebecca Zilberman, "That's Hot!" *Celebrities Use Trademarks to Add to Their Wealth, But Is It Excessive?*, 42 Loy. L.A. Ent. L. Rev. 273, 275 (2022).

⁶ *See, e.g.*, KIM KARDASHIAN, Reg. No. 3,371,751 (U.S. Pat. & Trademark Off.); BRITNEY SPEARS, Reg. No. 3,624,626 (U.S. Pat. & Trademark Off.); BEYONCE, Reg. No. 4,125,777 (U.S. Pat. & Trademark Off.).

⁷ *Id.*; *see also* note 3.

⁸ Lynne Weathered, *Trade Marking Celebrity Image: The Impact of Distinctiveness and Use as a Trademark*, 12 Bond L. Rev. 161, 163 (2000), <https://blr.scholastica.com/api/v1/articles/5359-trade-marking-celebrity-image-the-impact-of-distinctiveness-and-use-as-a-trade-mark.pdf>.

her personal identity and image to the business, prompting consumers to associate the brands' products, and more significantly, *the mark*, with her. In doing so, Rhode is able to significantly benefit from the relationship to Bieber, attracting a wider audience and strategically positioning the brand for longevity and financial success. It unfolds predictably as, like previously mentioned, Bieber is not the first individual to take such an approach, that said, her utilization of the mark posed an unexpected challenge as the name Rhode was already in use by another, Rhode-NYC, a lesser-known clothing brand. As a result of the conflicting usage, and with Hailey Rhode Bieber commanding widespread acclaim awarding her the opportunity to establish her brand as a dominant force in the marketplace, the prior users of the mark brought forth a claim based on the theory of "reverse confusion."⁹ The concern being that Bieber's use of the name would mislead customers into believing that she was the originator of the mark when the opposite is true, detrimentally impacting their small business.¹⁰ This note aims to highlight the phenomenon of celebrities utilizing trademarks that are already in use by small businesses that hold superior rights as the senior user, and the subsequent actions taken by same. Most prevalently framed in proceedings under a forward confusion theory, for smaller entities, favorable outcomes remain a rarity—contrary to both the goals of the Lanham Act and the core tenets of fair competition.

It further explores whether celebrities are infringing upon *in-use* trademarks and causing reverse confusion, *deliberately*, or whether the actions taken are an inadvertent means to an end. As the trademarks at issue are often registered and therefore easily accessible with a simple trademark search, it is likely that their continued use despite prior registration is intentional. With this in mind, the question becomes why do public figures take such risks? Likewise, what

⁹ Complaint at *20, *36, Rhode-NYC, LLC v. Rhodedeodato Corp., No. 22-CV-5185 (S.D.N.Y. June 21, 2022).

¹⁰ *Id.*

underlying motivations drive them to persist with such actions when a trademark infringement claim is likely to follow, the harms for the senior user are quite substantial in comparison, and they could just as effectively cultivate consumer goodwill through the use of alternative marks?

Part I of the ensuing discussion provides understanding of what a trademark is and offers a brief overview of the application process. Part II examines the history of the Lanham Act and the early beginnings of the reverse confusion doctrine. Part III introduces both forward and reverse confusion cases that feature celebrity actors against small businesses. Part IV highlights the role of social media within the reverse confusion framework alongside the moral considerations behind the decision to utilize ones' economic and influential leverage to the detriment of smaller entities. Lastly, part V considers the nuanced interplay between trademark law as a necessary tool for safeguarding celebrity interests versus the rights of first-to-use applicants of the same mark, concluding with various avenues of recourse for smaller business. The following discussion advances the argument that junior celebrity brands, that utilize and apply for trademarks already in established use by small businesses, should be subject to factors alternative to those proposed in *Polaroid*, *Sleekcraft*, and *DuPont*. In cases where evidence overwhelmingly indicates deliberate reverse confusion, it is expected that small businesses, as the senior user, will retain their rights in the event that a larger entity, possessing far superior financial resources and significantly greater influence, adopts a conflicting mark in order to benefit from prospective economic gain to the detriment of a smaller enterprise.

I. TRADEMARK BASICS

A. What is a Trademark?

A trademark is, “any word, name, symbol, or device, or any combination thereof [used in commerce] to identify and distinguish [ones'] goods . . . from those manufactured or sold by others

and to indicate the source of the goods, even if that source is unknown.”¹¹ Trademark rights can be established in a myriad of ways, for instance, by common law trademark use in a particular geographical area, or through state and federal registration.¹² Though, unlike common law rights and those granted under state authority, federal trademark registration grants the registered owner exclusive rights to the mark and subsequently, the right to bring a claim concerning the mark in federal court.¹³ Federal registration and infringement is governed by the Lanham Act, also known as the Trademark Act of 1946 (“the Act”).¹⁴ Generally, the purpose of the Act is to provide a uniform database for trademark registration and to safeguard federally registered marks against unauthorized use in an effort to facilitate and promote fair competition.¹⁵ While federal registration is not required, doing so comes with several privileges, the most coveted being the presumption, or “prima facie evidence of,” validity, that is, the assumption that a mark is valid until proven otherwise, thereby shifting the burden to the infringing party.¹⁶

The Act provides multiple benefits to consumers in addition to protecting trademark holders. First, it allows for goods and services to be easily distinguishable in the marketplace, ensuring that consumers are able to rely on the reputation of an established brand.¹⁷ Likewise, it aims to prevent consumers from purchasing counterfeit goods under a trademarked name, minimizing the likelihood that a consumer may encounter unsafe goods.¹⁸ Essentially, trademarks

¹¹ 15 U.S.C. § 1127.

¹² *Optimal Pets, Inc. v. Nutri-Vet, LLC*, 877 F. Supp. 2d 953, 958-59 (C.D. Cal. 2012).

¹³ *What Is a Trademark*, U.S. Pat. & Trademark Off. (Nov. 30, 2023),

<https://www.uspto.gov/trademarks/basics/what-trademark>; *Why Register Your Trademark?*, U.S. Pat. & Trademark Off. (Mar. 31, 2021), <https://www.uspto.gov/trademarks/basics/why-register-your-trademark>.

¹⁴ Lanham Act, ch. 22, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1072).

¹⁵ 15 U.S.C. § 1127.

¹⁶ 15 U.S.C. § 1115.

¹⁷ David Y. Gan, “*March Madness: An Examination of Dual-Use Trademark Terms and Reverse Confusion*,” 50 HASTINGS L.J. 223, 225-26 (1998).

¹⁸ *Id.*

“help consumers identify goods and services that they wish to purchase, as well as those they want to avoid.”¹⁹ Beyond the advantages heretofore identified in connection with registration, under the Lanham Act, the first person to use a trademark in commerce is generally granted exclusive rights to that mark.²⁰ Barring few exceptions, in the following cases, each of the senior small businesses were the first to not only register their mark, but also to use it in commerce. Accordingly, no preferential treatment is given in this regard; despite their notoriety, celebrities and public figures are subject to trademark law in the same manner as everyday applicants, meaning, they are subject to the same first-to-use requirements.

B. Application Process

The process for registering a trademark with the United States Patent and Trademark Office (“USPTO”) is a relatively straightforward affair. Prior to reaching the application stage, a trademark search is typically performed.²¹ Prospective applicants are encouraged to use the Trademark Search System, an online database maintained by the USPTO.²² The Trademark Search System grants users the opportunity to search for federally registered and pending trademark applications at no-cost. As an alternative, there are trademark search services that are able to automate the process and perform similar functions for a fee.²³ The multiple avenues available for an applicant to research a prospective mark for potential conflicts indicate that infringement should rarely occur, though notably, the USPTO database does not include trademarks established by state

¹⁹ *Matal v. Tam*, 582 U.S. 218, 224 (2017).

²⁰ 15 U.S.C. §§ 1127, 1055.

²¹ U.S. Pat. & Trademark Off., *Trademark Process* (Jan. 18, 2025), <https://www.uspto.gov/trademarks/basics/trademark-process>.

²² Barton Beebe and Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARVARD L. REV. 945, 970-71 (2018), <https://harvardlawreview.org/print/vol-131/are-we-running-out-of-trademarks/>.

²³ *See id.* (“[C]ommercial trademark clearance services . . . maintain their own databases of previously and currently used trademarks drawn from a variety of sources, such as trademark applications and registrations at the federal and state level, state corporate registration listings, and phone books.”).

and foreign entities, or those founded by common law use.²⁴ Nonetheless, a preliminary search not only insulates against costly infringement proceedings but also attempts to circumvent refusal predicated on earlier-filed marks and the attendant risk of consumer confusion.²⁵ A likelihood of confusion occurs when a “trademark is confusingly similar to another trademark and the goods and services are related; [thus] consumers are likely to mistakenly believe these goods or services come[] from the same source.”²⁶ In the cases that follow, the likelihood of confusion analysis is crucial because a number of the claims were brought as oppositions to Section 2(d) of the Lanham Act, thus, a finding of infringement depends upon the presence of consumer confusion. Absent such, a mark is generally eligible for registration.

In addition to performing a trademark search, applicants must identify which class or classes of goods or services their product is to be categorized with.²⁷ Classification is regulated by the Nice Classification System which standardizes the categorization of goods and services for registration.²⁸ As of 2025, there are forty-five possible categories in which a good or service could be organized.²⁹ While applicants may perceive an advantage in seeking registration across multiple classes, the classification framework precludes strategic monopolization by mandating independent applications for each distinct class of goods or services.³⁰ An incidental effect of the class system is that it facilitates concurrent use of similar or identical marks across businesses

²⁴ See “Why register your trademark,” *supra* note 13.

²⁵ 15 U.S.C. § 1052(d); *Why Search for Similar Trademarks*, U.S. Pat. & Trademark Off. (Nov. 30, 2023), <https://www.uspto.gov/trademarks/basics/why-search-similar-trademarks>.

²⁶ *Likelihood of Confusion*, U.S. Pat. & Trademark Off. (Nov. 30, 2023), <https://www.uspto.gov/trademarks/search/likelihood-confusion>.

²⁷ *Goods and Services*, U.S. Pat. & Trademark Off. (Mar. 31, 2021), <https://www.uspto.gov/trademarks/basics/goods-and-services>.

²⁸ *Nice Classification*, World Intell. Prop. Org. (2017), <http://www.wipo.int/classifications/nice/en>.

²⁹ 37 C.F.R. § 6.1 (2026).

³⁰ Claire Lenz-Dean, *That’s Your Name, Don’t Wear It Out: How NCAA Athletes Can Avoid Crossing the Invisible Line Between Name and Brand*, 58 TULSA L. REV. 295, 299-300 (2023); *see also*, *Trademark scope of protection*, U.S. Pat. & Trademark Off. (Mar. 31, 2021), <https://www.uspto.gov/trademarks/basics/scope-protection> (“Applying for more goods or services than you currently use, or intend to use, is likely to cause your application to be denied.”).

where the statutory likelihood-of-confusion threshold is not met.³¹ Thus, the classification of goods and services under which a mark is registered, when measured against the classification of its alleged infringing counterpart, constitutes a central element of the infringement analysis and frequently operates as a determinative factor in infringement proceedings. Lastly, and of particular significance, two principal requirements serve as the basis for determining registration eligibility: a mark must be used in commerce, and it must be distinctive.³²

C. Use-in-Commerce & Distinctiveness

There are two primary filing bases for trademark registration: ‘actual use’ and ‘intent-to-use’ applications.³³ *Actual use* generally refers to *use-in-commerce*, meaning, the use of a mark in an ordinary commercial manner, and “not made merely to reserve a right in a mark.”³⁴ The determination of whether a mark is “used in commerce” involves examining a myriad of factors including: the designated class of goods and services involved, the specific goods with which the mark is associated coupled with the means of distribution, and, for services, whether the mark is used or displayed in conjunction with the sale or advertising of said services.³⁵ Conversely, enacted in 1988, the Trademark Law Revision Act (“TLRA”) broadened the use-in-commerce requirement by establishing the intent-to-use (“ITU”) application.³⁶ Of the few exceptions to the first-to-use doctrine mentioned previously, applicants filing on an ITU basis are yet to use their mark in

³¹ Lenz-Dean, *supra* note 30, at 299-300.

³² *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act.

³³ 37 C.F.R. §2.34-(a)(1), (2) (2026).

³⁴ *Id.*; 15 U.S.C. § 1127 (2026); *see also*, *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1550 (11th Cir. 1986) (“Trademark rights flow from use, not from intent to protect rights. . . [t]he Lanham Act does not permit . . . warehousing of trademarks.”).

³⁵ 15 U.S.C. § 1127.

³⁶ Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 103(b), 102 Stat. 3935; 15 U.S.C. § 1127.

commerce, but have sufficiently demonstrated a bona fide intent to do so at a later date.³⁷ Though, evidence that another party is using the mark prior to the ITU registrant may prevent registration.³⁸

In addition to the *use* requirement, a key component of a successful trademark is distinctiveness.³⁹ Generally, trademarks are categorized as: generic, descriptive, suggestive, arbitrary, or fanciful.⁴⁰ Likewise, a mark can either be inherently or not inherently distinctive.⁴¹ A mark is inherently distinctive when it is capable of immediately identifying the source of a product or service without the need to prove secondary meaning.⁴² Fanciful, arbitrary, and suggestive marks are inherently distinctive, and thus, registerable—*given that all other requirements are met*—whereas generic marks are never eligible.⁴³ Consider Kodak cameras and wine, Kodak is an easily conceivable brand whereas ‘wine’ is a generic term for a product that could be sold by a multitude of companies, indistinguishable from counterparts of the same nature.⁴⁴ Many of the marks that public figures attempt to register, such as names and phrases, are descriptive.⁴⁵ Descriptive marks are eligible for registration if the mark has acquired secondary meaning.⁴⁶ Secondary meaning is achieved when a mark transcends its descriptive function and

³⁷ 15 U.S.C. § 1051(b).

³⁸ *Warnervision Entm’t, Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 262 (2d Cir. 1996) (holding that an injunction is proper if another party provides substantial evidence of use prior to the ITU applicant).

³⁹ *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act.

⁴⁰ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

⁴¹ *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act; *see also* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning.”).

⁴² *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 4:13, 7:25 (5th ed. 2024).

⁴³ *Id.* at § 7:25.

⁴⁴ *See, e.g.*, *United States PTO v. Booking.com B.V.*, 591 U.S. 549, 553-54 (2020) (“‘[A]rbitrary’ (‘Camel’ cigarettes), ‘fanciful’ (‘Kodak’ film), . . . ‘suggestive’ (‘Tide’ laundry detergent) . . . ‘descriptive’ (‘Park ‘N Fly’ airport parking) . . . ‘generic’ (wine).”).

⁴⁵ *See* *Tonawanda Str. Corp. v. Fay’s Drug Co.*, 842 F.2d 643, 648 (2d Cir. 1988) (holding that surnames and first names are descriptive, which require a secondary meaning).

⁴⁶ *See* J. THOMAS MCCARTHY, *supra* note 42, at § 11:53.

operates primarily as an indicator of origin, signifying to consumers a particular product, service, or individual.⁴⁷ Ultimately, secondary meaning can be acquired through evidence demonstrating that the mark is, “synonymous in the public mind with the service provided.”⁴⁸ If a mark is not inherently distinctive and has yet to develop secondary meaning, the mark is not federally eligible for protection.⁴⁹ Celebrities will generally encounter fewer obstacles demonstrating secondary meaning due to their ability to not only generate steadfast audiences of unprecedented scale, but to use said audience to create an association to a mark with greater ease.⁵⁰

D. Infringement

The cause of action for trademark infringement evolved out of the law of unfair competition, and is generally determined by the likelihood of confusion test, or, how likely a consumer is to mistake an opposer’s mark and goods for the original mark and associated products or services.⁵¹ As previously noted, a registered mark is better positioned to withstand trademark infringement due to the presumption of validity and exclusive use of a mark that is a byproduct of federal registration.⁵² Two forms of confusion have been recognized by courts previously: forward and reverse confusion.⁵³ The most recognized and pled form of confusion, ‘forward confusion,’ is the statutory claim derived from the Lanham Act, whereas ‘reverse confusion’ arose out of case law.⁵⁴ Under forward confusion, the customer is under the impression that the junior user’s

⁴⁷ *Id.* at § 4:14.

⁴⁸ See Zilberman, *supra* note 5, at 276, 286.

⁴⁹ *Id.* at 285.

⁵⁰ See *infra* note 85.

⁵¹ 15 U.S.C. § 1125; see generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1852–63 (2007), https://scholarship.law.nd.edu/law_faculty_scholarship/226/; McCarthy, *supra* note 42, at § 23:1.

⁵² 15 U.S.C. § 1115.

⁵³ Sean J. Flaherty, *Keeping It Wreal: How the Eleventh Circuit’s Wreal Decision is Better Suited for a Uniform Reverse Confusion Multifactor Analysis*, 28 MARQ. INTEL. PROP. & INNOVATION L. REV. 77, 78 (2024).

⁵⁴ *Id.* at 78-79; see *infra* note 59.

products are associated with the senior user.⁵⁵ Comparatively, and less commonly, reverse confusion occurs when a larger, or in this instance more famous and financially equipped, junior user, uses a trademark or releases a product similar to that of a smaller, senior user.⁵⁶ This note analyzes the outcomes of the latter group, highlighting the reverse confusion phenomenon in an effort to understand the barriers that emerge and the structural dynamics that sustain them. Nonetheless, while reverse confusion constitutes the primary focus, forward confusion cases involving junior celebrity and/or celebrity-endorsed brands and senior small businesses are also considered within the contours of reverse confusion theory. The validity of this approach rests not merely on the analytical parallels between the two frameworks, but on two principal grounds in particular. First, many of the cases involving celebrity junior actors and senior small businesses are brought under a forward confusion paradigm. Second, many small businesses may benefit from framing their opposition to trademark infringement in accordance with reverse confusion principles as opposed to that of forward confusion. Thus, assessing how an outcome might have differed under the proposed theory provides valuable insight for prospective litigants.

II. THE REVERSE CONFUSION THEORY

Reverse confusion aims to preserve the trademark rights of smaller businesses from their larger, more established counterparts.⁵⁷ The theory first appeared in *Westward Coach Mfg. Co. v. Ford Motor Co.*,⁵⁸ although it was not until nine years later in *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.* (“Big O”) that the theory of reverse confusion was formally accepted.⁵⁹ The

⁵⁵ See Flaherty, *supra* note 53, at 78 (“Essentially, a junior user attempts to ride the coattails and success of the senior user to sell its products.”).

⁵⁶ See *id.* at 79.

⁵⁷ Nancy Del Pizzo, *Developing a Uniform Test for “Reverse Confusion” Trademark Cases in the Sports & Entertainment Industries*, 14 SETON HALL J. SPORTS & ENT. L. 175, 203 (2004).

⁵⁸ 388 F.2d 627 (7th Cir. 1968).

⁵⁹ 561 F.2d 1365 (10th Cir. 1977).

10th Circuit in *Big O* postulated that reverse confusion occurs when “the infringer’s use of [the] plaintiff’s mark results in confusion as to the origin of [the] plaintiff’s product.”⁶⁰ Compared with forward confusion, reverse confusion entails a stricter burden than its inverse because the senior, and generally smaller, user must demonstrate that consumers are not only inclined to be confused, but that they are likely to assume infringement of the junior, more notable, user.

Big O serves as the seminal case for proponents of the reverse confusion theory. Asserting claims of unfair competition and trademark infringement, Big O served as the parent company for automobile tire dealers across fourteen different states.⁶¹ In the fall of 1973, Big O began to market a line of products as “Big Foot,” but was ultimately unable to acquire the trademark.⁶² Later that year, Goodyear began producing snowmobile replacement tracks under a similar designation to that of Big O: “Bigfoot;” however, unlike Big O, succeeded in its endeavors to register the mark.⁶³ In 1974, while developing a business plan to use the newly acquired mark in conjunction with the advertisement of a new line of tires, Goodyear first learned of Big O.⁶⁴ Though, even in light of the discovery, Goodyear’s trademark search revealed no potential conflict concerning the use of the “Bigfoot” mark in connection to the sale of tires.⁶⁵ Nevertheless, Goodyear informed Big O of its upcoming advertisement campaign that would feature the mark.⁶⁶ Big O was not interested in a licensing agreement and vehemently objected to the use of the mark in conjunction with the sale of tires because they believed that “such use would severely damage Big O.”⁶⁷ Despite admitting that it was likely feasible to remove the mark from advertising, Goodyear had already expended

⁶⁰ *Id.* at 1371.

⁶¹ *Id.* at 1367.

⁶² *Id.* at 1367-68.

⁶³ *Id.* at 1368.

⁶⁴ *Id.*

⁶⁵ *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1368 (10th Cir. 1977).

⁶⁶ *Id.*

⁶⁷ *Id.*

approximately nine million dollars on its nationwide campaign, and thus decided to proceed with it as planned.⁶⁸ Just as Big O predicted, evidence presented to the district court suggested that customers were confused by Goodyears' usage of the mark and believed Big O to be responsible for deceptive practices—undermining consumer trust in the smaller entity.⁶⁹ Notably, customers came into Big O requesting tires that were being advertised by Goodyear and thus neither marketed or sold by Big O altogether.⁷⁰ Ultimately, while not faced with economic loss, Goodyear's use of the mark substantially disrupted the independent dealers under the Big O label as they had to compete with a significantly larger corporation, a departure from prior circumstances.⁷¹ In finding for Big O, the district court noted:

“Having unleashed this extraordinary effort to identify the name BIGFOOT with [the] Goodyear tire and the defendant company, after learning of the Big O BIG FOOT tires, the officers of Goodyear must be presumed to have foreseen that one of the consequences of such concurrent but disproportionate use would be the creation of an innuendo that Big O was trading off of Goodyear”⁷²

The *Big O* Court maintained that the law of unfair competition necessitated protection against reverse confusion, as the absence thereof would result in large corporations with economic power acting with impunity.⁷³ Following an appeal, the Tenth Circuit affirmed the ruling for Big O and reverse confusion was no longer just a theory—it became actionable.⁷⁴

⁶⁸ *Id.*

⁶⁹ *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 1229 (D. Colo. 1976).

⁷⁰ *Id.*

⁷¹ *Id.* at 1230.

⁷² *Id.*

⁷³ *Id.* at 1236 (holding “[t]he logical consequence of accepting Goodyear’s position would be the immunization from unfair competition liability of a company with a well-established trade name and with the economic power to advertise extensively for a product name taken from a competitor. If the law is to limit recovery to passing off, anyone with adequate size and resources can adopt any trademark and develop a new meaning for that trademark as identification of the second user’s products. The activities of Goodyear in this case are unquestionably unfair competition through an improper use of a trademark and that must be actionable.”).

⁷⁴ See *Big O Tire Dealers*, 561 F.2d 1365 at 1372.

Essentially, reverse confusion occurs when consumers are led to believe that the goods of the later user—the “junior user”—of a mark, are associated with the original trademark owner—the “senior user.”⁷⁵ Further, as the junior user’s use of a mark increases, purchasers begin to associate the mark with the junior user, despite the senior user’s prior use.⁷⁶ The junior user in a reverse confusion case is typically a larger entity with far more resources and the ability to saturate the market with its own product which, in turn, diminishes the reputation that the senior user had taken time to cultivate and establish under the same trademark.⁷⁷ For example, in the foregoing Bieber case, people who know of the celebrity, “Hailey Rhode Bieber,” and then became familiar with her “Rhode” mark, might falsely believe that the original user of the mark, Rhode-NYC, is associated with Bieber and her products—when that is not the case. Currently, six other circuit courts have joined the Tenth in recognizing reverse confusion.⁷⁸ Although perceived as a favorable outcome for small entities, the inconsistency in the resulting framework calls the usability of the reverse confusion theory into question, weakening its legitimacy.

Traditional trademark infringement compromises a wide range of business interests. When a small entity is faced with reverse confusion, the magnitude of harm heightens considerably. Beyond merely preventing customer confusion, trademark law endeavors to protect the reputation associated with a business and the goodwill that comes with an established mark.⁷⁹ “Goodwill is

⁷⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 20 cmt. f, illus. f (Am. Law Inst. 1995). *See also* Flaherty, *supra* note 53 at 78.

⁷⁶ *See* Restatement Third of Unfair Competition § 20 cmt. f, illus. F.

⁷⁷ Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 957 (7th Cir. 1992); *see also* Ameritech, Inc. v. Am. Info. Tech. Corp., 811 F.2d 960, 964 (6th Cir. 1987) (“The public comes to assume that the senior user’s products are really the junior user’s or that the former has become somehow connected to the latter.”).

⁷⁸ Joel R. Feldman, *Reverse Confusion in Trademarks: Balancing the Interests of the Public, the Trademark Owner, and the Infringer*, 8 J. OF TECH. L. & POLICY 163, 167 n.24 (2003), <https://scholarship.law.ufl.edu/jtlp/vol18/iss2/3/> (“The second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have explicitly adopted the doctrine of reverse confusion.”).

⁷⁹ CHRISTOPER T. ZIRPOLI, CONG. RSCH. SERV., IF12456, CHRISTOPER T. ZIRPOLI, AN INTRODUCTION TO TRADEMARK LAW IN THE UNITED STATES, (2023); *see also* Vidal v. Elster, 602 U.S. 286, 305 (2024) (finding

the loyalty that a business earns from its customers” and is often connected to the mark a business owns, also known as brand loyalty.⁸⁰ Specifically, it exemplifies an “expectancy of continued patronage.”⁸¹ Amongst other characteristics, a brands goodwill may consist of public perception and trust, a strong identity, and an emotional connection with consumers resulting in customer retention.⁸²

As aforementioned, in forward confusion cases, “the junior user adopts a similar trademark in order to capitalize on the senior users’ goodwill.”⁸³ In contrast, with reverse confusion this is seldom the case, rather, the dominant, junior entity, is operating in accordance with its overarching vision and economic objectives, generally without deliberate intent to capitalize on the senior users’ goodwill.⁸⁴ Still, despite the lack of ill-intent, the senior user stands to incur material losses as they become overshadowed by the much larger, junior business. For small businesses, a well-established reputation and goodwill are central to viability and success. Accordingly, the factual record that gives credence to a reverse confusion claim calls for a reassessment of the framework through which the record is evaluated. For instance, in forward confusion cases, a strong trademark is beneficial for a plaintiff. Conversely, in a reverse confusion case, the opposite is true. If the senior user has a weak trademark and the junior user has a strong mark, a strong case for reverse

“[t]rademark protection ensures that consumers know the source of a product and can thus evaluate it based upon the manufacturer’s reputation and goodwill.”)

⁸⁰ Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make it Better*, 46 U. MICH. J.L. REFORM 349, 352 (2013).

⁸¹ Thomas F. Cotter, *Damages for Noneconomic Harm in Intellectual Property Law*, 72 HASTINGS L.J. 1055, 1074 (2020-21).

⁸² See *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 n.3 (1993) (Souter, J. dissenting) (“Legislative materials indicate that Congress is, in fact, aware of the accepted definition of ‘goodwill.’) (quoting H. R. Rep. No. 100-495, at 937 (1987) (Conf. Rep.) (“Goodwill has been defined as the expectancy of continued patronage, for whatever reason, or as the probability that old customers will resort to the old place.”)).

⁸³ Leah L. Scholer, Note, *Righting the Wrong in Reverse Confusion*, 55 HASTINGS L.J. 737, 738 (2020-21).

⁸⁴ *Id.*

confusion presents itself by revealing that the junior user's use of a similar mark is diminishing the relevance of the senior brand.

A. Reverse Confusion Involving Celebrity Actors

Understanding reverse confusion with a celebrity actor as a party first demands recognizing the commanding influence maintained by the public figure. The meticulously cultivated illusion of access to an influential individual functions to enhance the economic value of a celebrity persona, transforming perceived proximity into commercial capital.⁸⁵ Due to the fame and influence of a well-known figure, once that individual releases a good or service, overly-invested consumers are likely to indulge “because of the idealized glamour” surrounding it.⁸⁶ The good or service is connected with both the celebrity and the associated mark sold under, therefore, both the product and mark become well-known and economically valuable, solely due to the celebrity persona to which it is attached.

A celebrity brand gains power and status by publicizing the personal life of the influential figure attached to the brand in order to make consumers feel personally connected to them.⁸⁷ This type of relationship creates a devoted clientele which further influences the secondary meaning analysis. Supporters of the public figure become repeat customers who later serve as advertisements for, and ultimately endorse, the brand—all of their own accord. As such, a celebrity adopting a trademark that is already in use by another is likely to create issues for prior users of that mark despite classification differentiation. In cases involving celebrity actors, a smaller entity is likely to disproportionately suffer from the resulting confusion as consumers operate under the

⁸⁵ Naeha Prakash, *Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill*, 35 HASTINGS COMM. & ENT. L. J. 247, 252 (2013).

⁸⁶ *Id.*

⁸⁷ *Id.* at 253.

assumption that the senior user of a mark is infringing upon the celebrity. This stems from a combination of the latter individuals' visibility, reach, and use, of the same mark alone. Worse yet, some might falsely believe that the senior user is copying the celebrity's mark intentionally, despite the senior user being the original trademark holder. Essentially, trademarks derived from the likeness of influential public figures are highly coveted due to the perceived value—justifying the risk of potential infringement in many cases. In addition to benefitting from the heightened legal protections stemming from federal registration when trademarking or using their names in commerce, public figures possess superior bargaining power due to their status in society.⁸⁸

While this note intends to cover both junior celebrity and celebrity-endorsed uses of a mark (*collectively*, “celebrity brands”), the two concepts differ as a celebrity endorsement occurs when a celebrity's name or likeness is simply associated with a product or brand, but not owned or created by the public figure themselves,⁸⁹ and a “celebrity brand” is one that is owned or created by a celebrity. A ‘celebrity’ or ‘influential figure’ is intended to be defined as a widely known individual who possesses economic leverage and is “commonly in the spotlight.”⁹⁰ In addition, such individuals typically have large followings on social media and are often able to utilize their platform to advance their interests. Notwithstanding the above, it must be addressed that analyzing entire corporations with an influential figure at the forefront of a company⁹¹ is beyond the scope

⁸⁸ Jeremy N. Sheff, *Reverse Confusion and the Justification of Trademark Protection*, 30 GEO. MASON L. REV. 123, 143 (2022) (“Successful reverse confusion claims follow an analogous pattern to the parable of the ewe lamb. A large, wealthy company wishes to adopt a trademark, finds out that a small but established company already has rights in that mark, and goes ahead with its plans to adopt the mark, knowing that it will be disastrous for the smaller company but unwilling to accept the cost of changing its plans.”).

⁸⁹ Hailey Schimmel, *Walking, Talking Trademarks: How Influencer Marketing Is Affecting Trademark Enforcement on Social Media*, 6 WAYNE J. BUS. L. 33, 39 (2023).

⁹⁰ Eric D. Gorman, *Who Gets the Last Laugh? Satire, Doctrine of Fair Use, and Copywrong Infringement*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 205, 220 (2010); Andrew M. Jung, *Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites*, 86 CHI.-KENT L. REV. 381, 386 (2011).

⁹¹ Complaint at *3, *Metax LLC v. Meta Platforms, Inc.*, No. 1:22-CV-06125 (S.D.N.Y. July 19, 2022).

of this note. Instead, it specifically focuses on individual celebrities and influential figures whose trademark application or registration is associated with their image, name, or likeness, and the small businesses that have brought suit against them.⁹²

III. CASE STUDIES

Celebrities are entitled to significant rights intrinsically tied to their name and their likeness.⁹³ Yet, such a justification rarely stands alone in an action based upon Section 2(d) confusion where a finding of infringement generally rests on evidence of actual confusion.⁹⁴ Nonetheless, there are numerous non-exhaustive factors that are considered with respect to the likelihood of confusion analysis. In fact, several federal circuit courts have developed their own multifactor tests with slightly varying elements to aid in the endeavor.⁹⁵ Predictably, many reverse confusion cases end up weighing in favor of the junior user—ones involving celebrity brands more-so. The subsequent case studies highlight the substantial commitment and investment expended by small businesses in an effort to launch and sustain their brand, in addition to the extensive efforts required to prove trademark infringement. The analysis is similarly focused on emphasizing the influence and financial leverage held by celebrities, and the impact of reverse

⁹² See e.g. Complaint at 1, *Blue Sphere, Inc. et al. v. Swift, et al.*, No. 8:14-cv-00782-CJC-DFM (C.D. Cal. filed June 26, 2014) (“Lucky 13 is a small, individually owned business”); Dec. of Purna Khatau in Support of Proposed Order to Show Cause Without Emergency Relief at *14, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 1:22-cv-5185 (S.D.N.Y. Jul. 15, 2022) (“[o]ne of our goals was to make the company sellable in the future, once it became sizeable”).

⁹³ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992); see also *McFarland v. E & K Corp.*, No. 4-89-727, 1991 U.S. Dist. LEXIS 1496, at *4 (D. Minn. Jan. 17, 1991) (finding “[a] celebrity’s identity, embodied in h[er] name, likeness, and other personal characteristics, is the ‘fruit of h[er] labor’ and becomes a type of property entitled to legal protection.”).

⁹⁴ 15 U.S.C.S. § 1125. *But see* *Frehling Enters., Inc. v. Int’l Select Grp.*, 192 F.3d 1330, 1340 (11th Cir. 1999) (“[E]vidence of actual confusion is the best evidence of a likelihood of confusion.”); *World Carpets, Inc. v. Dick Littrell’s New World Carpets*, 438 F.2d 482, 489 (5th Cir. 1971) (“[I]t is not necessary to show actual confusion. One merely has to show that the likelihood of confusion exists.”).

⁹⁵ See *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (*Sleekcraft* factors); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.) cert. denied, 368 U.S. 820 (1961) (*Polaroid* test); *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (*DuPont* test); *Wreal, LLC v. Amazon.com, Inc.*, 38 F.4th 114, 128 (11th Cir. 2022) (*Modified* test).

confusion on small businesses in the marketplace that primarily operate in an online capacity. Of particular importance, attention must be drawn to the fact that not all of the senior users in the ensuing cases explicitly plead ‘reverse confusion’ as a theory. Rather, they appear because the entity bringing the claim or challenging the mark is a smaller senior user with concerns that their brand’s reputation and goodwill will be essentially, *diluted*, by a famous infringer’s continued use.

A. Rhode-NYC, LLC v. Rhodedeodato Corp. (Rhode)

On June 15th, 2022, Hailey Rhode Bieber launched *Rhode*, a skincare and beauty brand featuring a curated line of skincare essentials.⁹⁶ Shortly after the launch, owners of the clothing brand Rhode-NYC, filed a lawsuit against Bieber for trademark infringement.⁹⁷ Beginning in 2017, Rhode-NYC had accumulated registrations for several Rhode trademarks.⁹⁸ Sold at luxury retailers including Saks Fifth Avenue and Harrods, former roommates and founders, Purna Khatau and Phoebe Vickers, created the brand in 2014.⁹⁹ Interchangeably calling itself both Rhode and Rhode Resort for four years, the brand ultimately dropped “Resort” in 2018, and was henceforth known exclusively as Rhode.¹⁰⁰ Per Khatau and Vickers, the name Rhode was chosen because it not only reminded them of an island in the Mediterranean, but also for its connection to the mythological figure of Rhode, “daughter of Poseidon and wife of Helios, the gods of the sea and sun.”¹⁰¹ Despite being a smaller business, Rhode-NYC had been featured in multiple fashion and lifestyle

⁹⁶ See Manso, *supra* note 2.

⁹⁷ Rhode-NYC, LLC v. Rhodedeodato Corp., No. 22-CV-5185 (AKH), 2023 U.S. Dist. LEXIS 25319 (S.D.N.Y. Feb. 13, 2023); *see also* Complaint at *1, Rhode-NYC, LLC v. Rhodedeodato Corp., (S.D.N.Y. 2022) (No. 22-CV-5185).

⁹⁸ RHODE-NYC, LLC, Registration No. 7,219,293 (U.S. Pat. & Trademark Off.).

⁹⁹ Madeline Berg, *The Founders of Clothing Brand Rhode Describe Their ‘David and Goliath Fight’ with A-List Celeb Hailey Bieber Over Her New Skincare Line with the Same Name*, BUSINESS INSIDER, (Aug. 18, 2022), <https://www.businessinsider.com/hailey-bieber-rhode-trademark-dispute-with-clothing-brand-details-2022-8> .

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; *see also* Complaint at *7, Rhode-NYC, LLC v. Rhodedeodato Corp., No. 22-CV-5185 (AKH), 2023 U.S. Dist. LEXIS 25319 at 7 (S.D.N.Y. June 6, 2022).

magazines such as Vogue, Elle, and Harper’s Bazaar.¹⁰² In addition, the brand’s pieces have been worn by prominent figures such as Beyoncé, Rihanna, and Sophia Bush.¹⁰³ To the detriment of Khatau and Vickers, Hailey Rhode Bieber also had strong ties to the mark. Being that Rhode is Bieber’s middle-name, she contends that the mark was chosen due to its generational ties and association with family and beauty.¹⁰⁴ Notably, Bieber herself asserted that she “wanted to select a brand name that would immediately associate the brand with [her] personal identity and personal brand that [she] had carefully developed over the years.”¹⁰⁵ Significantly, prior to the suit, Bieber attempted to purchase the mark from Rhode-NYC, but the founders declined to sell considering the time expended into the project.¹⁰⁶

In their complaint, Rhode-NYC underscored the establishment of common law trademark rights stemming from the substantial sale of products in interstate commerce in addition to the rights granted to registered trademark holders.¹⁰⁷ The complaint further alleged that Bieber’s goods are both identical to the products sold by Rhode-NYC as well as *directly adjacent* in regard to the classes under which the products were to be categorized, giving more credence to a likelihood of confusion finding.¹⁰⁸ In an effort to support its assertions, Rhode-NYC provided side-by-side e-mail promotions from the two brands, demonstrating the ambiguity and lack of distinction in marketing materials.¹⁰⁹ Likewise, the clothing brand presented comments from individuals consistently and erroneously associating one company for the other on social media, redirecting

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ Dec. of Hailey Rhode Bieber in Opposition to Proposed Order to Show Cause at *2, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 1:22-cv-5185 (S.D.N.Y. July 13, 2022).

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.* at 11.

¹⁰⁷ Complaint at *13, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 22-CV-5185 (AKH), 2023 U.S. Dist. LEXIS 25319 (S.D.N.Y. June 6, 2022).

¹⁰⁸ *Id.* at 14.

¹⁰⁹ *Id.* at 22-25.

potential customers.¹¹⁰ In addition, Rhode-NYC presented evidence that Bieber began to utilize unique homophone-related hashtags derived from the mark that were in frequent use by the smaller entity since the brands founding.¹¹¹

In its initial proceedings, the United States District Court for the Southern District of New York denied the fashion label's motion to preliminarily enjoin Bieber's use of the mark in conjunction with her new business endeavor.¹¹² In making the determination that Rhode-NYC failed to establish that "the defendants' actions are likely to cause confusion with that mark," the court utilized the *Polaroid* factors based upon the reverse confusion¹¹³ theory:

(1) the strength of the plaintiff's mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the owner will bridge the gap; (5) evidence of actual confusion; (6) defendant's good faith in adopting the mark; (7) the quality of defendant's product; and (8) the sophistication of the consumers will likely cause confusion with plaintiff's mark.¹¹⁴

To begin, Judge Schofield found that the strength of the mark weighed in Bieber's favor because the word "Rhode" is considered descriptive, due to being a name,¹¹⁵ and is thus only awarded protection if it has developed secondary meaning.¹¹⁶ As mentioned previously, secondary meaning is acquired when a mark is associated with a single source in the minds of consumers.¹¹⁷ However, Rhode-NYC failed to present evidence showing "that the mark identifies plaintiff as the source."¹¹⁸

¹¹⁰ *Id.*

¹¹¹ *Id.* at 26-28.

¹¹² Emergency Motion (Remote Proceeding) at *7, Rhode-NYC, LLC v. RhodeDeodato Corp., No. 1:22-cv-05185 (LGS) (S.D.N.Y. filed July 22, 2022).

¹¹³ *Id.*

¹¹⁴ *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

¹¹⁵ See Berg, *supra* note 99 (brand named after Greek mythological sea nymph "Rhode.").

¹¹⁶ See *Abercrombie and Fitch Co.*, 537 F.2d at 9; see also Zilberman, *supra* note 5, at 276 ("Both celebrity names and phrases are classified as 'descriptive' marks. 'Descriptive marks are those trademarks or service marks that only describe the products or services to which they are applied'").

¹¹⁷ See J. Thomas McCarthy, *supra* note 42, at § 4:14.

¹¹⁸ Emergency Motion (Remote Proceeding) at *12, *14, Rhode-NYC, LLC v. RhodeDeodato Corp., No. 22-CV-1585 (LGS) (S.D.N.Y. filed July 22, 2022).

First, Judge Schofield was unable to determine whether the advertising amount expended and sales success achieved by Rhode-NYC were significant in relation to industry standards.¹¹⁹ Second, Judge Schofield found that they not only failed to prove that consumers associated the Rhode mark with the goods of Rhode-NYC, but that the evidence of media coverage submitted was likewise insufficient to show an association between the two.¹²⁰ Lastly, there was evidence that other brands were using iterations of the Rhode mark for similar goods, the culmination of which led to the mark being deemed “weak.”¹²¹

Next, the similarity of the marks was examined, an analysis which favored Rhode-NYC because the marks were visually similar.¹²² Conversely, in regard to the third factor, the court concluded that the products made available by each party in the marketplace were not competitors within the relevant market because Rhode-NYC sold women’s fashion and apparel whereas Bieber occupied the beauty and skincare realm.¹²³ The Judge noted, “cosmetics and women’s clothing may be related products [but], they do not serve common functions, they do not compete, they don’t share physical attributes, they are not inherently comparable.”¹²⁴ In regard to evidence of actual confusion and notwithstanding reliability and authenticity, Judge Schofield failed to take into consideration confusion occurring on a digital landscape, primarily surrounding the parties’ social media.¹²⁵ However, while the “similarity of the marks” factor weighed in favor of Rhode-NYC, Judge Schofield noted that the “proximity of the marks and their competitiveness with each

¹¹⁹ *Id.* at *13.

¹²⁰ *Id.*

¹²¹ *Id.* at *14.

¹²² *Id.* at *15 (finding the two marks consist only of the single word “RHODE” with the primary difference being Rhode-NYC uses all capitals, and Bieber uses all lower case).

¹²³ *Id.* at *16.

¹²⁴ Emergency Motion (Remote Proceeding) at *16, Rhode-NYC, LLC v. RhodeDeodato Corp., No. 22-CV-1585 (LGS) (S.D.N.Y. filed July 22, 2022).

¹²⁵ *Id.* at *17.

other,” favored Bieber.¹²⁶ Further, Judge Schofield determined that there was insufficient evidence to conclude that Bieber intended to enter the clothing industry.¹²⁷ Yet, despite Bieber’s declination of future use of the Rhode mark in connection with the sale of clothing items,¹²⁸ at the time the complaint was filed, Bieber had a pending intent-to-use application for the mark in class 25 for clothing, demonstrating possible intent to venture into new endeavors.¹²⁹

Regarding the remaining factors, there was insufficient evidence to make a determination,¹³⁰ yet enough to determine that an injunction would be improper.¹³¹ Despite being the senior user of a notable, but small business, Khatau and Vickers were unable to prevent Hailey Bieber from utilizing the Rhode mark, and on July 2nd, 2024, the case was voluntarily dismissed as the parties reached a confidential settlement.¹³² The case presents an interesting dilemma when smaller businesses attempt to utilize the reverse confusion theory against celebrity actors in efforts to deter them at the preliminary injunction phase. It is evident that small businesses who primarily utilize social media and online methods as their primary form of advertising will likely have a difficult time in proving both secondary meaning and actual confusion. In addition, it is apparent that smaller entities like Rhode-NYC are disadvantaged at the outset if they are not financially equipped to substantially advertise and garner recognition to the extent of larger entities. Arguably, despite the success of Rhode-NYC in the women’s-wear industry, the notoriety of Hailey Bieber is likely to eclipse the reputation they endeavored so diligently to cultivate. Rhode-NYC notes, “while Rhode has achieved great success in the competitive and challenging fashion industry and

¹²⁶ *Id.* at *15.

¹²⁷ *Id.* at *16.

¹²⁸ Complaint at *15-16, Rhode-NYC, LLC v. Rhodedeodato Corp., No. 12-CV-5185 (S.D.N.Y. June 21, 2022).

¹²⁹ *Id.* at *34.

¹³⁰ *Id.* at *16-19.

¹³¹ *Id.*

¹³² Stipulation of Voluntary Dismissal, Rhode-NYC, LLC v. Rhodedeodato Corp., No. 1:22cv5185 (S.D.N.Y. July 2, 2024).

has established a strong brand identity, there is no question that Ms. Bieber’s worldwide fame affords her a more substantial platform from which to sell products.”¹³³

B. Veronica Morales (*Blue Ivy*) v. BGK Trademark Holdings, LLC (*Blue Ivy Carter*)

Veronica Morales founded an event planning business in 2009 providing services under the trademark Blue Ivy.¹³⁴ In 2020, Morales challenged an intent-to-use application for the mark Blue Ivy Carter, filed by BGK Trademark Holdings, LLC, a corporation named after Beyoncé Giselle Knowles (hereinafter “BGK”).¹³⁵ Morales invested considerable thought into her mark, explaining that “Blue” was intended to pay homage to the “something blue” tradition, a well-established custom typically linked to wedding celebrations; in contrast, “Ivy” was intended to represent the romantic nature of the ceremony.¹³⁶ Morales first registered the mark on October 16th, 2012, in classes 35, product merchandising, and 41, entertainment services.¹³⁷ With Blue Ivy being the name of her daughter, BGK sought the mark for future use in the aforementioned classes alongside a myriad of others, despite Morales’s superior rights as the first-to-use.¹³⁸ In a notice of opposition submitted to the Trademark Trial and Appeal Board (hereinafter “TTAB”), Morales asserted that the use and registration of the proposed mark would likely cause confusion with her already established, and, currently in use, registered mark.¹³⁹ Morales claimed both common law rights and federal rights granted under the Lanham Act for the Blue Ivy mark for entertainment-related purposes.¹⁴⁰

¹³³ Complaint at *19, Rhode-NYC, LLC v. Rhododeodato Corp., No. 22-CV-5185 (AKH) (S.D.N.Y. June 6, 2022).

¹³⁴ See Morales v. BGK Trademark Holdings, LLC, 2020 TTAB LEXIS 619 at *6 n.4 (T.T.A.B. 2020).

¹³⁵ *Id.*

¹³⁶ *Id.* at *27-28.

¹³⁷ BLUE IVY, Registration No. 85,537,624 (U.S. Pat. & Trademark Off.).

¹³⁸ Morales v. BGK Trademark Holdings, LLC, 2020 TTAB LEXIS 619 at *1-5 (T.T.A.B. 2020).

¹³⁹ Notice of Opposition at *1, Morales v. BGK Trademark Holdings, LLC. (T.T.A.B. 2017); see also Morales, 2020 TTAB LEXIS 619 at 5-7; 15 U.S.C. § 1052(d).

¹⁴⁰ Notice of Opposition at *7, Morales v. BGK Trademark Holdings, LLC. (T.T.A.B. 2017).

Regarding the likelihood of confusion analysis, Morales emphasized the similarities in both the design and presentation of the mark.¹⁴¹ Likewise, she claimed that the designated classes in which BGK intended to categorize their goods and services were likely to “overlap extensively” with the same group of customers.¹⁴² In order to determine whether BGK should be prohibited from registering the mark, the TTAB utilized the *DuPont* Factors, examining:

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration . . . (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing. (5) The fame of the prior mark (sales, advertising, length of use). (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark). (10) The market interface between applicant and the owner of a prior mark . . . (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion, i.e., whether de minimis or substantial. (13) [And] any other established fact probative of the effect of use.¹⁴³

For brevity, only the first through fifth factors will be discussed. First, the TTAB found that the marks Blue Ivy and Blue Ivy Carter exhibited similarity in both their perceptual and aesthetic qualities as well as their psychological attributes, all of which are likely to cause consumer confusion.¹⁴⁴ Notably, “the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion” is likely.¹⁴⁵ The TTAB utilizes an objective reasonableness standard—focusing on the average

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

¹⁴⁴ *See Morales, supra* note 134 at *29-30 (finding the marks similar in, “appearance, sound, connotation and commercial impression.”).

¹⁴⁵ *Id.* at *21-22.

purchaser.¹⁴⁶ In this instance, both the registered trademark and the challenged mark contained the words “Blue” and “Ivy,” which gave credence to a likelihood of confusion.¹⁴⁷ While BGK’s proposed mark had a unique textual appearance, the Board noted that marks, “if registered, may be presented in any font, style, size, or color.”¹⁴⁸ Therefore, a unique font alone would not suffice to differentiate the marks—all of which led the TTAB to find in favor of Morales.

Next, the TTAB reviewed the similarity and differences between the services and their associated trade channels.¹⁴⁹ Morales argued that there is overlap between the classes that her mark is registered in and the proposed mark of BGK.¹⁵⁰ Despite this, the Board found no evidence to substantiate an assertion of relatedness as Morales failed to provide specific examples as to how the classes conflicted in a confusing fashion.¹⁵¹ In fact, the Board explicitly noted that while “the identifications of goods and services in the subject application and claimed registration may themselves constitute evidence of the relatedness of the goods or services . . .” such alone will not suffice to substantiate a likelihood of confusion analysis when the goods and services are different and no apparent relationship is found.¹⁵² Essentially, Morales failed to demonstrate that the goods and services in question were identical beyond their class identification numbers.¹⁵³ For instance, Morales and BGK both registered their mark in Class 35.¹⁵⁴ The former for, “event planning and management for marketing, branding, promoting, or advertising the goods and services of others,” and the latter for, “product merchandising for others” and “entertainment marketing services,

¹⁴⁶ *Id.* at *22.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *29.

¹⁴⁹ *Id.* at *30.

¹⁵⁰ Morales v. BGK Trademark Holdings, LLC, 2020 TTAB LEXIS 619 at *30-31 (T.T.A.B. 2020).

¹⁵¹ *Id.* at *23-25.

¹⁵² *Id.* at *33-34.

¹⁵³ *Id.* at *35.

¹⁵⁴ See Morales, *supra* note 134 at *26.

namely marketing, promotion, and advertising for recording, and performing artists.”¹⁵⁵ Further, Morales failed to provide evidence that their goods existed within the same trade channels, which would indicate competition in the market, and a potential overlap of customers.¹⁵⁶ The TTAB explicitly dismissed the notion that online marketing could establish similar trade channels, and likewise held that online advertising could not prove that consumers would confuse similar marks.¹⁵⁷ Thus, while similar in appearance, the TTAB found the services offered under the mark sufficiently different to find in favor for BGK as Morales failed to provide evidence that the services were so related that consumers would be unable to differentiate the sources.¹⁵⁸

Further, the TTAB found that the strength of Morales’s mark was strong but inconclusive.¹⁵⁹ The strength of a mark is determined by both its “inherent” and “commercial” strength, the latter of which may be based on marketplace recognition.¹⁶⁰ Tangentially, Morales’ inherent strength was not at issue due to its permitted registration.¹⁶¹ Commercial strength may be measured through quantitative metrics, such as sales volume, advertising expenditures, and length of time in commerce, as well as by qualitative measures, including consumer receptiveness to, and overall reputation of, a mark.¹⁶² Under *DuPont*, commercial strength of a mark rests upon the particular customers in which the parties advertise their goods and services to as opposed to the general public.¹⁶³ The TTAB found that Morales failed to provide figures in comparison to

¹⁵⁵ *Id.* at *36-37.

¹⁵⁶ Morales v. BGK Trademark Holdings, LLC, 2020 TTAB LEXIS 619 at *37 (T.T.A.B. 2020).

¹⁵⁷ *Id.* at *37-39.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *42.

¹⁶⁰ *Id.* at *39.

¹⁶¹ *Id.* at *40 (finding “[t]he registration is ‘prima facie evidence of the validity of the registered mark . . .’”) (quoting Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b)).

¹⁶² Morales v. BGK Trademark Holdings, LLC, 2020 TTAB LEXIS 619 at *39-40 (T.T.A.B. 2020).

¹⁶³ *Id.* at *40.

competitors within the industry that would demonstrate strong commercial strength.¹⁶⁴ The culmination of evidence, or lack thereof, led the TTAB to conclude that a determination of strength would be premature.¹⁶⁵

Despite finding that the two marks bore closer resemblance than difference stylistically, Morales's likelihood of confusion claim was dismissed because the parties' goods and services were "so dissimilar that confusion is unlikely."¹⁶⁶ More specifically, the aforementioned analysis concluded that the only "services that appeared even marginally related" between the two marks were those relating to advertising and marketing.¹⁶⁷ By holding that Morales failed to prove a likelihood of confusion, and subsequently dismissing the opposition proceeding, Blue Ivy Carter was able to be trademarked by BGK Trademark Holdings.¹⁶⁸

C. Evermore Park, LLC v. Taylor Swift (Evermore)

Evermore Theme Park (hereinafter "Evermore Park"), was a small fantasy adventure attraction in Pleasant Grove, Utah that opened in 2018.¹⁶⁹ Evermore held the rights for the mark Evermore in classes 41 and 25, for live entertainment services¹⁷⁰ and apparel,¹⁷¹ respectively. Despite their preestablished rights to the mark, in 2020, Taylor Swift announced her ninth album, *Evermore*.¹⁷² In response to several cease-and-desist notices issued by Evermore Park, Swift countered with the insinuation that the famous musicians' use of the mark was a benefit for the

¹⁶⁴ *Id.* at *41–42.

¹⁶⁵ *Id.* at *42.

¹⁶⁶ *Id.* at *30, *42–43.

¹⁶⁷ *Id.* at *36.

¹⁶⁸ U.S. Trademark Application Serial No. 98,254,714 (filed Nov. 3, 2023) (U.S. Pat. & Trademark Off.).

¹⁶⁹ Brittani Tuttle, *Evermore Park to Host Experience Park's Grand Opening on Sept. 29*, ATTRactions MAG., Sept. 10, 2018, <https://attractionsmagazine.com/evermore-park-grand-opening/>.

¹⁷⁰ EVERMORE, Registration No. 5,597,168 (U.S. Pat. & Trademark Off.).

¹⁷¹ EVERMORE, Registration No. 4,720,740 (U.S. Pat. & Trademark Off.).

¹⁷² Taylor Swift (@taylorswift), INSTAGRAM, <http://instagram.com/taylorswift/p/CInkR4Ajy1> (last visited October 10, 2024).

small theme park.¹⁷³ Proceeding despite objections, and in association with the album, Taylor Swift and her team (collectively “TAS Management”), released merchandise emblazoned with variations of the Evermore mark.¹⁷⁴ In 2021, prompted by the venture, Evermore Park, LLC filed a preliminary injunction against TAS Management (hereinafter “TAS”) to prohibit use of the Evermore trademark.¹⁷⁵

Per the initial complaint, Evermore Park invested approximately thirty-seven million dollars in the early stages of development, a portion of which was allocated for the acquisition of trademark rights.¹⁷⁶ The investment also consisted of approximately one million dollars in advertising expenditures.¹⁷⁷ In an effort to justify the request for an injunction, Evermore Park sought to prove that confusion was likely, alleging that the clothing items and associated merchandise sold by TAS utilized the Evermore trademark, and that visitors to the park questioned whether there was a collaboration between the small business and the star.¹⁷⁸ Additionally, Evermore Park claimed that traffic to the Park website increased 330.4% on the day of the album launch, however the surge was followed by a downward trend, indicating that those finding the theme park were searching for the album instead.¹⁷⁹ Evermore Park further noted that prior to Swifts’ album, the top result after a Google search for the word “Evermore” would primarily produce content relating to Evermore Theme Park, such as, corresponding social media accounts

¹⁷³ Complaint at *22, Evermore Park, LLC v. Swift, No. 2:21-cv-00069-DOA (D. Utah Feb. 2, 2021).

¹⁷⁴ *Id.* at 23.

¹⁷⁵ Motion for Preliminary Injunction, Evermore Park, LLC v. Swift, No. 2:21-cv-00069-DAO (D. Utah Mar. 24, 2021).

¹⁷⁶ See Complaint at *4-6, *supra* note 173.

¹⁷⁷ Dep. of Ken Bretschneider at *2–3, Evermore Park, LLC v. Swift, No. 2:21-cv-00122-DBB (D. Utah June 16, 2021).

¹⁷⁸ See Complaint at *13, *19, Evermore Park *supra* note 173.

¹⁷⁹ *Id.* at *19-20.

and patron reviews, whereas afterwards, the results were inundated with articles and sources for Evermore—the album.¹⁸⁰

While in their preliminary injunction documents Evermore Park goes further into the likelihood of confusion analysis,¹⁸¹ before substantially progressing any further, TAS countersued the Park for injunctive relief, alleging that they were infringing on Swifts' intellectual property rights by broadcasting her music without the requisite licensing.¹⁸² Already facing financial difficulties,¹⁸³ it is hardly unexpected that litigation concluded in this manner, especially given the status and capabilities of the actors involved. As follows, the case never progressed further than the initial complaint and countersuit as the parties mutually agreed to discontinue litigation.¹⁸⁴ Evermore Park closed on in 2024, for reasons unrelated.¹⁸⁵

The subsequent case study focuses on both celebrity-branded and endorsed goods and services.

D. Blue Sphere Inc. (Lucky 13) v. Taylor Swift

Launched in 1991, Lucky 13 is a clothing and apparel brand primarily centered around motorcycles and the associated lifestyle.¹⁸⁶ The mark encompasses a large range of goods, including clothing, jewelry, and cosmetics.¹⁸⁷ By happenstance, the lucky number thirteen was widely associated with another, more renowned individual—Taylor Swift. While not revealed in the lawsuit, Swift has a long-standing history with the number thirteen, making it a core part of her

¹⁸⁰ *Id.* at *21.

¹⁸¹ See Motion for Preliminary Injunction at *12-22, Evermore Park, *supra* note 175.

¹⁸² TAS Rights Management, LLC v. Evermore Park LLC, No. 3:21-cv-00136 at *1 (M.D. Tenn. Feb. 22, 2021).

¹⁸³ See Complaint at 26, Evermore Park, *supra* note 173.

¹⁸⁴ Judgment at *1, Evermore Park, LLC v. Swift, No. 2:21-cv-00069-DBB, (D. Utah Mar. 25, 2021).

¹⁸⁵ Kayla Baggerly, *Evermore Park Permanently Shuts Its Gates, New Attraction in the Works*, ABC4 (Apr. 10, 2024, 6:24 PM), <https://www.abc4.com/news/wasatch-front/evermore-park-permanently-shuts-its-gates-new-attraction-in-the-works/#:~:text=Brandon%20Fugal%2C%20the%20property%20owner,operations%20and%20have%20moved%20out.>

¹⁸⁶ First Amended Complaint at *6, Blue Sphere, Inc. v. Swift, No. 8:14-cv-00782 (C.D. Cal. June 26, 2014).

¹⁸⁷ *Id.*; LUCKY 13, Registration No. 3,022,964 (U.S. Pat. & Trademark Off.).

brand.¹⁸⁸ In the following action, Blue Sphere Inc. (hereinafter “Blue Sphere”), holder of the Lucky 13 mark, filed an infringement action against Taylor Swift and her business entities.¹⁸⁹ The complaint was subsequently amended to include American Greetings, the greeting card company, who collaborated with Swift to launch the “Lucky 13” Sweepstakes.¹⁹⁰

Blue Sphere alleged that Swift infringed on its marks by selling merchandise and engaging in promotional activities utilizing the Lucky 13 mark.¹⁹¹ States such as California in the Ninth District typically utilize the *Sleekcraft* factors when making an infringement determination:

- (1) strength of the mark;
- (2) proximity of the goods;
- (3) similarity of the marks;
- (4) evidence of actual confusion;
- (5) marketing channels used;
- (6) type of goods and the degree of care likely to be exercised by the purchaser;
- (7) defendant’s intent in selecting the mark; and
- (8) likelihood of expansion of the product lines.¹⁹²

In the complaint, Blue Sphere emphasized the substantial investment of time and resources expended into the brand and the subsequent goodwill that has been cultivated from use of the mark.¹⁹³ Blue Sphere additionally alleged that their goods are domestically and globally recognized in the marketplace, presumably in an attempt to convey the strength of the Lucky 13 mark.¹⁹⁴ Likewise, they noted that when consumers searched for the term, “Lucky 13” on Google, the first hit returned results for Blue Spheres’ goods.¹⁹⁵ To convey similar trade channels and an overlap in consumers, Blue Sphere argued that Swift, “. . . marketing herself as liking fast cars and

¹⁸⁸ Repumore, *Why 13 is Taylor’s Lucky Number*, YOUTUBE, (Dec. 2, 2021) (“I was born on the 13th, I turned 13 on Friday the 13th, my first album went gold in 13 weeks. . . my first number 1 song had a 13 second intro . . . every single time I’ve been seated in row M or row 13 . . . row M is the thirteenth . . . letter . . . I’ve won the award.”) <https://www.youtube.com/watch?v=sybgScZxs6s>.

¹⁸⁹ LUCKY 13, Registration No. 3022964; Initial Complaint, Blue Sphere, Inc. v. TAS Mgmt, LLC, No. 8:14-cv-00782 (C.D. Cal. May 20, 2014).

¹⁹⁰ See First Amended Complaint at *2, *13, Blue Sphere, Inc., *supra* note 186.

¹⁹¹ *Id.* at *17.

¹⁹² AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

¹⁹³ See First Amended Complaint at *6-7, Blue Sphere, Inc., *supra* note 186.

¹⁹⁴ *Id.* at 7-8.

¹⁹⁵ *Id.*

dangerous men who drive them inappropriately, as demonstrated by her *I Knew You Were Trouble* music video—undeniably and squarely fits within the exact consumer demographic to whom Lucky 13 markets and sells its . . . goods.”¹⁹⁶ In addition, Blue Sphere highlighted Swifts’ successful business enterprise and superior experience with intellectual property matters, conceivably in order to underscore the inequities between the worldwide celebrity and that of their smaller, less equipped, brand.¹⁹⁷ In opposition, TAS focused solely on the likelihood of confusion analysis, arguing that there can be no infringement where the goods are unrelated.¹⁹⁸ Further, TAS emphasized that the stylistic differences between the marks, the purposes for their use, and the connection of ‘Taylor Swift’ in relation to only one, eliminated any likelihood of confusion.¹⁹⁹ Swift and Blue Sphere Inc. eventually settled out of court under confidential terms.²⁰⁰ It is pertinent to emphasize that Blue Sphere likely erred by only alleging forward confusion in their complaint as this case was the perfect candidate for the reverse confusion theory.²⁰¹ Like *Big O*, a senior user of a mark, in this case Blue Sphere, is overshadowed by a larger, more influential junior user with vastly superior resources, Taylor Swift.²⁰² Under a reverse confusion framework, some of the facts used against Blue Sphere may have proved beneficial. For instance, use of the Lucky 13 mark combined with the name ‘Taylor Swift’ may encourage consumers to assume that Swift is the senior mark holder, as opposed to the marketing endeavor only being used for endorsement purposes, or as a tool for delineation of a good or service.

¹⁹⁶ Initial Complaint at *17, *Blue Sphere, Inc. v. TAS Mgmt.*, No. 8:14-cv-00782, (C.D. Cal. May 20, 2014).

¹⁹⁷ See First Amended Complaint at *20-21, *Blue Sphere, Inc. v. Swift*, *supra* note 186.

¹⁹⁸ Reply in Further Support of Motion to Dismiss at *10-11, *Blue Sphere, Inc. v. Swift*, No. 8:14-cv-00782, (C.D. Cal. June 10, 2014).

¹⁹⁹ *Id.* at 10.

²⁰⁰ Order of Dismissal of Action, *Blue Sphere, Inc. v. Swift*, No. 8:14-cv-00782 CJC-DFM (C.D. Cal. Nov. 9, 2015).

²⁰¹ See First Amended Complaint at *29, *Blue Sphere, Inc.*, *supra* note 186.

²⁰² See *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 1229 (D. Colo. 1976).

IV. RHODEBLOCKS: SMALL BUSINESSES VERSUS CELEBRITY ACTORS

Though the preceding cases were not all explicitly situated within a reverse confusion framework, the senior users demonstrated many of the elements that establish the theory—only under a forward confusion paradigm instead. Nevertheless, the senior users were unsuccessful due to a combination of factors. First, there was a lack of evidence that indicated that the senior brand was known in both the industry and marketplace, and therefore a failure to prove that actual confusion with the junior brand was likely. Secondly, similarity in design, and overlap in class categorization alone, were not enough to demonstrate a likelihood of confusion. Third, in cases where classification differed, the senior user failed to provide sufficient evidence to allege actual confusion with a junior brand. Lastly, in many of the cases that never continued past the complaint or notice of opposition phase, the smaller senior user was both socially and economically disadvantaged. As a result, senior users are often in a position where ongoing litigation would be unduly burdensome compared to that of their more equipped adversaries, making settlement preferable.

Considering that economic and societal leverage is generally an inherent benefit of being a celebrity, the course of action pursued by celebrity junior users appears to be driven primarily by self-interest. Blue Sphere, for instance, has a licensing program in which they engage in willful collaboration with licensees, an arrangement that has previously proven to be beneficial for both parties.²⁰³ License programs are advantageous when a mark is more beneficial to an infringer, and

²⁰³ See First Amended Complaint at *11, Blue Sphere Inc., *supra* note 186 (“Lucky 13 has a sophisticated licensing program for the marketing and sale of LUCKY 13® goods . . . Each of these licensing partners pay a negotiated royalty payment to Lucky 13, depending upon the licensed LUCKY 13® product, relevant market, and other economic factors.”).

a junior, celebrity user is readily able to absorb the expense.²⁰⁴ Though, not all businesses are willing to surrender part of their brand identity that they have worked diligently to cultivate.²⁰⁵ Therefore, licensing is not always an option and may even be less advantageous to a celebrity infringer when the alternative is, in all likelihood, cheaper, involves less actors, and has the potential for larger financial gain. Unfortunately, seldom do small businesses emerge successful in scenarios of this nature, in fact, most reverse confusion cases end up dismissed or settled in confidential proceedings between the parties.²⁰⁶ Fundamentally, the reverse confusion theory, especially in instances involving celebrity junior users, has fostered inequitable outcomes.²⁰⁷

A. The Digital Rhode: Social Media as a Business Tactic

Social media has exacerbated parasocial relationships, a phenomenon whereby an individual feels a “one-sided and non-reciprocal” strong connection with an online personality.²⁰⁸ Said behavior stems from the blurring between a public figures’ personal identity and that of their brand.²⁰⁹ The *Rhode* case demonstrates the link between personal trademarks and celebrity identity. “Celebrity influencers” differ from the separate categorizations of “celebrity” and “influencer” in the sense that they wield the power, status, and financial means of a *celebrity* along

²⁰⁴ See Feldman, *supra* note 75 at 173-74 (“[A]bility to pay is very relevant.” [B]because of the inherently large size of junior users by definition in reverse confusion cases, the junior user will normally have the ability to pay the minimum fee requested by a reasonable and rational senior user.”).

²⁰⁵ Initial Complaint at *13, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 22-CV-5185 (AKH), 2023 U.S. Dist. LEXIS 25319 at 13 (S.D.N.Y. June 22, 2022).

²⁰⁶ Anthony J. Dispoto, *Protecting Small Businesses Against Trademark Bullying: Creating A Federal Law to Remove the Disparity of Leverage Trademark Holders Maintain Over Small Business*, 16 SAN DIEGO INT’L L.J. 457, 470 (2015) (“a substantial number of [cases] are . . . resolved in the pre-litigation stages.”).

²⁰⁷ Jason Parent, *Federal Trademark Law—A Roadblock to Small Business Success?*, 6 BARRY L. REV. 105, 118 (2006).

²⁰⁸ Gerlinde Berger-Walliser, Stefan J. Hock & Björn Walliser, *Disclosure Effects in Influencer Marketing: Implications for Courts, Regulators and Marketers*, 44 NW J. INT’L L. & BUS. 207, 239 (2024).

²⁰⁹ Dreu Dixon, *Celebmarks: The Battle of Trademarks Between Celebrities and Small Business Owner and How We Protect the Little Guys*, 45 T. MARSHALL L. REV. 21, 27 (2018).

with commanding the influence of their audience akin to that of an *influencer*.²¹⁰ Consequently, such individuals are able to utilize their following to broadcast to a wide spectrum of potential customers with minimal effort.²¹¹ In comparison, small businesses seldom have the same reach as public figures, allowing the latter individuals to easily create consumer awareness, strengthening their mark.²¹² Similarly, due to their less widely known position, smaller businesses are often subject to traditional avenues of marketing in order to garner widespread visibility, often an expensive, and not as beneficial, endeavor.²¹³ Conversely, social media offers the ability to advertise to individuals of various locations and demographics at a cheaper cost—a luxury not awarded through traditional advertising methods.²¹⁴ In fact, advertising on social media has proven to be more effective than other avenues.²¹⁵ Although, one must consider that for such advertising

²¹⁰ Grace Greene, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age*, 168 U. PA. L. REV. ONLINE 153, 158-69 (2020) (“While celebrities create value then advertise, influencers create value as they advertise . . . influencers are immensely popular . . . they wield notable social power over their followers—the power to persuade, the power to inspire, the power to sell. Influencers, despite their wide-ranging popularity, are not celebrities in the traditional sense; they are a product of the social media age. ‘Celeb-influencers’ who, like Kim Kardashian-West, may have gotten their start in the traditional celebrity path but whose current success, popularity, and monetary income are primarily derived from their meticulously curated social media brand. Influencers wield their influence through the Internet. In comparison to celebrities, who can reach their audiences through movies, television commercials, print and radio advertisements, and gossip magazines, influencers almost exclusively use social media platforms—primarily Instagram, TikTok, Facebook, Snapchat, Twitter—blogs, and streaming sites to reach their audiences.”).

²¹¹ Schimmel, *supra* note 89, at 62.

²¹² Zilberman, *supra* note 5, at 308-09 (“A celebrity like Kylie Jenner was allowed to register the common phrase ‘Rise and Shine’ simply because she went viral on social media for saying it. Her application for the trademark was approved because she used the phrase in commerce, and it was distinctive. Within days of her video saying, ‘Rise and Shine’ went viral, she ‘launched two ‘Rise and Shine’ hoodies on her personal shop for \$65, both of which sold out almost immediately.’ This constituted using the phrase in commerce. The phrase is distinctive because it acquired a secondary meaning—the phrase became synonymous in the public mind with Kylie Jenner, even though she did not come up with the phrase herself. Although the mark meets the requirements for a validly registered trademark, the laws are too lenient toward celebrities. It is likely that someone who was not famous and owned a small business would not have been allowed to register a trademark for the same thing because a non-celebrity would not be able to acquire secondary meaning for such a common phrase.”).

²¹³ Berger-Walliser, *supra* note 208, at 216 (“Forbes . . . reports that ‘influencer marketing content delivers 11x better ROI than other more traditional marketing tactics.’”).

²¹⁴ Tatum Simpson, *Legal Ethics and Social Media: A Need for More Detailed Guidelines*, 44 T. MARSHALL L. REV. 97, 99 (2019) (“[S]ocial media marketing is a more cost-effective alternative and can target many people simultaneously.”).

²¹⁵ Berger-Walliser, *supra* note 208, at 215 (“Research in the social sciences has argued and shown that influencers are more effective than traditional advertising.”).

to be productive, one must have an audience—and within this domain, celebrities consistently draw larger numbers. In effect, when a well-known figure promotes their brand and associated merchandise on social media, they can achieve inconceivable monetary success with little financial expenditure, solely using themselves as the primary marketing tool.²¹⁶

In light of the command that such individuals wield, in the current era of influencers and social media marketing, it appears that the previous exception whereby two businesses can share identical or confusingly similar marks under the condition that they operate in distinct categories, is unsustainable. The Rhode case study makes it apparent that Rhode-NYC struggled to successfully and simultaneously compete under the trademark Rhode as consumers only recognized the more famous business, overshadowing prior efforts from the smaller brand. Accordingly, given social medias' ability to provide unfettered access to not only a diverse, but large audience, and the increased brand awareness that results therefrom, digital platforms play an important role when analyzing the commercial strength of a mark in relation to reverse confusion infringement. Consequently, the way in which the strength of a mark should be examined must be reconceptualized. When considered more broadly, it is evident that the likelihood of confusion test was neither intended for such scenarios nor is it currently equipped to manage them effectively.

B. Moral Challenges Surrounding Celebrity Branding

Considering the abundance of resources available to prospective trademark applicants, both paid and free,²¹⁷ celebrity actors and public figures are better positioned to prevent

²¹⁶ Erin Connors, *Trademarks and Twitter: The Costs and Benefits of Social Media on Trademark Strength, and What This Means for Internet-Savvy Celebs*, 52 NEW ENG. L. REV. 189, 190 (2018); see also Siyoung Chung & Hichang Cho, *Fostering Parasocial Relationships with Celebrities on Social Media: Implications for Celebrity Endorsement*, 34 PSYCH. & MKTG. 481 (Mar. 9, 2017) (finding that results showed that consumers' parasocial interactions with celebrities through social media have a positive impact on celebrity endorsement).

²¹⁷ See Beebe, *supra* note 22 at 971.

infringement of another business's trademark compared to non-celebrity applicants. In addition, due to their status and lifestyle, they are generally more likely to be well-experienced with intellectual property matters. In comparison to small businesses, such dominant entities are better situated to select a unique mark that will be equally well regarded, thereby compelling an inquiry into the motivations behind registering marks already in use by other individuals. As Blue Sphere succinctly stated in its complaint, "[t]here can be no doubt that Swift—who has an extensive trademark portfolio and numerous business and licensing partners . . . knows, understands and substantially profits from her carefully cultivated and meticulously managed trademarks and brand, image, and other intellectual property."²¹⁸

Furthermore, considering the aforementioned phenomenon of parasocial relationships, it is probable that *any mark* a notable celebrity utilizes would receive widespread acclaim solely due to the marks' connection with the famous individual. The justifications offered by the junior user for coveting a mark in the instances mentioned previously primarily stemmed from the mark's connection to the users' identity. Though, it is important to highlight that common motivations in reverse confusion cases involving public figures generally differ from those put forth in forward confusion instances. Reverse confusion cases typically involve larger entities that seldom have to capitalize off the reputation of the senior user—their identity is enough to cultivate a reputation for their brand on its own. In *Lucky 13*, TAS particularly maintained that “differences in style and purpose, coupled with the use of ‘Taylor Swift,’ eviscerates any chance that a consumer could possibly be confused.”²¹⁹ With particular regard to the latter portion of the statement, it suggests that influential junior users are cognizant of the command conferred by attaching a celebrity name

²¹⁸ First Amended Complaint at *21, Blue Sphere Inc., *supra* note 186.

²¹⁹ See Reply in Further Support of Motion to Dismiss at *10, Blue Sphere Inc., *supra* note 198 (*emphasis added*).

to a mark. Even further, the language used in the argument itself demonstrates the difficulty bestowed upon small businesses when opposing a celebrity or well-known infringer. Audiences are predisposed to associate with the more widely known individual, giving credence to the notion that the reverse confusion framework, as implemented, is inequitable when engaging with entities operating from opposite ends of the socioeconomic spectrum, and under vastly different conditions.

V. A SECURE RHODE: HOW TO PROTECT SMALL BUSINESSES

Crucial to the reverse confusion framework is the strength of a mark, oftentimes measured by inherent distinctiveness and acquired strength.²²⁰ Acquired strength is generally determined by commercial success.²²¹ A mark holder can provide circumstantial evidence, direct evidence, or a combination thereof, in order to illustrate commercial strength.²²² Circumstantial evidence is often presented in the form of financial investment, used to demonstrate that, in light of the capital devoted, there is an increased probability of consumers associating a mark with a singular brand, given the deliberate effort to make the relationship apparent.²²³ Conversely, direct evidence can be found through consumer studies regarding receptiveness to, and impressions of, a mark, necessary

²²⁰ See *Rhode-NYC, LLC v. RhodeDeodato Corp.*, No. 1:22-cv-05185-LGS (In reference to the Polaroid factors, finding that, “the strength of a mark is based on either or both of two components: “(1) the degree to which the mark is inherently distinctive; and (2) the degree to which it has achieved public recognition in the marketplace, sometimes call[ed] acquired strength”) (quoting *RiseandShine Corp. v. PepsiCo, Inc.*, 41 F.4th 112, 120 (2d Cir. 2022)); *Zamfir v. Casperlabs, LLC*, 528 F. Supp. 3d 1136, 1145 (S.D. Cal. 2021) (Under the *Sleekcraft* test, demonstrating the strength of the mark requires evidence of both its, “conceptual strength and commercial strength”); *Morales v. BGK Trademark Holdings, LLC*, 2020 TTAB LEXIS 619 at *28 (In determining the strength of a mark utilizing the *DuPont* factors the TTAB “consider[s] both [the] inherent strength based on the nature of the mark . . . and [the] commercial strength, based on the marketplace recognition value of the mark.”).

²²¹ See *Morales*, *supra* note 134.

²²² See *Connors*, *supra* note 216 at 195.

²²³ *Id.* at 196.

to corroborate the notion that consumers *do*, in fact, primarily associate a mark with a given brand.²²⁴

That said, commercial strength is an inequitable criterion because an influential figure is bound to dominate the marketplace. Notably, the “[p]laintiff’s ‘commercial’ strength will almost always be weaker in a ‘reverse confusion’ case. Although the plaintiff will be the senior user, it is undoubtedly always the weaker, smaller entity. . . .”²²⁵ For similar reasons, junior celebrity users are aptly positioned to prove secondary meaning for descriptive marks with comparatively less effort than others. Among the factors contributing to the resulting inequities, of significant importance is the lack of consideration for social media and the digital landscape in relation to commercial success. Many of the senior users in the preceding cases recognized the role of social media in advancing confusion. By explicitly rejecting the implication that social media can be a relevant factor in the *Blue Ivy* case,²²⁶ the TTAB relies on a position originally maintained by an Eastern District of Pennsylvania Court:

The PTO goes too far . . . in claiming that because both [applicant’s] services and the registrant’s goods are promoted through websites, the channels of trade are similar. Advertising on the Internet is ubiquitous and ‘proves little, if anything, about the likelihood that consumers will confuse similar marks used on such goods or services.’²²⁷

In a similar fashion, the Judge presiding over *Rhode* refused to consider social media evidence, finding it unreliable despite the fact that the senior users were able to provide evidence of actual confusion by way of consumers conflating their mark with that of the junior users’ online.²²⁸

²²⁴ *Id.* at 195-96.

²²⁵ *See* Del Pizzo, *supra* note 57 at 205.

²²⁶ *See* Morales, *supra* note 134 at 28.

²²⁷ *Id.* at 27 (citing *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087-88 (Fed. Cir. 2014)).

²²⁸ Emergency Motion (Remote Proceeding) at *17, *Rhode-NYC, LLC v. RhodeDeodato Corp.*, No. 22-CV-1585 (LGS) (S.D.N.Y. filed July 22, 2022); *see also* Joint Stipulation of Voluntary Dismissal, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 22-CV-5185 (AKH), No. 134 (S.D.N.Y. Feb. 13, 2023).

Counter to the TTAB and both the Eastern District of Pennsylvania and Southern District of New York Courts, this discussion posits that social media may, and ought to be, a salient factor. Social media serves as one of the most influential and widely utilized platforms for advertising and communication, offering widespread visibility, continuous exposure, and the ability to reach a diverse audience. In fact, a 2023 study revealed that over sixty-eight percent of companies in the United States of America were using social media for advertising.²²⁹ As a result of the trend, greater consideration should be given to confusion happening on digital platforms.

Previously, Nancy Del Pizzo put forth a comment proposing numerous revisions to the factors employed by courts in a reverse confusion analysis in an effort to award senior users more protections.²³⁰ In recognition of the fact that senior users are generally at a disadvantage, Del Pizzo proposes that courts should only explore the “inherent” strength of a senior user’s mark, that is, its’ registrability,²³¹ while examination of both the inherent and commercial strength of the junior users’ mark remain.²³² In the context of celebrity actors, this change ensures that each entity is assessed pursuant to their individual capabilities. By examining the commercial success of only the junior user, the court is better able to assess the advantage held by larger entities, and the potential harms incurred by the senior user.²³³

A. Requiring Different Standards for High-Profile Figures

²²⁹ *Insider Intelligence, Social Network Advertising Spending in the United States from 2021 to 2025*, STATISTA (June 2023), <https://www.statista.com/statistics/736971/social-media-ad-spend-usa/>.

²³⁰ See Del Pizzo, *supra* note 57 at 206-07.

²³¹ See Abercrombie & Fitch Co., *supra* note 40 at 9 (Trademarks are typically broken down into five categories of ‘conceptual’ or ‘inherent’ strength: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful).

²³² See Del Pizzo, *supra* note 57 at 205.

²³³ *Id.*

Critics of trademark law argue that, at present, trademark rules and regulations are far too broad.²³⁴ In consideration of such, greater protections should be awarded to small businesses, recognizing that public figures typically occupy a position of prominence and have a discernible impact on society. Moreover, acquiring a similar level of recognition as a small business is a greater endeavor, in fact, Rhode-NYC explicitly noted, “Hailey [Bieber] could choose any brand for her skin care line. We have only the brand name ‘Rhode’ that we’ve built.”²³⁵ Unlike large corporations, celebrities rarely incur an equally substantial setback to their reputation and growth trajectory, often emerging with their public image largely intact or facing only minimal scrutiny when engaging in unscrupulous behavior.²³⁶ The ability to overcome major setbacks, in large part due to the parasocial relationship with their audience,²³⁷ allow notable public figures to continue behaving in an unbecoming manner unencumbered, as financial constraints deter opposition and repercussions remain rare. For instance, famous junior users are often able to use their opponents lack of status as an advantage. In *Morales v. BGK Trademark Holdings, LLC*, in support of the claim that Morales’s mark is ‘weak’, Beyoncé’s team tellingly argued:

Opposer is a small business, with just three regional offices and a handful of employees. As would be expected of such a small business, Opposer produces a

²³⁴ See Keegan Girodo, *Lookalike Logos: Is a High School’s Use of a Logo or Insignia Similar to That of a University a Violation Under the Lanham Act*, 28 MARQ. SPORTS L. REV. 463, 482 (2018) (“[T]he current trademark law is very broad and allows trademark holders to enforce their rights too broadly . . . only 1.5% of trademark infringement cases make it to litigation.”); Peter Lee & Madhavi Sunde, *The Law of Look and Feel*, 90 S. CAL. L. REV. 529, 546 (2017) (“[T]he subject matter of trademark law is broad—trademark protection extends much farther than just words and symbols, from the name Nike to its omnipresent ‘swoosh.’”).

²³⁵ Rhode (@shoprhode), INSTAGRAM, https://www.instagram.com/p/CfFFGTHPi35/?utm_source=ig_embed&ig_rid=91ddf358-4123-48bb-a77c-83b157cbdf2e (last visited Jan. 6, 2025); see also Christopher D’Avanzo, “If at First You Don’t Succeed . . . the Carter’s Attempt to Trademark BLUE IVY Again,” THE TRADEMARK LAWYER (Nov. 21, 2024), <https://trademarklawyermagazine.com/if-at-first-you-dont-succeed-the-carters-attempt-to-trademark-blue-ivy-again/>.

²³⁶ See Leah C. Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 673 (“Large corporations are vulnerable to the reputational harms that come with such sanctioning, as can be seen in quick resolutions to trademark disputes by shamed large corporations, as well as attempts by shamed large corporations to repair their reputations with their consumer communities.”).

²³⁷ Eugene C. Aw & Lauren I. Labrecque, *Celebrities as Brand Shields: The Role of Parasocial Relationships in Dampening Negative Consequences from Brand Transgressions*, 52 J. ADVERT. 387, 397-98 (2022).

low volume of advertisements, since [she] is the only person involved in its marketing, promotions, and sales . . . Opposer’s online presence is very weak Opposer’s website is infrequently visited by consumers Opposer’s social media accounts are poorly subscribed. For instance, as of September 2017, only 915 accounts followed Opposer’s Twitter page, and as of August 2018, fewer than 3,000 accounts followed Opposer’s Facebook page.²³⁸

While this argument did little to sway the court in BGK’s favor in regard to the commercial strength of Morales’s mark, it is evident that it was deliberately framed in order to undermine the success and significance of the small business, a crucial step towards securing an application for the sought-after mark. The current framework is an unintended consequence of the Lanham Act.²³⁹ Notably, this note intentionally avoids relying only on the complaints themselves in order to refrain from endorsing arguments unsubstantiated by evidence, rather, it argues in favor of smaller businesses receiving greater protections with an appropriate demonstration of confusion. The current framework does little to address disadvantages encountered by smaller entities entirely due to circumstances beyond control, and likewise only serves to disincentivize small businesses from participating in fair competition. Thus, it is imperative to underscore elements that merit further evaluation due to apparent weaknesses in the doctrine that make current inequities permissible.

B. Under Construction: Shortcomings in the Current Reverse Confusion Framework

The current reverse confusion theory fails to sufficiently consider the nature of small businesses. Specifically, the current framework when analyzing whether a mark has achieved secondary meaning is far too restrictive for smaller entities, yet beneficial for those with means.²⁴⁰ Instead, Jeanne C. Fromer proposes a sliding scale which would make the requisite showing of

²³⁸ First Amended Complaint at *21, Blue Sphere Inc., *supra* note 186.

²³⁹ *United States Jaycees v. Phila. Jaycees*, 639 F.2d 134, 142 (3d Cir. 1981) (“Protection of infringers is not a purpose of the Lanham Act”); *see also* *Waits v. Frito-Lay, Inc.* 978 F.2d 1093, 1108 (9th Cir. 1992) (holding “[a]n express purpose of the Lanham Act is to protect commercial parties against unfair competition.”).

²⁴⁰ Jeanne C. Fromer, *Against Secondary Meaning*, 98 NOTRE DAME L. REV. 211, 260 (2022) (“[Secondary meaning] . . . is too easy to establish, especially for well-resourced businesses.”).

secondary meaning directly proportional to the size of a business's footprint.²⁴¹ As a result of this, the burden on a smaller entity to prove secondary meaning would decrease.²⁴² A sliding scale would be beneficial for smaller businesses because it acknowledges the role of secondary meaning in a likelihood of confusion inquiry, while remaining cognizant of the fact that smaller businesses seldom attain similar scale and reach akin to that of celebrities. In cases similar to *Rhode* where the mark at issue is a name, the junior user would have to provide evidence that the association stems from the brand and product itself—not just from the celebrities' association with the product. This amendment to the strength of a mark analysis would ensure that the goods and services convey their value independently. Likewise, it would award smaller businesses the ability to establish consumer awareness within their means.²⁴³

Moreover, while the reverse confusion analysis understandably relies on evidence of actual confusion,²⁴⁴ in the case of a junior user with more status, it is unlikely that the public will associate the senior, smaller user with the larger, well-known, brand. Rather, what will likely happen is the more influential junior user will force the smaller brand into obscurity. Consequently, the revision proposed by Del Pizzo, that evidence should rest not on the public's belief that the junior users' products are associated with the senior user, but on whether the public believes that the senior brand is owned by, or associated with, the more famous junior brand, is an ideal solution for cases involving celebrity actors.²⁴⁵ The foregoing proposal is a significant change because it allows for senior users to provide evidence, by way of market surveys and social media comments, that the

²⁴¹ *Id.* at 261.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 15 U.S.C. § 1125(a).

²⁴⁵ See Del Pizzo, *supra* note 57, at 206; see also Natalya Y. Belonozhko, *Famous Trademarks in Fashion: Why Federal Trademark Dilution Law Favors A Monopoly Over Small Business Success*, 51 WILLAMETTE L. REV. 365, 366 (2015) (“Reverse confusion claims by small businesses have also proven unsuccessful in instances when a more powerful junior user of a mark achieves greater commercial strength than a small business senior user.”).

junior user's use of the same, or similar, mark, is encroaching on business and causing confusion based upon use alone. Evidence of confusion involving celebrity actors in contemporary times requires a novel framework in part due to the avenues that such individuals use to advertise, and the means in which they choose to do so. For instance, by Hailey Bieber utilizing hashtags and marketing methods already frequently used by Rhode-NYC, in conjunction with consumers 'tagging' the latter brand under the impression that they are the former, evidence of confusion exists, but rather in an unconventional manner not yet fully accepted by courts.²⁴⁶ Essentially, all marketing and advertising endeavors become attributable to the more influential, junior user.

Compare the aforementioned cases with *Wreal LLC. v. Amazon.com, Inc.*²⁴⁷ Wreal, LLC was a technology company formed in 2006.²⁴⁸ The following year, Wreal launched a product named 'FyreTV.'²⁴⁹ Yet in 2011, global e-commerce giant Amazon began using the mark 'Fire' to market Kindle tablets.²⁵⁰ And in 2014, Amazon launched 'fireTV' accompanied by a nationwide campaign.²⁵¹ In determining the likelihood of confusion, the Eleventh Circuit considers seven factors initially put forth in *Welding Servs, Inc. v. Forman*.²⁵² In *Wreal*, the court set forth from the outset that "there are several important differences in how the . . . likelihood-of-confusion factors apply in reverse-confusion cases versus forward-confusion cases."²⁵³ Accordingly, the

²⁴⁶ Emergency Motion (Remote Proceeding) at *17, *Rhode-NYC, LLC v. RhodeDeodato Corp.*, No. 22-CV-1585 (LGS) (S.D.N.Y. filed July 22, 2022)

²⁴⁷ *Wreal, LLC. v. Amazon.com, Inc.*, 38 F.4th 114 (2022).

²⁴⁸ *Id.* at 122.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 123.

²⁵² *Welding Servs. v. Forman*, 509 F.3d 1351, 1360 (11th Cir. 2007) (The *Forman* factors consider: (1) distinctiveness of the mark alleged to have been infringed; (2) similarity of the infringed and infringing marks; (3) similarity between the goods or services offered under the two marks; (4) similarity of the actual sales methods used by the two parties, such as their sales outlets and customer base; (5) similarity of advertising methods; (6) intent of the alleged infringer to misappropriate the proprietor's good will; and (7) existence and extent of actual confusion in the consuming public).

²⁵³ 38 F.4th at 121.

analysis reflects the notion that the harm experienced, and theory of infringement, differ.²⁵⁴ *Wreal* is distinguishable from cases in other Circuit Courts because the likelihood of confusion test employed by the Eleventh Circuit includes an intent factor.²⁵⁵ In relation to same, the court noted that “when Amazon launched the fireTV, it specifically tried to flood the market with advertising in an attempt to lower awareness of Wreal’s similarly named mark.”²⁵⁶ Weighing in favor of Wreal, the record evidence revealed that Amazon had knowledge of Wreal’s use of the FyreTV mark.²⁵⁷ Undeterred, Amazon nevertheless proceeded with creating a good with a similar name—a measure viewed unfavorably by the court.²⁵⁸

In *Wreal*, evidence illustrating that, following the utilization of a mark by a junior user, consumers were confused as to where, or, from whom, the product or service originated from, garnered heightened attention.²⁵⁹ On this basis, the *Wreal* Court considered confusion arising across digital platforms.²⁶⁰ Initially hesitant due to the limited instances of direct evidence made available by Wreal, prior case law aided in determining that the two examples provided were sufficient to demonstrate direct evidence of reverse confusion.²⁶¹ Pertinent to the present

²⁵⁴ *Id.* at 140.

²⁵⁵ *See id.* at 135-36 (“The Seventh Circuit . . . has eliminated the intent element from its likelihood-of-confusion test in reverse-confusion cases. The Third Circuit has acknowledged that evidence of intent to infringe is not expected in reverse-confusion cases but continues to consider such evidence if it exists. . . . [T]he Tenth Circuit, while similarly discounting the importance of the intent factor in reverse-confusion cases, has continued to apply it in the same manner in both forward-and reverse confusion cases. Finally, the Ninth Circuit applies a modified version of the intent factor in reverse-confusion cases, under which indicia of intent may come from a variety of sources . . .”).

²⁵⁶ *See id.* at 137.

²⁵⁷ *Id.* at 140.

²⁵⁸ *See id.*

²⁵⁹ *See id.* at 137-38 (“[E]ven more relevant is direct evidence of reverse confusion—i.e., evidence that consumers of the plaintiff’s more senior mark became confused as to its source following the launch of the defendant’s more junior mark.”).

²⁶⁰ *Id.* at 138 (finding “[t]he record evidence here contains some evidence of actual confusion. For example, Wreal introduced evidence that one of its customers asked over Twitter, ‘Did you guys just merge with Amazon?’ And one of Amazon’s customers communicated with Amazon to ask whether he could access ‘adult content’ on his Amazon ‘fyre’ TV. Both instances directly suggest reverse confusion; the first consumer believed Amazon had purchased Wreal’s trademark, and the second consumer contacted Amazon to inquire about Wreal’s product”).

²⁶¹ *Id.* at 138-40.

discussion, *Wreal* turned not on whether online occurrences of confusion were admissible, but whether the quantity of evidence offered was sufficient, supportive of this notes' position that such evidence should be permitted when offered.

While *Wreal* is distinguishable from the case studies mentioned thus far—as it involves a corporation—a departure from the individual celebrity actors analyzed, it demonstrates a successful reverse confusion action with an emphasis on confusion substantiated by social media and online platforms. The district court's decision was reversed in favor of *Wreal* primarily because the appellate court recognized the intent of reverse confusion theory and analyzed the factors put forth under forward confusion accordingly.²⁶² The analysis in *Wreal* makes it evident that smaller businesses in other district courts seldom prevail because of an apparent failure to comprehend the circumstances surrounding the alleged infringement. In a comparable fashion, the structure of the frameworks utilized by certain courts fail to accurately represent the true manner in which reverse confusion manifests.

C. Other Rhodes to Recourse

The purpose of a trademark is to help brands differentiate their products from those made by competitors.²⁶³ Dual utilization of the same mark, even under different ownership, can result in erosion of reputation and brand identity.²⁶⁴ To mitigate the risk of being overshadowed by a junior users' superior standing, additional remedies must be available to smaller senior users. The Federal Trademark Dilution Act was enacted in 1995, and then amended as the Trademark Dilution Revision Act in 2006 (hereinafter "TDRA").²⁶⁵ The TDRA extended special rights to "famous"

²⁶² *Id.* at 140.

²⁶³ 15 U.S.C. § 1127.

²⁶⁴ *Analytic Recruiting, Inc. v. Analytic Res., LLC*, 156 F. Supp. 2d 499, 519-20 (E.D. Pa. 2001).

²⁶⁵ 15 U.S.C. § 1125(c); *see also* Federal Trademark Dilution Act, H.R. 1125, 104th Cong. (1995); Trademark Dilution Revision Act, H.R. 683, 109th Cong. §1(a) (2006).

marks under the principle of dilution, a framework which could be retrofitted to award small businesses with a large enough presence similar rights.²⁶⁶ A mark is famous “if it is widely recognized by the general consuming public of the United States as a designation of the source of the goods or services of the mark’s owner.”²⁶⁷ Trademark dilution is the unauthorized use of a *famous* mark in commerce that is likely to cause “dilution by blurring” or “dilution by tarnishment.”²⁶⁸ For purposes of this discussion, only “dilution by blurring” is pertinent. Dilution by blurring occurs when there is similarity between a famous mark, and one not so, that diminishes the distinctiveness of the former.²⁶⁹ The underlying principle behind the prerequisite that marks be famous in order for dilution to be applicable is premised on the idea that notable marks are worthy of stronger protections due to the effort required to reach distinction.²⁷⁰ However, small businesses working against prominent figures should be offered similar dilution rights in order to enjoin a junior celebrity user from simultaneously using the same mark. The justification for such is due to the ease in which a celebrity actor can claim a mark, in use or otherwise, make it known worldwide due to their reach and status, and methodically diminish the smaller brands’ social and marketplace prominence.

Previously, Paris Booker wrote an article posing an inverse trademark dilution test.²⁷¹ The theory aims to prioritize the safeguarding of a smaller business’s less “famous” trademark from

²⁶⁶ 15 U.S.C. § 1125(c); Paris Booker, *Are You Ready to Rum-Ble? A Proposal On Fighting Trademark Infringement for Small Businesses*, 22 UIC REV. INTELL. PROP. L. 308 (2023); Scott C. Wilcox, *The Dilution Solution: Populating the Trademark A-List*, 105 MICH. L. REV. 113 (2006) (“Congress has . . . limited the scope of dilution protection to A-list brands.”).

²⁶⁷ 15 U.S.C. § 1125(a).

²⁶⁸ 15 U.S.C. § 1125(c)(1).

²⁶⁹ 15 U.S.C. § 1125(c)(B).

²⁷⁰ *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992) (holding “[A] mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark.”).

²⁷¹ See Booker, *Are You Ready to Rum-Ble? A proposal On Fighting Trademark Infringement for Small Businesses*, *supra* note 266 at 321.

loss of distinctiveness by a larger, more influential, junior user.²⁷² As per the Lanham Act, a trademark must be “famous” in order to be diluted,²⁷³ opponents may consider it paradoxical to argue that small businesses may qualify for a “famous” mark given the seeming contradiction between the absence of apparent fame and the intended purpose of dilution theory. Significantly, the inverse dilution test is not intended to turn on the notoriety of a mark, for a smaller business is unlikely to ever succeed; instead, the proposed test addresses shortcomings in the law that allows for unencumbered trademark acquisition by celebrity actors. Sandra L. Rierson puts forth:

Statutory dilution claims are traditionally justified on the theory that even non-confusing uses of a famous trademark (or similar mark) can nonetheless minutely dilute the source-identifying power of the targeted trademark. The alleged harm from dilution is cumulative: unchecked, the dilutive activity subjects the trademark to death by a thousand cuts.²⁷⁴

Accordingly, non-famous mark holders are not immune to dilution. Inverse trademark dilution is a novel theoretical framework because it is available to those who typically would be prohibited from claiming dilution. The proposal of the inverse dilution test does not advocate for allowing smaller businesses to utilize marks in connection with a celebrity’s persona freely. Rather, it encourages consideration of a senior users’ pre-existing, good faith use of a mark, that is simultaneously and coincidentally intertwined with a celebrity persona, that was not yet used in connection to a celebrity previously, and which thereafter gains notoriety as a result of a celebrity’s use. A smaller-brand with a long-standing online presence similar to Rhode-NYC, that was first to use a trademark, is likely to undergo inverse dilution when a larger, more famous individual or brand, like Hailey Bieber, adopts a similar mark, uses similar marketing methods, and markets to similar populations. The resulting use is likely to overwhelm search results and eventually render

²⁷² *Id.*

²⁷³ *See id.*

²⁷⁴ Sandra L. Rierson, *The Myth and Realty of Dilution*, 11 DUKE L. & TECH. R. 212, 213 (2012).

the original brand obsolete. In this regard, “dilution” requires a different analysis better tailored to modern uses of technology.

Many of the senior users in the aforementioned cases noted the decline in visibility once the more prominent junior user entered the online market under the same trademark. As revealed in the *Rhode* documents, small businesses encounter significant setbacks when larger celebrity actors create businesses under the same mark, primarily due to the nature of a celebrity to garner heightened attention and prominence.²⁷⁵ Similarly, on account of both their position in society and financial leverage, celebrity actors are able to use themselves as advertisements at virtually no-cost, whilst also possessing the ability and connections to advertise traditionally. As a result, consumers looking for the senior user are pushed toward the more renown junior user who is endowed with far superior resources to influence such a result. Notably, *Rhode-NYC* emphasized confusion occurring between consumers as well as Bieber’s adoption of elements of their online brand identity.²⁷⁶ Use of the same mark by Bieber made the distinction between the two brands increasingly ambiguous for consumers. Viewed in totality, by recognizing the various challenges faced by a senior user when equipped with a coveted, unique mark, courts would be better positioned to analyze and understand the reach of junior celebrity brands, the ability to detract from the reputation of a smaller entity, and the difficulties posed by sharing the same mark.

D. Reaching A Level Rhode

Modifying the reverse confusion analysis for a more equitable application and offering additional avenues of recourse for small businesses is not without limitation. Whilst not exhaustive, a few of the challenges posed by doing such include: (1) addressing a celebrities’ right

²⁷⁵ See Complaint at *22-25, *Rhode-NYC, LLC v. Rhodedeodato Corp.*, No. 22-CV-5185 (AKH), 2023 U.S. Dist. LEXIS 25319 (S.D.N.Y. June 6, 2022).

²⁷⁶ See *id.* at *26-28.

to their name and associated likeness and, (2) ensuring that efforts to promote balance do not inadvertently create new inequities.

1. *The Right to a Name*

Celebrities generally have an exclusive right to the use of their identity similar to the interest a trademark holder has with a registered mark.²⁷⁷ While there are currently no federal protections for the right of publicity, such is typically safeguarded by state laws.²⁷⁸ The right of publicity prevents the unauthorized use of a celebrities name and or likeness for a commercial purpose.²⁷⁹ Notwithstanding eligibility, celebrities have a right, and should continue to have the right, to trademark names in use with their celebrity persona. However, a challenge arises when a celebrity aims to trademark an associated name that was previously registered and already in use by another. How might the two coexist when the factors discussed in Section III fail to address the capacity of a celebrity to overwhelm the marketplace due to their status alone? A potential solution: in cases where the senior mark is used in a way unrelated to the celebrity applicant's likeness, and where the celebrity or influential junior user is operating in bad faith, ignoring the vast number of resources at their disposal to ensure that confusion or similarity is unlikely, the reverse confusion analysis should remain the same as if the celebrity was a non-famous actor. Current legislation fails to acknowledge non-famous marks that then become "famous" in some regard due to use by

²⁷⁷ *Estate of Bisignano v. Exile Brewing Co., LLC*, 694 F. Supp. 3d 1088, 1113 (S.D. Iowa 2023) (citing 1 J. Thomas McCarthy & Roger E. Schechter, *Rights of Publicity and Privacy* § 6:2 (2d ed. 2023) ("Thirty-three states now recognize a right of publicity through statutes or the common law.")).

²⁷⁸ *Ohio State Univ. v. Redbubble, Inc.*, 989 F.3d 435, 448 (6th Cir. 2021) (quoting *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir. 2000)) ("The right of publicity is a creature of state common law and statute and originated as part of the common-law right of privacy.").

²⁷⁹ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.").

an influential figure, after all, Rhode was merely a name until Rhode-NYC started their brand—a name that then became further widely-recognized due to Bieber’s subsequent association and use.

2. *Finding Balance*

Several responses may be made to the critique that amending the reverse confusion analysis is likely to inadvertently create new inequities in favor of smaller businesses. Yet, the current framework that subjects small businesses to the mercy of larger entities is contrary to the principles of fair competition. At present, any celebrity junior user with sufficient resources and influence possesses the ability to create a product in a similar, but different, class, overwhelm the media and marketplace with use of a pre-existing mark, and ultimately confuse consumers about the origins of the mark. As the smaller, senior user lacks the resources to compete, there is little recourse available. Thus, even if it is determined that a revised framework provides small businesses with a slight advantage in comparison to the current tests, the proposed amendments allow for a better balancing of factors that consider a smaller entity proportionally to a larger, junior actor that is better situated, both influentially and economically, to choose a novel mark.

It may further be contended that permitting the consideration of social media evidence imposes a significant burden upon the judicial system due to the frequency and ease in which social media messages and posts can be nefariously manipulated. However, there are various court rules pertaining to the authentication of evidence, thus it is not of significant concern.²⁸⁰ Likewise, non-typical forms of evidence being used in trademark infringement is not a novel scenario.²⁸¹

E. Damages

²⁸⁰ FED. R. EVID. 901; *see also e.g.* N.J.R.E. 901; GUIDE TO NY EVID., rule 9.01; CAL. EVID. CODE, § 1400.

²⁸¹ *See Wreal, LLC. v. Amazon.com, Inc*, 38 F.4th 114, 140 (2022).

Senior users in reverse confusion cases face both economic and non-economic harms. Economic harms consist of litigation costs, lost profits, and mitigation expenses whereas noneconomic harms include the loss of goodwill.²⁸² Generally, injunctive relief is the most frequently granted remedy for trademark infringement, prohibiting any further use of a mark to prevent an infringer from reaping undue benefits.²⁸³ Though, alternative solutions may consist of receiving the profits wrongly incurred and litigation fees.²⁸⁴ Preservation of goodwill is a pillar concept of modern trademark law.²⁸⁵ In comparison to economic harms, non-economic harms are more damaging because smaller entities are generally more likely to have a difficult time recultivating a damaged reputation.²⁸⁶ Once an asset, reverse confusion renders a mark useless when a more notable user enters the marketplace under a similar brand identifier.²⁸⁷ While both the senior and junior user are likely to suffer due to consumer confusion, the imbalance that results can be far more devastating for a smaller entity who lacks the resources to maintain relevancy.

Unique harms arise in cases involving public figures. For instance, public perception, frequently influenced by a celebrity's persona and actions, can reshape the perceived value of a trademark, creating biases that disproportionately disadvantage the senior user. In effect, the behavior or actions of a celebrity could negatively impact any trademarks to which they are attached, irrespective of actual ownership, demonstrating the consequences that result from

²⁸² See Cotter, *supra* note 81 at 1057.

²⁸³ 15 U.S.C. § 1115; see also Lauren Straight, *A Case for Compulsory Licensing in Instances of Reverse Trademark Confusion*, 53 CONN. L. R. 209, 214-15 (2021) (noting “[i]n most intellectual property litigation, the principal battle is resolved by the grant or denial of injunctive relief.”).

²⁸⁴ Straight, *supra* note 283 at 215.

²⁸⁵ Robert W. Emerson & Katharine C. Collins, *Mutating Marks: Refusing to Lose the Trademark Trail*, 51 NW. J. TECH. & INTELL. PROP. 149, 154 (2018).

²⁸⁶ Fraser Tennant, *Hard to Build, Easy to Destroy: Managing Reputation Risk*, FINANCIER WORLDWIDE (May 2018), <https://www.financierworldwide.com/hard-to-build-easy-to-destroy-managing-reputation-risk> (“A good reputation is among the most important assets a company can possess. However, this asset is fragile. In the event of a scandal, disaster or accident, a reputation that has taken years of diligence to build can be damaged in the wink of an eye and may, in some cases, be impossible to repair.”).

²⁸⁷ See Scholer, *supra* note 83 at 738.

infringement. Undoubtably, the most damaging aspect of reverse confusion is that it diminishes the value of the senior user's mark as it becomes associated with the junior, yet more influential user. As a result, the senior user loses control over its mark despite owning it first.²⁸⁸ Considering that the junior user in celebrity reverse confusion cases is generally better-positioned for the reasons set forth above, the harms should be assessed accordingly.²⁸⁹

CONCLUSION

It is important to recognize that reverse confusion is trademark infringement. Celebrities capitalizing off of their image ensures that they maximize profits as they are able to utilize their identity and parasocial relationships to reach a wider audience and cultivate relevance. Public figures, therefore, have an inequitable advantage in acquiring exclusive rights to a word or phrase in comparison to small businesses.²⁹⁰ The consequence being that they are allowed to continue to add to their wealth while small businesses are likely to be overshadowed.²⁹¹ Wielding immense influence, notable junior users are able to overcome many of the current factors assessed for reverse confusion purposes. Allowing powerful junior users the ability to register marks with impunity defeats the purpose of trademark registration. Under the current reverse confusion

²⁸⁸ See Feldman, *supra* note 75 at 169-70.

²⁸⁹ See *Analytic Recruiting, Inc. v. Analytic Res., LLC*, 156 F. Supp. 2d 499, 519-20 (E.D. Pa. 2001) (“I must also consider the relative hardships to the parties of granting injunctive relief. In this case, injunctive relief would not harm defendant, the infringer, more than denial would harm plaintiff, the owner of the name. It is inevitable that defendant will incur certain expenses in changing its trade name. However, plaintiff's potential loss of clients and, therefore, revenue far outweighs any detriment to defendant . . . Furthermore, even if defendant in good faith selected the name . . . without intent to infringe on plaintiff's trade name or to profit from plaintiff's reputation, defendant selected a name substantially similar to plaintiff's name with full knowledge of the similarity. . . Defendant, therefore, assumed the risk of potential harm that would result if plaintiff later objected. Under these circumstances, any injury that defendant might suffer as a result of an injunction is outweighed by the irreparable harm to plaintiff.”).

²⁹⁰ Zilberman, *supra* note 5 at 309; Simran Thakur, *All I Want for Christmas Is a Trademark*, 57 UIC L. REV. 327, 362 (2024).

²⁹¹ See Sheff, *supra* note 88 at 143 (“The stereotypical reverse confusion case . . . aligns . . . closely with the story of David and Uriah. [I]t resembles the parable of the ewe lamb In that parable, a rich and powerful man takes from a poor man his only beloved ewe lamb and slaughters it to host a feast for a guest, rather than selecting from among his own vast flocks to satisfy his wants.”).

framework, trademark registration is only beneficial for smaller users until a more powerful junior user arises.²⁹² Reverse confusion is detrimental to smaller senior users as they lose “the value of the[ir] mark, its product identity, corporate identity, [and] control over its goodwill[,] reputation, and ability to move into new markets.”²⁹³ Inherent to the name, small businesses operate on a vastly reduced scale in comparison to celebrity actors that possess more discretionary resources and greater influence—factors many of the current confusion frameworks fail to take into account.

Reverse confusion claims involving celebrity actors should be analyzed differently for a myriad of reasons. First, ‘acquired strength’ is an inequitable criterion as a junior, celebrity user is bound to dominate the market due to having more economic resources to expend. Second, celebrity actors possess influence and the ability to garner widespread audiences, granting an advantage when attempting to create secondary meaning. Third, celebrity actors are optimally situated to choose a mark that is not in use by another. Ultimately, the current reverse confusion framework is insufficient in the contemporary era to sufficiently address the power of celebrity influence, conflicting trademark usage in a digital landscape, and the power of consumer parasocial relationships with influential figures. As such, courts should award greater protections to small businesses who have neither the resources nor the financial bandwidth to take on celebrity actors.²⁹⁴

²⁹² Inna Kaminer, *Set the Statutes Straight: Amending the Lanham Act to Dispel the Confusion Regarding Reverse Confusion*, 36 LOY. L.A. ENT. L. REV. 71, 94 (2015).

²⁹³ See Parent, *supra* note 207 at 119.

²⁹⁴ See Jeremy N. Sheff, *Reverse Confusion and the Justification of Trademark Protection*, 30 GEO. MASON L. REV. 123 n.107 (2022) (citing *Theia Techs. LLC v. Theia Grp., Inc.*, No. 20-97, 2021 WL 291313, at *22 (E.D. Pa. Jan. 28, 2021) (“Reverse confusion protects David’s trademarks against an encroaching Goliath.”)).