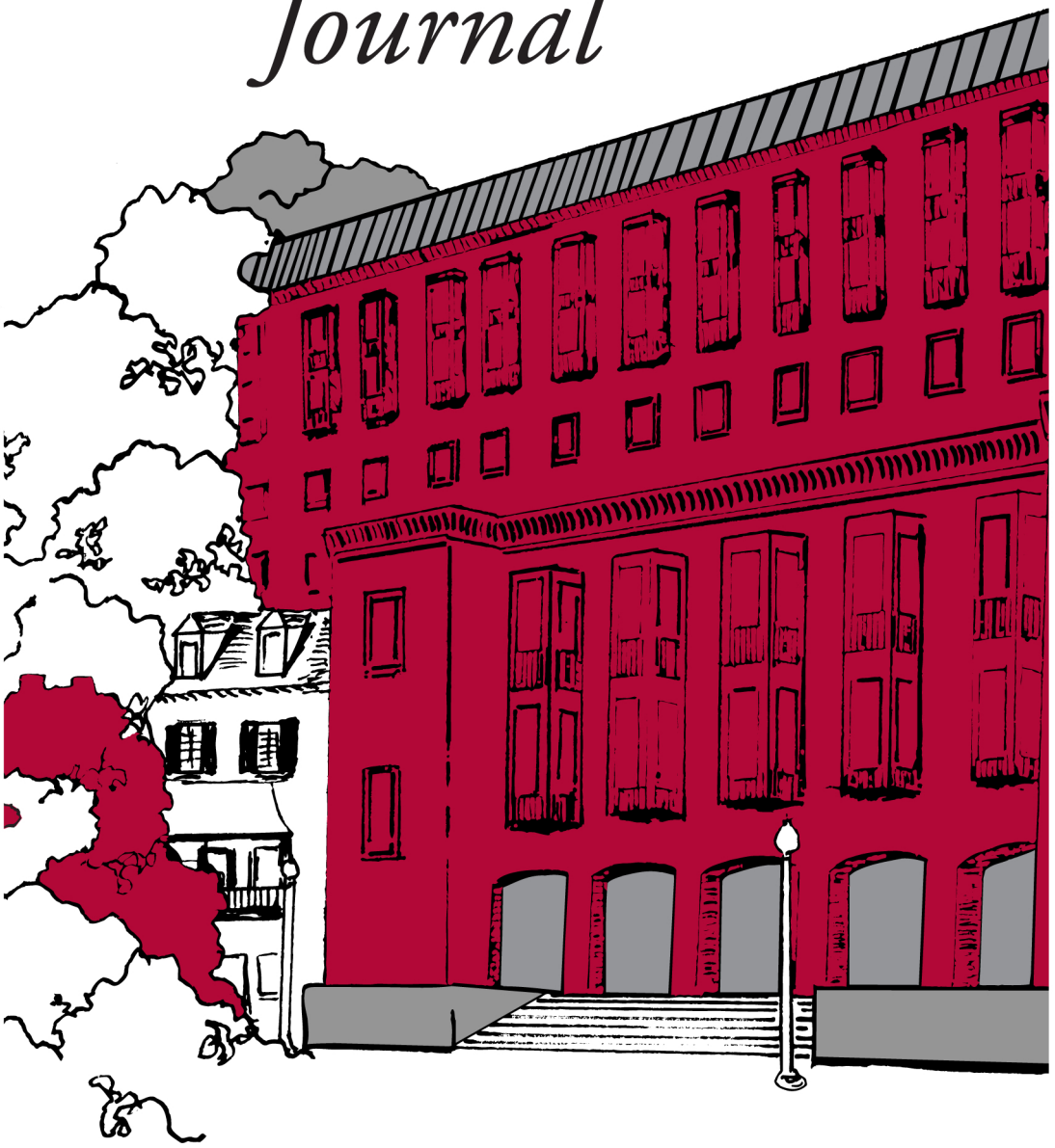
Federal Circuit Bar *Journal*



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Reaping Relief: Tucker Act Claims and Federal Obligations to Migrant and Seasonal Farmworkers

Annalie Cope*

Introduction

In 2025, over 2.2 million farmworkers worked across American agriculture.[1] Farmworkers sustain the nation's food economy, yet federal oversight of agricultural labor programs remains inconsistent and ineffective.[2] Over the past decades, government accountability offices and human rights organizations have reported widespread abuses of migrant workers, especially those from Latin America, regardless of the workers' citizenship status.[3] To address these

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* J.D. Candidate, May 2027, The George Washington University Law School; B.S., University of South Florida. Thank you to the *Federal Circuit Bar Journal* Editorial Board and Staff for their diligent work and guidance in preparing this piece for publication. Special thanks to my family, friends, and mentors for their support throughout my academic career.

[1] *See* U.S. Bureau of Lab. Stat., Labor Force Statistics from the Current Population Survey Employed People in Agriculture and Nonagricultural Industries by Age, Sex, and Class of Worker (2025), [https://perma.cc/U9H2-WBZZ].

[2] *See Farm Labor*, U.S. Dep't of Agric., Econ. Rsch. Serv., [https://perma.cc/SX7D-E4H6] (last visited Oct. 28, 2026); Bruce Goldstein, Barbara Howe & Irit Tamir, Weeding Out Abuses: Recommendations for a Law-Abiding Farm Labor System 2, 13–15 (2010).

[3] *See* U.S. Dep't of Lab., The Agricultural Labor Market—Status and Recommendations (2000), (explaining how "agricultural worker earnings and working conditions are either stagnant or in decline" despite the increasing demand and use of migrant farmworkers); *see also* U.S. Gov't Accountability Off., GAO-15-154, H-2A and H-2B Programs: Increased Protections Needed for Foreign Workers, at 2, 2 n.6, 30–31 (2015; reissued in 2017) [hereinafter GAO-15-154] (discussing inadequacies of government oversight measures by the Department of Labor Wage and Hour division). *See generally* 29 U.S.C §§ 1853, 1861–1863 (DOL is statutorily conscribed to oversee the AWPA). Between 2020 and 2022, 42% of farmworkers in the United States lacked work authorization; the scope of this Note does not consider undocumented migrant workers in depth, but the author recognizes that some of the pathways or solutions discussed in this Note may apply to unauthorized migrant workers in the United States. *See generally*, Marcelo Castillo, U.S. Dep't Agric., Legal Status of Hired Crop Farmworkers, Fiscal 1991–2022 (2025) (showing "hired crop farmworkers who were not legally authorized to work in the United States" between 1991–2022).

harms, Congress adopted fragmented statutory approaches through Section H-2A of the Immigration and Nationality Act ("INA")[4] and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[5] While the Fair Labor Standards Act ("FLSA")[6] extended some labor protections to farmworkers, many relief pathways and protections are limited or inapplicable to farmworkers.[7] AWPA and H-2A provide basic contract transparency and safety regulations for housing, transportation, wages, and recruitment practices.[8] Despite these regulatory frameworks, chronic federal underenforcement leaves migrant and seasonal farmworkers vulnerable to exploitation, dangerous conditions, and wage violations.[9]

The U.S. Supreme Court's decision in *United States v. Mitchell* ("*Mitchell II*")[10] established that federal fiduciary duties may arise not only from statutes that invoke explicit trust language, but also from regulatory regimes in which the U.S. government exercises "'comprehensive' control" over an economic or resource-management system.[11] The H-2A program, rife with mandatory duties and exercises of comprehensive federal control, shares structural similarities with the statutory regimes that triggered enforceable fiduciary obligations in *Mitchell II*.[12] However, despite similarities between the regulatory programs in *Mitchell II* and the farmworker protection statutes, courts and scholars have yet to examine whether federal mismanagement of labor

[4] 8 U.S.C. § 1188.

[5] 29 U.S.C. §§ 1801–1872.

[6] *Id.* § 203.

[7] 29 C.F.R. § 780.300 (2026) (FLSA minimum wage and maximum hour standards do not apply to farmworkers if (A) the employer did not "use more than 500 man-days of agricultural labor," (B) if the farmworker is immediately related to the employer, (C) if the farmworker is paid on a piece-rate basis).

[8] *See* U.S. Dep't of Lab., Farm Workers Rights (Mar. 2022), [https://perma.cc/VEB9-4LQN]; *see also* U.S. Dep't of Lab., Cultivating Compliance: An Agricultural Guide to Federal Labor Law 4, 8, 16, 28, 32–37 (July 2014), [https://perma.cc/PQ22-SSDL].

[9] *See* Kamala Kelkar, *When Labor Laws Left Farm Workers Behind—and Vulnerable to Abuse*, Pub. Broad. Serv., NewsHour (Sep. 18, 2016, at 16:47 ET), [https://perma.cc/VSB5-WTKB].

[10] 463 U.S. 206 (1983).

[11] *Id.* at 209, 224–25.

[12] *Compare H-2A: Temporary Agricultural Employment of Foreign Workers*, U.S. Dep't of Lab., [https://perma.cc/GC4M-926K] (last visited Oct. 28, 2026) (outlining how the U.S. government has broad authority to approve and admit H-2A visa holders), *with Mitchell*, 463 U.S at 209 (noting the "broad statutory authority" that the U.S. government has on timber resources).

protections for migrant and seasonal farmworkers is actionable in the U.S. Court of Federal Claims ("COFC").[13]

The doctrinal gap creates devastating impacts to migrant farmworkers, who are among the least protected and most economically vulnerable class of workers.[14] Migrant workers often have no meaningful remedies when federal agencies fail to enforce housing standards, neglect complaint investigations, or ignore dangerous workplaces.[15] Traditional administrative pathways and private rights of action for migrant and seasonal farmworkers can be inaccessible and sometimes nonexistent.[16] Bringing claims in the COFC for federal mismanagement of farmworker protection statutes offer an alternative path to relief for a group that has historically been subject to workplace exploitation.[17]

Most political development focuses on strengthening existing enforcement and expanding migrant farmworkers' private rights of action.[18] Little attention, however, is paid to another avenue: whether federal mismanagement of farmworker protection statutes allows claims for damages in the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[19] This Note examines the fragmented regulatory measures for migrant and seasonal farmworkers. It argues that Congress's assigned responsibilities are "money-mandating," allowing plaintiff farmworkers to bring actions against the federal government in the Federal Circuit under the *Mitchell II* framework.[20]

This Note proposes a structure for enforcing breach-of-trust and mismanagement claims in the COFC and the Federal Circuit. Part I of this

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[13] This statement is based on a search of the COFC's docket database and LexisNexis's case database using the terms "migrant farmworker" with "mismanagement" conducted on August 23, 2026. No responsive cases were found. *C.f. Mitchell*, 463 U.S. at 209–12 *with* 29 U.S.C. §§ 1801–72 *and* 8 U.S.C. § 1188.

[14] *See Migrant and Seasonal Farmworker Health*, Rural Health Info. Hub, [https://perma.cc/6FPX-KX3R] (last visited Oct. 28, 2026) (discussing the public health challenges that migrant and seasonal farmworkers face); Kelkar, *supra* note 9.

[15] *See* Goldstein, Howe & Tamir, *supra* note 2, at 5, 7–8.

[16] *See* [F]law School, *The Migrant Trap*, at 24:55–32:47 (Apple Podcasts, Mar. 17, 2025).

[17] *See* Lance Compa, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards 171–75 (Colum. Univ. Press ed., 2004); *see also* Kelkar, *supra* note 9.

[18] *See, e.g.*, *Employment Issues*, Migrant Legal Action Program, [https://perma.cc/8WFT-NCD5] (last visited Oct. 28, 2026) (discussing how private rights of actions are expanded under AWPA, but not exploring remedies available for claims against the federal government); *Labor–An Overview*, Nat'l Agric. L. Cntr., [https://perma.cc/E2U8-YMJ8] (last visited Oct. 28, 2026) ("[AWPA] creates a private action allowing the aggrieved party to file suit in any federal district court with jurisdiction over the parties.").

[19] *See Employment Issues*, *supra* note 18.

[20] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 209–12 (1983).

Note overviews the Tucker Act and identifies the regulatory frameworks of key farmworker protection statutes. Part II explains how federal underenforcement of these statutes causes predictable harm to migrant and seasonal farmworkers. It also discusses the importance of bringing these claims in the COFC because of inadequate or inaccessible private causes of action. Part III applies the *Mitchell II* framework to these protection statutes and addresses counterarguments.

I. Background

A. The U.S. Court of Federal Claims Jurisdiction and the Tucker Act

The Tucker Act grants the COFC jurisdiction over non-tort claims against the U.S. government.[21] The Federal Circuit hears appeals of COFC decisions.[22] Under 28 U.S.C. § 2502, non-citizen plaintiffs may bring claims against the United States subject to reciprocity requirements.[23] To sue the federal government in the COFC, plaintiffs must meet the Tucker Act requirements that the claim be: (1) based on the Constitution or congressional acts; (2) not founded in tort; (3) be over $10,000[24]; and (4) be money-mandating.[25] The Tucker Act is a jurisdictional statute and does not, on its own, create any enforceable substantive right for money damages.[26] Therefore, plaintiffs must find a separate money-mandating source of law to proceed with claims

[21] 28 U.S.C. § 1491(a)(1).

[22] *Id.* § 1295(a)(3).

[23] *See id.* § 2502. *See, e.g.*, Brodie v. United States, 62 Ct. Cl. 29, 46 (1926) (holding that the reciprocity test is contingent on whether American citizens can prosecute claims against a foreign government in the same way as citizens of that foreign government can bring claims against it); Zalcmanis v. United States, 173 F. Supp. 355, 356–57 (Ct. Cl. 1959) (finding that there was reciprocity between the United States and the Republic of Latvia sufficient to allow Latvian plaintiffs to file suit against the U.S. government despite the Latvian government not having a court system, because of "a continuing international agreement between the Republic of Latvia and the United States"); Ferreiro v. United States, 350 F.3d 1318, 1322 (Fed. Cir. 2003) (holding that "precedent cautions, if not compels [the Federal Circuit] to refrain from interpreting the Reciprocity Act rigidly" and that "[r]eciprocity will lie between the United States and a foreign nation so long as American citizens may sue the foreign sovereign on the same terms as native citizens").

[24] *See* 28 U.S.C. § 1491; *id.* § 1346(a).

[25] *See* sources cited *infra* note 29.

[26] United States v. Testan, 424 U.S. 392, 398 (1976) ("The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.").

under the Tucker Act.[27] A money-mandating claim is based on a law or regulation that either entitles a plaintiff to payment from or imposes a duty on the federal government that, if breached, entitles a beneficiary to monetary damages.[28] A claimant must demonstrate a substantive source of law that is fairly interpreted as mandating compensation by the U.S. government for a claim to be money-mandating.[29]

As discussed below, the Supreme Court expanded the meaning of the Tucker Act's money-mandating standards in *Mitchell II* and widened the avenue to recover damages against the federal government for federal mismanagement and breach-of-trust.[30] *Mitchell II* also clarified that a waiver of sovereign immunity exists so long as the Federal Circuit has Tucker Act jurisdiction over a claim.[31]

1. Money-Mandating Standards Established by Mitchell II

The Supreme Court's decision in *Mitchell II* established a framework for determining when federal statutes and regulations give rise to enforceable monetary claims against the United States under the Tucker Act.[32] The *Mitchell II* Court held the United States liable for money damages for the mismanagement of Tribal forest and timber resources because a network of federal statutes and regulations imposed specific fiduciary duties on the United States due to the federal government's comprehensive control over their management.[33]

Years earlier, in *United States v. Mitchell* ("*Mitchell I*"),[34] the Supreme Court held that the General Allotment Act[35] created a *limited trust* that imposed no

[27] *See id.*; *see also* 28 U.S.C. § 1491(a)(1).

[28] *See* 28 U.S.C. § 1491(a)(2); *see, e.g.*, United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 219 (1983); *Testan*, 424 U.S. at 398, 402 (citing Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007–09 (Ct. Cl. 1967)) (finding that a court must "determine" if federal statutes invoked in a claim against the U.S. government are money-mandating).

[29] *Id.*

[30] *See, e.g.*, *Mitchell*, 463 U.S. at 212–19; Fletcher v. United States, 26 F.4th 1314, 1324 (Fed. Cir. 2022) (holding that a 1906 act placed the Osage mineral estate in trust with the United States and imposed fiduciary duties to distribute headrights properly, satisfying the Tucker Act jurisdictional requirements); Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 733–35 (2011) (holding that the COFC has jurisdiction over a mismanagement claim brought by the Jicarilla Apache Nation because the relevant statutory authorities cited imposed fiduciary duties because of a trust relationship with the federal government, but finding no fiduciary duties in the timing of fund disbursement).

[31] *See Mitchell*, 463 U.S. at 218–19.

[32] *See id.*at 219.

[33] *See id.* at 209–10, 227.

[34] 445 U.S. 535 (1980), *aff'd*, 463 U.S. 206 (1983), *modified*, 10 Ct. Cl. 787 (1986).

[35] 25 U.S.C. § 331 (repealed 2000).

actual management obligations on the federal government.[36] The Supreme Court found that neither a fiduciary duty nor Tucker Act jurisdiction existed because the federal government had not assumed comprehensive control via the General Allotment Act.[37] In *Mitchell II*, Justice Marshall distinguished the timber statutes from those in *Mitchell I*.[38] He identified that government control was crucial to the finding for two interconnected reasons: (1) control turns a *limited trust* into a full fiduciary relationship, and (2) control implicitly requires the government to exercise oversight over the Tribal resources.[39] The federal control exercised over the Tribal resources in *Mitchell II* satisfied all elements of a common-law trust.[40] Because of this, Justice Marshall noted that when a trust relationship exists, "it naturally follows that the [g]overnment should be liable in damages for the breach of its fiduciary duties."[41]

Not only did the Supreme Court find that such statutes could give rise to federal fiduciary responsibility, the Court also rejected the argument that a statute must explicitly provide for monetary relief or invoke federal trust language.[42] Instead, *Mitchell II* instructs courts to examine several money-mandating and common-law trust features of statutory substance and structure to establish Tucker Act jurisdiction.[43] These money-mandating features include: (1) the existence of specific and mandatory duties on the federal government; (2) limited federal discretion through comprehensive regulatory control; (3) identifiable beneficiaries who would be directly affected by federal noncompliance; and (4) a statutory scheme that can "fairly be interpreted as mandating compensation" for breach.[44] Applied in *Mitchell II*, the statutes imposed spe-

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[36] *See Mitchell*, 463 U.S. at 226.

[37] *See id.* at 544–46 (holding that taxation laws on Tribal land involved no government control, and therefore no management obligations).

[38] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) (analyzing timber management and roadbuilding acts, Tribal funds statutes, and resource regulations); *see also Mitchell*, 445 U.S. at 542.

[39] *See Mitchell*, 463 U.S. at 219, 225.

[40] *Id.* at 225 ("All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allotees), and a trust corpus (Indian timber, lands, and funds).").

[41] *Id.* at 226 (citations omitted) (relating to similar precedent that recognized trust obligations on the United States in dealings with Tribal Nations).

[42] *See id.* at 211.

[43] *See id.* at 218, 225; *see also* United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (citation omitted) (recognizing that, as applied to Indigenous American Tribes, a Tribe's claim must satisfy a two-pronged test: (1) a law establishes specific fiduciary duties which the federal government has failed to perform; and (2) the source of the substantive law can be interpreted as mandating compensation for damages).

[44] United States v. Mitchell (*Mitchell II*) 463 U.S. 206, 218, 225 (1983).

cific duties of complete federal management of Tribal land for the benefit of those living thereon, with compensation mandates fairly interpreted and backed by legislative structure, purpose, and the practical consequences of agency failure.[45]

The Supreme Court reaffirmed and extended the *Mitchell II* framework in *United States v. White Mountain Apache Tribe*[46] and held that a statute directing the government to "use" and "preserve" Tribal land imposed a fiduciary duty sufficient to support Tucker Act jurisdiction, even though the statute contained no explicit trust language and no express damages remedy.[47] *White Mountain Apache Tribe* thereby confirmed that *Mitchell II*'s comprehensive control framework remains the operative standard for money-mandating claims, and that the absence of explicit trust language or damages provisions is not fatal to Tucker Act jurisdiction when the statutory scheme otherwise imposes specific, mandatory management obligations on the federal government.[48]

2. Distinction of Federal Circuit Claims from the Administrative Procedure Act ("APA") Claims

Claims in the COFC are limited to monetary relief, unlike those brought under the APA, which may encompass generalized challenges to agency policy or requests for non-monetary relief, such as an injunction or declaratory relief.[49] Even if a claim concerns money damages, the COFC is limited to hearing cases arising under federal statutes that impose concrete, money-mandating duties on the government.[50] Mismanagement of those duties gives rise

[45] *Id.* at 224, 226.

[46] 537 U.S. 465 (2003).

[47] *Id.* at 475–77.

[48] *See id.* at 479–80 (Ginsburg, J., concurring) ("[T]his case is properly ranked with *Mitchell II*.").

[49] *Compare* 5 U.S.C. §§ 702, 704 (permitting judicial review of a final agency action for claims seeking declaratory, non-monetary, or injunctive relief), *with* Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (finding that the Court of Claims did not have exclusive jurisdiction over a claim because it was not an action for money damages and that the "monetary aspects of the relief" were not money damages as determined by the APA § 702, 5 U.S.C. § 702).

[50] *See* 28 U.S.C. § 1491(a)(1); *see also* Doe v. United States, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (quoting United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 216–17 (1983)) (holding that the COFC has jurisdiction under the Tucker Act only if a federal statute satisfies the "money-mandating requirement").

to compensable harm in the Federal Circuit, even in the absence of a reviewable final agency action.[51]

B. Migrant Farmworker Programs: From Braceros to H-2A Workers

The United States relies on migrant farmworkers (sometimes called "guest-workers") to meet growing agricultural demands, and the legal framework governing this labor has evolved over the past century.[52] Congress enacted the *Bracero Program* in 1942 through the Mexican Farm Labor Program Agreement ("MFLPA") which brought over 1.5 million Mexican nationals to the United States to work under short-farm labor contracts.[53] The MFLPA guaranteed certain worker protection measures, including a thirty-cent hourly minimum wage.[54] To circumvent these protection measures, many agricultural employers recruited undocumented immigrants,[55] who were not subject to formal MFLPA requirements like minimum wage, safe housing, and transportation.[56] This led to braceros and undocumented individuals suffering exploitative conditions like wage theft, unsafe housing, and limited recourse against abusive employers.[57] To continue to pay under minimum wage, employers preferred to hire braceros, which decreased the availability

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[51] *See Mitchell*, 463 U.S. at 221–22 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980)).

[52] *See 1942: Bracero Program*, Lib. of Cong., [https://perma.cc/8NAC-YJMB] (last visited Oct. 28, 2026); Frank P. Barajas, Curious Unions: Mexican American Workers and Resistance in Oxnard, California, 1898-1961, at 193–97 (Univ. Neb. Press ed., 2012).

[53] *See* Philip Martin, *Mexican Braceros and US Farm Workers*, Wilson Ctr. (July 10, 2020), [https://perma.cc/WK84-3SW7] ("[B]etween 1.5 million and two million Mexicans gained experience working legally in [U.S.] agriculture.").

[54] *See* Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, U.S.-Mex., Apr. 26, 1943, 57 Stat. 1152, 1158–60 ("All transportation and living expenses . . . shall be met by the employer. . . . [W]ages for piece work or hourly work will not be less than 30 cents per hour.").

[55] Braceros often had to pay bribes to local Mexican officials to go to recruitment centers. *See* Martin, *supra* note 53.

[56] *See* Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 139–141, 148 (2004) (discussing the guarantees to workers under the MFLPA and the preference of some farm owners to hire undocumented individuals because they could pay them "roughly two-thirds" the bracero rate); *see also* sources cited *supra* note 52.

[57] *See* Robert Mayer, *Guestworkers and Exploitation*, 67 Rev. Pol. 311, 325–26 (2005); *see also* President's Comm'n on Migratory Labor, *Migratory Labor in American Agriculture* 19 (1951) ("[T]he migratory laborer has virtually none of the social protections we commonly extend to industrial workers. He has no unemployment insurance, no minimum-wage standards . . . no old-age and survivors['] insurance, no disability insurance. . . .").

of agricultural jobs to domestic workers.[58] Because of exploitative conditions and the economic impacts on domestic farmworkers, the MFLPA *Bracero Program* ended in 1964.[59]

The demand for temporary foreign labor did not end with the *Bracero Program*.[60] Congress enacted its successor, the INA's H-2 visa program, in 1952, which continued to allow employers to hire temporary, non-immigrant workers when domestic workers were unavailable.[61] The Immigration Reform and Control Act of 1986 ("IRCA")[62] bifurcated the H-2 visa category: H-2A for farmworkers and H-2B for non-farmworkers. The H-2A program allows agricultural employers to hire foreign farmworkers for temporary or seasonal agricultural labor when employers expect a shortage of domestic workers to meet seasonal labor demands.[63] To hire H-2A workers, the employer must demonstrate that: (1) there is a lack of domestic workers available to perform the seasonal or temporary work; and (2) domestic workers' wages and working conditions will not be adversely affected by hiring H-2A workers.[64]

1. Statutory Purpose of the H-2A Program, Regulatory Structure, and Federal Control

The H-2A program serves a dual purpose: to stabilize the supply of agricultural labor to address domestic worker shortages during peak seasons, while also preventing the exploitation of migrant and seasonal farmworkers by employers.[65] The program is administered through a multilayered federal regulatory structure that vests program responsibility and screening authority in multiple federal agencies, including the Department of Homeland

[58] *See id.*

[59] *See* Martin, *supra* note 53. The *Bracero Program* lasted from 1942 to 1964. *See id.*; *see also* Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (providing that no workers would be employed under the Mexican Farm Labor Program, 7 U.S.C. § 1461, after December 31, 1964).

[60] *See* 8 U.S.C. § 1188; *see also Farm Labor Series: Improving the H-2A Program,* AgAmerica Lending (Nov. 19, 2025), [https://perma.cc/PKS5-8375] (noting that, when the *Bracero Program* ended in 1964, "growers still needed a legal, seasonal workforce").

[61] *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

[62] *Id.* § 1188.

[63] *See H-2A Temporary Agricultural Program*, U.S. Dep't of Lab., [https://perma.cc/C3XY-9E2M] (last visited Oct. 28, 2026).

[64] *Id.*; *see also* 8 U.S.C. § 1188(a)(1).

[65] *See* 8 U.S.C. § 1188(a)(1) (conditioning approval of an H-2A petition on the certification that (A) "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed" and (B) employing foreign workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed"); 20 C.F.R. § 655.122(a) (2026) (setting minimum terms for H-2A job offers, including housing, transportation, and wage requirements).

Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), the Department of State ("DOS"), and the Department of Labor ("DOL").[66] Participation in the H-2A program is contingent upon affirmative federal authorization at multiple stages, and employers cannot access nor administer H-2A visas themselves.[67] An agricultural employer seeking to hire H-2A workers on the standard path[68] is required to apply for an initial job order with their DOL State Workforce Agency.[69] After receiving a final determination from the DOL's Office of Foreign Labor Certification, the employer petitions to USCIS.[70] After USCIS approves the petition to hire H-2A workers, workers interview with DOS.[71] Admitted workers then travel to the employer's DOL-approved agricultural worksite.[72] Federal agency review and approval are required at each step of the H-2A hiring process, and agencies can impose additional reviews and approvals in emergencies and other extenuating circumstances.[73]

Agency oversight of the H-2A program extends beyond the initial certification process and includes ongoing monitoring and enforcement to ensure employer compliance with statutory requirements.[74] The H-2A program is monitored and enforced by the DOL's Office of Foreign Labor Certification ("OFLC") and Wage and Hour Division ("WHD").[75] OFLC monitors the

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[66] *See* Nat'l Ctr. for Farmworker Health, *H-2A Guest Workers Fact Sheet*, at 3–4 (Oct. 2020), [https://perma.cc/NKX6-B27M] (citing GAO-15-154, *supra* note 3, at 2); *see H-2A Temporary Agricultural Workers*, U.S. Citizenship and Immigration Servs., [https://perma.cc/DN7F-TE9E] (last visited Nov. 2, 2026) (outlining that H-2A petitioners must submit forms to USCIS in DHS for approval after receiving a temporary labor certification (TOL) from DOL).

[67] *See H-2A Visa Program*, U.S. Dep't Agric., [https://perma.cc/9QFN-XP8P] (last visited Oct. 28, 2026); *see also State Workforce Agencies*, U.S. Dep't Lab., [https://perma.cc/AVT5-FSG9] (last visited Nov. 2, 2026) (listing DOL State Workforce Agencies).

[68] Additional pathways for certification exist for emergency and expedited circumstances and are not discussed or considered by the Author in this Note. *See id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See H-2A Visa Program*, *supra* note 67.

[74] *See* 29 C.F.R. § 501.1(c) (2026) (delegating investigative and enforcement functions to the Wage and Hour Division).

[75] *Id.*; *see also* U.S. Dep't of Lab. v. Three D Farms, LLC, ARB No. 2016-0092, 0093, ALJ No. 2016-TAE-00003, slip op. at 12, 2017 U.S. Dist. LEXIS 27305 (ARB Feb. 12, 2019) (finding that the Secretary of Labor delegated H-2A enforcement responsibility to WHD, who is authorized to "investigate, inspect, and enforce the provisions of the H-2A program" which includes "assess[ing] unpaid wages and impos[ing] sanctions in the form of civil monetary penalties" (citing 29 C.F.R. §§ 501.16, 501.19 (2026))).

H-2A visa certification process.[76] WHD enforces employer obligations, including wage requirements, and conducts "investigations, inspections, and law enforcement functions" to identify violations.[77] When violations are identified, WHD has the authority to impose sanctions on non-compliant employers, including assigning penalties and debarment from future participation in the H-2A program.[78]

2. The H-2A Visa Statute Imposes Employer Obligations to Migrant Workers

Agricultural employers hiring migrant farmworkers must "provide the same minimum wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in 'corresponding employment.'"[79] Employers must provide "at least the same level of minimum benefits, wages, and working conditions" to migrant workers they offer domestic workers.[80] Employers must also supply no-cost housing that meets federal and state safety standards, reimburse transportation costs, and guarantee a set amount of work hours pursuant to the job order.[81]

C. The Migrant and Seasonal Agricultural Worker Protection Act

Congress enacted AWPA in 1983 in response to pervasive exploitation of migrant and seasonal workers in the agricultural industry under its predecessor

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[76] *See* U.S. Gov't Accountability Off., GAO-25-106389, H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and Enforcement 7 (2024) (highlighting that OFLC and WHD share monitoring authority over the H-2A program, with OFLC reserving the power to audit adjudicated H-2A applications); *see also* 29 C.F.R. § 501.1(d) (2026) (stating WHD and OFLC's shared debarment authority for employers that violate requirements of the H-2A program).

[77] *See* 29 C.F.R. § 501.1(c) (2026).

[78] *See id.*; *see also* GAO-25-106389, *supra* note 76, at 7 (discussing WHD's investigative functions, including its ability to assign monetary penalties and shared debarment authority with OFLC); GAO-15-154, *supra* note 3, at 13 (observing that WHD can recommend debarment for non-compliant employers).

[79] *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, *Hearing before the Subcomm. On Immigr., S. Comm. on the Judiciary*, 105th Cong. 3 (1998) (statement of Carlotta C. Joyner, Dir., Educ. and Emp. Issues, U.S. Government Accountability Office, Health, Education, and Human Services Division).

[80] *See* 20 C.F.R. § 655.122(a) (2026).

[81] *See id.* § 655.122(d), (h), (i)(1) (2026); *see also Fact Sheet #26E: Job Hours and the Three-Fourths Guarantee under the H-2A Program*, U.S. Dept. of Lab., Wage and Hour Div. (Nov. 2022), [https://perma.cc/K735-UM5H] (highlighting that the job opportunity must be full time, employing the worker for at least thirty-five hours per week, and must abide by a three-fourths guarantee).

statute, the 1963 Farm Labor Contractor Registration Act ("FLCRA").[82] Senate hearings and investigative reports revealed widespread contractor abuses under FLCRA, including deceptive recruitment practices, withheld wages and documents, and unsafe housing and transportation, with minimal enforcement by the DOL.[83] Congress enacted AWPA to mitigate abuses that frequently affect migrant farmworkers, which still persist throughout the United States.[84]

1. AWPA's Substantive Protections

Congress designed AWPA to protect migrant farmworkers by establishing baseline regulatory frameworks to safeguard their wages, health, and safety.[85] These frameworks, overseen by the DOL, ensure that housing and transportation provided to migrant and seasonal farmworkers comply with federal and state health and safety standards.[86] To further protect migrant and seasonal farmworkers, AWPA requires that agricultural employers provide all

[82] *See* 29 U.S.C. § 1801 ("It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers . . . and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers."); Migrant and Seasonal Agricultural Worker Protection Act, Pub L. No. 97-470, § 523, 96 Stat. 2583, 2600 (1983) (repealing the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041-2055 (1982) (repealed 1983)); *see also* Guerrero v. Garza, 418 F. Supp. 182, 186 (W.D. Wis. 1976) ("The purpose of [the FLCRA] is to protect migrant workers from unscrupulous contractors who take advantage of their superior bargaining position by exploiting the workers in various ways." (citing 7 U.S.C. § 2041; S. Rep. No. 93-1295)).

[83] *See Administration of Laws Affecting Farmworkers: Hearing Before a Subcomm. of the Comm. on Gov't Operations*, 96th Cong. 59, 64–66 (1979) (statements of Art Read, Camden Regional Legal Services; John Ebbott, Dir. Litig., Migrant Legal Action Program).

[84] *See Ending Abuses and Improving Working Conditions for Tomato Workers: Hearing Before the S. Comm. on Health Educ., Lab., & Pensions*, 110th Cong. 24–31 (2008) (statement of Mary Bauer, Dir., Immigrant Justice Project, Southern Poverty Law Center, Montgomery, Ala.); Some District Courts have held that AWPA protections extend to undocumented workers alike to protect the general class of migrant workers. *See* Escobar v. Baker, 814 F. Supp. 1491, 1498 (W.D. Wash. 1993).

[85] *See* 29 U.S.C. § 1801 (noting that AWPA was enacted to "assure necessary protections for migrant and seasonal agricultural workers").

[86] *See id.* § 1823(b)(1) ("[N]o facility or real property may be occupied by any migrant agricultural worker unless either a State or local health authority or other appropriate agency has certified that the facility or property meets applicable safety and health standards."); *see also id.* § 1862(a)–(b) (granting the Secretary of Labor authority to investigate potential violations of AWPA, inspect employer records, and interview workers).

workers with written disclosures of wages, the employment period, and living arrangements.[87]

2. Federal Administrative Responsibilities

The WHD is charged with enforcing AWPA protections.[88] WHD investigators are permitted to inspect safety and payroll records and to interview individual workers.[89] For violations of AWPA, WHD can impose penalties and seek civil or criminal sanctions; 2A certificates, and seek criminal or civil penalties; WHD can also suspend or revoke employers' certificates of registration, which agricultural employers must maintain to contract H-2A migrant farmworkers.[90] As of March 2026, the maximum civil penalty for any individual violation of AWPA is $3,126.[91]

3. Private Rights of Action Available Under AWPA

AWPA codified private rights of action for migrant and seasonal farmworkers to recover damages against agricultural employers.[92] Despite the availability of these private rights of action, practical barriers often limit their effectiveness.[93] Migrant workers often lack access to legal counsel, face retaliation risks, or are unable to pursue litigation due to limited geographic mobility and fear of immigration consequences.[94]

II. Analysis

Despite the extensive statutory and regulatory frameworks governing the employment of migrant and seasonal farmworkers, federal enforcement of

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[87] *See id.* § 1821(a).

[88] *See* Dep't of Lab., Wage and Hour Div., Fact Sheet #49, The Migrant and Seasonal Agricultural Worker Protection Act (2008), [https://perma.cc/KAG3-CF9M] (last visited Oct. 28, 2026).

[89] *See id.*

[90] *See id.*; Dep't of Lab., Wage and Hour Div., Fact Sheet No. 26, Section H-2A of the Immigration and Nationality Act (INA) (2010), [https://perma.cc/G24A-YPYP] (last visited Oct. 28, 2026).

[91] *See* 29 C.F.R. § 500.1(e) (2026).

[92] *See* 29 U.S.C. § 1854(a); *see also* Martinez-Mendoza v. Champion Int'l Corp., 340 F.3d 1200, 1207–10 (11th Cir. 2003) ("Anyone aggrieved as a result of an employer's failure to discharge these responsibilities may bring a private right of action in a United States district court, for both legal and equitable relief." (citing 29 U.S.C. § 1854(a), (c))).

[93] *See* Kelkar, *supra* note 9; *see also Ending Abuses and Improving Working Conditions for Tomato Workers*, *supra* note 84, at 28 (discussing how migrant farmworkers often "face dramatic barriers to obtaining legal redress when their rights are violated" because of language barriers, geographic isolation, financial insecurity, and fears of retaliation from employers).

[94] *See* Kelkar, *supra* note 9.

these protections is limited and underdeveloped.[95] Although the H-2A program is managed by DOL, DOS, and DHS, oversight of the program is plagued by chronic agency capacity constraints, structural enforcement gaps, and significant barriers that deter workers from prevailing in court and, in many cases, from reporting employer abuses and violations.[96] The underenforcement of these protection statutes is an expected consequence of federal agency mismanagement of regulations enacted with the specific intent of protecting vulnerable workers from employer abuses.[97]

A. Agency Investigative Capacity Constraints

The DOL, tasked with enforcing farmworker protection statutes, operates under significant capacity constraints that limit its ability to monitor and enforce regulatory compliance.[98] Of 2,857 investigations conducted between FY2018 and FY2023, WHD found that 84% of employers (2,392) had H-2A violations.[99] Of these 2,392 investigations, 45% of employers (1,076) had more than five violations, and 39% involved violations of additional labor laws, such as the FLSA and AWPA.[100]

While 84% of WHD investigations of agricultural employers found H-2A and AWPA violations between FY2018 and FY2023, DOL's investigative coverage has declined relative to the substantial growth of H-2A

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[95] *See* Mary Bauer & Meredith Stewart, S. Poverty L. Ctr., Close to Slavery: Guestworker Programs in the United States 38-41 (Booth Gunter ed., 2013) (noting that "[w]hen employers violate the legal rights of workers, the DOL takes little action to stop them from importing more guestworkers" and that, even when identifying employer violations, "debarment is rare").

[96] *See* U.S. Dep't of Lab., Off. of Inspector Gen., Off. of Audit, Rep. No. 06-21-001-03-321, Overview of Vulnerabilities and Challenges in Foreign Labor Certification Programs, 27, 30 (2009) [hereinafter Rep. No. 06-21-001-03-321] (noting that there is limited identification of high-risk employers, the certification program is susceptible to fraud, and that WHD's lack of subpoena and the statute of limitations could impede WHD from debarring abusive employers).

[97] *See* Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (1983) (declaring that the purpose of AWPA is to "assure necessary protections for migrant and seasonal agricultural workers" and "to require farm labor contractors to register under this chapter").

[98] *See* GAO-25-106389, *supra* note 76, at 27–31 (finding that limited WHD resources effected oversight of H-2A and other programs).

[99] S*ee id.* at 33–34 (fig. 7).

[100] *See id.*, *supra* note 76, at 35, n.74. There are concurrent FLSA and AWPA investigations with every H-2A investigation, in which WHD investigators found that out of the 2,857 investigations between 2018 and 2023, an additional 7,764 violations of the FLSA and AWPA were found. *See id.*

visa certifications.[101] WHD lacks sufficient staffing and funding to conduct proactive inspections at a scale commensurate with the size and geographic dispersion of the agricultural workforce, including migrant and seasonal farmworkers.[102]

Moreover, AWPA and the H-2A program impose extensive, mandatory obligations on federal agencies to regulate, monitor, and enforce employment conditions to protect a population of laborers that Congress has long recognized as being uniquely vulnerable to abuse.[103] When those obligations are systematically underperformed, delayed, or outright ignored, the resulting harm to workers reflects widespread mismanagement of a regulatory regime over which the federal government, through the DOL, has assumed comprehensive control.[104] Access to employment, the terms of that employment, and statutorily guaranteed economic safeguards are paramount features of these regulations.[105] Under established federal mismanagement jurisprudence, such failures are properly understood as breaches of federally imposed duties

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[101] *See* Daniel Costa & Philip Martin, *Record-Low Number of Federal Wage and Hour Investigations of Farms in 2022*, Econ. Pol'y Inst. (Aug. 22, 2023), [https://perma.cc/QQ8F-WPP9] (analyzing U.S. DOL Wage and Hour Compliance Action Data and finding that fewer than one percent of agricultural employers are investigated in any given year); *see also* GAO-25-106389, *supra* note 76, at (documenting declining WHD inspection coverage relative to the substantial growth in H-2A visa certifications over the same period).

[102] *See* U.S. Dep't of Lab., Off. of Inspector Gen., Rep. No. 17-25-001-15-001, *Review of WHD Efforts to Address Child Labor Law Violation Challenges* 10–12 (Sep. 30, 2025). In 2023, WHD had 733 investigators, and its approved annual budget ($260 million) was $47.7 million below than requested amount ($307.7 million). *Id.* (reviewing WHD child labor enforcement but noting that WHD investigators are responsible for enforcement across all labor violation investigations, including those under AWPA and H-2A program).

[103] *See* Antenor v. D & S Farms, 88 F.3d 925, 930 (11th Cir. 1996) (finding that Congress enacted AWPA to "protect migrant and seasonal workers from abuse and exploitation") (quoting Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986)). *See, e.g.*, 8 U.S.C. § 1188; 29 U.S.C §§ 1801–1872.

[104] *See, e.g.*, GAO-25-106389, *supra* note 76, at 7, 26–31, 37–38 (finding that the DOL "has the primary authority to monitor and enforce H-2A visa program regulations," yet WHD "has a limited number of investigative staff to conduct wide-ranging enforcement obligations," resulting in "roughly 20 percent of back wages" were never returned to workers); *see also* Mary Bauer & Maria Perales Sanchez, Centro de los Derechos del Migrante Inc., Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program, 18, 29 (2006) ("[T]he [H-2A Program] regulations that do exist are poorly enforced. . . . Few workers experienced only one problem; rather, they experienced multiple violations with cumulative effect."); *see also* 29 C.F.R. § 501.1(c) (2026) (WHD control of H-2A); 29 U.S.C. § 1853 (WHD control over AWPA).

[105] *See, e.g.*, 8 U.S.C. § 1188; 29 U.S.C §§ 1801–1872.

that may give rise to money-mandating claims within Tucker Act jurisdiction of the COFC.[106]

The practical consequence of WHD's capacity constraints is that enforcement actions, when they do occur, are often limited in scope and remedial impact.[107] WHD relies on back-wage assessments and civil money penalties to enforce AWPA protections.[108] These remedies are structurally inadequate to deter recidivism among large agricultural operations when the cost of noncompliance is outweighed by the economic boon of wage theft and substandard housing.[109] Many farmworkers who are owed damages after WHD investigations are never paid; between 2011 and 2021, WHD diverted $7.2 million to the U.S. Treasury because of inadequate DOL efforts to locate wronged H-2A farmworkers.[110] Furthermore, WHD civil monetary penalties have not kept pace with the dramatic expansion of the agricultural labor market.[111] This structural mismatch between the scale of the labor market and the deterrent value of available penalties cannot be attributed to a lack

[106] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 212 (1983).

[107] *See* GAO-25-106389, *supra* note 76, at 29 ("DOL [i]nvestigations [f]ind [h]igh [r]ates of [v]iolations, and [i]ncomplete [i]nformation [m]ay [c]onstrain [b]ack [w]age [r]epayment [e]fforts."); *see also* 29 C.F.R. § 501.16(a)(1) (2026) (stating that the WHD may award unpaid wages, make whole relief, and enforce violated provisions of a work contract).

[108] *See* U.S. Dep't of Lab., Wage & Hour Div., Field Assistance Bull. No. 2022-02, Protecting Workers from Retaliation (2022); *see also* GAO-25-106389, *supra* note 76, at 6–7 (noting that the WHD "imposes civil money penalties; seeks legal remedies; and enforces employer obligations, including the payment of back wages").

[109] *See* Costa & Martin, *supra* note 101 (citing GAO-25-106389, *supra* note 76) (noting that only one percent of agricultural employers are investigated annually by the WHD). With inadequate remedies, agricultural employers can violate protection statutes with a reasonable expectation that those violations will never be detected. *See* Tina Vásquez, *Human Trafficking or a Guest Worker Program? H-2A's Systemic Issues Result in Catastrophic Violations*, Prism Reports (Apr. 14, 2023), [https://perma.cc/8GFF-2VW9] ("It's rare to come across an H-2A worker who hasn't experienced wage theft.").

[110] *See* Vásquez, *supra* note 109 (reporting that over $7.2 million was diverted to the treasury after WHD ordered damages: "[WHD] comes around and recovers the wages, and [the farmworkers] still don't get the money"). Vásquez also argues that "there is no good reason the DOL is unable to find migrant workers" and that the DOL does not frequently implement "digital communication like WhatsApp" to find migrant workers who are owed damages. *Id.*

[111] *Compare* 29 C.F.R. § 500.1(e) (2026) (maximum penalty per AWPA violation as of August 2026 is $3,126), *with* Department of Labor Civil Penalties Inflation Adjustment Act Annual Adjustments for 2024, 89 Fed. Reg. 1810, 1813 (Jan. 11, 2024) (maximum penalty per AWPA violation as of January 2024 is $3,047).

of resources, and reflects a systemic failure to adopt enforcement mechanisms to the modern agricultural labor economy that Congress sought to regulate.[112]

The WHD's capacity constraints disproportionately affect workers in the most geographically remote agricultural regions.[113] WHD field offices are concentrated in metropolitan areas, leaving large swathes of rural farms with effectively no proximate enforcement presence.[114] In Colorado, for example, the only WHD field office is located in Denver County[115]; as of 2021, about 63% of certified H-2A farmworkers in Colorado were located at least 100 miles from the Denver field office.[116] Such geographic isolation increases the barriers to reporting labor violations against agricultural employers.[117]

B. Federal Control as the Predicate for Mismanagement Liability

The regulatory regimes governing AWPA and the H-2A program vest comprehensive operational authority in federal agencies, making the realization of statutory protections entirely contingent on federal performance.[118]

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[112] *See* Migrant and Seasonal Agricultural Worker Protection Act, H.R. 7102, 97th Cong. (1982).

[113] *See*, *e.g.*, Bauer & Stewart, *supra* note 96 (highlighting that H-2A workers are often housed in "extremely rural locations" which increase H-2A "workers' social isolation and dependence on their employer."); Bauer & Perales Sanchez, *supra* note 105, at 8–9 ("H-2A workers generally live in rural areas with limited access to medical care" and that "DOL certified over 10,000 employer requests for ten or fewer employees."); U.S. Dep't of Lab., Off. of Inspector Gen., Off. of Audit, Rep. No. 06-25-001-03-321, ETA can Improve its Management of the H-2A Program, 2 (2025).

[114] *See Local Offices*, U.S. Dep't of Lab., [https://perma.cc/Z2U9-X2CC] (last visited Oct. 28, 2026). (listing WHD Local Field Officers by state).

[115] *Local Offices: Colorado*, U.S. Dep't of Lab., [https://perma.cc/VCH7-E3EN] (last visited Oct. 28, 2026).

[116] Using mapping software ArcGIS Pro and Census Bureau TIGER/Line county boundaries, the author mapped a 100-mile radius around Denver County. Because the buffer extends 100 miles from the edge of the county's irregular boundary, it is not a perfect circle. The author then overlaid the buffer on the county map and flagged any county with less than 75% of its land area inside it. The author then cross-referenced a 2023 American Immigration Council report on H-2A certified workers to approximate how many of these workers were employed in the flagged counties, meaning those mostly or entirely more than 100 miles from Denver County. *See* American Immigration Council, Colorado's H-2A Workers in Fiscal Year 2021, at 5–6 (2023); *see also infra* App., Figures 1–2.

[117] *See* discussion *infra* Sections II.C.1–2.

[118] *See e.g.*, 8 U.S.C. § 1188(a)(1); 29 U.S.C § 1853; *see also* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475–76 (2003); Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (distinguishing between permissible agency discretion over methods of statutory implementation and impermissible failure to discharge mandatory statutory duties altogether).

Participation in the H-2A guestworker program is conditioned on the full, sequential involvement of multiple agencies: an agricultural employer cannot hire H-2A workers without DOL certification, DHS approval, and DOS visa issuance; and guestworkers cannot enter the United States unless the federal government takes each of those affirmative steps.[119] Under AWPA, WHD holds exclusive responsibility for investigating statutory violations, monitoring employer and contractor compliance, and intervening when evidence of economic exploitation or other coercive labor practices is found.[120] In each context, the federal government functions as a regulator of private conduct and as the primary institutional actor through which statutory protections are either applied or denied.[121] Migrant and seasonal farmworkers have no independent means of securing these protections because their access to lawful employment and enforcement of their statutory rights depends entirely on mandatory agency compliance.[122]

Comprehensive federal control is the predicate for mismanagement liability under *Mitchell II*.[123] Applicable jurisprudence does not require Congress to use express trust language or provide explicit damages remedies; courts instead apply the *Mitchell II* framework and assess whether a regulatory scheme imposes specific, mandatory duties on the federal government—particularly when it has near-total operational control over an economic system affecting identifiable beneficiaries—whose breach foreseeably causes economic harm.[124] Agencies retain discretion over how to implement statutory mandates, but not over whether to perform them.[125] The H-2A program and AWPA assign

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[119] *See e.g.*, 8 U.S.C. § 1188(a)(1) (requiring the Secretary of Labor to certify H-2A applications before hiring); 20 C.F.R. § 655.130 (2026) (H-2A application filing requirements); 29 C.F.R. § 501.1(c) (2026) (WHD enforces H-2A protections).

[120] *See* 29 C.F.R. § 500.1(c), (e) (2026) (WHD can investigate and enforce AWPA violations).

[121] *See id.*; *see also* 29 C.F.R. § 501.1(c) (2026).

[122] *See* Bauer & Perales Sanchez, *supra* note 104, at; *see also* GAO-15-154, *supra* note 3.

[123] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 226–28 (1983).

[124] *See id.*at 226 (even though there was no express trust language in the timber resources statutes, the "statutes and regulations at issue in [*Mitchell II*] clearly establish fiduciary obligations on the Government . . . [g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties"); *see also* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475–76 (2003) (applying the *Mitchell II* framework).

[125] *See White Mountain Apache Tribe*, 537 U.S. at 475–76 (2003); *see also* Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (distinguishing between permissible agency discretion over methods of statutory implementation and impermissible failure to discharge mandatory statutory duties altogether). An example of a pure discretionary regulatory program is the Conservation Reserve Program, which is a voluntary program administered by the U.S.

mandatory, non-discretionary functions to specific agencies that cannot be recharacterized as lawful policy choices when they go unperformed.[126]

C. Systematic Underenforcement Constitutes Federal Mismanagement

Despite the government's comprehensive role in managing AWPA and H-2A programs, enforcement of these farmworker protections remains persistently inadequate and contributes to pervasive, long-recognized abuse of farmworkers.[127] The Government Accountability Office's ("GAO") evaluations of the H-2A program noted the inefficiencies in WHD's enforcement of protections for migrant workers.[128] As the number of H-2A visa certifications and issuances has grown substantially over the past decade, the number of WHD investigators dedicated to agricultural labor enforcement has remained relatively static, resulting in declining inspection coverage.[129] In 2022, every WHD investigator was responsible for covering about 202,800 workers, about three times more than the number covered per investigator in 1973 (72,558 workers per WHD investigator).[130] This imbalance forces the DOL to rely predominantly on complaint-driven enforcement, which effectively silences a significant number of migrant and seasonal workers.[131] Agricultural worksites themselves are among the least accessible and most difficult environments from which workers can report violations.[132] Migrant

Department of Agriculture (USDA) Farm Service Agency (FSA), and allows farmers to contract with the government to promote environmental sustainability. 7 C.F.R. §§ 1410.1, 1410.33 (2026). Even though the FSA must follow the regulatory changes according, the agency has discretion in implementing some of the provisions. *Id.*

[126] *See generally Cobell*, 240 F.3d at 1099 (holding that the DOL's "overriding duty" constrains their discretion (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974))).

[127] *See* GAO-15-154, *supra* note 3, at 2.

[128] *See id.*, *see also* GAO-25-106389, *supra* note 76, at 28 tbl. 1.

[129] *See* GAO-15-154, *supra* note 3, at 17, 79; *see also Farm Labor*, *supra* note 2; Costa & Martin, *supra* note 101 (WHD investigators have declined between 2010 and 2021; in 2021, WHD "employed only 782 investigators to police a U.S. labor market of 144 million").

[130] *See* Costa & Martin, *supra* note 101.

[131] *See* Daniel Costa, Threatening Migrants and Shortchanging Workers, Econ. Pol'y Inst. 9 (Dec. 15, 2022) ("DOL investigations are driven by complaints brought by workers, it would make a massive difference if migrant workers were empowered to come forward . . . without fear of retaliation that could result in losing their jobs and being deported."). *But see* U.S. Gov't Accountability Off., GAO-21-13, Fair Labor Standards Act: Tracking Addit'l Complaint Data Could Improve DOL's Enforcement at 10, 41 (2020) (finding that WHD made efforts to move away from complaint-driven AWPA investigations and instead put resources towards agency-directed investigations).

[132] *See* Bauer & Stewart, *supra* note 95, at 39–41.

and seasonal agricultural workers are dependent on AWPA to combat threats of violence, wage theft, document withholding, and inadequate or nonexistent access to food or water, or breaks from work.[133] H-2A visa holders can lose their right to work in the United States if they are terminated by their contracted employer.[134]

1. Barriers that Migrant Farmworkers Face to Filing Complaints and Reporting Statutory Violations

The current federal oversight of farmworker protection statutes is ill-managed and directly affects migrant and seasonal farmworkers' ability to file complaints and report violations.[135] Migrant and seasonal farmworkers, both those in the H-2A visa program and those not, often reside in employer-controlled housing, lack independent means of safe transportation, face language barriers, and depend on continued employment for lawful immigration status.[136] These conditions significantly deter workers from reporting violations, rendering complaint-based enforcement mechanisms ineffective in practice.[137]

These enforcement failures have direct economic consequences. When agencies fail to comply with regulatory standards for housing inspections, workers incur costs associated with unsafe or substandard living conditions.[138]

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[133] *See* Sally Moyce, *Risks to Safety and Health for Migrant and Seasonal Farmworkers*, *in* Rural Nursing: Concepts, Theories, and Practice 337, 340 (Charlene A. Winters ed., 6th ed. 2022) (discussing how migrant farmworkers "experience[] more abuse on the job than [] native-born worker[s]," including "wage theft and threats of termination," and that migrant farmworkers are "rarely" protected from potential exposures to workplace hazards, extreme weather, and hazardous chemicals); *see also* Alein Y. Haro, et al., *Beyond Occupational Hazards: Abuse of Day Laborers and Health*, 22 J. Immigr. Minority Health 1172, 1172–76 (2020) (discussing how migrant farmworkers are vulnerable to "more occupational hazards than non-immigrant [farmworkers]").

[134] *See* Costa & Martin, supra note 101. Because migrant farmworkers' visas "are almost always tied to a single [agricultural] employer who controls both their livelihoods and their visa status," many fear retaliation and immigration consequences if they file a claim against their employer. *Id*. at 8.

[135] *See* GAO-25-106389, *supra* note 76, at 15–29, 35–40, 46–47.

[136] *See* Haro, et al., *supra* note 133, at 1174 (showing that, from the sample population, 90.8% of those interviewed are not U.S. citizens or permanent residents, 82.1% have "limited English proficiency," 37.6% have experienced abuse from their employer, and 70.6% have experiences "food inadequacy and food shortage"). The data also shows other adverse working conditions that those samples struggle with.

[137] *See* Grace Meng, Hum. Rts. Watch, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the United States to Sexual Violence and Sexual Harassment 3, 6–8 (Alison Parker et al. eds., 2012).

[138] *See* 20 C.F.R. § 655.122(d)(1) (2026) (requiring that agricultural employers "provide housing at no cost to the H-2A workers"); *see also* Costa & Martin, *supra* note 101. *See*

When wage violations go uninvestigated, workers lose statutorily guaranteed compensation for damages.[139] When transportation safety requirements are unenforced, workers bear the costs that Congress explicitly allocated to employers.[140] These harms are not speculative, and are expected to increase in congruence with America's growing reliance on migrant farmworker labor.[141] These are the precise injuries that farmworker protection statutes were enacted to prevent.[142]

The complaint-driven enforcement model is particularly ill-suited to migrant workers because of the potentially suppressive power dynamics inherent in the employer-migrant worker relationship.[143] H-2A workers, for example, are bound to a single employer by terms of their visa certification; they cannot transfer to another employer without triggering a new certification process, a practical impossibility for most workers that threatens their ability to work in the United States.[144] This structural dependency gives employers near-absolute leverage over H-2A workers' immigration status, their ability to remain employed, and their capacity to seek legal redress.[145] Workers who do attempt to report violations frequently face retaliation in the form of termination, eviction, and threats of visa revocation; some employers

generally Haro, et al., *supra* note 133, at 1174 (finding that day laborers often experience workplace abuse and documenting the frequency with which these occur).

[139] If a farmworker's wage violation claim is not investigated by the DOL, the farmworker is unable to be compensated by the WHD for damages arising from AWPA violations. *See* 20 C.F.R. § 655.122(c) (2026) (requiring that agricultural employers must issue job orders that "include each of the minimum benefit, wage, and working condition provisions," including workers compensation insurance "at no cost to the worker"); *see also* GAO-15-154, *supra* note 3.

[140] *See* 20 C.F.R. § 655.122(h)(3)–(4) (2026) (requiring that agricultural employers "provide or pay for the worker's transportation and daily subsistence from the place of employment" to where the worker "departed to work [from]").

[141] *See* Costa & Martin, *supra* note 101 (showing that "nearly 8 million workers—roughly 5% of the U.S. labor force" lack immigration status and that there are "roughly 2 million temporary migrant workers . . . accounting for 1.2% of the total labor force" that are admitted under temporary visas like H-2A).

[142] *See* Antenor v. D & S Farms, 88 F.3d 925, 929–30 (11th Cir 1996) (quoting Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986)).

[143] *See Administration of Laws Affecting Farmworkers*, *supra* note 83, at 64 (statement of John Ebbott, Dir. Litig., Migrant Legal Action Program); *see also* Kelkar, *supra* note 9.

[144] *See* 20 C.F.R. § 655.103(b) (2026) (defining an H-2A worker's tie to a single employer for a job period).

[145] *See* Moyce, *supra* note 133, at 341–42.

withhold valid passports and documentation, creating additional immigration concerns for migrant workers—even those with work authorization.[146]

Language barriers pose an additional obstacle to reporting labor violations to WHD.[147] Although WHD reporting materials are available in Spanish,[148] many farm workers who speak a primary language other than Spanish are left without comprehensive reporting resources.[149] Limited language options in WHD intake forms, combined with geographic isolation, threats from employers, and immigration concerns, are not mere practical oversights in reporting.[150] These elements, and others, represent a foreseeable obstructive failure in the labor regulatory system enacted to protect vulnerable migrant workers.[151]

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[146] *See* Rebecca Smith & Eunice Hyunhye Cho, Nat'l Empl. L. Project, Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights 2–4 (2013).

[147] *See* Thomas A. Arcury, Jorge M. Estrada & Sara A. Quandt, *Overcoming Language and Literacy Barriers in Safety and Health Training of Agricultural Workers*, 15 J. Agromedicine 236, 239 (2010) (noting that at least one-quarter of workers from Latin America, including Mexico, speak an indigenous language and that in some areas, "Haitian Creole is widely spoken").

[148] *See How to File a Complaint*, Dep't of Lab., [https://perma.cc/LY5E-U8XH] (last visited Oct. 28, 2026). Additionally, when enacting AWPA, Congress instructed the DOL to "make and provide forms in English, Spanish or other language," recognizing that access to materials in a worker's native language is important to ensure fair labor practices. *See* H.R. Rep. No. 97-885, at 16 (1982).

[149] *See* Arcury, Estrada & Quandt, *supra* note 147, at 240 (noting that "[t]he primary native language for one-quarter or more of "Latino" agricultural workers is an indigenous or Native American language" and that "when indigenous agricultural workers are provided with occupational safety training in Spanish, their understanding is limited").The DOL's "How to File a Complaint" online resources are only available in English and Spanish. *See How to File a Complaint*, *supra* note 148; *see also Cómo Presentar una Queja*, Dep't of Lab., [https://perma.cc/R8K9-QDP9] (last visited Oct. 28, 2026).

[150] *See generally id.* (noting challenges for providing agricultural workers with workplace health and safety trainings).

[151] *See* 20 C.F.R. § 655.122(q) (2024) (requiring the agricultural employer to provide a work contract copy "in a language understood by the worker as necessary or reasonable"); *see also supra note* 147,.at 8 (noting that while some "[i]ndividual companies have developed Spanish-language training programs for their workers," many of the materials are not translated appropriately and "many such materials needed substantial improvement to make them linguistically, culturally, and educationally appropriate").

2. Department of Labor Wages and Hours Division Lacks the Capacity to Conduct Statutorily Prescribed Investigations into Violations by Agricultural Employers

The DOL Office of Inspector General ("OIG") has echoed these GAO findings, concluding that WHD lacks the capacity to conduct proactive inspections to deter noncompliance or even identify violations that workers are unable or unwilling to report.[152] Importantly, these reports characterize these enforcement gaps as structural consequences of mismanagement from agencies tasked with carrying out these mandatory enforcement functions, not as discretionary policy choices.[153] OIG has found that investigations into H-2A violation complaints are frequently delayed, sometimes extending beyond the worker's authorized employment period.[154] Even substantiated violations fail to produce meaningful relief, especially when workers have returned to their home countries, their seasonal operations have ended, or when visa lapses leave them undocumented.[155]

These DOL enforcement deficiencies are exacerbated by the geographic dispersion and seasonal mobility of agricultural worksites.[156] Agricultural employers are often located in remote, hard-to-reach rural areas far from DOL field offices.[157] This increases the time and costs associated with conducting inspections and follow-up investigations.[158] Limited DOL resources therefore constrain the timing, scope, and overall number of inspections conducted.[159]

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[152] *See* Rep. No. 06-21-001-03-321, *supra* note 96, at 12.

[153] *See, e.g.*, Vásquez, *supra* note 109 ("[WHD] does 'very little' to enforce the H-2A rule that requires employers to keep records of their workers' permanent contact information abroad. . . . [W]hich is a little bit surprising because there are so many very specific H-2A [record keeping] requirements with money penalties potentially attached to them." (third alteration in original)).

[154] *Id.*

[155] *See id.*; *see also* Bauer & Perales Sanchez, *supra* note 104.

[156] *See* Int'l Lab. Recruitment Working Grp., The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse 44 (2013) (discussing that farmworkers often work in rural areas, which poses geographic, language, and economic barriers to securing and maintaining counsel during litigation against employers).

[157] *See* Bauer & Stewart, *supra* note 95, at 41; *see also* Bauer & Perales Sanchez, *supra* note 104, at 8 (noting that H-2A workers usually live in rural areas); *see also See* Thomas A. Arcury & Sara A. Quandt, *Living and Working Safely: Challenges for Migrant and Seasonal Farmworkers*, 72 N.C. Med. J. 466, 468 (2011) (noting that migrant farmworkers "are often isolated, living in rural areas with no transportation").

[158] *See* Rep. No. 06-21-001-03-321, *supra* note 96, at 12, 30 (discussing that WHD is constrained by time-limits for complaint-driven investigations, including a 2-year statute of limitations on debarment, and obtaining documentation from employers is often delayed).

[159] *See id.*

As a result, compliance monitoring trends are inconsistent despite prevailing regulatory requirements that demand ongoing federal oversight.[160]

B. The Farmworkers Protection Statutes Satisfy Each *Mitchell II* Element

The H-2A program and AWPA satisfy each of the money-mandating elements that *Mitchell II* instructs courts to examine.[161] Together, they establish that the farmworker protection statutes can be fairly interpreted as mandating compensation when their terms are systematically breached.[162]

1. Both Statutes Impose Specific, Mandatory Duties on Federal Agencies

Critically, the H-2A program and AWPA require affirmative determinations to ensure compliance with labor standards.[163] H-2A regulations require that the DOL *shall* review employer applications, *shall* verify compliance with safety obligations, and *shall* investigate complaints.[164] AWPA mandates that the DOL *shall* investigate complaints of farmworker rights violations when appropriate, and *shall* bring actions to seek redress of violations.[165] These are mandatory obligations that allow no agency discretion over whether to act.[166] Although courts sometimes construe "shall" as permissive when directed against the government, they decline to apply that presumption if statutory structure and context demonstrate a contrary congressional intent.[167] Here, the legislative history combined with the directed enforcement mechanisms demonstrates Congress's intent to allow compensation for breaches.[168] Moreover, the notable instances in which the Supreme Court has construed a statutory "shall" as permissive have concerned statutorily imposed time frames

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[160] *See id.* (noting that investigations of violations of the H-2A program are complaint-driven).

[161] *See supra* Section I.A.1.

[162] *See* United States v. Mitchell (*Mitchel II*), 463 U.S. 206, 226 (1983); *see also* Ravi v. United States 104 F.4th 1359, slip op. at 6 (Fed. Cir. 2024) (finding that an F-1 temporary visa holder has Tucker Act jurisdiction because their suit "involves the 'express or implied contract with the United States's language of the Tucker Act. 28 U.S.C. § 1346(a)(1) . . . a breach of contract with the government").

[163] *See* 29 C.F.R. § 501.16 (2026); 29 U.S.C. §§ 1855(b), 1862(a).

[164] 8 U.S.C. § 1188(c)(3)(A), (c)(3)(B)(vii)(II), (c)(4).

[165] *See* 29 U.S.C. § 1855(b).

[166] *See supra* Section II.B.

[167] *See* Butte City v. United States, No. 2021-1779, 2022 U.S. App. LEXIS 5746, at *13–15 (Fed. Cir. Mar. 4, 2022) (holding that statutory language, "including whether it uses 'may' and 'shall' language[] is central to the inquiry").

[168] *See* 29 U.S.C. § 1855(b); 8 U.S.C. § 1188; H.R. Rep. No. 97-885, at 2–4, 13 (1982).

with unclear consequences for failure to meet deadlines.[169] In *Mitchell II*, the Court found that the existence of a money-mandating provision created financial consequences, even if the consequences were implicit and not expressly defined.[170] While agencies retain discretion over how to allocate resources or prioritize investigations, they lack the discretion to ignore statutory requirements or decline to enforce them altogether.[171] Thus, AWPA and the H-2A guestworker program impose specific, mandatory duties on the DOL, which satisfy the first element of the *Mitchell II* assessment.[172]

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[169] *See, e.g.*, St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 41, 44 (2d Cir. 1985), *rev'd* Brock v. Pierce Cnty., 476 U.S. 253, 259 (1986) (finding that the use of "shall" to specify a deadline for an agency determination was permissive because the statute did not explicitly or implicitly specify a consequence of not complying with the deadline); United States v. Montalvo-Murillo, 495 U.S. 711, 718 (1990) (finding that noncompliance with a statute that dictated that the "Secretary of Labor 'shall' act within a certain time [frame]" does not completely bar the Secretary's power to act outside of that time frame"); Barnhart v. Peabody Coal Co., 537 U.S. 149, 159–60 (2003) (finding that "if a statute does not specify a consequence for noncompliance with statutory timing provisions," the use of "shall" in the statute cannot be mandatory (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)).

[170] *See* Fisher v. United States, 402 F.3d 1167, 1174–75 (Fed. Cir. 2005) (finding that the Federal Circuit has Tucker Act jurisdiction to hear disability claims because statutes that entitle individuals to monetary benefits are money-mandating) (citing Sawyer v. United States, 930 F.2d 1577, 1580 (Fed. Cir. 1991) (finding that a statute is money-mandating when the Secretary of the Navy had no discretion whether to pay disability)); *see also* Grav v. United States, 886 F.2d 1305, 1307 (Fed. Cir. 1989) (finding that a statute is money-mandating when the government does not have discretion to refuse to enter a contract with a statutorily qualified applicant). *But see* Meyers v. United States, 96 Fed. Cl. 34, 45 (2010) (finding that a statute is not money-mandating when the government "enjoys complete discretion in determining who is, and who is not, entitled to a payment" (citing Doe v. United States, 463 F.3d 1314, 1324 (Fed Cir. 2006))).

[171] Even statutes that allow for some agency discretion can be entitled to Tucker Act jurisdiction. *See* Samish Indian Nation v. United States, 419 F.3d 1355, 1365 (Fed. Cir. 2005) (citing Perri v. United States, 340 F.3d 1337, 1342–43 (Fed. Cir. 2003)) (holding that "Tucker Act jurisdiction is not limited to such narrow statutory" discretionary requirements, and that statutes that meet certain other conditions are entitled to Tucker Act jurisdiction). A mandatory duty to perform remains mandatory even when the agency has discretion over how it carries that duty out. *See* Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003) (explaining that "the use of the word 'shall' generally makes a statute money-mandating" even though the statute left the President to set the rates and designate eligible sites).

[172] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 226 (1983).

2. Both Statutes Vest Comprehensive Regulatory Control in Federal Agencies, Leaving Limited Operational Discretion

Federal Circuit precedent draws a distinction between statutes that confer broad policy discretion and those that impose enforceable obligations subject only to affirmative implementation choices.[173] The farmworker protection statutes fall in the latter category.[174] Agencies retain discretion over how to allocate resources or sequence investigations, but they do not have discretion to decline performance of their core investigative responsibilities altogether.[175] The DOL, DHS, and DOS are mandated to follow a structured process for conferring visas under the H-2A program.[176] This is the same distinction drawn in *Mitchell II* between the pervasive regulatory control established in Tribal timber management statutes and purely advisory programs that impose no binding management obligations.[177] Because the farmworker protection statutes impose affirmative obligations on the federal government throughout a migrant farmworker's labor in the United States, the government has the comprehensive regulatory control to satisfy the second element of the *Mitchell II* assessment.[178]

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[173] *See id.* at n.6 ("[T]he duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials."). *Compare Meyers*, 96 U.S. at 62 n.16 (finding that the government had "no obligation to approve any specific practices" as eligible for conservation program payments), *with Grav*, 886 F.2d at 1307 (finding that the Secretary of Agriculture lacked "discretion to refuse participation by any applicant who was qualified for the program").

[174] *See supra* Section II.D.1.

[175] *See Grav*, 886 F.2d at 1308 (finding that the Secretary can "alter the quantities in a contract, but not to permit him to refuse to enter into a contract altogether with a qualified applicant"). Even statutes that allow for some agency discretion can be entitled to Tucker Act jurisdiction. *See* Samish Indian Nation v. United States, 419 F.3d 1355, 1364–65 (Fed. Cir. 2005) (citing Perri v. United States, 340 F.3d 1337, 1342–43 (Fed. Cir. 2003)) (holding that "Tucker Act jurisdiction is not limited to such narrow statutory" discretionary requirements, and that statutes that meet certain other conditions are entitled to Tucker Act jurisdiction).

[176] *See H-2A Visa Program*, *supra* note 67.

[177] *Compare Mitchell*, 463 U.S. at 209, 219, 222 (finding a compensable federal duty where the federal government possessed "'comprehensive' control" and "exercise[d] literally daily supervision" over Native American timber resources (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 147 (1980))), *with* 8 U.S.C. § 1188(a)(1) (DOL must take affirmative actions before migrant farmworkers can work in the United States), *and* 29 U.S.C. § 1811(a) (the Secretary of Labor must take affirmative actions to certify registration of labor contractors before migrant workers can work on contractor farms).

[178] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 222 (1983).

3. Migrant and Seasonal Farmworkers are the Identifiable Beneficiaries Congress enacted these Statutes to Protect

The legislative histories of the farmworker protection statutes expressly identify migrant and seasonal farmworkers as the population whose economic exploitation Congress sought to remedy.[179] In *Mitchell II*, the Native American allottees could not harvest or sell their own timber without the federal government's intervention, just as H-2A workers cannot enter the United States without DOL certification.[180] In *White Mountain Apache Tribe*, the Tribe could not maintain trust property because of the federal government's exclusive occupation.[181] Here, farmworkers cannot enforce wage and protection rights codified in the H-2A program and AWPA without a WHD investigation.[182] The farmworkers protected by AWPA and H-2A provisions are the intended beneficiaries: they depend on federal performance for visa certification and for enforcement of their wage and safety rights.[183] Migrant farmworkers' reliance on federal action throughout their employment mirrors the beneficiary dependency the Court recognized as sufficient for Tucker Act jurisdiction in *Mitchell II* and *White Mountain Apache Tribe*.[184] Because of this dependency, farmworkers are intended beneficiaries under the law, which satisfies the third element of the *Mitchell II* assessment.[185]

4. Quantifiable Economic Harms to Farmworkers Give Rise to Remedies Upon Breach

Congress did not create these statutes in a vacuum. It enacted them in response to documented, quantifiable losses that migrant workers suffered when left unprotected.[186] The direct economic harms resulting from federal

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[179] *See, e.g.*, H.R. Rep. No. 97-885, at 12, 16 (1982); H.R. 7102; *Hearing on the Migrant and Seasonal Agricultural Worker Protection Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce*, 105th Cong. 17 (statement of Mary Ellen Beaver, Philadelphia Legal Assistance Corporation); *see also* 8 U.S.C. § 1188(a)(1).

[180] *Mitchell*, 463 U.S. at 219–25.

[181] United States v. White Mountain Apache Tribe, 537 U.S. 465, 475–76 (2003).

[182] *See* 29 C.F.R. § 500.1(e) (2026); *id.* § 501.1(c) (2026).

[183] *See Mitchell*, 463 U.S. at 219–25; *White Mountain Apache Tribe*, 537 U.S. at 475–76.

[184] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. at 219–25; *White Mountain. Apache Tribe*, 537 U.S. at 475–76. *See e.g.*, 8 U.S.C. § 1188(a)(1) (requiring the Secretary of Labor to certify H-2A applications before hiring); 20 C.F.R. § 655.130 (2026) (H-2A application filing requirements); *see also* 29 U.S.C § 1853 (granting the Secretary of Labor authority to investigate AWPA violations).

[185] *See Mitchell*, 463 U.S. at 225.

[186] *See*, *e.g.*, 29 U.S.C. § 1822; H.R. Rep. No. 97-885, at 1–3, 12, 16 (1982).

breach of farmworker protection statutes are measurable.[187] AWPA addresses how low or unpaid wages, poor working conditions, and fears of employer retaliation contribute to migrant farmworkers' low bargaining power, making them especially susceptible to abuse by unscrupulous contractors.[188] When these protections go unenforced, workers bear costs that Congress expressly allocated to employers, giving rise to a damages remedy for breach.[189] In 2019, WHD found that an average of $572 was owed per worker for AWPA violations, and an average of $485 was owed per worker for H-2A program violations.[190] These measurable losses align squarely with the statutory objectives that Congress sought to achieve through mandatory agency oversight.[191] The Tucker Act does not require that Congress specify the precise measure of damages, only that a statute can "fairly be interpreted as mandating compensation," and a regime whose breach produces quantifiable economic losses to an identifiable class of beneficiaries satisfies the *Mitchell II* standard.[192]

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[187] *See, e.g.*, GAO-25-106389, *supra* note 76, at 33, 36 (finding that from FY2018 to FY2023, WHD uncovered "a total of 69,294 H-2A violations affecting 66,819 workers" and assessed over $20 million in back wages and over $25 million in civil money penalties); Costa & Martin, *supra* note 101 (finding that WHD investigations from FY2000 to FY2019 resulted in orders "to pay $76 million in back wages to 154,000 farmworkers" and "63 million in civil money penalties for violations").

[188] *See Administration of Laws Affecting Farmworkers*, 66, *supra* note 83, at 66; *see also* 29 U.S.C. § 1801 ("It is the purpose of [the AWPA] to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers.").

[189] *See* 20 C.F.R. §§ 655.120, 655.122 (2026) (agricultural employers are required to provide minimum wages, housing, and transportation to H-2A workers); *see also* H.R. Rep. No. 97-885, at 2–4, 13 (1982) (recognizing that migrant workers are among "the most abused of all workers in the United States" and enacting AWPA to protect migrant workers' rights to fair wages and standard living conditions).

[190] *See* Daniel Costa, Philip Martin & Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture*, Econ. Pol'y Inst. (Dec. 15, 2020), [https://perma.cc/SEA2-4E7A]. These figured reflect only detected violations from WHD investigations of labor standards complaints, and the true aggregate loss to farmworkers could be substantially higher. *See id.*

[191] *See, e.g.*, Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985) (finding that the civil remedies were imposed both to "promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market"); Martinez v. Shinn, 992 F.2d 997, 999 (9th Cir. 1993) (holding that civil remedies are "provided not only to compensate injuries, but also to promote the enforcement of [AWPA] and deter violations") (quoting Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1309 (9th Cir. 1990)).

[192] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 227 (1983).

Because AWPA and the H-2A program satisfy each *Mitchell II* element, they can fairly be interpreted as money-mandating.[193] Part III applies this framework to establish the elements of a farmworker mismanagement claim and the available damages theories.[194]

III. Solutions

The enforcement lapses documented in Part II are not mere administrative shortcomings.[195] Rather, they are the product of federal agencies' systematic failure to discharge specific, mandatory duties.[196] Federal performance is the exclusive mechanism by which migrant and seasonal farmworkers can realize the economic protections of the farmworker statutes guaranteed by Congress.[197] This Note proposes that farmworkers harmed by those failures have a cognizable damages remedy against the United States under *Mitchell II* via the Tucker Act, with jurisdiction in the Federal Circuit. This Part sets out the jurisdictional basis for that claim, its elements, the available damages theories, how to overcome the principal doctrinal obstacle, and the practical framework for bringing such claims.

A. Tucker Act Jurisdiction and the Money-Mandating Requirement

The Tucker Act grants the COFC jurisdiction over claims against the United States for any act of Congress or an executive department.[198] To establish jurisdiction, a claimant must identify a substantive source of law that can be fairly interpreted as mandating compensation by the federal government, or "money-mandating."[199] The absence of an express damages provision does not defeat Tucker Act jurisdiction.[200] The Federal Circuit and Supreme Court

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[193] *Id.*

[194] *See infra* Part III.

[195] *See* discussion *supra* Section II.D.

[196] *See* discussion *supra* Section II.C.

[197] *See, e.g.*, 8 U.S.C. § 1188(g)(3)–(4); 29 U.S.C. § 1801; *see also* H.R. Rep. No. 97-885, at 12, 16 (1982).

[198] 28 U.S.C. § 1491(a)(1) (granting Tucker Act jurisdiction over claims ". . . against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort").

[199] *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003); *see also* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1327 (2020) (finding Tucker Act jurisdiction by employing a "'fair interpretation' test") (citation omitted).

[200] *See White Mountain Apache Tribe*, 537 U.S. at 472–73 (holding that a statute can be money-mandating even when it does not contain an explicit damages remedy); United

have repeatedly held that money-mandating intent may be inferred from a statute's structure and purpose, especially when Congress assigns the federal government the responsibility for safeguarding financial interests.[201]

AWPA and the H-2A program satisfy this standard for three mutually reinforcing reasons. First, Congress enacted both statutes with express awareness that migrant farmworkers were subject to pervasive, measurable economic exploitation, and designated exclusive federal oversight as the corrective mechanism.[202] Second, both regulatory regimes vest the federal government with near-total operational control over access to agricultural employment and over the enforcement of the conditions attached to that employment.[203] This degree of control mirrors the control that *Mitchell II* identifies as the predicate for compensable federal duty.[204] Third, the regulatory provisions governing both programs use mandatory, non-permissive language, directing that agencies *shall* certify, inspect, investigate, and enforce; this leaves no room for recharacterizing systematic non-performance as a lawful policy choice.[205]

These features suggest that the farmworker protection create a fiduciary duty on the U.S. government similar to that established in *Michell II*, and can be fairly interpreted as mandating compensation when their terms are breached.[206] The fact that no prior plaintiff has successfully litigated this theory

States v. Mitchell (*Mitchell II*), 463 U.S. 206, 216–17 (1983).

[201] *See* Smith v. United States, 158 Fed. Cl. 520, 524 n.1 (2022) (citing Fisher v. United States, 364 F.3d 1372, 1377–78 (Fed. Cir. 2004), *rev'd en banc on other grounds*, 403 F.3d 1167 (Fed. Cir. 2005) (finding that the Federal Circuit has Tucker Act jurisdiction to hear disability claims because statutes that entitle individuals to monetary benefits are money-mandating)).

[202] 8 U.S.C. § 1188; 29 U.S.C. § 1801. *See* discussion *supra* Section II.A; *see also* 123 Cong. Rec. 19982 (1977) (statement of Hon. Dave Stockman) (noting that Congress sought to restrict the "unscrupulous individuals" providing unsafe transportation for migrant workers who "stole from the workers . . . and they needlessly endangered the health and safety of migrant workers"); Antenor v. D & S Farms, 88 F.3d 925, 933 (quoting A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (holding that AWPA remedies must be construed broadly to reflect its "humanitarian purpose to protect all those hired by middlemen to toil in our nation's fields, vineyards, and orchards")).

[203] *See* 8 U.S.C. § 1188(a)(1) (stating that employer access to migrant and seasonal farmworkers is conditioned on DOL's affirmative actions, because no H-2A worker may be admitted unless the Secretary of Labor has certified that qualified U.S. workers are not available and that employment will not adversely affect domestic workers); 29 U.S.C. § 1811(a)–(b) (under AWPA, no farm labor contractor may recruit, hire, or transport any migrant farmworker without a valid certificate of registration from the Secretary of Labor); *see also* discussion *supra* Section III.B.

[204] *See* discussion *supra* Sections II.D.1–2.

[205] *See supra* Section II.D.1.

[206] *Cf.* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 219, 226 (1983).

to judgment in the Federal Circuit does not undermine its doctrinal viability.[207] Instead, it reflects the structural barriers that have historically prevented migrant farmworkers from accessing this remedial avenue.[208] Those barriers are features of, and exacerbated by, the same regulatory failures this Note documents; they do not diminish the underlying legal entitlement to relief.[209]

B. Establishing a Farmworker Protection Statute Mismanagement Claim

A farmworker mismanagement claim under the Tucker Act requires a plaintiff to establish four elements drawn from the *Mitchell II* framework: (1) a mandatory, statutory duty is imposed on a federal agency; (2) the agency's failure to perform that duty constitutes breach; (3) the plaintiff is an intended beneficiary of the regulatory scheme; and (4) economic harm to the plaintiff is causally attributable to the agency's breach.[210] Each element is satisfied under the H-2A and AWPA frameworks.[211]

1. A Plaintiff Farmworker Must Demonstrate that Federal Nonenforcement Caused Harms that are Protected by the Farmworker Protection Statutes

The first element requires that a plaintiff allege a specific, non-discretionary statutory or regulatory provision that imposed an affirmative duty on the relevant agency and that the agency failed to perform the duty.[212] A generalized allegation of poor enforcement with no connection to the specific affirmative

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[207] *Cf.* Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1182 (11th Cir. 2005) (reminding that a party may still have reasonable grounds for suit even when the suit asserts a novel legal claim and when the facts of a case may be questionable or unfavorable). As of April 2026, claims brought by migrant farmworkers against the United States have not crossed the COFC or Federal Circuit dockets.

[208] *See* discussion *supra* Section II.C.1 (discussing barriers to access for migrant farmworkers).

[209] *See* discussion *supra* Section II.C.1; *see also* Costa & Martin, *supra* note 101 (documenting that fear of employer retaliation and immigration consequences structurally deter farmworkers from filing complaints with WHD, which affect farmworker access to courts); Meng, *supra* note 137, at 6–8 (documenting systemic reluctance of farmworkers to engage in formal legal processes).

[210] *See Mitchell*, 463 U.S. at 225; *see also* United States v. White Mountain Apache Tribe, 537 U.S. 465, 472–76 (2003) (applying the same framework); United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (requiring the identification of specific, mandatory duties imposed on the federal government as trustee). The four elements described here are derived from the conditions identified in *Mitchell* II and applied subsequently in the Federal Circuit. *See id.*

[211] *See* discussion *infra* Sections III.B.1–4.

[212] *See Mitchell*, 463 U.S. at 228; see also 8 U.S.C. § 1188; 29 U.S.C. § 1801.

duties is insufficient.[213] The farmworker protection statutes are dense with mandatory provisions, and a plaintiff must connect their injury to at least one provision.[214] If Tucker Act jurisdiction is challenged, the plaintiff should assert that the statutes are money-mandating under *Mitchell II*, even though they do not contain express damages provisions.[215]

2. A Plaintiff Farmworker Must Demonstrate that the Agencies' Failures to Perform H-2A and AWPA Duties Cause their Harm

The second element requires a plaintiff to establish that the agency's nonperformance of its mandatory duty caused the plaintiff's loss.[216] First, a plaintiff must show that the statutory protection at issue was designed to prevent the type of harm they suffered.[217] If a plaintiff alleges that their employer stole or withheld wages or did not provide standard housing or transportation, the plaintiff can likely demonstrate that they suffered an injury within the protective scope of the statutes.[218] Second, a plaintiff must allege that but-for the agencies' failure to certify, inspect, investigate, or sanction an employer, that employer would have been prevented from inflicting harm or held accountable for it.[219] If WHD received a sufficient complaint and failed to investigate within a reasonable period, or where DOL certified an employer who was not in compliance with applicable H-2A requirements, the but-for connection between agency inaction and worker harm is traceable.[220]

Plaintiffs should address the documented systemic character of WHD's enforcement failures to rebut any government argument that the failure to investigate was a one-off resource decision. The GAO and OIG reports characterizing enforcement gaps as systemic mismanagement are useful at this stage to demonstrate that the failure was not anomalous.[221]

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[213] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 228 (1983).

[214] *See, e.g.*, 29 U.S.C. § 1855(a), (b) (mandating actions that are prohibited by agricultural employers, including retaliation); *id.* § 1823(a) (mandating housing standards that agricultural employers must follow for employer certification); 8 U.S.C. § 1188(c)(4) (mandating the process that DOL must take to certify that an employer provides compliant housing). If a plaintiff alleges wage, housing, or transportation violations, they should allege that in their complaint. *See id.*

[215] *See Mitchell*, 463 U.S. at 225; *see also supra* Section II.B.

[216] *See Mitchell*, 463 U.S. at 220–21. Here, a plaintiff farmworker should rely on the agency's nonperformance aspect, rather than the employer's underlying violation. *See id.*

[217] *See id.* at 226–28.

[218] *See* discussion *supra* Section II.C.

[219] *Id.*; *see also* discussion *supra* Section II.D.1.

[220] *See* discussion *supra* Section II.C.

[221] *See supra* Sections II.A, C; *see also* Costa & Martin, *supra* note 101 (reporting that WHD farm investigations fell in fiscal year 2022).

3. A Plaintiff Farmworker Must Demonstrate that they are Within the Class of Intended Beneficiaries of the H-2A Program and AWPA

The third element requires that a plaintiff show that the money-mandating statute was designed to protect members of their class.[222] For farmworker mismanagement claims, this requirement is satisfied when a plaintiff has H-2A certification or performs agricultural labor covered by AWPA.[223] A plaintiff should allege whether they held H-2A status, whether they were employed as a migrant or seasonal agricultural worker, and whether they worked with a certified employer subject to the relevant statutory obligations.[224] Because AWPA's protections extend to workers regardless of immigration status in many circumstances, undocumented workers who performed covered agricultural labor may also qualify as intended beneficiaries.[225]

4. A Plaintiff Farmworker Must Demonstrate Quantifiable Economic Loss Causally Attributable to the Breach

Tucker Act damages are measured as the economic loss caused by the government's breach: the difference between the economic position the plaintiff would have occupied had the government performed its mandatory duties and the position the plaintiff actually occupies.[226] For farmworker mismanagement claims, this yields three concrete and measurable categories of loss: (1) lost wages; (2) housing costs; and (3) transportation losses.[227]

For example, to recover lost wages, the damages calculation is the difference between wages owed under the applicable statutory minimum and wages usually paid.[228] In 2019, WHD found that an average of $572 was owed per worker for AWPA violations, and an average of $485 per worker for H-2A

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[222] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983).

[223] *See* 8 U.S.C. § 1188(a)(1); *see also* 29 U.S.C. § 1802(8)(A) ("[T]he term 'migrant agricultural worker' means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.").

[224] *See* 29 U.S.C. § 1802(2), (8)(a); *see also* 8 U.S.C. § 1188(c)(3)(A) (discussing the issuance of employer certifications).

[225] *See* Escobar v. Baker, 814 F. Supp. 1491, 1498 (W.D. Wash. 1993); *see also* discussion on reciprocity *supra* note 23.

[226] *See generally,* Bear v. United States, 174 Fed. Cl. 54, 71–72 (2019) (noting that the plaintiffs, if breach is found, would be entitled to recover financial losses caused by that breach).

[227] *See* 29 U.S.C. §§ 1811, 1855(b), 1823; *see also* 8 U.S.C. § 1188(a)(1), (c)(4).

[228] *See* Costa, Martin & Rutledge, *supra* note 190 (documenting that in 2019, WHD investigations found that employers owed farmworkers $6.0 million in back wages).

program violations, figures which represent only detected violations among investigated employers.[229]

B. Overcoming the Discretionary Function Defense to Farmworker Claims Against the U.S. Government

The government's principal defense to farmworker mismanagement claims in the Federal Circuit could be that enforcement resource allocation involves discretionary judgments that do not constitute comprehensive federal control, and therefore fall outside Tucker Act jurisdiction.[230] Courts distinguish between statutes that confer broad policy discretion and those that impose enforceable obligations that are subject only to affirmative implementation choices.[231]

The H-2A program and AWPA assign specific, mandatory functions to specific agencies in imperative regulatory language.[232] Thus, the government cannot recharacterize systematic non-performance of these mandatory functions as a lawful exercise of discretion.[233] An individual decision about how many investigators to deploy to investigate complaints in a particular region per quarter may be discretionary.[234] A systematic, multi-year failure to maintain sufficient investigative capacity to perform congressionally imposed certification, inspection, and enforcement functions is not a discretionary action.[235] Systematic failures are what the GAO and OIG have documented over time.[236] These structural failures constitute injurious conduct in a farmworker mismanagement claim, and fall squarely within the scope of liability established by *Mitchell II*.[237]

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[229] *See id.*

[230] *See* 28 U.S.C. § 1491; United States v. Navajo Nation, 537 U.S. 488, 507 (2003) (finding no Tucker Act jurisdiction when a statute does not encompass comprehensive federal control).

[231] *See* Price v. Panetta, 674 F.3d 1335, 1339 (Fed. Cir. 2012) ("A statutory or regulatory provision that grants a government official or agency substantial discretion to decide whether to expend government funds in a particular way is not considered money-mandating.").

[232] *See* regulatory language discussion *supra* Section III.A.

[233] *See* Berkovitz v. United States, 486 U.S. 531, 537, 547 (1988) (holding that if an agency makes no policy judgment in performance, "the discretionary function exception does not bar a claim that the act was negligent or wrongful").

[234] *See id.*

[235] *See*, *e.g.*, GAO-25-106389, *supra* note 76; GAO-15-154, *supra* note 3; *also* Rep. No. 06-21-001-03-321, *supra* note 96.

[236] *See id.*

[237] United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 227 (1983) ("A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.").

Conclusion

AWPA and H-2A visa program protections assign the federal government a central role in regulating access to lawful agricultural employment and enforcing protections against employer abuses and exploitation.[238] If Congress has imposed affirmative duties on federal agencies, persistent failure to comply with protective duties constitutes a breach of trust and a federal mismanagement of a regime designed to protect vulnerable workers' economic interests.[239]

Under established mismanagement jurisprudence, statutes that impose mandatory obligations and foreseeably result in financial harm upon breach may be fairly interpreted as money-mandating so long as they mirror common-law trust obligations.[240] These farmworker protection statutes fit comfortably within the *Mitchell II* framework.[241] Recognizing jurisdiction of claims by migrant and seasonal farmworkers against the federal government in the Federal Circuit does not expand Tucker Act doctrine but, instead, applies already settled jurisprudence to a regulatory regime that relies on federal performance to function as Congress intended.

The Court recognized that a "prospective remedy" for federal mismanagement may not even make whole the harm done to the beneficiary class, which suggests that punitive damages could be sought in similar cases. *See id.* at 228 (citing Squire v. Capoeman, 351 U.S. 1, 10 (1956) (noting that "by the time [federal] government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless" because of severe, irreversible damage to resources)).

[238] *Supra* discussion in Section II.B.

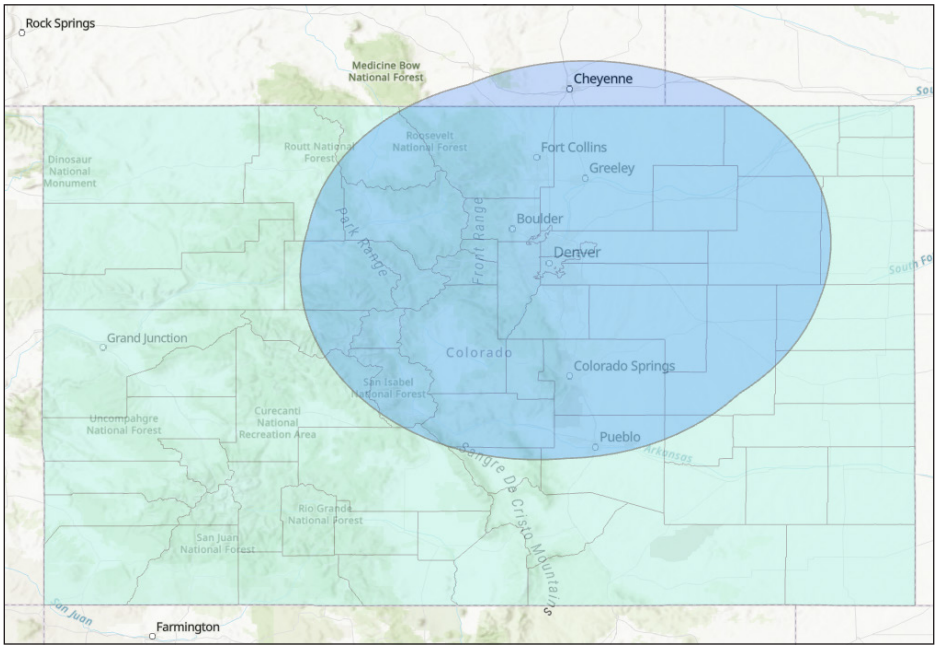
[239] *Supra* discussion in Section II.D.1.

[240] *See Mitchell*, 463 U.S. at 219–27.

[241] *Id.*

Appendix

Figure 1. Colorado Counties Located 100 or More Miles from Denver County[242]



[242] *U.S. Census Bureau, TIGER/Line Shapefiles: Colorado County Boundaries and Denver County*, U.S. Dep't of Commerce (2026), [https://perma.cc/9PVV-9ZQ5] (data); Environmental Systems Research Institute, *ArcGIS Pro*, version 3.7 (Windows, May 2026) (map software). The author used geospatial mapping software, ArcGIS Pro, and imported U.S. Census Bureau TIGER/Line Shapefiles for Colorado's county boundaries. To create the 100-mile radius around Denver County, the author used the Buffer tool in ArcGIS Pro's Geoprocessing pane. The author set the input feature to Denver County and specified a specific radius of 100-miles, which ArcGIS Pro calculated using the standard coordinate system. The author overlaid the buffer on the county boundaries map and flagged any county with less than 75% of its land area inside it. The author used ArcGIS Pro's symbology panes to adjust the colors, lines, and text fonts for readability. The map was created using ArcGIS Pro software on October 11, 2026.

Table 2. Distribution of Certified H-2A Workers Across Colorado Counties 100 or More Miles from Denver County, FY2021

County	Certified H-2A Workers (FY2021[243])	% of All Certified H-2A Workers in Colorado (FY2021)[244]
Mesa	526	15.1%
Saguache	291	8.3%
Montrose	245	7.0%
Moffat	217	6.2%
Delta	215	6.2%
Pueblo	183	5.2%
Otero	116	3.3%
Garfield	59	1.7%
Yuma	52	1.5%
Rio Blanco	50	1.4%
Bent	34	1.0%
Routt	28	0.8%
Rio Grande	26	0.7%
Logan	22	0.6%
Alamosa	18	0.5%
Jackson	18	0.5%
Kit Carson	17	0.5%
Prowers	13	0.4%
Cheyenne	12	0.3%
Conejos	12	0.3%
Sedgwick	9	0.3%
Gunnison	8	0.2%
Ouray	7	0.2%
La Plata	6	0.2%
Montezuma	6	0.2%
Costilla	3	0.1%
Baca	2	0.1%
Phillips	1	0.0%

[243] See American Immigration Council, Colorado's H-2A Workers in Fiscal Year 2021, at 6 (2023).

[244] Percentages are each county's share of the 3,488 H-2A workers certified by the U.S. Department of Labor across all 43 Colorado counties listed in the source. Counties marked "Not listed" do not appear in the source.

County	Certified H-2A Workers (FY2021[243])	% of All Certified H-2A Workers in Colorado (FY2021)[244]
San Miguel	1	0.0%
Crowley	*Not listed*	*N/A*
Custer	*Not listed*	*N/A*
Dolores	*Not listed*	*N/A*
Hinsdale	*Not listed*	*N/A*
Huerfano	*Not listed*	*N/A*
Kiowa	*Not listed*	*N/A*
Las Animas	*Not listed*	*N/A*
Mineral	*Not listed*	*N/A*
Pitkin	*Not listed*	*N/A*
San Juan	*Not listed*	*N/A*
Archuleta	*Not listed*	*N/A*
Total (listed counties)	**2,197**	**63.0%**

Veterans Last: How the Government's Broad Power to Terminate for Convenience Undermines Congressional Protections of Veteran-Owned Small Businesses

Morgan W. Fasolak*

Introduction

Every year, the U.S. government spends hundreds of billions of dollars on contracts with private companies and organizations for goods and services.[1] Civilian federal agency contracting accounts for approximately 40% of those dollars.[2] Between 2022 and 2025, the Department of Veterans Affairs ("VA") spent the most in contracting dollars among all non-Department of

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[1] In Fiscal Year ("FY") 2025, the government spent approximately $792.8 billion on federal contracts, as reported by the Government Accountability Office in their annual snapshot of Government-wide spending. *A Snapshot of Government-Wide Contracting for FY 2025 (Interactive Dashboard)*, U.S. Gov't Accountability Off. (May 5, 2026), [https://perma.cc/LCK2-SV2R]. Goods and services include, for example, "[prescription] drugs and biologicals," "cybersecurity software," and "professional support services." *See id.* In FYs 2022, 2023, and 2024 the government spent approximately $694.2, $759.2, and $755.1 billion, respectively. *See A Snapshot of Government-Wide Contracting for FY 2022*, U.S. Gov't Accountability Off. (Aug. 15, 2023), [https://perma.cc/M7NH-X6D5]; *A Snapshot of Government-Wide Contracting for FY 2023 (Interactive Dashboard)*, U.S. Gov't Accountability Off. (June 25, 2024), [https://perma.cc/6ZW6-2YSS]; *A Snapshot of Government-Wide Contracting for FY 2024 (Interactive Dashboard)*, U.S. Gov't Accountability Off. (June 24, 2025), [https://perma.cc/S4GX-635F].

[2] Using the GAO Dashboard to calculate 40.29% for FY 2022, 39.93% for FY 2023, 41.05% for FY 2024, and 37.99% for FY 2025. *See* sources cited, *supra* note 1. The remaining contract dollars are spent by the Department of Defense ("DoD"). *See id.* This Note refers to the DoD by its statutory name, consistent with the terminology used in the cited GAO reports. *See generally id.*

Defense ("DoD") federal agencies.[3] Annually, the Secretary of VA establishes an agency-wide goal that a percentage of the VA's contracting activities be awarded to small businesses owned and primarily controlled by veterans, including those with service-connected disabilities.[4] These groups are classified under regulations as Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs") and Veteran-Owned Small Businesses ("VOSBs").[5] The VA uses various regulations and programs to prioritize these groups in its contracting activities, including the Veterans First initiative, the VA Rule of Two, and an internal goal of awarding 15% of its contracts to SDVOSBs.[6]

In early 2025, the VA announced it would terminate $2 billion of its contracts.[7] The agency claimed that the contracts identified for termination were for services such as creating PowerPoint slides, recording meeting minutes, and "coaching and training."[8] The VA asserted that cost savings from these terminations would be redirected to support "[veterans'] healthcare and benefits."[9] However, a review of the list of affected contracts revealed that the terminations affected essential services, including cancer care and the ability

[3] *See* sources cited, *supra* note 1.

[4] *See* 38 U.S.C. § 8127(a).

[5] *See* 48 C.F.R. pt. 819(a) (2022) (implementing the SDVOSB and VOSB provisions in 38 U.S.C. § 8127); FAR 2.101 (2026). "The term 'veteran' means a person who served in the active military . . . and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2). Service-disabled veterans are veterans whom the VA has determined are disabled due to illness or injury sustained during their military service. *See* 38 U.S.C. § 101(2), (16); FAR 2.101 (2026). To qualify as an SDVOSB, a business must be "[n]ot less than 51 [%] [] owned and controlled by one or more service-disabled veterans . . . or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran . . . ." FAR 2.101 (2026).

[6] *See infra* Section III.A; U.S. Dep't of Veterans Affairs, Office of Small & Disadvantaged Business Utilization (OSDBU), *VA Small and Veteran Business Programs, Empowering Veteran-Owned Business Success*, U.S. Dep't of Veterans Affairs, [https://perma.cc/SUN2-FLA6] (last visited Oct. 28, 2026) [hereinafter OSDBU].

[7] U.S. Dep't of Veteran's Affairs (@deptvetaffairs), Instagram, (Feb. 25, 2025), [https://perma.cc/6YAY-VRAN] ("Today, VA Secretary Doug Collins announced in a video that VA has found $ 2 billion in cuts to contracts that will be redirected to Veterans' health care and benefits."); Doug Collins, Sec'y of Veterans Affairs (@SecVetAffairs), X, at 00:35–00:55 (Feb. 25, 2025, 11:38 ET), [https://perma.cc/L6U5-GKXH].

[8] *Id.*

[9] *Id.*

to assess toxic exposure claims.[10] The move also disproportionately affected SDVOSB and VOSB contractors.[11]

Because of the VA's preference for contracting with SDVOSBs and VOSBs, veteran-owned businesses are disproportionately affected by sweeping decisions like the VA's mass contract terminations in early 2025 and the Trump administration's push for contract consolidation.[12] The VA's use of terminations for convenience to dispose of these contracts, particularly if a contracting officer did not properly determine each termination decision, misused legitimate contracting tool, and left contractors with few recourse options.[13]

This Note addresses the effects of terminations for convenience on SDVOSBs and VOSBs, including how recent policy changes and terminations by the VA have negatively affected these small businesses' ability to contract with the government.[14] This Note proposes that federal courts should apply existing precedent to ensure the continued protection and promotion of SDVOSBs and VOSBs in government contracting.[15] This Note further recommends congressional action to protect these businesses in a changing

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[10] Tara Copp & Carla K. Johnson, *VA Pauses Billions in Cuts Lauded by Musk as Lawmakers and Veterans Decry Loss of Critical Care*, Assoc. Press (Feb. 26, 2025, 13:41 GMT), [https://perma.cc/ZU3P-CKWB].

[11] *See infra* Section III.C.

[12] *See infra* Sections III.B–C. Contract consolidation is the practice of bundling requirements for supplies and services previously obtained under multiple contracts into a single, larger contract. FAR 2.101 (2026). Contract consolidation is touted as an effective measure to reduce contract redundancy among federal agencies, streamline procurement, and save taxpayer money. *See* U.S. Gov't Accountability Off., GAO-25-108638, Government Contracting: Leveraging Federal Buying Power Can Save Billions 2 (2025) ("Congressional oversight of [consolidation] efforts—and a sustained focus on accountability, data, and requirements—has the potential to help federal agencies accomplish their missions more effectively while also achieving savings and being better stewards of taxpayer dollars."). The Federal Acquisition Regulation (FAR) recognizes the potential adverse impact of contract consolidation on small businesses and requires justification for consolidations estimated to exceed $2 million. FAR 7.107-2 (2026). *See also*, Jennifer Jones, *Contracting Concepts: Bundling and Consolidation*, Def. Acquisition Mag., Nov.–Dec. 2024, at 44–47 (explaining contract consolidation and how the government must tackle small business concerns with consolidation).

[13] *See infra* Sections I.B, III.B–D (explaining the deference afforded to the government in challenges to terminations); *Terminations for Convenience: Can They Be Successfully Challenged?*, Miller & Chevalier (Mar. 17, 2025), [https://perma.cc/P6WC-Q5FZ].

[14] *See infra* Sections III.C–D. The scope of this Note is limited to the impact of terminations for convenience on VOSBs and SDVOSBs. These small business classes have been protected by Congress in the Small Business Act and in government contracting activities at the VA. *See infra* Part II, Section III.A.

[15] *See infra* Section IV.A.

government contracting landscape, as envisioned by the policymakers who initially crafted the veterans' preference legislation.[16]

This Note is organized into four parts. Part I details the government's right to terminate contracts for convenience and the few limitations placed thereon by the U.S. Court of Federal Claims ("COFC"). Part I also describes what remedies are available to owners of terminated contracts. Part II examines the legislative history of small-business and veterans' preferences in government contracting. Part III explains the programs the VA uses to prioritize SDVOSBs and VOSBs in its contracting activities and details the 2025 VA mass contract terminations event. Part III also explores the potential consequences of the government's relatively unfettered ability to terminate for convenience with respect to SDVOSBs and VOSBs, as well as one potential avenue for contractors to contest such terminations. Finally, Part IV recommends judicial and congressional actions to resolve termination disputes and to continue protections for veteran-owned businesses' ability to contract with the government.

I. Terminations for Convenience

As part of its contract management toolkit, the government may terminate a contract for commercial products or services for its convenience.[17] This Part explores the history of terminations for convenience and the legal tests for establishing an improper termination, which demonstrate the difficulties contractors face in successfully asserting such a claim.[18] This Part also explains the relief available to contractors when their contracts are terminated.[19]

A. The History and Applicability of Terminations for Convenience

Termination for convenience is one of the primary tools a contracting officer may use to discharge their duty to "safeguard[] the interest of the United States in its contractual relationships."[20] The government began using terminations for convenience in earnest following World War II to discontinue wartime contracts whose continuation would have resulted in enormous, unnecessary expenditures.[21] In 1964, a termination-for-convenience clause was included in the first version of the Federal Acquisition Regulation ("FAR"),

[16] *See infra* Part II, Section IV.B.

[17] *See* FAR 12.403(d) (2026).

[18] *See infra* Sections I.A–B.

[19] *See infra* Section I.C.

[20] *See* FAR 1.602-2, 12.403(d) (2026).

[21] *See* Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1540–41 (Fed. Cir. 1996) (tracing the history of the Government's use of terminations for convenience and explaining that peacetime use expanded when the clause became mandatory in all government contracts).

then called the Federal Procurement Regulation.[22] The clause was initially optional, then became required in all contracts with the government.[23]

In 1963, the U.S. Court of Claims ("Court of Claims")[24] decided *G.L. Christian & Associates v. United States*,[25] which established the *Christian* doctrine.[26] There, the contractor sought anticipated profits after the Army terminated its contract, arguing that the contract contained no termination-for-convenience clause.[27] The court disagreed, holding that a mandatory clause expressing a significant or "deeply ingrained strand of public procurement policy" is read into the contract by operation of law, and that the termination clause qualifies as such a provision.[28] The *Christian* doctrine rests on the premise that a lower-level government official, such as a contracting officer, lacks the authority to override procurement policies set by a higher authority.[29] Thus, any government contract with a FAR-mandated termination clause may be terminated for convenience regardless of the clause's

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[22] *Id.* at 1541. The FAR is the primary set of policies and procedures governing how U.S. agencies conduct procurement activities. *See* FAR 1.101 (2026). Each agency may create their own acquisition regulation which supplements, but does not supersede, the FAR. *See id; see, e.g.*, 48 C.F.R. § 801.101(b) (2026) (Department of Veterans Affairs Acquisition Regulation ("VAAR")).

[23] *See Krygoski Constr. Co.*, 94 F.3d at 1541. *See generally* FAR subpt. 49.5 (2026) (instructing that "[t]he contracting officer *shall* insert the [termination for convenience] clause" as written in FAR 52.2 that corresponds with the type of solicitation and contract being awarded) (emphasis added).

[24] The Court of Claims is the predecessor court to the COFC. *See* Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified at 28 U.S.C. § 171); *U.S. Court of Federal Claims, 1992-Present*, Fed. Jud. Ctr., [https://perma.cc/ZHL4-PSY3] (last visited Oct. 26, 2026).

[25] 312 F.2d 418 (Ct. Cl. 1963).

[26] *See id.* at 427; Merle M. DeLancey Jr., *What Is the Christian Doctrine and Why Should You Care?*, Gov't Conts. Navigator, Blank Rome (Nov. 19, 2018), [https://perma.cc/476N-4LPR].

[27] *G.L. Christian & Assocs.*, 312 F.2d at 423–24.

[28] *See id.* at 426–27 (explaining the historical use of terminations for convenience to conclude that the clause should be read into the contract); *see also* Gen. Eng'g & Mach. Works v. O'Keef, 991 F.2d 775, 779 (Fed. Cir. 1993) ("[T]he [*Christian*] Doctrine has also been employed to incorporate less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation.").

[29] *See G.L. Christian & Assocs.*, 312 F.2d at 427; *see also* Michael D. Pangia, *The Unpredictable and Often Misunderstood* Christian *Doctrine of Government Contracts: Proposed Approaches for Removing Harmful Uncertainty*, 49 Pub. Cont. L.J. 617, 623–24 (2020) ("One of the express purposes of the [*Christian*] doctrine fashioned by the Court of Claims was to prevent 'ad hoc encroachment or dispensation' by the executive branch on policy set forth by the legislative branch.").

explicit inclusion.[30] The practical consequence is that contractors may be bound by clauses that appear nowhere within the four corners of the contract.[31]

B. The High Bar for Establishing an Improper Government Contract Termination

A contract may be terminated for convenience "only when such a termination would be in the best interests of the government."[32] This seemingly limiting language belies the government's broad discretion to terminate for convenience.[33] Suits against the government for such terminations are rarely decided in the contractor's favor.[34] The FAR establishes the contracting officer's authority to terminate a contract.[35] A contracting officer has a virtually unrestricted ability to terminate a contract for convenience when it is "in the [g]overnment's interest."[36] Although contracting officers are "allowed wide latitude to exercise business judgment," they must treat contractors fairly and impartially, including when determining whether terminating a contract is in the government's best interest.[37]

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[30] *See G.L. Christian & Assocs.*, 312 F.2d at 427.

[31] *See* DeLancey, *supra* note 26.

[32] FAR 12.403(b) (2026).

[33] *See* David H. Carpenter, Cong. Rsch. Serv., LSB11275, The Government's Broad Power to Terminate Procurement Contracts 1, 4 (2025).

[34] Suits against the government for terminations for convenience are typically only upheld when the government acts in bad faith, abuses its discretion, or contracts with no intention of fulfilling its promises. *See, e.g.*, Tigerswan, Inc. v. United States, 118 Fed. Cl. 447, 453 (2014) (denying the government's motion for summary judgement where the record supported plaintiff's claim that the contracting officer abused his discretion by failing to exercise independent judgment in terminating the contract); *see also*, John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., Administration of Government Contracts 1209, 1218 (6th ed. 2025) (The authors contend that "[i]t has been virtually impossible for terminated contractors to demonstrate government bad faith." They cite numerous decisions from the COFC between 1977 and 2021 which declined to determine that a contracting officer's actions, even when erroneous, constituted bad faith.).

[35] FAR 1.602-1(a) (2026) ("Contracting officers have authority to enter into, administer, or *terminate* contracts and make related determinations and findings." (emphasis added)).

[36] *See* FAR 52.249-2(a) (2026); Matthew S. Pearlman & William W. Goodrich, Jr., *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 Pub. Cont. L.J. 1, 3, 7 (1978) (arguing that there are "virtually no limitations on the Government's right to terminate for convenience"); Grace Tramack, *Guidance for United States Government Termination for Convenience or Illegality*, 35 Fed. Cir. B.J. 113, 137–39 (2026).

[37] FAR 1.602-2 (2026); *see* FAR 52.249-2 (2026); *see also* Penner Installation Corp. v. United States, 89 F. Supp. 545, 547 (Ct. Cl. 1950) ("[T]he contracting officer must act

The primary hurdles for contractors in asserting an improper termination are the high bar for showing bad faith or abuse of discretion by a contracting officer and overcoming the deference that courts and boards afford the government in termination cases.[38] The Court of Claims and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") have articulated three tests to determine whether a termination for convenience is improper.[39]

In *Torncello v. United States*,[40] the Court of Claims established the "changed circumstances" test.[41] The court held that the government cannot use the convenience clause to freely dishonor its contractual obligations and that the clause requires "some kind of change from the circumstances of the bargain or in the expectations of the parties."[42] When the government cannot establish a sufficient change in circumstances between the contract award and termination, the government cannot terminate simply, for example, to obtain a better price elsewhere.[43] The Federal Circuit currently applies the changed circumstances test established in *Torncello* narrowly.[44]

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impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge. . . . [H]is function . . . is to act impartially, weighing with an even hand the rights of the parties . . . .") *aff'd*, 340 U.S. 898 (1950).

[38] *See, e.g.,* JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 709 (Fed. Cir. 2021) (quoting Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995)) ("To overcome [the] presumption [of good faith], a contractor must show through 'well-nigh irrefragable proof' that the government had a specific intent to injure it."); Kalvar Corp. v. United States, 543 F.2d 1298, 1301–06 (Ct. Cl. 1976) (requiring "well-nigh irrefragable proof" to induce the court to abandon the presumption the government officials act in good faith); *see also* Sareesh Rawat, *Understanding the Presumption of Good Faith in Official Government Actions*, Tillit L. (Dec. 22, 2023), [https://perma.cc/R2V4-PQ5G] (explaining that the "well-nigh irrefragable proof" standard is akin to the clear and convincing evidence standard of proof that "produces an abiding conviction in the mind of the judge that the truth of the factual contention is highly probable").

[39] *See Kalvar Corp.*, 543 F.2d at 1301–06 (the "bad faith or abuse of discretion" test); Torncello v. United States, 681 F.2d 756, 765, 772 (Ct. Cl. 1982) (the "changed circumstances" test); Krygoski Constr. Comp. v. United States, 94 F.3d 1537, 1541–42, 1545 (Fed. Cir. 1996) (the "no intention of fulfilling its promises" test (citing Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990))). Recently, in *JKB Solutions & Services, LLC*, the Federal Circuit affirmed these tests. *See* 18 F.4th at 708–09.

[40] 681 F.2d 756 (Ct. Cl. 1982).

[41] *See id* at 765, 771–72.

[42] *Id.* at 772.

[43] *See id.* at 771–72.

[44] *See Krygoski Constr. Co.*, 94 F.3d at 1544–45 (clarifying that "[*Torncello*] applies only when the Government *enters* a contract with no intention of fulfilling its promises" (emphasis added) (citing *Salsbury Indus.*, 905 F.2d at 1521)); *see, e.g.*, Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1582 (Fed. Cir. 1995) (declining to apply *Torncello* when the

In *Krygoski Construction Co. v. United States*,[45] the Federal Circuit held that the government may terminate a contract for convenience unless it enters into a contract with "no intention of fulfilling its promises."[46] As long as a contracting officer has a "reasonable basis" for terminating a contract, the court generally will not rule against the government in a termination dispute.[47] As a result, "courts have been reluctant to convert terminations for convenience into breach of contract claims in the absence of strong evidence of bad faith or abuse of discretion in the termination decision."[48]

Finally, in *Kalvar Corp. v. United States*,[49] the Court of Claims articulated that the government's broad discretion to terminate for convenience is limited when a contracting officer acts in bad faith or clearly abuses that discretion.[50] Courts presume that the government acts in good faith in its contracting activities, and establishing bad faith is an extremely high bar for contractors to overcome.[51] Whether abuse of discretion carries the same burden is less settled, although courts often recite the two together.[52] To defeat this long-standing presumption, a contractor must show through "well-nigh irrefragable

government had knowledge of potential issues that would necessitate a future termination but did not act in bad faith in terminating the contract for convenience).

[45] 94 F.3d 1537 (Fed. Cir. 1996).

[46] *See id.* at 1545 (citing Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990)).

[47] *See id.* at 1544 ("[T]his court will avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition.").

[48] Cibinic, Nagle & Nash, *supra* note 34, at 1218; *see* David B. Dixon & Michael R. Rizzo, *Challenging Trump 2.0 En Masse Contract Terminations*, Pillsbury (Feb. 24, 2025), [https://perma.cc/76VV-M42R] ("Challenges to a termination for convenience based on bad faith (i.e., done to harm the contractor) are usually unsuccessful because it requires a very difficult standard of proof ('well-nigh irrefragable' proof).").

[49] 543 F.2d 1298 (Ct. Cl. 1976).

[50] *Id.* at 1301–02.

[51] *See* Gearing v. United States, 48 Ct. Cl. 12, 22 (1912) (quoting United States v. Gleason, 175 U.S. 588, 607 (1900)); *Kalvar Corp.*, 543 F.2d at 1301; *see also* Dixon & Rizzo, *supra* note 48; Rawat, *supra* note 38; *see, e.g.,* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 765 (2005) (applying the "well-nigh irrefragable proof" standard).

[52] *See Kalvar Corp.*, 543 F.2d at 1301 ("Kalvar makes no conceptual distinction between 'bad faith' and 'abuse of discretion' and, for the purposes of this decision, we accept Kalvar's equation of the two concepts."); Mark G. Jackson, *Abuse of Discretion: A Maligned and Misunderstood Claim*, Jackson Holcomb LLP (Aug. 11, 2026), [https://perma.cc/MD42-J7CL] (tracing the mischaracterization of the abuse of discretion standard to *Kalvar*).

proof" (clear and convincing evidence) that the government had a specific intent to injure it.[53]

For example, in *Tecom, Inc. v. United States*,[54] a contractor alleged bad faith, demonstrating that the Air Force unreasonably directed the contractor to delete maintenance logs required by the contract.[55] The Air Force threatened to issue negative evaluations of the contractor's work if the contractor refused to perform the deletions.[56] The contractor also provided sufficient evidence that the agency conducted far more stringent inspections than those conducted on the previous contractor's work.[57] Still, the court drew inferences in the Air Force's favor, allowing the agency to escape a finding of bad faith.[58] *Tecom* demonstrates the uphill battle contractors face in prevailing on a bad faith claim.[59]

The COFC has issued opinions on the standards that contracting officers must meet when deciding on contracting actions.[60] In *Schlesinger v. United States*,[61] the court held that a termination was improper even though the con-

[53] *See Tecom, Inc.*, 66 Fed. Cl. at 765; Cibinic, Nagle & Nash, *supra* note 34, at 1218. The term "well-nigh irrefragable proof" originated from a 1954 Court of Claims case, *Knotts v. United States*, and has been echoed in many court opinions since. 128 Ct. Cl. 489, 492 (1954). *See, e.g.*, JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 709 (Fed. Cir. 2021) (quoting Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995)). The Federal Circuit clarified this standard in *Am-Pro Protective Agency, Inc. v. United States*, holding that a contractor seeking to overcome the presumption of good faith must produce clear and convincing evidence. 281 F.3d 1234, 1239–40 (Fed. Cir. 2002). *See generally* Rawat, *supra* note 38 (explaining the "well-nigh irrefragable proof" standard).

[54] 66 Fed. Cl. 736 (2005).

[55] *Id.* at 772.

[56] *Id.*

[57] *See id.*

[58] *See id.* at 773. *But see* Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702, 708 (2000) (holding that a contractor successfully demonstrated bad faith by proving a contracting officer representative's ("COR") use of coercion and intimidation when the COR made numerous remarks about his dislike of the contractor and his intent to "run [the contractor] off," and openly celebrated when the contract was terminated).

[59] *See id.* A successful demonstration of bad faith by a contractor may result in a finding of contract breach, entitling the contractor to remedies not available when settling for costs after a termination for convenience, including damages. *See* Bowles v. United States, 144 Fed. Cl. 240, 254 (2019); *see also infra* Section I.C.

[60] *See, e.g.*, Schlesinger v. United States, 390 F.2d 702, 709 (Ct. Cl. 1968) (holding that a termination must be made by an individual with proper authority); Fireman's Fund Insurance Co. v. United States, 92 Fed. Cl. 598, 696 (2010).

[61] 390 F.2d 702 (Ct. Cl. 1968) (dictating that contracting officers must render fair and impartial decisions that are a product of their independent judgment).

tractor defaulted on his contractual obligations.[62] The court found that neither the contracting officer nor his superiors exercised independent discretion in reaching the decision to terminate.[63] Instead, the contract was wrongfully terminated at the direction of a Senate subcommittee chairman.[64] The court reaffirmed in *Fireman's Fund Insurance Co. v. United States*,[65] holding that a contracting officer who seeks the advice or opinion of others in the course of determining a contract action "must still 'put his own mind to the problems and render his own decisions.'"[66] A contracting officer must "ensure that his decisions are the product of his personal and independent judgment."[67] These holdings are crucial for contractors seeking to assert that the VA improperly terminated their contract.[68] To avoid the challenge of successfully proving bad faith, a contractor should instead argue that VA contracting officers abused their discretion by failing to exercise independent judgment when terminating the contracts.[69]

C. Remedies for Terminated Contracts

A successful suit against the government for an improper contract termination is unlikely to result in reinstatement of the contract.[70] However, terminations for convenience do not completely absolve the government of its obligation to pay a contractor for work performed, nor for any costs the contractor can demonstrate directly resulted from the termination.[71] Contractors may be reimbursed for various other expenses, depending on the contract type.[72] Recovery by a contractor in a termination settlement is, generally: profit for work completed prior to termination; materials and services purchased by the contractor to complete all work required under the contract;

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[62] *Id.* at 709.

[63] *Id.* (finding that the agreement gave termination authority to "the [g]overnment" but "nobody in the Navy exercised . . . the discretion they possessed under the article").

[64] *See id.* at 705.

[65] 92 Fed. Cl. 598 (2010).

[66] *Id.* at 696 (quoting Pac. Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 744 (Ct. Cl. 1974)).

[67] *Id.* (emphasis omitted) (quoting N. Star Alaska Hous. Corp. v. United States, 76 Fed. Cl. 158, 209 (2007)).

[68] *See infra* Section IV.A.

[69] *See infra* Section IV.A; *Fireman's Fund Ins., Co.*, 92 Fed. Cl. at 696; *see also Terminations for Convenience: Can They Be Successfully Challenged?*, *supra* note 13 (explaining several factors a contractor should consider before raising an abuse of discretion claim).

[70] *See Terminations for Convenience: Can They Be Successfully Challenged?*, *supra* note 13.

[71] *See* FAR 12.403(d) (2026).

[72] *See, e.g.*, FAR 52.249-2(e)–(f) (2026) (termination for convenience clause for fixed-price contracts that exceed the simplified acquisition threshold).

costs of settlements with subcontractors; settlement expenses; and "other proper charges" requested by the contractor, such as termination costs.[73] If a court finds that the government has improperly terminated a contract for convenience, a contractor may also be eligible to recover lost or anticipated profits.[74] However, when a contract is properly terminated, a contractor cannot recover the unearned profits it anticipated receiving upon full completion of the work.[75]

II. The History of Small Business Contracting Preference

A look at legislative and statutory history demonstrates a long-standing congressional intent to advance the interests of small businesses, including veteran-owned businesses, in government procurement.[76] In the 1950s, Congress enacted what is now known as the Small Business Act ("the Act"),[77] which recognized the important role that American small businesses play in the country's economic strength and well-being.[78] The Act established aid and assistance mechanisms to support small businesses and created the Small Business Administration ("SBA") to oversee the implementation of the Act's requirements.[79] The Act highlights congressional findings that eco-

[73] *See* FAR 49.202, 49.206-2(a)(1)(*i*)–(v) (2026). Terminations of cost-reimbursement and fixed-price contracts terminated for convenience may be settled by "(a) negotiated agreement, (b) determination by the [terminating contracting officer], (c) costing-out . . . or (d) a combination of these methods." *See* FAR 49.103 (2026). The FAR expresses a preference for settling by negotiated agreement. *See id.*; *see also* Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1545 (Fed. Cir. 1996) (allowing for termination costs).

[74] *See, e.g.,* Advanced Team Concepts, Inc. v. United States, 77 Fed. Cl. 111, 112–14 (2007) (finding plaintiff was entitled to recover lost profits for cancelled classes where the cancellations were made in bad faith to replace plaintiff with a government "insider").

[75] *See* FAR 49.202(a). *See also Krygoski Constr. Co.*, 94 F.3d at 1545 (disallowing anticipatory profits).

[76] *See, e.g.*, 15 U.S.C. § 631(a) (2025) (Congressional declaration of small business economic policy); *id.* § 644(g) (2025) (Goals for participation of small business concerns in procurement contracts); Pub. L. No. 93-237, 87 Stat. 1025 (1974) (instructing the Small Business Administration to give "special consideration to veterans of the Armed Forces of the United States").

[77] Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. § 631).

[78] *Id.* § 631(a) ("Such [national] security and [economic] well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed."); *see also* Anna Urman, *The Big Power of Small Business*, Nat'l Cont. Mgmt. Ass'n (May 2025), [https://perma.cc/C4KK-G99P] (illustrating the importance of involving small businesses in government contracting and discussing Congress's recognition of involving those businesses to "mobilize the Nation's full productive capacity").

[79] *See* 15 U.S.C. § 631(b)(1), (c), (d)(1).

nomic development is advanced through procurement activities with small businesses and that, ultimately, the inclusion of small businesses in government procurement promotes competition, ensuring the government receives the best value for its needs.[80] In 1974, Congress amended the Act, instructing the SBA to give "special consideration to veterans."[81]

In 2007, the House of Representatives passed the Small Business Fairness in Contracting Act ("FIC Act").[82] The FIC Act reiterated the importance of including small businesses in government procurement activities and identified that, despite "remarkable expansion" in the government's purchasing of supplies and services, "contracting opportunities for small businesses continue to lag."[83] Passage of the FIC Act was spurred, in part, by the government's increased use of contract bundling, which led to a sharp decline in the number of government contracts awarded to small businesses.[84] The FIC Act detailed the negative impacts of contract bundling on small businesses' ability to compete for procurements.[85] Although small businesses may protest the award of a bundled contract if it harms them, the FIC Act notes that they are unlikely to do so because of the associated costs and the risk of punitive agency action.[86]

The FIC Act was referred to the Senate Committee on Small Business and Entrepreneurship, but was never enacted.[87] The bill nonetheless generated momentum within Congress, and subsequently, the Senate passed the Small Business Contracting Revitalization Act of 2010 ("CRA").[88] Here again, Congress recognized that the practice of bundling or consolidating procurement activities "tends to deprive small firms of business opportunities with the [f]ederal government," and found an "urgent need . . . to close the loopholes

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[80] *See id.* § 631(f)(1)(F)–(G); *see also* 41 U.S.C. § 253(a)(1) ("[A]n executive agency conducting a procurement for property or services [] shall obtain full and open competition . . . .").

[81] Pub. L. No. 93-237, 87 Stat. 1025 (1974) (amending 15 U.S.C. § 633); *see* R. Corinne Blackford, Cong. Rsch. Serv., R47226, Federal Contracting by Veteran-Owned Small Businesses: An Overview and Analysis of Contemporary Issues 16 (2022).

[82] H.R. 1873, 110th Cong. (2007).

[83] H.R. Rep. No. 110-111, pt. 3, at 8 (2007). Although government contracting dollars increased by 60% between 2000 and 2007, contract awards to small businesses decreased by 55%. *Id.* at 9.

[84] *See* Andy Leonatti, *Panel Backs Measure to Curb Contract Bundling*, Gov't Exec (Apr. 25, 2007), [https://perma.cc/D323-2VM6]. "Bundling" is defined in the FAR as "a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts [], into a solicitation . . . that is likely to be unsuitable for award to a small business concern . . . ." FAR 2.101 (2026).

[85] *See* H.R. Rep. No. 110-111, pt. 3, at 9 (2007).

[86] *Id.* at 10–11.

[87] *See* H.R. 1873, 110th Cong. (2007).

[88] S.R. 111-343, 111th Cong. (2010); *see* S. Rep. No. 111-343 (2010).

that lead to contract bundling."[89] The CRA implemented numerous changes, including a requirement for annual certifications of small businesses to reduce fraud and misrepresentation.[90] Additionally, the CRA required agencies to report on their efforts to reduce bundling and post their anti-bundling policies on their websites.[91] The CRA also required department and agency heads to make certain that efforts to consolidate contract requirements did not impede opportunities for small businesses to participate as prime contractors and subcontractors.[92]

In 2024, the SBA proposed changes to its small business recertification rules.[93] The changes clarified the recertification requirements and closed a long-standing and concerning loophole that allowed formerly small businesses to continue competing for small business-designated contracts after being acquired by larger businesses.[94] Previously, a company's status as a small business was determined at the time of contract award and remained unchanged for the life of the contract.[95] Under the new rule, a business must recertify its size and status as a small business "within 30 calendar days of a merger, acquisition, or sale . . . which results in a change in controlling interest."[96] This rule became effective in January 2025.[97] The continuous periodic reevaluation and updating of legislation and regulations reflect an ongoing congressional commitment to maintaining the competitiveness of SDVOSBs and VOSBs in government contracting.[98]

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[89] S. Rep. No. 111-343, at 3–4 (2010).

[90] *See id.* at 16.

[91] *Id.* at 5.

[92] *Id.*

[93] HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs, 89 Fed. Reg. 102448, 102448 (Dec. 17, 2024) (codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, 128, 134) [hereinafter HUBZone Program Updates].

[94] *Id.*; Don Walsh, *SBA's New Size Recertification Rule Is Now Effective and Reshapes Small Business M&A*, RKW L. Grp. (Feb. 12, 2026), [https://perma.cc/W5FL-RLQ9]; Dismas Locaria, James Y. Boland & Emily M. Rios, *SBA Final Rule Changes M&A Landscape for Multiple Award Contracts*, Venable LLP (Jan. 23, 2025), [https://perma.cc/P7FA-H96E]; Dismas Locaria & Lindsay M. Reed, *SBA Proposes Significant Changes to Size Recertification Rules*, Venable LLP (Sep. 16, 2024), [https://perma.cc/UR6C-A682].

[95] *See* Locaria & Reed, *supra* note 94.

[96] 13 C.F.R. § 125.12(a) (2026).

[97] HUBZone Program Updates, 89 Fed. Reg. at 102448.

[98] *See* Blackford, *supra* note 81 (discussing that other congressional efforts include expanding the VA's authority to provide preference to companies that employ veterans based on the percentage of the company's full-time, veteran employees, attempts to increase the sole source limit for SDVOSBs, and increasing the government-wide procurement goal for SDVOSBs).

III. The Policies Prioritizing SDVOSBs and VOSBs in VA Contracting and the VA's 2025 Mass Contract Terminations Event

Government agencies are required to allocate specified percentages of their procurement activities to small business concerns.[99] In the National Defense Authorization Act for Fiscal Year ("FY") 2024,[100] Congress raised the minimum government-wide goal for SDVOSB participation in government contracts to 5%.[101] The VA subsequently set its own internal goal of 15% SDVOSB participation that same year.[102] In recent years, the VA has spent the most on contracting activities among all U.S. civilian agencies, besting the next-closest agency by nearly $20 billion.[103] Given the scale of VA's contracting activities and its policies prioritizing SDVOSBs and VOSBs, the agency's decision to mass-terminate nearly 600 contracts in early 2025 had an outsized impact on SDVOSBs and VOSBs.[104]

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[99] *See* 15 U.S.C. § 644(g) ("The President shall annually establish [g]overnmentwide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women . . . .").

[100] Pub. L. No. 118-31, 137 Stat. 136 (2023) (amending 15 U.S.C. § 644(g)(1)(A)(ii)).

[101] *Id.* at § 863. The previous threshold for service-disabled veteran-owned small business participation was 3%. *Id.*

[102] U.S. Dep't of Veterans Affairs (OSDBU), *supra* note 6. Notably, there is no minimum government-wide participation threshold for veteran-owned small businesses (VOSB), which raises its own set of concerns, though the VA establishes priority for VOSBs through its Veterans First Contracting Program. 15 U.S.C. § 644(g)(1)(A)(ii). To qualify as a VOSB, a business must be "not less than 51 [%] owned and controlled by one or more veterans who reside in the United States." 13 C.F.R. § 128.200(a)(2) (2026). VOSBs are excluded from the accountability of government-wide procurement goals and deprived of eligibility for sole-source contracts and business set-asides. As a result, VOSB priority is eclipsed by four other classes of business concerns: 8(a), SDVOSBs, HUBZone, and Women-owned small businesses. Importantly, however, the Veteran's First Contracting Program requirements ensure that VOSBs are treated equally to SDVOSBs for procurement activities within the VA. *See* Kelly McGann, *Benign Neglect: Veteran-Owned Small Business in Federal Procurement Today*, 6 Veterans L.R. 188, 195–99 (2014).

[103] *See* sources cited *supra* note 1. In FY 2023, the VA spent $61.6 billion contract dollars. FY 2023 Government-Wide Contracting, *supra* note 1. The next closest agency was the Department of Energy at $46.3 billion. *Id.* In FY 2024, the VA spent $66.9 billion on contracts. FY 2024 Government-Wide Contracting, *supra* note 1. The Department of Energy again ranked second, at $47.7 billion dollars. *Id.*

[104] *See infra* Sections III.A–C.

This Part explains the VA's policies for prioritizing veteran-owned businesses in its contracting activities and explains the agency's mass contract termination event in 2025, which was especially harmful to SDVOSBs and VOSBs.[105] This Part also identifies subsequent policy changes that threaten to further compromise SDVOSBs' and VOSBs' ability to contract with the government.[106]

A. Veterans' Preference and the VA Rule of Two

Veterans' preference has long been justified "to reward veterans for the sacrifice of military service[] [and] to ease the transition from military to civilian life."[107] For decades, Congress has passed legislation to provide for veterans' preference in contracting with the VA; specifically, for SDVOSBs and VOSBs.[108]

The Veterans First Contracting Program was created by the Veterans Benefits, Health Care, and Information Technology Act of 2006,[109] which sought to "increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities."[110] The Act requires the VA to give contracting preference to SDVOSBs and VOSBs, in that order.[111] The Act also requires the VA to set aside procurements when "two or more small business concerns owned and controlled by veterans . . . will submit offers and [] the award can be made at a fair and reasonable price that offers best value to the United States."[112] This provision is known as the VA Rule of Two.[113] These directives were incorporated into the Veterans Affairs Acquisition Regulation ("VAAR")—VA's supplement to the FAR which governs how the agency buys goods and services—as the VA Veterans First Contracting Program.[114]

The Supreme Court issued an important ruling on the broad applicability of the VA Rule of Two in *Kingdomware Technologies, Inc. v. United States*.[115]

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[105] *See infra* Sections III.A–C.

[106] *See infra* Section III.D.

[107] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 265 (1979).

[108] *See supra* Part II; 38 U.S.C. § 8127; 48 C.F.R. subpt. 819.70 (2026).

[109] Pub. L. No. 109-461, 120 Stat. 3403 (2016) (codified at 38 U.S.C. § 8127).

[110] *Id.* § 8127(a)(1).

[111] *Id.* § 8127(d), (h), (*i*)(1)–(2). A SDVOSB is any business that is 51% owned and controlled by a service-disabled veteran and managed by the veteran, their spouse, or their caregiver. FAR 2.101 (2026). A VOSB is any business that is 51% owned, controlled, and managed by a veteran. *Id.*

[112] 38 U.S.C § 8127(d)(1).

[113] *Id.* § 8127(d); 48 C.F.R. § 802.101 (2026).

[114] *See* 48 C.F.R. § 801.000 (2026).

[115] 579 U.S. 162 (2016).

In 2012, the VA entered into a contract with a non-veteran-owned business for emergency-notification services through the Federal Supply Schedule.[116] Kingdomware argued that the VA was required to conduct market research to determine if two or more veteran-owned businesses could perform the work at a fair and reasonable price before contracting with a non-veteran-owned business.[117] The Court held that the Rule of Two is compulsory for all VA procurements.[118] Even when the VA has met its annual contracting goals for veteran-owned businesses, the agency *must* still restrict procurements when two or more SDVOSB or VOSB submit offers.[119]

B. Mass Contract Terminations at the Department of Veterans Affairs

On February 25, 2025, VA Secretary Doug Collins announced that the VA would terminate $2 billion in contracts and redirect those funds to promote efficiency and support veterans' healthcare and benefits.[120] Secretary Collins claimed that millions of dollars were being improvidently spent on contracts to create PowerPoint slides and meeting minutes.[121] However, after reviewing a list of nearly 900 affected contracts, the Associated Press found that the terminations would affect a broad range of VA services, from cancer care to the ability to assess toxic exposure claims.[122] For example, one contract on the agency's list was with the National Oncology and Precision Medicine program which "helps VA health leaders in developing and implementing

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[116] *Id.* at 167–68. The Federal Supply Schedule (FSS) is a program managed by the General Services Administration (GSA) that "provides [f]ederal agencies [] with a simplified process for obtaining commercial supplies and services at prices associated with volume buying." FAR 8.402(a) (2026).

[117] *Kingdomware Techs., Inc.*, 579 U.S. at 168.

[118] *Id.* at 164–65.

[119] *See id.* Notably, since the decision in *Kingdomware* in 2016, Congress has remained silent on courts' determinations that priority of VA contracting activities to veteran-owned small businesses supersedes other congressionally protected contracting entities. *See* PDS Consultants, Inc. v. United States, 907 F.3d 1345, 1360 (Fed. Cir. 2018) (stating that "[the court] must give effect to the policy choices made by Congress" in holding that a veteran-owned business had contracting preference over an AbilityOne business because the Veterans Benefits Act of 2003 "unambiguously demands that priority be given to veteran-owned small businesses").

[120] Dep't of Veterans Affairs (@deptvetaffairs), *supra* note 7; Doug Collins, Sec'y of Veterans Affairs (@SecVetAffairs), *supra* note 7.

[121] *Id.*

[122] Copp & Johnson, *supra* note 10; *see also* Eric Umansky & Vernal Coleman, *Internal VA Emails Reveal How Trump Cuts Jeopardize Veterans' Care, Including To "Life-Saving Cancer Trials,"* ProPublica (May 6, 2025), [https://perma.cc/4LDK-T3MS].

cutting-edge cancer health treatment efforts."[123] Secretary Collins's announcement sparked immediate backlash from lawmakers who met to discuss the cancellations and concerns that the cuts "will harm veterans and taxpayers for years to come."[124] As a result, the day after Collins's announcement, the VA temporarily suspended the terminations.[125]

In a March 3, 2025, press release, the VA announced it would terminate 585 "non-mission-critical or duplicative" contracts, framing the action as part of the Trump Administration's efforts to improve government efficiency.[126] The VA maintained that the terminations would "not negatively affect [v]eteran care, benefits or services" and characterized the targeted contracts as primarily administrative.[127] The agency claimed the terminations were identified through a "deliberative, multi-level review" to assess how closely each contract supported Veterans and VA beneficiaries.[128] Skeptical of the VA's justifications, the ranking members of the Senate and House Committee on Veterans' Affairs sent a letter to Secretary Collins in May 2025.[129] The letter stated that "Congress is still waiting for accurate and complete information on the contracts [Collins] ha[d] canceled."[130] The letter called out "contradictions and inadequacies" in the VA's review of its contracts to

[123] Press Release, Richard Blumenthal, Blumenthal Statement on Doug Collins' Reckless Cancelation of Critical Contracts Delivering Direct Services to Veterans (Feb. 25, 2025). Records of individual VA contract actions, including terminations and the contractors affected, are searchable on USAspending.gov, the federal government's official spending database, and on HigherGov.com, a commercial platform that compiles federal procurement data. *See Advanced Search*, USAspending.gov, [https://perma.cc/K8MY-4MDL] (last visited Oct. 28, 2026); *Federal Contract Awards*, HigherGov, [https://perma.cc/7FNA-7GVB] (last visited Oct. 28, 2026).

[124] Copp & Johnson, *supra* note 10 (quoting Sen. Richard Blumenthal).

[125] *Id.*

[126] Press Release, Dep't of Veterans Affairs, VA to Terminate 585 Non-Mission-Critical or Duplicative Contracts (Mar. 3, 2025).

[127] *See id.*

[128] *Id.*

[129] *See* Letter from Richard Blumenthal, Ranking Member, S. Comm. on Veterans' Affairs, et al., to Doug Collins, Sec'y of Veterans Affairs, U.S. S. Comm. on Veterans' Affairs (May 19, 2025); Press Release, U.S. Senate Committee on Veterans' Affairs, Blumenthal, King, Takano, Colleagues Demand Complete & Updated List of Cancelled VA Contracts (May 20, 2025).

[130] Blumenthal, et al. (May 19, 2025), *supra* note 129. This letter refers to the VA's actions as "cancellations." *See id.* "Terminations" and "cancellations" are distinct terms of art within government contracts law. *See* FAR pts. 13, 49; *see, e.g.*, FAR 13.302.4 (2026) ("Termination *or* cancellation of purchase orders") (emphasis added). Cancellations typically occur during contract award, before performance has begun, or if performance of a contract is "tainted with illegal conduct." Cibinic, Nagle & Nash, *supra* note 34, at 95. A discussion of contract cancellations is outside the scope of this Note.

determine which contracts were targeted for termination.[131] The letter accused the VA of poor program management, questioning why the agency reversed its announcement a day later if, as Secretary Collins claimed, the VA had initially conducted a consultative and deliberate process in selecting contracts for termination.[132] The lawmakers requested a briefing from the agency to explain how contracts were selected for termination.[133]

The VA's woes did not end there. In June 2025, ProPublica—an independent investigative journalism organization—reported that an investigation had revealed the VA used an error-ridden artificial intelligence ("AI") tool, created by the Department of Government Efficiency ("DOGE"), that flagged over 2,000 contracts for termination.[134] ProPublica reported that a software engineer with no medical experience quickly built an AI tool to identify non-essential services provided by private companies.[135] The tool labeled the contracts as "munchable."[136] Following the report's release, lawmakers again demanded transparency and wrote to the VA Inspector General requesting a review of the VA's mass contract terminations.[137]

In September 2026, the VA Office of Inspector General concluded its investigation into the terminations, reporting that VA contracting officials "generally" complied with FAR termination procedures.[138] Importantly, the investigation does not appear to have examined whether each contracting officer independently determined that each termination served the government's

[131] Blumenthal et al. (May 19, 2025), *supra* note 129.

[132] *See id.*

[133] *Id.*

[134] *See* Brandon Roberts, Vernal Coleman & Eric Umansky, *DOGE Developed Error-Prone AI Tool to "Munch" Veterans Affairs Contracts*, ProPublica (June 6, 2025, 5:00 ET), [https://perma.cc/4DY8-272W].

[135] *Id.*

[136] *Id.*

[137] Letter from Richard Blumenthal, Ranking Member, et al., to David Case, Acting Inspector Gen., S. Comm. on Veterans' Affairs (June 13, 2025).

[138] U.S. Dep't of Veterans Affairs Off. of Inspector General, 25-03033-230, Review of Contracts Terminated for Convenience 3 (2026) (hereinafter OIG Report). The review assessed VA's compliance with FAR termination procedures, such as issuing stop-work orders and termination notices and negotiating settlements. *Id.* at 6–7.

best interests.[139] The investigation also found that some contracting officers were given "only a few hours to review hundreds of contracts."[140]

While the terminations were a reaction to the Administration's efforts to reduce government spending, the actions represent ongoing procurement issues within the agency.[141] For years, the VA has struggled with its acquisition management program, which the government Accountability Office ("GAO") first placed on its High Risk List ("the List") in 2019.[142] The List identifies "programs and operations with serious vulnerabilities to waste, fraud, abuse, or mismanagement, or in need of transformation."[143] In 2022, the GAO found that the VA had created plans to implement a new framework to address its procurement issues.[144] The VA did not identify which of its acquisition programs were subject to the new framework, however, nor did it address its acquisition workforce needs.[145] As of October 2026, the VA's Acquisition Management program remains on the List for problems with: (1) developing adequate strategies and policies, (2) managing its supply chain, (3) managing its acquisition workforce, and (4) providing consistent leadership and execution of management priorities.[146] Notably, the GAO found the VA has "unreliable and incomplete data on its service contracts" and provides limited oversight of those contracts.[147] While the VA's sweeping effort to

[139] *See id.* at 6–8, app. A. The report therefore does not foreclose a contractor's ability to seek judicial review of their termination decision to ensure that it was properly decided by a contracting officer. *See* 41 U.S.C. § 7104(b)(1) (allowing a contractor to bring a claim directly in the COFC).

[140] OIG Report, *supra* note 140, at 5. (reporting that, on February 21, 2025, the VA offices reviewing 1,049 contracts identified for termination "were given less than 11 hours to complete their review, obtain approval from the deputy under secretaries or deputy assistant secretaries and senior advisers, and submit responses to [the Office of Acquisition, Logistics, and Construction]").

[141] *See* U.S. Gov't Accountability Off., GAO-22-105195, VA Acquisition Management: Action Needed to Ensure Success of New Oversight Framework 18–21 (2022) [hereinafter GAO-22-105195].

[142] *See id.* at 1.

[143] *High Risk List*, U.S. Gov't Accountability Off., [https://perma.cc/MC92-7SMQ] (last visited Oct. 28, 2026).

[144] GAO-22-105195, *supra* note 141, at 19–20.

[145] *See id.* at 21–22.

[146] *High Risk List*, *supra* note 143; *see also* U.S. Gov't Accountability Off., GAO-25-107743, High-Risk Series: Heightened Attention Could Save Billions More and Improve Government Efficiency and Effectiveness 299 (2025) [hereinafter GAO-25-107743].

[147] GAO-25-107743, *supra* note 146, at 301; *see also* U.S. Gov't Accountability Off., GAO-24-106312, VA Acquisition Management: Oversight of Service Contracts

terminate allegedly unnecessary, wasteful, and redundant contracts may purport to save money, it does not address the underlying years-long acquisition issues the agency has faced.[148]

C. The Impact of Terminations for Convenience on SDVOSBs and VOSBs

Because of the VA's emphasis on contracting with veteran-owned businesses, the early-2025 contract terminations had an outsized effect on SDVOSBs and VOSBs.[149] In FY 2024, the VA awarded 19.5% of its total prime contract dollars to SDVOSBs.[150] By contrast, cuts to SDVOSB contracts accounted for 89.2% of the $81.1 million in savings claimed by DOGE.[151] A September 2025 analysis of DOGE contract terminations across all government agencies found that contracts with small businesses accounted for 61% of the terminations, with SDVOSBs and VOSBs disproportionately affected compared to other socio-economic preference programs.[152]

D. Contract Consolidation Presents Further Challenges for SDVOSBs and VOSBs Seeking to Contract with the Government

The threat to SDVOSBs and VOSBs is two-fold: in addition to existing contracts being terminated seemingly without proper determinations by contracting officers, future contracting opportunities are being consolidated and moved to the General Services Administration ("GSA"),[153] where veteran-owned business preferences do not exist.[154]

Needing Heightened Management Attention Could Be Improved 17 (2024) [hereinafter GAO-24-106312].

[148] *See id.*; *see also* Amey, *supra* note 123; GAO-22-105195, *supra* note 139, at 1, 36 (finding that the VA's acquisition management program has remained on the High Risk List since 2019).

[149] *See* Nick Wakeman, *Veteran-Owned Small Firms Hit First by VA's Push for $2B in Contract Cuts*, Wash. Tech. (Feb. 25, 2025), [https://perma.cc/WDP3-RP8M].

[150] OSDBU, *supra* note 6.

[151] Wakeman, *supra* note 147.

[152] *See* Tina Barton, *DOGE Impacts on Small Business Contracts*, Deltek GovWin IQ (Sep. 4, 2025), [https://perma.cc/M5EP-PKFZ].

[153] The GSA offers products and services such as "equipment, supplies, telecommunications, and integrated information technology solutions to federal agencies." *Products and Services*, U.S. Gen. Servs. Admin., [https://perma.cc/QJU9-QNZE] (last visited Oct. 28, 2026).

[154] *See* Exec. Order No. 14240, 90 Fed. Reg. 13671 (Mar. 25, 2025); U.S. General Servs. Admin., General Services Administration Acquisition Manual § 519.502-1(a) (2026) ("The contracting officer *may* . . . set aside for . . . [the] Service-Disabled

Shortly after the contract terminations at the VA in March 2025, President Trump issued an Executive Order directing the consolidation of federal procurement efforts within the GSA to "eliminate waste and duplication, while enabling agencies to focus on their core mission of delivering the best possible services for the American people."[155] The Office of Management and Budget directed that agencies work proactively with the GSA to fully leverage GSA's expertise and statutory role as the government's core buyer of prevalent and repetitive needs.[156]

These consolidations pose further risks to SDVOSBs' and VOSBs' ability to contract with the federal government.[157] Congress has historically recognized this risk and has previously proposed legislation to address these effects.[158] Notably, though, the GSA is not required to set aside any of its contracting activities for SDVOSBs or VOSBs.[159] As a result, veteran-owned businesses not only compete against a potentially much larger pool of contractors seeking to obtain consolidated procurement activities at the GSA, but also lose any advantage they had in acquiring similar contracts at the VA.[160] Further, because consolidating supply and service needs across multiple agencies can result in much larger contracts—rather than smaller contracts for the same supplies and services at each agency—small businesses may not have the

Veteran-Owned Small Business (SDVOSB) Procurement Program []." (emphasis added)); *see also supra* Section III.B.

[155] Exec. Order No. 14240, 90 Fed. Reg. 13671 (Mar. 25, 2025).

[156] *See* Memorandum from Russell T. Vought, Off. of Mgmt. and Budget Dir., to the Heads of Executive Departments and Agencies (July 18. 2025) (on file with the Federal Circuit Bar Journal).

[157] *See* H.R. Rep. No. 110-111, pt. 2, at 6–8 (2007) ("expand[ing] the definition of contract bundling to ensure small businesses have access to work previously available for small businesses" and defining "bundled contract" as one that meets "procurement requirements that are consolidated in a bundling of contract requirements").

[158] *See supra* Part II; H.R. Rep. No. 110-111, pt. 2, at 6 (2007); Leonatti, *supra* note 83.

[159] *See* U.S. General Servs. Admin., General Services Administration Acquisition Manual § 519.502(a) (2026).

[160] *See id.*; Prot. Strategies Etc. Int'l., LLC, B-423539 at 8 (Comp. Gen. Aug. 25, 2025) (noting that SDVOSB set asides are not required by agencies outside of the VA); *Understanding & Leveraging Federal "Veterans First" Preferences*, Ctr. for Indus. Rsch. & Serv., Iowa State Univ. (Oct. 13, 2025), [https://perma.cc/HM9X-MVGG]. Contracting through the GSA offers agencies "[a] vast selection of contractors offering expert solutions for services and products." U.S. Gen. Serv. Admin., Multiple Award Schedule Desk Reference 4 (2019) (updated Mar. 31, 2026).

resources or capacity to handle consolidated procurements they could have competed for as individual contracts.[161]

IV. The COFC and Congress Can Act to Protect SDVOSBs' and VOSBs' Preference in Government Contracting

Both judicial and congressional actions can be taken to ensure the continued protection and prioritization of SDVOSBs' and VOSBs' ability to contract with the government.[162] The COFC should extend and expand its reasoning in prior cases challenging contracting officer decisions to suits involving congressionally protected SDVOSBs and VOSBs.[163] Congress, for its part, can amend existing legislation to address vulnerabilities exposed by the VA's terminations.[164]

These recommendations are complementary. The judicial recommendations proposed below ask the COFC to articulate a standard for evaluating whether a VA contracting officer independently determined that each termination was in the government's best interest, and to hold that the absence of such judgment constitutes an abuse of discretion.[165] The legislative recommendation, requiring that contracting officers document the basis for terminating an SDVOSB or VOSB contract, creates the record the courts would use to make that evaluation.[166] A judicial standard without the required documentation forces contractors to prove their claim with a record that potentially says little to nothing on the point, while a full record without a review standard leaves contractors without a clear measure of what the court will treat as a proper exercise of discretion. Thus, the recommendations give contractors a workable claim and give courts a consistent standard to apply to VA termination cases.

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[161] *See* U.S. Gov't Accountability Off., GAO-14-36, Small Business Contracting: Updated Guidance and Reporting Needed for Consolidated Contracts 1 (2013); Jacqui Baldwin-LeClair & Ava LaPlante, *Federal Contract Consolidation: Help or Hindrance for Native Entity Enterprises?*, Fed. Rsrv. Bank of Minneapolis (Apr. 9, 2025), [https://perma.cc/7JRT-CABH] ("[F]or small, minority-owned, or disadvantaged businesses that normally pursue set-aside contracts, consolidation may put some contracts out of reach. That's because some consolidated contracts combine previously set-aside or smaller contracts, making them more difficult for small businesses to win.").

[162] *See infra* Sections IV.A–B.

[163] *See infra* Section IV.A.

[164] *See infra* Section IV.B.

[165] *See infra* Section IV.A.

[166] *See infra* Section IV.B.

A. The COFC Should Revisit its Decision in Atkins and Apply its Reasoning in *Fireman's Fund* and *Securiforce* to Cases Involving Terminations of Contracts with SDVOSBs and VOSBs

Contractors may raise several arguments when challenging the VA's termination of their contracts. One argument is that the termination decisions during the VA's early-2025 mass contract termination event were improper because they were not made by a contracting officer exercising independent judgment.[167] Instead, they were made by a higher authority within the VA who then directed the terminations, or, more concerningly, by AI.[168] On this basis, a contractor could argue that the VA contracting officers abused their discretion by failing to exercise *any* discretion when following a superior's order to terminate the contract.[169] The COFC has addressed the issue of determining proper independent judgment decisions by contracting officers in *Fireman's Fund*[170]; *Securiforce International America, LLC v. United States*[171]; and *Atkins North America, Inc. v. United States*.[172]

In *Fireman's Fund*, the COFC invalidated a contracting officer's final decision because she failed to exercise independent judgment when terminating a contract.[173] The court found that the contracting officer did not rely on her own analysis in finding the contractor liable to the government for reduced

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[167] *See Terminations for Convenience: Can They Be Successfully Challenged?*, *supra* note 13; Pac. Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 744 (Ct. Cl. 1974) (noting that the parties to a contract are presumed to intend for the contracting officer, not another official, to exercise his own discretion in a termination decision) (quoting N.Y. Shipbuilding Corp. v. United States, 385 F.2d 427, 435 (Ct. Cl. 1967)); *see also* Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir.1987) (explaining that a contractor who proves the contracting officer abused his discretion need not also prove bad faith).

[168] *See Terminations for Convenience: Can They Be Successfully Challenged?*, *supra* note 13; *see also* Lauren Brier & Kristine Crallé, *Lawmakers Sounds Alarm Over VA's AI-Driven Contract Terminations: What to Do If You're Terminated,* PilieroMazza (July 10, 2025), [https://perma.cc/3JF9-9LHY] (discussing concerns about the VA's use of AI to select contracts for termination).

[169] *See* Schlesinger v. United States, 390 F.2d 702, 707 (Ct. Cl. 1968) ("a decision to terminate is rooted in discretion") (citing Commercial Cable Co. v. United States, 170 Ct. Cl. 813, 821 (1965)); *see also* Danzinger v. United States, No. 25-1241, slip op. at 2, 4, n.3 (Fed. Cl. Apr. 10, 2026) (holding that contractors adequately pleaded improper termination and rejecting the "peculiar notion" that governmental misconduct is immunized when a contracting officer follows directives from higher-ranking officials in termination decisions).

[170] 92 Fed. Cl. 598 (2010).

[171] 125 Fed. Cl. 749 (2016), *aff'd in part*, *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018).

[172] No. 09-112, 2012 U.S. Claims LEXIS 1496, at *1–2 (Fed. Cl. Nov. 28, 2012); *see Securiforce Int'l Am., LLC*, 125 Fed. Cl. 15 785; *Fireman's Fund Ins. Co.*, 92 Fed. Cl. at 695–96.

[173] *Fireman's Fund Ins., Co.*, 92 Fed. Cl. at 696–98.

contract costs, but merely "rubber-stamped" a final decision memorandum prepared entirely by agency counsel.[174] The court dictated that "[p]laintiffs [are] entitled to [] fair and impartial final decision[s] by [a] contracting officer."[175] The same reasoning reaches contractors affected by the VA's early-2025 contract terminations.[176] The analysis would apply when a contractor can show that the decision to terminate their contract rested entirely with a higher authority, without the contracting officer's own fair, impartial, and thorough analysis of their contract.[177] Extending *Fireman's Fund* in this way would reaffirm contracting officers' non-delegable duty of judgment and enforce their responsibility for all contracting actions.[178]

Moreover, the *Securiforce* court articulated that a termination not personally decided by the contracting officer constitutes an abuse of discretion.[179] The COFC found a termination for convenience improper because the contracting officer abdicated her duty to exercise independent judgment.[180] An agency must not be allowed to use the termination for convenience clause as a device to end contracts arbitrarily.[181] Termination authority is vested in the contracting officer, who is obligated to base their decisions on the merits of each case and the government's legitimate needs.[182] This requirement cannot be met without proper review by a contracting officer exercising their independent, professional judgment.[183] Accordingly, a termination decided by a higher agency authority or an AI tool is untenable.[184] Enforcing the contracting officer's responsibilities protects SDVOSBs and VOSBs by ensuring that an identifiable person with proper authority has weighed the government's

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[174] *See id.* at 692, 697–98.

[175] *Id.* at 698 (citing FAR 1.602-2(b) (2026)).

[176] *See supra* Section III.B.

[177] *See supra* Section III.B; *Fireman's Fund Ins., Co.*, 92 Fed. Cl. at 698.

[178] *See supra* Section III.B; FAR 1.602-2 (2026).

[179] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 783 (2016) (citing U.S. Fid. & Guar. Co. v. United States, 676 F.2d 622, 630 (Ct. Cl. 1982)), *aff'd in part*, *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018). Although on appeal the Federal Circuit court vacated *Securiforce* in part due to lack of jurisdiction, the COFC's underlying analysis provides a persuasive framework that the court adopt when evaluating challenges to a termination by the VA. *See* Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1368 (Fed. Cir. 2018).

[180] *Securiforce Int'l Am., LLC*, 125 Fed. Cl. at 787.

[181] *See, e.g.*, Torncello v. United States, 681 F.2d 756, 772 (Ct. Cl. 1982) (holding that the government could not use the termination for convenience clause merely to escape its contractual obligations).

[182] *See* Schlesinger v. United States, 390 F.2d 702, 709–10 (Ct. Cl. 1968); FAR 1.602-1(a), 49.1 (2026).

[183] *See Schlesinger*, 390 F.2d at 709–10.

[184] *See supra* Section III.B.

actual needs against the contract terms and can be held accountable for that judgment on review.[185]

Fireman's Fund and *Securiforce* establish that a contracting officer's deference to a superior's orders, without exercising their own discretion, is not a permissible basis for terminating a contract.[186] Where a contractor sufficiently demonstrates that a contracting officer failed to conduct an independent review of the contract, the court should find that a contested VA termination was an abuse of discretion and a breach of contract.[187] Thus, instead of requiring contractors to meet the weighty burden of showing bad faith to invalidate a termination for convenience, a contractor would need only to show that the contracting officer did not independently determine that termination was in the government's best interest.[188]

Finally, the court should revisit its decision in *Atkins* to more clearly define the standard that contracting officers must meet to demonstrate that they exercised independent judgment.[189] In *Atkins*, a contractor asked the court "to clarify 'the standard to be applied [] in determining whether a contracting officer exercised independent judgment in rendering a decision.'"[190] The court declined to create a test because such a determination is case-specific and fact-intensive.[191] However, challenges to the VA's termination of SDVOSB and

[185] *See supra* Section I.B.

[186] See Fireman's Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 695–96 (2010); Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 782–83 (2016), *aff'd in part*, *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018). The contracting officer must "put his own mind" to the decision to terminate a contract for convenience. *Fireman's Fund Ins., Co.*, 92 Fed. Cl. at 696 (quoting Pac. Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 744 (Ct. Cl. 1974)).

[187] *See Securiforce Int'l Am., LLC*, 125 Fed. Cl. at 787; Tigerswan, Inc. v. United States, 118 Fed. Cl. 447, 453 (2014) (observing that a contracting officer's failure to make an independent termination decision weighs in favor of finding an abuse of discretion); *supra* Section III.B (describing the AI-driven identification of contracts for termination and the ranking members' inability to obtain an account of how contracts were selected).

[188] *See* FAR 49.101(b) (2026); Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996); *Securiforce Int'l Am., LLC*, 125 Fed. Cl. at 783; *Fireman's Fund Ins., Co.*, 92 Fed. Cl. at 696. *See also* Jackson, *supra* note 52 (arguing that an abuse-of-discretion claim is proved by a preponderance of the evidence and turns on reasoning defects in the record, not on bad faith).

[189] *See* Atkins N. Am., Inc. v. United States, No. 09-112, 2012 U.S. Claims LEXIS 1496, at *2 (Fed. Cl. Nov. 28, 2012) (noting only that a contracting officer should be familiar with the facts and conclusions in her decision and that the decision "reflect[] her independent judgment").

[190] *Id.* at *1–2.

[191] *Id.* at *4.

VOSB contracts present an opportunity for the court to articulate a standard for evaluating whether a contracting officer's decision-making process is properly supported by the record and by the officer's written justification.[192] This standard would be used to evaluate all disputed terminations from the VA's mass termination event, where the methods used to select contracts for termination and the facts surrounding those terminations are likely similar.[193] Guidance from the court is necessary to hold the VA accountable for breaches of its contractual agreements.[194] Otherwise, contractors are left without a clear basis to determine whether the VA properly terminated their contracts.[195]

The court's reliance on the record to determine whether independent judgment was properly exercised exposes a gap in the current documentation requirements, which do not require a contracting officer to provide written justification in a termination action.[196] Given the sheer breadth of contracts obtained by the government,[197] the court's reluctance to articulate a universal standard is understandable. A documentation requirement like the one proposed below closes this gap by ensuring that a complete record exists in every case, allowing the COFC to articulate a standard it can apply consistently.[198]

B. Congress Should Amend Existing Legislation and Regulations to Guide Courts and the VA in Protecting SDVOSBs and VOSBs When the Government Terminates a Contract

Congress has historically passed legislation to guarantee the continued ability of SDVOSBs and VOSBs to contract with the government when shifting political and economic conditions threaten that ability.[199] Congress should direct the VA to update the VAAR to supplement the existing FAR standards that protect small businesses in terminations for convenience.[200] Heightened

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[192] *See* Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 783, 786 (2016), *aff'd in part*, *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018); *infra* Section IV.B (proposing written justification for terminations of contracts with SDVOSBs and VOSBs at the VA).

[193] *See Akins*, 2012 U.S. Claims LEXIS 1496, at *1; *see also* Tigerswan, Inc. v. United States, 118 Fed. Cl. 447, 453 (2014); *see* OIG Report, *supra* note 140, at 4.

[194] *See* Torncello v. United States, 681 F.2d 756, 770–72 (Ct. Cl. 1982) (rejecting the ASBCA's expansive reading of the termination clause to benefit the government).

[195] *See infra* Section IV.B.

[196] *See* Atkins N. Am., Inc. v. United States, No. 09-112, 2012 U.S. Claims LEXIS 1496, at *4 (Fed. Cl. Nov. 28, 2012). *See generally* FAR 49 (Terminations for Convenience).

[197] *See* sources cite *supra* note 1 (finding that the U.S. government has over $700 billion in contracts each year).

[198] *See infra* Section IV.B.

[199] *See supra* Part II.

[200] This action would be akin to the "Revolutionary FAR Overhaul" undertaken pursuant to an executive order in 2025. *See Revolutionary FAR Overhaul (RFO)*, Acquisition.

documentation requirements for convenience terminations of contracts between the government and SDVOSBs and VOSBs must accompany those updates in both the VAAR and the FAR.[201] Finally, Congress must amend the SBA or the Veterans Benefits, Health Care, and Information Technology Act of 2006 to further protect SDVOSBs' and VOSBs' interests in terminations for convenience at the VA.[202]

Congress can increase protections for SDVOSBs and VOSBs against terminations for convenience by directing the VA to update the VAAR to supplement existing language in the FAR.[203] Currently, the FAR requires that contracting officers give priority to preserving a small business's contract over a large business when partially terminating a delivery contract for commercial items.[204] Extending this language in the VAAR would require contracting officers to prioritize preserving SDVOSBs' and VOSBs' contracts when considering terminating duplicative contracts, unless the contracting officer determines that doing so is not in the government's best interest.[205]

Congress must also enact documentation requirements to justify the termination of SDVOSB and VOSB-held contracts at the VA. Documentation requirements of this kind are not novel.[206] For example, in April 2026, the President directed that any non-fixed-price contract "be justified in writing by the contracting officer."[207] The FAR requires that contracting officers document a detailed justification when awarding a contract under other than full and open competition.[208] A revision of the VAAR to adopt similar documentation requirements when terminating contracts with SDVOSBs or VOSBs would impose the same discipline on terminations. The VA should require its

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gov, [https://perma.cc/3URG-48E2] (last visited Oct. 28, 2026); *see also* 48 C.F.R. pt. 801 (2023) (Department of Veterans Affairs Acquisition Regulation).

[201] *See, e.g.,* Carpenter, *supra* note 33, at 4 (recommending limitations on the Government's broad discretion to terminate contracts by placing limitations on permissible reasons for terminations).

[202] *See generally* Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958); Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, § 863, 137 Stat. 136 (2006).

[203] *See generally* FAR 1.301(a)(1) (2026) (allowing agencies to supplement the FAR).

[204] *See* FAR 49.101(e) (2026).

[205] This language would preserve the requirement that the contracting officer consider the government's interests in FAR 49.101(e) (2026).

[206] *See, e.g.,* FAR 6.303-2(b) (2026); Exec. Order No. 14402, § 2(b)(1), (d), 91, Fed. Reg. 24325, 24325-26 (May 5, 2026).

[207] *See* Exec. Order No. 14402, § 2(b)(1), (d).

[208] *See* FAR 6.303-2(b) (2026). Like veteran-owned business contracting preferences within the VA, full and open competition is congressionally mandated in government contracting activities. *See* 10 U.S.C. § 3201 (full and open competition).

contracting officers to document that they conducted an independent review and exercised their discretion in terminating each contract.[209] This additional requirement will ensure that contracting officers are properly involved in all VA contract terminations involving SDVOSBs and VOSBs.

For example, a contracting officer would have to explain, with supporting evidence, that an SDVOSB or VOSB contract identified for termination is redundant or that the supplies or services are no longer needed by the agency.[210] In cases of redundancy, the contracting officer must also justify why the SDVOSB or VOSB contract was selected for termination over a non-protected contractor, when applicable.[211] Such documentation would help ensure that the contracting officer exercises thorough and independent judgment and provide the court with a clear record for assessing whether a termination was improper.[212] Requiring a written substantiation for termination of an SDVOSB or VOSB contract for convenience ensures continued protection of these classes of small business contractors while placing a relatively light burden on the contracting officer to justify his or her decision.[213]

Finally, it is imperative that Congress amend legislation to require that the cost of any terminated SDVOSB and VOSB contracts be deducted from an agency's totals toward meeting its small business contracting goals for the fiscal year in which the contract is terminated.[214] As a result, the funds remain apportioned to contracts with SDVOSBs and VOSBs. This amendment also ensures that agencies do not use terminations for convenience to escape the congressionally mandated requirement to allocate a portion of their contracting activities to small businesses.[215]

Conclusion

The government's ability to terminate its contracts for convenience arose from concerns about the impact of continuing wartime contracts after an

[209] *See supra* Section III.B.

[210] The FAR requires sufficient documentation to support contracting officer decisions and contains stipulations demonstrating a preference for protecting small businesses in termination decisions. *See* FAR 4.801(b) (2026) (documentation); FAR 49.101(e) (2026) (preference for small businesses).

[211] *See* FAR 49.101(e) (2026).

[212] *See supra* Section IV.A.

[213] Contracting officers are already required to provide written notice of termination to a contractor. FAR 49.102(a) (2026).

[214] *But see* 15 U.S.C. § 644(g)(1)(A)(ii); National Defense Authorization Act for Fiscal Year 2024; Pub. L. No. 118-31, § 863, 137 Stat. 136 (2023).

[215] *See id.*

armed conflict concluded.[216] Beyond the practicalities of halting production of wartime goods and services, such terminations are necessary to save the government potentially billions of dollars.[217] Given the services the VA provides, however, it is unlikely that the agency requires such unbounded ability to terminate contracts with SDVOSBs and VOSBs.[218] A two-fold increase in veteran enrollment over the past decade suggests that the VA requires more supplies and services, not less.[219] Further, although the VA awarded $10.2 billion in prime contract dollars to SDVOSBs in 2024, this amount accounted for only one sixth of the VA's expenditures that year.[220]

Because of the VA's preference for contracting with SDVOSBs and VOSBs, its early-2025 move to quickly terminate nearly six hundred contracts disproportionately harmed those businesses it purports to protect.[221] Given the virtually unrestricted authority of a contracting officer to terminate a contract

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

[217] For example, in WWII, Higgins Industries produced war boats for the United States Navy. David D. Jackson, *Higgins Industries in World War Two*, The Am. Auto. Indus. in World War Two (June 15, 2024), [https://perma.cc/TL3Z-K92A]. The average cost of each boat was at least $135,000 and the total for Higgins' major contracts with the government totaled nearly $27.3 million. *See id.* More recently, between 2001 and 2015, five major defense contractors—Lockheed Martin, Boeing, Northrop Grumman, Raytheon, and General Dynamics—were awarded $40 billion in contract dollars for combat aircraft, bombs, and missiles for use in the wars in Iraq and Afghanistan. William D. Hartung, Brown Univ., Profits of War: Corporate Beneficiaries of the Post-9/11 Pentagon Spending Surge 15–16 (2021).

[218] The VA runs programs benefiting veterans such as "education opportunities and rehabilitation services and provides compensation payments for disabilities or death related to military service, home loan guaranties, pensions, burials, and health care that includes the services of nursing homes, clinics, and medical centers." *U.S. Department of Veterans Affairs*, USA.gov, [https://perma.cc/B3C7-7HLZ] (last visited Oct. 28, 2026).

[219] Between 2006 and 2022, the number of veterans enrolled in the VA's health care system increased from 7.9 million to 9.2 million, placing a greater demand on the VA to provide reliable services to veterans. U.S. Gov't Accountability Off., GAO-23-106636, Veterans Affairs: Addressing Longstanding Management Challenges Requires Sustained Leadership (2023). Legislation establishing presumptive service connection for certain conditions arising from war-time toxic exposures such as Agent Orange and burn pits has added to the VA's existing surge of workload, both in processing claims and in treating service-disabled veterans. U.S. Gov't Accountability Off., GAO-26-108789, VA Disability Benefits: Agency Has Taken Steps, But Challenges Remain with Managing and Modernizing Its Program 3–4 (2025).

[220] *See* OSDBU, *supra* note 6. The government obligated $755.1 billion dollars in funds in 2024, $66.9 billion of which went to the VA's contracts. FY 2024 Government-Wide Contracting, *supra* note 1.

[221] *See supra* Section III.C.

for convenience, SDVOSBs and VOSBs have few regulatory and judicial tools to contest such terminations.[222] In light of the circumstances under which the VA contracts were terminated, any litigation arising from these terminations presents an opportunity for the COFC to enforce the requirement that contracting officers independently reach and justify each termination decision.[223] Further, in response to these recent events, Congress should amend legislation and regulations to continue protecting SDVOSBs and VOSBs, as it has in the past.[224]

[222] *See supra* Section I.B.
[223] *See supra* Section IV.A.
[224] *See supra* Section IV.B.

When One Door Closes, Another One Opens: The Limits of *V.O.S. Selections* and the Future of Tariff Authority

Nicole Kalinowski*

Introduction

On a typical morning in Mississippi's Delta, soybean farmer Ray Crawford wakes before dawn to check the irrigation systems and scan the news for "hints of what will become of his livelihood."[1] In 2025, however, the news brought little relief.[2] For the first time in decades, not a single bushel of his upcoming soybean harvest had been sold to China, once the largest buyer of American soybeans.[3] Facing mounting losses, Crawford considered selling personal assets to stay afloat and reflected on whether he will survive the year.[4] Mississippi Representative Bennie Thompson called for awareness, stating, "I hear from the corn growers. I hear from the beet people. I hear from the rice people. If they can't sell to China, Canada or Mexico, they are in real trouble. These countries have other options, and we're chasing them away."[5]

Tariff policy is not an abstract economic theory, but a mechanism capable of reshaping domestic prices, employment patterns, and the stability of the national economy.[6] The United States's deep integration into the global supply chain means that significant tariff increases can raise costs and prices across the national economy while reducing household incomes.[7]

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* Thank you to my loved ones for their endless support in this process, and to the Editors of the *Federal Circuit Bar Journal* for their invaluable guidance on publishing my Note.

[1] Christopher Harress, *In Mississippi Delta, Even Conservative Farmer Feels Betrayed by Tariffs*, Miss. Indep. (Sep. 8, 2025), [https://perma.cc/4G4P-WN2J].

[2] *See id.*

[3] *See id.*

[4] *See id.* (quoting Crawford, "I cleaned out my daughter's horse trailer in case I have to sell it. I'm bare bones," and reporting that he has forgone personal expenditures including vacations).

[5] *Id.*

[6] *See generally* Int'l Monetary Fund, World Economic Outlook: Growth Slowdown, Precarious Recovery 104–05 (2019) (discussing tariffs' effects on productivity, output, and employment).

[7] *See generally* Erica York & Alex Durante, *Tracking the Impact of the Trump Tariffs & Trade War*, Tax Found. (Mar. 13, 2026), [https://perma.cc/SZN6-GVP7] (tracking tariffs

The Trump-era tariff escalations have triggered retaliatory measures from major trading partners, reducing export access and disrupting established trade flows.[8]

Congress passed the Smoot-Hawley Tariff Act[9] in 1930, raising import duties to protect American businesses and farmers.[10] However, the measure prompted retaliation from foreign governments and contributed to a sharp decline in global trade.[11] Nearly a century later, tariff policy has again been used as a mechanism for crisis governance, but the authority to wield it has shifted to the executive branch.[12] Through decades of delegation, Congress built trade statutes that allow the President to restrict imports for reasons ranging from national security to "unusual and extraordinary" foreign threats that are deemed national emergencies.[13] The practical stakes are very real, with ripple effects that travel through supply chains and provoke global retaliation that injures U.S. consumers and businesses.[14] Those consequences are paired with a heightened need for judicial rulings to clarify the scope of these statutory provisions and to resolve ongoing legal uncertainty surrounding the limits of executive tariff authority.[15]

This structural weakness is illustrated in *V.O.S. Selections Inc. v. Trump,*[16] where the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit")

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passed by the Trump administration and estimating that the average household in the United States will pay an average of $820 in tariff taxes).

[8] *See* Janardan Behera, *Global Ripple Effects of the Trump Tariff War on Trade, Economic Growth, and Inflation*, 16 Theoretical & Prac. Res. Econ. Fields 981, 986 (2025).

[9] Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified at 19 U.S.C. §§ 1202–1683).

[10] *See id.*; Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power Over Tariffs?*, Brookings Inst. (Jan. 15, 2025), [https://perma.cc/CLN3-BA66].

[11] *See* Looney & Patel, *supra* note 10.

[12] *See id.*

[13] *See* 50 U.S.C. § 1701(a) (requiring an "unusual and extraordinary threat" originating wholly or substantially outside the United States); 19 U.S.C. § 1862 (authorizing import adjustments following prescribed national-security findings); Looney & Patel, *supra* note 10.

[14] *See* Looney & Patel, *supra* note 10.; *see also* Lorenzo Rotunno & Michele Ruta, *Trade Partners' Responses to US Tariffs* 3–4 (IMF Working Paper No. WP/25/147, 2025), [https://perma.cc/SG7H-4DCS].

[15] *See* Stratos Pahis, *The Federal Circuit Rules Trump Tariffs Are Illegal*, Lawfare (Sep. 3, 2025, 8:00 ET), [https://perma.cc/CXH6-V6U5]; *see also* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1326–27 (Fed. Cir. 2025) (discussing statutory limits on presidential tariff authority), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

[16] 149 F.4th 1312 (Fed. Cir. 2025), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

held that the International Emergency Economic Powers Act ("IEEPA")[17] does not authorize sweeping tariffs of unlimited duration on nearly all imported goods.[18] IEEPA gives the President broad authority to regulate economic transactions and to impose sanctions after declaring a national emergency in response to an unusual foreign threat.[19] In *V.O.S. Selections*, the court emphasized that IEEPA contains no clear grant of tariff authority and invoked the major questions doctrine to require exclusive congressional authorization for measures of such vast economic and political significance.[20] In doing so, the court affirmed that emergency powers cannot be presumed to carry economy-shaping consequences absent explicit statutory language.[21] The Federal Circuit explained that when the President claims strong authority with sweeping economic consequences, courts may hesitate before inferring such power from broad or ambiguous statutory language.[22] Instead, Congress must speak clearly if it intends to delegate power of that scale.[23] Yet, the decision addressed only IEEPA and not the scope of other trade statutes, leaving unclear how courts should evaluate similar tariff actions under different statutory authority.[24] The Federal Circuit's analysis focuses on whether IEEPA provides the President with the power to invoke the challenged tariffs and whether they are constitutionally sound.[25] Because multiple trade statutes confer overlapping emergency-based import authority, the ruling leaves open the possibility that similar tariff regimes could be imposed under alternative statutory provisions, allowing executive action to migrate from one delegation to another without meaningful judicial constraint.[26]

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[17] 50 U.S.C. § 1701.

[18] *See V.O.S. Selections*, 149 F.4th at 1338.

[19] *See* Christopher A. Casey, Jennifer K. Elsea & Liana W. Rosen, Cong. Rsch. Serv., R45618, The International Emergency Economic Powers Act: Origins, Evolution, and Use 10 (2025); *see also* 50 U.S.C. §§ 1701–1706.

[20] *See V.O.S. Selections*, 149 F.4th at 1333–35.

[21] *See id.*

[22] *See* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1333–35 (Fed. Cir. 2025), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

[23] *See id.*

[24] *See id.*; *see also* Pahis, *supra* note 15 (explaining that *V.O.S. Selections* addressed tariffs imposed under IEEPA without affecting tariffs imposed under other statutes); Ashley Akers et al., *Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling*, Holland & Knight (Sep. 9, 2025), [https://perma.cc/4AY9-886F].

[25] *See V.O.S. Selections*, 149 F.4th at 1333–34.

[26] *See* Christopher T. Zirpoli, Cong. Rsch. Serv., R48435, Congressional and Presidential Authority to Impose Import Tariffs 2 (Apr. 23, 2025); *see also* Pahis, *supra* note 15.

This Note argues that *V.O.S. Selections* insufficiently constrains presidential tariff power because its strict IEEPA holding invites statutory substitution across alternative trade authorities, enabling recurring cycles of unilateral tariff escalation and retaliation on a global and domestic level. This Note proposes that the Federal Circuit adopt a two-step "Anti-Substitution Test," which requires the government to show that: (1) the tariff is a targeted, time-limited emergency response rather than economy-wide trade policymaking and (2) Congress clearly authorized tariffs of the challenged magnitude and duration to prevent circumvention of statutory limits and to curb the potential for abuse by substituting other statutes. Part I traces the historical expansion of presidential tariff power through congressional delegation, explaining the origins of the major questions doctrine and why it is vital in the trade and national security context. Part I also examines the global economic consequences of the second Trump administration's 2025–2026 expansion of U.S. tariffs. Part II analyzes the Federal Circuit's reasoning in *V.O.S. Selections* and demonstrates how a narrow focus on IEEPA leaves a doctrinal gap that can lead to continued cycles of unilateral trade escalation. Part III recommends that the Federal Circuit implement an "Emergency Tariff Anti-Substitution Test" to ensure that emergency tariff authority cannot be used to circumvent congressional limits and restore greater stability to the international trading system.

I. Background

Presidential tariff authority has expanded through a long process of congressional delegation, beginning with the breakdown of direct legislative control after the Smoot-Hawley Tariff Act and continuing through a series of trade statutes that gradually shifted tariff policymaking into the executive branch.[27] The statutory structure now includes multiple mechanisms, such as Section 232 of the Trade Expansion Act of 1962[28] and IEEPA, which authorizes presidents to impose trade restrictions on grounds ranging from national security concerns to declared national emergencies.[29] Tariff escalation during President Trump's second term highlights the substantial global consequences associated with these powers, including retaliatory measures and the imposition of widespread economic burdens domestically and abroad.[30] The Federal Circuit plays a central role in defining the limits of presidential tariff authority and in ensuring uniform interpretation because it holds exclusive appellate

[27] *See* Looney & Patel, *supra* note 10.

[28] 19 U.S.C. § 1862.

[29] *See id.*; 50 U.S.C. §§ 1701–1702 (IEEPA); Looney & Patel, *supra* note 10.

[30] *See* Looney & Patel, *supra* note 10; Behera, *supra* note 8, at 981–82.

jurisdiction over the U.S. Court of International Trade ("CIT").[31] Against this backdrop, *V.O.S. Selections* illustrates both the judiciary's willingness to apply the major questions doctrine to emergency tariff actions and the limits of that intervention, as the Federal Circuit confined its analysis to IEEPA while leaving other statutory delegations unexamined.[32]

A. The Expansion of Executive Trade Power

The Smoot-Hawley Tariff Act marked one of the last moments when Congress exercised direct control over tariff policy.[33] Amid declining agricultural prices and growing pressure from agricultural interests for protection, Congress enacted the Smoot-Hawley Act during the early months of the Great Depression, sharply raising import duties.[34] Although President Hoover campaigned on raising tariffs for agricultural goods alone, mounting protectionist pressure in Congress ultimately led him to sign the sweeping Smoot-Hawley Tariff Act, which established tariff schedules for more than 20,000 separate items.[35] Despite opposition from some members of Congress, the Smoot-Hawley Tariff Act was followed by tariff increases abroad, some of which were imposed in direct retaliation against U.S. exports.[36] U.S. trading partners quickly imposed countervailing tariffs, which contributed to a sharp decline in global trade and worsened an already fragile world economy.[37] The proposed bill also prompted political backlash, including a petition from more than 1,000 economists urging President Hoover to veto the bill.[38]

Congress realized the need for a more flexible system of trade policy that could respond to the global market's ever-changing conditions without lawmaker interference.[39] Congress began expanding presidential discretion over tariff policy by enacting the Reciprocal Trade Agreement Act of 1934 ("RTAA").[40] The RTAA delegated limited authority to the President to nego-

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[31] *See* Zirpoli, *supra* note 26, at 4.

[32] *See* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1334–35 (Fed. Cir. 2025), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026); *see also* Pahis, *supra* note 15 (discussing the implications of the Federal Circuit's IEEPA ruling).

[33] *See* Looney & Patel, *supra* note 10.

[34] *See* Barry Eichengreen, *The Political Economy of the Smoot-Hawley Tariff* 5, 10–12, 19–20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2001, 1986).

[35] *Id.* at 11, 19–20.

[36] *See id.* at 47–49.

[37] *See id.*

[38] *See* Frank Whitson Fetter, *The Economists' Tariff Protest of 1930*, 32 Am. Econ. Rev. 355, 355 (1942).

[39] *See Eighty Years After the Reciprocal Trade Agreements Act*, Off. of the U.S. Trade Representative Blog (June 12, 2014), [https://perma.cc/L9W7-K8AS].

[40] *See id.*; ch. 747, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351) (RTAA).

tiate bilateral tariff reductions with foreign nations without requiring separate approval from Congress.[41] The RTAA aimed to revive international trade and repair relationships overseas, while delegating power to the executive branch to enable more efficient action in the fast-changing arena of global commerce.[42] The delegation of tariff authority under the RTAA established the foundation for modern trade policy and began the lasting trend towards executive dominance in economic policymaking.[43]

Congress extended the RTAA's delegation framework by enacting the Trade Expansion Act of 1962 ("TEA"),[44] which further strengthened presidential authority over global trade policy.[45] Under Section 232 of TEA, the Department of Commerce ("Commerce") investigates whether imports pose a threat to U.S. national security.[46] Any national security threat that Commerce finds is subsequently reported to the President.[47] If Commerce determines the imports threaten national security, the President has ninety days to decide whether to agree with Commerce's determination and, if so, whether to take action.[48] If the President decides to act on the findings, the President must specify the action's nature and duration, and implement it within fifteen days.[49] Within thirty days, the President must provide Congress with a written statement explaining the reasons for taking or not taking action.[50] As Section 232 of TEA provides:

> If the President concurs [with Commerce's findings, the President shall] determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.[51]

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[41] *See The Reciprocal Trade Agreement Act of 1934*, U.S. House of Representatives, His., Art & Archives (Mar. 29, 1934), [https://perma.cc/2NLK-MSZJ] (last visited Oct. 28, 2026).

[42] *New Deal Trade Policy: The Export-Import Bank & the Reciprocal Trade Agreements Act, 1934*, U.S. Dep't of State, Off. of the Historian, [https://perma.cc/2ALB-3AXH] (last visited Oct. 28, 2026).

[43] *See Eighty Years After the Reciprocal Trade Agreements Act*, *supra* note 39.

[44] Inu Manak & Helena Kopans-Johnson, *Tariffs on Trading Partners: Can the President Actually Do That?*, Council on Foreign Rels. (Feb. 2025), [https://perma.cc/LN4M-D5FL]; 19 U.S.C. § 1862.

[45] *See* Manak & Kopans-Johnson, *supra* note 44; 19 U.S.C. § 1862.

[46] 19 U.S.C. § 1862(b).

[47] *Id.* § 1862(b)(3)(A).

[48] *Id.* § 1862(c)(1)(A).

[49] *Id.* § 1862(c)(1)(B).

[50] *Id.* § 1862(c)(2).

[51] *Id.* § 1862(c)(1)(A)(ii).

Passed during the peak of the Cold War, amidst pressing national security concerns and faith in the President's self-restraint by lawmakers, Section 232 gave the President great discretion over imports that are a threat to national security, partly because the statute does not objectively define national security.[52] The lack of definition for national security permits anything to be deemed as one, "regardless of the merits."[53]

The Supreme Court subsequently confirmed the constitutionality of Congress's delegation of authority to the President under Section 232 to adjust imports in the interest of national security in *Federal Energy Administration v. Algonquin SNG, Inc*.[54] The Court reasoned that the statute provided sufficient standards to guide executive discretion.[55] The Court confirmed that Section 232 authorizes the President to adjust imports, including by imposing cost-raising measures.[56] Under Section 232, presidential authority to adjust imports extends to the imposition of license fees, which, like quotas, have an initial and direct impact on imports by affecting their price rather than their quantity.[57] *Algonquin* recognized that the President's discretion under Section 232 extends beyond restricting the quantity of imports to imposing license fees that directly affect import prices.[58]

Congress granted even broader powers under IEEPA as presidential authority over trade strengthened.[59] Section 232 addresses imports that may threaten national security, whereas IEEPA allows the President to regulate or block certain international economic activities following a foreign-based national emergency declaration.[60] Unlike Section 232's narrow focus on import-related risks, IEEPA operates within a broader foreign-policy and national-security framework, allowing the President to respond to a wider range of foreign threats that affect the United States.[61] Ultimately, IEEPA allows the President

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[52] *See* Scott Lincicome & Inu Manak, Cato Inst., Protectionism or National Security? The Use and Abuse of Section 232, at 3, 5 (2021); Jay Hakes, *Are Trump's Tariffs Justified by National Security?*, Real Clear Energy (Mar. 14, 2018), [https://perma.cc/V2DA-VHK9].

[53] Lincicome & Manak, *supra* note 52, at 1.

[54] 426 U.S. 548, 559–60 (1976).

[55] *See id.* at 548–49, 559.

[56] *See id.* at 560–61, 570–71 (holding that Section 232(b) is not an unconstitutional delegation of legislative power).

[57] *See id.* at 551, 571 (holding that the license fee and quota were authorized by Section 232(b) because of "its initial and direct impact on imports").

[58] *See id.* at 561.

[59] *See* Casey, Elsea & Rosen, *supra* note 19, at 62–65.

[60] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 636, 640, 640 n.2 (2026) (plurality opinion) (holding that IEEPA does not authorize tariffs).

[61] *See id.* at 636, 640 n.2, 643.

to regulate international economic transactions during declared national emergencies that are "unusual and extraordinary threats."[62]

IEEPA was historically invoked to impose targeted sanctions rather than to adjust tariffs or set general trade policy, and past presidents have relied on IEEPA to respond to specific foreign crises.[63] Historical invocations of IEEPA include President Carter's freezing of Iranian assets held in U.S. banks after the Tehran hostage crisis in 1979.[64] President H. W. Bush used the same authority to block trade and financial dealings with Iraq following its invasion of Kuwait in 1990.[65] President Obama invoked IEEPA to freeze assets of the Libyan government and other parties involved in that nation's civil unrest in 2011.[66] Although IEEPA initially functioned as a tool for narrowly tailored economic sanctions, its use has expanded beyond those traditional bounds, particularly during the Trump administrations.[67] In practice, the statute has also supported long-running emergency regimes that are frequently renewed.[68]

Once a national emergency is declared, IEEPA's authorities take effect, which permit the President to "regulate or prohibit" global economic transactions.[69] Presidents may continue national emergency declarations annually, allowing emergency authorities to remain in effect for extended periods.[70] As of September 1, 2025, Presidents have declared seventy-seven national emergencies under IEEPA, and forty-six of them remain active as of that date.[71] For instance, President H. W. Bush issued Executive Order 12808 in 1992 to block assets and restrict trade with Serbia and Montenegro during the violent breakup of Yugoslavia.[72] President W. Bush enacted Executive Order 13219 in 2001, which targeted individuals undermining peace in the Western Balkans and former Yugoslavia.[73] Executive Order 13219 has been renewed annually through 2026 to maintain sanction authority over persons involved

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[62] 50 U.S.C. §§ 1701–1702.

[63] *See* Casey, Elsea & Rosen, *supra* note 19, at 18–19.

[64] Exec. Order No. 12170, 44 Fed. Reg. 65729 (Nov. 15, 1979).

[65] Exec. Order No. 12722, 55 Fed. Reg. 31803 (Aug. 3, 1990).

[66] Exec. Order No. 13566, 76 Fed. Reg. 11315 (Mar. 2, 2011).

[67] *See* Casey, Elsea & Rosen, *supra* note 19, at 10, 12–13, 18.

[68] *See id.* at 20–21 ("The average length of an emergency invoking IEEPA declared in the 1980s was four years. That average extended to [twelve] years for emergencies declared in the 1990s and [sixteen] years for emergencies declared in the 2000s and continues to grow [].").

[69] 50 U.S.C. §§ 1701, 1702(b).

[70] *See* Casey, Elsea & Rosen, *supra* note 19, at 20.

[71] *See id.* at 1, 69–74 (noting multiple executive orders invoking IEEPA that have remained in effect for decades, including Executive Orders 12938, 12957, 12978, 13067, which were issued in the 1990s and remain ongoing as of September 1, 2025).

[72] Exec. Order No. 12808, 57 Fed. Reg. 23299 (June 2, 1992).

[73] *See* Exec. Order No. 13219, 66 Fed. Reg. 34777 (June 29, 2001).

in corruption of regional agreements.[74] Emergency authorities under IEEPA thus continued to operate long after their initial invocation in the region.[75]

B. Additional Statutory Tariff Authorities (Sections 301 and 122)

Other alternative statutory mechanisms in place allow the executive branch to further impose tariffs. Under Section 301,[76] the U.S. Trade Representative ("USTR") shall take action when: (1) a foreign country denies the United States rights under a trade agreement or (2) when a foreign country's law or practice violates a U.S. trade agreement or "is unjustifiable and burdens or restricts [U.S.] commerce."[77] The USTR may take action if a foreign country's law or practice "is unreasonable or discriminatory and burdens or restricts U.S. commerce, and [] action by the United States is appropriate."[78] The USTR's tariff power is vested in the executive branch's discretion.[79] Section 301 generally requires the USTR to investigate and provide opportunities for public input before taking action.[80] During President Trump's first term, the USTR used Section 301 to initiate six investigations and impose tariffs in several instances, including on imports from China.[81]

Section 122[82] serves a different function, authorizing the President to proclaim a temporary import surcharge of up to 15% or impose import quotas, for up to 150 days.[83] Section 122 authority may be used when the United States faces significant trade and payment imbalances that create economic concerns and require corrective measures.[84]

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[74] *See* Notice of Continuation of the National Emergency with Respect to the Western Balkans, 91 Fed. Reg. 38233 (June 24, 2026) (renewing the national emergency declared in Executive Order 13219).

[75] *See id.*; The Breakup of Yugoslavia, 1990–1992, U.S. Dep't of State, Off. of the Historian, [https://perma.cc/3QN4-SBE4] (last visited Oct. 28, 2026).

[76] 19 U.S.C. § 2411.

[77] *Id.* § 2411(a)(1). These actions may take the form of import restrictions, such as tariffs. *See* Keigh E. Hammond & William F. Burkhart, Cong. Rsch. Serv., R48549, Presidential 2025 Tariff Actions: Timeline and Status 3 (updated Jan. 12, 2026).

[78] 19 U.S.C. § 2411(b).

[79] *See id.* § 2411(a)(1)(B)(ii), (b)(2).

[80] *See* Danielle M. Trachtenberg, Cong. Rsch. Serv., IF11346, Section 301 of the Trade Act of 1974, at 1 (updated Mar. 13, 2026).

[81] Hammond & Burkhart, *supra* note 77, at 3.

[82] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat 1978 (codified at 19 U.S.C. § 2132).

[83] *Id.* § 2132(a)(3).

[84] *Id.* § 2132(a)(1). President Trump became the first president to invoke Section 122 after the Supreme Court of the United States held on February 20, 2026, that IEEPA does not authorize the President to impose tariffs. *See* Christopher A. Casey, Danielle M.

C. Global Repercussions of Recent Tariff Expansion

The Trump administration's expansion of tariffs has generated measurable global economic disruption, including retaliatory measures by major global trading partners, which heightens uncertainty across international supply chains.[85] In April 2025, the Trump administration invoked IEEPA to impose country-specific reciprocal tariffs on a broad range of imports.[86] These tariffs, which varied by trading partner and product category, were announced in early April 2025 and took effect that August for most nations.[87] In response, several of the affected economies, including Canada, the European Union ("EU"), and China, implemented retaliatory tariffs and related countermeasures targeting significant U.S. political and economic sectors.[88] Table 1 summarizes the rate of the tariffs as well as the retaliatory measures that the countries took.[89]

Trachtenberg, & Christopher T. Zirpoli, Cong. Rsch. Serv., IF13199, Section 122 of the trade Act of 1974, at 1 (2026).

[85] *See Impact of Tariffs on Tax and Trade*, Thomson Reuters Tax & Acct. (Oct. 29, 2025), [https://perma.cc/3EGU-B7DJ].

[86] *See Trump Tariff Tracker,* Atl. Council: Geoeconomics Ctr., [https://perma.cc/5VYU-C3HE] (last visited Oct. 28, 2026).

[87] *See id.*

[88] *See id.*

[89] The columns labeled "Target;" "Tariff Announcement Date;" "Legal Authority Used;" and "Tariff Rate" were compiled using data from *id.* (incorporating specifically Canada, EU, and China into the table to provide a geographically diverse representation across North America, Asia, and Europe) unless otherwise noted.

Table 4. U.S. Tariff Measures and Foreign Retaliation

Target	Tariff Announcement Date	Tariff Effective Date	Legal Authority Used	Tariff Rate	Retaliation
Canada	February 1, 2025	March 4, 2025	IEEPA	25%	• Retaliatory 25% tariffs on $155 billion of U.S. goods, including beverages, cosmetics, and paper products; • First phase: $30 billion of U.S. imports, effective February 4, 2025; • Second phase: $125 billion of additional U.S. goods including vehicles, aluminum/steel, agricultural products, and aerospace materials.[90]
EU	April 2, 2025	August 7, 2025	IEEPA	15%	• Retaliatory 25% tax on around €21 billion of U.S. imports products, including some U.S. agricultural exports, steel/aluminum, tobacco, yachts; • First phase of retaliation took effect between April 15, 2025, until December 1, 2025; • Second phase in development FN; • Proposed that retaliation may be suspended contingent on a negotiation agreement.[91]

[90] Press Release, Dep't of Fin. Can., Canada Announces Robust Tariff Package in Response to Unjustified U.S. Tariffs (Mar 4., 2025) (on file with Department of Finance Canada), [https://perma.cc/C9R2-ZRQL]; Press Release, Dep't of Fin. Can., Government of Canada Announces Next Steps in Its Response Plan to Unjustified U.S. Tariffs (Feb. 2, 2025) (on file with Department of Finance Canada), [https://perma.cc/Y46Q-DGFV].

[91] *See* Commission Regulation 2025/778 of Apr. 14, 2025, Commercial Rebalancing Measures Concerning Certain Products Originating in the United States of America and Amending Implementing Regulation (EU) 2018/886, 2025 O.J. (L 788) 4; Peggy Corlin, *EU Member States Agree First Wave of Retaliatory Tariffs*, Euronews (Apr. 9, 2025), [https://perma.cc/4C3N-HUBE].

Target	Tariff Announcement Date	Tariff Effective Date	Legal Authority Used	Tariff Rate	Retaliation
China	April 2, 2025	April 5, 2025 [92]	IEEPA	34%	• Retaliatory 34% tariffs on all U.S. imports; • Tariffs increased to 84% and then 125% in April 2025 as the trade conflict escalated; • Imposed export controls on rare earth materials (tech, defense, energy), which restrict access to Chinese-made goods and technology; • Added U.S. companies to "Unreliable Entity List," which ban trade and investments with China; • Suspended imports from certain U.S. agricultural exporters.[93]

The Trump administration's main justification for its 2025 tariffs was to punish foreign exporters and protect domestic industries.[94] The burden of the 2025 tariffs, however, falls overwhelmingly on the American people.[95] Foreign exporters bore only 4% of the tariff burden, while U.S. consumers absorbed 96% of the tariff burden through increased prices of goods.[96] These tariffs function as a consumption tax on Americans, raising everyday costs for U.S. households and reducing the range of products available to consumers.[97] Tariffs intensified consumer harm and domestic economic strain as escalating tariff cycles raised prices and businesses passed the resulting costs on to consumers.[98] Rather than burdening foreign governments, as President Trump

[92] Exec. Order No. 14257, 90 Fed. Reg. 15041 (Apr. 2, 2025).

[93] Sophie Jin et al., *China's Comprehensive Retaliation Against U.S. Tariffs*, Holland & Knight (Apr. 8, 2025), [https://perma.cc/8V3U-EYC2] (noting information reflects responses to early 2025 U.S. tariff actions; measures, timelines, and rates may have changed as policies evolved and negotiations continued).

[94] *See* Julian Hinz et al., Kiel Inst. For the World Econ., America's Own Goal: Who Pays the Tariffs?, Kiel Pol'y Brief No. 201, at 4 (2026).

[95] *See id.*

[96] *See id.* at 7.

[97] *See id.* at 4.

[98] *See* Joint Econ. Comm. Minority, 119th Cong. American Families Have Paid More Than $1,700 Each in Tariff Costs Since Trump Entered Office (2026).

stated, these trade measures rebound onto the domestic economy, squeeze American businesses, and shrink trade volume, while Americans foot the bill.[99]

D. The Major Questions Doctrine: Origins and Evolution

The debate over the President's tariff authority is one instance of a larger question this Note explores, namely how clearly Congress must speak before granting sweeping power. The major questions doctrine is a judicial principle that directs courts to require agencies to identify clear congressional authorization before regulating issues of exceptional political or economic importance.[100] Courts examine the history and breadth of an agency's asserted authority, as well as its economic and political significance, to determine whether the major questions doctrine applies and requires clear congressional authority.[101] The doctrine reflects judicial hesitation to infer broad regulatory power from vague statutory language when an agency asserts authority over a matter of national significance.[102] Yet, the precise boundaries of the major questions doctrine remain unsettled, as neither the Supreme Court nor Congress have clearly defined when a question is sufficiently *major* to trigger the requirements of an explicit delegation.[103] This ambiguity potentially discourages agencies from pursuing regulatory initiatives because it is difficult to predict

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[99] *Compare* Hannah Grabstein, *WATCH: Trump Says Tariffs Could Replace Income Tax*, Pub. Broadcast Serv. (Feb. 24, 2026, 22:22 ET), [https://perma.cc/QE3J-TA85] (discussing the tariffs replacing the income tax, President Trump stated "I believe the tariffs paid for by foreign countries") *with* Hinz et al., *supra* note 94, at 11–13 (finding that American consumers bear the costs of tariffs).

[100] *But see* Kate R. Bowers, Cong. Rsch. Serv., IF12077, The Major Questions Doctrine (Nov. 2, 2022) (finding that the Supreme Court rejected an agency's claim of regulatory authority when the underlying issue concerned "vast 'economic and political significance'" or Congress clearly did not give the agency the authority); West Virginia v. EPA, 722, 142 S. Ct. 2587, 2608–09 (2022) (finding that the major questions doctrine addresses the issue of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted").

[101] *See* Bowers, *supra* note 100, at 1; *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022) (explaining that the history, breadth, and economic and *political significance* of an agency's asserted authority may warrant judicial hesitation before concluding that Congress conferred such authority).

[102] *West Virginia*, 142 S. Ct. at 2608–09 (requiring clear congressional authorization for extraordinary assertions of regulatory power).

[103] *See id.* at 2609 (explaining that the major question doctrine applies in "certain extortionary cases," where the nature of the agency's claimed authority makes the Court "reluctant to read into ambiguous statuary text" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 Admin. L. Rev. 445, 448 (2016) ("The [major questions] doctrine is defined in the most

when courts will determine that an issue is a major question.[104] The doctrine's indeterminate contours generate confusion for agencies and courts alike.[105]

Courts have applied the major questions doctrine unevenly in cases regarding trade, foreign affairs, and national security, leaving it unclear whether these domains fall within the doctrine's scope.[106] Some judges, most prominently Justice Kavanaugh, argue that the doctrine should not apply to foreign policy or national security because such presidential decision-making relies on independent constitutional authority and requires rapid, flexible responses to evolving global threats.[107] Under this argument, major questions analysis "does not translate" to foreign affairs because Congress is presumed to delegate broadly in such contexts and must expressly cabin presidential discretion if it wishes to impose limits.[108] Some courts have rejected this carve-out.[109] Most notably, the Federal Circuit held in *V.O.S. Selections* that President Trump's imposition of emergency-based tariffs under IEEPA triggered application of the major questions doctrine due to the economic magnitude and novelty of asserting such tariff authority.[110] Likewise, the historically broad delegations of executive authority under foreign affairs statutes, such as IEEPA and Section 232 raise questions about whether the challenged tariff actions

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general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates.").

[104] *See* Bowers, *supra* note 100; Monast, *supra* note 103, at 447–48, 474–75 (examining the potential chilling effect of doctrinal uncertainty under the former *Chevron* framework). Although Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) has since been overruled, *see* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), uncertainty about whether an agency can establish clear congressional authorization may similarly discourage regulatory action.

[105] *See* Monast, *supra* note 103, at 448, 474–76.

[106] *See* Erin Webb, *ANALYSIS: Foreign Affairs Will Derail Major Questions Doctrine*, Bloomberg L. (Nov. 11, 2025, 21:00 ET), [https://perma.cc/652P-DJWE] (contrasting Justice Kavanaugh's concurrence in FCC v. Consumers' Research, 145 S. Ct. 2482 (2025), which reasoned that the major questions doctrine does not apply to foreign policy or national security questions, and Judge Oldham's reliance on that reasoning in his dissent in W.M.M. v. Trump, 154 F.4th 207 (5th Cir. 2025), with the Federal Circuit's application of the doctrine to IEEPA tariffs in V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025)).

[107] *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2512 (2025) (Kavanaugh, J., concurring); *accord* Webb, *supra* note 106.

[108] Webb, *supra* note 106 (quoting *Consumers' Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring)).

[109] *See V.O.S. Selections*, 149 F.4th at 1334–35 (applying the major questions doctrine to the asserted IEEPA tariff authority), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026) (affirming the judgment without adopting the major questions analysis as a majority holding).

[110] *See id.* at 1334–36.

constitute the kind of "unheralded" or "transformative" assertions of power that trigger major questions analysis.[111] The resulting divide between those who view foreign-affairs powers as categorically exempt and those who treat trade-based emergency actions as classic major questions have produced inconsistent judicial treatment and significant doctrinal unpredictability in this area.[112]

E. The Federal Circuit's Role in Trade Law

Courts should apply federal trade law uniformly across the country, and the Federal Circuit plays a vital role in ensuring consistent appellate review of trade disputes.[113] In 1980, Congress reorganized the U.S. Customs Court into the Court of International Trade ("CIT"), expanding its jurisdiction over trade-related cases.[114] Prior to this reorganization, trade cases were split between different courts, causing confusion and inconsistent rulings on major trade issues.[115] To further alleviate trade law inconsistencies, Congress created the Federal Circuit in 1982, and transferred unto it appellate jurisdiction over cases from CIT.[116] Sending customs and trade appeals to one national appellate court ensures consistent interpretation of laws.[117] The Federal Circuit reviews appeals in cases about how imports are classified and whether certain trade duties are owed.[118] As such, the Federal Circuit's decisions is vital precedent

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[111] *See* Jack Goldsmith, *The Tariff Case and the Major Questions Doctrine*, Exec. Functions (Sep. 12, 2025), [https://perma.cc/7B59-BA5E]; *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022) (requiring action to be "unheralded" and "transformative" to trigger the doctrine (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023) (considering the unprecedented magnitude of the asserted authority alongside its economic and political significance in applying the major questions doctrine)).

[112] *See* source cited *supra* notes 105–07 and accompanying text; Goldsmith, *supra* note 111.

[113] *See generally supra* Section I.D (examining how differing judicial approaches to presidential tariff authority contribute to uncertainty in federal trade law); *About the Court*, U.S. Ct. Of In't Trade, [https://perma.cc/2NDB-6DVL] (last visited Oct. 28, 2026) (explaining that the CIT promotes national uniformity in trade-related judicial decisions and that its final decisions are appealable to the Federal Circuit).

[114] *U.S. Court of International Trade, 1980–Present*, Fed. Jud. Ctr., [https://perma.cc/9YAU-W5ND] (last visited Oct. 28, 2026).

[115] *See id.*

[116] *See id.*

[117] *See* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. Chi. L. Rev. 603, 616–17 (1989).

[118] *See, e.g.*, Schlumberger Tech. Corp. v. United States, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (reviewing a CIT judgment concerning tariff classification).

and affect trade law nationwide.[119] In 2017, the Federal Circuit issued fourteen decisions on appeals from the CIT, demonstrating the Federal Circuit's continuing role in interpreting federal trade statutes.[120] Therefore, the creation of the Federal Circuit as a specialized appellate court promotes expertise and more consistent decision-making in tough and complex areas, such as trade law, that have lasting national impacts.[121]

F. The Case: *V.O.S. Selections v. Trump*

The disputes over President Trump's 2025 emergency-based tariff measures have raised questions about the limits of presidential authority in imposing large tariff restrictions when they have significant economic consequences.[122] In *V.O.S. Selections*, the Federal Circuit reviewed "five Executive Orders that imposed tariffs of unlimited duration on nearly all goods from nearly every country in the world."[123] President Trump justified these tariffs as necessary for national security following declared national emergencies targeting drug trafficking into the United States.[124] The Federal Circuit held that President Trump did not have statutory authority under IEEPA to impose tariffs of such large scope.[125] The court emphasized that IEEPA contains no explicit reference to "tariffs, duties, or the like, or the power to tax."[126] The majority explained that when Congress has previously allowed the President to impose tariffs, it has done so through statutes that clearly grant that authority and include specific procedures and limits.[127] In *V.O.S. Selections*, the Federal Circuit applied the major questions doctrine to IEEPA, concluding that tariffs with major economic and political consequences require clear approval from Congress.[128] The Federal Circuit refused to construe IEEPA's general

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[119] *See generally* Meador, *supra* note 117 (discussing the Federal Circuit's role in promoting nationwide uniformity in trade law).

[120] *See* Kevin J. Fandl, *2017 International Trade Law Decisions of the Federal Circuit*, 67 Am. U. L. Rev. 1329, 1330 (2018).

[121] *See Landmark Legislation: Federal Circuit*, Fed. Jud. Ctr., [https://perma.cc/QK39-DAXF] (last visited Oct. 28, 2026).

[122] *See, e.g.*, V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1326–27 (Fed. Cir. 2025) (en banc) (reviewing challenges to the reciprocal and trafficking tariffs), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026) (holding that the International Emergency Economic Powers Act does not authorize the President to impose tariffs).

[123] *See id.* at 1318.

[124] *See id.* at 1319–20.

[125] *See id*. at 1318.

[126] *See id.* at 1330–31.

[127] *See id.* at 1332–33, 1338.

[128] *See* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1334–36 (Fed. Cir. 2025), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

power to regulate imports with allowing sweeping tariffs of unlimited scope and duration.[129] Simultaneously, because the Federal Circuit's analysis was focused narrowly on IEEPA and the particular emergency-based tariffs at issue, the decision did not explain how courts should evaluate similar tariff actions under other trade laws.[130] By doing this, the Federal Circuit leaves open how future cases could account for the economic scope or international impacts of the imposition of tariffs.[131]

II. Analysis

The Federal Circuit's decision in *V.O.S. Selections* is so narrowly decided that it fails to meaningfully resolve the broader structural problem of expansive presidential tariff authority under emergency-based trade statutes.[132] The Federal Circuit, by confining its holding strictly to IEEPA, leaves alternative statutory pathways that allow future administrations to impose similar tariffs through overlapping delegation of trade power.[133] This doctrinal gap invites continued cycles of unilateral tariff escalation and prolonged litigation over what constitutes a sufficiently limited emergency measure.[134] Moreover, emergency tariffs do not operate as isolated policy tools.[135] They destabilize global trade networks by disrupting supply chains and triggering retaliatory responses from U.S. trading partners.[136] Economic research demonstrates that the economic burden of sweeping emergency tariffs falls overwhelmingly on domestic importers and consumers rather than strictly on foreign exporters.[137] This effectively transforms the emergency tariff into a broad domestic tax.[138] Accordingly, *V.O.S. Selections* ultimately postpones, but does not resolve, the

[129] *See id.* at 1330, 1337–38.

[130] *See id.* at 1330; Akers et al., *supra* note 24 (noting that the ruling does not affect tariffs imposed under other statutory authorities).

[131] *See generally* Akers et al., *supra* note 24 (discussing the IEEPA ruling and its implications for other tariff authorities).

[132] *See* Zirpoli, *supra* note 26, at 1, 20 (discussing alternative tariff authorities, including Sections 232, 301, and 122). *See generally* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025) (addressing the scope of presidential tariff authority under IEEPA); Pahis, *supra* note 15 (criticizing the Federal Circuit for leaving open the possibility of narrower tariffs under IEEPA).

[133] *See* Zirpoli, *supra* note 26, at 1, 20 (naming the alternative statutory pathways).

[134] *See* Pahis, *supra* note 15.

[135] *See* Behera, *supra* note 8, at 986–87.

[136] *See id.* at 980–81.

[137] *See id.* at 1005 (finding that tariffs increase import costs and transmit higher prices to consumers).

[138] *See id.*

constitutional and economic conflicts posed by the emergency-based tariff power without clear doctrinal limits on executive trade authority.[139]

A. The Post-*V.O.S.* Gap: Statutory Substitution Risk

The Federal Circuit's limitation of IEEPA must be understood within the broader statutory framework that governs presidential tariff authority and consists of multiple overlapping delegations enacted by Congress.[140] Congress has authorized the President to impose tariffs under several statutes, each of which provides an independent legal basis for regulating imports, including IEEPA, Sections 232, 122, and 301.[141] These statutes are distinct delegations with different triggering conditions and procedural requirements, rather than as components of a single unified scheme.[142] IEEPA requires a declared national emergency; Section 232 requires a Commerce investigation and finding that imports threaten to impair national security; Section 122 authorizes temporary import restrictions to address economic imbalances; and Section 301 requires an investigation into unfair trade practice.[143] Courts have traditionally evaluated presidential action on a statute-by-statute basis, asking only whether the President has acted within the bounds of the particular delegation invoked.[144] As a result, the current standard of review does not account for how overlapping combinations of delegations operate in context.[145] The structure of IEEPA further illustrates this dynamic, as the statute was designed to allow rapid executive action with comparatively minimal procedural constraints once a national emergency is declared.[146] By contrast, other trade statutes require more structured processes, yet still ultimately

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[139] *See* Pahis, *supra* note 15.

[140] *See generally* Zirpoli, *supra* note 26 (surveying congressional delegations of tariff authority).

[141] *See* Zirpoli, *supra* note 26, at 2, 8; 19 U.S.C. §§ 1862 (Section 232), 2132 (Section 122), 2411 (Section 301).

[142] *See* Zirpoli, *supra* note 26, at 8–9 (explaining that Sections 232, 201, and 301 require agency investigations and findings, while Sections 122 and 338 do not).

[143] *See id.* at 10; See *supra* Sections I.A–B (discussing the statutory requirements of IEEPA and Sections 232, 122, and 301); *see also* 50 U.S.C. § 1701**;** 19 U.S.C. §§ 2132, 2411.

[144] *See, e.g.,* Sustainability Inst. v. Trump, 165 F.4th 817, 830, 832–33 (4th Cir. 2026) (examining whether executive officials exceeded their statutory authority in suspending or terminating congressionally funded grants); Learning Res., Inc. v. Trump, 146 S. Ct. 628, 637–39 (2026) (examining whether IEEPA authorized the President to impose tariffs); Zirpoli, *supra* note 26 at 4–5.

[145] *See supra* Section II.B; Inu Manak, Univ. of Calgary, New N. Am. Initiative, Tariffs, the Executive Branch and Recent Developments in U.S. Trade Policy 5 (2025).

[146] *See* Manak, *supra* note 145, at 4.

permit the imposition of tariffs when statutory conditions are satisfied.[147] Each tariff statute provides an independently sufficient basis for tariff action when its requirements are met, enabling the President to recharacterize the same underlying economic conditions to satisfy multiple statutory triggers.[148] This allows the President to shift between statutory regimes without materially altering the substance of the trade restriction.[149]

The Supreme Court's decision in *Learning Resources, Inc. v. Trump*[150] reinforces this structure by invalidating tariffs imposed under IEEPA while purposefully leaving other statutory delegations of tariff authority untouched.[151] By confining its analysis to IEEPA and declining to evaluate overlapping trade statutes in relation to one another, the Supreme Court left intact a broader framework where multiple delegations continue to operate simultaneously.[152] Courts have historically afforded significant deference to the President for applying these statutory authorities, often limiting judicial review to whether the President has clearly exceeded the scope of a particular delegation.[153] As a result, constraining tariff authority under IEEPA does not eradicate the ability for the President to pursue tariffs through available alternative statutory pathways.[154]

One might argue that the procedural safeguards embedded in statutes such as Sections 232 and 301 impose different constraints from those in IEEPA.[155] However, those safeguards continue to provide independent legal authority

[147] *See* Zirpoli, *supra* note 26, at 9–10, 12, 14–15, 19.

[148] *See id.* at 9–12, 14, 17–19; Prentiss Lee Smith & Matthew W. McGee, *Trade Policy Shifts: IEEPA Tariffs End*, *Section 122 Begins, and Section 301 and 232 Activity Grows*, Baker Donelson (Feb. 23, 2026), [https://perma.cc/BZ8M-HBJR].

[149] *See* Zirpoli, *supra* note 26 at 20–21.

[150] 146 S. Ct. 628 (2026). The Supreme Court consolidated *Learning Resources* with *Trump v. V.O.S. Selections, Inc.*, which arose from the Federal Circuit's decision in V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025). V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025) was consolidated on appeal, Trump v. V.O.S. Selections, Inc., 146 S. Ct. 73 (2025), and therefore, was decided by the Supreme Court in *Learning Resources*.

[151] *See Learning Res.*, 146 S. Ct. at 723 (Kavanaugh, J., dissenting) (arguing that invalidating IEEPA tariffs may not prevent the President from imposing similar tariffs under other trade statutes); Akers at al., *supra* note 24.

[152] *See V.O.S. Selections*, 149 F.4th at 1326–27 (Fed. Cir. 2025); *Learning Res.*, 146 S. Ct. at 721–23 (2026) (Kavanaugh, J., dissenting).

[153] *See* Zirpoli, *supra* note 26 at 4–5.

[154] *See id.* at 18–20; Smith & McGee, *supra* note 148.

[155] Bryce Engelland, *The IEEPA Tariffs Are Dead—Now What?*, Thomson Reuters (Feb. 20, 2026), [https://perma.cc/22VF-65FR].

for tariff action.[156] This independent authority allows the President to exercise their own interpretive discretion, including by expanding "national security" concepts to justify broad tariff measures.[157] Because these standards are flexible, the President can invoke alternative statutory justifications to address the same underlying economic conditions even after one statutory pathway is constrained.[158] As a result, the procedural requirements of any single statute do not prevent the President from achieving tariff outcomes through different statutory mechanisms.[159] Accordingly, the post-*V.O.S Selections* framework reveals a doctrinal gap in which judicial limits on one statutory authority do not meaningfully constrain the breadth and flexibility of the President's delegated tariff powers.[160]

When the President imposes emergency-based tariffs under any statutory authority, courts should evaluate whether the tariff operates as a legitimate, targeted emergency response, or as a sweeping instrument of international trade policy. This inquiry reflects the central concern of the major questions doctrine: "[a] decision of such magnitude and consequences rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[161] Emergency tariffs, like those imposed in 2025, operate as economy-wide trade measures that can trigger significant retaliatory escalation and in turn, increase domestic consumer costs, and create consequences that underscore the necessity for the major questions doctrine's requirement of express congressional authority.[162] Therefore, the Federal Circuit must reevaluate these new-age trade cases and ensure that emergency tariffs are connected to a legitimate and immediate crisis.[163]

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[156] *See* Halit Harput & Marius Risse, *After IEEPA: How Sections 232 and 301 Work*, Global Trade Alert (Feb. 26, 2026), [https://perma.cc/AK6Y-2EFL].

[157] *See* Manak & Kopans-Johnson, *supra* note 44, Scott Lincicome, Inu Manak & Alfredo Carrillo Obregon, Cato Inst. Pol'y Analysis, Unfair Trade or Unfair Protection? The Evolution and Abuse of Section 301, at 3–4 (June 14, 2022).

[158] *See* Manak & Kopans-Johnson, *supra* note 44.

[159] *See id.*; Zirpoli, *supra* note 26 at 1, 17, 19–21.

[160] *See supra* Section I.B, F; *see also* Manak & Kopans-Johnson, *supra* note 44; V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1326 (Fed. Cir. 2025) (concluding that IEEPA does not authorize the challenged tariffs of unlimited scope, amount or duration); *V.O.S. Selections*, 149 F.4th at 1340 (Cunningham, J., concurring) (concluding that IEEPA does not authorize the President to impose any tariffs); Learning Res., Inc. v. Trump, 146 S. Ct. 628, 723 (2026) (Kavanaugh, J., dissenting) (observing that other trade statutes may still authorize similar tariffs despite the Court's IEEPA ruling); Smith et al., *supra* note 155, at 1–2.

[161] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[162] *See Trump Tariff Tracker*, *supra* note 86; Hinz et al., *supra* note 94, at 11–12.

[163] *See* Mark Melatos, *'Liberation Day' Tariffs: A Solution in Search of a Problem*, Geo. J. Int'l Aff. (July 7, 2025), [https://perma.cc/5Z3L-QCTC]; *see infra* Part III.

B. President Trump's Reliance on Other Trade Statutes

President Trump's response to the Supreme Court's ruling in *Learning Resources* confirms in practice what the preceding analysis established in theory.[164] Following the Supreme Court's decision, President Trump moved to preserve much of his prior tariff framework through alternative statutory authorities, imposing a sweeping 10% tariff under Section 122 within hours of the ruling, increasing it to 15% the following day, and setting a 150-day period beginning February 24, 2026.[165] This sequence demonstrates the President's ability to repackage the same economic conditions used to justify IEEPA tariffs to meet the requirements of a different statute.[166] This substitution dynamic is not a hypothetical, but already underway.[167] Congress designed Section 122 as a short-term tool, capping it at 150 days and requiring a congressional vote to go further, which reflects a deliberate choice to limit how long the President can act alone on tariffs.[168] That limitation loses its practical force when Section 122 is not used as a standalone response to a specific economic problem, and instead serves as a temporary placeholder to keep broad tariffs in place while the administration builds longer-term authority under Section 232 and 301.[169] The Trump administration has explicitly employed this strategy by launching multiple new accelerated Section 301 investigations and pursuing numerous Section 232 investigations across major industries.[170] So, while Sections 232 and 301 require more procedural steps than IEEPA, such as formal investigations and specific findings, those steps do not prevent the executive from using them to reach the same destination when the underlying goal is rebuilding a broad tariff program.[171] In reviewing presidential tariff actions, the Federal Circuit has generally focused on whether the challenged measures exceeded the authority conferred by the

[164] *See infra* Part III; *see also* Smith & McGee, *supra* note 148.

[165] *See* Smith & McGee, *supra* note 148.

[166] *See id.*

[167] *See id.*

[168] *See* 19 U.S.C. § 2132(a) (limiting special import measures to 150 days unless extended by an Act of Congress); Marc L. Busch & Daniel Trefler, *Trump's Lawyers Are Wrong About Section 122*, Council on Foreign Rels. (Aug. 27, 2025, 11:14 ET), [https://perma.cc/PJ9B-MCEZ].

[169] *See* Smith & McGee, *supra* note 148; Scott R. Anderson et al., *Brookings Experts on the Supreme Court's Tariff Decision*, Brookings Inst. (Feb. 24, 2026), [https://perma.cc/MB2R-DXA7].

[170] *See* Smith & McGee, *supra* note 148 (citing pharmaceutical pricing under Section 301 and semiconductors under Section 232 as examples of ongoing investigations).

[171] *See id.*; Anderson et al., *supra* note 169.

statute invoked.[172] The practical result is that *V.O.S. Selections*, rather than placing a meaningful limit on executive tariff power, has simply rerouted it.[173] The same broad tariff coverage that existed pre-*V.O.S. Selections* is being rebuilt piece-by-piece through a combination of authorities that courts evaluate separately without considering the context through which tariffs are used together.[174] If this pattern goes unaddressed, judicial decisions striking down one statutory authority would do little more than shift the executive to another, undermining the substantive force of judicial review over emergency power.[175]

C. Emergency Tariffs and the Effects on Global Economic Stability

Emergency tariffs have significant economic and political consequences that go beyond the specific harms felt in Canada, the EU, or China, because these measures disrupt the stability of the global trade system and the U.S. economy.[176] The major questions doctrine is concerned not with whether Congress delegated general authority, but whether Congress clearly authorized the President to make decisions of "vast economic and political significance."[177] The doctrine as applied in *V.O.S. Selections* reflects that courts should not presume that Congress silently transferred to the President the power to restructure major sectors of the national economy through broadly-worded statutory language.[178] The Trump administration's 2025 tariffs do not operate as narrow, targeted measures aimed at a discrete emergency or a limited set of foreign actors.[179] Instead, they function as sweeping trade restrictions

[172] *See generally* Zirpoli, *supra* note 26 (discussing the Federal Circuit's review of presidential tariff actions for clear misconstruction of statutory authority).

[173] *See* Smith & McGee, *supra* note 148; Harput & Risse, *supra* note 156.

[174] *See supra* Section II.A (discussing the independent statutory basis for presidential tariff authority and the limitations of statute-specific judicial review); *see also* Smith & McGee, *supra* note 148; Harput & Risse, *supra* note 156.

[175] *See supra* Section II.A; *see also* Smith & McGee, *supra* note 148; Harput & Risse, *supra* note 156; Anderson et al., *supra* note 169.

[176] *See* Behera, *supra* note 8 at 981–82.

[177] West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[178] *See* Bowers, *supra* note 100; Learning Res., Inc. v. Trump, 146 S. Ct. 628, 638–39 (2026) (discussing Congress's constitutional tariff authority and statutory delegations).

[179] *See* Joint Brief of George F. Allen et al. as Amici Curiae, at 16, V.O.S. Selections, Inc. v. Trump, No. 25-00066 (Ct. Int'l Trade Apr. 23, 2025) (contrasting the administration's broad IEEPA tariffs with the narrower authority and procedural safeguards provided by other trade statutes).

that vastly affect prices, supply chains, investment flows, consumer costs, and relations with major trading partners all at once.[180]

Applying the major questions doctrine, the scale and impact of the 2025 Trump tariffs exceed the authority Congress likely intended to delegate.[181] The broad effects of the second Trump administration's tariff are legally relevant because they define the level of authority the President is claiming.[182] When a dominant global power like the United States imposes tariffs, these effects are not confined to a single sector or nation, but propagate through interconnected global markets.[183] In this context, the tariffs function not as a routine trade measure but as economy-wide interventions with systemic consequences.[184] The scale of the tariffs and the sweeping policy are mismatched with the generalized statutory language on which the President acted.[185] Where Congress has elsewhere clearly spoken when authorizing trade measures, its silence here reinforced the conclusion that no such authority, to this magnitude, was granted.[186] The idea that Congress does not "hide elephants in mouseholes,"[187] suggests that broad tariffs like those imposed by the second Trump administration are difficult to square with general statutes, since authority of that scale would ordinarily be expressed more clearly by Congress.[188] Accordingly, the widespread economic consequences of these tariffs confirm that they fall within the category of "major question" requiring clear congressional authorization, which is absent here.[189]

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[180] *See id.*; Behera, *supra* note 8, at 982.

[181] *See Learning Res.*, 146 S. Ct. at 639–41; Joint Brief of George F. Allen et al., *supra* note 179, at 23 (explaining that Congress rejected proposals to include tariff powers when enacting IEEPA).

[182] *See* Manak & Kopans-Johnson, *supra* note 44; Joint Brief of George F. Allen et al., *supra* note 179, at 26.

[183] *See Impact of Tariffs on Tax and Trade*, supra note 85; Behera, *supra* note 8, at 982.

[184] *See* Behera, *supra* note 8, at 982; Joint Brief of George F. Allen et al., *supra* note 179, at 25.

[185] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 640–41 (2026); Joint Brief of George F. Allen et al., *supra* note 179, at 23–24.

[186] *See Learning Res.*, 146 S. Ct. at 639–40 ("When Congress has delegated its tariff powers, it has done so in explicit terms, and subject to strict limits.").

[187] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (coining the phrase to explain that Congress would not implicitly delegate to the EPA authority to consider costs in setting air quality standards through vague statutory language (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))).

[188] *See Learning Res.*, 146 S. Ct. at 639–40 (explaining that Congress delegates tariff authority expressly and with strict limits).

[189] *See id.* at 641–42.

The domestic impact of the 2025 Trump tariffs further supports this conclusion.[190] Although the Trump administration argued that the tariffs would primarily burden foreign exporters, evidence shows that most of the costs are instead borne by American businesses and consumers.[191] If the tariffs operated as targeted measures affecting foreign actors, they might more closely resemble the type of limited emergency actions historically upheld under statutes like IEEPA.[192] However, because the costs are largely imposed domestically, the tariffs function less as a foreign-directed remedy and more as a broad internal economic policy tool.[193] As estimated, model retaliation is deliberately designed to "maximize leverage" by targeting politically sensitive U.S. industries and regions, which is a tool for political leverage and not a way to resolve simple trade issues.[194] Even though countries may be directly targeting specific American industries—such as farming—to create political pressure, the impact is felt across the United States and in the homes of almost every American.[195] Under *Learning Resources*, this kind of widespread domestic impact is critical to the major questions doctrine inquiry.[196] It demonstrates that the tariffs do not merely regulate external economic relations but have significant effects on domestic production, employment, and economic activity.[197] That level of impact signals that the President is exercising authority of "vast economic and political significance," which triggers the requirement

[190] *See generally* Kelly McGee, Notice & Comment, *The Major Questions Doctrine Applies to President Trump's Tariffs*, Yale J. on Regul. (2025) (citing projected GDP losses exceeding $200 billion annually); Hinz et al., *supra* note 94 (finding that 96% of the tariff burden passed through to U.S. importers).

[191] *See* Hinz et al., *supra* note 94, at 4, 11–12.

[192] *See* James Wallar, *Supreme Court Case on IEEPA Tariffs: Facts Should Matter*, Council on Foreign Rels. (Nov. 5, 2025, 9:09 ET), [https://perma.cc/D3WU-RCFB] (explaining that IEEPA measures must address an unusual and extraordinary threat originating substantially outside of the United States).

[193] *See id.*

[194] *See* Christopher Shim & Will Merrow, *Here's How Countries Are Retaliating Against Trump's Tariffs*, Council on Foreign Rels. (Mar. 21, 2025, 11:48 ET), [https://perma.cc/NBQ9-PM6B]; *supra* Section I.C, Table 1.

[195] *See* Shim & Merrow, *supra* note 194.

[196] *See* Bowers, *supra* note 100; Learning Res., Inc. v. Trump, 146 S. Ct. 628, 641 (2026) (plurality opinion) (emphasizing that the "economic and political consequences of the IEEPA tariffs are astonishing").

[197] *See* World Economic Outlook, April 2019: Growth Slowdown, Precarious Recovery, Int'l Monetary Fund104–05 (2019) (explaining that tariffs affect output, employment, and productivity through global supply chains).

for clear congressional authorization.[198] Because IEEPA provides only limited, general authority and does not expressly authorize tariffs with broad domestic consequences, the asserted power to impose such tariffs exceeds the clear authorization granted by Congress.[199]

Ray Crawford's account of the financial strain on his Mississippi soybean farm illustrates the widespread domestic consequences of the tariffs, underscoring their economic significance under the major questions doctrine and the need for clear congressional authorization.[200] Courts applying heightened review to emergency tariff power should therefore consider whether the aggregate domestic consequence of a tariff action, across all invoked statutory authorities, rise to the level that demands congressional authorization.[201] The Federal Circuit should extend its reasoning in *V.O.S. Selections* to require that courts evaluate the aggregate economic and political consequences of coordinated multi-statute tariff actions when determining whether heightened review applies.[202]

D. Implications for U.S. Global Leadership

The absence of effective judicial checks on emergency tariffs creates uncertainty, as courts have been reluctant to constrain presidential action and Congress has not consistently imposed additional limits on tariff authority.[203] This leaves U.S. trade policy unpredictable and subject to significant economic and geopolitical risks.[204]

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[198] Bowers, *supra* note 100 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[199] *See Learning Res.*, 146 S. Ct. at 638–40, 642–43.

[200] *See* Harress, *supra* note 1 (describing Crawford's financial difficulties after China stopped purchasing U.S. soybeans); *supra* Part I (discussing the domestic economic consequences of the 2025 tariffs); *see also Learning Res.*, 146 S. Ct. at 643–44 (declining to define the full scope of IEEPA's import-regulation authority while holding that IEEPA does not authorize tariffs).

[201] *See infra* Section III.A.

[202] *See infra* Part III.

[203] *See* Clark Packard & Scott Lincicome, *Presidential Tariff Powers and the Need for Reform*, Cato Inst. (Oct. 9, 2024), [https://perma.cc/QU59-GXRY].

[204] *See id.*

Algonquin illustrates this problem.[205] The requirement of clear authorization for international tariffs is reinforced by the Supreme Court in *Algonquin*.[206] There, the Court upheld presidential authority under Section 232(b) to impose import restrictions, including cost-raising measures, because the statute provided sufficient standards to guide executive discretion.[207] In *Algonquin*, the Supreme Court emphasized that Section 232 required an investigation, a finding that imports threatened national security, and limits on the President's remedial authority in concluding that the statute provided an intelligible principle for the delegation of power.[208] Although the case involved international trade authorities, its scope was limited to a specific category of imports and used an established administration with process and clearly defined statutory criteria.[209] Therefore, the Supreme Court's affirmation in *Algonquin* that Section 232 authorized the President to impose import license fees suggests that the Court is more receptive to congressional delegations of authority when they contain clear preconditions and meaningful constraints on the exercise of executive discretion.[210]

By contrast, in *Learning Resources*, the Supreme Court held that IEEPA does not authorize the President to impose tariffs.[211] The Court distinguished *Algonquin*, explaining that Section 232 contains statutory language authorizing duties that IEEPA lacks.[212] Together, *Learning Resources* and *Algonquin* illustrate how the Supreme Court has evaluated presidential tariff authority and other monetary import restrictions under different statutory delegations.[213] Although *Algonquin* upheld the particular import license fees imposed

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[205] *Compare* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559–61, 571 (1976) (upholding the challenged license-fee scheme under Section 232), *with* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 642–46 (2026) (distinguishing *Algonquin* based on the different statutory text because IEEPA lacks Section 232's "sweeping, discretion-conferring" language).

[206] *See Algonquin*, 426 U.S. at 569–71.

[207] *See id.* at 559–60.

[208] *See id.*

[209] *See id.* at 550–52, 555, 559.

[210] *See id.* at 570–71; *id.* at 559 (noting that the preconditions and limited scope of Section 232(b) indicate that there is "no looming problem of improper delegation"); *id. at* 569 (drawing a contrast between a rejected amendment that would have given the President the power to impose duties with Section 232(b) and noting that the "articulation of standards to guide the invocation of the President's powers" and "narrower criterion of 'national security'" set it apart).

[211] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 642–43 (2026).

[212] *Id.* at 653–54.

[213] *See id.*; Fed. Energy Admin v. Algonquin SNG, 426 U.S. 548, 559–61, 571 (1976); *see also supra* Section II.A (discussing statutory substitution risk and the limits of statute-specific

under Section 232 and *Learning Resources* rejected the challenged tariffs under IEEPA, these decisions leave uncertainty about how courts should evaluate similar tariff measures imposed under alternative statutory authorities.[214]

President Trump's 2025 IEEPA tariffs were repeatedly modified, adjusted, and recalibrated over time, often in response to ongoing negotiations and shifting policy objectives.[215] Such variability contributes to a lack of predictability for regulated actors, as constantly changing tariff regimes do not provide the stability necessary for long term economic planning or investment.[216] *V.O.S. Solutions* provides a limiting principle in theory but leaves unresolved how that principle operated in closer cases, creating uncertainty about the legal boundaries of emergency tariff authority.[217] The uncertainty is evident in the Court's own reasoning.[218] Although the Supreme Court held in *Learning Resources* that IEEPA does not authorize the challenged tariffs, the Justices differed on whether the major questions doctrine was necessary to reach that conclusion.[219] Therefore, although *Learning Resources* established that IEEPA does not authorize tariffs, the decision left unresolved questions about the administration's ability to impose similar tariffs under other statutory authorities.[220] This raises continuing uncertainty for both foreign trading partners negotiating in the shadow of these measures and for the federal government in determining the scope of its remaining tariff authority.[221]

III. Recommendation

To address the substitution risk left unresolved by V.O.S. Selections, the Federal Circuit should adopt a judicial framework that prevents the executive

judicial review).

[214] *See Learning Res.*, 146 S. Ct. at 642–43, 653–54; *Algonquin*, 426 U.S. at 571.

[215] *See* Alan O. Sykes, *Stanford Law's Alan Sykes on the Supreme Court's Tariff Ruling and What's Next for Trump's Trade Agenda*, Stanford Legal (Mar. 6, 2026), [https://perma.cc/T5HW-2J8E] (explaining that tariffs were repeatedly modified through exemptions, rate adjustments, and negotiations with foreign countries).

[216] *See id.*

[217] *See* Sam Callahan et al., *Supreme Court's Tariffs Ruling Answers Some Major Questions, Leaves Others Open*, Arnold & Porter (Feb. 20, 2026), [https://perma.cc/7Q6P-YJE4] (discussing questions left open by the IEEPA ruling).

[218] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 639–42 (2026) (plurality opinion); *Learning Res.*, 146 S. Ct. at 647–77 (Kagan, J., concurring in part and concurring in the judgment).

[219] *See id.* at 638–42 (plurality opinion); *id.* at 674–77 (Kagan, J., concurring in part and concurring in the judgment) (concluding that ordinary statutory interpretation resolves the case without resort to the major questions doctrine).

[220] *See* Callahan et al., *supra* note 217; *see also* Sykes, *supra* note 215.

[221] *See id.*

from imposing expansive tariffs through overlapping statutory substitutes.[222] The Federal Circuit should implement an Emergency Tariff Anti-Substitution Test: a structured inquiry designed to ensure that emergency-based tariff authority is not used to evade the procedural and substantive constraints Congress has imposed on trade policymaking.[223] Rather than focusing solely on the statutory source invoked by the executive, the Emergency Tariff Anti-Substitution Test requires courts to evaluate how an asserted emergency tariff operates in context.[224] By considering not only formal statutory authorization, but also how the asserted power operated in practice, the Federal Circuit can assess the realistic future impacts.[225] Adopting this test would restore constitutional balance between Congress and the executive branch by ensuring that emergency tariff authority remains confined to a genuine crisis, rather than serving as a vehicle for broad economic policymaking without meaningful Congressional oversight.[226]

A. Proposed Emergency Tariff Anti-Substitution Test

The Emergency Tariff Anti-Substitution Test consists of two inquiries. First, courts should evaluate the economic significance of the challenged tariff.[227] This inquiry asks whether the tariff operates as a sweeping, economy-wide trade policy instrument rather than a targeted response to a discrete emergency.[228] Where a tariff produces substantial economic consequences, such as widespread market imbalance or significant consumer cost increase, it raises

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[222] *See supra* Sections II.A–B.

[223] *See infra* Section III.B.

[224] *See infra* Section III.A; *see also* Valerie C. Brannon, Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends 45 (Mar. 10, 2023) (explaining that courts consider how statutes operate in practice and whether their consequences align with the statutory scheme); City of Chicago v. Morales, 527 U.S. 41, 63–64 (1999) (similarly looking beyond the stated limits on government authority to determine where those limits actually restricted how officials could exercise their power).

[225] *See* Brannon, *supra* note 224, at 47–48 (discussing the practical consequences of statutory interpretation); *see also Morales*, 527 U.S at 60–64 (emphasizing the need for meaningful limits on government discretion).

[226] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (requiring clear congressional authorization for exercises of power of vast economic and political significance); *see also* Bowers, *supra* note 100 (discussing Congress's responsibility for authorizing major political decisions); *see also supra* Section II.A.

[227] *See West Virginia*, 142 S. Ct. at 2608 (considering the economic and political significance of asserted authority) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

[228] *See West Virginia*, 142 S. Ct. at 2608–09 (examining the breadth and significance of asserted regulatory authority); *see also supra* Section II.A.

the same separation of powers concerns reflected in the major questions doctrine.[229] In such cases, courts need to require a clear statement of congressional authorization before upholding the exercise of emergency tariff authority.[230] Second, courts should assess whether the President is functionally substituting one statutory authority for another to evade congressionally-imposed limits.[231] This inquiry responds directly to the gap left by *V.O.S. Selections* and addresses the ecosystem of trade statutes.[232] Under this test, courts will evaluate whether the challenged tariff mirrors the scope, duration, or policy function of measures that Congress has subjected to more rigorous constraints, and if that is the case, then the tariff should be invalidated as an attempt to circumvent the statutory limits that Congress deliberately imposed on comparable measures.[233]

This framework aligns with established approaches to judicial review.[234] In determining the scope of statutory authority, the Supreme Court has considered the statutory scheme, congressional intent, and the practical

[229] *See* Bowers, *supra* note 100 (explaining Congress's responsibility for decisions of major national significance); see also *West Virginia*, 142 S. Ct. at 2608; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (requiring clear congressional authorization for major regulatory decisions); Learning Res., Inc. v. Trump, 146 S. Ct. 628, 639–40 (2026) (plurality opinion) (applying separation-of-powers concerns to tariff authority); *see also supra* Section II.C.

[230] *See West Virginia*, 142 S. Ct. at 2609 (requiring clear congressional authorization for extraordinary assertions of regulatory authority); *see also Learning Res.,* 146 S. Ct. at 639–42 (applying the major questions doctrine to presidential tariff authority asserted under IEEPA); *Util. Air Regul. Grp.*, 573 U.S. at 324 (requiring clear congressional authorization for agency decisions of vast economic and political significance).

[231] *See Util. Air Regul. Grp.*, 573 U.S. at 327–28 (holding that an agency cannot rewrite unambiguous statutory requirements to advance its regulatory objectives); Smith & McGee, *supra* note 148 (describing the administration's shift from IEEPA tariffs to Section 122); *see also supra* Section II.B.

[232] *See generally* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025) (holding that the challenged IEEPA tariffs exceeded the President's statutory authority without deciding the legality of tariffs imposed under other trade statutes), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

[233] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608–10 (2022) (requiring clear congressional authorization for extrordinary assertions of agency authority); s*ee also* Bowers, *supra* note 100 (discussing Congress's legislative choices); *supra* Section II.A.

[234] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (considering the statutory framework and congressional intent in evaluating the FDA's claimed authority); King v. Burwell, 576 U.S. 473, 485–86 (2015) (considering the statutory scheme and practical consequences of competing interpretations); *see, e.g.*, *see also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321–24 (2014) (considering the expansion of regulatory authority resulting from EPA's interpretation).

consequences of competing interpretations.[235] By examining how a tariff action functions in practice, the Emergency Tariff Anti-Substitution Test scrutinizes the President's use of emergency powers by preventing their use to achieve outcomes that lack clear congressional authorization.[236]

B. Why the Federal Circuit is the Necessary Venue to Implement this Review

The Federal Circuit should implement the Emergency Tariff Anti-Substitution Test framework to interpret future trade cases because of the institutional responsibility it has in ensuring uniformity of trade statutes and delegation.[237] Because the President may invoke alternative tariff statutes after IEEPA's tariff authority has been rejected, executive tariff policy may persist despite statutory limits that Congress imposed on particular delegations.[238] This development may blur otherwise distinct legal boundaries, which the Federal Circuit may remedy through how it analyzes and implements these statutes.[239] The proposed Emergency Tariff Anti-Substitution Test does not introduce additional uncertainty for foreign governments and industries predicting when tariffs are lawful. Instead, it provides clearer guidance than the current framework. Overlapping trade statutes already create uncertainty by granting the President multiple avenues to impose emergency tariffs.[240] Confined judicial holdings and courts' reluctance to address overlapping trade statutes, combined with the executive's shift to alternative authorities, allow the current framework to enable workarounds for existing emergency tariff power.[241] The Emergency Tariff Anti-Substitution Test would instead utilize the Federal Circuit's power to reduce this uncertainty over

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[235] *See Brown & Williamson,* 529 U.S. at 132–33 (considering statutory context and congressional intent); *see also King*, 576 U.S. at 485–86, 492–98 (considering statutory structure and the practical consequences of competing interpretations).

[236] *See West Virginia*, 142 S. Ct. at 2608–10 (requiring clear congressional authorization for assertions of extraordinary authority); *see also supra* Section II.A.

[237] *See* Meador, *supra* note 117, at 609, 615–16 (discussing the Federal Circuit's jurisdiction over customs cases and the importance of nationwide uniformity); *see also supra* Section I.E.

[238] *See* Zirpoli, *supra* note 26, at 20–22 (discussing the President's reliance on Section 122 following the Supreme Court's rejection of IEEPA tariffs); *see also supra* Section II.B.

[239] *See* Zirpoli, *supra note* 26, at 4, 20–21 (discussing the Federal Circuit's role in interpreting tariff authority); *see also supra* Section I.E.

[240] *See* Zirpoli, *supra* note 26, at 9, 20, 25–26; Manak, *supra* note 145, at 5, 10.

[241] *See* Manak, *supra* note 145, at 7 (discussing judicial deference to presidential authority under Section 232); Anderson et al., *supra* note 169 (discussing the possibility of preserving aspects of IEEPA tariffs through alternative statutes; Smith & McGee, *supra* note 148 (describing the shift to section 122); *see also supra* Sections II.A–B.

time by making clear that the President cannot escape major question doctrine scrutiny by relying on broad language or various statutes. By providing the Federal Circuit with the clear and workable factors that the Emergency Tariff Anti-Substitution Test does, the test strengthens consistency and prevents emergency tariff authority from being used in an unpredictable way.[242]

Conclusion

When the Supreme Court decided *Learning Resources*, it raised questions that extend far beyond the immediate dispute over drug-trafficking emergency tariffs.[243] *Learning Resources* reflects a broader transformation in modern day trade.[244] Emergency economic powers and other delegated trade authorities provide the President with broad discretion to impose tariffs, aided by expansive and often ambiguous national security justifications.[245] Although the application of the major questions doctrine under IEEPA marked an important constraint on executive overreach, its narrow statutory framing left deeper and unresolved structural problems.[246] In reality, the President can likely still impose functionally identical tariffs by relying on different, overlapping trade authorities, since the decision was limited to IEEPA and the decision did not resolve the scope of other statutes.[247] This resulting uncertainty is not just a domestic constraint.[248] The destabilizing ripple effects felt in the EU, China, and Canada showcase how emergency tariffs operate as global economic shockwaves rather than purely U.S. measures.[249] To preserve the integrity and role of Congress's constitutional role and to maintain credibility in the international order as well as controlling statutory circumvention, the Supreme Court must adopt clearer and stronger principles.[250] Without such reforms, the line between true emergencies and unchecked tariff power

[242] *See supra* Sections II.A, III.A.

[243] *See* Pahis, *supra* note 15; *see* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 643–44 (2026).

[244] *See* Pahis, *supra* note 15.

[245] *See* Manak & Kopans-Johnson, *supra* note 44.

[246] *See* Akers et al., *supra* note 24.

[247] *See* Manak, *supra* note 145, at 5, 10; V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1334 (Fed. Cir. 2025) (Cunningham, J., additional views), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

[248] *See* Pahis, *supra* note 15.

[249] *See* Behera, *supra* note 8, at 281–82, 1008.

[250] *See* Pahis, *supra* note 15.

will continue to erode the Supreme Court and U.S. reliability in trade, with profound implications for both domestic and globally.[251]

[251] *See id.*; *Learning Res.*, 146 S. Ct. at 640–41 (warning against unchecked presidential tariff authority).