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Rights Without Remedies: Bundled Causation and the Legislative-Branch Whistleblower Gap

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Abstract: Employees of the Library of Congress occupy an unusual position in American employment law. They are protected against reprisal for opposing discrimination by the Congressional Accountability Act (CAA), and they are protected by statute against reprisal for reporting to the Library's Inspector General. But only the first protection comes with a forum and a remedy. This article studies that asymmetry with formal tools and uses the recent case of *Dines v. Office of Congressional Workplace Rights* as a worked example. The case went through a Merits Hearing Officer, the Board of the Office of Congressional Workplace Rights, and the U.S. Court of Appeals for the Federal Circuit, which affirmed without opinion under its Rule 36. The article makes four contributions. First, it models the right–remedy structure of legislative-branch employment law as a mapping from protected acts to enforcement channels. It proves that disclosures to an Inspector General fall into a statutory remedial gap and shows that the gap removes deterrence in a Becker-type enforcement model. Second, it gives a structural-causal analysis of employer reasons stated as an undifferentiated aggregate, such as "disruptive behavior," that contains protected and unprotected conduct together. A finding that such an aggregate reason was legitimate and genuine does not, by itself, settle whether protected activity was a but-for cause of the decision. A separate finding that the unprotected residue alone was sufficient does. Third, it shows that when employers can bundle reasons and adjudicators accept bundled reasons, the deterrent effect of anti-reprisal law falls in proportion. Fourth, it models certiorari review of an unexplained affirmance as a vehicle problem: the chance that winning the question presented changes the outcome is bounded by the product of the failure probabilities of every alternative ground, including forfeiture. Public data illustrate the institutional setting: Supreme Court filings fell from 8,857 in the 2006 Term to 3,856 in the 2024 Term; petitions *in forma pauperis* fell by roughly two thirds; and Rule 36 judgments account for about 41% of the Federal Circuit's decisions in appeals from post-grant patent proceedings. The analysis supports two conclusions. Congress should adopt the whistleblower recommendation that the OCWR Board has repeated in at least seven biennial reports. Adjudicators facing aggregate reasons should require explicit disaggregation of protected and unprotected conduct.

Keywords: Congressional Accountability Act; retaliation; whistleblower protection; Inspector General; Library of Congress; but-for causation; structural causal models; remedies; certiorari; Rule 36; access to justice

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1. Introduction

Chief Justice Marshall's dictum that "where there is a legal right, there is also a legal remedy"[1] has never been literally true. American public law has always had rights that cannot be enforced, because a court lacks jurisdiction, because an official is immune, or because Congress has channeled the dispute into a scheme that does not reach it (Fallon and Meltzer 1991; Levinson 1999). What changes from one era to the next is where the gaps lie and whether anyone is responsible for closing them. This article studies one such gap that is small in absolute terms and sharply drawn: the position of a Library of Congress employee who reports suspected waste or mismanagement to the Library's Inspector General and is then dismissed.

[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone).

The gap comes from the way three bodies of law fit together. The first is the Congressional Accountability Act of 1995 (CAA),[2] which extends Title VII and other employment statutes to the legislative branch and forbids reprisal against an employee who "has opposed any practice made unlawful by" the CAA or who has taken part in a CAA proceeding (2 U.S.C. § 1317(a); see also 2 U.S.C. § 1311(a)(1)). The CAA provides a forum (the Office of Congressional Workplace Rights, OCWR), appellate review in the Federal Circuit, and "such legal or equitable remedy as may be appropriate" (2 U.S.C. § 1317(b); 2 U.S.C. § 1407). The second is the Inspector General statute.[3] Through 2 U.S.C. § 185(d)(1), it makes the anti-reprisal rule of 5 U.S.C. § 407(c) applicable within the Library: no official "shall … take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General" (5 U.S.C. § 407(c), made applicable to the Library by 2 U.S.C. § 185(d)(1)). That rule names no forum and provides no remedy. The third is the Whistleblower Protection Act,[4] which supplies forum and remedy for executive-branch employees who report waste but does not reach the Library (5 U.S.C. § 2302(a)(2)(C), (b)(8)). The implied constitutional damages remedy that might once have filled the space has been closed for Library employees, and since *Egbert v. Boule* it is closed in practice for everyone (Pfander and Alley 2025; Mascott and McCotter 2022).[5]

The OCWR's own Board of Directors has called this a defect. In biennial reports to Congress going back at least to 2006, the Board has recommended that legislative-branch employees receive whistleblower protection comparable to that of executive-branch employees under 5 U.S.C. § 2302(b)(8). The December 2024 report lists the recommendation as "not yet enacted" (Office of Congressional Workplace Rights, Board of Directors 2024). The gap is therefore not a scholarly invention. The agency responsible for the statute has acknowledged it, and Congress has left it open.

Gaps of this kind rarely come before a court in a clean form, because an employee who has a remedy for one theory will litigate that theory and fold everything else into it. The case of Dr. Ilya Dines, a rare-book librarian dismissed by the Library on September 20, 2023, illustrates the pattern.[6] According to the public decisions, the termination letter gave as its reasons an "ongoing" pattern of "disruptive" and "dishonest" conduct. The episodes it listed included repeated reports about manuscript acquisitions and digitization; complaints that his first-line supervisor was "retaliating," "threatened," and "blackmailing" him; going to higher management after being told to raise concerns "only" through the EEO office and the Inspector General; and an account of a September 13, 2023 incident that the deciding official found false.[7] The Merits Hearing Officer found that the Library had legitimate, non-retaliatory reasons "related to the Claimant's conduct" and that the dismissal was unrelated to his EEO activity.[8] The Board affirmed. Denying reconsideration, it added that the theory of reprisal for *opposition*, as distinct from EEO *participation*, had not been presented to the Hearing Officer.[9] The Federal Circuit affirmed without opinion.

This article does not argue that the Library acted unlawfully, and it does not argue that any tribunal erred. The record that would be needed for either claim is not public, and the decisions themselves contain findings, especially the finding of dishonesty, that could independently sustain the outcome. The article uses the case for a different purpose: as a concrete instance of three structural problems that can be stated precisely and analyzed formally.

(1) **The remedial gap.** A statutory protection with no enforcement channel provides, in an economic model of enforcement, no deterrence. Where the protected act (reporting to an Inspector General) occurs alongside acts that do have a channel (opposing discrimination or retaliation), the unenforceable protection has no effect on the outcome. Its only effect is on the vocabulary in which the employer describes the employee's conduct.

(2) **Bundled causation.** When an employer gives its reason as an undifferentiated aggregate of conduct, such as "disruptive behavior," and that aggregate includes protected conduct, the usual inquiry into whether the reason is legitimate or pretextual does not answer the question the statute asks. That question is whether the protected conduct was a but-for cause of the decision.[10] Section 6 makes this claim precise as a non-identification theorem. It also states exactly which additional finding would answer the statutory question.

(3) **The vehicle problem.** When an appellate court affirms without opinion, a petitioner asking the Supreme Court for review must show that the question presented would make a difference to the outcome. The difference depends on every other ground that could support the judgment. Section 6 derives a simple bound and shows why preservation problems and independent factual findings dominate it.

Each of these problems has a literature: on the right–remedy relation (Hohfeld 1913; Levinson 1999); on causation in antidiscrimination law (Sperino and Thomas 2017) and in the structural-model tradition (Halpern and Pearl 2005; Halpern 2016); on deterrence (Becker 1968; Polinsky and Shavell 2000); on certiorari (Perry 1991; Caldeira and Wright 1988; Thompson and Wachtell 2009); and on judgments without opinion (Crouch 2017; Gugliuzza and Lemley 2018; Dowd 2020). What the article adds is a single formal framework in which the three problems interact. It shows that a small remedial gap can have consequences out of proportion to its size, because the gap and the bundled reason reinforce each other.

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2 Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. §§ 1301–1438).

3 Inspector General provisions, 5 U.S.C. §§ 401–424 (as enacted by Pub. L. No. 117-286 (2022)); Library of Congress Inspector General, 2 U.S.C. § 185.

4 Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C., including §§ 1221 and 2302).

5 *Davis v. Billington*, 681 F.3d 377 (D.C. Cir. 2012); *Egbert v. Boule*, 596 U.S. 482 (2022).

6 *Dines v. Library of Congress*, No. 23-LC-44 (CV, DA, FM, RP) (OCWR Merits Hearing Officer July 8, 2024) [hereinafter *MHO Decision*], *aff'd*, 2025 WL 1019270 (C.A.O.C. Mar. 24, 2025) [hereinafter *Board Decision*], *reconsideration denied* (C.A.O.C. Apr. 28, 2025) [hereinafter *Reconsideration Decision*], *aff'd*, No. 2025-1657 (Fed. Cir. Nov. 10, 2026) (Rule 36 judgment).

7 *MHO Decision*, at 13–14 (quoting the termination letter).

8 *Id.* at 22–23.

9 *Reconsideration Decision*, at 3 n.3.

10 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020).

The article proceeds as follows. Section 2 sets out the logical structure of the argument. Section 3 gives the statutory and procedural background. Section 4 defines the conceptual framework, and Section 5 reviews the literature. Section 6 contains the formal development. Section 7 presents data-grounded illustrations from public sources and from the published decisions in *Dines*. Sections 8–10 discuss implications, limitations and directions for further work. Appendix A gives a sourced chronology. Appendix B reproduces the operative statutory text, and Appendix C contains the code that produces every figure.

1.1 Counterarguments and Responses

Objection 1: A single case is anecdote, not evidence. The article does not infer anything statistical from one case. The case serves as an existence proof that the structures modeled in Section 6 occur in practice, and as a check that the formal objects correspond to real legal texts. The general claims rest on statutory text and on the theorems, not on the case.

Objection 2: The author is not neutral. That is correct, and it is disclosed. The article tries to offset it in three ways. Every factual statement about the case is limited to what the public decisions say. The analysis states the strongest grounds on which the outcome could be sustained, especially the dishonesty finding and the Board's forfeiture ruling. And the vehicle model in Section 6.4 is deliberately unfavorable to the petitioner's prospects.

Objection 3: The gap is intentional; Congress decided not to extend the WPA to itself. Perhaps so. But the claim that Congress has made a deliberate choice must be squared with the fact that Congress *did* extend the Inspector General anti-reprisal rule to the Library in 2022. Pub. L. No. 117-286 made 5 U.S.C. § 407 applicable through 2 U.S.C. § 185(d)(1) (Pub. L. No. 117-286, §§ 3(b), 4(b)(1), 136 Stat. 4224, 4342 (2022); see the statutory notes to 2 U.S.C. § 185 and 5 U.S.C. § 407). A legislature that writes a prohibition without a remedy has made a choice that requires explanation, and Section 8 considers the possible explanations.

1.2 Section Result and Implications

The introduction fixes the scope. The object of study is the interaction of three structural features of legislative-branch employment law: an unenforceable protection, aggregate reasons, and unexplained affirmance. *Dines* serves as a documented instance. The article's conclusions are conditional and structural; they do not depend on any contested fact in that case.

2. Logical Structure of the Argument

The argument has seven steps. Steps L1–L3 are legal premises established from statutory text and binding precedent. Steps L4–L6 are formal results proved in Section 6. Step L7 is the normative conclusion. The dependency structure is

(L1, L2, L3: legal premises) $\Rightarrow$ L4 (gap) $\Rightarrow$ L5 (bundling) $\Rightarrow$ L6 (vehicle) $\Rightarrow$ L7 (reform),

with one qualification: L6 does not depend on L4 or L5 for its validity, only for its relevance to the case.

L1. A Library of Congress employee is protected against reprisal (a) for opposing practices made unlawful by the CAA or participating in CAA proceedings, and (b) for disclosing information to an Inspector General. Protection (a) has a forum, a standard of review and a remedy. Protection (b) has none (Section 3; Premises 1–5).

L2. Under (a), liability requires that protected activity be a but-for cause of the adverse action. Multiple but-for causes can coexist, and the employer is liable if the protected activity is one of them.[11]

L3. Complaining internally that a supervisor is retaliating can be "opposition" to a practice made unlawful by the CAA, but only to the extent that the retaliation complained of is itself retaliation for CAA-protected activity, or discrimination on a protected basis.[12] Reports of waste are not opposition in this sense.

L4. Disclosures to an Inspector General belong to the statutory remedial gap. In a Becker-type model, the expected sanction for reprisal against them is zero, so the anti-reprisal rule does not deter (Theorem 12, Proposition 13).

L5. If an employer's reason is an aggregate that gives positive weight to protected conduct, then a finding that the aggregate reason was legitimate and was the true reason is consistent both with protected conduct being a but-for cause and with its not being one. The statutory question is answered only by a separate finding about the unprotected residue (Theorem 16, Corollary 17). If adjudicators accept aggregate reasons with probability π, effective deterrence falls by the factor $(1-\pi)$ (Proposition 20).

L6. After an affirmance without opinion, the probability that winning the question presented changes the outcome is bounded above by the product of the failure probabilities of all alternative grounds. In particular, it is bounded by the probability that a forfeiture ruling is overcome (Theorem 23).

L7. Because L4 and L5 are structural, reform through adjudication is slow and uncertain, as L6 shows. The efficient remedy is legislative: adopt the OCWR Board's recommendation. A complementary adjudicative remedy is a disaggregation requirement for aggregate reasons (Section 8).

2.1 Counterarguments and Responses

Objection: L3 is too narrow; any internal complaint about mistreatment should count as opposition. The narrower reading is used because it is the one the governing text supports. Section 1317(a) protects opposition to "any practice made unlawful by this chapter." A broad reading would strengthen L5, because it would enlarge the protected component of the aggregate. So adopting the narrow reading makes the argument harder, not easier.

Objection: L5 presupposes that adjudicators do not disaggregate. No. L5 is a statement about what a given finding does and does not entail. Whether a particular adjudicator in fact disaggregated is a question about that adjudicator's findings. Section 7 reports what the published decisions in *Dines* say on this point, without characterizing the unpublished record.

Objection: the chain is only as strong as L1. That is correct for L4, which is why L1 is broken into separately cited premises in Section 4. L5 and L6 are independent of L1 and apply to any anti-reprisal regime that uses but-for causation and any appellate system that permits judgments without opinion.

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11 *Nassar*, 570 U.S. at 360; *Bostock*, 590 U.S. at 656; *Burrage v. United States*, 571 U.S. 204, 211–12 (2014).

12 *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 276 (2009); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 64–68 (2006).

2.2 Section Result and Implications

The argument decomposes into legal premises that can be checked against text and precedent, mathematical results that can be checked by proof, and a normative conclusion that follows from both. A reader who rejects the normative conclusion must identify which premise or proof fails. The rest of the article supplies the material needed to make that check.

3. Background and Related Work

3.1 The Library of Congress as an employer

The Library of Congress is a legislative-branch agency with a workforce of roughly 3,100 permanent staff. The Acting Librarian reported this figure to the House Appropriations Subcommittee in March 2026 (Newlen 2026). The prior Librarian had testified that the permanent workforce had declined from more than 5,000 employees in the early 1990s to about 3,300 (Hayden 2025). For employment-law purposes the Library is anomalous. It is not an "Executive agency" for purposes of the Civil Service Reform Act's whistleblower provisions (5 U.S.C. § 2302(a)(2)(C), defining "agency" as "an Executive agency and the Government Publishing Office"; 5 U.S.C. § 105), yet its employees are federal employees covered by many title 5 personnel rules. The Supreme Court has treated the Library as an entity of the United States for sovereign-immunity purposes.[13]

3.2 The Congressional Accountability Act

The CAA extends a set of private-sector and executive-branch employment statutes to the legislative branch (2 U.S.C. § 1301 *et seq.*). For present purposes three provisions matter. Section 201 requires that personnel actions be "made free from any discrimination based on" race, color, religion, sex or national origin (2 U.S.C. § 1311(a)(1)).[14] Section 208 prohibits intimidation and reprisal against an employee who "has opposed any practice made unlawful by this chapter" or who "has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter" (2 U.S.C. § 1317(a)). The OCWR's own 2024 training materials refer to the provision as "section 208 of the CAA" (Office of Congressional Workplace Rights 2024); older OCWR materials, and decisions before 2019, call it section 207, its number before renumbering by Pub. L. No. 116-92, div. A, tit. XI, § 1122(d)(1)(B), 133 Stat. 1198, 1608 (2019).[15] Third, the CAA channels claims through the OCWR. A claim is heard by a Merits Hearing Officer and may be appealed to the OCWR Board of Directors. The Board's final decision is reviewable in the Federal Circuit, which must set aside a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law," "not made consistent with required procedures," or "unsupported by substantial evidence" (2 U.S.C. § 1407(d)).[16]

The OCWR Board analyzes reprisal claims under a Title VII-based framework. The employee must show protected activity, an adverse action, and a causal connection. The employer may then articulate a legitimate, non-retaliatory reason, and the employee must show that reason to be pretext.[17]

3.3 The Inspector General anti-reprisal rule

The Library has had a statutory Inspector General since 2005 (2 U.S.C. § 185, added by Pub. L. No. 109-55, tit. I, § 1307, 119 Stat. 583 (2005)).[18] After the 2022 reorganization of the Inspector General Act into title 5, section 185(d)(1) provides that sections 404, 405, 406(a) and 407 of title 5 "shall apply to the Inspector General of the Library of Congress … and such sections shall be applied to the Library of Congress and the Librarian of Congress" with appropriate substitutions (2 U.S.C. § 185(d)(1), as amended by Pub. L. No. 117-286, § 4(b)(1), 136 Stat. 4342 (2022)). Section 407(c) prohibits reprisal for complaints or disclosures to an Inspector General, unless they were made knowing they were false or with willful disregard for their truth (5 U.S.C. § 407(c)). Neither section 407 nor section 185 creates a cause of action, designates a forum, or specifies a remedy. In the executive branch, that work is done by the Whistleblower Protection Act: a disclosure to an Inspector General is a protected disclosure under 5 U.S.C. § 2302(b)(8)(B), enforceable through the Office of Special Counsel and the Merit Systems Protection Board. The Library is outside that scheme.

3.4 Constitutional and common-law alternatives

Three non-statutory routes might be thought to fill the gap, and each is narrow. (i) *Bivens* damages are unavailable. The D.C. Circuit has held that the Civil Service Reform Act's comprehensive scheme precludes a *Bivens* action by a Library employee,[19] and *Egbert* rejected a First Amendment retaliation *Bivens* claim in terms that leave little room for any new context.[20] (ii) Official-capacity suits for equitable relief on constitutional grounds have been entertained against the Library,[21] but they reach only constitutionally protected conduct. A disclosure made pursuant to an employee's official duties is not protected speech.[22] Back pay and

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13 *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (no interest on attorney's fees absent express waiver).

14 Compare the identical federal-sector phrasing construed in *Babb v. Wilkie*, 589 U.S. 399 (2020).

15 National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

16 See *Duncan v. Office of Compliance*, 541 F.3d 1377 (Fed. Cir. 2008).

17 *MHO Decision*, at 21 (citing Board precedent); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

18 Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, tit. I, § 1307, 119 Stat. 583 (2005).

19 *Davis v. Billington*, 681 F.3d 377 (D.C. Cir. 2012); see *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc); *Bush v. Lucas*, 462 U.S. 367 (1983).

20 *Egbert*, 596 U.S. at 498–99.

21 *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984).

22 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

compensatory damages are unavailable in such suits.[23] (iii) Common-law tort suits against officers, which Pfander and Alley (2025) argue survive the Westfall Act in some forms, are untested for employment reprisal and face the channeling doctrine of *United States v. Fausto* and *Elgin*.[24]

3.5 Judgments without opinion and certiorari

Federal Circuit Rule 36 permits the court to "enter a judgment of affirmance without opinion" in specified circumstances.[25] The practice has been criticized as inconsistent with statutory requirements in patent appeals (Crouch 2017), defended (Dowd 2020), and studied for its doctrinal effects (Gugliuzza and Lemley 2018). On certiorari, the Supreme Court's Rule 10 states that review "is not a matter of right, but of judicial discretion," and that a petition is rarely granted where "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[26] The Court generally does not decide questions not pressed or passed upon below.[27]

3.6 Related work

The closest scholarly treatments are the OCWR Board's biennial reports under section 102(b) of the CAA, which have repeatedly identified the absence of whistleblower protection as a gap (Office of Compliance 2006; Office of Compliance, Board of Directors 2010, 2012, 2014, 2016; Office of Congressional Workplace Rights, Board of Directors 2022, 2024). The general literature on whistleblowing (Near and Miceli 1985; Miceli, Near, and Dworkin 2008; Dyck, Morse, and Zingales 2010) documents both the social value of internal reporting and the frequency of retaliation, but it says little about the legislative branch. The remedial literature after *Egbert* (Pfander and Alley 2025; West 2025; Mascott and McCotter 2022) addresses executive officers, not legislative-branch employers. We are not aware of formal work applying structural causal models to aggregate employer reasons in retaliation law.

3.7 Counterarguments and Responses

Objection: the Library's own regulations may supply an internal remedy for reprisal against Inspector General complainants. An internal grievance procedure that the employing agency controls, without external review, is not an enforcement channel in the sense used here (Definition 3): its probability of redress is chosen by the party whose conduct is under review. If such a procedure exists, it would change the model's parameter q from zero to some small positive number. It would not change the qualitative results.

Objection: the CAA's "opposition" clause already covers most whistleblowing. It covers whistleblowing about CAA violations, such as discrimination, harassment and retaliation. It does not cover reports of waste, fraud or mismanagement as such, which is precisely the subject matter of 5 U.S.C. § 2302(b)(8). The OCWR Board's recommendations would make no sense if the opposition clause already reached that subject matter.

3.8 Section Result and Implications

The statutory map is clear. Protection against reprisal for CAA-related opposition has a forum, a review standard and a remedy. Protection against reprisal for disclosure to the Inspector General has none. The constitutional and common-law alternatives are narrow and do not reach the ordinary case. Section 4 turns this description into defined objects.

4. Conceptual Framework

This section introduces the objects used in Section 6. The guiding idea is Hohfeldian. A "right" against reprisal is a duty owed by the employer, and the duty matters only if it is correlated with a power of the employee to invoke a sanction (Hohfeld 1913). Levinson (1999) argued that rights and remedies are in equilibrium, so that what a right is cannot be separated from what a court will do about its violation. The framework below makes that relationship explicit enough to compute with.

4.1 Acts, protections and channels

Definition 1 (Act types). Let $\mathcal{A}$ be a finite set of acts types an employee may perform. For the legislative branch we distinguish the following subsets, which may overlap:

- $\mathcal{O} \subseteq \mathcal{A}$: *opposition* acts, consisting of opposition to a practice made unlawful by the CAA;
- $\mathcal{E} \subseteq \mathcal{A}$: *participation* acts, consisting of initiating, assisting or testifying in a CAA proceeding (including an internal EEO complaint that alleges CAA violations);
- $\mathcal{I} \subseteq \mathcal{A}$: *Inspector General* acts, consisting of complaints or disclosures to an Inspector General;
- $\mathcal{W} \subseteq \mathcal{A}$: *internal waste* acts, consisting of reports of waste or mismanagement to management.

Definition 2 (Protection). An act type a is *protected* if some statute in force prohibits the employer from taking adverse action against an employee because the employee performed a. Write $\Pi \subseteq \mathcal{A}$ for the set of protected act types.

Definition 3 (Enforcement channel). An *enforcement channel* is a triple $r = (F, \sigma, M)$. Here F is a forum external to the employing office; σ is a standard by which F adjudicates a claim; and M is a non-empty set of remedies, at least one of which is

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23 See *Davis v. Billington*, 51 F. Supp. 3d 97 (D.D.C. 2014).

24 *United States v. Fausto*, 484 U.S. 439 (1988); *Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012).

25 Fed. Cir. R. 36 (Entry of Judgment—Judgment of Affirmance Without Opinion).

26 Sup. Ct. R. 10; Supreme Court of the United States, *Rules of the Supreme Court of the United States* (adopted Jan. 2023, effective Feb. 2023), https://www.supremecourt.gov/ctrules/ctrules.aspx.

27 *United States v. Williams*, 504 U.S. 36, 41 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

reinstatement or monetary relief, that F may order and that the employing office is bound to obey. Write $\mathcal{R}$ for the set of channels, and $\rho: \Pi \to 2^{\mathcal{R}}$ for the map assigning to each protected act type the channels through which reprisal against it may be redressed.

The requirement that F be external excludes procedures controlled by the employer under review. The requirement that M contain reinstatement or money excludes declaratory relief alone. Both choices follow the ordinary understanding of an "enforcement" remedy. Relaxing them changes the value of q in Definition 5 but not the structure of the results.

Definition 4 (Remedial gap). The *remedial gap* is $G = \{a \in \Pi: \rho(a) = \varnothing\}$.

Definition 5 (Redress probability). For $a \in \Pi$, let $q(a) \in [0,1]$ denote the probability that a meritorious claim of reprisal for a results in an enforceable remedy. By construction $q(a) = 0$ for $a \in G$.

4.2 Legal premises

The following premises are stated in the form used by the proofs. Each is grounded in the cited text.

Premise 1 (CAA channel). $\mathcal{O} \cup \mathcal{E} \subseteq \Pi$, and $\rho(a) \ni r_{CAA}$ for $a \in \mathcal{O} \cup \mathcal{E}$. Here r_{CAA} is the OCWR hearing, Board review and Federal Circuit review, with the remedies of 2 U.S.C. § 1317(b) (see 2 U.S.C. §§ 1317, 1405–1407).

Premise 2 (IG protection). $\mathcal{I} \subseteq \Pi$ for Library employees (5 U.S.C. § 407(c); 2 U.S.C. § 185(d)(1)).

Premise 3 (Scope of the CAA). $\mathcal{I} \cap (\mathcal{O} \cup \mathcal{E})$ contains only those IG disclosures whose content is opposition to a CAA-unlawful practice. In particular, an IG disclosure about waste or mismanagement is not in $\mathcal{O} \cup \mathcal{E}$ (2 U.S.C. § 1317(a), protecting opposition to "any practice made unlawful by this chapter").

Premise 4 (No WPA channel). The WPA channel r_{WPA} (OSC and MSPB) is not in $\rho(a)$ for any act of a Library employee (5 U.S.C. § 2302(a)(2)(C)).

Premise 5 (No damages channel; narrow equitable channel). No *Bivens* channel exists. A non-statutory equitable channel r_{eq} exists only for acts that are constitutionally protected. Speech made pursuant to official duties is not constitutionally protected.[28]

4.3 Decisions, reasons and causes

The second part of the framework concerns how an adverse decision relates to the conduct that preceded it. We use the structural-model approach of Pearl (2009) and Halpern and Pearl (2005), specialized to a threshold decision.

Definition 6 (Conduct profile and decision rule). A *conduct profile* is a vector $x = (x_P, x_U, x_O) \in X_P \times X_U \times X_O$. Here x_P records protected conduct (opposition and participation), x_U records conduct that is unprotected but has no channel or is lawful to consider (for example, internal waste reports), and x_O records other conduct (for example, discourtesy or dishonesty). A *decision rule* is a function $D: X \to \{0,1\}$, with $D = 1$ meaning termination.

Definition 7 (Additive threshold rule). D is an *additive threshold rule* if there are non-negative functions s_P, s_U, s_O, called salience functions, with $s_k(0) = 0$, and a threshold $\tau > 0$, such that

$$D(x) = \mathbf{1}[\,\phi(x) \geq \tau\,], \qquad \phi(x) = s_P(x_P) + s_U(x_U) + s_O(x_O).$$

The quantity $\phi(x)$ is the employer's *aggregate reason*. In ordinary language it is the degree of "disruptive behavior" the employer perceives.

Definition 8 (But-for cause). Protected conduct is a *but-for cause* of $D(x) = 1$ if $D(x) = 1$ and $D(0, x_U, x_O) = 0$.

Definition 9 (Aggregate finding). An adjudicator makes an *aggregate finding* at profile x when it finds that (i) $D(x) = 1$; (ii) the employer acted because $\phi(x) \geq \tau$ (the stated reason was the true reason); and (iii) the conduct summarized by ϕ is, in kind, a legitimate ground for discipline. An aggregate finding is *disaggregated* if it also finds the value of $s_U(x_U) + s_O(x_O)$ relative to τ.

Remark 10. *Definition 7 is a modeling choice, and it can be relaxed. All results in Section 6.2 that are stated for additive rules continue to hold for any rule* $D = \mathbf{1}[\Phi(s_P, s_U, s_O) \geq \tau]$ *with* Φ *continuous and strictly increasing in each argument. Only the explicit constructions change.*

4.4 Counterarguments and Responses

Objection: employers do not compute scores. The model does not claim they do. It claims only that a decision maker who terminates "because of" an accumulation of conduct can be represented by some monotone rule over that conduct. Given monotonicity, the existence of such a representation is a mild assumption. The salience functions are latent, which is exactly why the identification question in Theorem 16 arises.

Objection: the three-way partition is artificial, because a single email may contain both a retaliation complaint and a waste report. That is the phenomenon being modeled. The partition is a partition of *content*, not of documents. A single message contributes to more than one coordinate. The "chain of command" episodes in the *Dines* termination letter are an example (Table 3).

4.5 Section Result and Implications

The framework supplies two kinds of objects. The first is a right–remedy map $(\Pi, \mathcal{R}, \rho)$ that makes "remedial gap" a defined set. The second is a threshold decision model that makes "aggregate reason" and "but-for cause" defined relations. These are the only primitives the proofs use.

5. Relevant Literature Review

5.1 Rights, remedies and remedial equilibration

Hohfeld's analysis of jural correlatives (Hohfeld 1913) supplies the vocabulary: a claim-right of the employee correlates with a duty of the employer, and a power of the employee to invoke a sanction correlates with a liability of the employer. A prohibition without a forum gives the employee a nominal claim-right but no power. Levinson (1999) argued against "rights essentialism":

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[28] *Davis*, 681 F.3d 377; *Egbert*, 596 U.S. 482; *Clark*, 750 F.2d 89; *Garcetti*, 547 U.S. at 421.

rights are shaped by, and cannot be understood apart from, the remedies that enforce them. On that view, a right without a remedy is a different and weaker right, not a strong right that happens to go unenforced. Fallon and Meltzer (1991) defended a more modest principle, that the legal system must provide some effective redress for constitutional violations as a general structural matter but not in every case. The present article is consistent with either view. It does not need the strong claim that every right needs a remedy, only the weaker observation that the deterrent function of a reprisal ban depends on the expected sanction (Section 6.1).

5.2 Constitutional damages after *Egbert*

Pfander and Baltmanis (2009) argued that *Bivens* is better understood as a common-law remedy that Congress has implicitly accepted than as a judicial invention. After *Egbert*, scholarship has turned elsewhere. Mascott and McCotter (2022) trace the nineteenth-century tradition of officer suits by common law and argue that, after *Egbert*, those who want individual monetary liability must look to Congress. Pfander and Alley (2025) argue that the FTCA and the Westfall Act, properly read, preserve a broad range of common-law tort suits against federal officers. West (2025) responds that the success of that textual argument depends on contested historical premises. None of this work addresses legislative-branch employers specifically. For our purposes it confirms Premise 5: the constitutional route is closed or nearly so.

5.3 Causation in anti-discrimination and retaliation law

The Supreme Court has moved anti-discrimination causation toward but-for tests. *Price Waterhouse* allowed a mixed-motive framework.[29] *Gross* rejected mixed-motive analysis under the ADEA.[30] *Nassar* required but-for causation for Title VII retaliation.[31] *Bostock* emphasized that a decision can have multiple but-for causes and that the presence of other causes does not defeat liability.[32] *Babb* held that the federal-sector ADEA's "free from any discrimination" language imposes liability when age is a but-for cause of differential treatment in the decision-making *process*, even if not of the ultimate outcome, although remedies tied to the outcome still require outcome causation.[33] Sperino and Thomas (2017) document how lower courts have used doctrinal frameworks, especially pretext analysis, to dispose of cases on grounds that do not track the statutory causation question. Our Theorem 16 gives a formal account of one way this happens.

The pretext framework itself is a burden-allocation device.[34] It was designed for cases in which the employer's reason is *alternative* to the forbidden one: "we fired her for absenteeism, not for her race." It fits less well when the employer's stated reason *incorporates* protected conduct, as in "we fired him for constantly complaining." That mismatch is the starting point of Section 6.2.

5.4 Structural causal models and actual causation

Pearl (2009) developed structural causal models in which counterfactuals are evaluated by intervention. Halpern and Pearl (2005)) and Halpern (2015) defined "actual cause" in a way that handles overdetermination and preemption. In those cases, simple but-for tests give counterintuitive answers. Chockler and Halpern (2004) defined degrees of responsibility. Halpern (2016) gives a book-length treatment. The legal standard in retaliation cases is but-for causation, which is narrower than Halpern–Pearl actual causation. Proposition 19 shows where the two come apart in the employment setting and why the difference matters for the effect of independent findings.

5.5 Economics of enforcement

Becker (1968) modeled the decision to violate a rule as a comparison of private gain with expected sanction, the probability of sanction times its magnitude. Polinsky and Shavell (2000) survey the extensions. The application to retaliation is direct: an employer that values removing a troublesome employee at g retaliates if g exceeds the expected cost of liability. Empirical work on whistleblowing documents that retaliation is common and that external enforcement matters. Near and Miceli (1985) and Miceli, Near, and Dworkin (2008) develop the organizational account of whistleblowing as a process involving the reporter, the wrongdoer and the recipient. Dyck, Morse, and Zingales (2010) find that employees are a leading source of corporate-fraud detection and that monetary incentives affect their willingness to report.

5.6 Agenda-setting at the Supreme Court

Perry (1991) describes certiorari as a decision shaped by cues such as circuit conflict, the importance of the issue, and whether the case is a clean "vehicle." Caldeira and Wright (1988) show that amicus participation at the certiorari stage raises grant probability. Thompson and Wachtell (2009) document the role of calls for response and the views of the Solicitor General. Kastellec and Taboni (2026) built a database of the Court's non-merits orders for the 1993–2025 Terms. According to press summaries of that work, the decline in petitions *in forma pauperis* is primarily responsible for the shrinking docket (Dennie 2026). Baude (2015) and Vladeck (2023) examine the "shadow docket" more generally.

5.7 Judgments without opinion

Crouch (2017) (preprint SSRN 2909007) argues that Federal Circuit Rule 36 judgments in appeals from the Patent and Trademark Office violate a statutory requirement that the court issue an "opinion." Dowd (2020) disputes that reading. Gugliuzza and Lemley (2018) show empirically that Rule 36 affirmances in patent-eligibility cases can shift doctrine without explanation. The

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29 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

30 *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

31 *Nassar*, 570 U.S. at 360.

32 *Bostock*, 590 U.S. at 656.

33 *Babb*, 589 U.S. 399.

34 *McDonnell Douglas*, 411 U.S. at 802–04; *Burdine*, 450 U.S. at 253–56; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

literature focuses on patent appeals. The present article applies its concern, that an unexplained affirmance conceals the ground of decision, to an employment appeal, where it creates a specific problem for further review (Section 6.4).

5.8 Counterarguments and Responses

Objection: the causation literature already recognizes "mixed motives"; nothing is new. The mixed-motive literature asks whether a forbidden motive *coexisted* with a permitted one. Section 6.2 studies the case in which the permitted reason, as articulated, *contains* the protected conduct as a component. That is a question about the structure of the stated reason, not about the coexistence of motives. The formal treatment yields a precise sufficiency condition (Corollary 17) that the mixed-motive literature does not state.

Objection: SCM methods are foreign to legal adjudication. The but-for test is itself a counterfactual intervention, "what would the employer have done had the protected conduct not occurred?" *Bostock* describes it as changing one thing at a time and seeing whether the outcome changes.[35] The SCM formalism adds explicitness, not foreign content.

5.9 Section Result and Implications

The literature supplies each component: the right–remedy relation, the but-for standard and its alternatives, the enforcement model, and the agenda-setting model. What it does not supply is an analysis of how these components interact when a reprisal ban lacks a remedy and the employer's reason is an aggregate that includes protected conduct. Section 6 provides that analysis.

6. Mathematical Development

This section proves the results announced in Section 2. Each subsection states its results, explains why they are needed, proves them, and then interprets them. Proofs are complete; they are elementary by design, because the claims are claims about what given findings do and do not *entail*. Entailment claims should be checkable by a reader without specialized machinery.

6.1 The remedial gap

We first need one further assumption about the set of channels. It concerns the common-law officer suit discussed by Pfander and Alley (2025). No court has recognized that suit as a channel for employment reprisal, and the channeling doctrine of *Fausto* and *Elgin* points against it.

Assumption 11 (Closed channel set). $\mathcal{R} = \{r_{CAA}, r_{WPA}, r_{eq}\}$, *where* r_{eq} *is the non-statutory equitable channel of Premise 5. No damages channel and no common-law tort channel for employment reprisal is recognized.*

Write $\mathcal{I}^{duty} \subseteq \mathcal{I}$ for IG disclosures that are not constitutionally protected speech, for example because they are made pursuant to official duties, and $\mathcal{I}^{free} = \mathcal{I} \setminus \mathcal{I}^{duty}$.

Theorem 12 (Gap theorem). *Under Premises 1–5 and Assumption 11,* $\mathcal{I}^{duty} \setminus (\mathcal{O} \cup \mathcal{E}) \subseteq G$, $\rho(a) \subseteq \{r_{eq}\}$ for every $a \in \mathcal{I}^{free} \setminus (\mathcal{O} \cup \mathcal{E})$.

Why the theorem is needed. It turns the informal claim "IG whistleblowers in the Library have no remedy" into a statement whose truth depends only on the listed premises. A reader who disputes the conclusion must dispute a premise.

Proof. Let $a \in \mathcal{I} \setminus (\mathcal{O} \cup \mathcal{E})$. By Premise 2, $a \in \Pi$, so $\rho(a)$ is defined. By Assumption 11, $\rho(a) \subseteq \{r_{CAA}, r_{WPA}, r_{eq}\}$. We check each channel. (i) r_{CAA} redresses only reprisal prohibited by 2 U.S.C. § 1317(a), that is, reprisal for acts in $\mathcal{O} \cup \mathcal{E}$ (Premise 1). Since $a \notin \mathcal{O} \cup \mathcal{E}$ (Premise 3), $r_{CAA} \notin \rho(a)$. (ii) $r_{WPA} \notin \rho(a)$ by Premise 4. (iii) r_{eq} is available only for constitutionally protected acts (Premise 5). If $a \in \mathcal{I}^{duty}$, it is not constitutionally protected, so $r_{eq} \notin \rho(a)$ and therefore $\rho(a) = \varnothing$, which means $a \in G$. If $a \in \mathcal{I}^{free}$, at most r_{eq} remains. □

Interpretation. For the ordinary case, an employee who tells the Inspector General what the employee learned while doing the job, the prohibition of 5 U.S.C. § 407(c) has no channel. For the less common case of a disclosure that is also protected citizen speech, there is at most an equitable constitutional claim. Back pay is unavailable in that claim, and its success turns on First Amendment doctrine rather than on the statute.

We now connect the gap to behavior. Let an employer who has observed an act a obtain private gain $g \geq 0$ from dismissing the employee and let $S > 0$ be the sanction if liability is imposed. Assume for this subsection that a claim is filed whenever there is reprisal, which biases the analysis toward deterrence.

Proposition 13 (No deterrence in the gap). *A risk-neutral employer dismisses an employee because of* a *if and only if* $g > q(a)S$. *If* $a \in G$, *then* $q(a) = 0$ *and the employer dismisses if and only if* $g > 0$. *That is exactly the condition under which it would dismiss if no prohibition existed.*

Proof. The employer's payoff from dismissal is $g - q(a)S$ and from retention is 0. Dismissal is strictly preferred iff $g > q(a)S$. For $a \in G$, Definition 5 gives $q(a) = 0$. Without any prohibition, the expected sanction is also 0, so the two conditions coincide. □

The next lemma is what links the gap to the analysis of aggregate reasons. It says that, for purposes of liability, conduct in the gap is indistinguishable from unprotected conduct.

Lemma 14 (Reclassification). *Consider a liability rule under which the employer is liable only through some channel in* $\mathcal{R}$. *Then an act in* G *contributes to the employer's expected liability only through its effect on whether some* other *act, one with a non-empty* ρ, *is a but-for cause. Equivalently, in the decision model of Definition 7, acts in* G *may be placed in the coordinate* x_U *without changing any liability determination.*

Proof. Liability arises only from a channel finding reprisal for an act b with $\rho(b) \neq \varnothing$. For $a \in G$, no channel adjudicates reprisal for a. Hence whether a is counted as protected has no effect on any liability determination, except in its role as one of the other conduct variables held fixed when the but-for status of b is assessed. That is precisely the role of x_U in Definition 8. □

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[35] *Bostock*, 590 U.S. at 656.

Counterarguments and Responses

Objection: the Inspector General can itself act against reprisal. The Inspector General can investigate and report, and an adverse report has reputational force. But the Inspector General cannot order reinstatement or back pay, so it is not a channel under Definition 3. If one wants to model reputational sanction, one can let $q(a) > 0$ with a small S. Proposition 13 then gives a threshold $g > q(a)S$ that is low but positive, and the qualitative conclusion is unchanged.

Objection: claims are not always filed, so q is overstated even for the CAA. True, and this only strengthens the contrast. The comparison is between $q(b) > 0$ for CAA acts and $q(a) = 0$ for gap acts. Lowering the former narrows the contrast but cannot make the latter positive.

Step Result

Theorem 12 establishes that the ordinary IG disclosure has no enforcement channel. Proposition 13 establishes that the prohibition then does not deter. Lemma 14 establishes that, in litigation, such disclosures function as unprotected conduct. This last result is the bridge to bundling.

6.2 Aggregate reasons and the identification of but-for causation

The pretext framework asks whether the employer's stated reason was its true reason. The first result shows that when the stated reason incorporates protected conduct, an affirmative answer does not settle liability.

Lemma 15 (Self-incorporation). *Let D be an additive threshold rule and let x satisfy $D(x) = 1$. Then conditions (i)–(iii) of Definition 9 can all be true while protected conduct is a but-for cause of the decision.*

Proof. Take $s_P(x_P) = a > 0$, $s_U(x_U) + s_O(x_O) = b \geq 0$ and $\tau \in (b, a + b]$. Then $\phi(x) = a + b \geq \tau$, so $D(x) = 1$, and the employer acts because $\phi(x) \geq \tau$, so (i) and (ii) hold. Condition (iii) is a statement about the *kind* of conduct summarized by ϕ, for example "disruptive behavior," and is not constrained by the numbers. Finally, $D(0, x_U, x_O) = \mathbf{1}[b \geq \tau] = 0$ because $\tau > b$. So protected conduct is a but-for cause. □

The lemma isolates the logical gap. The pretext inquiry tests whether the reason was genuine. The statutory inquiry tests whether, *inside* a genuine reason, the protected component was decisive. The next theorem shows that the first inquiry carries no information about the second.

Theorem 16 (Non-identification). *Fix a conduct profile x such that the protected component could receive positive salience. Suppose the only facts found are an aggregate finding at x in the sense of Definition 9. Then:*

(a) *if the unprotected residue could receive positive salience, there exist additive threshold rules (s, τ) and (s', τ'), both consistent with the aggregate finding, such that protected conduct is a but-for cause under (s, τ) and is not a but-for cause under (s', τ');*

(b) *if the unprotected residue receives zero salience, protected conduct is a but-for cause under every rule consistent with the finding.*

Why the theorem is needed. Lemma 15 shows only that a genuine aggregate reason *can* coexist with but-for causation. Theorem 16 shows that the aggregate finding is *uninformative* on the question. Both answers remain open unless the residue is empty, and in that case the finding actually entails liability.

Proof. (a) Choose salience functions with $s_P(x_P) = a > 0$ and $s_U(x_U) + s_O(x_O) = b > 0$, and set $s' = s$. Let $\tau = b + a/2$ and $\tau' = b$. Under both rules $\phi(x) = a + b \geq max(\tau, \tau')$, so $D(x) = 1$ and the employer acts because the aggregate reaches the threshold. Condition (iii) is unaffected, so both rules are consistent with the aggregate finding. Under (s, τ), $D(0, x_U, x_O) = \mathbf{1}[b \geq b + a/2] = 0$, so protected conduct is a but-for cause. Under (s', τ'), $D(0, x_U, x_O) = \mathbf{1}[b \geq b] = 1$, so it is not. (b) If $s_U(x_U) + s_O(x_O) = 0$ under every consistent rule, then $D(0, x_U, x_O) = \mathbf{1}[0 \geq \tau] = 0$, because $\tau > 0$ by Definition 7. Since $D(x) = 1$, protected conduct is a but-for cause. □

Corollary 17 (What the statutory question requires). *Under an additive threshold rule with $D(x) = 1$, protected conduct is* not *a but-for cause if and only if $s_U(x_U) + s_O(x_O) \geq \tau$. Hence a disaggregated finding (Definition 9) is necessary and sufficient to resolve the but-for question. Put in words, the adjudicator must find that the unprotected conduct alone would have produced the dismissal.*

Proof. By Definition 8, protected conduct fails to be a but-for cause iff $D(0, x_U, x_O) = 1$, that is, iff $s_U(x_U) + s_O(x_O) \geq \tau$. A disaggregated finding states exactly whether this inequality holds. Necessity follows from Theorem 16(a): any finding that leaves this inequality undetermined leaves the but-for question undetermined. □

Interpretation. The legally sufficient finding is a counterfactual one: "the employer would have dismissed the employee for the unprotected conduct alone." A finding that the employer was in fact motivated by "disruptive behavior" and not by protected activity is equivalent to that counterfactual only if "disruptive behavior" has been defined to exclude the protected component. When the employer's own articulation of the reason lists protected conduct among its instances, that definitional step cannot be assumed. It must be made.

Two further results clarify what does and does not rescue an aggregate finding.

Proposition 18 (Multiple but-for causes). *Unprotected conduct and protected conduct can both be but-for causes of the same decision. In that case the employer is liable notwithstanding the unprotected cause.*

Proof. Let $s_O(x_O) = 0$, $s_P(x_P) = a$, $s_U(x_U) = u$, with $a < \tau$, $u < \tau$ and $a + u \geq \tau$. Then $D(x) = 1$, $D(0, x_U, x_O) = \mathbf{1}[u \geq \tau] = 0$ and $D(x_P, 0, x_O) = \mathbf{1}[a \geq \tau] = 0$. Each is a but-for cause. Liability follows because the statutory test is satisfied by the protected cause, and it is not defeated by the existence of another.[36] □

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[36] *Bostock*, 590 U.S. at 656 ("Often, events have multiple but-for causes.").

Proposition 19 (Overdetermination by independent grounds). *Suppose $s_O(x_O) \geq \tau$; for example, a separately found act of dishonesty would alone have caused dismissal. Then protected conduct is not a but-for cause, whatever s_P is. Nevertheless, if $s_P(x_P) + s_U(x_U) \geq \tau > s_U(x_U)$, protected conduct is an actual cause in the sense of Halpern and Pearl (2005).*

Proof. First claim: $D(0, x_U, x_O) = \mathbf{1}[s_U + s_O \geq \tau] = 1$, because $s_O \geq \tau$ and $s_U \geq 0$. Second claim: the Halpern–Pearl definition allows counterfactual dependence to be tested under a contingency that fixes other variables at non-actual values, provided the actual outcome is preserved under the actual value of the candidate cause. Take the contingency $x_O \mapsto 0$. Under it, $D(x_P, x_U, 0) = \mathbf{1}[s_P + s_U \geq \tau] = 1$ and $D(0, x_U, 0) = \mathbf{1}[s_U \geq \tau] = 0$. The decision then depends on x_P, and since $D(x) = 1$ actually, the conditions of the definition are met. □

Interpretation. Proposition 19 identifies the finding that defeats a retaliation claim even when the employer's reason is an aggregate that includes protected conduct. That finding is that some separately identified unprotected conduct was, *by itself*, sufficient. The law's choice of but-for causation over actual causation (Halpern 2016) makes this finding dispositive. Whether a particular adjudicator made it is a question about the text of the findings. A finding that rests on a separately identified ground "considering" the rest of the history is, on its face, a finding about the aggregate.

Counterarguments and Responses

Objection: adjudicators implicitly disaggregate when they find that the employer acted because of "conduct" rather than "protected activity." Sometimes they do. Corollary 17 does not presume otherwise. It specifies what the implicit finding must be in order to resolve the question: that the conduct *other than* the protected component would alone have sufficed. Whether a given opinion contains that finding, explicitly or by necessary implication, is a question of reading the opinion.

Objection: the additive model is too simple; real decisions involve interactions. Remark 10 covers strictly monotone continuous aggregators. The non-identification construction requires only that the aggregate be able to cross the threshold with the protected component and fall short without it, which is possible whenever the aggregator is strictly increasing in that component. Non-monotone rules, under which more protected activity makes dismissal *less* likely, are outside the case of interest.

Objection: employees can manufacture liability by mixing protected complaints into otherwise sanctionable conduct. The but-for test answers this objection. If the sanctionable conduct alone suffices, then by Corollary 17 there is no liability. The requirement of disaggregation protects employers whose unprotected grounds are sufficient. It burdens only employers whose grounds are not.

Step Result

A genuine aggregate reason does not answer the statutory question (Lemma 15) and carries no information about it (Theorem 16). The question is answered exactly by a finding that the unprotected residue alone suffices (Corollary 17). Such a finding is dispositive even though protected conduct may be an actual cause in the broader philosophical sense (Proposition 19).

6.3 Bundling and the erosion of deterrence

We now combine the two previous subsections. An employer that wishes to dismiss an employee who has engaged in protected conduct can state its reason as an aggregate. Let $\pi \in [0,1]$ be the probability that the adjudicator accepts the aggregate reason without disaggregating. In that case no liability is imposed even if protected conduct was a but-for cause. With probability $1 - \pi$ the adjudicator disaggregates and imposes liability exactly when protected conduct was a but-for cause. Let $q \in (0,1]$ be the probability that a CAA claim is pursued to decision, and S the sanction.

Proposition 20 (Effective deterrence under bundling). *For an employer whose dismissal of the employee would be caused, in the but-for sense, by protected conduct, the expected sanction is $E(\pi) = q(1-\pi)S$. The employer dismisses iff $g > q(1-\pi)S$, equivalently iff $\pi > \pi^* := 1 - g/(qS)$ when $g < qS$. If the private gain g is distributed across employers according to a continuous distribution function F on $[0, \infty)$, the probability of reprisal is $1 - F(q(1-\pi)S)$. That probability is non-decreasing in π, and strictly increasing wherever F has positive density.*

Proof. Liability is imposed only on the event "claim pursued" (probability q) and "disaggregation" (probability $1 - \pi$). Taking these as independent, the expected sanction is $q(1-\pi)S$. The comparison with g follows from Proposition 13 with $q(a)$ replaced by $q(1-\pi)$. Solving $g > q(1-\pi)S$ for π gives $\pi > 1 - g/(qS)$. For the distributional statement, the probability that a randomly drawn employer retaliates is $\Pr[g > q(1-\pi)S] = 1 - F(q(1-\pi)S)$. Since $q(1-\pi)S$ is decreasing in π and F is non-decreasing, $1 - F(\cdot)$ evaluated at it is non-decreasing in π, and strictly increasing where $F' > 0$. □

Corollary 21 (Bundling is a dominant framing). *If stating the reason as an aggregate is costless and $\pi > 0$, an employer that intends to dismiss weakly prefers the aggregate framing. It strictly prefers it whenever $q > 0$.*

Proof. Under a disaggregated framing, the expected sanction is $qS \cdot \mathbf{1}$[but-for]. Under the aggregate framing it is $q(1-\pi)S \cdot \mathbf{1}$[but-for], which is no greater, and strictly smaller when $q > 0$, $\pi > 0$ and the but-for condition holds. □

Proposition 22 (Chilling of reporting). *Let an employee's private benefit from reporting be $b \geq 0$ with distribution function H, and the loss from dismissal $L > 0$. Suppose employees know the reprisal probability $\kappa(\pi) = 1 - F(q(1-\pi)S)$. Then the reporting rate $1 - H\big(L\kappa(\pi)\big)$ is non-increasing in π. For acts in G it equals $1 - H\Big(L\big(1 - F(0)\big)\Big)$, independent of π and no greater than its value for any CAA-protected act at any π.*

Proof. An employee reports iff $b \geq L\kappa(\pi)$ (ties resolved toward reporting), so the reporting rate is $1 - H\big(L\kappa(\pi)\big)$, up to atoms of H. By Proposition 20, κ is non-decreasing in π, and H is non-decreasing, so the reporting rate is non-increasing in π. For $a \in G$, $q(a) = 0$ gives $\kappa = 1 - F(0)$, which is the maximum of κ over all q and π, so the reporting rate is minimal. □

Interpretation. The gap and bundling are the same problem seen from two sides. For IG disclosures, the expected sanction is zero by statute. For CAA-protected opposition, it falls toward zero as π rises. At $\pi = 1$ the two cases coincide: protected opposition that comes bundled with gap conduct receives exactly the protection gap conduct receives, which is none. Figure 3 plots $E(\pi)/S$ for several values of q.

Counterarguments and Responses

Objection: π is not a policy variable. It is partly one. It reflects how adjudicators write findings, and a disaggregation requirement (Section 8) would push π toward zero. It is also partly a fact about records. Where the employer's own articulation separates the grounds, π has little room to operate.

Objection: risk-neutral, fully informed employers are unrealistic. Risk aversion raises the effective S and imperfect information smooths the threshold. Neither changes the sign of any comparative static above.

Step Result

Bundling reduces expected sanctions in proportion to the probability that aggregate reasons are accepted (Proposition 20). It is a dominant framing for employers (Corollary 21), and it chills reporting (Proposition 22). When $\pi = 1$, protected opposition bundled with unprotected disclosure is reduced to the status of the gap.

6.4 Certiorari after an unexplained affirmance

The last result concerns the prospects of correcting problem through further review. Suppose a judgment J has been affirmed without opinion. Let γ_1 be the ground addressed by the question presented and $\gamma_2, \dots, \gamma_m$ the alternative grounds on which J could be sustained. Examples are forfeiture, an independent factual finding, and a deferential standard of review. Let $w \in [0,1]$ be the probability that the petitioner prevails on γ_1. Let $s_j \in [0,1]$ be the probability that γ_j, $j \geq 2$, independently sustains J. Let C denote the event that a decision for the petitioner on γ_1 changes the outcome.

Theorem 23 (Vehicle bound). *Without any independence assumption,* $\Pr[C] \leq \min\{w, \min_{2\leq j\leq m}(1 - s_j)\}$. *If the events "$\gamma_j$ fails" ($j \geq 2$) and "petitioner prevails on γ_1" are mutually independent, then* $\Pr[C] = w\prod_{j=2}^{m}(1 - s_j)$.

Why the theorem is needed. It formalizes a familiar reason the Supreme Court gives for denying review, that the case is a poor vehicle. It also shows that the absence of an opinion below does not remove alternative grounds from the calculation. It only makes them harder to see.

Proof. The outcome changes only if the petitioner prevails on γ_1 *and* every alternative ground fails: $C = A_1 \cap \bar{B}_2 \cap \dots \cap \bar{B}_m$, where A_1 is "prevails on γ_1" and B_j is "γ_j sustains J." For any events, $\Pr[\cap_k E_k] \leq \min_k \Pr[E_k]$ (the Fréchet upper bound), which gives the first inequality, since $\Pr[A_1] = w$ and $\Pr[\bar{B}_j] = 1 - s_j$. Under mutual independence, the probability of the intersection is the product of the probabilities. □

Corollary 24 (Forfeiture dominates). *If one alternative ground is that the theory underlying the question presented was not raised before the first-instance adjudicator, and that ground prevails with probability s_f, then* $\Pr[C] \leq 1 - s_f$ *regardless of the merits.*

Proof. Immediate from Theorem 23, taking $j = f$. □

Proposition 25 (Opacity of unexplained affirmance). *Let $\Gamma^* \subseteq \{\gamma_1, \dots, \gamma_m\}$ be the set of grounds on which the court of appeals actually relied. A Rule 36 judgment is consistent with every non-empty Γ^* that would sustain J. Hence, it provides no information that distinguishes among them, and a reviewing court must evaluate every γ_j itself in order to assess* $\Pr[C]$.

Proof. A Rule 36 judgment states only that J is affirmed. Its content is identical for every Γ^* that sustains J, so the likelihood of observing it is the same under every such hypothesis. By Bayes' rule, the posterior over these hypotheses equals the prior. A reviewing court that wants to bound $\Pr[C]$ through Theorem 23 therefore needs the s_j for every j, which it must assess from the record. □

Interpretation. A reasoned opinion that rests on γ_1 alone tells the Supreme Court that the court of appeals rejected, or did not reach, the other grounds. A Rule 36 judgment does not. The petitioner then carries the burden of showing that *every* alternative ground fails. Forfeiture, in particular, can make $\Pr[C]$ small regardless of how strong the merits of γ_1 are. Figure 4 shows how quickly the product in Theorem 23 decays.

Counterarguments and Responses

Objection: the Court sometimes grants review to settle a legal question even when the outcome may not change. Yes. The Court's objective includes declaring law, not only correcting outcomes. But a poor vehicle also threatens law-declaring value, because the Court may be unable to reach the question. The bound in Theorem 23 therefore applies to both objectives.

Objection: the independence assumption is unrealistic, because grounds are correlated. The first statement of the theorem needs no independence. When failures of alternative grounds are positively correlated, $\Pr[C]$ can exceed the product, but it can never exceed the minimum.

Step Result

After an unexplained affirmance, the chance that winning the question presented changes the outcome is bounded by the weakest link among the alternative grounds (Theorem 23). A forfeiture ruling can dominate that bound (Corollary 24), and the unexplained judgment conceals which ground mattered (Proposition 25).

6.5 Section Result and Implications

The formal development establishes four results. (1) Ordinary IG disclosures in the Library fall into a statutory remedial gap, where the prohibition does not deter. (2) A genuine aggregate reason does not identify but-for causation; a finding about the unprotected residue does. (3) Bundling reduces the deterrence of protected opposition toward the level of the gap. (4) Correction through certiorari after an unexplained affirmance is limited by the weakest alternative ground. Together these results imply that the problem is structural and that adjudicative correction will be slow and uncertain. That is why Section 8 turns to legislative and rule-based remedies.

7. Empirical and Data-Grounded Illustrations

This section has two parts. The first assembles public data on the institutional setting: the Supreme Court's docket, the Federal Circuit's use of Rule 36, and the OCWR Board's recommendations. The second applies the framework of Section 4 to the published decisions in *Dines*. All numbers are taken from the sources cited, and the code that produces the figures is in Appendix C. Model-based figures are labeled as illustrations.

7.1 The Supreme Court's shrinking docket

The Chief Justice's year-end reports give the total number of cases filed in each Term. Filings reached 8,857 in the 2006 Term (Roberts 2007). They were 4,223 in the 2023 Term and 3,856 in the 2024 Term (Roberts 2025). Two independent tabulations attribute most of the decline to petitions *in forma pauperis* (IFP). According to a summary of Kastellec and Taboni (2026), IFP petitions numbered 6,850 in 2006, fewer than 4,500 in 2016, and 2,400 in 2024 (Dennie 2026). A SCOTUSblog analysis reported 7,132 IFP filings in the 2006 Term and 2,527 in the 2024 Term (Dallas Express 2026), with 1,329 paid petitions in the 2024 Term (Pulse 2026). The SCOTUSblog figures are internally consistent: $2{,}527 + 1{,}329 = 3{,}856$, matching the Chief Justice's total for the 2024 Term. The discrepancies between the two tabulations (roughly 4% in 2006 and 5% in 2024) presumably reflect differences in counting conventions, such as Term versus calendar year or the treatment of applications. Both show a decline in IFP filings of about two thirds: 65% in the SCOTUSblog figures and 65% in the Kastellec–Taboni figures.

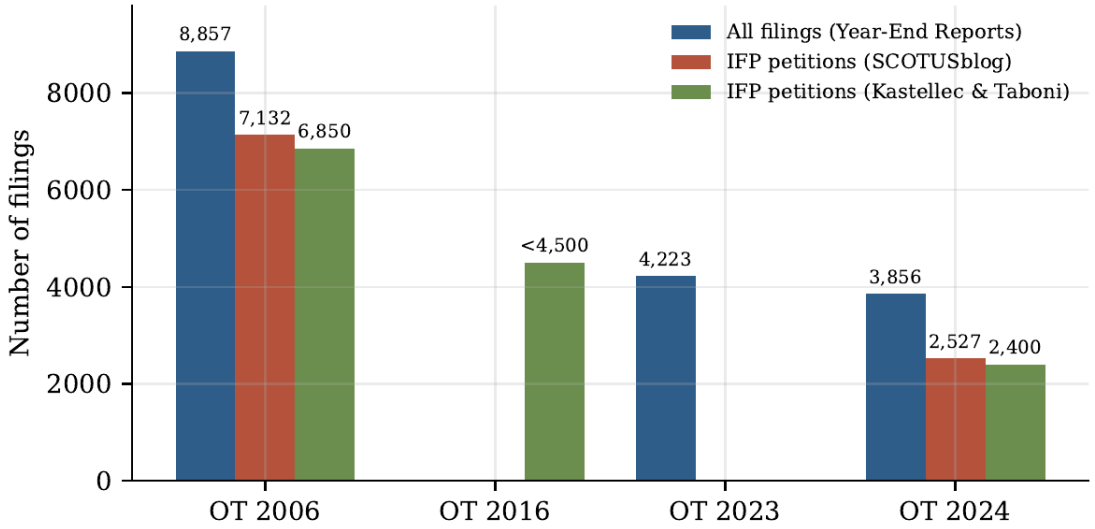


Figure 1. Supreme Court filings, selected Terms. Totals: Chief Justice's Year-End Reports (Roberts 2007, 2025). IFP petitions: SCOTUSblog analysis as reported by Dallas Express (2026); Kastellec–Taboni counts as reported by Dennie (2026) (the 2016 value is an upper bound). Blank positions indicate that the source reports no value for that Term.

Table 1. Grant rates and composition, 2024 Term (as reported)

Quantity	Value	Source
Total filings	3,856	Roberts (2025)
IFP petitions	2,527	Dallas Express (2026)
Paid petitions	1,329	Pulse (2026)
Grant rate, paid petitions (2024)	about 8%	Dennie (2026)
Grant rate, paid petitions (2016)	about 6%	Dennie (2026)
Grant rate, IFP petitions	about 1.6%	Dennie (2026)

For a pro se petitioner the relevant base rate is low. Even the paid-petition grant rate of about 8% is an average dominated by petitions filed by experienced counsel. Under Theorem 23, any particular petition's chances are further discounted by the strength of the alternative grounds.

7.2 Unexplained affirmance at the Federal Circuit

Systematic public statistics on Rule 36 are available mainly for patent appeals. Finnegan's cumulative tabulation of Federal Circuit decisions in appeals from inter partes review, covered business method review and post-grant review shows the following. As of February 1, 2017, 54% of those appeals had been decided by Rule 36 (Finnegan, Henderson, Farabow, Garrett & Dunner, LLP 2017). Through May 31, 2026, the court had decided 1,611 such appeals, 667 (41.40%) by Rule 36 (Finnegan, Henderson, Farabow, Garrett & Dunner, LLP 2026). Through July 31, 2026, written opinions accounted for 58.81% of decisions, implying a Rule 36 share of 41.19% (Klodowski et al. 2026). We have found no comparable published tabulation for appeals under the CAA. The patent figures are offered only to show that the practice is routine at this court, not as an estimate for employment appeals.

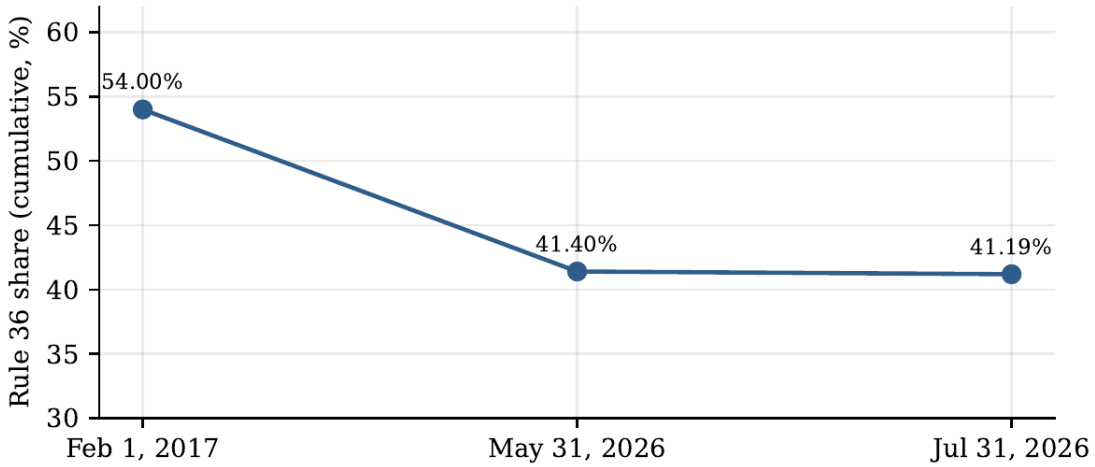


Figure 2. Cumulative share of Federal Circuit decisions in PTAB post-grant appeals entered under Rule 36. Sources: (Finnegan, Henderson, Farabow, Garrett & Dunner, LLP 2017, 2026; Klodowski et al. 2026).

7.3 The OCWR Board's recommendations

Table 2 lists the Board's section 102(b) reports in which we have confirmed a recommendation to extend whistleblower protection to the legislative branch. The list is not necessarily complete. The 2024 report describes the recommendation, framed as protection comparable to 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 1221, as "not yet enacted" (Office of Congressional Workplace Rights, Board of Directors 2024).

Table 2. OCWR (formerly Office of Compliance) section 102(b) reports recommending whistleblower protection for legislative-branch employees.

Report	Recommendation as stated (paraphrased)	Source
2006 (110th Cong.)	Apply the Whistleblower Protection Act to the CAA	Office of Compliance (2006)
2010 (112th Cong.)	Congress exempted itself from the WPA; extend protection	Office of Compliance, Board of Directors (2010)
2012 (113th Cong.)	Workplace Rights Recommendation #1: whistleblower protection	Office of Compliance, Board of Directors (2012)
2014 (114th Cong.)	CAA Recommendation #4: whistleblower protection	Office of Compliance, Board of Directors (2014)
2016 (115th Cong.)	Recommendation #3: extend whistleblower protection to the legislative branch	Office of Compliance, Board of Directors (2016)
2022 (118th Cong.)	Protect employees who make disclosures to authorized officials	Office of Congressional Workplace Rights, Board of Directors (2022)
2024 (119th Cong.)	Provide comparable whistleblower protections; "not yet enacted"	Office of Congressional Workplace Rights, Board of Directors (2024)

7.4 Application to the published decisions in *Dines*

We now map the termination letter, as quoted in the Hearing Officer's decision, onto the conduct profile of Definition 6. Table 3 lists each episode the letter recites, a short description (quotation marks indicate the letter's words as quoted in the decision), and the coordinate to which its content belongs. "P^*" marks content that is CAA-protected opposition only to the extent that the retaliation complained of was itself retaliation for CAA-protected activity (step L3). The public decisions do not resolve that question, and we do not resolve it here.

Table 3. Episodes in the termination letter (as quoted in MHO Decision, at 13–14) mapped to conduct coordinates.

#	Episode	Coordinate
1	"Circumventing the chain of command" from late spring 2023 (content not specified)	P^*/U
2	June 2023 conversations about digitization records, in which the employee "raised [his] voice and [was] discourteous"	U (subject); O (manner)
3	Concerns about manuscript purchasing raised "on a nearly daily basis for weeks"	U
4	Refusal to work with the supervisor, who he said was "retaliating," "threatened," and "blackmailing" him	P^*
5	"Constant stream of emails and meetings complaining about [the] supervisor"	P^*
6	Elevating concerns to a Deputy Librarian despite instructions "to only address these concerns through EEO/DP and the Inspector General's office"	P^*/U
7	Account of the September 13, 2023, incident, found by the deciding official to be false	O
8	Mischaracterizing the supervisor's decision on attending an event	O

Three observations follow, each limited to what the public decisions state.

(a) The reason is stated as an aggregate. The letter describes the listed episodes as "some examples of your ongoing behavior that has caused disruption in the workplace." The Standard Form 50 records the reason as "ongoing dishonest and disruptive conduct."[37] In the terms of Definition 7, the stated reason is $\phi(x)$, and episodes 4–6 are instances of it whose content is at least potentially in x_P.

(b) The findings addressed the participation theory and the aggregate. The Hearing Officer analyzed reprisal for the employee's EEO filing and found that the deciding official testified she did not know whether he had filed EEO complaints. The Hearing Officer concluded that "what led to the termination action was not the Claimant's EEO activity, but instead his continued, escalating actions of misconduct," and that the Library had "legitimate, non-retaliatory reasons related to the Claimant's conduct."[38] The decision describes the deciding official's reasoning in combined terms. Having concluded that the employee lied and considering "the history of the Claimant's disruptive behavior … to include on-going defiance of supervisory instructions," she decided to terminate him.[39] In the terms of Proposition 19, the dishonesty finding is a candidate for an independently sufficient ground in x_O. Whether the decisions treat it as *alone* sufficient is a question of interpretation. The quoted passage presents it together with the aggregate.

(c) The opposition theory meets a forfeiture ruling. Denying reconsideration, the Board stated that before the Hearing Officer the employee argued reprisal for filing his EEO claim, whereas before the Board he argued reprisal for opposing Library practices, and that an argument not first presented to the Hearing Officer may not be raised on appeal.[40] The Board also agreed that temporal proximity alone *can* satisfy the causation element of a prima facie case, but held that any error on that point was harmless.[41] The Federal Circuit's Rule 36 judgment does not say on which ground it rested.[42]

Observations (a)–(c) instantiate the three structures of Section 6. Under Lemma 14, the waste reports (episodes 3 and part of 1, 2 and 6) function in litigation as unprotected conduct, whether made to management or, as the decisions note occurred in mid-August 2023, to the Inspector General.[43] Under Theorem 16, the finding of a legitimate conduct-based reason, standing alone, would leave the but-for status of episodes 4–6 open to the extent those episodes are protected. Corollary 17 and Proposition 19 identify what would close it: a finding that episodes 2, 3, 7 and 8 (or 7 alone) would have sufficed. Under Corollary 24, the forfeiture ruling bounds the value of any question presented about the opposition theory.

7.5 Model illustrations

Figures 3 and 4 are numerical illustrations of Proposition 20 and Theorem 23. The parameter values are chosen for exposition and are not estimates.

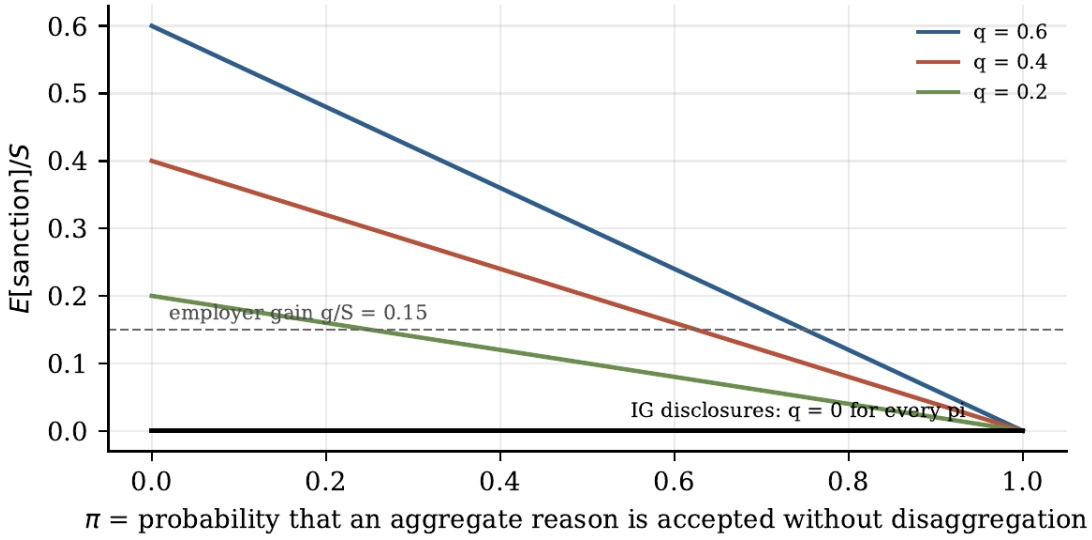


Figure 3. Illustration of Proposition 20. Expected sanction relative to S as a function of π. An employer with gain $g/S = 0.15$ (dashed) retaliates where the curve lies below the dashed line. For IG disclosures (bold line at zero) the sanction is zero at every π.

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37 *MHO Decision*, at 14–15.

38 *MHO Decision*, at 21–23.

39 *Id.* at 22.

40 *Reconsideration Decision*, at 3 n.3.

41 *Id.* at 2 (citing *Board Decision*, 2025 WL 1019270, at *1 n.2).

42 *Dines v. OCWR*, No. 2025-1657 (Fed. Cir. Nov. 10, 2026).

43 *MHO Decision*, at 16.

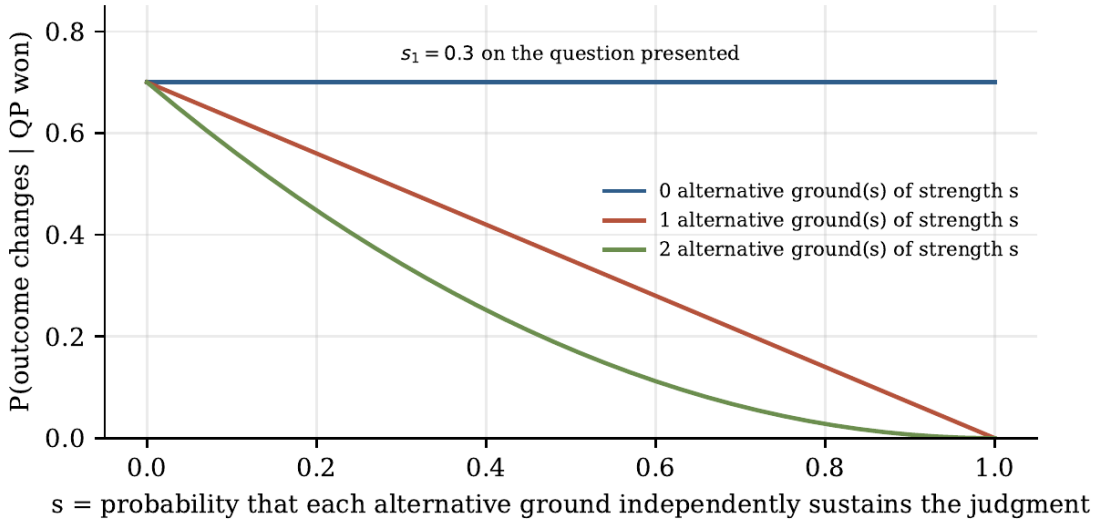


Figure 4. Illustration of Theorem 23. Probability that winning the question presented changes the outcome, with $w = 0.7$ and k independent alternative grounds of equal strength s.

7.6 Counterarguments and Responses

Objection: Table 3 imposes the author's classification on the record. The classification is of the letter's *words*, as quoted in a public decision, and the uncertain cases are marked P^*. The only claim made is that the letter's stated reason contains episodes whose content is at least potentially protected. That claim is evident from the letter's own description of episodes 4–6.

Objection: the docket data are irrelevant to an employment case. They are relevant to the feasibility of correction through certiorari, which is the subject of step L6. They describe the base rates against which any petition, including one in a case like *Dines*, is assessed.

Objection: the patent Rule 36 data say nothing about CAA appeals. Agreed, and the text says so. They establish only that unexplained affirmance is a routine practice of the court that hears CAA appeals.

7.7 Section Result and Implications

The data confirm the institutional premises of the argument. Access to Supreme Court review has contracted sharply, especially for IFP litigants. Unexplained affirmance is routine at the Federal Circuit. The OCWR Board has recommended closing the whistleblower gap in at least seven reports without result. The published decisions in *Dines* exhibit an aggregate reason containing potentially protected content, findings framed in aggregate terms alongside a dishonesty finding, and a forfeiture ruling. These are the inputs to Theorems 16 and 23.

8. Discussion

8.1 The legislative remedy and why its design matters

The OCWR Board's recommendation would extend to the legislative branch protections "comparable" to 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 1221 (Office of Congressional Workplace Rights, Board of Directors 2024). The formal results show why the reference to section 1221 matters as much as the reference to section 2302. In an individual-right-of-action appeal under section 1221, the employee need show only that a protected disclosure was a "contributing factor" in the personnel action. Corrective action is then denied only if the agency "demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure" (5 U.S.C. § 1221(e)(1)– (2)).

The second clause is, word for word, the disaggregated counterfactual of Corollary 17, with the burden placed on the employer. Adopting the WPA framework would therefore do two things at once. It would close the remedial gap of Theorem 12, because IG disclosures would acquire a channel. And it would neutralize the bundling problem of Theorem 16, because an aggregate reason would no longer be enough. The employer would have to prove what the unprotected residue alone would have produced. In the notation of Proposition 20, the WPA structure drives π toward zero by statute.

8.2 An adjudicative remedy: disaggregation of aggregate reasons

Short of legislation, adjudicators can apply Corollary 17 directly. When an employer's articulated reason lists among its instances conduct that is protected or arguably protected, the first-instance adjudicator should make an express finding on whether the unprotected conduct alone would have led to the same decision. That finding is not an innovation. It is the but-for question that *Nassar* requires, put in a form that cannot be bypassed by the legitimacy of the aggregate. Price Waterhouse's same-decision inquiry asked an analogous question in a different burden structure.[44] The OCWR could implement the requirement through its procedural rules or through Board precedent, without any change in statute.

8.3 Appellate practice

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[44] *Price Waterhouse*, 490 U.S. at 244–45, 252–53 (plurality opinion).

Proposition 25 implies that unexplained affirmance is most costly when the record contains several plausible grounds, some procedural and some substantive. A one-paragraph statement identifying the ground of decision would reduce the opacity at little cost to the court. The critics of Rule 36 in patent cases have made the general argument (Crouch 2017; Gugliuzza and Lemley 2018). The employment setting adds a specific reason: the reviewing court cannot tell whether a forfeiture ruling, or a merits ruling was affirmed.

8.4 Implications for employees and their advisers

Three practical implications follow from the theorems; none of them is legal advice for a particular case. First, by Theorem 12, a Library employee who reports waste to the Inspector General should not assume the report is protected in any enforceable sense. Second, by Theorem 16, an employee whose complaints include opposition to CAA-unlawful practices benefits from separating that opposition, in time and in medium, from reports of waste. Separation lowers the employer's ability to bundle. Third, by Corollary 24, every theory of protected activity, opposition as well as participation, must be presented to the Hearing Officer. A theory raised for the first time on review may be lost however strong it is.

8.5 Why might Congress leave the gap open?

Several explanations are possible, and the article does not adjudicate among them. One is separation-of-powers caution about executive-branch bodies (OSC and MSPB) adjudicating legislative-branch personnel actions. This concern could be met by routing claims through the OCWR, as the Board proposes. A second is the Speech or Debate Clause as applied to Members' personal offices. That concern does not apply to the Library's rare-book divisions. A third is simple inertia: whistleblower reform for the legislative branch has no organized constituency comparable to that for executive-branch reform. The persistence of the recommendation across at least seven reports (Table 2) is consistent with inertia but does not prove it.

8.6 Counterarguments and Responses

Objection: a WPA-style regime would flood the OCWR with claims. Executive-branch experience is relevant evidence, but the legislative branch is far smaller. The Library alone has roughly 3,100 permanent staff (Newlen 2026). In any case, the clear-and-convincing defense protects employers whose unprotected grounds are genuinely sufficient.

Objection: disaggregation findings would be speculative. Every but-for finding is counterfactual and, in that sense, speculative. Courts make such findings routinely, including in same-decision defenses. The requirement adds no new kind of inference. It only requires that the inference be stated.

8.7 Section Result and Implications

The formal results point to a specific legislative design, the WPA's contributing-factor and clear-and-convincing structure, that solves the gap and the bundling problem together. They also point to an adjudicative measure, express disaggregation findings, and an appellate measure, a brief statement of grounds, that would reduce the problems without legislation.

9. Limitations

Record limitations. The analysis of *Dines* relies only on the public decisions. The hearing transcript and most exhibits are not public, so the article cannot say whether the record supports a finding that the unprotected residue alone was sufficient, or whether the employee's complaints about his supervisor were opposition to CAA-unlawful practices. Table 3 classifies words in a letter. It does not classify the underlying conduct.

Model limitations. The decision model is a threshold model with a latent aggregate. Real decisions may be path-dependent: earlier conduct may change the salience of later conduct. They may also be made by several officials whose reasons differ. Remark 10 covers monotone aggregators. A multi-agent extension in which each official has a separate threshold, and the decision requires the concurrence of some of them, is not developed here. The deterrence model treats q, π and S as exogenous and independent.

Premise limitations. Theorem 12 depends on Assumption 11. If a court were to recognize a common-law officer suit along the lines Pfander and Alley (2025) propose, or an implied private right of action under 5 U.S.C. § 407(c), the set G would shrink. We know of no decision recognizing either for a Library employee, but the absence of such decisions is not proof that the routes are unavailable.

Data limitations. The docket figures come from two tabulations that differ in level, and the IFP figures are reported through secondary sources. The grant rates are approximate. The Rule 36 statistics cover patent appeals only. No public tabulation of outcomes in CAA appeals was located.

Positional limitation. The author has assisted a party. The disclosure on the title page, the restriction to public decisions, and the explicit statement of grounds that cut against the party are the safeguards used. Readers should weigh the analysis accordingly.

9.1 Section Result and Implications

The formal results are robust to the limitations listed, because they are entailment claims. The application to *Dines* is limited by the public record and is offered as illustration, not as a judgment about the case.

10. Future Directions

An empirical study of aggregate reasons. The OCWR publishes Board decisions. A systematic coding of reprisal decisions would allow estimation of π, the rate at which aggregate reasons are accepted without disaggregation. The coding would record whether the employer's stated reason incorporated protected conduct and whether the adjudicator made a finding of the type in Corollary 17. The same coding could be applied to MSPB decisions under section 1221, where the clear-and-convincing standard should, on our analysis, produce a lower π.

Multi-agent decision models. Extending the threshold model to committees and to chains of recommendation and approval would connect the analysis to the "cat's paw" problem in employment law, in which a biased subordinate influences an unbiased decision maker.[45] Degrees of responsibility in the sense of Chockler and Halpern (2004) offer a natural formalism.

Comparative legislative-branch law. State legislatures and the legislatures of other common-law jurisdictions handle staff whistleblowing in different ways. A comparative study would show whether the federal gap is typical or anomalous.

Measurement of Rule 36 in non-patent appeals. The Federal Circuit hears appeals from the MSPB, from the OCWR and from other agencies. A tabulation of Rule 36 use by source agency would test whether unexplained affirmance is concentrated in particular kinds of appeals.

Drafting. The legislative design in Section 8 could be specified as statutory text: an amendment to the CAA adding a section that applies 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 1221(e) to covered employees, with the OCWR as forum. A drafting exercise would expose questions of coverage and remedies that the formal model abstracts away.

10.1 Section Result and Implications

Each direction either estimates a parameter the model treats as given (π, the Rule 36 rate) or relaxes a structural assumption (single decision maker, closed channel set). The theorems tell future empirical work what to measure.

11.Conclusion

A Library of Congress employee who reports waste to the Inspector General holds a right without a remedy. The article has shown that this gap does more than leave one category of reports unprotected. In litigation, such reports function as unprotected conduct. Bundled with protected opposition into an aggregate reason such as "disruptive behavior," they make the protected component's causal role unidentifiable from findings of legitimacy and genuineness alone. The deterrent force of the CAA's anti-reprisal provision then declines toward the level of the gap. Correction through certiorari after an unexplained affirmance is constrained by the weakest alternative ground. The remedy the OCWR Board has long recommended, protection comparable to 5 U.S.C. § 2302(b)(8) enforced through a section 1221-style burden structure, would address both problems at once. Until Congress acts, the most useful single measure is an express finding, in every case where the employer's reason incorporates protected conduct, on whether the unprotected conduct alone would have produced the same decision.

Data Availability: All data used are published in the sources cited. The code that reproduces every figure is in Appendix C. The decisions in *Dines* are available from the OCWR and from the Federal Circuit's docket in No. 2025-1657.

Disclosure: The author has assisted Dr. Ilya Dines, without compensation, in preparing materials for a petition for a writ of certiorari in the case discussed here. The analysis in this article is the author's own; it is not legal advice and does not state the position of any party. Every factual statement about the case is drawn from public decisions in the record, cited in footnotes. Individuals other than the parties are identified by role only.

Conflicts of Interest: The author has assisted the petitioner in *Dines v. Office of Congressional Workplace Rights*, without compensation, in preparing materials for further review. The author has no financial interest in the outcome.

Use of AI Tools: An AI language model (Claude, Anthropic) assisted with literature search, data compilation, drafting and formatting. The author reviewed the text, the citations and the proofs and takes responsibility for them.

Appendix A. Procedural Chronology of *Dines*

All entries are taken from the public decisions cited in the right-hand column.

Date	Event	Source
Late spring 2023	Concerns about the employee's "circumventing the chain of command" begin, according to the letter	*MHO Decision*, at 13
June 12, 2023	Interactions in the Rare Book and Special Collections Division	*MHO Decision*, at 6–9
July 17, 2023	Employee states he sent a five-page letter to the Library's EEO office	*MHO Decision*, at 16, 21
Mid-Aug. 2023	Concerns about manuscript acquisition raised with the OIG and the Office of General Counsel	*MHO Decision*, at 16
Aug. 16, 2023	EEO office receives written allegations; assigns Case No. 23-023	*MHO Decision*, at 16, 21
Sept. 13, 2023	Incident whose account the deciding official found false	*MHO Decision*, at 14, 22
Sept. 20, 2023	Termination of the not-to-exceed appointment	*MHO Decision*, at 13–15
Oct. 5, 2023	Claim filed with the OCWR	*MHO Decision*, at 1
July 8, 2024	Merits Hearing Officer decision for the Library	*MHO Decision*
Aug. 7, 2024	Petition for review to the Board	*Reconsideration Decision*, at 1
Mar. 24, 2025	Board affirms	*Board Decision*
Apr. 7, 2025	Motion for reconsideration	*Reconsideration Decision*, at 1
Apr. 28, 2025	Reconsideration denied; forfeiture noted (n. 3)	*Reconsideration Decision*

[45] *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011).

Date	Event	Source
Nov. 10, 2026	Federal Circuit affirms under Rule 36 (No. 2025-1657)	Judgment

Appendix B. Statutory Text

The provisions below are reproduced from the United States Code (public domain).

2 U.S.C. § 1317 (CAA § 208)

(a) *In general.* It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter. (b) *Remedy.* The remedy available for a violation of subsection (a) shall be such legal or equitable remedy as may be appropriate to redress a violation of subsection (a).

5 U.S.C. § 407(c)

(c) *Prohibition on Reprisal.* —Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to that authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

2 U.S.C. § 185(d)(1)

(1) *In general.* Sections 404, 405 (other than subsection (b)(13)), 406(a) (other than paragraphs (7) and (8) thereof) [note reference omitted], and 407 of title 5 shall apply to the Inspector General of the Library of Congress and the Office of such Inspector General and such sections shall be applied to the Library of Congress and the Librarian of Congress by substituting— (A) “Library of Congress” for “establishment”; and (B) “Librarian of Congress” for “head of the establishment”.

2 U.S.C. § 1407(d)

(d) *Standard of review.* To the extent necessary for decision in a proceeding commenced under subsection (a)(1) and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision of the Board if it is determined that the decision was— (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence.

Appendix C. Code

The following Python script (matplotlib 3.11) reproduces Figures 1–4. Empirical values are hard-coded with their sources noted in comments; the script asserts the internal consistency check reported in Section 7.

```
"""Figures for 'Rights Without Remedies'.

Every empirical number below is copied from a cited public source; the
source is named next to each value.  Model figures (Figs. 3-4) are
numerical illustrations of the propositions in Section 6, not data.
"""
import matplotlib
matplotlib.use("Agg")
import matplotlib.pyplot as plt
import numpy as np

plt.rcParams.update({
    "font.family": "serif", "font.size": 9, "axes.spines.top": False,
    "axes.spines.right": False, "axes.grid": True, "grid.alpha": 0.25,
    "savefig.bbox": "tight", "figure.dpi": 200,
})
C1, C2, C3 = "#2F5D8A", "#B5523B", "#6B8E4E"

# ---------------------------------------------------------------- Fig. 1
# Total filings: Chief Justice's Year-End Reports (2007; 2025).
total = {"2006": 8857, "2023": 4223, "2024": 3856}
# IFP petitions, two independent tabulations:
kt = {"2006": 6850, "2016": 4500, "2024": 2400}   # Kastellec & Taboni, as reported by Dennie (2026); 2016 is an upper bound
sb = {"2006": 7132, "2024": 2527}                # SCOTUSblog analysis of May 11, 2026, as reported by Dallas Express (2026)
paid_2024 = 1329                                # SCOTUSblog, as summarized by Pulse (2026)
assert sb["2024"] + paid_2024 == total["2024"]    # internal consistency check

fig, ax = plt.subplots(figsize=(6.0, 3.0))
terms = ["2006", "2016", "2023", "2024"]
x = np.arange(len(terms)); w = 0.26
ax.bar(x - w, [total.get(t, np.nan) for t in terms], w, color=C1, label="All filings (Year-End Reports)")
ax.bar(x, [sb.get(t, np.nan) for t in terms], w, color=C2, label="IFP petitions (SCOTUSblog)")
ax.bar(x + w, [kt.get(t, np.nan) for t in terms], w, color=C3, label="IFP petitions (Kastellec & Taboni)")
for xi, t in zip(x, terms):
    for off, d in ((-w, total), (0, sb), (w, kt)):
        if t in d:
            lab = f"<{d[t]:,}" if (d is kt and t == "2016") else f"{d[t]:,}"
            ax.text(xi + off, d[t] + 120, lab, ha="center", va="bottom", fontsize=6.5)
ax.set_xticks(x, [f"OT {t}" for t in terms]); ax.set_ylabel("Number of filings")
ax.set_ylim(0, 9800); ax.legend(frameon=False, fontsize=7, loc="upper right")
fig.savefig("fig1_docket.pdf"); plt.close(fig)

# ---------------------------------------------------------------- Fig. 2
```

```
# Cumulative share of PTAB post-grant appeals disposed of by Rule 36 (Finnegan).
pts = [("Feb 1, 2017", 54.0), ("May 31, 2026", 41.40), ("Jul 31, 2026", 100 - 58.81)]
fig, ax = plt.subplots(figsize=(6.0, 2.6))
ax.plot(range(3), [p[1] for p in pts], "o-", color=C1)
for i, (d, v) in enumerate(pts):
    ax.annotate(f"{v:.2f}%", (i, v), textcoords="offset points", xytext=(0, 7), ha="center", fontsize=7.5)
ax.set_xticks(range(3), [p[0] for p in pts]); ax.set_ylim(30, 62)
ax.set_ylabel("Rule 36 share (cumulative, %)")
fig.savefig("fig2_rule36.pdf"); plt.close(fig)

# ---------------------------------------------------------------- Fig. 3
# Proposition 6.9: effective expected sanction q(1-pi)S, normalised by S.
pi = np.linspace(0, 1, 201)
fig, ax = plt.subplots(figsize=(6.0, 2.8))
for q, c in ((0.6, C1), (0.4, C2), (0.2, C3)):
    ax.plot(pi, q * (1 - pi), color=c, label=f"q = {q}")
ax.axhline(0.15, ls="--", color="0.4", lw=0.8)
ax.text(0.02, 0.165, "employer gain g/S = 0.15", fontsize=7, color="0.3")
ax.plot([0, 1], [0, 0], color="k", lw=1.6)
ax.text(0.55, 0.02, "IG disclosures: q = 0 for every pi", fontsize=7)
ax.set_xlabel(r"$\pi$ = probability that an aggregate reason is accepted without disaggregation")
ax.set_ylabel(r"$E[\mathrm{sanction}]/S$"); ax.legend(frameon=False, fontsize=7)
fig.savefig("fig3_deterrence.pdf"); plt.close(fig)

# ---------------------------------------------------------------- Fig. 4
# Theorem 6.11: P(outcome changes) = (1-s1) * prod_j (1-s_j).  Illustrative.
s = np.linspace(0, 1, 201)
fig, ax = plt.subplots(figsize=(6.0, 2.8))
for k, c in ((0, C1), (1, C2), (2, C3)):
    ax.plot(s, (1 - 0.3) * (1 - s) ** k if k else np.full_like(s, 0.7), color=c,
            label=f"{k} alternative ground(s) of strength s")
ax.set_xlabel("s = probability that each alternative ground independently sustains the judgment")
ax.set_ylabel("P(outcome changes | QP won)")
ax.text(0.5, 0.74, r"$s_1 = 0.3$ on the question presented", fontsize=7, ha="center")
ax.set_ylim(0, 0.85); ax.legend(frameon=False, fontsize=7)
fig.savefig("fig4_vehicle.pdf"); plt.close(fig)
print("figures written")
```

References

Baude, William. 2015. Foreword: The Supreme Court's Shadow Docket. *New York University Journal of Law & Liberty* 9 (1): 1. https://doi.org/10.2139/ssrn.2545130

Becker, Gary Stanley. 1968. Crime and Punishment: An Economic Approach. *Journal of Political Economy* 76 (2): 169–217. https://doi.org/10.1086/259394

Caldeira, Gregory Anthony, and John R. Wright. 1988. Organized Interests and Agenda Setting in the U.S. Supreme Court. *American Political Science Review* 82 (4): 1109–27. https://doi.org/10.2307/1961752

Chockler, Hana, and Joseph Yehuda Halpern. 2004. Responsibility and Blame: A Structural-Model Approach. *Journal of Artificial Intelligence Research* 22: 93–115. https://doi.org/10.1613/jair.1391

Crouch, Dennis. 2017. Wrongly Affirmed Without Opinion. *Wake Forest Law Review* 52: 561. https://doi.org/10.2139/ssrn.2909007

Dallas Express. 2026. Path to Supreme Court Narrows as Petitions Drop 56% Since 2006. *Dallas Express*, May 12, 2026 (reporting a SCOTUSblog analysis of May 11, 2026). https://dallasexpress.com/national/path-to-supreme-court-narrows-as-petitions-drop-56-since-2006/

Dennie, Madiba K. 2026. The Supreme Court Is a Glorified Protection Racket for Conservative Billionaires. *Balls & Strikes*, February 10, 2026. https://ballsandstrikes.org/scotus/shadow-docket-supreme-court-study/

Dowd, Matthew J. 2020. Rule 36 Decisions at the Federal Circuit: Statutory Authority. *Vanderbilt Journal of Entertainment and Technology Law* 21: 857.

Dyck, Alexander, Adair Morse, and Luigi Zingales. 2010. Who Blows the Whistle on Corporate Fraud? *Journal of Finance* 65 (6): 2213–53. https://doi.org/10.1111/j.1540-6261.2010.01614.x

Fallon, Richard Henry, Jr., and Daniel Julius Meltzer. 1991. New Law, Non-Retroactivity, and Constitutional Remedies. *Harvard Law Review* 104 (8): 1731–833. https://doi.org/10.2307/1341619

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. 2017. Should the Federal Circuit Stop Issuing Rule 36 Affirmances? Firm news item (reporting *Managing IP*). https://www.finnegan.com/en/firm/news/should-the-federal-circuit-stop-issuing-rule-36-affirmances.html

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. 2026. Federal Circuit PTAB Appeal Statistics for March–May 2026. *At the PTAB Blog*, July 2026. https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal-circuit-ptab-appeal-statistics-for-marchmay-2026.html

Gugliuzza, Paul R., and Mark A. Lemley. 2018. Can a Court Change the Law by Saying Nothing? *Vanderbilt Law Review* 71 (3): 765. https://doi.org/10.2139/ssrn.3015459

Halpern, Joseph Yehuda. 2015. A Modification of the Halpern–Pearl Definition of Causality. In *Proceedings of the 24th International Joint Conference on Artificial Intelligence (IJCAI)*, 3022–33. Preprint, https://doi.org/10.48550/arXiv.1505.00162

Halpern, Joseph Yehuda. 2016. *Actual Causality*. Cambridge, MA: MIT Press. https://doi.org/10.7551/mitpress/10809.001.0001

Halpern, Joseph Yehuda, and Judea Pearl. 2005. Causes and Explanations: A Structural-Model Approach. Part I: Causes. *British Journal for the Philosophy of Science* 56 (4): 843–87. https://doi.org/10.1093/bjps/axi147

Hayden, Carla. 2025. Statement of the Librarian of Congress Before the Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. Senate: Fiscal 2026 Budget Request. https://www.appropriations.senate.gov/imo/media/doc/carla_hayden_testimony_5625.pdf

Hohfeld, Wesley Newcomb. 1913. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *Yale Law Journal* 23 (1): 16–59. https://doi.org/10.2307/785533

Kastellec, Jonathan P., and Robin A. Taboni. 2026. A Database of the United States Supreme Court's Shadow Docket, 1993–2025. *Journal of Law and Courts* 14 (1): 220–37. https://doi.org/10.1017/jlc.2025.10011

Klodowski, Daniel F., Michelle G. Rice, Jason E. Stach, and Elliot C. Cook. 2026. Federal Circuit PTAB Appeal Statistics for June and July 2026. Finnegan, *At the PTAB Blog*, September 9, 2026. https://www.finnegan.com/en/insights/blogs/at-the-ptab-blog/federal-circuit-ptab-appeal-statistics-for-june-and-july-2026.html

Levinson, Daryl J. 1999. Rights Essentialism and Remedial Equilibration. *Columbia Law Review* 99 (4): 857–940. https://doi.org/10.2307/1123480

Mascott, Jennifer L., and Richard Trent McCotter. 2022. *Egbert v. Boule*: Federal Officer Suits by Common Law. *Cato Supreme Court Review* 2021–2022. https://doi.org/10.2139/ssrn.4182657

Miceli, Marcia P., Janet P. Near, and Terry Morehead Dworkin. 2008. *Whistle-Blowing in Organizations*. New York: Routledge.

Near, Janet P., and Marcia P. Miceli. 1985. Organizational Dissidence: The Case of Whistle-Blowing. *Journal of Business Ethics* 4 (1): 1–16. https://doi.org/10.1007/BF00382668

Newlen, Robert Randolph. 2026. Statement of the Acting Librarian of Congress Before the Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. House of Representatives: Fiscal 2027 Budget Request. March 6, 2026. https://docs.house.gov/meetings/AP/AP24/20260306/119010/HHRG-119-AP24-Wstate-NewlenR-20260306.pdf

Office of Compliance. 2006. *2006 Section 102(b) Report*. Washington, DC: Office of Compliance, December 2006. https://www.ocwr.gov/wp-content/uploads/2021/09/report_section_102_b_110_congress.pdf

Office of Compliance, Board of Directors. 2010. *Biennial Report Required by § 102(b) of the Congressional Accountability Act, Issued at the Conclusion of the 111th Congress for Consideration by the 112th Congress*. Washington, DC: Office of Compliance. https://www.ocwr.gov/wp-content/uploads/2011/01/report_section_102_b_112_congress.pdf

Office of Compliance, Board of Directors. 2012. *Biennial Report Required by § 102(b) of the Congressional Accountability Act for the 113th Congress*. Washington, DC: Office of Compliance. https://www.ocwr.gov/wp-content/uploads/2012/02/report_section_102_b_113_congress.pdf

Office of Compliance, Board of Directors. 2014. *Recommendations for Improvements to the Congressional Accountability Act (Section 102(b) Report for the 114th Congress)*. Washington, DC: Office of Compliance. https://www.ocwr.gov/wp-content/uploads/2021/09/report_section_102_b_114_congress.pdf

Office of Compliance, Board of Directors. 2016. *Biennial Report Required by § 102(b) of the Congressional Accountability Act, Issued at the Conclusion of the 114th Congress for Consideration by the 115th Congress*. Washington, DC: Office of Compliance. https://www.ocwr.gov/wp-content/uploads/2021/09/report_section_102_b_115_congress.pdf

Office of Congressional Workplace Rights. 2024. CAA Statutory, Regulatory, and Case Law Updates: Brown Bag Outline. April 17, 2024. https://www.ocwr.gov/wp-content/uploads/CAA-Statutory-Regulatory-and-Case-Law-Updates-Brown-Bag-Outline-4-17-24.pdf

Office of Congressional Workplace Rights, Board of Directors. 2022. *Recommendations for Improvements to the Congressional Accountability Act (Section 102(b) Report for the 118th Congress)*. Washington, DC: OCWR. https://www.ocwr.gov/wp-content/uploads/2023/02/102b-Report-2022-REMED.pdf

Office of Congressional Workplace Rights, Board of Directors. 2024. *Recommendations for Improvements to the Congressional Accountability Act (Section 102(b) Report for the 119th Congress)*. Washington, DC: OCWR, December 2024. https://ocwr.gov/wp-content/uploads/102b-Report-2024-Remediated.pdf

Pearl, Judea. 2009. *Causality: Models, Reasoning, and Inference*. 2nd ed. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511803161

Perry, H. W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.

Pfander, James E., and Rex N. Alley. 2025. Federal Tort Liability After *Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law. *Harvard Law Review* 138 (4): 985–1054.

Pfander, James E., and David Baltmanis. 2009. Rethinking *Bivens*: Legitimacy and Constitutional Adjudication. *Georgetown Law Journal* 98 (1): 117–48.

Polinsky, Alan Mitchell, and Steven Shavell. 2000. The Economic Theory of Public Enforcement of Law. *Journal of Economic Literature* 38 (1): 45–76. https://doi.org/10.1257/jel.38.1.45

Pulse. 2026. The Serious Decline in Petitions Before the Supreme Court. Summary of SCOTUSblog analysis of May 11, 2026. https://www.pulse.bot/legal/news/the-serious-decline-in-petitions-before-the-supreme-court-0b445986-03be-40ac-804d-14b805ece66b/

Roberts, John Glover, Jr. 2007. *2007 Year-End Report on the Federal Judiciary*. Washington, DC: Supreme Court of the United States. https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx

Roberts, John Glover, Jr. 2025. *2025 Year-End Report on the Federal Judiciary*. Washington, DC: Supreme Court of the United States. https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx

Sperino, Sandra F., and Suja A. Thomas. 2017. *Unequal: How America's Courts Undermine Discrimination Law*. New York: Oxford University Press.

Thompson, David C., and Melanie F. Wachtell. 2009. An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General. *George Mason Law Review* 16 (2): 237.

Vladeck, Stephen. 2023. *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. New York: Basic Books.

West, E. Garrett. 2025. Torts Stories After *Bivens*. *Harvard Law Review Forum* 138: 89.