COMMENTS

The Exception to Rule 12(d): Incorporation by Reference of Matters Outside the Pleadings

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Defendants frequently attach supporting materials to Rule 12(b)(6) motions to dismiss for failure to state a claim. The plain text of Federal Rule of Civil Procedure 12(d) dictates that judges must either exclude this material or treat the motion as one for summary judgment. However, a substantial exception has emerged that threatens to swallow the rule.

The exception, called incorporation by reference, permits the consideration of outside materials when they are either referenced in the pleadings, central to the claim, or sometimes both. Courts have defined these elements differently and have diverged in their understandings of the doctrine. Incorporation by reference appealingly offers an expedient route to resolve cases. But it also skirts the text and intention of the Federal Rules. This Comment explores the history of Rule 12(d), describes courts' varying uses of the exception, and proposes a unifying method of interpretation for the future. Drawing on other procedural rules and an analogous doctrine in contract law, it argues that only unmistakably referenced written instruments may be incorporated.

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INTRODUCTION

The sophisticated legal teams of the Trump Organization,[1] Justin Bieber,[2] ESPN,[3] and countless others have all deployed a litigation tactic that has received little comment from scholars.[4] Namely, they attached certain relevant materials to their Rule 12(b)(6) motions to dismiss. If judges consider this information, they "deviate from the general rule that courts, when ruling on a motion to dismiss, must disregard facts that are not alleged on the face of the complaint or contained in documents attached to the complaint."[5] Yet for the Trump Organization and ESPN, this strategy was successful. The district courts deviated from the general rule and dismissed the complaints. The circuit courts affirmed.[6]

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1 *See In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 368 n.9 (3d Cir. 1993).

2 *See* Copeland v. Bieber, 789 F.3d 484, 490 (4th Cir. 2015).

3 *See* Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

4 Practitioners have been comparatively prolific. *See, e.g.*, Laurence A. Steckman & Rita D. Turner, *Determining When Extrinsic Evidence Not Attached to or Incorporated by Reference in a Pleading May Be Considered on a Rule 12 Dismissal Motion*, 31 TOURO L. REV. 115, 128–31 (2015); Cathy Trent-Vilim, *Looking Beyond the Pleadings for Motions to Dismiss – Part 1 of 3*, LAMSON DUGAN & MURRAY (Dec. 21, 2018), https://perma.cc/2EJU-NXYU; Charles S. Fax, *When Is a Motion to Dismiss Not a Motion to Dismiss?*, 38 ABA SECTION LITIG. 4 (2013).

5 *Knievel*, 393 F.3d at 1076.

6 *Id.* at 1079; *In re Trump Casino*, 7 F.3d at 377.

This tactic implicates two of the Federal Rules of Civil Procedure—12(b)(6) and 12(d). Rule 12(b)(6) describes a defensive motion that attacks the legal sufficiency of a complaint ("failure to state a claim upon which relief can be granted"). Rule 12(d), describing the "Result of Presenting Matters Outside the Pleadings,"[7] explains how courts should adjudicate Rule 12(b)(6) and Rule 12(c) motions for judgment on the pleadings. On these motions, "[i]f . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."[8] Per 12(d), when defense teams like those of the Trump Organization, Bieber, or ESPN present "matters outside the pleadings" to the court on 12(b)(6) motions to dismiss, the court must ignore the matters or treat the motion as one for summary judgment.

Deviations from 12(d) are common, so common that they constitute a "judicially created doctrine"—incorporation by reference.[9] This Comment proposes that the doctrine is best understood to have two key elements. One element is reference: a plaintiff *references* a particular material in their complaint. The second is centrality: a particular material is *central*, or integral, to the claim. Courts tend to require one or both of these elements. If a defendant presents a matter that the plaintiff referenced in their complaint or was central to their claim, many courts will consider the material and decide the motion to dismiss without converting to summary judgment.

Despite these common components, the doctrine is interpreted differently among the circuits. Courts exhibit variation in the definitions of reference and centrality and whether they require one or both elements. The differences create the risk of expensive litigation to decide a threshold procedural question.

The variety creates a risk that a central material could be considered in one jurisdiction, resulting in the dismissal of the case, and excluded or converted to a summary judgment motion in another jurisdiction. If the motion to dismiss is denied or converted, the court opens the doors to discovery. The same case,

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7 FED. R. CIV. P. 12(d).

8 *Id.* This Comment will largely use "materials" to refer to outside matters to avoid confusion with other common legal uses of the word "matter."

9 *See, e.g.*, Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002–08 (9th Cir. 2018); Hi-Tech Pharm., Inc. v. HBS Int'l Corp., 910 F.3d 1186, 1189 (11th Cir. 2018).

same motion, and same materials could theoretically lead to divergent outcomes. The case might immediately end in the defendant's favor or progress to discovery, creating opportunity for the plaintiff to uncover damning evidence and for the case to resolve in the plaintiff's favor.[10] Incorporation by reference inherently adds volatility by carving out an exception to a clear rule, 12(d).

Yet courts have conscientious reasons for straying from the rule. Resolving a case at the motion-to-dismiss stage with dispositive attached materials allows for efficient adjudication of clear cases. As this Comment will demonstrate, the efficiency concerns that persuade modern courts to deviate from 12(d) were also persuasive to many courts and commentators of the early twentieth century. The current, fractured approach to incorporation-by-reference doctrine is a historical echo of the "speaking motion" debate of the 1940s.[11] The speaking-motion debate was resolved with the enactment of the rule that would become 12(d). This Comment will suggest how the modern fragmentation should be resolved.

Specifically, courts should adopt a new approach to the incorporation by reference. Only unmistakable references to written instruments should be incorporated by reference. By reformulating the incorporation-by-reference doctrine into a standard tied closely to the text of the Federal Rules and to an analogous doctrine in contract law, this Comment seeks to make the doctrine more uniform, predictable, and fair across the circuits.

Part I presents a brief overview of the Federal Rules of Civil Procedure that are most relevant to understanding 12(d). Part II describes the history of 12(d) and incorporation by reference. This history reveals the principled reasons for courts' attempts to consider outside material on motions to dismiss and the principled reasons for the prohibitions on considering such material. Part III compares the varying approaches among the circuits that

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[10] *Compare* Lihosit v. Flam, No. 15-1224, 2016 WL 2865870, at *4–5 (D. Ariz. May 17, 2016) (applying the Ninth Circuit's standard to determine that a body-camera video was central to an excessive-force claim and granting defendants' motion to dismiss with prejudice), *with* Channel v. Smith, No. 317-60, 2018 WL 1463356, at *2 (S.D. Ga. Mar. 23, 2018) (applying the Eleventh Circuit's standard to determine that a video was not central to an excessive-force claim and was a matter outside the pleadings, resulting in the denial of the defendants' motion to dismiss). *Cf.* Lesowitz v. Tittle, No. 17-cv-2174, 2018 WL 3993854, at *4 n.4 (N.D. Ohio Aug. 21, 2018) (describing a dashcam video of an incident giving rise to a § 1983 claim as "more consistent with evidence that would convert the motion to dismiss to a motion for summary judgment").

[11] Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 194 (1958).

implement incorporation by reference. This Part imposes a framework to reconcile circuit courts' divergent applications of incorporation by reference, examines the varied definitions of reference and centrality, and describes the trends exhibited by circuit courts' decisions. Part IV proposes a remodeled incorporation-by-reference standard—unmistakably referenced written instruments—which can maintain some of the doctrine's attractions while avoiding the pitfalls of the current disunity. It also addresses lingering objections.

I. PLEADINGS AND MOTIONS: THE RELEVANT CIVIL PROCEDURE BASICS

It is helpful to start by reviewing some Federal Rules of Civil Procedure and their interplay with 12(d)'s "matters outside the pleadings." To begin, what are pleadings? Defined in Rule 7, pleadings include complaints and answers to complaints.[12] Importantly, pleadings are set in opposition to motions, another type of litigation paper.[13] The complaint filed to commence an action is a pleading, but defendants can respond with either a variety of motions or an answer, a pleading that responds to the complaint's allegations.[14]

Rule 10 dictates the "form of pleadings."[15] Most crucially for our purposes, it explains that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."[16] This rule hints at the meaning of "matters outside the pleadings"[17] by defining what is "part of the pleading[s] for all purposes."[18] Accordingly, a court can consider exhibits attached to complaints, answers, or other pleadings as part of the pleadings. If an exhibit is instead attached to a motion, it falls outside this category, suggesting that the exhibit is not considered part of the pleadings.[19]

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12 The full list is a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and (if the court so orders) a reply to an answer. FED. R. CIV. P. 7.

13 *Id.*

14 *See* WILLIAM H.J. HUBBARD, CIVIL PROCEDURE: AN INTEGRATED APPROACH 280–83 (2021).

15 FED. R. CIV. P. 10.

16 FED. R. CIV. P. 10(c).

17 FED. R. CIV. P. 12(d).

18 FED. R. CIV. P. 10(c).

19 Importantly, in the first sentence of Rule 10(c), both pleadings and motions are mentioned. *See* FED. R. CIV. P. 10(c) ("A statement in a pleading may be adopted by

These distinctions have important consequences. When defendants respond to a complaint with an answer, they respond with a pleading and thus may attach exhibits that will be considered part of the pleadings. When defendants respond to a complaint with a motion, attached exhibits would be considered matters outside the pleadings. Therefore, a defendant's choice of response impacts what information is appropriately available to the court in adjudicating the dispute.

There are, of course, other distinctions between answers and defendants' defensive motions. First, answers require defendants to admit or deny the allegations asserted against them in the complaint.[20] This requirement may be costly. Because an admission in a pleading cannot be controverted at trial or on appeal, it binds defendants at an early stage.[21] Second, responsive motions take many different forms; 12(b) lists seven of them. Six of these defenses—including lack of personal jurisdiction, improper venue, and insufficient process—assert that the court cannot proceed with the action and do not address the merits of the claim.[22] The other defense—failure to state a claim upon which relief can be granted under 12(b)(6)—does address the merits by testing the legal sufficiency of the claim.[23] Given this substantive difference, it is perhaps unsurprising that 12(d) references 12(b)(6) specifically, prohibiting the use of matters outside the pleadings in considering 12(b)(6) motions.[24]

Rule 12(d) also specifically references 12(c), the motion for judgment on the pleadings.[25] Rule 12(c) is a noteworthy responsive motion. Most responsive motions, including all those listed in 12(b), must be asserted prior to a responsive pleading, like an answer.[26] Rule 12(c) is instead filed after the pleadings are closed.[27]

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reference elsewhere in the same pleading or in *any other pleading or motion*." (emphasis added)). The second sentence of 10(c) discusses only pleadings and does not mention motions. *See* FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of *the pleading* for all purposes." (emphasis added)).

20 FED. R. CIV. P. 8(b).

21 *See* Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152, 157–58 (2013).

22 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d ed. 2002).

23 *Id.*

24 As Rule 12(b)(1)–(5) and (7) motions are not mentioned in 12(d), exhibits may be attached and considered on those motions. *See, e.g.*, Grayson v. Anderson, 816 F.3d 262, 269 (4th Cir. 2016) (discussing exhibits and matters considered on a 12(b)(2) motion).

25 FED. R. CIV. P. 12(d) (referring to "a motion under Rule 12(b)(6) or 12(c)").

26 FED. R. CIV. P. 12(b).

27 FED. R. CIV. P. 12(c).

A defendant would generally file an answer first and then, believing that the complaint and response taken together show that the case should be resolved in his favor, file a 12(c) motion for judgment on the pleadings.

The normal courses of 12(b)(6) and 12(c) have important implications for the 12(d) context. A 12(b)(6) motion responds to the complaint. Any exhibits attached to the complaint are considered part of the pleading and can be addressed. A 12(c) motion would typically rely on a complaint and an answer. Any exhibits attached to the complaint or answer can be addressed as part of the pleadings. Consequently, if a defendant is willing to make the admissions and denials required in an answer, he may attach exhibits that will be considered as part of that pleading and later file his 12(c) motion in the hopes of getting the case dismissed. This means that 12(d) might not be particularly impactful for 12(c) motions. As long as defendants attach exhibits to their answers instead of to their 12(c) motions, they can avoid running afoul of 12(d). The option of an answer and 12(c) motion, as an alternative to a 12(b)(6) motion, is especially potent because all federal courts have held—though not always consistently—that when a 12(c) motion challenges the legal sufficiency of a claim, the standard to be used is identical to that used on a 12(b)(6) motion.[28]

Parties, however, rarely use 12(c). The preeminent civil-procedure treatise, by Professors Charles Alan Wright and Arthur Miller, describes it as "little more than a relic of the common law and code eras."[29] Indeed, in almost every case discussed throughout this Comment, the complaint is the only pleading, and defendants respond to that complaint by filing a 12(b)(6) motion to dismiss. Rule 12(c) motions for judgment on the pleadings are largely unaddressed in this Comment because in practice they are much less common in the incorporation-by-reference context than 12(b)(6) motions to dismiss. But their existence suggests that defendants have an effective procedural option. When defendants attach exhibits to 12(b)(6) motions and judges do not treat the motions as ones for summary judgment, the process directly contravenes the plain text of 12(d). Instead, if they filed an answer and 12(c) motion, they could gain the sought-after advantages within the confines of the Federal Rules.

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[28] WRIGHT & MILLER, *supra* note 22, § 1368 n.9 (collecting cases from each circuit and noting exceptions).

[29] *Id.* § 1369.

Rule 56, which governs summary judgment, is the last rule mentioned by name in 12(d). Rule 56 sets out that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[30] To support this factual claim, the party must cite to "particular parts of materials in the record" or show that the opposing party's cited materials do not establish whether there is a factual dispute or are not admissible in evidence.[31]

Rule 56 is central to understanding 12(d) because it distinguishes the factual materials presented in summary judgment motions from those presented in 12(b)(6) or 12(c) motions. When courts evaluate materials presented at summary judgment, Rule 56 specifies the standard in connection to evidence admissibility. When materials are presented at the 12(b)(6) stage, it is not clear how they should be evaluated. This uncertainty further justifies 12(d)'s mandate to either exclude the materials in question or convert to a summary judgment motion.

II. HISTORICAL ANALYSIS OF RULE 12(d)

The consideration of materials outside the pleadings at the motion-to-dismiss stage is not a new challenge. The framers of the Federal Rules seriously considered the issue and attempted to resolve it. Section A sets out the state of the law prior to the Federal Rules, the debate that ensued after the Rules were adopted, and the compromise that formed as a result. Section B then describes the major justifications and situations that caused courts to reinterpret the rule, carving out the sizable exception that became the incorporation-by-reference doctrine. Through the historical analysis, this Part illuminates arguments both for and against the rule that became 12(d).

A. Historical Perspective Regarding Matters Outside the Pleadings

At English common law, those with legal grievances could file a bill, the equivalent of a complaint, in the courts of equity.[32] The

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30 FED. R. CIV. P. 56(a).

31 FED. R. CIV. P. 56(c).

32 *See* David L. Noll, *A Reader's Guide to Pre-modern Procedure*, 65 J. LEGAL EDUC. 414, 417–23 (2015) (explaining the distinction between the common law and equity systems).

rules of the courts of equity were central to the evolution of U.S. federal courts.[33] In courts of equity, those responding to the bill would file an answer to counter the bill's factual allegations or a demurrer to counter to the bill's legal allegations.[34] The demurrer formally admitted that all the facts alleged in the declaration were true but argued that, despite their accuracy, the pleader was not legally entitled to a remedy.[35] The demurrer is the basis of the modern 12(b)(6) motion to dismiss.[36]

By the late nineteenth century, U.S. courts began to distinguish between types of demurrers. A demurrer that attempted to introduce factual material from outside the pleading was called a "speaking demurrer."[37] Federal courts strictly prohibited speaking demurrers; as one court noted, "[I]t is a fundamental principle of pleading that a demurrer must be based exclusively upon matter apparent on the face of the bill."[38] Defendants were not permitted to introduce new facts in the demurrer because it was intended to challenge legal sufficiency.[39] Rather, new relevant facts had to be introduced via answer.[40] This distinction was incorporated into the Federal Equity Rules, which preceded the Federal Rules of Civil Procedure.[41]

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[33] *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987) ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

[34] Noll, *supra* note 32, at 422.

[35] 2 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 12App.101[1] (3d ed. 2021).

[36] *See* McConville v. District of Columbia, 26 F. Supp. 295, 296 (D.D.C 1938) ("The motion to dismiss under the federal rules is essentially the same as the demurrer in the early equity practice.").

[37] Jeffries v. Fraternal Bankers' Rsrv. Soc'y, 112 N.W. 786, 788 (Iowa 1907) ("A demurrer which sets up a ground de hors the record, or a ground which to be sustained requires reference to facts not appearing upon the face of the pleading thus attacked, is said to be a 'speaking demurrer,' and is never held good.").

[38] Richardson v. Loree, 94 F. 375, 379 (5th Cir. 1899).

[39] *See* Stewart v. Masterson, 131 U.S. 151, 158 (1889) ("It is very clear that the present demurrer introduces as its support new facts which do not appear on the fact of the bill, and which must be set up by plea or answer."); *see also* WRIGHT & MILLER, *supra* note 22, § 1364.

[40] *See Stewart*, 131 U.S. at 158.

[41] *See* WRIGHT & MILLER, *supra* note 22, § 1364; *see also* Elevator Supplies Co. v. Peelle Co., 53 F.2d 93, 94 (E.D.N.Y. 1931) ("The motion must be heard and decided as upon demurrer. This means that the sufficiency of the bill cannot be tested through resort to any other pleading or affidavits containing denials or new matter." (citing Conway v. White, 292 F. 837 (2d Cir. 1923)).

1. The speaking-motion debate.

Adopted in 1938, the Federal Rules of Civil Procedure created an opportunity for change from the traditional resistance to speaking demurrers. After the first version of the Rules was adopted, commentators and even members of the Advisory Committee that drafted the Rules disagreed as to whether they permitted the consideration of outside materials in deciding motions to dismiss.[42] Judge Charles Clark, a principal architect of the Rules,[43] argued that 12(b) did and should permit extrinsic materials to be considered. The initial draft of 12(b) stated that "[e]very defense, in law or fact," shall be asserted in the responsive pleading, except for enumerated defenses.[44] Based on the text, Judge Clark argued that the broad "every defense" language carried over to the specific defenses of 12(b) motions (1) through (6).[45] This reading, encompassing factual defenses and legal defenses on the 12(b) motions, suggested that factual information could be presented by defendants.

Normatively, Judge Clark worried that "adoption of the old common-law rule against the speaking demurrer" would create the type of needless formalism that the Federal Rules were designed to avoid.[46] Given that summary judgment clearly allowed for the use of extrinsic materials, objecting to their inclusion on a 12(b) motion "makes small differences of form and designation as to a particular motion of perhaps decisive importance."[47] Rule 56 for summary judgment provides that the motion can be filed "at any time," limited in the original version of the Rules by days prior to a hearing[48] and in the modern wording by days after the

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42 *See* George C. Roeming, Note, *Speaking Motions Under New Federal Rule 12(b)(6)*, 9 GEO. WASH. L. REV. 174, 178–84 (1940).

43 Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

44 The relevant section of 12(b) read: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except [ ] the following defenses." MOORE ET AL., *supra* note 35, § 12App.06[1].

45 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364 (1st ed. 1969).

46 Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 286 (1942).

47 *Id.*

48 11 MOORE ET AL., *supra* note 35, § 56App.01[1] ("The motion shall be served at least 10 days before the time specified for the hearing.").

close of discovery.[49] Judge Clark's point is that a defendant could just as easily file a motion for summary judgment (and attach materials outside the complaint) as a motion to dismiss. This "mere form of allegation" would be "opposed to the spirit of the rules . . . for it requires decision upon the basis of the formal papers before the court, and not upon what counsel show to be the real issues."[50]

Judge Clark acknowledged, however, that other members of the Advisory Committee did not share his view, particularly as applied to 12(b)(6).[51] Those opposed to the speaking motions argued from the text of 12(b)(6). "[F]ailure to state a claim upon which relief can be granted"[52] explicitly refers to the "claim." Opponents argued that "stat[ing] a claim" could only mean a plaintiff's complaint, which should not be influenced by any additional matters that a defendant might want to include.[53]

The opponents' textual argument connected to arguments about the developing standards for ruling on a motion to dismiss. If a motion to dismiss solely challenged the sufficiency of the complaint—as tested by taking the allegations as true and determining if they were sufficient to claim relief—other material would confuse the standard.[54] Construing motions to dismiss to include extrinsic materials "would practically eliminate the necessity of [the summary judgment rule]"[55] and allow defendants to take the benefits of an answer without making any admissions.[56] Moreover, as one commentator noted, there might be no principled place to draw the line—judges could ostensibly admit oral testimony in support of the motion to dismiss, and the plaintiff would

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49 FED. R. CIV. P. 56(b) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.").

50 Clark, *supra* note 46, at 286.

51 1 FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938; AND OF THE SYMPOSIUM AT NEW YORK CITY, OCTOBER 17, 18, 19, 1938, at 75 (Edward H. Hammond ed. 1938); *cf.* 5 WRIGHT & MILLER, *supra* note 45, § 1366 ("There never has been any serious doubt as to the availability of extra-pleading material on these [12(b)(1)–(5)] motions.").

52 FED. R. CIV. P. 12(b)(6).

53 *See* Stanley E. Sparrowe, Note, *Pleading: Availability of a "Speaking Motion" Under Federal Rule 12(b)(6)*, 30 CALIF. L. REV. 92, 95 (1941).

54 Eberle v. Sinclair Prairie Oil Co., 35 F. Supp. 296, 299 (E.D. Okla. 1940), *aff'd*, 120 F.2d 746 (10th Cir. 1941).

55 *Id.* at 300.

56 *Cf. McConville*, 26 F. Supp. at 296 (overruling a motion to dismiss but allowing defendants to submit an answer instead, to take "whatever advantages might otherwise have been secured by the motion").

lose the opportunity for trial along with its protections of cross-examination and a jury.[57]

In the years after the adoption of the Federal Rules, courts used both approaches. As the Third Circuit acknowledged in *Gallup v. Caldwell*[58] in 1941, "whether the Federal Rules of Civil Procedure countenance a 'speaking' motion to dismiss[ ] has been much discussed since the adoption of the Rules."[59] *Gallup* involved a stockholder action in which the plaintiff alleged that the company had wasted its assets and earnings over a particular period of years. The court permitted consideration of an affidavit from the company's secretary that showed no record of stock in the plaintiff's name during the relevant time period.[60] The court allowed the affidavit, as ownership was a "prerequisite to the right to bring this action."[61] Otherwise, "[t]he alternative would be to sanction discovery and perhaps other pre-trial proceedings likely to be exceedingly burdensome upon both parties only to have the case ultimately dismissed at the trial because of the plaintiff's inability to prove a fundamental but initial point."[62] These results would waste the court's time and run counter to Rule 1, the mandate to secure the "just, speedy, and inexpensive determination of every action."[63]

Other courts, in contrast, doubled down on excluding outside materials. Particularly illustrative is *Sherover v. John Wanamaker*,[64] a patent-infringement suit involving mattresses that was filed in the Southern District of New York. Defendants attempted to submit an affidavit and a sample of the mattress as part of their motion to dismiss.[65] The court pointed out that even with the addition of these materials, the complaint stated a claim upon which relief could be granted on its face.[66] As affidavits could not be included on a motion to dismiss, the court recommended filing a summary judgment motion and establishing that the

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57 *See Sparrowe*, *supra* note 53, at 95–96.
58 120 F.2d 90 (3d Cir. 1941).
59 *Id.* at 92–93.
60 *Id.* at 93.
61 *Id.*
62 *Id.*
63 FED. R. CIV. P. 1.
64 29 F. Supp. 650 (S.D.N.Y. 1939).
65 *Id.* at 651.
66 *Id.*

sample was indeed the alleged infringing mattress through interrogatories.[67]

These cases highlight each side of the speaking-motion debate. While *Gallup* typifies courts' efficiency concerns, *Sherover* characterizes an insistence on procedures that allow systematic consideration of the outside material as evidence. In line with Judge Clark's arguments, the *Gallup* court eschewed formalistic adherence to the strict letter of the rules to efficiently address the merits of the case. The *Sherover* court faced an example of the slippery slope that concerned the commentators who opposed Judge Clark's position. Asked to consider a mattress sample on a motion to dismiss, the court insisted on the proper channels for presenting evidence at the summary judgment stage so that all parties would be satisfied about the identity of the sample.

2. Compromise—the precursor to Rule 12(d).

With the courts unsettled, the Advisory Committee took up the issue in the first round of proposed amendments to the Rules in 1946.[68] The Advisory Committee notes expressed that when outside materials were presented and could resolve the entire case, it was understandable that the circuit courts were reluctant to ignore them.[69] Despite this understanding, the committee embraced the approach of several early 1940s Second Circuit opinions that suggested motions to dismiss with extraneous matter could be treated as motions for summary judgment.[70] The committee sought to formalize this proposal and tie it specifically to the summary judgment rule.

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[67] *Id.* at 652.

[68] ADVISORY COMM. ON RULES FOR CIV. PROC., REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 8–9 (1946).

[69] *Id.* at 12:

> [W]here the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it.

[70] *Id.*; *see, e.g.*, Boro Hall Corp. v. Gen. Motors Corp., 124 F.2d 822, 823 (2d Cir. 1942) ("The motion to dismiss the complaint was accompanied by an affidavit which in turn was answered by the plaintiff without raising any material issues of fact. We see no reason why the application should not be treated as one for summary judgment under Section 56 of the Rules."); Samara v. United States, 129 F.2d 594, 597 (2d Cir. 1942).

The committee asserted three central justifications. First, "the term 'speaking motion' is not mentioned in the rules, and if there is such a thing its limitations are undefined."[71] Second, explicitly requiring the use of the summary judgment rule would provide the courts with a consistent, defined standard for ruling on the motion. It would prevent a court from resolving questions of fact, making it entirely clear that the case could not be resolved if a conflict of fact existed.[72] Lastly, the Committee noted that conversion to summary judgment would ensure that both parties had a reasonable opportunity to present outside information without surprise.[73]

With this amendment, the Committee sought to define and "regularize[ ] the practice" proposed by the Second Circuit.[74] The amendment read:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[75]

The change went into effect in 1948 as part of 12(b) and is substantively similar to the modern, restylized Rule 12(d).

The amendment represented a compromise between the two views on speaking motions.[76] Judge Clark, who had argued so emphatically that the Federal Rules allowed speaking motions, considered this "perhaps the most interesting of all the new amendments" and a win for his position.[77] From his view, the advantages of the amendment included that decisions would be "addressed as much as possible to the merits of the dispute, and not to the form," and 12(b)(6) motions would be "reduced in importance" because they could easily be converted to summary judgment.[78]

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71 ADVISORY COMM. ON RULES FOR CIV. PROC., *supra* note 68, at 13.

72 *Id.*

73 *Id.* at 15.

74 *Id.*

75 *Id.* at 8–9.

76 *See* Smith, *supra* note 43, at 928.

77 Charles E. Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 501 (1949).

78 *Id.*

B. Creation of the Exception to Rule 12(d)

After the amendment, many courts dutifully applied the new rule.[79] Appellate courts identified extrinsic information on district courts' records, noted when district courts failed to exclude it when ruling to dismiss the claim, and summarily reversed and remanded.[80] Given the sheer volume of motions to dismiss, however, it is perhaps unsurprising that, despite the rule, courts occasionally considered outside materials presented at the motion-to-dismiss stage. These occasional instances became cited precedents and gradually proliferated to create the full-fledged incorporation-by-reference doctrine.

A sea change began in the late 1980s and early 1990s. The Second Circuit's 1991 opinion in *Cortec Industries v. Sum Holding, L.P.*[81] characterizes courts' articulated reasons for creating an exception to 12(d)'s procedure. In this securities-fraud action, a defendant corporation attached documents to its motion to dismiss, including an offering memorandum and stock-purchase agreement, to help show that it was not a seller for purposes of the case.[82] The district court, wary of the extrinsic materials, ignored the outside materials and dismissed the action.[83] Although the Second Circuit did not need to reach the incorporation-by-reference question, the court nonetheless noted a conflict in its own precedent and addressed definitively whether the trial court could have examined the materials.

The *Cortec* court held that, despite 12(d), district courts were entitled to consider extrinsic evidence on motions to dismiss. To justify this conclusion, the court drew on Rule 10(c), the concept of notice, and the threat of nuisance litigation.[84] The court's holding represents an early form of the incorporation-by-reference doctrine. Because *Cortec* was cited in many other circuits' early incorporation-by-reference opinions, its justifications have been echoed and extended.[85]

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79 *See, e.g.*, Allison v. Mackey, 188 F.2d 983, 984 (D.C. Cir. 1951).

80 *See, e.g.*, Mantin v. Broad. Music, Inc., 248 F.2d 530, 531–32 (9th Cir. 1957).

81 949 F.2d 42 (2d Cir. 1991).

82 *Id.* at 46.

83 *Id.*

84 *Id.* at 47–48.

85 *See, e.g.*, Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998); Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993); Tierney v. Vahle, 304 F.3d 734, 738–39 (7th Cir. 2002).

1. The means—Rule 10(c).

Rule 10(c), as originally drafted, provided: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."[86] Whereas 12(d) describes the consequences of introducing matters outside the pleadings, 10(c) describes when matters are considered part of the pleadings—via adoption and attachment.

Most simply, 10(c) states that material attached to a plaintiff's complaint as an exhibit is part of the pleading. Similarly, a plaintiff could adopt statements in the complaint, such as a background section relevant to multiple claims, with a reference. These references might read something like this: "Each and every allegation set forth in paragraphs 1 through 45 of this Complaint is hereby repeated, reiterated, and realleged with the same force and effect and incorporated by reference as if fully set forth herein at length and in detail."[87]

Straying slightly from these straightforward applications, several courts have interpreted 10(c) to permit the inclusion of certain matters in the pleadings. This interpretation crucially avoids characterizing the materials as outside matters, which would require conversion to summary judgment.[88] A Second Circuit opinion illustrates the extension. The court reasoned that a magistrate judge was authorized to treat a letter (that had been clearly referenced in the complaint) "*as if* it had been incorporated by reference into the complaint," despite admitting that the letter was "[t]echnically . . . a matter outside the pleadings."[89] Through

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86 MOORE ET AL., *supra* note 35, § 10App.01[1]. This text may be compared with the current text, as it was amended in 2007, which the Advisory Committee "intended to be stylistic only." Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civ. Proc., to Hon. David F. Levi, Chair, Standing Comm. on Rules of Prac. & Proc., Report of the Civil Rules Advisory Committee 51 (June 2, 2006). The current text reads: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." FED. R. CIV. P. 10(c).

87 Antonio Gidi, *Incorporation by Reference: Requiem for a Useless Tradition*, 70 HASTINGS L.J. 989, 990 (2019) (recounting the "talismanic practice of repeating and realleging facts in each count in a pleading").

88 *See, e.g.*, Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997); Venture Assocs. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993).

89 Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Lab'ys, 850 F.2d 904, 910 n.3 (2d Cir. 1988) (emphasis added).

precedent,[90] treating a material "as if" it had been incorporated by reference became doctrine.

As stated in 10(c), parties may adopt statements—written sentences in a pleading—but not outside material, like introduced documents. By reinterpreting 10(c) to include documents in addition to statements, however, the Second Circuit charted a rule-based path that avoided the necessity of converting to summary judgment. As summarized in *Cortec*, "Relying on Rule 10(c), we have held that the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."[91]

2. The ends—notice and nuisance.

While 10(c) provided the means, notice provided the primary justification for the *Cortec* court. The court seemed concerned that a plaintiff could "so easily be allowed to escape the consequences of its own failure."[92] It would be unjust for a plaintiff to act strategically (or ignorantly) by choosing not to attach an integral document that would allow the court to resolve the easy case: "Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion."[93] Thus, the court determined that it was fairer to consider the document if the defendant presented it, even if the plaintiff had not. "Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a 12(b)(6) motion into one under Rule 56 is largely dissipated."[94]

To support its normative view, the court cited precedent that had relied on Wright and Miller.[95] The treatise stated that when "plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his

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90 *See* Goldman v. Belden, 754 F.2d 1059, 1066 (2d Cir. 1985); Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989).

91 *Cortec*, 949 F.2d at 47 (first citing *Cosmas*, 886 F.2d at 13; and then citing *Goldman*, 754 F.2d at 1065–66).

92 *Id.*

93 *Id.* at 44.

94 *Id.* at 48.

95 *Id.* at 47 (citing I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991)).

motion attacking the pleading."[96] The treatise section supported its proposition with two cases that highlighted the remaining confusion about the 1948 amendment.[97] The first was a speaking-motions case from 1941.[98] Citing to that case was misleading, given that it predated the amendment. The other cited case was decided after the amendment,[99] but the case cited exclusively to preamendment authority regarding judicial notice to justify considering contracts introduced to support the motion to dismiss.[100] The treatise citation added an imprimatur to the holding that may have been based largely on the confusion and conflict prior to the 1948 amendment.

The *Cortec* court also relied on the doctrine of judicial notice, particularly as used in the securities-fraud context. Judicial notice, a controversial and "frequently misunderstood" doctrine,[101] is beyond the scope of this Comment, but it is quickly apparent that the rule provides an appealing work-around for courts loath to convert to summary judgment. The relevant Federal Rule of Evidence states that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[102] The Second Circuit, which had recently permitted judicial notice of public-disclosure documents legally required to be filed with the SEC in another case, reasoned that the outside materials of the *Cortec* case were not dissimilar.[103]

Judicial and actual notice helped address concerns about nuisance litigation. Just as judicial notice helped avoid "[f]oreclosing resort to such documents [which] might lead to complaints filed solely to extract nuisance settlements," the court stressed that when plaintiffs had actual notice of the information in the documents, then they could be viewed by the court for the same

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96 *I. Meyer Pincus & Assocs.*, 936 F.2d at 762 (quoting 5 WRIGHT & MILLER, *supra* note 45, § 1327 & n.15).

97 5 WRIGHT & MILLER, *supra* note 45, § 1327, n.15.

98 *Id.* (citing Sinclair Refin. Co. v. Stevens, 123 F.2d 186 (8th Cir. 1941)).

99 *Id.* (citing Interstate Nat. Gas Co. v. S. Cal. Gas Co., 209 F.2d 380 (9th Cir. 1953)).

100 *See Interstate Nat. Gas Co.*, 209 F.2d at 384 (citing Nev-Cal Elec. Sec. Co. v. Imperial Irrigation Dist., 85 F.2d 886, 904–05 (9th Cir. 1936); Cohen v. United States, 129 F.2d 733, 736 (8th Cir. 1942); Boice v. Boice, 48 F. Supp. 183, 186 (D.N.J. 1943), *aff'd*, 135 F.2d 919 (3d Cir. 1943)).

101 Michael C. Zogby & Daniel A. Dorfman, *Judicial Notice: An Underappreciated and Misapplied Tool of Efficiency*, 84 DEF. COUNS. J. 1, 2 (2017).

102 FED. R. EVID. 201(b).

103 *Cortec*, 949 F.2d at 48.

reason.[104] As the Seventh Circuit has similarly stated, "[W]ere it not for the exception, the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit."[105] The shared sentiment was that if a plaintiff had notice of a relevant outside material and failed to attach it to his complaint because of oversight or malice, the court should consider the material to quickly end the nuisance litigation.

3. The proliferation of the exception.

The *Cortec* court's reasoning resonated with the other circuits. The Third Circuit, for instance, shared the court's notice concern. It held that a court could consider an extrinsic document because "[o]therwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."[106] Other circuits were initially convinced by the 10(c) adoption-by-reference reasoning, which treats materials referred to in the complaint as part of the pleadings.[107] And while certain circuits initially met the Second Circuit's "exception" with some skepticism—raising that it "doubtless reflects the pressure on judges in a busy court to dispose of meritless cases at the earlier opportunity"[108]—each circuit eventually carved out a similar exception.[109]

By 2007, even the Supreme Court seemed to have accepted the work-around. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[110] the Court made a brief and offhand comment on the outside-matters issue: "[C]ourts must consider the complaint in

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104 Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

105 *Tierney*, 304 F.3d at 738.

106 *Pension Benefit Guar. Corp.*, 998 F.2d at 1196.

107 *See, e.g.*, New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am., 18 F.3d 1161, 1164 (4th Cir. 1994) (citing *Cortec*, 949 F.2d at 47–48) (considering a union's constitution as adopted by reference).

108 *Tierney*, 304 F.3d at 738.

109 *See* Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498–99 (5th Cir. 2000); Amini v. Oberlin Coll., 259 F.3d 493, 503 (6th Cir. 2001); Andersen v. Village of Glenview, 821 F. App'x 625, 627 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1726 (2021); Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007); Horsley v. Feldt, 304 F.3d 1068, 1134 (11th Cir. 2002); Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995); Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014); Zak v. Chelsea Therapeutics Int'l, Ltd., 780 F.3d 597, 606 (4th Cir. 2015); Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004); Wolfing v. United States, 144 Fed. Cl. 516, 520 (2019).

110 551 U.S. 308 (2007).

its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[111] Though only a clause, this statement is taken as the Supreme Court's acceptance of the incorporation-by-reference doctrine.[112]

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The debate over materials outside the pleadings presented on motions to dismiss has taken different forms with similar normative concerns. Historically, speaking motions were disallowed because they added new factual information not present in the bill. After the adoption of the Federal Rules, extrinsic materials posed a dilemma. Notable proponents of including extrinsic material, like Judge Clark, believed that the prior prohibition was needless formalism that distracted from deciding cases on the merits and caused delay. Others worried that the formalism was necessary to prevent defendants from taking the benefit of an answer without the burdens of making admissions and to ensure that plaintiffs were not deprived of procedural safeguards for evidence. Divergent views created divergent approaches in courts.

The compromise, 12(d)'s predecessor, was enacted to promote consistency. Beginning in cases like *Cortec*, courts began to create an exception to the rule. When plaintiffs clearly had notice of the materials, following 12(d) by omitting the materials or converting to summary judgement seemed only to extend nuisance litigation. Each concern reflects a principled interpretation of the goals of litigation and the Federal Rules, but the new exception has again led to a fractured state of the law in need of resolution.

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111 *Id.* at 322 (citing 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004 & Supp. 2007)).

112 *See, e.g.*, Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018) ("Properly used, this practice has support. The Supreme Court stated [this] in *Tellabs*." (citing *Tellabs*, 551 U.S. at 332)); Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016); Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009).

III. CURRENT APPROACHES IN THE CIRCUITS

Every circuit has addressed incorporation by reference at some point,[113] but no uniform standard has emerged.[114] Painting in broad strokes, this Part suggests a framework for understanding courts' current approaches to the doctrine. It gathers courts' descriptions of the doctrine and distinctive precedents, which may reveal circuits' implicit approaches to incorporation by reference. With the important caveat that generalizing about any circuit's approach to this procedural tactic is difficult, this Part collects precedents that litigants might effectively employ to advocate that a judge consider certain materials at the motion-to-dismiss stage despite 12(d). The circuit court opinions of the past three decades indicate that three categories of extrinsic materials are currently considered under the incorporation-by-reference doctrine:

1. Materials referenced in and central to the complaint
2. Materials referenced in the complaint
3. Materials central to the complaint

This Part discusses various definitions of "reference" and "centrality," the doctrine's key elements. Some circuits appear to require both elements (category one), while other circuits appear to require only one or the other (categories two and three). This Part also briefly raises a potential third element—"undisputed authenticity." Courts frequently do not address this aspect, but

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[113] *See* Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498–99 (5th Cir. 2000); Amini v. Oberlin Coll., 259 F.3d 493, 503 (6th Cir. 2001); Andersen v. Village of Glenview, 821 F. App'x 625, 627 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1726 (2021); Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007); Horsley v. Feldt, 304 F.3d 1068, 1134 (11th Cir. 2002); Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995); Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014); Zak v. Chelsea Therapeutics Int'l, Ltd., 780 F.3d 597, 606 (4th Cir. 2015); Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004); Wolfing v. United States, 144 Fed. Cl. 516, 520 (2019).

[114] The American Law Report on incorporation by reference, first published in 1997, has since split into multiple, circuit-specific reports. *Compare generally* Kurtis A. Kemper, *What Matters Not Contained in Pleadings May Be Considered in Ruling on a Motion to Dismiss Under Rule 12(b)(6) of the Federal Rules of Civil Procedure or Motion for Judgment on the Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment*, 138 AM. L. REPS. FED. 393 (1997), *with generally* Danielle Bolong, *What Matters Not Contained in Pleadings May Be Considered in Ruling on Motion to Dismiss Under Rule 12(b)(6) of Federal Rules of Civil Procedure or Motion for Judgment on Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment—Eleventh Circuit*, 62 AM. L. REPS. FED. 3d Art. 5 (2021).

all have indicated its importance.[115] Each section highlights the plethora of open questions and confusion about incorporation-by-reference doctrine.

A. Reference

In order to clarify how various courts use incorporation-by-reference doctrine, it is important to understand how each of the key elements of this doctrine is defined. "Reference," even outside of the legal context, encompasses a wide range of definitions. *Merriam-Webster* defines "reference" as an "allusion, mention," "something . . . that refers a reader or consulter to another source of information," or a "consultation of sources of information."[116] This range hints at the operative question for the doctrine, as phrased by an exasperated Ninth Circuit: "How 'extensively' must the complaint refer to the document?"[117]

The Ninth Circuit itself has stated that plaintiffs must "refer[ ] extensively to the document"[118] and that "mere mention"[119] of a document's existence is not enough. Other circuits have used less stringent definitions. For example, the Sixth Circuit has held that an indirect reference is sufficient.[120] This definition allowed incorporation of a lease agreement based on the plaintiff's claim that "a thief broke into a warehouse located at 2602 NW 72nd Avenue, Doral Florida, and stole iPhones belonging to Berrylane."[121] Other courts have allowed not only documents "expressly mentioned in the complaint" but even documents "contemplated by" complaints.[122] Documents "referred to either directly . . . or by inference . . . in the complaint" could be incorporated.[123] For example, in a rental-lease suit where the plaintiff alleged in his complaint that he "entered into a business

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115 *See infra* notes 171–72 and accompanying text.

116 *Reference*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2012).

117 Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018) (quoting United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)).

118 *Ritchie*, 342 F.3d at 908. This language from *Ritchie* has been cited in over 700 cases per Westlaw's "Citing References." WESTLAW, http://www.westlaw.com (search "2003 WL 22004994" to select the case; then view the "Citing References" tab and search "refers extensively to the document").

119 Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010).

120 Berrylane Trading, Inc. v. Transp. Ins. Co., 754 F. App'x 370, 378 n.2 (6th Cir. 2018).

121 *Id.*

122 *E.g.*, Dittmer Props., L.P. v. FDIC, 708 F.3d 1011, 1021 (8th Cir. 2013).

123 *Id.* at 1021; *see also id.* at 1021 n.8 (incorporating two documents "mentioned, directly or by inference, in the complaint" but not incorporating a third).

agreement,"[124] the Eighth Circuit permitted incorporation of both a guaranty and a signed note.[125] This example prompts further questions about the clash of incorporation by reference with other vexing legal doctrines. What result when a court incorporates matters extrinsic to the pleadings that are contractual "extrinsic evidence"?[126]

Other circuits tend to use language so imprecise that it is difficult to characterize. The First Circuit calls for documents "sufficiently referred to in the complaint"[127]—language which has been cited in over 700 cases.[128] The Third and Fourth Circuits often call for "explicit[ ] reli[ance]."[129] The courts thus suggest a range of what may constitute reference without providing a clear basis for parties to predict whether a particular document may be considered on a motion to dismiss. The uncertainty adds to the overall expense of litigation, as litigants must determine not only how incorporation by reference might be used but also how "reference" is even defined.

B. Centrality

All circuits have at least discussed the "central"[130] (or "integral")[131] element of incorporation by reference. When attempting

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[124] Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 (8th Cir. 2003).

[125] *Id.* at 697 n.4.

[126] *See* Eric A. Posner, *Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998) (explaining extrinsic evidence). Indeed, many courts have drawn this analogy in references to the "four corners of the complaint." *See, e.g.*, Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991); Beveridge v. City of Spokane, No. 20-35848, 2021 WL 3082003, at *2 (9th Cir. July 21, 2021).

[127] *Watterson*, 987 F.2d at 3.

[128] *See* WESTLAW, http://www.westlaw.com (search "1993 WL 23908" to select the case; then view the "Citing References" tab and search "sufficiently referred to in the complaint").

[129] *See, e.g.*, Spizzirri v. Zyla Life Scis., 802 F. App'x 738, 739 (3d Cir. 2020) ("[A] court may also consider matters of public record and documents integral to or explicitly relied upon in the complaint without converting the motion to dismiss into a motion for summary judgement."); Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999) ("explicitly relied on in the complaint"); Copeland v. Bieber, 789 F.3d 484, 490 (4th Cir. 2015) (same); *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

[130] *Watterson*, 987 F.2d at 3 ("central to plaintiffs' claim"); *Collins*, 224 F.3d at 498–99 ("central to her claim"); *Amini*, 259 F.3d at 503 ("central to his claim"); *Andersen*, 821 F. App'x at 627 ("central to the plaintiff's claim"); *Knievel*, 393 F.3d at 1076 ("'central' to plaintiff's claim" (quoting *Horsley*, 304 F.3d at 1135)); *Alvarado*, 493 F.3d at 1215 ("central to the plaintiff's claim" (quoting Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002))); *Horsley*, 304 F.3d at 1134 ("central to the plaintiff's claim").

[131] *Int'l Audiotext Network, Inc.*, 62 F.3d at 72 ("Although the amended complaint in this case does not incorporate the Agreement, it relies heavily upon its terms and effect;

to define these vague terms, courts commonly discuss whether the material acts as the "basis" of the complaint.[132] The "usual example" of a central document is a contract in a breach-of-contract suit,[133] but the newspaper article relevant to a defamation suit[134] or the songs at issue in a copyright-infringement case[135] are similarly considered central.

Alternatively, some cases describe central materials as those required to evaluate a case. For example, an early First Circuit opinion describes a magazine story in a libel action: "[H]ere the article was not merely referred to in plaintiffs' complaint but was absolutely central to it. Plaintiffs unquestionably would have had to offer a copy of the article in order to prove their case."[136] Essentially, cases define central materials as those materials which are legally important.

Asking which materials are legally important, however, somewhat begs the question. While a defendant can present a document as central, and the court can find it to be central based on the limited information available, it is possible that the material would appear less central with more information. For instance, a third-party video of an arrest might appear central until undisclosed footage illuminates a different angle of the arrest and thus the case. This potential again highlights a rationale embedded in the text of 12(d). If litigants are given the "reasonable opportunity to present all the material that is pertinent,"[137] as 12(d) requires,

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therefore, the Agreement is 'integral' to the complaint." (quoting *Cortec*, 949 F.2d at 47)); *Schmidt*, 770 F.3d at 249 ("integral to the complaint"); *Zak*, 780 F.3d at 606 ("integral to the complaint"); *Kaempe*, 367 F.3d at 965 ("integral to [plaintiff's] conversion claim"); *see also Wolfing*, 144 Fed. Cl. at 520 ("integral to the claim").

[132] *See, e.g.*, *Schmidt*, 770 F.3d at 249–50 ("They are not integral to the complaint—the complaint was not 'based' on [extrinsic matter]." (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426)); Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) ("[Plaintiff's] claims do not turn on, nor are they otherwise based on, statements contained in the [outside matter]."); *Ritchie*, 342 F.3d at 908 ("[I]t may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."); Bryant v. Avado Brands, 187 F.3d 1271, 1280 n.16 (11th Cir. 1999) ("so central to the claim that it served as a basis").

[133] Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002); *see also* Banneker Ventures, LLC v. Graham, 798 F.3d 1119, 1133 (D.C. Cir. 2015).

[134] *See Knievel*, 393 F.3d at 1076 (citing *Horsley*, 304 F.3d at 1135).

[135] *See Copeland*, 789 F.3d at 490.

[136] Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988); *see also* Angstadt v. Midd-W. Sch. Dist., 377 F.3d 338, 342 (3d Cir. 2004) ("These requirements were integral to the complaint, as the [plaintiffs'] claim could not be evaluated without some reference to them.").

[137] FED. R. CIV. P. 12(d).

the court might make a better judgment about what materials are central to the case.

Without clear guidance, some district courts have begun to articulate more specific definitions. For example, many district courts[138] in the Fourth Circuit have coalesced around a more functional description of centrality. For these courts, "[a]n integral document is a document that by its 'very existence, and not the mere information it contains, gives rise to the legal rights asserted.'"[139] As Judge Michelle Childs acknowledged, this description "appears to be a higher standard than that suggested"[140] by the Fourth Circuit's "based on" or "form the basis for a claim" language.[141] While this suggested standard[142] existed prior to (and was ignored by) the Fourth Circuit in a 2016 incorporation-by-reference opinion, its ongoing use could indicate that district courts find it useful. Its persistence may indicate one possible way forward in defining centrality.

C. The Connection Between Reference and Centrality

Beyond the wide-ranging definitions of the key elements of incorporation, the circuits also appear to splinter regarding the connection between these elements. Some circuits seem to apply what this Comment calls a "disjunctive" version of the doctrine. For these courts, if an extrinsic material is either central *or* referenced, then it may be incorporated. Other circuits appear to apply a "conjunctive" version, meaning that materials must be both

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[138] In fact, eight of the nine district courts have used this standard at least once. *See* Chesapeake Bay Found. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 611 (D. Md. 2011); Tinsley v. OneWest Bank, FSB, 4 F. Supp. 3d 805, 819 (S.D.W. Va. 2014); Tisdale v. Enter. Leasing Co., No. 13-cv-221, 2013 WL 3227927, at *2 n.2 (W.D.N.C. June 25, 2013); Mozingo v. Orkin, Inc., No. 10-cv-71, 2011 WL 845896, at *4 (E.D.N.C. March 8, 2011); Alexander v. City of Greensboro, 762 F. Supp. 2d 764, 822 (M.D.N.C. 2011); Hendrix Ins. Agency v. Cont'l Cas. Co., No. 7:10-2141, 2010 WL 4608769, at *4 (D.S.C. Nov. 3, 2010); Walker v. S.W.I.F.T. SCRL, 517 F. Supp. 2d 801, 806 (E.D. Va. 2007); Herrmann v. Wells Fargo Bank, 529 F. Supp. 3d 549, 557 (W.D. Va. 2021).

[139] *Chesapeake Bay Found.*, 794 F. Supp. 2d at 611 (quoting *Walker*, 517 F. Supp. 2d at 806).

[140] United States v. Savannah River Nuclear Sols., LLC, No. 16-cv-825, 2016 WL 7104823, at *6 (D.S.C. Dec. 6, 2016).

[141] *Goines*, 822 F.3d at 166 (quoting Thompson v. Ill. Dep't of Pro. Reg., 300 F.3d 750, 754 (7th Cir. 2002)).

[142] A similar standard appears in district courts in the Third Circuit. *See, e.g.*, Sivolella v. AXA Equitable Life Ins. Co., No. 11-4194, 2012 WL 4464040, at *1 n.3 (D.N.J. Sept. 25, 2012) ("A document is essential if it creates the rights or duties that are the basis for the Complaint." (citing Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993))).

referenced *and* integral to the complaint. Logically, disjunctive courts permit a wider range of materials than conjunctive courts.

1. Disjunctive courts.

The First,[143] Second,[144] Third,[145] Eighth,[146] and Ninth[147] Circuits have found that extrinsic materials may be incorporated if central *or* referenced. The logical consequence is that a wider range of external materials may be considered: those that are only referenced in the complaint, only central to the claim, or both. For instance, though the Ninth Circuit has been critical of incorporation by reference,[148] it has also found that extrinsic materials were incorporated based on just one element. In *Knievel v. ESPN*,[149] celebrity stuntman Evel Knievel sued ESPN for an allegedly defamatory photo online. The court "affirmed the incorporation of materials that the complaint did not reference at all," namely the surrounding photos in the online spread, because "the claim necessarily depended on them" as crucial context.[150] The Ninth

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143 *See* Flores v. OneWest Bank, F.S.B., 886 F.3d 160, 167 (1st Cir. 2018) ("[W]e have held that we may make 'narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; *or* for documents sufficiently referred to in the complaint.'" (emphasis added) (quoting *Watterson*, 987 F.2d at 1)).

144 *See* Halebian v. Berv, 644 F.3d 122, 132 n.10 (2d Cir. 2011) ("[A] federal district court faced with a motion to dismiss might deem the board's written rejection of the plaintiff's demand to be incorporated by reference within, *or* integral to, the plaintiff's complaint." (emphasis added)); Alexander v. Bd. of Educ., 648 F. App'x 118, 120 n.2 (2d Cir. 2016) ("The district court properly considered Alexander's termination letter and the report . . . , both of which were either incorporated by reference in *or* were integral to the complaint." (emphasis added)).

145 *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426 ("[A]n exception to the general rule is that a 'document *integral to or explicitly relied* upon in the complaint'" may be considered "without converting the motion [to dismiss] into one for summary judgment." (alteration in original) (emphasis in original) (quoting Shaw v. Digit. Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996))).

146 *See* von Kaenel v. Armstrong Teasdale, LLP, 943 F.3d 1139, 1143 (8th Cir. 2019) ("While a court generally may not consider matters outside the pleadings on a motion for judgment on the pleadings, exceptions include: 'matters incorporated by reference *or* integral to the claim'" (emphasis added) (quoting Williams v. Emps. Mut. Cas. Co., 845 F.3d 891, 903–04 (8th Cir. 2017))).

147 *See Ritchie*, 342 F.3d at 908 ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document *or* the document forms the basis of the plaintiff's claim." (emphasis added)).

148 *See Khoja*, 899 F.3d at 1002.

149 393 F.3d 1068 (9th Cir. 2005).

150 *Khoja*, 899 F.3d at 1002 (citing *Knievel*, 393 F.3d at 1068).

Circuit has also arguably incorporated the reverse—noncentral materials that were referenced in the complaint.[151]

The First, Third, and Eighth Circuits have similarly incorporated materials because, though they were not referenced, they were central to the claim.[152] Though evidence of the reverse—that these circuits have incorporated referenced-but-not-central materials—is less clear, there are opinions that incorporate referenced documents without an explicit finding of centrality.[153] These cases again reveal the difficulty in defining centrality. Might a court consider a matter central but a party challenge its relevancy?[154] Centrality might be in the eye of the beholder.

Moreover, the fact that courts may incorporate materials based solely on centrality reveals that calling the doctrine "incorporation by reference" is something of a misnomer. Many disjunctive courts perpetuate this nomenclature, however, adding further confusion to the doctrine. *Knievel* encapsulates the contradiction: "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document . . . even though the plaintiff does not

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[151] In *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124 (9th Cir. 2015), the court incorporated a Department of Commerce white paper on a Sherman Act claim with no indication that the paper was at all integral to the claim. *Id.* at 1127 n.1 ("The white paper was cited repeatedly in the complaint and was therefore incorporated by reference.").

[152] *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426 (including an extrinsic matter despite the fact that "the Complaint [did] not *explicitly* refer to or cite" the extrinsic matter (emphasis in original)); Beddall v. State St. Bank & Tr. Co., 137 F.3d 12, 16–17 (1st Cir. 1998) (incorporating an agreement undisputedly not "incorporated [ ] therein by an explicit reference" because "the Agreement's centrality to the plaintiffs' contentions, as limned in their complaint, makes it in effect part of the pleadings"); Zean v. Fairview Health Servs., 858 F.3d 520, 527 (8th Cir. 2017) (considering business records not referenced by plaintiff but that were "embraced by the pleadings").

[153] *See* Fallon v. Mercy Cath. Med. Ctr., 877 F.3d 487, 493 (3d Cir. 2017) (incorporating an essay that the plaintiff had written and quoted in his complaint because the "[plaintiff] explicitly relied on it, and it was permissible for the District Court to consider it"); Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 34 (1st Cir. 2001); Usenko v. MEMC LLC, 926 F.3d 468, 471 n.3 (8th Cir. 2019) ("We also derive certain information from plan documents and an independent auditor's report dated December 31, 2014, which Usenko's complaint refers to directly and whose authenticity is not in question."); Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1063 n.3 (8th Cir. 2005) ("We may examine the press release in our consideration of the 12(b)(6) motion to dismiss, even though it was not expressly part of the pleadings, because it was incorporated into the pleadings by reference—the complaint specifically mentioned it as a ground for [plaintiff's] claims against [defendants].").

[154] *Cf. Alt. Energy, Inc.*, 267 F.3d at 34 (incorporating an agreement referred to "numerous times" despite the fact that appellants "challenge[d] the relevancy" of the agreement).

explicitly allege the contents of that document in the complaint."[155] The name "incorporation by reference" inherently emphasizes reference; it best describes the version of the doctrine requiring reference alone or reference and centrality. Using it to describe incorporation of unreferenced-but-central documents is inapt.[156]

The Seventh Circuit facially falls in the conjunctive camp. It frequently uses "and" language, holding that documents are "considered part of the pleadings if they are referred to in the plaintiff's complaint *and* are central to her claim."[157] Select opinions, however, suggest that the court will occasionally incorporate unreferenced-but-central materials. For example, in explaining its consideration of a collective bargaining agreement, the court conceded that, "[a]s it happens, the complaint in this case neither quoted from nor referred to the collective bargaining agreement; no mention of the CBA was made at all. Yet, there is no question that the plaintiffs' due process claim rests on the terms of the CBA."[158] This example reveals a gap between the Seventh Circuit's description of its standard and its implementation of that standard, making decisions by courts in the circuit even more difficult to predict.

This behavior accentuates the current confusion of the standard and serves as an important reminder that this Part describes doctrinal inclinations suggested by each circuit, not hard-and-fast rules. The difficulty in describing circuits' incorporation-by-reference doctrines is also consequential for litigants. Uncertainty increases the cost of litigation: more lawyers will spend more time—and clients' money—on attempting to answer this question.[159]

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155 *Knievel*, 393 F.3d at 1076.

156 Indeed, the Second Circuit avoids this application of the term by reserving the phrase "incorporation by reference" only for referenced documents. *See, e.g.*, *Alexander*, 648 F. App'x at 120 n.2. This Comment refers to all versions of the doctrine collectively as "incorporation by reference" to follow the nomenclature that is more prevalent in practice.

157 Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (emphasis added); *see also Andersen*, 821 F. App'x at 627 ("[C]ourts may consider outside exhibits that are central to the plaintiff's claim *and* referred to in the complaint, even if supplied by the defendants." (emphasis added)).

158 Minch v. City of Chicago, 486 F.3d 294, 300 n.3 (7th Cir. 2007); *see also* Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661 (7th Cir. 2002) ("Although [the plaintiff] did not refer explicitly to the Employment Agreement in his complaint, that agreement nevertheless falls within the exception.").

159 *Cf.* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) (describing "decision costs," including the costs of "supplying judges with information needed to decide the case at hand and formulate doctrines to govern future cases; the opportunity

2. Conjunctive courts.

The Fifth,[160] Sixth,[161] Tenth,[162] and D.C.[163] Circuits consistently describe incorporation by reference as requiring both centrality *and* reference. This dual requirement means that for 12(b)(6) motions to dismiss, the materials must be both central to the claim and referenced in the complaint for a judge to review those materials. These circuits' conjunctive approach is highlighted by cases in which courts refused to incorporate presented material that satisfied only one element.

One example is a recent Fifth Circuit Title VI case dealing with alleged race discrimination in a program that received federal funding.[164] An African American property owner alleged that a local port district had used coercive means to obtain property in his majority-minority neighborhood.[165] The port attempted to rely on documents, attached to a motion to dismiss, indicating that the port did not receive any federal funding.[166] Given the nature of the action, these documents were credibly central to the claim. However, as the plaintiff had not referred to the documents in

costs of litigation to litigants and judges . . . ; and the costs to lower courts of implementing and applying doctrines developed at higher levels").

[160] *See* Villarreal v. Wells Fargo Bank, 814 F.3d 763, 766 (5th Cir. 2016) ("The court may, however, also consider '[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint *and* are central to her claim.'" (alterations in original) (emphasis added) (quoting *Collins*, 224 F.3d at 498–99)).

[161] *See* Gavitt v. Born, 835 F.3d 623, 640 (6th Cir. 2016) ("However, a court may consider . . . exhibits attached to defendant's motion to dismiss, so long as they are referred to in the complaint *and* are central to the claims contained therein, without converting the motion to one for summary judgment." (emphasis added)); Scanlan v. Tex. A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003).

[162] *See Jacobsen*, 287 F.3d at 941 ("[T]he district court may consider documents referred to in the complaint *if* the documents are central to the plaintiff's claim." (emphasis added)).

[163] *See* Palmieri v. United States, 896 F.3d 579, 582 (D.C. Cir. 2018) ("We also take account of undisputedly authentic documents cited in *and* 'integral to' the complaint." (emphasis added) (quoting *Kaempe*, 367 F.3d at 965)); *Kaempe*, 367 F.3d at 965 ("[External documents] may be considered here because they are referred to in the complaint *and* are integral to Kaempe's conversion claim." (emphasis added)).

[164] *See* Rollerson v. Brazos River Harbor Navigation Dist., 6 F.4th 633, 638 (5th Cir. 2021).

[165] The court shared troubling history: "The neighborhood was created in the 1930s, when the Freeport city council designated the area as a 'Negro reservation' and forced all African-American residents, apart from live-in servants, to relocate there." *Rollerson*, 6 F.4th at 637.

[166] *See id.* at 639; The United States Army Corps of Engineers' Motion to Dismiss at 11, Rollerson v. Port Freeport, No. 18-CV-235, 2019 WL 6053410 (S.D. Tex. Nov. 15, 2019).

his complaint, the court determined that it could not apply the incorporation-by-reference exception.[167]

A Tenth Circuit case makes the distinction even more obvious. The plaintiff argued that two reports about the Denver Sheriff Department were central to his municipal-liability claim against Denver for a sheriff's excessive use of force.[168] As the reports were not published until after the plaintiff had filed his complaint and amended complaint, the plaintiff was rebuked for "ignor[ing] the clear language of our precedents, under which this exception applies only to 'documents referred to in the complaint.'"[169] Certain Sixth Circuit and D.C. Circuit opinions suggest a comparable approach.[170]

The Fourth and Eleventh Circuits also appear to approach incorporation by reference in this more restrictive manner, but these circuits often add a third element—undisputed authenticity. For instance, the Eleventh Circuit allows incorporation "when the plaintiff refers to the document in his complaint, it is central to his claims, and there is no reasonable dispute as to the authenticity of the document."[171] The Fourth Circuit explains that a material may be incorporated if "it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity."[172]

Although the Fourth and Eleventh Circuits most frequently include this requirement in articulating incorporation by reference, each circuit has noted the importance of authenticity

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[167] *See Rollerson*, 6 F.4th at 639 n.3 ("[Plaintiff] did not refer to those documents in his complaint, so this exception does not apply.").

[168] Waller v. City & County of Denver, 932 F.3d 1277, 1281 (10th Cir. 2019).

[169] *Id.* at 1283 (quoting *Jacobsen*, 287 F.3d at 941).

[170] *See* Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997) (considering documents central and referenced but refusing to consider documents "not mentioned directly or indirectly in the complaint"); *Banneker Ventures*, 798 F.3d at 1134 (relying solely on referenced portions of an external matter because the plaintiff's "claims here [we]re not based on" the matter).

[171] Booth v. City of Roswell, 754 F. App'x 834, 836 (11th Cir. 2018); *see also* Moore v. Camden Prop. Tr., 816 F. App'x 324, 327 n.3 (11th Cir. 2020) (incorporating an attached, central, and undisputed document); Adamson v. Poorter, No. 6-15941, 2007 WL 2900576, at *2 (11th Cir. 2007) (same). *But see* Brooks v. Blue Cross & Blue Shield, 116 F.3d 1364, 1369 (11th Cir. 1997) (requiring reference and centrality without mention of authenticity); Crespo v. Coldwell Banker Mortg., 599 F. App'x 868, 873 n.1 (11th Cir. 2014) (same); Muhammad v. JPMorgan Chase Bank, 567 F. App'x 851, 853 n.1 (11th Cir. 2014) (same).

[172] *Phillips*, 190 F.3d at 618; *see also, e.g.*, Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004) (quoting *Phillips*, 190 F.3d at 618); Blankenship v. Manchin, 471 F.3d 523, 526 n.1 (4th Cir. 2006) (citing *Am. Chiropractic Ass'n*, 367 F.3d at 234).

at some point.[173] For example, in the Denver municipal-liability case, the Tenth Circuit described its "limited exception" to 12(d) as follows: "[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity."[174] In the Denver case, as in the vast majority of incorporation-by-reference cases, authenticity was undisputed, and the element was not discussed.

Undisputed authenticity is a carefully worded element. Requiring authenticity would open a can of worms because authenticity must be established under the Federal Rules of Evidence,[175] not the Federal Rules of Civil Procedure. To require authenticity might mean that materials must comply with the Federal Rules of Evidence and that litigants and judges must address evidentiary issues at the motion-to-dismiss stage.

The element also evinces the fine, blurred line between the consideration of outside materials on motions to dismiss and evidence on motions for summary judgment. Rule 56, the summary judgment rule, indicates the relationship between the motion's supportive materials and evidence. It states that parties may object to a cited material if it could not be presented in a form that would be admissible in evidence.[176] Rule 12, the defenses and objections rule, lacks this purposeful procedure. Consequently, courts have expressed uncertainty regarding how outside materials are distinguished from evidence and how these authenticity challenges are adjudicated.[177] Thus, the link between Rules 12(d) and 56 is not a mere technicality but establishes important procedures.

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[173] *See, e.g.*, *Flores*, 886 F.3d at 167; Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006); *Pension Benefit Guar. Corp.*, 998 F.2d at 1196; *Goines*, 822 F.3d at 166; Walch v. Adjutant Gen.'s Dep't, 533 F.3d 289, 294 (5th Cir. 2008); Greenberg v. Life Ins. Co. of Va., 177 F.3d 507, 514 (6th Cir. 1999); *Minch*, 486 F.3d at 300 n.3; *von Kaenel*, 943 F.3d at 1143; Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994); *Alvarado*, 493 F.3d at 1215; *Kaempe*, 367 F.3d at 965; Int'l Fed'n of Pro. & Tech. Eng'rs v. United States, 111 Fed. Cl. 175, 183 (2013).

[174] *Waller*, 932 F.3d at 1282 (alteration in original) (quoting *Jacobsen*, 287 F.3d at 941).

[175] *See* FED. R. EVID. 901, 902.

[176] *See* FED. R. CIV. P. 56(c)(2).

[177] *See* Benson v. CIGNA Corp., No. CV 16-5019, 2016 WL 11745933, at *6 (C.D. Cal. Aug. 15, 2016) (assuming that "it is the Federal Rules of Evidence which govern this Rule 12(b)(6) 'authenticity' question"); *cf. Tierney*, 304 F.3d at 739 ("What would not be cricket would be for the defendant to submit a document in support of his Rule 12(b)(6) motion that required discovery to authenticate or disambiguate."); Foremost Ins. Co. Grand Rapids v. Enriquez, No. 13-cv-1604, 2013 WL 12090311, at *2 (S.D. Cal. Sept. 3, 2013) (declining to consider an exhibit because its authenticity was disputed and also

IV. GOING FORWARD

The complexity and fragmentation of the circuits' approaches surveyed in Part III suggest a problem. Rule 12(d) was adopted to establish a consistent procedure across the federal circuits. Without consistency, costly litigation over what materials can be considered and when is more likely. On close cases, courts might even grant dismissals based on a partial view of evidence that might be resolved differently with more evidence. This Part offers a solution to this problem by providing an interpretation of incorporation by reference that is closely tied to other Federal Rules and contract law (which has its own incorporation doctrine).

In short, this Part argues that only unmistakably referenced written instruments should be incorporated. Paralleling Part III, this Part discusses the recommended adjustments to the reference element, the centrality element, and their connection to one another. The reference element should be narrowed to only unmistakably referenced materials, a standard derived from contract law. The centrality element should be eliminated in favor of an element based on the type of material incorporated—written instruments. The connection between the elements—whether both are required or one is sufficient—should be answered definitively in favor of the more restrictive, conjunctive standard. This text-based solution suggests a path forward for all circuits to reestablish settled expectations for litigants.

A. Using Rule 10(c) to Define Incorporation by Reference

It is difficult to read 12(d) in isolation. The rule requires that if "matters outside the pleadings are presented to and not excluded by the court" on a 12(b)(6) motion to dismiss or a 12(c) motion for judgment on the pleadings, then the court must treat the motion "as one for summary judgment under Rule 56."[178] The rule hinges on "matters outside the pleadings," which neither the text nor the rule's notes define.

Rule 10(c) is the best way to fill this gap. Titled "Adoption by Reference; Exhibits," the rule states: "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all

declining to engage in Federal Rules of Evidence analysis despite specific evidentiary questions being raised).

178 FED. R. CIV. P. 12(d).

purposes."[179] By explaining what may be considered part of the pleadings, the rule can also be interpreted to define what materials are outside the pleadings. Thus, Section A.1 uses the first sentence of 10(c) to define reference by drawing a comparison to contract law. Section A.2 then recommends a limitation based on 10(c)'s second sentence in lieu of the atextual centrality element.

1. Contract law's unmistakability standard suggests a definition for "reference."

"Adoption by reference," as defined by *Black's Law Dictionary*, is a synonym for "incorporation by reference."[180] Incorporation by reference is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one."[181] Putting this definition and 10(c) together, if a statement in a pleading indicates that a secondary document should be treated as if it were contained within the primary one, then a motion could also adopt such a statement.

The operative question is what statements indicate that a secondary document should be treated as incorporated. This question is substantially the same as the courts' varying interpretations of reference reviewed in Part III.A: When is a document sufficiently referenced for incorporation? While the question is unsettled in the pleading realm, contract law provides a viable answer.

The *Black's Law Dictionary* definition of incorporation stems from contract, will, and patent law, all of which have their own incorporation doctrine.[182] This Comment borrows from contract law. Many courts have previously compared the issue of incorporation by reference of material extrinsic to the pleadings to the

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179 FED. R. CIV. P. 10(c).

180 *Adoption by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

181 *Incorporation by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

182 For wills, incorporation applies "only to clearly identified writings that existed when the testator signed the will," while in the patent context, "[i]ncorporation by reference is a necessity doctrine" that is allowed in constrained circumstances to reference other patents or graphic elements "when there is no other practical way to convey the information in words." *Incorporation by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272, 1283 (Fed. Cir. 2000) ("[T]he doctrine of incorporation by reference has its roots in the law of wills and contracts.").

extrinsic-evidence problem in contract law.[183] This Section operationalizes that analogy to use the more fulsome incorporation doctrine from contracts.

Under the common law of contracts,[184] "the document to be incorporated must be referred to and described in the contract in such a way that the document's identity is clear beyond doubt."[185] Applied in the civil-procedure context, this definition is a substantial limitation.[186] To unmistakably reference a material requires more than mere mention. For example, in-text references to "the plan"[187] or "surveillance video tape"[188] do not clearly identify any material beyond doubt. References to an apartment's address could not act as an indirect reference sufficient to incorporate the lease agreement.[189] By essentially requiring that the plaintiff cite or thoroughly describe the outside material, the court avoids any risk of unfair surprise. Although this contract-law reasoning may leave some variety in the materials sufficiently referenced, a standard is preferable to a bright-line rule in this context. Courts'

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[183] *See, e.g.*, Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991) ("[A] district court must confine itself to the four corners of the complaint when deciding a motion to dismiss under Rule 12(b)(6)."); Beveridge v. City of Spokane, No. 20-35848, 2021 WL 3082003, at *2 (9th Cir. July 21, 2021) ("In deciding motions for judgment on the pleadings, courts are limited to the four corners of the complaint."); Shaw v. Digit. Equip. Corp., 82 F.3d 1194, 1206 n.13 (1st Cir. 1996) ("We discuss more fully later the circumstances in which a court may look outside the four corners of a complaint in deciding a motion to dismiss."). *Cf. generally* Posner, *supra* note 126.

[184] *See, e.g.*, PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996) ("New York follows that common law rule by 'requir[ing] that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be *identified beyond all reasonable doubt*.'" (alteration in original) (emphasis in original) (quoting Chiacchia v. Nat'l Westminster Bank USA, 124 A.D.2d 626, 628 (2d Dep't 1986))); Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1344 (Fed. Cir. 2008) ("[T]he incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." (emphasis in original)).

[185] *Incorporation by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[186] *See infra* Part IV.B.1.

[187] *But see* Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997):

> Plaintiff references the "plan" numerous times in his complaint. Although plaintiff maintains that the complaint referred only to the "plan" as an entity and not to the "plan documents," his claims are based on rights under the plans which are controlled by the plans' provisions as described in the plan documents.

[188] *See* Benny v. City of Long Beach, No. 20-cv-1908, 2021 WL 4340789, at *9 (E.D.N.Y. Sept. 23, 2021).

[189] Under this Comment's approach, *Berrylane Trading, Inc. v. Transportation Insurance Co.*, 754 F. App'x 370, 378 n.2 (6th Cir. 2018), would come out differently. *See supra* text accompanying note 120.

rationales for incorporation by reference include concerns about strategic plaintiffs[190] but also can be read to reflect the desire to correct genuine failures. For instance, one might imagine that for a simple, pro se case, in-text descriptions of a particular document might suffice.[191] For a complex action with multiple versions of a document, a citation would likely be required.

2. "Written instrument" provides a textual limitation on incorporation by reference in lieu of centrality.

Unlike the reference element, which courts link to 10(c), the centrality element seems primarily derived from analogy or from a concern about strategic plaintiffs avoiding documents that may damage their case. Describing the centrality element, one court commented that "[t]he underlying premise of the doctrine seems to be that if the document was indeed so central to the claim that it served as a basis for the complaint, then plaintiffs must have already been aware of it" and thus do not need an opportunity for further discovery.[192] Without a textual link to the Rules, this element is even more amorphous.

Indeed, one of the few instances of scholarship to address incorporation by reference was devoted almost entirely to the Second Circuit's use of the "integral" standard and recommended a "but for" test to determine whether materials had been used to frame a complaint and thus could fairly be considered.[193] Though there is nothing inherently incorrect about a but-for test, it seems unlikely that circuits will adopt such a test without any basis in the rules. By instead substituting a limitation that is grounded in the Federal Rules, it is more likely that the circuits will reach a uniform standard.

Per the second sentence of 10(c), only copies of "written instrument[s]" become "part of the pleading[s] for all purposes."[194]

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190 *See, e.g.*, Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002) ("[T]he concern is that, were it not for the exception, the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit."); I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991).

191 *Compare* Wister v. White, No. 19-cv-5882, 2019 WL 6841370, at *1 n.2 (N.D. Cal. Dec. 16, 2019) (incorporating a document that the pro se plaintiff had referred to "multiple times" in his pleading), *with* Gill v. Frawley, No. 2-cv-1380, 2006 WL 1742738, at *6 (N.D.N.Y. June 22, 2006) (refusing to incorporate due to the plaintiff's loss of status as a pro se litigant).

192 Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1280 n.16 (11th Cir. 1999).

193 Steckman & Turner, *supra* note 4, at 128–31.

194 FED. R. CIV. P. 10(c).

A 2013 comment by Aimee Brown analyzed the history of Rule 10 to suggest that written instruments "generally consist[ ] of instruments being sued upon, such as contracts or agreements," or documents that serve the function of evincing legal rights and duties.[195] If incorporation by reference were limited to written instruments, defendants might be more effectively restrained from the "alluring temptation to pile on numerous documents to their motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage."[196] If plaintiffs may attach only written instruments to their complaints—and defendants only written instruments to answers—it is clear that defendants should not be allowed to attach a wider range of materials to a 12(b)(6) motion to dismiss.

There is some indication that this Federal Rules–based, textual reasoning is already persuading some circuits. The Second Circuit recently implemented a similar limitation. In *Lynch v. City of New York*,[197] a § 1983 action, the plaintiff attempted to incorporate a memo book by arguing that it was referenced by and integral to his complaint. The court, however, relying in part on the *Black's Law Dictionary* definition of written instrument, maintained that the record "plainly is not an 'instrument' on which Lynch can rely as defining rights, duties, entitlements, or liabilities."[198] The memo book was not incorporated. The case illustrates that some courts are willing to tailor their doctrinal approaches to the high standard suggested by the plain text of the Federal Rules.[199]

If "written instrument[s]"[200] are the only materials that can become part of the pleadings for all purposes, no audiovisual works would ever be considered incorporated by reference. This prohibition is dramatic given how common the use of audiovisual works in litigation has become.[201] Yet it is clearly possible for

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195 Aimee Woodward Brown, Comment, *Pleading in Technicolor: When Can Litigants Incorporate Audiovisual Works into Their Complaints?*, 80 U. CHI. L. REV. 1269, 1288–89 (2013) (quoting Bajwa v. Metro. Life Ins. Co., 804 N.E.2d 519, 531 (Ill. 2004)).

196 Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018).

197 952 F.3d 67 (2d Cir. 2020).

198 *Id.* at 79.

199 *Cf.* Doe v. N.Y. Univ., No. 20-cv-1343, 2021 WL 1226384, at *11 (S.D.N.Y. Mar. 31, 2021) ("The conclusion in *Lynch* was not dicta—it was essential to the court's holding—so the Court will embrace its holding here.").

200 FED. R. CIV. P. 10(c).

201 *See* Snowden Becker & Jean-François Blanchette, *On the Record, All the Time: Audiovisual Evidence Management in the 21st Century*, D-LIB MAG. (2017), https://perma.cc/UT25-YZ94.

courts to respect this total ban. District courts applying the new *Lynch* standard noted that, while the Second Circuit has historically used broader language to describe materials capable of incorporation, there has never been "a published opinion in which the Circuit has embraced as 'integral' a document that cannot reasonably be characterized as a written instrument."[202]

In practice, it seems that courts often interpret 10(c)'s "written instrument" language more broadly. Brown's research related to copyright cases "suggests that the term should include at least some audiovisual works."[203] Even in cases where incorporation by reference on a motion to dismiss is at issue, courts sometimes consider pictures attached to the complaint without mention of the written-instrument complication.[204] The Seventh Circuit, though declining to decide the issue, expressed the opinion that "it makes eminently good sense to extend the doctrine to cover such works, especially in light of technological changes that have occasioned widespread production of audio-visual works."[205]

Brown's research offers a functional definition of written instruments based on 10(c)'s history. She illuminates how a broader conception of written instruments might coherently permit audiovisual works as a practical concession to the proliferation of audiovisual works attached to pleadings. In particular, she suggests that there is strong evidence that copyrighted works, including audiovisual works, could be attached to pleadings. Extrapolating from copyrighted works and contracts, she suggests a central commonality of "evidenc[ing] legal rights and duties."[206] If an audiovisual work defines legal rights and duties, it could functionally be a written instrument.

While this functional definition is vastly more flexible than the plain text of "written instrument," it still creates a limitation. As applied to the *Knievel* case, for example, this standard would require that the allegedly defamatory photo should have been considered, at the motion-to-dismiss stage, as giving rise to the legal action. The photo arguably "defines rights, duties,

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202 *E.g.*, *Doe*, 2021 WL 1226384, at *11 n.6.

203 Brown, *supra* note 195, at 1295.

204 *See, e.g.*, *Knievel*, 393 F.3d at 1076 ("The Knievels attached to their complaint only the photograph and caption that they argue was defamatory, and they do not allege or describe the contents of the surrounding pages in their complaint.").

205 Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 691 (7th Cir. 2012).

206 Brown, *supra* note 195, at 1300.

entitlements, or liabilities."[207] This instance can be compared to audiovisual works that "do not manifest the existence of rights and duties, [ ] in claims like invasion of privacy, in which the audiovisual work serves as mere evidence of actions that may have infringed on preexisting rights."[208] This distinction would mean that videos would not be considered in civil rights cases, for example. There, audiovisual material would serve as evidence rather than as rights defining.

With the proliferation of audiovisual exhibits, courts will need to confront the "written instrument" language in 10(c). By tying the incorporation-by-reference doctrine to the text of 10(c), this Comment recommends that these principles rise and fall together. If courts elect to use the more expansive, functional definition suggested by the Seventh Circuit, the approach should be consistent for exhibits attached to pleadings and motions. If courts strictly follow the text of 10(c), like the Second Circuit, materials incorporated by reference should be limited to literally written instruments.

3. The proposed incorporation-by-reference doctrine requires both elements.

Crucially, both the unmistakable-reference and the written-instrument elements are vital to a Federal Rules–based incorporation-by-reference doctrine. If a written instrument is described so vaguely that a court cannot determine what was referenced, it should not be incorporated. Alternatively, if a material is undoubtedly referenced but is not a written instrument, incorporating the material would grant defendants leeway beyond the authorization of the Federal Rules.

Again, note that the disjunctive version of the rule, which permits central-but-unreferenced materials to be incorporated, is the most expansive version of the current doctrine. It is difficult to imagine that the Supreme Court, by arguably sanctioning consideration of "documents incorporated into the complaint by reference,"[209] intended to encompass unreferenced central materials. To create an exception to 12(d) that is truly based in 10(c),

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[207] *Id.* at 1284 (quoting *Written Instruments*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

[208] *Id.* at 1307.

[209] *Tellabs*, 551 U.S. at 322.

incorporated materials must be unmistakably referenced *and* written instruments.

B. Lingering Practical and Doctrinal Concerns

Not unlike the compromise that resulted in 12(d), this newly proposed compromise is subject to objections that it is both overly stringent and overly lenient. Efficiency-minded practitioners might object that limiting outside materials so severely at the motion-to-dismiss phase prolongs frivolous suits. Rules absolutists might respond by questioning how this exception to 12(d) coheres with the rest of civil procedure. This Section will address both concerns in turn.

1. Phased discovery and procedural alternatives allay efficiency concerns.

The proposed compromise might still create an opportunity for plaintiffs to "escape the consequences of [their] own failure[s]"[210] or, perhaps more accurately, strategically omit necessary outside materials. The real and significant result of adhering to 12(d) is the opportunity for discovery. The rule makes clear that "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."[211] Treatment as a summary judgment motion under Rule 56 would enable the nonmovant (here, the plaintiff) to show that it lacks "facts essential to justify its opposition,"[212] which would, in turn, justify discovery. Discovery not only increases costs but creates unwarranted leverage for even meritless cases to conclude in settlement payouts.[213]

Discovery, however, can be limited. As the Seventh Circuit reminded litigants worried about the expense of discovery in the summary-judgment context, judges have wide discretion to limit discovery according to the circumstances of the case: "District courts need not, and indeed ought not, allow discovery when it is clear that the case turns on facts already in evidence."[214]

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[210] *Cortec*, 949 F.2d at 47.

[211] FED. R. CIV. P. 12(d).

[212] FED. R. CIV. P. 56(d).

[213] *See generally* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989). *See also* Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 602 (2017).

[214] *Brownmark Films*, 682 F.3d at 691.

Particularly in supposedly frivolous cases, discovery could be specifically tailored to the potentially dispositive outside material.[215] For instance, in the early 1940s *Gallup* case, in which one issue was whether the plaintiff "was the owner of stock of Indian Company at the time of the grievances complained of,"[216] discovery could have been limited to this ownership question alone. Furthermore, a defendant can always avoid these problems by filing an answer, to which materials may be attached and considered as part of the pleadings under 10(c).

2. Historical resistance suggests that absolutism is untenable.

An alternative reaction might be that total elimination of the incorporation-by-reference exception is the best path forward. The clause in *Tellabs* might be more boilerplate than blessing, and the doctrine clearly contravenes the mandatory text of 12(d) and the intent of the Advisory Committee. The original text of the rule stated that the motion "shall be treated"[217] as one for summary judgment. "Shall" is widely understood in the legal field as mandatory language.[218] The modern text, which changed the language to "must be treated," is even clearer.[219] A transcript of the committee's lengthy discussion of the rule demonstrates unequivocally that the committee intended the rule to be mandatory.[220] Moreover, even under this Comment's proposal, courts must effortfully determine whether each presented material qualifies as an unmistakably referenced written instrument.[221] Issues of authenticity, raised at the end of Part III, would linger.

The impact of these issues is lessened by the solution proposed in this Part. An exception to the mandatory text is more logical when tied closely to the text of another Federal Rule. If a plaintiff makes an unmistakable reference to a particular

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215 *Cf.* Michael Thomas Murphy, *Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89, 97 (2016) (describing factors to determine proportional phased discovery).

216 *Gallup*, 120 F.2d at 92.

217 2 MOORE ET AL., *supra* note 35, § 12App.07[2].

218 *Shall*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("This is the mandatory sense that drafters typically intend and that courts typically uphold.").

219 FED. R. CIV. P. 12(d).

220 *See* 1 ADVISORY COMM. ON RULES FOR CIV. PROC., PROCEEDINGS 99–159 (1946). Specifically, the chairman of the committee stated, "[W]e don't want a judge deciding a case on affidavits other than in Rule 56." *Id.* at 153.

221 In *Khoja*, the Ninth Circuit spent close to ten pages of a thirty-one-page opinion determining whether various documents should be considered. 899 F.3d at 998–1008.

document, they ostensibly believe it to be authentic. If written instruments are the only materials considered, the court can evaluate if the instrument creates a claim upon which relief can be granted while drawing all inferences in favor of the plaintiff. Importantly, if there is a dispute about the document's authenticity or legal impact that requires more information, the court can deny the motion to dismiss or convert the motion into one for summary judgment to provide opportunity for further discovery.

The exception to 12(d) was created for clear, bordering on frivolous, cases. As the narrow exception expanded to become a distinct incorporation-by-reference doctrine, its purview has expanded as well. The new doctrinal formulation of incorporation by reference proposed in this Comment aims to add stricter limitations while permitting flexibility to cut short baseless cases. While this variation might not please the absolutist, 12(d) itself was a compromise. The resilience of courts' resistance to 12(d) indicates that a compromise is needed once more.

CONCLUSION

This Comment has synthesized the federal courts' fractured approaches to the incorporation-by-reference doctrine, described the doctrine's controversial past, and offered limitations to guide courts in the future. By ensuring that incorporation by reference is firmly grounded in 10(c) and contract law, where materials are also incorporated by reference, this Comment proposed a compromise that would greatly limit the materials that could be considered on a motion to dismiss. On this doctrinal version, only unmistakably referenced written instruments may be incorporated. With a more restrictive definition, incorporation by reference becomes a special case arising out of the Federal Rules rather than the exception that swallows 12(d).