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Administrative Law and Process

FOURTH EDITION

2025 SUPPLEMENT

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Chapter 1. Relating Individuals to Government

§ 1.02 Rules or Orders?

Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020) (case note)

Insert after note 1-9 on page 12.

S1-1 Consider the Eleventh Circuit's en banc decision in *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020), which highlights the critical task of precisely identifying the government action being challenged. That case involved a dispute over Florida's constitutional reenfranchising felons who completed "all terms of sentence including parole or probation." Fla. Const. art. VI, § 4(a). Specifically, in 2018, the Florida legislature enacted a statute defining "all terms of sentence" to include the "[f]ull payment" of restitution, fines, and fees, without regard to one's ability to pay. Fla. Stat. § 98.0751(2)(a). It remained a crime to vote without satisfying these reenfranchisement requirements.

Prospective voters brought suit, challenging the statute. Were the prospective voters challenging their disenfranchisement (for requiring completion of their payment obligations), the process for regaining their franchise, or both? To Chief Judge William Pryor and the majority, the lawsuit spoke only to the former:

> The constitutional provision [depriving all felons of the right to vote] is a law of general applicability that plainly qualifies as legislative action. And even if we accept the argument that [the constitutional amendment and reenfranchisement statute] deprive felons of the right to vote by conditioning reenfranchisement on the completion of all terms of sentence, those laws also qualify as legislative acts. The legislative and constitutional-amendment processes gave the felons all the process they were due before Florida deprived them of the right to vote and conditioned the restoration of that right on completion of their sentences.

Jones, 975 F.3d at 1048–49. To the four judges in dissent, the lawsuit represented something much broader:

> The Plaintiffs do not say [that the statute] or the Florida constitutional provision . . . were enacted without due process of law. This alone makes the majority's reliance on *Bi-Metallic* misguided. The majority also focuses exclusively on the removal of people from voter rolls [in its due process analysis]. However, I view the scope of the due process interest here to be much broader. People are deprived of a protected due process interest when they cannot register to vote because they lack reliable information about their outstanding [criminal payment] balances. People are likewise deprived of a protected due process interest when they don't vote for fear of criminal prosecution while they wait for the Division of Elections to review their voter registrations—a process that apparently takes years to complete. Meanwhile, elections will come and go. Because the Division's determinations are necessarily individualized and fact-specific, Florida's voter reenfranchisement scheme is one for which "persons [are] . . . exceptionally affected, in each case upon individual grounds" and entitled to due process.

Id. at 1061 n.1 (Martin, J., dissenting) (quoting *Bi-Metallic*, 239 U.S. at 446) (alterations in internal quotation original; citation omitted).

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Administrative law, then, involves a series of decisions about framing. So far, this chapter has introduced two big-picture questions that must be answered in every case—identifying the action being challenged and categorizing it as a rule, order, or something else. Often these will be straightforward questions; sometimes, like in the Eleventh Circuit's split decision, they will be contentious. In all cases, the answers will lead to more specific issues of framing that we take up in the remainder of this chapter and this book.

Miller v. Zoning Bd. of Appeals of Vill. of Lyndon Station, 991 N.W.2d 380 (Wis. 2023) (case note)

S1-2. In *Miller v. Zoning Board of Appeals of Village of Lyndon Statio*n, the Wisconsin Supreme Court addressed whether a zoning board member's participation in amending the Village's zoning ordinance violated the plaintiff's procedural due process rights. Specifically, the zoning board granted the applicant's application by a 2-1 vote, amending the Village's zoning ordinance to rezone the applicant's vacant property from residential to commercial. The deciding vote was cast by the mother of the property owner who applied for the zoning amendment. A neighboring property owner brought suit.

Citing *Jones* and other cases interpreting the federal due process clause, the court held that the vote did not violate procedural due process because it was a "legislative act." While "adjudicative acts" require "impartial decision-makers," legislative actions do not require "any process beyond that provided by the legislative process." The court explained that legislative actions "necessarily entail[] in 'political trading, compromise, and ad hoc decision making," and "the primary check on legislators acting contrary to public interest when legislating is the political process." Because the "legislative determination already provides all the process that is due, partiality on the part of the legislators does not violate the Due Process Clause."

Here, the court held that the rezoning ordinance was a legislative act because it involved an amendment to "the Village's generally applicable zoning ordinance. In other words, the Village Board changed the law. It did not apply existing law to individual facts or circumstances, as it would if it were making an adjudicative decision like whether to grant a variance or permit a legal non-conforming use." The court acknowledged that "this particular amendment came about only after [the applicant] applied for the zoning change and affected only the [applicant's] property directly. But that does not alter our analysis." It did not matter that "the number of people affected . . . is small." Instead, the court held, "What matters is that the Village Board made a prospective change by enacting, repealing, or amending existing generally applicable law. The Village Board's action was thus legislative in nature, and for that reason, [the plaintiff] was not entitled to an impartial decision-maker."

In light of *Londoner*, *Bi-Metallic*, and *Jones*, what do you make of the Wisconsin Supreme Court's analysis? How does the court determine that the zoning board's action was legislative in nature? Does the court's approach seem formalist or functionalist?

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Chapter 2. Due Process and Administrative Adjudication

§ 2.05 Due Process Methodology

Insert after note 2-26 on page 85.

AstraZeneca Pharms. LP v. Sec'y United States Dep't of Health & Hum. Servs., 137 F.4th 116 (3d Cir. 2025) (case note)

Note 2-26A. A recent Third Circuit decision illustrates a typical property interest analysis. In 2022, Congress created the "Drug Price Negotiation Program" which directed the Centers for Medicare & Medicaid Services (CMS) to negotiate (and ultimately set) Medicare prices for certain expensive drugs. For drugs that are subject to the Program, the law sets price ceilings of no more than 75 percent of the private market price.

Pharmaceutical company AstraZenica sued, alleging (among other things) that the Negotiation Program infringed on its property rights without due process of law by "limit[ing] its ability to sell its drugs at a market rate." To support its claim to a property interest, AstraZenica pointed to its "patents and regulatory exclusivity periods."

The court rejected this argument. It explained that although "patent rights exist to permit greater profits during a product's exclusivity period to incentivize innovation," they "do not create any affirmative right to make, use, or sell anything"—let alone any "right to sell at a particular price." Thus, the court concluded, "[t]here is no protected property interest in selling goods to Medicare beneficiaries (through sponsors or pharmacy benefit plans) at a price higher than what the government is willing to pay when it reimburses those costs. AstraZeneca's asserted interest does not "resemble any traditional conception of property," *Town of Castle Rock*, and AstraZeneca has no more than "a unilateral expectation" of that interest, *Roth*.

Insert the following section heading before Note 2-36 on page 92.

A. Reputational Interests and "Stigma-Plus" Claims

Insert after note 2-36 on page 92.

Note on Flyer from Paul v. Davis

Note 2-36A. The "active shoplifter" flyer from *Paul v. Davis* is available at https://biotech.law.lsu.edu/cases/adlaw/Paul-v-Davis-Flier.pdf. Mr. Davis (the plaintiff-respondent in *Paul v. Davis*) is pictured on page 3. What do you make of Davis's argument that his inclusion in this flyer violated a due process interest? Why do you think Rehnquist held that this was a matter for state tort law?

Insert the following materials after Note 2-39 on page 100.[1]

Doe v. Purdue University, 928 F.3d 652 (7th Cir. 2019) (case note)

Note 2-39A. Contrast the result and discussion in *Fritz* with *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), authored by then-Circuit Judge (and current Supreme Court Justice) Amy Coney Barrett. *Doe* involved the sufficiency of the complaint of a Purdue University student who complained of being suspended for sexual misconduct. John Doe's property interest claim foundered because "a college education . . . is not 'property' in the usual sense of the word" (though this is the subject of a circuit split).[2]

[1] Notes 2-39A and C are adapted from Aman, Rookard & Mayton, Administrative Law 170–73 (West Academic Publishing, 4th ed. 2023)

[2] Judge Barrett explained: "The First, Sixth, and Tenth Circuits have recognized a generalized property interest in higher education. The Fifth and Eighth Circuits have assumed without deciding that such a property interest exists. The Second, Third, Fourth, Ninth, and Eleventh Circuits join us in making a state-specific inquiry to determine

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In contrast, (citing *Goss v. Lopez*, *infra* § 2.09) "[h]igh school students (and, for that matter, elementary school students) have a property interest in their public education because state law entitles them to receive one." Doe failed to "point to any specific contractual promise that Purdue allegedly broke" or otherwise "identify a state-granted property right to pursue higher education."

But Doe's liberty interest claim stood on stronger footing, because he also complained that the action led to a deprivation of "his freedom to pursue naval service, his occupation of choice," after Purdue told the Navy of the misconduct finding and the Navy kicked Doe out of the Navy ROTC program. Judge Barrett explained: "To succeed on this theory, John [Doe] must satisfy the 'stigma plus' test, which requires him to show that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held."

The court concluded that Doe sufficiently alleged such a claim. First, Purdue decision to tell the Navy about the misconduct finding against Doe "stigmatized" Doe. Second, Purdue's alleged actions went beyond mere stigma. Unlike the case of "state-spread rumors or an investigation that was ultimately dropped," Purdue's misconduct finding "changed John's status: he went from a full-time student in good standing to one suspended for an academic year." The additional damage allegedly done to John's career was the result of "this official determination of guilt, not the preceding charges or any accompanying rumors, that allegedly deprived John of occupational liberty. It caused his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his re-enrollment in it."

Doe v. Trs. of Indiana Univ., 101 F.4th 485 (7th Cir.), cert. denied, 145 S. Ct. 546 (2024) (case note)

Note 2-39B. In contrast to the Purdue University student in *Doe v. Purdue*, in *Doe v. Trustees of Indiana University*, John Doe successfully identified a property interest in his medical school education at Indiana University. Judge Frank Easterbrook explained:

> The University is right that property interests depend on statutes and contracts that create legitimate claims of entitlement, see *Board of Regents v. Roth*, but wrong to think that property lies in specific procedural promises. Under the Supreme Court's positivist approach, statutes and contracts create legitimate claims of entitlement, while constitutional law identifies the process due. As far as we can see, Indiana University entitles medical students to finish their educations unless specified events happen—failure to pay tuition, poor grades, violence against other students, and similar matters. The University does not assert that [the dean] had authority to expel Doe for any reason [the dean] chose, such as wearing loud clothes or mocking the football team. Doe thus had a legitimate claim of entitlement to remain a student unless he transgressed a norm. That's a property interest in constitutional lingo and requires some kind of hearing.

What lessons might you take for demonstrating property interests in future cases, both in the higher education context and otherwise?

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whether a property interest exists." *Id.* at 659 n.2; *see, e.g.*, R. George Wright, *Due Process on Campus: Where Do Procedural Rights Come from, and What Do They Require?*, 22 NEV. L.J. 281 (2021) (describing the state of the law and observing that "there is nothing approaching a consensus on the source of any possible procedural due process rights to which public university students may be entitled").

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Terrorist Watchlist Cases (case notes)

Note 2-39C. Judge Barrett's property interest analysis in *Doe v. Purdue* should sound familiar, as the Seventh Circuit analyzed Indiana law to determine that Doe lacked a property interest in his education. The liberty interests at issue in cases like *Doe v. Purdue*, *Beley v. City of Chicago*, and *Fritz v. Evers*, are, as Judge Barrett explained, flavors of "Stigma-plus" claims. Stigma-plus cases build on *Roth*'s and *Paul*'s conclusions that a plaintiff may have a viable due process liberty interest if stigma is accompanied by some additional threatened injury.

Another burgeoning area of significant stigma-plus litigation involves a pair of terrorist watchlists contained within the Terrorist Screening Database (TSDB): the "Selectee List" and the No Fly List. The Fifth Circuit concisely described the significance of these watchlists:

> Inclusion on either comes with consequences. The No Fly List is exactly what it sounds like: a list of individuals that the TSA prohibits from flying. In contrast, someone on the Selectee List may still fly. The TSA, however, will subject the individual to "enhanced screening" before boarding. According to the Government, enhanced screening differs from standard screening in two ways. First, it takes more time for the passenger. The TSA will search the passenger's person multiple times and in multiple ways instead of using a single search. Second, the screening itself is more intrusive. TSA will search the passenger's property for trace amounts of explosives, physically search luggage, power electronics on and off, and examine the passenger's footwear.
>
> Still, merely undergoing enhanced screening does not mean that the TSA has placed a passenger on the Selectee List. According to the Government, any passenger with an "SSSS" printed on his boarding pass must undergo enhanced screening. And those passengers might have an SSSS printed on their boarding passes due to inclusion on the Selectee List, "random selection," or "reasons unrelated to any status." . . . . The Government neither confirms nor denies who is included on either list since that would reveal information of "considerable value" to terrorists.[3]

Because inclusion on the TSDB is secret (though one may infer that they are on the No Fly List when they are not permitted to fly), allegations of inclusion on the Selectee List are usually based on excessive "enhanced security screenings" on multiple flights. Several courts of appeals have recently addressed liberty interest due process claims by individuals who believed they were listed on the Selectee List. In *Ghedi v. Mayorkas*, 16 F.4th 456 (5th Cir. 2021), the Fifth Circuit made quick work of the plaintiff's claim, noting that the plaintiff was required to "plausibly allege both 'stigma' and 'an infringement of some other interest [i.e., the "plus"].'" He plausibly alleged neither; the plaintiff's "status on the Selectee List is a Government secret," and "Secrets are not stigmas." Additionally, the court observed that the plaintiff "has no right to hassle-free travel."

In *Elhady v. Kable*, 993 F.3d 208, 217 (4th Cir. 2021), the Fourth Circuit reached a similar conclusion on similar facts, rejecting the plaintiff's more detailed allegations regarding both public dissemination and additional infringement. First, the plaintiff alleged that the government made the TSDB available to certain private entities, such as those involved with national security. But the court held that dissemination is a matter of degree: under circuit precedent, "plaintiffs must plead more than the simple act of making derogatory information available; they must prove that information is likely to be inspected by prospective employers." Despite completing discovery, the plaintiffs failed to make this showing and did

[3] Ghedi v. Mayorkas, 16 F.4th 456, 460 (5th Cir. 2021).

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"not point to specific instances where private employers looked at this evidence or made employment decisions based upon it."

In *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019), the plaintiff alleged a list of possible stigmatizing consequences from his inclusion on the Selectee List, including, "potentially," restrictions on accessing the financial system and bank accounts, sponsoring the permanent residency of relatives, entering other countries, purchasing a gun, obtaining hazardous material licenses, working for an airline, or obtaining an FAA license. But, again, the plaintiff failed to state a claim. His litany of complaints "suffer[ed] from two infirmities": First, the plaintiff "failed to specifically allege that he has actually been prevented from participating in any of the above activities. His allegations are entirely speculative." Second, as in the other cases, the plaintiff failed to allege that the government distributed the watchlist. The court held that the plaintiff failed to meet a further requirement: the plaintiff also needed to allege that the "government mandates that the private and public entities in receipt of the list refuse to offer service or employment to the listed individuals." The plaintiff alleged "that the government disseminates the watchlist 'with the purpose and hope' that the entities and individuals that receive it 'will impose consequences on those individuals.' But a 'purpose and hope' is not a mandate.'"

In contrast to this trio of Selectee List cases, the plaintiff-appellant in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), a recent Ninth Circuit case, alleged that he was listed in both the broader TSDB and, more specifically, the No Fly List. While the was ongoing pended, the government removed the plaintiff from the No Fly List and committed that it wouldn't put him back on the List "based on 'currently available information.'" The Ninth Circuit reversed the district court's finding that the plaintiff's stigma-plus claim was moot.[4] Declining to opine in the first instance on the merits of the plaintiff's claimed liberty interest, the Ninth Circuit suggested that, "[c]onsidering [the plaintiff's] placement on the No Fly List and his alleged presence in the broader [TSDB] together, both the reputational injuries and the 'plus' factors . . . may be more numerous and more substantial than the district court believed."

These cases illustrate the high bar for stigma-plus claims, especially in this context. In the Fifth Circuit case of *Ghedi v. Mayorkas*, for example, the plaintiff described how it took him an hour simply to check in, another hour for TSA inspections, and, for international travel, three hours or more of questioning plus the confiscation of his laptop and phone for up to three weeks. In a world where multi-hour travel delays often provoke viral social media posts, these far exceed what an average U.S. citizen might call an inconvenience. Despite these consequences, these courts unanimously concluded that, on its own, inclusion on the secret Selectee terrorist watchlist does not trigger a reputational due process interest.

Trump's Executive Orders Regarding Law Firms (case notes)

Note 2-29D. Donald Trump has issued several executive orders targeting law firms with a history of working with Democrats or supporting liberal causes. Among other things, the executive orders threaten to suspend security clearances for the firms' attorneys, terminate government contracts with the firms and their clients, limit federal building access, refuse to hire the firms' employees, and further investigate the firms' hiring practices.

While some firms have reached controversial agreements with Trump to avoid these consequences, others have sued in federal court. Thus far, the firms that have pursued lawsuits have achieved a 4-to-0 record in the district court, with appeals pending or forthcoming.[5] Among other things, the suing firms have alleged that Trump's actions violated their due process rights.

[4] In similar circumstances, the Fourth Circuit came to the opposite conclusion on the mootness issue. Long v. Pekoske, 38 F.4th 417, 424–25 (4th Cir. 2022).

[5] Perkins Coie LLP v. U.S. Dep't of Just., No. 25-CV-716, —— F. Supp. 3d ——, ——, 2025 WL 1276857, at *49 (D.D.C. May 2, 2025), *appeal filed* (D.C. Cir.); Jenner & Block LLP v. U.S. Dep't of Just., No. 25-CV-916, —— F.

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Before Chief Judge , Susman Godfrey prevailed on a variety of "stigma-plus" and other due process theories:

> *Right to pursue chosen profession.* Susman attorneys have the right to pursue their chosen profession—law. The Constitution safeguards an individual's "right to follow a chosen trade or profession" against governmental intrusions. *Kartseva v. Dep't of State*, 37 F.3d 1524, 1529 (D.C. Cir. 1994) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895-96 (1961)). Governmental action that creates "a stigma or other disability that foreclose[s] [the plaintiff's] freedom to take advantage of other employment opportunities" is prohibited. *Roth*. The stigma may either "formally or automatically exclude[ ] [the plaintiff] from work on some category of future ... government employment opportunities" or have "the broad effect of largely precluding [the plaintiff] from pursuing her chosen career."
>
> Here, the Order creates both sets of stigmas. First, the Order formally excludes the firm and its employees from being employed by the federal government or working on government contracts. Second, the Order has a preclusive effect on Susman's practice of law. The Order directs the government to terminate contracts with Susman's clients, pressuring clients to terminate their representation agreements with Susman and virtually shunning the firm as persona non grata. By banning Susman employees from government buildings and from engaging with government officials, the Order prevents the firm's attorneys from going to their place of work (the courts) and engaging in their daily business (discussing cases with the government). Accordingly, the Order violates the right of Susman and its attorneys to pursue their chosen profession.
>
> *Susman's reputation.* Relatedly, Susman has a liberty and a property interest in its "good name, reputation, honor, [and] integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). This interest is particularly acute in the legal profession, where each state bar requires a showing of honor and integrity for certification. Against this, the Order is especially pernicious. The Order tarnishes, without process, Susman's reputation with salacious allegations of wrongdoing—references to "egregious" actions by Susman and a statement that the firm has "degrade[d] the quality of American elections"—and it brands Susman as unfit for government work, or even government interaction. The government is required to provide process when it issues "findings of wrongdoing" that "could have an adverse impact on [an organization]'s reputation." *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 256 (2012). Thus, the Order violates Susman's interest in its reputation.
>
> *Contracts with clients.* Finally, the Order deprives Susman of its interest in contracting with clientele. The Order attaches a penalty to Susman's representation: if a client chooses Susman under the Order's regime, that client loses their government contract. The Order therefore violates the firm's interest in being able to contract with clients.[6]

Supp. 3d ——,2025 WL 1482021, at *26 (D.D.C. May 23, 2025) (appeal filed); Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of President, No. 25-CV-917, —— F.Supp.3d ——, 2025 WL 1502329, at *33-34 (D.D.C. May 27, 2025) (appeal filed); *Susman Godfrey LLP v. Exec. Off. of President*, —— F.Supp.3d ——, No. CV 25-1107 (LLA), 2025 WL 1779830 (D.D.C. June 27, 2025).

[6] *Susman Godfrey*, 2025 WL 1779830, at *19–20.

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Perkins Coie prevailed on the theory that Trump's order deprived it of its protected right to petition the government:

> The Supreme Court has recognized that "[t]he very idea of government, republican in form, implies a right on the part of its citizens to ... petition for a redress of grievances," and that this right "is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." This liberty interest in petitioning the government is so fundamental, therefore, that it is protected under the due process clauses of both the Fifth and Fourteenth Amendments.
>
> The right to petition the government "extends to all departments of the Government" and, crucially, includes "[t]he right of access to the courts." Moreover, retaliation based on the exercise of the right to petition the government via access to the courts violates that right, and the associated liberty interest, in the same way that retaliation based on protected speech violates the First Amendment. . . . [T]he government's retaliatory actions reflected in EO 14230, based in part on plaintiff's filing of lawsuits on behalf of the Firm's clients, deprived plaintiff of its liberty interest in petitioning the government.
>
> Here, deciding what process was due to plaintiff is unnecessary, because no process was provided. Certainly, here, the text of EO 14230 does not satisfy the notice requirement because the retaliation, and thus the deprivation of the right, was completed at the time of issuance, regardless of whether guidance in some form remains pending. Notably, even in cases involving legitimate national security interests, some level of due process is required before subjecting a person to the adverse consequences of government action.
>
> In sum, . . . EO 14230 violates the Firm's procedural due process rights by severely impinging on the Firm's protected liberty interest to petition the government by both retaliating against the Firm for exercising its right to petition the government and by restricting the Firm's access to government facilities and officials, without any prior notice or opportunity to be heard.[7]

§ 2.06 Modern Battlegrounds in Due Process

A. Immigration

Add the following materials to the end of § 2.09.A on page 100.

Note S2-1: Due Process and the Second Trump Administration's Immigration Policies

Restricting immigration and removing noncitizens have been major priorities for the second Trump Administration, which began in January 2025. Individuals have faced removal, in some instances to countries with which they have no connection, without prior notice or opportunity to be heard. Thus far, individuals challenging these actions have invoked the Due Process Clause and other grounds, achieving mixed results.

***Noem v. Abrego Garcia* (case note)**

In one high-profile case, ICE removed Kilmar Abrego Garcia to his native El Salvador due to, in the government's words, "an 'administrative error'"—despite an Immigration Judge having granted Abrego Garcia a withholding order under the Immigration and Nationality Act forbidding his removal[8] Under the

[7] *Perkins Coie*, 2025 WL 1276857, at *43–45.
[8] *Noem v. Abrego Garcia*, 604 U.S. ____ (2025).

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United States' controversial contract with the Salvadorean government, Abrego Garcia and numerous others—including hundreds of Venezuelans—were housed in El Salvador's notorious Centro de Confinamiento del Terrorismo (CECOT).[9]

In response to Abrego Garcia's lawsuit over his erroneous deportation, the Trump Administration claimed that it lacked the ability to return him to the United States. On April 4, 2025, the U.S. District Court for the District of Maryland ordered the government to "facilitate and effectuate the return of [Abrego Garcia] to the United States by no later than 11:59 PM on Monday, April 7"[10] because, among other reasons, the government deprived him of a protected due process interest by removing him to El Salvador. The District Court explained:

> 'In order for a statute to create a vested liberty or property interest giving rise to procedural due process protection, it must confer more than a mere expectation (even one supported by consistent government practice) of a benefit.' There must be entitlement to the benefit as directed by statute, and the statute must 'act to limit meaningfully the discretion of the decision-makers.' Here, the statutory scheme [the INA] which conferred withholding of removal also entitled Abrego Garcia to not be returned to El Salvador absent process. Further, the statutes at issue eliminated the discretion altogether. Thus, this element is easily met.[11]

On April 7, the government applied to the Supreme Court to vacate the District Court's order. The Court granted the application in part and denied it in part on April 10, explaining:

> The order properly requires the Government to "facilitate" Abrego Garcia's release from custody in El Salvador and to ensure that his case is handled as it would have been had he not been improperly sent to El Salvador. The intended scope of the term "effectuate" in the District Court's order is, however, unclear, and may exceed the District Court's authority. The District Court should clarify its directive, with due regard for the deference owed to the Executive Branch in the conduct of foreign affairs.[12]

Justice Sotomayor, joined by Justices Kagan and Jackson, "agree[d] with the Court's order that the proper remedy is to provide Abrego Garcia with all the process to which he would have been entitled had he not been unlawfully removed to El Salvador. That means the Government must comply with its obligation to provide Abrego Garcia with "due process of law," including notice and an opportunity to be heard, in any future proceedings." Sotomayor wrote separately to emphasize that "[t]he government's argument, moreover, implies that it could deport and incarcerate any person, including U. S. citizens, without legal consequence, so long as it does so before a court can intervene." She encouraged the District Court on remand to "continue to ensure that the Government lives up to its obligations to follow the law."

In the aftermath of the Supreme Court's order, the government continued to insist that it lacked the ability to return Abrego Garcia to the United States and insisted that the Supreme Court's decision required it only to "remove any domestic obstacles that would otherwise impede the alien's ability to return here," not help

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[9] See Reuters, *What to Know About the El Salvador Mega-prison Where Trump Sent Deported Venezuelans*, The Guardian (Mar. 19, 2025), https://www.theguardian.com/world/2025/mar/20/cecot-el-salvador-venezuela-prison-trump-deportations.

[10] Abrego Garcia v. Noem, No. 8:25-CV-00951-PX, 2025 WL 1024654, at *1 (D. Md. Apr. 4, 2025), amended, No. 8:25-CV-00951-PX, 2025 WL 1085601 (D. Md. Apr. 10, 2025).

[11] Abrego Garcia v. Noem, No. 8:25-CV-00951-PX, 2025 WL 1014261, at *10, ___ F. Supp. 3d ____ (D. Md. Apr. 6, 2025).

[12] *Abrego Garcia*, 604 U.S.

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extract him from El Salvador."[13] After continued posturing in the District Court, replete with discovery disputes, invocations of privileges, and suggestions of contempt sanctions, the government finally returned Abrego Garcia to the United States on June 6 to stand trial for new federal criminal charges in Tennessee.[14]

Abrego Garcia's immigration and criminal matters are ongoing. Most recently, on July 23, the U.S. District Court for the District of Maryland ordered the government to essentially restore Abrego Garcia to the immigration status and situation he was in before his unlawful removal.[15] This directive prohibits the government "from taking Abrego Garcia into immediate ICE custody in Tennessee," requires the government to restore him to his original ICE supervision in Baltimore, and requires the government to provide advance notice if it decides to "initiate third-country removal proceedings." The court emphasized that, "[o]nce Abrego Garcia is restored under the ICE Supervision Order out of the Baltimore Field Office, Defendants may take whatever action is available to them under the law," including "lawful arrest, detention and eventual removal." The court explained that "it must accord modest relief that ensures the fulfillment of this Court's injunction and protects Abrego Garcia from re-deportation without due process."

Trump v. J.G.G. **(case note)**

As mentioned, the Trump Administration has removed numerous individuals to countries with which they have no connection. This effort has included the deportation of hundreds of Venezuelan citizens, allegedly connected with the Tren de Aragua gang (TdA), to CECOT in El Salvador—the same facility that had held Abrego Garcia. To support the summary removal of these individuals, the Trump Administration has relied on the Alien Enemies Act of 1798, previously invoked only in wartime (according to one filing, only during the War of 181 and the First and Second World Wars). The AEA provides, in relevant part,

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom . . . .[16]

Trump's proclamation invoking the AEA stated in part that "TdA is perpetrating, attempting, and threatening an invasion or predatory incursion against the territory of the United States. TdA is undertaking

[13] Julia Harte, REUTERS, *Trump Administration Says it is Not Required to Help Wrongly Deported Man Return to US* (Apr. 14, 2025), https://www.reuters.com/world/us/trump-administration-says-it-is-not-required-help-wrongly-deported-man-return-us-2025-04-14/; Stephen Collinson, CNN, *As he lionizes a strongman, Trump flexes power over the law, top colleges and the media*, (Apr. 15, 2025) https://edition.cnn.com/2025/04/15/politics/trump-bukele-immigration-colleges-media.

[14] Katherine Faulders, James Hill & Alexander Mallin, Kilmar Abrego Garcia brought back to US, appears in court on charges of smuggling migrants, ABC NEWS (June 6, 2025), https://abcnews.go.com/US/mistakenly-deported-kilmar-abrego-garcia-back-us-face/story?id=121333122.

[15] *Abrego Garcia v. Noem*, No. 8:25-CV-00951-PX, 2025 WL 2062203 (D. Md. July 23, 2025).

[16] 50 U.S.C. § 21.

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hostile actions and conducting irregular warfare against the territory of the United States both directly and at the direction, clandestine or otherwise, of the Maduro regime in Venezuela."[17]

Numerous individuals promptly challenged the Trump Administration's removals under the AEA and obtained a temporary restraining order. As it did in Abrego Garcia's matter, the government applied to the Supreme Court to vacate the district court's orders. Over the dissenting votes of Justices Sotomayor, Kagan, Jackson, and Barrett, on April 7, the Court granted the government's application on the grounds that the "detainees" were required to seek writs of habeas corpus in the district in which they were confined. But the Court emphasized that

> [i]t is well established that the Fifth Amendment entitles aliens to due process of law in the context of removal proceedings. So, the detainees are entitled to notice and opportunity to be heard appropriate to the nature of the case. More specifically, in this context, AEA detainees must receive notice after the date of this order that they are subject to removal under the Act. The notice must be afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs.[18]

The *JGG* matter remains ongoing, with the district court most recently untangling complicated issues of relief given that some of the noncitizens have already been removed to El Salvador where, the government maintains, "El Salvador is the legally responsible sovereign for the CECOT Plaintiffs' ongoing detention."[19]

***A.A.R.P. v. Trump* (case note)**
AARP v. Trump involves a putative class habeas corpus action brought by Venezuelan nationals alleged to be members of TdA and held in U.S. detention facilities. The background and reasoning of the Supreme Court's opinion, especially its discussion of the District Court's and Fifth Circuit's handling of the matter, is worth excerpting in full:

> On April 17, 2025, the District Court denied the detainees' motion for a temporary restraining order (TRO) against summary removal under the AEA. The detainees allege that, hours later, putative class members were served notices of AEA removal and told that they would be removed "tonight or tomorrow." On April 18 at 12:34 a.m. central time, the detainees moved for an emergency TRO. At 12:48 p.m., the detainees moved for a ruling on that motion or a status conference by 1:30 p.m. At 3:02 p.m., they appealed "the constructive denia[l]" of the emergency TRO to the Fifth Circuit. The detainees also applied to this Court for a temporary injunction.
>
> We understood the Government to assert the right to remove the detainees as soon as midnight central time on April 19. The Government addressed the detainees' allegations on April 18 only at an evening hearing before the District Court for the District of Columbia, where the detainees had separately sought relief. The Government guaranteed that no putative class members would be removed that day. But it further represented that, in its view, removal of putative class members as soon as the next day "would be consistent with" its due process obligations, and it "reserve[d] the right" to take such action. (See explanation by the district court that "tomorrow ... starts at 12:01 a.m."). Evidence now in

[17] Presidential Proclamation No. 10903, 90 Fed. Reg. 13033 (2025), https://www.whitehouse.gov/presidential-actions/2025/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/.
[18] Trump v. J.G.G., 604 U.S. ____ (2025) (per curiam).
[19] J.G.G. v. Trump, No. CV 25-766 (JEB), 2025 WL 1577811, at *13 (D.D.C. June 4, 2025), *appeal filed*, No. 25-5217 (D.C. Cir.).

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the record (although not all before us on April 18) suggests that the Government had in fact taken steps on the afternoon of April 18 toward removing detainees under the AEA—including transporting them from their detention facility to an airport and later returning them to the facility. Had the detainees been removed from the United States to the custody of a foreign sovereign on April 19, the Government may have argued, as it has previously argued, that no U.S. court had jurisdiction to order relief. See Application To Vacate Injunction in *Noem v. Abrego Garcia.*

At 12:52 a.m. eastern time (11:52 p.m. central time), we ordered the Government—in light of all these circumstances—"not to remove any member of the putative class of detainees" in order to preserve our jurisdiction to consider the application. . . . The Fifth Circuit dismissed the detainees' appeal for lack of jurisdiction and denied their motion for injunction pending appeal as premature, on the ground that the detainees "gave the [district] court only 42 minutes to act." We now construe the application as a petition for writ of certiorari from the decision of the Fifth Circuit. See Reply 15. We grant the petition as well as the application for injunction pending further proceedings, vacate the judgment of the Fifth Circuit, and remand for further proceedings.

The Fifth Circuit erred in dismissing the detainees' appeal for lack of jurisdiction. Appellate courts have jurisdiction to review interlocutory orders that have "the practical effect of refusing an injunction." . . . Here the District Court's inaction—not for 42 minutes but for 14 hours and 28 minutes—had the practical effect of refusing an injunction to detainees facing an imminent threat of severe, irreparable harm. . . .

"[T]he Fifth Amendment entitles aliens to due process of law in the context of removal proceedings." *Trump v. J. G. G.*. "Procedural due process rules are meant to protect" against "the mistaken or unjustified deprivation of life, liberty, or property." We have long held that "no person shall be" removed from the United States "without opportunity, at some time, to be heard." *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903). Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties" and that "afford[s] a reasonable time ... to make [an] appearance." Accordingly, in *J. G. G.*, this Court explained—with all nine Justices agreeing—that "AEA detainees must receive notice ... that they are subject to removal under the Act ... within a reasonable time and in such a manner as will allow them to actually seek habeas relief " before removal. In order to "actually seek habeas relief," a detainee must have sufficient time and information to reasonably be able to contact counsel, file a petition, and pursue appropriate relief.

The Government does not contest before this Court the applicants' description of the notice afforded to AEA detainees in the Northern District of Texas, nor the assertion that the Government was poised to carry out removals imminently. The Government has represented elsewhere that it is unable to provide for the return of an individual deported in error to a prison in El Salvador, see *Abrego Garcia* v. *Noem*, where it is alleged that detainees face indefinite detention. The detainees' interests at stake are accordingly particularly weighty. Under these circumstances, notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, surely does not pass muster. But it is not optimal for this Court, far removed from the circumstances on the ground, to determine in the first instance the precise process necessary to satisfy the Constitution in this case. We remand the case to the Fifth Circuit for that purpose.

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> To be clear, we decide today only that the detainees are entitled to more notice than was given on April 18, and we grant temporary injunctive relief to preserve our jurisdiction while the question of what notice is due is adjudicated. We did not on April 19—and do not now—address the underlying merits of the parties' claims regarding the legality of removals under the AEA.

In response to the Justice Alito's dissent, which Justice Thomas joined, the Court held that relief for the entire putative class was appropriate:

> Finally, this Court may properly issue temporary injunctive relief to the putative class in order to preserve our jurisdiction pending appeal. . . . The named applicants, along with putative class members, are entitled to constitutionally adequate notice prior to any removal, in order to pursue appropriate relief. Although the putative class members may ultimately take different steps to protect their own interests in response to such notice, the notice to which they are entitled is the same. And because courts may issue temporary relief to a putative class, we need not decide whether a class should be certified as to the detainees' due process claims in order to temporarily enjoin the Government from removing putative class members while the question of what notice is due is adjudicated.
>
> We recognize that the Government "has agreed to forgo removing the named petitioners pursuant to the AEA while their habeas proceedings are pending." But we reject the proposition that a class-action defendant may defeat class treatment, if it is otherwise proper, by promising as a matter of grace to treat named plaintiffs differently. And we are skeptical of the self-defeating notion that the right to the *notice* necessary to "actually seek habeas relief," *J. G. G.*, must *itself* be vindicated through individual habeas petitions, somehow by plaintiffs who have not received notice.

Department of Homeland Security v. D.V.D. **(case note)**

In *DVD v. DHS*, the district court granted a preliminary injunction in favor of a class of noncitizens facing deportation "to a country other than their country of origin."[20] Specifically, the court ordered that, "prior to removing any alien to a third country, *i.e.*, any country not explicitly provided for on the alien's order of removal, Defendants must: (1) provide written notice to the alien—and the alien's immigration counsel, if any—of the third country to which the alien may be removed, in a language the alien can understand; (2) provide meaningful opportunity for the alien to raise a fear of return for eligibility for [Convention Against Torture] CAT protections; (3) move to reopen the proceedings if the alien demonstrates "reasonable fear"; and (4) if the alien is not found to have demonstrated "reasonable fear," provide meaningful opportunity, and a minimum of 15 days, for that alien to seek to move to reopen immigration proceedings to challenge the potential third-country removal."

Citing *JGG*, the court explained that the Due Process Clause applies to removal proceedings in general and, more specifically, to proceedings to determine whether someone is entitled to withholding of removal under the Convention Against Torture. The court rejected the government's contention that individuals were obligated to bring up "all the countries where they have concerns that they will be tortured" as part of their initial removal proceeding for numerous reasons, including: "the immigration court does not normally consider claims about countries not proposed as a country of removal"; "conditions change in countries change over time"; and "[l]isting all the countries in the world as to which an individual might have a reasonable fear" would be "impractical. The court continued: "Indeed, the Assistant to the Solicitor General,

[20] D.V.D. v. U.S. Dep't of Homeland Sec., No. CV 25-10676-BEM, 2025 WL 1142968, at *1 (D. Mass. Apr. 18, 2025).

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arguing before the Supreme Court on the topic of third-country removals less than a month ago, affirmatively stated that '[w]e would have to give the person notice of the third country and give them the opportunity to raise a reasonable fear of torture or persecution in that third country,' even where that individual was already subject to an order of removal."

Over a strong dissent from Justice Sotomayor, joined by Justices Kagan and Jackson, on June 23, 2025, the Supreme Court stayed the district court's preliminary injunction "pending the disposition of the appeal in the United States Court of Appeals for the First Circuit and disposition of a petition for a writ of certiorari."[21] The Court did not explain its decision further.

* * *

The preceding materials are designed to provide some insight into the far-ranging due process litigation happening throughout the country and the difficulties parties face in (a) obtaining relief from the courts and (b) obtaining compliance with favorable court orders. The public-interest attorneys litigating these matters are extensively well versed in the due process caselaw and, in these "matters of life and death" (as described in Justice Sotomayor's dissent in *DVD*), often file motions and participate in hearings at all hours of the day and night to try to keep their clients safe. Courts ruling on these emergency motions often offer truncated or oral explanations of their decisions.

Though administrative law often involves highly technical disputes on seemingly niche topics, it also plays an important role in holding the government accountable to basic rule-of-law norms and protecting fundamental liberties. These materials also preview the interbranch conflicts that permeate the remainder of this book. Who enforces judicial decrees? The executive branch. What happens when the executive branch systematically refuses to comply with judicial decrees? We may be approaching that situation as this supplement goes to print.

These cases and more are ongoing. Numerous resources, such as https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html, are available for tracking these cases.

Insert the following section heading after § 2.09 on page 162.

§ 2.10 Due Process in an Emergency

Adapted from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 170–73
West Academic Publishing (4th ed. 2023)

Mathews v. Eldridge, we've seen, is a pragmatic framework. It does not require the government to "do the impossible" and provide "pre-deprivation" protections against an agent gone rogue. Nor does it require schools to give dangerous or unruly students a hearing before removing them from the classroom. Under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552–53 (1985), the government may, under appropriate circumstances, act promptly with process to follow, such as where a government employee is suspended upon facing a serious criminal charge.[22] In those cases, the initial criminal processes stand in the

[21] Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153 (2025)

[22] Gilbert v. Homar, 520 U.S. 924 (1997) (holding that felony arrest and formal charges served as adequate pre-suspension process under *Loudermill*, assuming that plaintiffs' suspension without pay triggered due process interest); Nnebe v. Daus, 931 F.3d 66, 85, 88 (2d Cir. 2019) (citing *Gilbert* for the proposition that taxi drivers' licenses may be immediately suspended upon being charged with certain crimes but concluding that post-suspension hearing needed

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place of agency pre-deprivation process to provide at least some basis to conclude that the initial deprivation is warranted. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993), the Court held that the government may not seize real property without prior hearing except under "exigent circumstances." Exigent circumstances must be demonstrated by showing that less restrictive measures, such as a *lis pendens*, restraining order, or bond, "would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property."

Apart from these situation-specific holdings, the Supreme Court has recognized more generally that "summary administrative action may be justified in emergency situations," such as where "swift action is necessary to protect the public health and safety." *Hodel v. Vir. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 300–01 (1981). At issue in *Hodel* was the Secretary of the Interior's authority under the Surface Mining Control and Reclamation Act to order immediate stoppages in a surface mining operation whenever it violates the law and "creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." In a terse, implicit weighing of the factors at issue (though the Court did not cite *Mathews*), the Court held that post-deprivation procedures satisfied the Due Process Clause in light of the "paramount governmental interest" at stake.

The courts of appeals have relied on *Hodel* to uphold summary actions to demolish a damaged building[23] and to seize animals that may be in imminent danger, may carry harmful pathogens, or may threaten public safety.[24] *Simpson v. Brown County*, *supra* Note 2-49, suggested too that *Hodel* would support the summary suspension of a septic repairer if the county could produce evidence showing that the suspension was tied to the repairer's qualifications.[25]

Government efforts to ameliorate public health emergencies often impinge upon liberty and property rights, not to mention day-to-day life. This has been felt acutely throughout the COVID-19 pandemic, which wrought myriad suits challenging, on a variety of constitutional and statutory grounds, measures such as business closures, travel quarantine requirements, vaccination requirements for student, and employees, masking requirements, and church closures and attendance limitations.[26] Some of these cases raised interesting substantive due process issues. But district courts, seemingly uniformly, rejected many efforts to pigeonhole these suits into procedural due process. One reason is that, under *Hodel*. district courts were accommodating of the governments' emergency rationales. But another, more pressing reason (and one overlooked by several district courts[27]) is that the vast majority of these cases challenged restrictions taking

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to "encompass[] some level of conduct-specific findings based upon the facts underlying the complaint and the driver's history and characteristics"); Nagel v. City of Jamestown, 952 F.3d 923, 934 (8th Cir. 2020) (addressing scope of *Loudermill* rights and collecting authorities).

[23] S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc., 775 F.3d 82, 86–87 (1st Cir. 2014).

[24] Recchia v. City of Los Angeles Dep't of Animal Servs., 889 F.3d 553, 562 (9th Cir. 2018).

[25] Simpson v. Brown Cnty., 860 F.3d 1001, 1009 (7th Cir. 2017).

[26] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022) (employee vaccination requirement likely outside scope of OSHA's authority); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (church occupancy restrictions likely violated Free Exercise Clause); Klaassen v. Trustees of Indiana Univ., 7 F.4th 592 (7th Cir. 2021) (rejecting substantive due process challenge to student vaccinations); Hernandez v. Grisham, 508 F. Supp. 3d 893, 979–80 (D.N.M. 2020) (collecting numerous cases rejecting procedural due process to various COVID-19 policies, including limitations on gatherings, mask requirements, and business closures); Page v. Cuomo, 478 F. Supp. 3d 355, 371 (N.D.N.Y. 2020) (rejecting procedural due process challenge to travel quarantine).

[27] Though some decisions flagged the rules–orders issue, many others skipped right to *Hodel*. *Compare, e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1148–49 (D. Haw. 2020) (applying *Hodel* and also holding that quarantine for travelers did not impact due process because it "affect[s] the entire state"), *and* Hernandez v. Grisham, 508 F. Supp. 3d 893, 980 (D.N.M. 2020) (applying *Hodel* and describing directive closing schools in high COVID areas as "quasi-legislative in nature" and thus not triggering individual due process protections), *with* Page v. Cuomo, 478 F. Supp. 3d 355, 371 (N.D.N.Y. 2020) (resolving due process challenge to travel quarantine under *Hodel*), *and* Savage

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the form of generally applicable rules that, unlike orders, are not subject to due process requirements.[28] We introduced this topic in Chapter 1, § 1.02. The complaints, in other words, weren't that an individual faced the prospect of receiving insufficient process before being punished for violating (for example) a business closure or travel quarantine rule, but rather that the rules themselves were unfair or unconstitutional. That's a matter of substantive due process[29] or other substantive constitutional right, not procedural due process. As conventionally understood, *Hodel* comes into play only when adjudicating a particular deprivation.

That said, COVID-19 has yielded a few important procedural due process cases addressing the appropriate safeguards for particular deprivations. In one case, the Pennsylvania Supreme Court cited *Hodel* to uphold the adequacy of the post-deprivation process provided to businesses to challenge their categorization as "life-sustaining" versus "non-life-sustaining," which in turn decided which businesses could remain open during the height of the pandemic.[30] In another case, Chrysafis v. Marks, 141 S. Ct. 2482 (2021), the U.S. Supreme Court enjoined enforcement of part of New York's COVID eviction moratorium which allowed a tenant to conclusively establish financial hardship (and forestall eviction) by filing a self-certification. The Court held that "[t]his scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." (The dissent took umbrage at the characterization of the statute as depriving property rather than merely "delaying the exercise" of "the right to challenge a tenant's hardship claim" since the self-certification provision was due to expire three weeks later.)[31]

Finally, quite apart from the constitutionality of the COVID protections themselves, scholars, advocates, and judges have raised concerns about the impact of COVID-related alterations to judicial procedures[32] and delays.[33] For example, the indigent and elderly may lack the ability to participate in virtual judicial proceedings. Should future waves of this or a future pandemic result in renewed restrictions, alteration, and delays in judicial proceedings, these issues may evolve from being the primary concerns of

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v. Mills, 478 F. Supp. 3d 16, 29 (D. Me. 2020) (same with respect to non-essential business closures and travel quarantine).

[28] Toni M. Massaro *et. al.*, *Pandemics and the Constitution*, 2022 U. ILL. L. REV. 229, 244 (2022) (describing this principle through the example of a two-week before a travelling student may attend class at a public university; the quarantine requirement itself is "a generally applicable, prospective rule" not subject to process before its implementation, but "[i]f the university later determined that the student violated the quarantine rule, then that decision would be an individualized determination potentially subject to due process").

[29] *See, e.g.*, Jennifer L. Piatt, *A Balancing Act: Public Health, COVID-19, and the Economic Due Process "Right to Work"*, NEB. L. REV. BULLETIN (June 16, 2021), https://lawreview.unl.edu/balancing-act-public-health-covid-19-and-economic-due-process-%E2%80%9Cright-work%E2%80%9D.

[30] Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa.), *cert. denied*, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020).

[31] *Id.* at 2483 (Breyer, J., dissenting).

[32] *See, e.g.*, Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875 (2021); Leslie Birnbaum, *Due Process and Administrative Hearings in the Time of Covid-19: Help, I Need Somebody!*, 41 J. NAT'L ASS'N ADMIN. L. JUDICIARY 140 (2021); Madison C. DeRegis, Comment, *"Can You Hear Me Now?": The Implications of Virtual Proceedings on Criminal Defendants' Constitutional Rights*, 81 MD. L. REV. ONLINE 71 (2022). One scholar raises similar concerns with virtual school discipline, invoking *Goss v. Lopez*. Peggy Nicholson, *When Virtual Discipline Becomes Virtual Suspension: Protecting the Due Process Rights of Virtual Learners*, 50 J.L. & EDUC. 133 (2021).

[33] *See, e.g.*, A Casey C. DeReus, *Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight Against Communicable Diseases*, 81 LA. L. REV. 887, 920 (2021) (arguing that Louisiana's "court-by-court" evaluation of what should be prioritized as "emergency matters" during the pandemic risked deprioritizing cases involving "disease-related deprivation[s] of liberty"); *see also, e.g.*, Tarika Daftary-Kapur *et. al.*, *Covid-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings from A National Survey of Defense Attorneys*, 45 LAW & HUM. BEHAV. 81 (2021).

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court administrators and commentators into full-fledged due process issues requiring evaluation under *Mathews v. Eldridge*.

Notes & Questions

Note S2-2. Suppose a state enacted a valid statue requiring all restaurants to wash their produce for 30 seconds to protect against a new disease ("X"). Transmission by insufficiently washed restaurant produce is the primary (though not only) way X is transmitted. The statute tasks the state health agency to enforce the statute and gives it power to conduct all necessary procedures and issue all necessary orders to do so, including shutting down restaurants that violate the statute, consistent with public health and the Due Process Clause. Suppose further that the agency primarily monitors compliance with the vaccination rule by asking hospitalized consumers what restaurants they had eaten at in the previous 24 hours.

As part of this monitoring the agency notices a spike in consumers who took ill with X after eating at Small's Restaurant. It wants to order Small's to shut down immediately. Suppose you represent the agency. What questions would you have for the agency's medical health professionals? What evidence would you hope to gather to defend against a challenge that the agency should have provided Small's a chance to contest the closure order before shutting it down? Assuming you advise the agency that it can shut Small's down immediately, what would you advise that the agency do thereafter?

Conversely, if you represented Small's, what questions would you have for your client? What questions would you want to ask of the agency officials or of your own experts? What evidence would you hope to marshal on your client's behalf?

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Chapter 3. Formal and Informal Adjudication

§ 3.05 Formal Adjudication and the APA

Delete *Dominion Energy Brayton Point v. Johnson* and Notes 3-8 through 3-13 (pp. 174-180). Retain remaining notes 3-14 through 3-16.

Though courts have agreed that the "three magic words ['on the record'] need not appear for a court to determine that formal hearings are required, *City of W. Chicago v. U.S. Nuclear Regulatory Comm'n,* 701 F.2d 632, 641 (7th Cir. 1983), they have not otherwise taken a uniform approach for deciding when an agency adjudication must comply with §§ 554, 556, and 557. The Ninth Circuit's longstanding approach, for example, has, "[a]bsent congressional intent to the contrary," examined "the substantive character of the proceedings involved" to decide whether the formal adjudication requirements apply. *Marathon Oil Co. v. E.P.A.*, 564 F.2d 1253, 1263 (9th Cir. 1977).

After *Chevron* was decided in 1984, some courts deferred to an agency's interpretation of whether their organic statutes triggered the formal adjudication requirements. *See, e.g.*, *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Chem. Waste Mgmt., Inc. v. U.S. E.P.A.*, 873 F.2d 1477 (D.C. Cir. 1989). In *Dominion Energy*, for example, the First Circuit explained that it could not "discern a clear and unambiguous congressional intent behind the words 'public hearing' in the [Clean Water Act]." Thus, because the EPA reasonably interpreted that term to not require a formal adjudication, the court deferred to that interpretation.

Courts will need to reevaluate their approach in light of the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron* and the deference doctrine that case established. Very few decisions have addressed how the end of *Chevron* deference impacts their analysis of when the formal adjudication provisions are triggered. We will discuss *Chevron* and *Loper Bright* at length in Chapter 7. For now, consider the following post-*Loper Bright* decision from the Eighth Circuit.

Union Pacific Railroad Co. v. Surface Transportation Board

113 F.4th 823 (8th Cir. 2024)

SMITH, Chief Judge.

Congress has charged the Surface Transportation Board (Board) with resolving rate disputes between rail carriers and shippers when rates are not set by private contract. *See* 49 U.S.C. §§ 10704(a)(1), 10709(c)(1). In the Surface Transportation Board Reauthorization Act of 2015, Congress directed the Board to "maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged [rail carrier] rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3). These petitions for review challenge the Board's adoption of a final rule to establish a new procedure for challenging the reasonableness of rail carrier rates in smaller cases, the Final Offer Rate Review (FORR). Under FORR, the Board decides a case by selecting either the shipper's or the rail carrier's final offer. . . .

II. *Discussion*

. . . Our task is to determine whether Congress statutorily authorized the Board to prescribe rail carrier rates through a rate-setting scheme like FORR. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. OSHA*,

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595 U.S. 109, 117 (2022). "Congress ... enacted the APA [(Administrative Procedure Act)] as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Loper Bright Enters. v. Raimondo* (overruling *Chevron*). The APA sets forth judicial review of agency action. It "directs that '[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.' " *Id.* (quoting 5 U.S.C. § 706). Additionally, under the APA, reviewing courts must "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). The APA "makes clear that agency interpretations of statutes ... are *not* entitled to deference." *Id.* It is our responsibility as the reviewing court "to decide whether the law means what the agency says." *Id.*

Thus, in determining "whether an agency has acted within its statutory authority, as the APA requires," we "must exercise [our] independent judgment." *Id.* "When interpreting a statute, we begin with the statute's plain language, giving words the meaning that proper grammar and usage would assign them. If the intent of Congress can be clearly discerned from the statute's language, the judicial inquiry must end." If confronted with a statutory ambiguity, we must "independently interpret the statute." *Loper*. In exercising our "independent judgment," we "may ... seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance consistent with the APA. *Id.* We must "use every tool at [our] disposal to determine the best reading of the statute and resolve [any] ambiguity." *Id.*

We begin with the statute's plain language. The Board claims that 49 U.S.C. § 10704(a)(1) provides the statutory authority to prescribe rail carrier rates through FORR. Section 10704(a)(1) provides:

> When the Board, *after a full hearing*, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate [Part A, Subtitle IV of Title 49], *the Board may prescribe the maximum rate*, classification, rule, or practice to be followed.

(Emphases added.) In turn, Part A provides that "[i]f the Board determines, under [49 U.S.C. §] 10707..., that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable." *Id.* § 10701(d)(1). Congress requires the Board to "maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates" in cases involving smaller disputes with a rail carrier. 49 U.S.C. § 10701(d)(3). The Board determines whether the challenged rate is reasonable by "giv[ing] *due consideration* to" [certain] factors" . . . . "If the Board finds the rate *unreasonable*, it sets the maximum rate the railroad may charge. In setting that rate, the Board must permit the railroad to cover its costs 'plus a reasonable and economic profit or return (or both) on capital employed in the business.' "

Is FORR consistent with the Board's statutory obligations? We hold that it is not because some of FORR's requirements conflict with the Board's statutory duties. Section 10704(a)(1) requires the Board to hold a "full hearing" before determining a rate's reasonableness. The threshold question we must answer is whether this "full hearing" is an adjudication to which the APA applies; if so, then certain procedural protections apply. "The APA itself mandates that its provisions govern certain administrative proceedings." Section 554 of the APA "pertains to formal adjudications"; it "applies to 'every case of adjudication required by statute to be determined on the record after [the] opportunity for an agency hearing.' " . . . The administrative

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proceeding must be 1) an adjudication; 2) determined on the record; and 3) after the opportunity for an agency hearing." We will now examine whether these requirements are satisfied in the present case.

"The APA defines 'adjudication' broadly as an agency process leading to a final disposition 'other than rulemaking.' " *Marathon Oil*, 564 F.2d at 1263 (quoting 5 U.S.C. § 551(6)–(7)). "In setting out procedures that an agency must follow in making 'adjudicatory' determinations, Congress recognized that certain administrative decisions closely resemble judicial determinations and, in the interest of fairness, require similar procedural protections." *Id.* "Where an agency's task is 'to adjudicate disputed facts in particular cases,' an administrative determination is quasi-judicial." *Portland Audubon Soc.*, 984 F.2d at 1540 (quoting *Marathon Oil*). As in "judicial proceedings, the ultimate decision often turns, in large part, on sharply-disputed factual issues. As a result, ... APA procedures ... are needed both for the protection of affected parties and to help achieve reasoned decisionmaking." *Marathon Oil*.

"At the opposite end of the pole are agency determinations that depend less on the resolution of factual disputes and more on the drawing of policy; such 'rulemaking' decisions must by necessity be guided by more informal procedures." *Id.* (footnote omitted). "[R]ulemaking concerns policy judgments to be applied generally in cases that may arise in the future ...." *Portland Audubon Soc.* The APA's procedural protections are not necessary in proceedings conducted "for the purpose of promulgating policy-type rules or standards." *Marathon Oil*.

"We conclude that the first requirement of APA § 554(a) is satisfied." The Board is tasked with resolving rate disputes between rail carriers and shippers. In determining whether "the rate established by such carrier for such transportation [is] reasonable," § 10701(d)(1), the Board is statutorily required to hold a "full hearing," § 10704(a)(1). In assessing a rate's reasonableness, the Board is also statutorily required to "give due consideration to," *id.* § 10701(d)(2), [certain] factors. Assessing the reasonableness of a rail carrier's rate requires the Board "to weigh the many factors at issue." In other words, the Board must weigh the statutory factors to resolve the parties' factual dispute over the reasonableness of the challenged rate.

As to the second § 554(a) requirement, "[a]lthough Section 554 specifies that the governing statute must satisfy the 'on the record' requirement, those three magic words need not appear for a court to determine that formal hearings are required." For the APA's "formal, on-the-record hearing provisions" to apply, "Congress need only 'clearly indicate its intent to trigger' " them. Application of the procedural safeguards "rests on the substantive character of the proceedings involved," "[a]bsent congressional intent to the contrary." *Marathon Oil*. "In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections." A court's inquiry must be focused "on the nature of the administrative determination before [it]." *Id.*

We conclude that the second requirement of APA § 554(a) is satisfied. Although § 10704(a)(1) does not contain the "three magic words" of "on the record," those words are not needed for us to determine that the APA's procedural protections apply. Section 10704(a)(1) does require the Board to hold a "full hearing." When adjudicating the rate dispute between the shipper and rail carrier, the Board is not engaging in rulemaking but instead is engaging in "an agency process leading to a final disposition" of the parties' rate dispute.

As to the third § 554(a) requirement, "[w]herever the outer bounds of the 'after opportunity for an agency hearing' requirement may lie, ... where ... a statute provides that an adjudication be determined at least in

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part *based on* an agency hearing, that requirement is fulfilled.' " "The failure of Congress to provide for any hearing whatsoever within an administrative process may well be a valid indication that Congress either did not feel that it was providing for an 'adjudication' in the traditional sense of the word or did not intend the APA procedures to apply." *Marathon Oil*. But when "a statute provides for a hearing, similar weight should not typically be accorded to Congress'[s] failure to specify that determinations must be made 'on the record.' " *Id.* We conclude that this third requirement is satisfied. Under § 10704(a)(1), the Board is statutorily authorized to "prescribe the maximum rate" "after a full hearing" on the rate's reasonableness.

Having determined that the requirements set forth in § 554(a) are satisfied, we must examine whether FORR complies with the APA's procedural requirements. We focus on the APA's requirement that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA does not define "burden of proof"; however, the Supreme Court has interpreted the APA's use of "the term 'burden of proof' to mean the burden of persuasion." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries* [excerpted in § 3.05.C of the Casebook]. "[T]he burden of persuasion [is] the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.*

Under FORR, the shipper "bear[s] the burden of proof to demonstrate that (i) the defendant carrier has market dominance over the transportation to which the rate applies, and (ii) the challenged rate is unreasonable." FORR, however, *does not* require the shipper to bear the burden of proof on the final offer. The Board argues that the "merits-stage 'full hearing' requirement is inapplicable at the remedy stage." But, under the APA, as "the proponent of a rule or order," the shipper "has the burden of proof" on the selection of offers. 5 U.S.C. § 556(d). FORR is contrary to the APA because it does not require the shipper to carry the burden of persuasion on the final offer; in fact, the shipper need not prove anything. Under FORR, the Board is tasked only with "choos[ing] between the parties' final offers."

Additionally, under FORR, contrary to the statutory language, it is the parties—not the Board—that "prescribe the maximum rate" pursuant to § 10704(a). Instead, the Board receives and reviews the parties' reasonableness analysis and final offers reflecting the maximum reasonable rate. FORR then requires the Board to "choose between the parties' final offers. . . ." . . .

We conclude that this procedure falls short of the statutory requirement that "*the Board* ... prescribe the maximum rate." 49 U.S.C. § 10704(a)(1) (emphasis added). Under FORR, the Board is limited in its "ability to exercise its own judgment by weighing each side's arguments, evaluating the evidence, and considering both the public interest and rail transportation policy." FORR effectively prevents the Board from giving "due consideration" to the statutory factors that the Board is required to consider in assessing a rate's reasonableness, *see* 49 U.S.C. § 10701(d)(2), by limiting the Board to the two final offers the parties propose in prescribing the maximum reasonable rate. . . .

III. *Conclusion*

Accordingly, we hold that the Board lacks statutory authority to prescribe rates through FORR, grant the petitions for review, and vacate the final rule.

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Notes & Questions

S3-1. What test does the Eighth Circuit announce for deciding whether a statute triggers the formal adjudication of the APA? How does the court apply that test in this case? What role does *Loper Bright* and the end of *Chevron* deference play in this analysis?

S3-2. Why didn't the STB's "FORR" ratemaking procedure comply with the Administrative Procedure Act? Revisit this question after reviewing the burden of proof/burden of persuasion materials in § 3.05.C of the Casebook.

S3-3. Was violating the APA the only flaw with the FORR procedure? What other flaw is noted in the brief excerpt?

§ 3.07 The Administrative Law Judge as an Unbiased Decision Maker

Replace the excerpt and text on page 212 with the following updated and corrected text.

ALFRED C. AMAN, JR., LANDYN WM. ROOKARD AND WILLIAM T. MAYTON,
ADMINISTRATIVE LAW, 4th Edition, §9.5.2
(West Academic Publishing, 4th ed. 2023)

The Administrative Procedure Act created the position of Administrative Law Judge (ALJ). Prior to this Act, hearing examiners, as they were then called, usually were "subordinate employees chosen by the agencies, and the power of the agencies to control and influence such personnel made questionable the contention of any agency that its proceedings assured fundamental fairness."[34] They were perceived as "mere tools of the agency concerned,"[35] substantially undermining the objectivity of the administrative process.

The APA sought to allay these fears by vesting ALJs with an independence from their respective agencies.[36] Tenure[37] and compensation[38] decisions were removed from agency control and vested largely in the Civil Service Commission, now the Office of Personnel Management. In addition, ALJs were exempted from performance ratings required for other civil service employees.[39] They could be removed by the agency that employed them, but only for cause and after a hearing before the Merit Systems Protection Board. The Trump administration altered the independence of ALJs as originally conceived. Following the Supreme Court's decision in *Lucia v. SEC*,[40] holding that ALJs in the SEC were "Officers of the United States," the Trump Administration issued Executive Order 13843.

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[34] Jeffrey Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981). *See also* Nash v. Califano, 613 F.2d 10, 14 (2d Cir. 1980) (hearing examiners had "limited independence from the agencies they served"); *Administrative Procedure Act-Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950).

[35] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131, 73 S. Ct. 570, 572, 97 L. Ed. 872 (1953).

[36] Lubbers, *supra* note 315, at 111.

[37] 5 U.S.C. § 5362 (1976).

[38] *Id*.

[39] 5 U.S.C. § 4301 (1976).

[40] 138 S. Ct. 2044 (2018); *see* text and note 334 *infra*. *See also* Chapter 14, § 14.3.2 for discussion of this case in the context of the executive branch's appointment and removal powers.

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> Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures. Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised. This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the significant authority conferred on ALJs, and each agency should be able to assess them without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency's particular needs. This change will also promote confidence in, and the durability of, agency adjudications.[41]

These changes were controversial; critics saw the order as a politicization of the administrative judiciary and there were concerns about efficiency and impartiality.[42] The Trump Administration's Order recognized the need for increased agency control and flexibility, but arguably at the expense of the independence of ALJ's. The Biden Administration issued its own orders repealing some of the hiring processes of the Trump administration, but many of the hiring changes remain in place, including the lone qualification for appointment that the ALJ must be authorized to practice law.

Summarizing the concerns and prospects for amelioration of these new practices, the Federal Bar Association encouraged "national leaders" to take steps to address the "legitimate concerns over the prospect of abuse in the exercise of agency hiring authority" raised by "the lone requirement [in the Order] that an ALJ need only be authorized to practice law."[43] This concern may stems from the fact that agency heads are political appointees and may feel pressured by the executive administration to put like-minded individuals into judicial-type positions. This can undermine the integrity of the appointment process. Though some agencies, have made headway in creating new and effective standards,[44] no comprehensive guideline has yet been created. Congress has tried but so far has failed to pass legislation opposing implementation of this order on the grounds that it compromised the independence of ALJs.[45]

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41 Exec. Order No. 13843, § 1, 83 Fed. Reg. 32755 (Jul. 10, 2018).

42 For example, *see* William Funk, *Trump's Politicization of the Administrative Judiciary,* AMERICAN CONSTITUTION SOCIETY—EXPERT FORUM, July 19, 2018, https://www.acslaw.org/expertforum/trumps-politicization-of-the-administrative-judiciary/. The Administrative Conference of the United States responded with recommendations supporting the independence of ALJs such as competitive searches, broad pools, and transparency regarding qualifications Administrative Conference of the United States. Recommendation 2019–2: Agency Recruitment and Selection of Administrative Law Judges, https://www.acus.gov/recommendation/agency-recruitment-and-selection-administrative-law-judges. *See also* Jeremy Graboyes, *Decisional Independence of Administrative Adjudicators: Perspectives from ACUS,* YALE J. ON REG. (Feb. 25, 2022), https://www.yalejreg.com/nc/symposium-decisional-independence-10/.

43 Federal Bar Association, *Statement on Executive Order 13843 Regarding the Hiring of Federal Administrative Law Judges* (Aug. 10, 2018), https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/fba-statement-on-executive-order-13843-august-2018/.

44 *See* PAUL VERKUIL, BUREAUCRACY AND PRESIDENTIAL ADMINISTRATION: EXPERTISE AND ACCOUNTABILITY IN CONSTITUTIONAL GOVERNMENT ("The Department of Labor, one of the most politically contested agencies, has created criteria that in some respects even exceed those previously required by OPM (*e.g.*, requiring 10, not 7, years of relevant litigation experience) and placed the screening panel under the aegis of the DOL Chief ALJ, a non-political figure.")

45 U.S. House of Representatives—117th Congress. Administrative Law Judges Competitive Service Restoration Act—HR 4448 (2021–2022). As of this writing, HR 4448 remains with the House Committee on Oversight and Reform.

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In the case that follows, the issue before the court was whether the ALJ's previous position as an "attorney advisor" was an "investigative or prosecutorial function" under § 556(e). Is it fair to say that individual bias resulting from the combination of functions is more closely controlled by the APA than the Due Process Clause of the Constitution?

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Chapter 4. Agency Rulemaking

§ 4.03 Formal and Informal Rules and Rulemaking Processes

A. Overview

Insert the following introductory materials to the end of § 4.03[A] on Page 300.

Adapted from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 108–09
West Academic Publishing (4th ed. 2023)

The Pre-Notice Part of Rulemaking: Setting the Agenda

An oft-overlooked first step of the administrative process is the agency's responsibility to identify its regulatory priorities and set its agenda.[46] These priorities reflect a range of considerations, from pure politics to practical concerns such as "internal management considerations as to budget and personnel; evaluations of [the agency's] own competence; [and] weighing of competing policies within a broad statutory framework."[47] Control of the presidency often determines the political affiliation of the agency head who sets the agenda, whether as a sole leader or as part of a multimember commission, and that leader will invariably face pressure—if not an obligation—to align their rulemaking activities with the administration's priorities.[48] Congress, too, can influence an agency's rulemaking agenda, for example, by allocating (or refusing to allocate) funding[49] or by directly mandating the initiation or completion of a rulemaking proceeding.[50] But ordinarily, proposals for rulemaking are formulated by the agencies themselves.

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[46] *See* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 798 (2021) ("[A]gencies make many of their most important decisions in rulemaking well before the publication of a Notice of Proposed Rulemaking (NPRM). Long before agencies publish their proposals, they set their regulatory agendas and decide which issues or problems they will and will not address."); *cf., e.g.*, Office of Information & Regulatory Affairs, Office of Management & Budget, *Current Unified Agenda of Regulatory and Deregulatory Actions*, Reginfo.gov (last updated Spring 2022), https://www.reginfo.gov/public/do/eAgendaMain (setting forth the current regulatory agenda for executive agencies; we discuss OIRA's and OMB's influence on agency policymaking in § 14.1).

[47] Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

[48] This is true even for independent, multi-commissioner agencies, such as the FCC. "[N]ew empirical research on commissions with partisan balance requirements shows that commissioners have become more partisan since the 1990s, which might mean that they will be less likely than earlier 'partisans' to moderate their views. . . . [I]n a partisan political environment, we might expect commissioners to move to the fringes in order to curry favor with co-partisans in Congress and the Executive Branch who could support their ambitions for future positions in government." Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 750 (2019).

[49] *See infra* § 15.2.

[50] Sometimes the two (failing to provide funding while simultaneously requiring agency action) go hand-in-hand. *See, e.g.*, *Establishing the Digital Opportunity Data Collection*, Second Report & Order & Third Further Notice of Proposed Rulemaking, 35 FCC Rcd. 7460, 2020 WL 4187348, at *5 (2020) (explaining that the FCC lacked the funding to implement the improved broadband maps for allocating government subsidies but would "take steps to complete the rulemaking required within the statutory deadline and in anticipation of receiving necessary funding in the future so that we can begin developing these granular, precise broadband service availability maps as quickly as possible"). In addition to a lack of funding, NHTSA has often faced inconsistent mandates to act swiftly without "relax[ing] of supplement[ing] in any way the statutory commands of 'reasonableness,' 'practicability,' and 'objectivity' that inhabited the original act and had proven so troublesome earlier on judicial review." Jerry L. Mashaw & David L. Harfst, *From Command and Control to Agency Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 204 (2017).

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In all events, agencies lack the resources to address every problem. Allocating those limited resources is, in many respects, determinative of the policies that agencies will ultimately pursue. Thus, the most critical aspect of agency policymaking happens with only minimal public input and even less public oversight. Agencies often embed contractors within their structure, and they can play an important role in the "pre-rule stage" (and beyond) by, for example, "help[ing] with crafting regulatory strategies, planning timelines, conducting research, convening stakeholders, and developing models that inform the agency's thinking ahead of writing a proposed rule."[51] Informal conversations with agency staff and leaders and behind-the-scenes lobbying from interest groups can greatly influence the course of future rulemakings "by, at a minimum, framing the debate and scope of action available during the notice and comment period."[52]

Agencies have some mechanisms available to formally solicit outside input prior to the proposed rule stage.[53] For example, agencies could separately seek comment on potential rulemaking priorities.[54] For perhaps obvious reasons, such as a lack of resources or, indeed, a lack of a desire to consider those comments, agencies rarely do this. More frequently, agencies issue broader notices of inquiry to generate input on subjects of anticipated rulemakings.

B. Informal Rulemaking Processes—Notice and Comment

Insert after Note 4-17, page 306.

Center for Science in the Public Interest v. Perdue, 438 F. Supp. 3d 546 (D. Md. 2020) (case note)

S4-1. Consider *Center for Science in the Public Interest v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020), where a district court dealt with a challenge to "a final rule promulgated by Defendant United States Department of Agriculture ('USDA') governing nutrition standards for school breakfast and lunch programs." The court held that the Final Rule's elimination of school meal nutrition requirements (a sodium requirement and a "one-hundred percent whole grain-rich requirement") was "not a logical outgrowth of the Interim Final Rule":

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[51] Bridget C.E. Dooling & Rachel Augustine Potter, Regulatory Body Shops 8 (Aug. 11, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186402 (describing contractors' roles throughout the rulemaking process and arguing that the use of "embedded . . . regulatory body shops" can "compromise the agency's capacity to act as an independent decision maker").

[52] Susan Webb Yackee, *The Politics of* Ex Parte *Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373, 378 (2011) ("By lobbying early in the regulatory policymaking process, groups introduce the facts agencies consider, define policy problems, and develop the detailed stipulations in proposed government rules."); William C. Hudson, *When Influence Encroaches: Statutory Advice in the Administrative State*, 26 WM. & MARY BILL RTS. J. 657, 683–84 & nn.135–36 (2018) ("Having the opportunity to develop an administrator's view of an issue well before the administrator has actually taken steps in his or her official capacity to address the issue may be more impactful than intervening when the issues have matured into actual deliberations; the advantages that accrue to early influencers is a recognized feature of both administrative law practice and cognitive psychology.").

[53] Sant'Ambrogio & Staszewski, *supra* note 6, at 801 (discussing research that "unearthed numerous efforts by federal agencies to engage the public with their agenda setting," including petitions for rulemaking, advisory committees, "focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, various forms of web-based outreach, negotiated rulemaking, and advance notices of proposed rulemaking," but lamenting that such measures were "relatively unstructured, unsystematic, and ad hoc").

[54] Statutes may mandate additional "pre-notice" steps, such as the Magnuson-Moss Warranty Act, 15 U.S.C. § 57a(b)(2), which requires the Federal Trade Commission to publish an "advance notice of proposed rulemaking" prior to publishing a notice of proposed rulemaking under its authority to define specific "unfair or deceptive acts or practices" proscribed by the FTC Act.

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With respect to sodium, the Interim Final Rule acknowledged "the importance of reducing the sodium content of school meals" because over ninety percent of school-age children exceeded the Dietary Guidelines' upper intake limit for dietary sodium between 2009 and 2012. At the same time, it recognized that "a more gradual process" was necessary to meet this goal. The purpose of the Interim Final Rule was therefore to provide "more time" for children to adjust to school meals with less sodium content and for schools and manufacturers to make appropriate menu and product changes, thus suggesting that the Dietary Guidelines' upper intake limit, long-embodied in the Final Sodium Target, would remain in effect, but would simply be delayed. Indeed, the Interim Final Rule spoke exclusively in terms of delaying compliance requirements, not abandoning the compliance requirements altogether, and at no point did the Interim Final Rule discuss eliminating the Final Sodium Target or even solicit comments about the effect of continued sodium "flexibilities" on the Final Sodium Target. Rather, it "specifically" sought comment only on "the impact [of extending the Sodium Target 1 compliance dates] on Sodium Target 2." "This specificity, together with total silence concerning any suggestion of eliminating [the Final Sodium Target], strongly indicated that [the Final Sodium Target] was not at issue." See *Chocolate Mfrs. Ass'n*, 755 F.2d at 1107 (finding that a final rule eliminating flavored milk from a permissible diet was not a logical outgrowth of a proposed rule that specifically discussed the dangers of high sugar content in foods such as cereals and juices, but not flavored milk, which had long been considered part of a permissible diet).

Although an agency is certainly permitted to change a rule in response to comments, USDA's changes are not "in character with the original scheme" of the Interim Final Rule, because there is a fundamental difference between delaying compliance standards— which indicates that school meals will still eventually meet those standards— and eliminating those standards altogether. Thus, the Final Rule's elimination of the Final Sodium Target is not a logical outgrowth of the Interim Final Rule's focus on delaying compliance requirements.

The Final Rule's elimination of the one-hundred percent whole grain-rich requirement is similarly not a logical outgrowth of the Interim Final Rule. With respect to whole grains, the Interim Final Rule specifically "retain[ed] the whole grain-rich regulatory requirement" of one hundred percent whole grains, while also extending the availability of an exemption, upon request, to "SFAs that demonstrate hardship in providing specific products that meet the whole grain-rich criteria and as long as at least 50 percent of the grains served are whole grain-rich." The express purpose of extending the exemption's availability was, as with sodium, to provide "additional time" for students, schools, and the industry to adjust.

Congress' regular appropriations riders offering the hardship exemption, in conjunction with the Interim Final Rule's "very detailed" discussion of that exemption and its "total silence concerning" eliminating, or even changing, the underlying one-hundred percent whole-grain rich requirement, "could have led interested persons only to conclude that a change in [the underlying whole-grain rich requirement] would not be considered." See *Chocolate Mfrs.*, 755 F.2d at 1107.The Final Rule therefore "materially alter[ed]" and "substantially depart[ed] from the terms or substance" of the Interim Final Rule by transforming what was a limited, case-by-case exemption into the new rule across the board. *See id.* at 1105. Thus, the Final Rule's elimination of the one hundred percent whole grain-rich requirement is not a logical outgrowth of the Interim Final Rule.

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S4-2. Note the several ways in which the *Chocolate Manufacturers* Court describes the purposes of the notice and comment process. Can you explain these purposes?

One of the purposes identified by the court is that the process "allow[s] the agency to benefit from the experience and input of the parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules." While one might agree that this is one of the purposes of notice and comment and that it is desirable for agencies to keep an open mind and take the public's submissions seriously, the Supreme Court has rejected the idea that this is an enforceable requirement under the APA. For more on the lack of an "open-mindedness" requirement in APA rulemakings, see § 4.03 of this Supplement.

D. Administrative Common Law

Littered throughout the corpus of cases addressing the notice and comment process—including *Chocolate Manufacturers*, § 4.03.B of the Casebook, and *United States v. Reynolds*, § 4.03.G.3 of the Casebook—are references to an agency's obligation to keep an open mind.[55] In its original form, this was a narrow requirement, limited to situations where the challenger could show that the agency (and, more specifically, one or more of its decisionmakers) had an "unalterably closed mind on matters critical to the disposition of the proceeding."[56] However, in certain courts, this evolved into a far broader "obligation to remain 'open-minded' about the issues raised."[57] It became not a matter of showing that the decisionmaker "was impervious to contrary evidence,"[58] but a far more exacting obligation that the Third Circuit in particular tested by comparing the proposed (or interim) rule with the final rule to see whether the record "reflect[s] any real open-mindedness" to an alternative position[59] or instead "demonstrates a single-minded commitment to the substantive result reached."[60]

In *Little Sisters of the Poor*, excerpted next, the Third Circuit faulted the Departments of Health and Human Services, Labor, and the Treasury for issuing "virtually identical" interim and final rules exempting employers with religious objections from the contraceptive mandate rule, promulgated under the Affordable Care Act of 2010. The fact that the interim final rule (IFR) and final rules were identical suggested to the Third Circuit that the agencies had not acted with an open mind. The Supreme Court granted certiorari. The excerpt below addresses two issues: Did the agencies commit reversible error in issuing an IFR rather than a document entitled a "notice of proposed rulemaking"? Are agencies obligated to keep an open mind in the rulemaking process?

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[55] *See, e.g.*, Prometheus Radio Project v. F.C.C., 652 F.3d 431, 453 (3d Cir. 2011) (collecting cases).

This introduction is adapted from Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton, *Administrative Law*, West Academic Publishing (4th ed. 2023).

[56] United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (internal quotation omitted).

[57] *Prometheus Radio*, 652 F.3d at 453.

[58] *United Steelworkers*, 647 F.2d at 1209.

[59] Pennsylvania v. President United States, 930 F.3d 543, 568 (3d Cir. 2019), *rev'd and remanded sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020)

[60] United States v. Reynolds, 710 F.3d 498, 519 (3d Cir. 2013).

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Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania

591 U.S. 651 (July 8, 2020)

III

[W]e must next decide whether the 2018 final rules are procedurally invalid. Respondents present two arguments on this score. Neither is persuasive.

A

Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U.S.C. §553(b). Respondents point to the fact that the 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," not a document entitled "General Notice of Proposed Rulemaking." They claim that since this was insufficient to satisfy §553(b)'s requirement, the final rules were procedurally invalid. Respondents are incorrect. Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.

The APA requires that the notice of proposed rulemaking contain "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." §§553(b)(2)–(3). The request for comments in the 2017 [Interim Final Rules (IFRs), which the agencies issued in lieu of a document entitled "notice of proposed rulemaking,] readily satisfies these requirements. That request detailed the Departments' view that they had legal authority under the ACA to promulgate both exemptions, as well as authority under RFRA to promulgate the religious exemption. And respondents do not—and cannot—argue that the IFRs failed to air the relevant issues with sufficient detail for respondents to understand the Departments' position. Thus, the APA notice requirements were satisfied.

Even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking" when the agency moves from an IFR to a final rule, there was no "prejudicial error" here. §706. We have previously noted that the rule of prejudicial error is treated as an "administrative law . . . harmless error rule." Here, the Departments issued an IFR that explained its position in fulsome detail and "provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be made permanent or subject to modification." Respondents thus do not come close to demonstrating that they experienced any harm from the title of the document, let alone that they have satisfied this harmless error rule. "The object [of notice and comment], in short, is one of fair notice," and respondents certainly had such notice here. Because the IFR complied with the APA's requirements, this claim fails.

B

Next, respondents contend that the 2018 final rules are procedurally invalid because "nothing in the record signal[s]" that the Departments "maintained an open mind throughout the [post-promulgation] process." As evidence for this claim, respondents point to the fact that the final rules made only minor alterations to the IFRs, leaving their substance unchanged. The Third Circuit applied this "open-mindedness" test, concluding that because the final rules were "virtually identical" to the IFRs, the Departments lacked the requisite "flexible and open-minded attitude" when they promulgated the final rules.

We decline to evaluate the final rules under the openmindedness test. We have repeatedly stated that the text of the APA provides the "'maximum procedural requirements'" that an agency must follow in

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order to promulgate a rule. *Perez*, 575 U. S., at 100 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978)). Because the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009), we have repeatedly rejected courts' attempts to impose "judge-made procedur[es]" in addition to the APA's mandates, *Perez*, 575 U. S., at 102; see also P*ension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 654–655 (1990); *Vermont Yankee*, 435 U. S., at 549. And like the procedures that we have held invalid, the open-mindedness test violates the "general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *LTV Corp.*, 496 U. S., at 654. Rather than adopting this test, we focus our inquiry on whether the Departments satisfied the APA's objective criteria, just as we have in previous cases. We conclude that they did.

Section 553(b) obligated the Departments to provide adequate notice before promulgating a rule that has legal force. As explained supra, at 22–23, the IFRs provided sufficient notice. Aside from these notice requirements, the APA mandates that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," §553(c); states that the final rules must include "a concise general statement of their basis and purpose,"; and requires that final rules must be published 30 days before they become effective, §553(d).

The Departments complied with each of these statutory procedures. They "request[ed] and encourag[ed] public comments on all matters addressed" in the rules—i.e., the basis for the Departments' legal authority, the rationales for the exemptions, and the detailed discussion of the exemptions' scope. 82 Fed. Reg. 47813, 47854. They also gave interested parties 60 days to submit comments. The final rules included a concise statement of their basis and purpose, explaining that the rules were "necessary to protect sincerely held" moral and religious objections and summarizing the legal analysis supporting the exemptions. Lastly, the final rules were published on November 15, 2018, but did not become effective until January 14, 2019—more than 30 days after being published. In sum, the rules fully complied with "'the maximum procedural requirements [that] Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.'" *Perez*, 575 U. S., at 102 (quoting *Vermont Yankee*, 435 U. S., at 524). Accordingly, respondents' second procedural challenge also fails.

Notes & Questions

S4-3. In a footnote, the Court added: "Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs." For more on the good cause exceptions to the notice and comment requirements and interim rules, see §§ 4.03.G.3 and G.4 of the Supplement and casebook.

S4-4. At face value, the interested public may expect (or hope) that agencies will fairly consider the evidence and opinions submitted in response to a notice of proposed rulemaking. Yet the Supreme Court's opinion comports with the text of the APA and the practical realities on the ground. Agency leaders have their own agenda they are expected to carry out when they are appointed. Further, those same leaders could not, as a factual matter, be compelled to maintain an open mind. Rather, open-mindedness requirement was, as the Supreme Court implicitly recognized, merely a procedural hurdle that simply required an interim or proposed rule to list possible alternatives, even if the agency had no intention of adopting such an

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alternative. At bottom, the open-mindedness test was an uneasy fit for a process designed to mirror a legislative process, rather than an adjudicative one that would raise due process considerations.[61]

G.2 Exceptions to Section 553 Rulemaking Procedures – Interpretive Rules

United States v. Riccardi, 989 F.3d 476, 487 (6th Cir. 2021) (case note)
Insert after Note 4-57, page 365.[62]

Note 4-57A. *Hoctor* remains influential. For example, the Sixth Circuit turned to *Hoctor* for guidance in addressing a "Commentary" provision of the U.S. Sentencing Guidelines (very roughly analogous to interpretive rules under the APA) defining the word "loss" in the context of stolen gift cards to mean a minimum "loss" value of $500 per card. *United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021). A greater loss amount generally translates to a higher "offense level" score and longer recommended sentence. Thus, a defendant found responsible for the theft of gift cards could face a longer sentence than if they had stolen cash worth the same amount. *See generally* U.S.S.G. 2B1.1. The Sixth Circuit held that the "bright-line" gift card calculation was not an "'interpretation' of general nonnumeric language," and thus needed to be part of a guideline rather than set forth in the Commentary.

The rough analogies between the unique provisions of the Sentencing Reform Act of 1984 (*see* 18 U.S.C. § 3553(b)(1); 28 U.S.C. § 995) and the APA's categories of legislative rules and interpretive rules are part of a deep circuit split. That split has touched on a variety of administrative law issues, including matters of organic statute interpretation and administrative deference. *See generally* United States v. Moses, 23 F.4th 347, 347–58 (4th Cir. 2022) (describing the broad contours of the circuit split and explaining the nuances that set guidelines commentary apart from APA interpretive rules).

G.3 Exceptions to Section 553 Rulemaking Procedures – Interim Rules

Replace or augment the principal case *United States v. Reynolds*, page 366, and accompanying notes and questions with the following materials.

Excerpt from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
Administrative Law 108–09
West Academic Publishing (4th ed. 2023)

As its name suggests, an interim rule is a gap-filling measure, one that (often) takes immediate effect but is accompanied by a notice of proposed rulemaking to solicit comments on and craft a permanent solution. Theoretically, at least, an agency could issue an interim rule after an abbreviated notice and comment period, with the subsequent period designed to allow for more fulsome input and review. Despite their prevalence,[63] the APA nowhere refers to them. Rather, when issued without notice and comment, the agency must justify them with one of the enumerated good cause bases set forth in § 553(b)(B).[64] Occasionally, courts of appeals have treated the decision to solicit post-effective comment as a factor

[61] This note is adapted from Aman, Rookard & Mayton, *Administrative Law* (West Academic Publishing 2023). *See also* Biden v. Texas, 142 S. Ct. 2528, 2547 (2022) (reiterating that *Little Sisters* "rejected criticisms of agency closemindedness based on an identity between proposed and final agency action").

[62] The following materials are adapted from Aman, Rookard & Mayton, Administrative Law 90 n.36 (West Academic Publishing, 4th ed. 2023)

[63] *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 712–15 (1999).

[64] *See, e.g.*, N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012) (collecting cases).

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weighing in favor of good cause for issuing the interim rule without notice and comment,[65] though, if given any serious weight, this position could permit agencies to "issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency," and thereby insulate their good cause determinations from scrutiny.[66]

The Administrative Conference of the United States and commentators have proposed amending the APA to require a post-effective comment period for all rules invoking the impracticable and public interest prongs of the good cause exception, in essence codifying an interim rule procedure.[67] Though agencies may follow this practice on a voluntary basis, this recommendation has much to commend to it. An emergency, for example, may well provide good cause for taking immediate action without notice and comment. But that same emergency would have no impact on the agency's ability to subsequently seek public input on whether the interim rule should be finalized as adopted, finetuned or amended, or ultimately withdrawn.

G.4. Other APA Rulemaking Exceptions

Insert before first complete paragraph on page 371.

In *Capital Area Immigrants' Rights Coalition v. Trump*, the District Court addressed and rejected the Department of Justice and Department of Homeland Security's reliance on the good cause and military and foreign affairs exception to notice-and-comment rulemaking. Plaintiffs challenged "an interim final rule that significantly changes the United States' asylum procedures. The rule categorically disqualifies aliens arriving at the southern border from receiving asylum unless they have already unsuccessfully sought similar protection in another country on their way here. Plaintiffs allege that the rule is unlawful for several reasons, including that . . . it was issued without notice-and-comment procedures required under the Administrative Procedure Act (APA)." The District Court agreed, as excerpted below:

Capital Area Immigrants' Rights Coalition v. Trump

471 F. Supp. 3d 25 (D.D.C. June 30, 2020)

The APA generally requires substantive rules to be promulgated through notice-and-comment rulemaking. See 5 U.S.C. § 553. These procedures are not a mere formality. They "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). And they "attempt[] to

[65] *See, e.g.*, United States v. Johnson, 632 F.3d 912, 932 (5th Cir. 2011) (suggesting "that the final rulemaking process with full APA comment . . . cannot be ignored" in determining that the Attorney General's failure to seek comment on the SORNA Interim Rule was harmless); James Kim, Comment, *For A Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Ac*t, 18 GEO. MASON L. REV. 1045, 1076 & n.232 (2011) (citing, for example, Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm'n, 822 F.2d 1123, 1131–34 (D.C. Cir. 1987); Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984); Republic Steel Corp. v. Costle, 621 F.2d 797, 804 (6th Cir. 1980)).

[66] Mack Trucks, Inc. v. EPA, 682 F.3d 87, 94 (D.C. Cir. 2012) (internal quotation omitted); *see, e.g.*, United States v. Ross, 848 F.3d 1129, 1133 (D.C. Cir. 2017) ("[P]rocedurally sound adoption of a rule after the conduct affected can have no legitimate effect on that conduct."); United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010) ("The fact that the Attorney General eventually made SORNA retroactive through legitimate means cannot sustain prosecution of an individual based on conduct committed long before the final guidelines' enactment . . . .").

[67] *See, e.g.*, Asimow, *supra* note 153, at 733–36 (citing ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110 (1995)); Kim, *supra* note 155 at 1076.

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provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." *Regents of the Univ. of California,* No. 18-587, 2020 WL 3271746, at *27 (Thomas, J., dissenting) (citation omitted)).

Because the Rule was promulgated without these procedures, the question for the Court is whether one of the APA's exceptions to the usual requirements applies. Defendants assert that two do. First, under the "good cause" exception, an agency need not provide notice and an opportunity to comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

Second, under the "foreign affairs function" exception, the normal notice-and-comment requirements do not apply "to the extent that there is involved . . . a military or foreign affairs function of the United States." *Id.* § 553(a)(1).

Despite their potentially broad sweep, the D.C. Circuit has instructed that these exceptions must be "narrowly construed" and "reluctantly countenanced." New Jersey, 626 F.2d at 1045. The Circuit has also emphasized that the broader a rule's reach, "the greater the necessity for public comment." American Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981). With these baseline principles in mind, the Court considers whether either the good cause or foreign affairs function exception applies here. Neither does.

1. The Good Cause Exception

The APA permits an agency to dispense with notice-and-comment procedures when it finds that doing so would be "impracticable, unnecessary, or contrary to the public interest," an exception said to require "good cause." 5 U.S.C. § 553(b)(B). Here, Defendants assert that providing notice and comment would have been both impracticable and contrary to the public interest. 84 Fed. Reg. at 33,841.

Even on top of the principles described above, the D.C. Circuit has set a high bar for satisfying good cause. As it recently explained, review of an "agency's legal conclusion of good cause is de novo." Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014). In other words, a court may not simply defer to an agency's judgment about whether good cause exists. Rather, the Circuit instructs, a court must "examine closely" an agency's stated rationale and the circumstances surrounding the agency's decision. Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 580 (D.C. Cir. 1981). The good cause inquiry is both "meticulous" and "demanding." Sorenson, 755 F.3d at 706 (citation omitted).

The Circuit has found notice-and-comment procedures sufficiently impracticable only in unusual cases, such as when "air travel security agencies would be unable to address threats posing 'a possible imminent hazard to aircraft, persons, and property within the United States,'" or when "a rule was of 'life-saving importance' to mine workers in the event of a mine explosion." Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (citation omitted). And it has instructed that the public interest ground "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Id.* at 95. The good cause exception is therefore "appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, 'announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.'" *Id.* (citation omitted).

Defendants argue that notice-and-comment rulemaking would have been impracticable and contrary to the public interest because that process would have led to a surge of asylum seekers at the southern border of the United States. 84 Fed. Reg. at 33,841. The Departments asserted upon the Rule's promulgation that if it were published for notice and comment before becoming effective, smugglers might communicate its impending effects to potential asylum seekers, thus creating a "risk of a surge in migrants hoping to enter the country" beforehand. *Id.* They also asserted that pre-promulgation "notice and comment, or a delay in the effective date, would be destabilizing and would jeopardize the lives and welfare of aliens who could

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surge to the border to enter the United States before the rule took effect." *Id.* According to the Departments, their "experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States along the southern border." *Id.*

Common sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures. See Sorenson, 755 F.3d at 707. After carefully examining the record, the Court finds that it does not contain sufficient evidence to justify invocation of the good cause exception.

The evidence that Defendants rely on begins—and for the most part ends—with a single newspaper article in the Washington Post from October 2018; indeed, it is the only specific evidence the Departments cited when promulgating the Rule. That article includes several passages suggesting that: (1) after the United States abruptly stopped separating families who applied for asylum together in the spring of 2018, smugglers encouraged asylum seekers to bring their children and to speed up their efforts to reach the border; (2) those same smugglers may coach asylum seekers about what to tell interviewing officers so they can meet the credible fear standard; and (3) many months after the United States stopped separating families, a greater proportion of asylum applicants had brought children or other family members with them to the border.

Under Circuit precedent, this newspaper article alone does not provide good cause to bypass notice-and-comment rulemaking procedures for the reasons cited by Defendants. Even assuming that the Rule was likely to have had a similar effect as the regulatory change described in the article, the article contains no evidence that that change caused a surge of asylum seekers at the border—let alone one on a scale and at a speed that would have jeopardized their lives or otherwise have defeated the purpose of the Rule if notice-and-comment rulemaking had proceeded. In fact, the article lacks any data suggesting that the number of asylum seekers increased at all during this time—only that more asylum seekers brought children with them. Clearly, the article suggests that smugglers are not oblivious to major changes in United States' immigration policy, and that they pass on the information they learn to some who may use it to game the asylum process. None of that is surprising. But at bottom, the article does little if anything to support Defendants' prediction that undertaking notice-and-comment rulemaking would have led to a dramatic, immediate surge of asylum applicants at the border that would have had the impact they suggest. And other articles from the administrative record that Defendants cite either do not support, or even undermine, their prediction of such a surge.

Defendants offer no other data or information that persuasively supports their prediction of a surge. They point the Court to several charts that they argue support their invocation of good cause. One shows the number of enforcement actions undertaken by Customs and Border Protection at the southwest border from October 2016 through May 2019, broken down by the alien's country of origin. But the Court can glean little from that chart, other than that these enforcement actions decreased somewhat during the first six months of that period, increased gradually over the next few years, and then increased more sharply early in 2019. Defendants also point to a chart that depicts "Southwest Border Encounters of non-Mexican Aliens" each month from October 2012 to March 2019 and also contains some agency observations of that data. See AR at 208–20. But again, all this chart shows is that as of March 2019, more and more non-Mexican aliens were encountered at the southern border and that the agency projected the number to continue to rise for unspecified reasons. Interestingly, though, the agency's observations reflect that even the relatively high number of encounters reported in March 2019 was not unprecedented; a higher number had been reported a decade earlier.

As far as providing a basis for predicting a surge of asylum seekers prompted by the publishing of the Rule for notice and comment, these numbers would be meaningful if Defendants explained that peaks or

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troughs in the data corresponded with regulatory or policy changes in the United States. But Defendants have not done so, and the Court cannot find any such analysis in the record. At bottom, as Plaintiffs point out, Defendants—"despite studying migration patterns closely"—have "failed to document any immediate surge that has ever occurred during a temporary pause in an announced policy." That failure is striking. . . .

Finally, Defendants also cite the Supreme Court's decision in *Holder v. Humanitarian Law Project,* 561 U.S. 1, 34–35 (2010), to support their argument that "courts are ill-equipped to second-guess the Executive Branch's prospective judgment." In Holder, the Court denied a constitutional challenge to a criminal statute prohibiting the provision of material support to a foreign terrorist organization. In so doing, Defendants point out, the Court noted that the "Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."

There are many circumstances in which the law appropriately commands, as in Holder, that courts defer to the Executive Branch's national security judgments. But even putting aside the many other differences between that case and this one, the record in that case consisted of far more than a newspaper article. There, the basis for the judgments of both Congress and the Executive about the material support statute—the latter's set forth in an affidavit of a State Department official—were thoroughly explained to the Court. Those judgments were informed by extensive experience with how terrorist groups fund their activities, and the specific designated terrorist organizations at issue, which the Executive asserted had killed thousands. *Id.* at 29–30. Here, by contrast, the Departments rely on a single newspaper article that does not even directly address the key predictive judgment in question: the likelihood of a surge in asylum seekers so great and so rapid as to threaten human life or defeat the purpose of the Rule if notice- and-comment procedures were followed.

It bears emphasizing that in holding that the good cause exception does not apply, the Court does not suggest in any way that the Executive's broader security concerns that prompted promulgation of the Rule were unfounded. The question for the Court is simply whether, on the record before it, the prediction of a surge offered by the Departments provided good cause to dispense with notice-and-comment procedures before the Rule took effect. For the reasons explained above, the Court holds that it did not.

2. The Foreign Affairs Function Exception

The second exception Defendants invoke is the foreign affairs function exception. As noted above, notice-and-comment requirements do not apply "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). Unlike the good cause exception, there is little case law in this Circuit, or elsewhere, to guide the Court's application of this exception. Perhaps as a result, it presents a closer call. Still, the Court finds that Defendants' arguments in favor of the exception come up short. . . .

The Court starts, as it must, with the text of the statute: notice-and-comment procedures are unnecessary "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The first part of that phrase, "to the extent there is involved," applies to several other categories of rulemakings as well, including those involving public benefits, 5 U.S.C. § 553(a)(2), and the D.C. Circuit has interpreted the phrase in that context. Specifically, in *Humana of South Carolina, Inc. v. Califano*, the Circuit instructed— consistent with the duty to "narrowly construe" and "reluctantly countenance" such exceptions, New Jersey, 626 F.2d at 1045—that "to the extent that any one of the enumerated categories is clearly and directly involved in the regulatory effort at issue, the Act's procedural compulsions are suspended." 590 F.2d 1070, 1082 (D.C. Cir. 1978) (citations and quotations omitted) (emphasis added). As a result, a rule falls within the foreign affairs function exception only if it "clearly and directly" involves "a foreign affairs function of the United States."

The APA does not define the key terms in the second part of that phrase—"foreign affairs" or "function"—and so the Court turns to dictionaries in use at the time of the APA's enactment. The definition

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of "foreign affairs" is reasonably straightforward: it refers to the conduct of international relations between sovereign states. The meaning of "function," on the other hand, is less so. The 1945 version of Webster's New International Dictionary defines it as "[t]he natural and proper action of anything; special activity," "[t]he natural or characteristic action of any power or faculty," or "[t]he course of action which peculiarly pertains to any public officer in church or state; the activity appropriate to any business or profession; official duty." "Function" thus appears to narrow the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign affairs. Applying these definitions, then, a "foreign affairs function" encompasses activities or actions characteristic to the conduct of international relations. And to sum up, to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations. . . .

Thus, the foreign affairs function exception plainly covers heartland cases in which a rule itself directly involves the conduct of foreign affairs. For example, the exception covers scenarios in which a rule implements an international agreement between the United States and another sovereign state. Indeed, that is the only circumstance to which the D.C. Circuit has applied it. Specifically, in *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994), the Circuit held that the foreign affairs function exception applied to a Federal Highway Administration rule implementing a Memorandum of Understanding (MOU) between the United States and Mexico about the countries' reciprocal recognition of each other's commercial drivers' licenses. The court noted that "the rule does no more" than carry out the United States' "obligations to a foreign nation." The rule in that case merely "added a sentence to [a] footnote" in a regulation specifying that the Administrator had determined that Mexican commercial drivers' licenses met the United States' standards. The exception also certainly covers rules that regulate foreign diplomats in the United States. For example, in *City of New York v. Permanent Mission of India to United Nations*, the Second Circuit held that the exception covered an action by the State Department "exempt[ing] from real property taxes" any "property owned by foreign governments and used to house the staff of permanent missions to the United Nations or the Organization of American States or of consular posts." 618 F.3d at 175. As the court observed, "the action taken by the State Department to regulate the treatment of foreign missions implicates matters of diplomacy *directly*."

That Congress would categorically exclude rules like these from notice-and-comment procedures is unsurprising. These procedures enhance the rulemaking process by exposing proposed regulations to feedback from a broad set of interested parties. But comments are unlikely to impact a rule to which the United States has already effectively committed itself through international agreement. Similarly, in the diplomatic context, agency action may be grounded in international reciprocity.

Here, however, the foreign affairs function exception does not excuse the Departments from failing to engage in notice-and-comment rulemaking before promulgating the Rule. The Rule overhauls the procedure through which the United States decides whether aliens who arrive at our southern border are eligible for asylum here, no matter the country from which they originally fled. These changes to our asylum criteria do not "clearly and directly" involve activities or actions characteristic of the conduct of international relations. They do not, for example, themselves involve the mechanisms through which the United States conducts relations with foreign states. Nor were they the product of any agreement between the United States and another country, regardless of any ongoing negotiations. To be sure, Defendants say they intended that the Rule would have downstream effects in other countries, and perhaps on those negotiations. Obviously, they expected that the Rule would cause more aliens to apply for protection in other countries before arriving in the United States and seeking asylum here. But these indirect effects do not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception.

It may seem a quibble that the exception distinguishes between rules that "clearly and directly" involve activities characteristic of the conduct of international relations and those that have indirect international effects. And of course, the Court is bound to apply both Circuit precedent and the statutory text as it is, "even if it thinks some other approach might accord with good policy." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014). But it is worth pointing out that the Circuit's holding in Califano and

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Congress's use of the word "function"— instead of, say, "effects" or "implications"—prevent the foreign affairs function exception from swallowing the proverbial rule. There are many rulemakings that an agency might plausibly argue have downstream effects in other countries or on international negotiations in which the United States is perpetually engaged. Courts have, for example, warned that in the immigration context, the "dangers of an expansive reading of the foreign affairs exception . . . are manifest." But this is true in other areas of the law as well. One agency might reach for a too-sweeping interpretation of the foreign affairs function exception to argue that a rule involving climate change that affects other countries is subject to the exception.

Another might contend that a rule regarding domestic production of some good or commodity that impacts ongoing trade negotiations is covered. Thus, as Plaintiffs point out, courts of appeals have generally rejected the idea that the exception applies merely because a rule "implicate[s] foreign affairs" or "touche[s] on national sovereignty." In the end, the narrowness of this exception does not mean that these agencies cannot take these hypothetical actions; it simply means that they are not excused from engaging in notice-and- comment rulemaking when they do. . . .

Defendants also argue that the Court should defer to the Departments' conclusion that the foreign affairs function exception applies. But they do not point to any case law suggesting that agencies are entitled to deference in interpreting the scope of the exception. That is hardly surprising. As this Circuit has explained, "an agency has no interpretive authority over the APA." And Defendants again point to cases like *Holder*, 561 U.S. at 35. The Court reiterates that there are many circumstances in which courts appropriately defer to the national security judgments of the Executive. But determining the scope of an APA exception is not one of them. As noted above, if engaging in notice-and- comment rulemaking before implementing the rule would have harmed ongoing international negotiations, Defendants could have argued that these effects gave them good cause to forgo these procedures. And they could have provided an adequate factual record to support those predictive judgments to which the Court could defer. But they did not do so.

***

For all the above reasons, the Court finds that the Rule is not exempt from the APA's notice-and-comment procedures. Because the Departments unlawfully dispensed with those requirements, they issued the Rule "without observance of procedure required by law," 5 U.S.C. § 706. . . .

I. Policymaking By Delays and Rescissions [deleted]

Delete the materials appearing in § 4.03[I], pp. 374–76. The principal case addressed in that section, *Pennsylvania v. Trump*, was reversed *sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, excerpted in § 4.03.D of this Supplement. The District Court's decision in *California v. EPA* likewise took a U-turn after the EPA promulgated a new regulation. *See* California *ex rel* Becerra v. EPA, 978 F.3d 708 (9th Cir. 2020).

For an edited version of *DHS v. Regents*, the Supreme Court's decision dealing with the attempt by the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) and accompanying discussion questions, see § 7.08 of this Supplement.

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Chapter 5. Legislative Control of Agency Discretion

§ 5.06 Nondelegation Doctrine Revival?

Insert the following after *Gundy v. United States*, p. 456

Federal Communications Commission v. Consumers' Research

606 U.S. ____ (2025)

Justice KAGAN delivered the opinion of the Court.

Nearly a century ago, Congress charged the then-new Federal Communications Commission (FCC or Commission) with making communications services available, at affordable prices, to all Americans. That objective became known as "universal service." Some decades on, near the turn of the 21st century, Congress reaffirmed its commitment to universal service while providing new and more detailed instructions to the FCC about how to achieve it. Under the amended statutory plan, the FCC would use required payments, called contributions, from telecommunications companies to subsidize basic communications services for consumers in certain underserved communities—particularly, rural and low-income areas. To carry out that mandate, the Commission established discrete subsidy programs for the consumers Congress had identified, set up a special fund to receive and disburse the companies' payments, and enlisted a private corporation, called the Universal Service Administrative Company, to help manage that fund's operations.

The question in this case is whether the universal-service scheme—more particularly, its contribution mechanism—violates the Constitution's nondelegation doctrine, either because Congress has given away its power to the FCC or because the FCC has given away its power to a private company. We hold that no impermissible transfer of authority has occurred. Under our nondelegation precedents, Congress sufficiently guided and constrained the discretion that it lodged with the FCC to implement the universal-service contribution scheme. And the FCC, in its turn, has retained all decision-making authority within that sphere, relying on the Administrative Company only for non-binding advice. Nothing in those arrangements, either separately or together, violates the Constitution.

I

A

The Communications Act of 1934 established the FCC and empowered it to regulate communications services. In the Act's very first provision, Congress instructed the FCC to pursue the goal now called universal service. The FCC, Congress stated, was "to make available, so far as possible, to all the people of the United States," reliable communications services "at reasonable charges." 47 U.S.C. § 151.

The universal-service project arose from the concern that pure market mechanisms would leave some segments of the population without access to needed communications services. That is because providers of those services, also called carriers, can reap greater profits from some classes of customers than from others. . . . The result, policymakers thought, would be severe inequities in access to communications systems, and a swiss-cheese-like communications network for the whole country. . . .

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In 1996, Congress overhauled the Act to "promote competition and reduce regulation" in the telecommunications sector. See Telecommunications Act. As part of those reforms, Congress created a new framework for achieving universal service. The amended Act discarded the implicit subsidies embedded in [the regulated monopoly system originally set forth in the Communications Act] and substituted a plan for explicit transfer payments to ensure that basic communications services extend across the country.

Section 254 of the amended statute requires every carrier providing interstate telecommunications services to "contribute," in line with the statute and FCC rules, to a fund designed to "preserve and advance universal service." The FCC must use the money in that fund, now known as the Universal Service Fund, to pay for subsidy programs for designated populations and facilities needing improved access. The statute, for example, continues the Lifeline program [previously established by the FCC under the Communications Act] aiding low-income individuals. It directs the FCC to provide assistance to rural hospitals, as well as to schools and libraries. And it instructs the FCC to expand communications access for consumers in "rural" and other "high cost areas." The carrier contributions collected to support those programs . . . must be "sufficient" to carry them out and so to "advance universal service."

The statute also provides detailed guidance for identifying the specific communications services to which the statute's beneficiaries should have access. . . . [T]he Act recognizes that those services, given the expected pace of technological change, are unlikely to stay static: Universal service, says the statute, is "an evolving level of telecommunications services that the Commission shall establish periodically" as it accounts for "advances in telecommunications and information technologies and services." . . . In deciding which communications services the "definition" of universal service encompasses, the FCC "shall consider the extent to which" a service (1) is "essential to education, public health, or public safety"; (2) has, through market forces, "been subscribed to by a substantial majority of residential customers"; and (3) is in fact "being deployed in public telecommunications networks by telecommunications carriers." . . . Congress thus struck a balance in establishing universal service's metes and bounds—affording the FCC latitude to adapt to technological developments, but insisting that the FCC always look to whether services are essential, affordable, and widely used.

Echoing the provisions just described, Congress also listed six "principles" on which the FCC "shall base" all its universal-service policies. § 254(b). First, "[q]uality services should be available at just, reasonable, and affordable rates." Second, "all regions of the Nation" should have access to those services. Third, all consumers, "including low-income consumers and those in rural, insular, and high cost areas," should have access to services that are "reasonably comparable" in quality and price to those in urban areas. Fourth, every carrier should make "an equitable and nondiscriminatory contribution" to the achievement of universal service. Fifth, the subsidies given to advance that goal should be "specific, predictable[,] and sufficient." And sixth, "schools," "libraries," and "health care providers" should have access to services. That list concludes with a provision enabling the FCC to add "other principles" found both "consistent with" the Act and "necessary and appropriate for the protection of the public interest, convenience, and necessity." . . .

To calculate how much carriers must contribute to the Fund for those programs, the FCC has devised a formula, known as the "contribution factor." 47 C.F.R. § 54.709(a). That factor is a fraction, expressed as a percentage, whose numerator is the Fund's projected expenses for the upcoming quarter (the subsidy payments it will make plus overhead) and whose denominator is the total projected revenue of contributing carriers during that same period. A carrier must pay into the Fund an amount equal to its own projected revenue multiplied by the contribution factor. So, for example, if the FCC forecasts that it will need, in a

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given quarter, 25% of all carrier revenues to cover the costs of its universal-service programs, a carrier expecting to generate $100 million in revenue in that quarter will have to contribute $25 million. The carrier may then pass along to its customers the cost of its contributions. Every quarter, the FCC updates its expense and revenue projections, comes up with a new contribution factor, and announces it in a public notice. §§ 54.709(a)(2)–(3). During the next 14 days, the FCC may revise the factor as it thinks proper. § 54.709(a)(3). If the FCC takes no action within that period, the factor is "deemed approved by the Commission" and goes into effect. . . .

The FCC in 1998 appointed the Universal Service Administrative Company as the Fund's "permanent Administrator." § 54.701(a). The Administrator, as we will call it, is a private, not-for-profit corporation owned by an association of carriers. It manages the day-to-day operations of the Fund . . . . More relevant here, the Administrator plays a role each quarter in producing the financial projections that end up determining the contribution factor. See §§ 54.709(a)(2)–(3). Specifically, the Administrator estimates the Fund's expenses (again, the costs of the programs plus overhead) and adds up the estimates it receives from individual carriers about their revenues. The Administrator then submits those figures, along with supporting documentation, to the Commission for approval and eventual use in calculating required contributions.

B

In December 2021, the FCC proposed a contribution factor of 25.2% for the first quarter of 2022. . . . . The Commission took no action in response, so the 25.2% contribution factor went into effect. . . . In the full Fifth Circuit's view, the universal-service contribution mechanism is unconstitutional because of its so-called "double-layered delegation" [that is, a broad public delegation plus a subdelegation to the Administrator—a private party].

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other. See *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 472 (2001). At the same time, we have recognized that Congress may "seek[ ] assistance" from its coordinate branches to secure the "effect intended by its acts of legislation." And in particular, Congress may "vest[ ] discretion" in executive agencies to implement and apply the laws it has enacted—for example, by deciding on "the details of [their] execution."

To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an "intelligible principle" to guide what it has given the agency to do. Under that test, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." The "guidance" needed is greater, we have explained, when an agency action will "affect the entire national economy" than when it addresses a narrow, technical issue (*e.g.*, the definition of "country [grain] elevators"). But in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority." And similarly, we have asked if Congress has provided sufficient standards to enable both "the courts and the public [to] ascertain whether the agency" has followed the law. If Congress has done so—as we have almost always found—then we will not disturb its grant of authority.

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A

Although the intelligible-principle standard has focused our nondelegation doctrine for a century, Consumers' Research and the dissent primarily argue that we must apply a different test here. . . . Consumers' Research views th[e] required contributions as taxes [and argues] that tax statutes—and probably all revenue-raising statutes—have to satisfy a special nondelegation rule. For those statutes, Congress must set a "definite" or "objective limit" on how much money an agency can collect—a numeric cap, a fixed rate, or the equivalent. Without such a limit, Consumers' Research claims, no intelligible principle (however constraining) will do. . .

Twice before, we have rejected a party's request to create a special nondelegation rule for revenue-raising legislation. In *J.W. Hampton*, a taxpayer contended that when Congress is "exercis[ing] the power to levy taxes and fix customs duties," it lacks the usual leeway to confer discretion on agencies. 276 U.S. 394, 409 (1928). "The [legal] authorities," the Court responded, "make no such distinction." [Instead, the usual "'intelligible principle' standard' serves]. More than sixty years later, we reiterated that holding. In *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220 (1989), another litigant urged that "Congress' taxing power" can be delegated only "with much stricter guidelines" than are normally used. [W]e again—and unanimously—rejected that "two-tiered theory of nondelegation." "[N]othing" in the Constitution's text or structure, *Skinner* explained, "distinguish[es] Congress' power to tax from its other enumerated powers" "in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive." Nor, the Court added, did history at all distinguish the two. . . .

The alternative test Consumers' Research and the dissent propose also would throw a host of federal statutes into doubt. . . . The Federal Reserve Board, for instance, funds its operations by levying on Federal Reserve Banks "an assessment sufficient to pay its estimated expenses." 12 U.S.C. § 243. The Office of the Comptroller of the Currency (OCC) likewise "collect[s]" from OCC-chartered banks an "assessment, fee, or other charge" as the Office "determines is necessary or appropriate to carry out [its] responsibilities." § 16. And the Deposit Insurance Fund of the Federal Deposit Insurance Corporation (FDIC), which protects the savings of millions of Americans, is financed through charges on banks "which the Corporation may by regulation prescribe, after giving due consideration to the need to establish and maintain the [Fund's] reserve ratio." § 1815(d)(1). In none of those (or many other) revenue-raising statutes does a number appear. . . .

[The Court next discussed and rejected Consumers' Research's alternative argument that its "numeric-limit requirement" should apply only to taxes and not fees," observing that Consumers' Research "offers no argument for *why* categorizing something as a fee rather than a tax should matter for delegation purposes."]

And yet a greater problem inheres in the shared position of Consumers' Research and the dissent: Whatever it applies to (just taxes or fees as well), its focus on numeric limits produces absurd results, divorced from any reasonable understanding of constitutional values. Under that view, a revenue-raising statute containing non-numeric, qualitative standards can never pass muster, no matter how much guidance those standards provide and how tight the constraints they impose. But a revenue-raising statute with a numeric limit will always pass muster, even if it effectively leaves an agency with boundless power. Consider a hypothetical raised at oral argument: Congress tells the FCC it can demand payments from carriers of any amount it wants up to $5 trillion. (The actual cost of universal service is, of course, a tiny fraction of that amount.) According to Consumers' Research, that statute is permissible because ... well, because Congress has set the $5 trillion figure. But so what? The purpose of the nondelegation doctrine is to enforce limits on the "degree of policy judgment that can be left to those executing or applying the law." *Mistretta v. United*

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States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting). The anywhere-up-to-$5-trillion tax statute would not do that, whereas a statute with qualitative limits well might. [T]he Consumers' Research approach does nothing to vindicate the nondelegation doctrine or, more broadly, the separation of powers.

B

We therefore return to the usual intelligible-principle test to decide whether the universal-service contribution scheme violates the Constitution's nondelegation rule. The question is, again, whether Section 254 adequately guides the FCC in requiring contributions from carriers—whether it expresses the "general policy" the FCC must pursue in setting contribution amounts, as well as the "boundaries" it cannot cross. Here, that inquiry into the nature of the FCC's discretion involves what turn out to be two closely related questions. First, how much money can the FCC raise through contributions? And second, on what things can it spend those funds? . . . Congress . . . imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers.

1

As Consumers' Research notes, Section 254 imposes no quantitative but only qualitative limits on how much money the FCC can raise from carriers for universal service. There is not a number or a rate in sight. Instead, the statute directs the FCC to collect the amount that is "sufficient" to support the universal-service programs Congress has told it to implement. §§ 254(b)(5), (d), (e). That language replicates or resembles the statutory terms Congress has used in other revenue-raising statutes . . . . See, *e.g.*, 12 U.S.C. § 243 (instructing the Federal Reserve Board to levy on banks "an assessment sufficient to pay its estimated expenses"). . . . "[S]ufficient" sets a floor and a ceiling alike. An amount of money is "sufficient" for a purpose if it is "[a]dequate" or "necessary" to achieve that purpose. Black's Law Dictionary 1447 (7th ed. 1999). That means, of course, that the FCC cannot raise *less* than is adequate or necessary to finance the universal-service programs Congress wants. But it also means that the FCC cannot raise *more* than that amount. Were the FCC to raise, say, twice as much as needed, the revenue would not be "sufficient" but instead excessive. . . .

2

To say that much, though, takes us only halfway, because it raises the question: Sufficient for what? If Section 254's universal-service program is itself indeterminate—so that the FCC can turn it into anything the FCC wants—then the "sufficiency" ceiling will do no serious work. The FCC could operate—and collect contributions "sufficient" for—either the most barebones or the most extravagant program. . . .

On this further, "for what" question, our nondelegation precedents provide context . . . . Those that have failed are fewer in number—in fact, only two—but offer object lessons about the amount of latitude Congress can confer. In one case, the statute empowered the President to bar the transport of petroleum products while "establish[ing] no criterion" and "declar[ing] no policy" for whether, when, or how he should do so. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). The statute in the second case was even worse. It authorized the President to approve "codes of fair competition" for "the government of trade and industry throughout the country," yet imposed "few restrictions" and "set[ ] up no standards" aside from a "statement of the general aims of rehabilitat[ing], correct[ing,] and expand[ing]" the economy. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–522, 541–542 (1935). The law thus gave the President "virtually unfettered" authority to govern the Nation's trades and industries.

At the same time, we have found intelligible principles in a host of statutes giving agencies significant discretion. So, for example, we upheld a provision enabling an agency to set air quality standards at levels "requisite to protect the public health." *Whitman*, 531 U.S. at 472. We sustained a delegation to an agency

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to ensure that corporate structures did not "unfairly or inequitably distribute voting power" among security holders. *American Power & Light*, 329 U.S. at 104, 67 S.Ct. 133. And we affirmed authorizations to regulate in the "public interest" and to set "just and reasonable" rates, because we thought the discretion given was not unbridled. See, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–226, (1943). Of course, our cases did not examine those statutory phrases in isolation but instead looked to the broader statutory contexts, which informed their interpretation and supplied the content necessary to satisfy the intelligible-principle test.

Section 254, for its part, provides the FCC with determinate standards for operating the universal-service program. The statute makes clear whom the program is intended to serve: those in rural and other high-cost areas (with a special nod to rural hospitals), low-income consumers, and schools and libraries. And in provisions defining universal service and stating the program's core "principles," the statute provides specific criteria for which services those statutory beneficiaries should receive. In deciding whether a service falls within the program's ambit, the FCC must consider whether the service has "been subscribed to by a substantial majority of residential customers." If that objective criterion is not met, the FCC generally may not subsidize the service. So too, the service must be one that can be made available to all consumers in all regions at "reasonable[ ] and affordable rates"—so more a basic than a budget-busting good. And still more, the service must be "essential to education, public health, or public safety"—a necessity, not a luxury, in order to live in the world. The conditions, each alone and together, have bite, creating a bounded program. Section 254 instructs the Commission to provide to an identified set of recipients a defined sort of benefit—widely used, generally affordable, and essential telecommunications services.

That limited conception of universal service is rooted in its history—except that the new statute, as compared with the old, holds the FCC to more specific requirements. . . .

The proof is in the pudding: Each of the four programs the FCC now operates under Section 254 reflects Congress's choices about universal service's scope and content. The Lifeline program, which began under the original Act, advances a basic commitment. Now codified, it helps make phone service affordable to all Americans by providing a modest monthly subsidy. The High Cost program similarly implements a longstanding principle—to integrate rural communities into the Nation's communications network. And it does so now in accordance with the statutory directive to ensure that rural and other high-cost areas have access to roughly the same needed services, at the same affordable prices, as urban areas do. The Commission's other two programs, E-Rate and Rural Health, are of a piece. Specifically authorized in the amended Act, they underwrite services essential to education and healthcare, with a focus on underserved populations. Not one of those important but decidedly ordinary programs suggests an agency vested with unbridled discretion. . . .

We likewise see no constitutional issue in Section 254(c)(1)'s description of universal service as an "evolving level of telecommunications services that the Commission shall establish periodically" in light of "advances in telecommunications and information" services. According to Consumers' Research and the dissent, that language enables the FCC to "redefine universal service" over time as it and only it "sees fit." But Congress's statement that universal service should "evolve" is itself a direction—and a near-inevitable one, given the reality of technological change. If universal service did not evolve—if Congress had defined it as, say, a landline in every home (or, as the dissent would have it, "touch-tone [phone] service")—the program would have long since become obsolete. The Act's embrace of evolution—the permission it gives the FCC to subsidize different services now than 30 years ago—ensures that the universal-service program

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will be of enduring utility. But that conferral of discretion does not strip the statute of standards and constraints. The Commission still may fund only essential, widely used, and affordable services, for the benefit of only designated recipients. . . .

Finally, we do not view as Consumers' Research does the provision in Section 254 enabling the FCC to articulate "[a]dditional principles," beyond the six listed, to guide its universal-service programs. § 254(b)(7). Recall that the added principles are ones the FCC "determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter." . . . [T]he added principles must be "consistent with" the rest of the statute. They cannot change any of the statute's other principles, much less its conditions on what subsidies can go toward and who can receive them. . . . The public-interest requirement lies on top of the consistency requirement—connected with an "and," not an "or" . . . [W]e have long held that "the words 'public interest' in a regulatory statute" do not encompass "the general public welfare" but rather "take meaning from the purposes of the regulatory legislation." . . .

In a sense, each of the arguments Consumers' Research and the dissent make about Section 254 suffers from the same flaw. At every turn, they read Section 254 extravagantly, the better to create a constitutional problem. . . .

Properly understood, the universal-service contribution scheme clears the nondelegation bar. The policy it expresses is clear and limiting. If, says the statute, a substantial majority of Americans has access to a communications service that is both affordable and essential to modern life, then other Americans should have access to that service too. And to make that happen, the statute continues, carriers should kick in the needed funds. At bottom, that is all the contribution scheme challenged here accomplishes. . . .

III

The next question . . . is whether a different delegation, now from the Commission to the Administrator (which, recall, is a private, not-for-profit corporation), independently flouts a constitutional command. Here, Consumers' Research invokes what is commonly called the private nondelegation doctrine. In the leading case of *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–311 (1936), this Court struck down a statute authorizing certain coal producers to set maximum hours and minimum wages for the rest of the industry. We explained that the statute involved "delegation in its most obnoxious form" because it was made to "private persons whose interests" are often "adverse to the interests of others." Consumers' Research contends that the FCC has in like manner conferred governmental power on a private party, by (in its description) giving the Administrator *carte blanche* to set the contribution factor, which then determines what individual carriers pay into the Fund.

Carter Coal, though, has a counterpart case, addressing how Government agencies may rely on advice and assistance from private actors. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940), this Court considered a statute, enacted in response to *Carter Coal*, permitting boards of coal companies to propose minimum coal prices to a Government agency for "approv[al], disapprov[al], or modifi[cation]." That arrangement, we held, was "unquestionably valid." After all, we explained, the private boards "function[ed] subordinately to" the agency and were subject to its "authority and surveillance." As long as an agency thus retains decision-making power, it may enlist private parties to give it recommendations.

Here, the Administrator is broadly subordinate to the Commission. The FCC appoints the Administrator's Board of Directors and approves its budget. See 47 C.F.R. §§ 54.703(b)–(c), 54.715(c). The Administrator "may not make policy," and must carry out all its tasks "consistent with" the FCC's rules, "orders, written

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directives, and other instructions." § 54.702(c). And anyone aggrieved by an action of the Administrator may seek *de novo* review by the Commission. §§ 54.719–54.725. So in the relationship between the two, the Commission dominates.

And critically, that is as true in determining the contribution factor as in other matters: Although the Administrator plays an advisory role, the Commission alone has decision-making authority. . . . . The Administrator makes the initial projections. On the revenue side, that means just doing arithmetic: The carriers submit their projections on FCC forms and the Administrator adds them up. On the expense side, the Administrator's estimates involve considerably greater effort—but still no policy-making. The FCC's rules implementing the Act dictate the programs' scope: For example, they set eligibility criteria for beneficiaries, provide formulas for calculating subsidies, and impose some funding caps. Working within those rules, the Administrator estimates the programs' cost. It then publicly reports those projections, along with supporting documents, to the Commission . . . . That gives the Commission a chance to review—and, if needed, to revise—the projections before approving final figures. When the review process is complete, the Commission sets the contribution factor and posts it in a public notice. The Commission then has 14 days to make additional changes before the factor is "deemed approved." So the Commission is, throughout, the final authority—just as the agency was in *Sunshine Anthracite*. The Administrator, following the FCC's rules, makes recommendations. But the Commission decides whether or how to use them in setting the contribution factor.

. . . Consumers' Research misunderstands the regulatory scheme. Its primary argument rests on the words "deemed approved" in the FCC's regulations. Consumers' Research takes that to mean that the Administrator's projections can "take legal effect" just by the "deem[ing]" mechanism—that is, without receiving "formal FCC approval." But that account ignores everything that happens before the 14-day period following public notice. Prior to that time, the Commission reviews the Administrator's projections, and either revises or approves them. Then, the Commission sets the contribution factor based on the vetted projections and issues it to the public. So the Administrator's projections can have only the legal (or, indeed, practical) effect the Commission decides they should. . . . [T]he "deemed approved" provision just operates to shut off an additional two-week opportunity the Commission has to revise the published contribution factor—because something (including public comments like Consumers' Research submitted) has caused it to change its mind. . . . In every way that matters to the constitutional inquiry, the Commission, not the Administrator, is in control.

IV

. . .

The Fifth Circuit, as noted earlier, founded its combination theory—that a constitutional non-violation plus a constitutional non-violation may equal a constitutional violation—on this Court's decision in *Free Enterprise Fund* [see § 6.04, p. 572 of the Casebook]. There, we struck down a statute because it gave an executive officer two "layers of protection" from the President's removal authority: The President was "restricted in his ability to remove a principal officer, who [was] in turn restricted in his ability to remove an inferior officer." Even granting that each layer of good-cause protection was alone permissible, we thought the combination was too much. The two together, more than either alone, insulated the officer from the President's firing power, thus super-charging the officer's "independence." . . .

[T]he court's analogy and associated logic do not work. In *Free Enterprise Fund*, each of the two layers of for-cause protection limited the same thing—the President's power to remove executive officers. And when combined, each compounded the other's effect, so that the President was left with no real authority. Or

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otherwise said, the two layers of restrictions operated on a single axis with the one exacerbating (we thought exponentially) the other. But that reasoning has no bearing here. A law violates the traditional (or call it, for comparison's sake, "public") nondelegation doctrine when it authorizes an agency to legislate. And a law—whether a statute or, as here, a regulation—violates the private nondelegation doctrine when it allows non-governmental entities to govern. Those doctrines do not operate on the same axis (save if it is defined impossibly broadly). So a measure implicating (but not violating) one does not compound a measure implicating (but not violating) the other, in a way that pushes the combination over a constitutional line. "Two wrong claims do not make one that is right." If a regulatory scheme authorizes neither executive legislation nor private governance, it does not somehow authorize an unlawful amalgam. Contra the Fifth Circuit, a meritless public nondelegation challenge plus a meritless private nondelegation challenge cannot equal a meritorious "combination" claim. . . .

Justice KAVANAUGH, concurring.

[Justice Kavanaugh began by discussing the origin of the intelligible principle test.]

To be clear, the intelligible principle test is not toothless. But it does operate in a way that respects the President's Article II authority to execute the laws—that is, to exercise discretion and policymaking authority within the limits set by Congress and without undue judicial interference. Notably, the intelligible principle test was accepted and applied over the years by Justice Scalia, Chief Justice Rehnquist, and Chief Justice Taft—three jurists who, based on their Executive Branch experience and judicial philosophies, deeply appreciated the risks of undue judicial interference with the operations of the Presidency. The intelligible principle test has had staying power—perhaps because of the difficulty of agreeing on a workable and constitutionally principled alternative, or because it has been thought that a stricter test could diminish the President's longstanding Article II authority to implement legislation.[4]

In any event, there of course can be difficult questions about how to apply the intelligible principle test to particular statutes. But I agree with how the Court has applied the test in this case.

B

I see no need in this case to try to spell out a definitive guide for applying the intelligible principle test, and it would probably not be possible to do so anyway. It is important, however, to emphasize three points.

First, as both the Court and Justice GORSUCH agree, under the intelligible principle test, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." Congressional delegations of authority to the President "must be judged 'according to common sense and the inherent necessities of the governmental co-ordination.' "

Second, many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas—in particular (i) the Court's rejection of so-called *Chevron* deference and (ii) the Court's application of the major questions canon of statutory interpretation. . . . Although the nondelegation doctrine's intelligible principle test has historically not packed much punch in constricting Congress's authority to delegate, the President generally must act within the confines set by Congress when he implements legislation. So the President's actions when implementing legislation *are* constrained—namely, by the scope of Congress's authorization and by any restrictions set forth in that statutory text.

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[C]ourts presume that Congress, in the domestic sphere, has not delegated authority to the President to issue major rules—that is, rules of great political and economic significance—unless Congress clearly says as much. . . .

Third, in the national security and foreign policy realms, the nondelegation doctrine (whatever its scope with respect to domestic legislation) appropriately has played an even more limited role in light of the President's constitutional responsibilities and independent Article II authority. . . .

In addition, the major questions canon has not been applied by this Court in the national security or foreign policy contexts, because the canon does not reflect ordinary congressional intent in those areas. On the contrary, the usual understanding is that Congress intends to give the President substantial authority and flexibility to protect America and the American people—and that Congress specifies limits on the President when it wants to restrict Presidential power in those national security and foreign policy domains. . . .

II

Congressional delegations to *independent* agencies, as distinct from delegations to the President and *executive* agencies, raise substantial Article II issues. [The remainder of Kavanaugh's concurrence evokes arguments against restrictions on the president's removal power.]

Justice JACKSON, concurring.

Respondents in this case have challenged the Federal Communications Commission's universal-service program under both the traditional nondelegation doctrine and the private nondelegation doctrine. The Court properly rejects both challenges today, and I join the Court's opinion in full. I write separately to express my skepticism that the private nondelegation doctrine—which purports to bar the Government from delegating authority to private actors—is a viable and independent doctrine in the first place. Nothing in the text of the Constitution appears to support a *per se* rule barring private delegations. And recent scholarship highlights a similar lack of support for the doctrine in our history and precedents. . . .

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, dissenting.

Within the federal government, Congress "alone has access to the pockets of the people." The Federalist No. 48 (J. Madison). The Constitution affords only our elected representatives the power to decide which taxes the government can collect and at what rates. See Art. I, § 8, cl. 1. . . .

Today, the Court departs from these time-honored rules. When it comes to "universal service" taxes, the Court concludes, an executive agency may decide for itself what rates to apply and how much to collect. . . . Still, things could be worse. Because today's misadventure "sits unmoored from surrounding law," I have reason to hope its approach will not stand the test of time. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 425 (2024) (GORSUCH, J., concurring) (internal quotation marks omitted). . . .

I

If you look closely at your phone bill, you will likely notice a charge for "universal service." Perhaps you have wondered what that is and why you are paying for it. As it turns out, in 47 U.S.C. § 254, Congress has authorized the Federal Communications Commission (FCC) to subsidize a number of disparate programs under the umbrella of "universal service." The FCC selects which programs to pursue and how much they should cost. To fund them, the agency taxes telecommunications companies at a rate it controls. By regulation, those companies are then free to pass the charges along to consumers like you. . . .

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[The dissent discussed the background and evolution of the universal service programs at length.] From [the statutory] mash of four factors and six (now eight) principles, the FCC must discern which programs it wishes to fund and to what degree. And it falls to the FCC to " 'balance' " these "factors" and " 'principles' " " 'against one another when they conflict.' " . . . As the FCC has long put it: "[A]ll four criteria enumerated in section 254(c)(1) must be considered, but not each necessarily met." *In re Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776, 8809 (1997). . . . Consistent with these provisions, the FCC has funded programs without regard to whether they satisfy the four factors outlined in § 254(c)(1). . . .

2

Once the FCC decides which programs to support, it must figure out how to pay for them. On that score, § 254(d) offers this instruction: "Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." § 254(d). In addition to those "mandatory" contributions from common carriers, the statute also grants the FCC "permissive" authority to compel contributions from "[a]ny other provider of interstate telecommunications," including noncommon carriers, "if the public interest so requires." § 254(d). Essentially, the agency must figure out whom to tax and how much.

. . . [O]ver time, the FCC has also expanded the roster of companies who must contribute, so that it now includes providers of prepaid calling cards and internet-based calling. See 71 Fed. Reg. 38781, 43667 (2006). Currently, the FCC does not tax carriers' broadband revenues (think internet). But some have suggested that, too, should change.

After deciding whom to tax, the agency must determine how much to collect from each carrier. For that, the FCC relies on the Universal Service Administrative Company, a Delaware not-for-profit corporation. Congress has not expressly authorized the FCC to outsource its responsibilities under § 254. But in 1997, the FCC directed an association of carriers to create the Administrative Company, and the agency has assumed the task of defining that company's structure and role. Among other things, FCC regulations ensure that a supermajority of the Administrative Company's board consists of directors who represent industry insiders (like carriers) and groups that benefit financially from universal-service programs (like libraries and schools). § 54.703(b)(1). . . .

As the scope of the FCC's programs has expanded, so have the taxes the agency collects to fund them. In 1998, universal-service disbursements totaled about $2.29 billion. In 2024, that figure swelled to about $8.59 billion—nearly double, adjusted for inflation. To pay for that increase, the "contribution factor" (or tax rate) has risen, too. In 1998, carriers paid less than 4% of their revenue from interstate and international telecommunications. Today, that figure is nearly 37%. FC

One might wonder why the Administrative Company, dominated as it is by industry insiders, has allowed universal-service contributions to grow so dramatically. FCC regulations supply at least a partial explanation: "Federal universal service contribution costs may be recovered . . . through a line item on a customer's bill." 47 C.F.R. § 54.712(a). So, in the end, it is consumers who pay for the agency's universal-service programs.

II

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. . . [T]he Court and I agree that the intelligible principle test is not one size fits all. . . . I would start by examining the nature of the power Congress assigned to the FCC. Under § 254, the FCC may compel carriers to "contribute" money to support what everyone agrees is a government program. That is a quintessential tax . . . . Taxation ranks among the government's greatest powers. Indeed, it is arguably the federal government's "most important ... authorit[y]." The Federalist No. 33 (A. Hamilton). . . . Reflecting as much, the Constitution provides that all legislation "for raising Revenue" must "originate in the House of Representatives," the only popularly elected chamber at the time of the Constitution's adoption. Art. I, § 7, cl. 1. . . . That context matters. To survive the intelligible principle test, a delegation involving such a significant power must supply more significant limits on an agency's discretion than when Congress confers some lesser authority. . . .

What exactly does the intelligible principle test require in this context? Surely, history must count for something. And it supplies at least one clear standard. As far as I can tell, and as far as petitioners have informed us, this Court has never approved legislation allowing an executive agency to tax domestically unless Congress itself has prescribed the tax rate. . . .

III

Having failed to identify a single example where this Court has approved a tax delegation like this one, petitioners and the Court propose a workaround. Yes, they concede, § 254 "imposes no quantitative ... limits on how much money the FCC can raise." But, they contend, Congress has provided guidance that amounts to a "qualitative" cap. . . .

Searching for some way (any way) to support the notion that § 254(c)(1) contains a "qualitative" cap on how much the FCC can tax and spend, the Court eventually resorts to rewriting the statute. Now, it says, the FCC can fund a service only if it meets *all* of subsection (c)(1)'s four factors. . . . It's a nice theory. But it bears no resemblance to the law Congress adopted. By its terms, § 254(c)(1) requires the FCC only to "consider the extent to which" each factor applies. The statute nowhere says each (or any) of those criteria "has to be met" before the agency can fund a particular service. . . .

. . . If we had simply confessed the obvious—that this statute is unconstitutional—Congress could have responded easily with the simple addition of a rate or, perhaps, a cap. But now? Now, the FCC can fund a program only if it satisfies *all* subsection (b) principles and *all* subsection (c) factors—a novel requirement that calls existing programs into question and promises profound implications for future ones as well. Far from avoiding any short-term disruption, the Court's new statute promises plenty of chaos of its own. . . .

IV

. . .

A

Start with the Court's assertion that "Congress has often enacted statutes empowering agencies to raise revenue without specifying a numeric cap or tax rate." . . . Those provisions all have something in common: Each describes a fee. And that makes them poor benchmarks for a tax delegation. Fees, by definition, are payments made in "compensation for a service provided to, or alternatively compensation for a cost imposed by, the person charged the fee." For that reason, fees carry a built-in intelligible principle: The government cannot collect more money than it needs to offset a real-world cost or benefit.

. . . When carriers pay into the Universal Service Fund, they do not gain any special benefit, such as permission "to practice law or medicine or construct a house or run a broadcast station." Nor do § 254

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contributions offset some regulatory cost that carriers impose on the FCC or on society. . . . Instead, § 254 takes money from some (carriers) and gives it to others (libraries, schools, and the like). In short: Section 254 creates a classic tax-and-spend scheme, not a fee. Even the FCC does not dispute the point.

C

. . . [O]ur anemic approach to legislative delegations leaves the Court with a choice. It can permit the delegation to stand and move us all one step further from being citizens in a self-governing republic and one step closer to being subjects of quadrennial kings and long-tenured bureaucrats. Or the Court can, as it does today, usurp legislative power, rewrite the statute, and dictate its own terms for Congress's surrender. Either way, we wind up in much the same place, only now with judges, rather than Presidents or bureaucrats, making our laws.

There is another way. The Constitution promises that our elected representatives in Congress, and they alone, will make the laws that bind us. To honor that commitment, historical practice and our cases suggest other guides, beyond the intelligible principle test, for assessing when Congress has impermissibly ceded legislative power, as I have pointed out before. As I have observed, too, when Chief Justice Taft first used the phrase "intelligible principle," he did not aim to displace those traditional guides, only to summarize them. Someday, soon, we should find our way back. . . .

Notes & Questions

S5-0. About what do the majority and dissent disagree? Is there (or should there be) a special nondelegation rule for taxation? If so, why would that rule be limited to the taxation context?

Statutory interpretation is key for administrative law. The nondelegation doctrine creates complicated situations where litigants are often advancing overly broad or narrow interpretations of an agency's authority in order to, as the majority suggests, "create" (or avoid) "a constitutional problem."

§ 5.08E supp. The Freedom of Information Act

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§ 17.1 (West Academic Publishing, 3d ed. 2014)

In the late 1960's and throughout the 1970's, Congress passed a number of Acts aimed at increasing the openness with which agencies carried out their regulatory responsibilities. The most important of these was the Freedom of Information Act (FOIA), passed in 1966. It, and its subsequent amendments, establish a liberal disclosure policy regarding public access to information obtained, generated and held by the government. "Any person" is entitled to request and receive identifiable records held by an agency, unless the records in question fall within one of the Act's nine exemptions. …

The … assumption underlying…[such] legislation is that open government leads to better government. Open government is in accord with our basic principles of democracy and the need for citizens to know how their government, in fact, functions. This enables the citizenry to make proper evaluations of the wisdom of governmental uses of power. It also, however, is in accord with a healthy sense of distrust of governmental power as well and the need to control agency discretion to ensure that the law is administered properly. In this sense, open government and the publicity that goes along with it provides not

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only valuable information but a means of effectively constraining government and thus protecting citizens from any potential abuses of governmental power that may exist….

* * *

Below, you will find an overview of FOIA and examine some typical cases that arise under that Act. As you consider these cases, reflect upon the basic purposes of this statute and the extent to which those purposes can be achieved.

A. The Freedom of Information Act - Overview

Congress passed the Freedom of Information Act (FOIA) in 1966[68] "to establish a general philosophy of full agency disclosure." Under FOIA, "any person" has the right to request and receive copies of much of the records and information generated or maintained by Federal agencies. Although the Act exempts certain types of information from mandatory release to the public, disclosure is the norm. A requester's motives or her relation to the information she seeks to acquire are irrelevant; the government has the burden of proving that information it withholds is exempt from disclosure. An agency's refusal to disclose requested information is subject to *de novo* judicial review.

The Act was first amended in 1974 in the aftermath of the Watergate hearings. The 1974 amendments provided FOIA with more teeth and greater reach. The Act increasingly has come to symbolize an implicit tenet of democracy: the public's right to know.[69] But at the same time, questions persist with regard to its scope, its costs compared to its benefits, and its susceptibility to abuse. Critics contend that in practice, FOIA "has turned out to be a far cry from just John Q. Public finding out about how his Government works."[70] Moreover, computers have triggered a transformation of information services and, more importantly, they have redefined what now qualifies as "information."

The Act continued to evolve with further amendments in 1976 and 1986 in response to ambiguities that arose with regard to some of its nine exemptions (3 and 7, respectively).[71] In 1996 more fundamental issues were involved, specifically, the ability of agencies to effectively adapt to the computer age. On October 2, 1996, President Clinton signed onto law the Electronic Freedom of Information Act Amendments of 1996, (EFOIA), P.L. 104-231….

The open environment that began taking hold changed dramatically after September 11, 2001. There was an information clamp down of sorts, especially at certain agencies. Various web sites were removed, including some at the Departments of Energy and Transportation as well as the Nuclear Regulatory Commission and the EPA. In 2003, President Bush issued Executive Order 13,292. This order

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[68] Codified as amended at 5 U.S.C. § 552 (1982).

[69] *See* P. Wald, *The Freedom of Information Act. A Short Case Study in the Perils and Paybacks of Legislating Democratic Values.* 33 EMORY L.J. 649, 652 (Citing President Johnson: "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits"). *See* S. Rep. No. 813, 89th cong., 1st sess. 3 (1965) ("[I]t is only when one further considers the hundreds of departments, branches and agencies which are not directly responsible to the people that one begins to understand the great importance of having an information policy of full disclosure").

[70] 1981 Senate Hearings on FOIA (97th Cong., 1st Sess., July–Dec. 1981) (Statement of then Professor, now Justice, Scalia).

[71] *See* Paul M. Schoenhard, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH 497, 502 (2002).

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allowed more information to be classified, at much longer time intervals than the previous Executive Order, removing the time limit for initial document classification and the clause requiring declassification of historical information over twenty-five years old. [In 2007, Congress passed the Openness Promotes Effectiveness in Our National Government Act (the OPEN Government Act of 2007, strengthening Se3ction 552 of the FOIA with amendments to various of FOIA processes.] In turn, President Obama issued Executive Order 13,526 on December 29, 2009, revoking and replacing the previously mentioned orders. This Order created the National Declassification Center, which has the task of classifying and declassifying government information, set new declassification goals for historical records, and implemented new technologies to expedite declassification of documents. Moreover, as President Obama outlined in a memorandum on January 21, 2009, all agencies should adopt a presumption in favor of disclosure with regard to all decisions involving FOIA to serve the concept of open government. Following the publication of this memorandum, Attorney General Eric Holder issued a memorandum requiring a "presumption of openness" and explicitly rescinding a prior memorandum published by former Attorney General John Ashcroft in 2001.

[In 2016, Congress passed the FOIA Improvement Act of 2016, to address FOIA's backlog issues.]

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ADMINISTRATIVE LAW § 16.3 (West Academic Publishing, 4th ed. 2023)

FOIA is divided into twelve subsections.[72] Subsection (a)(1) requires automatic publication in the Federal Register of matters such as descriptions of agency organization, functions, procedures, substantive rules and statements of general policy. Subsection (a)(2) requires agencies to "make available for public inspection and copying," materials such as final opinions rendered in the adjudication of cases, policy statements and interpretations not published in the Federal Register, administrative staff manuals or instructions "unless the materials are promptly published and copies offered for sale", and copies of records released in response to FOIA requests that the agency determines have been, or will likely be, the subject of additional requests, as well as an index of these previously released records. The 1996 Amendments direct these records to be made available by computer telecommunications or other electronic form if the agency does not have the means to put the information online. To protect personal privacy, an agency may delete identifying details from these materials, but must indicate the extent of any deletion. Agencies must also compile and publish indices of these materials in order to facilitate public access.

Subsections (a)(1) and (a)(2) guarantee constructive notice to the public of agencies' regulations and operations, along with the procedures necessary to initiate agency action or responses.[73] An agency's failure to satisfy the notification requirements of either subsection can invalidate related agency action.[74] An agency's failure to respond to a FOIA request within the statutory time frame satisfies the exhaustion of administrative remedies requirement necessary for the requester to seek *de novo* judicial review.[75] Failure

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72 5 U.S.C. § 552.

73 *See, e.g.*, Schwaner v. Department of Air Force, 698 F.Supp. 4 (D.D.C.1988), *rev'd on other grounds*, 898 F.2d 793 (D.C.Cir.1990); *see also* Welch v. United States, 750 F.2d 1101, 1111 (1st Cir.1985) (purposes of subsections (a)(1) and (a)(2) are to provide public notice and guidance).

74 *See, e.g.*, Vigil v. Andrus, 667 F.2d 931, 938 (10th Cir. 1982); Anderson v. Butz, 550 F.2d 459, 462 (9th Cir. 1977). *But see* United States v. Hall, 742 F.2d 1153, 1155 (9th Cir.1984) (no invalidation if complaining party had actual and timely notice of unpublished agency policy); Zaharakis v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984) (no invalidation if complainant unable to show she was adversely affected by the lack of publication).

75 5 U.S.C. § 552(a)(6)(C). *But cf.* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615–16 (D.C. Cir. 1976) (absent exceptional urgency on part of requester, agency deemed to be complying with FOIA, notwithstanding passage of the statutory deadline, if it is exercising "due diligence" while processing requests in the order in which they are received); Spannaus v. U.S. Department of Justice, 824 F.2d 52, 58 (D.C.Cir.1987) (statute of

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to follow an agency's previously published procedures for making FOIA requests, however, may prevent the requester from obtaining judicial relief.[76]

Subsection (a)(3) is the heart of the Act. Except with respect to records made available pursuant to Subsections (a)(1) and (a)(2), "each agency," upon receipt of a request for records "which reasonably describes such records" and is made in accordance with the agency's published procedures, must make the requested records promptly available "to any person in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." Moreover, an agency must make "reasonable efforts to search for the record in electronic format."

Subsection (a)(4) limits the fees that agencies can charge for a request.[77] It also authorizes *de novo* judicial review of an agency's decision to withhold requested records,[78] and prescribes fairly stringent deadlines by which agencies must respond to requests. In the event that a court finds that records have been withheld improperly, there are conditional provisions for plaintiffs' recovery of attorney fees[79] and disciplinary action against responsible agency personnel.[80] Sections (a)(7)(A) and (a)(7)(B) require each agency to establish a system to assign and provide to the requestor an individualized tracking number for each request received that will take longer than ten days to process and to establish a telephone line or

limitations started to run when the agency failed to comply with the FOIA request within ten working days, and not when all administrative appeals were completed).

[76] *See, e.g.*, Brumley v. U.S. Dep't of Labor, 767 F.2d 444, 445 (8th Cir.1985) (plaintiff's disclosure suit dismissed for failure to exhaust administrative remedies where agency's delayed response resulted in part from plaintiff's failure to make his request in accordance with published routing procedures).

[77] Fees are limited to "reasonable standard charges . . . for recovery of only the [agency's] direct costs of . . . search for duplication," but documents must be furnished "without any charge or at a charge reduced below the fee established . . . if disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A). Depending on the scope of the search, search and copying costs can be substantial, and often vary from agency to agency. *See, e.g.*, 28 C.F.R. § 16.11 (1999). The agency's discretionary determination of whether a request qualifies for a fee waiver—i.e., is "in the public interest"—may thus dictate the viability of a request. *See, e.g.*, Ely v. U.S. Postal Service, 753 F.2d 163, 165 (D.C.Cir.1985), *cert. denied* 471 U.S. 1106, 105 S. Ct. 2338, 85 L. Ed. 2d 854 (1985) (requester's indigency alone insufficient to warrant waiver of fees).

[78] The general rule under FOIA is that administrative remedies must be exhausted prior to judicial review. *See, e.g.*, Tuchinsky v. Selective Service System, 418 F.2d 155, 158 (7th Cir. 1969); Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1497 (D.C. Cir. 1984), *affirmed in part and remanded*, 848 F.2d 1265 (D.C. Cir. 1988); however, the Act gives requesters the right to seek immediate judicial review, even where the requester has not filed an administrative appeal, when the agency does not respond to a *properly made* request within the statutory time limits (twenty business days, absent "unusual circumstances") set forth in Section 552(a)(6). Practically speaking, this constructive exhaustion provision has been diluted by the D.C. Circuit's holding in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615–16 (D.C. Cir. 1976) (notwithstanding its failure to respond by statutory deadline, agency deemed to be complying with FOIA if exercising "due diligence" under the circumstances).

[79] Courts are authorized to award "attorney fees and other litigation costs reasonably incurred" to a FOIA complainant who has "substantially prevailed." Whether a plaintiff has "substantially prevailed" is a question of fact that involves both causation and equities. *See, e.g.*, *Weisberg*,745 F.2d at 1494–1500.

[80] Where a court orders disclosure of improperly withheld records *and* assesses attorneys' fees and costs against the government *and* issues a written finding that agency personnel may have acted arbitrarily and capriciously, the Special Counsel of the Merit System Protection Board must initiate an investigation and take appropriate action. 5 U.S.C. § 552(a)(4). However, no court to date has issued the written finding that is a prerequisite for such sanctions. *See, e.g.*, Perry v. Block, 684 F.2d 121, 122 (D.C. Cir. 1982) (despite a "regrettable [2-year] saga of carelessness and delay," court refused to issue a sanction, in part because the records sought were not technically disclosed pursuant to court order); U.S. Gov't Accountability Off., Freedom of Information Act: Federal Court Decisions Have Not Required the Office of Special Counsel to Initiate Disciplinary Actions for the Improper Withholding of Records (Mar. 13, 2018), https://www.gao.gov/assets/gao-18-235r.pdf ("[S]ince fiscal year 2008, no court orders have been issued that have required OSC to initiate a proceeding to determine whether disciplinary action should be taken against agency FOIA personnel.").

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Internet service that provides information about the status of a request to the requestor,[81] including the date of original receipt and estimated completion.[82]

Subsection (b) defines nine types of information that are exempt from disclosure under the Act. The last sentence of Subsection (b) mandates the release of reasonably segregable portions of any requested record "after deletion of the portions which are exempt." This provision was added as part of the 1974 Amendments and it prevents agencies from classifying entire categories of records as exempt.[83] At the same time, it imposes a significant burden on the agencies, which must often pull from the field personnel most familiar with the subject matter to review and redact large volumes of documents so as to avoid disclosure of legitimately exempt information.[84] The ease with which computers can redact information makes it impossible to tell how much information has, in fact, been redacted. The 1996 Amendments, therefore, require agencies to identify the location of deletions and show the amount of deleted material at the place on the record where the deletion was made.[85] In addition, with the OPEN Government Act, agencies are required to indicate the exemption under which the deletion was made unless the indication would harm an interest protected by that exemption.[86]

Subsection (c) allows an agency to exempt information related to a pending criminal investigation, information that identifies informants, and FBI records that pertain to foreign intelligence and international terrorism.[87] Subsection (d) states that FOIA does not authorize agencies to withhold information from Congress.[88] Subsection (e) requires annual reports to Congress from each agency regarding its FOIA operations, and an annual report from the Attorney General regarding FOIA litigation and the Department of Justice's efforts (through the Office of Information and Privacy) to encourage agency compliance with FOIA.[89] The 1996 Amendments, which completely restructured existing provisions in subsection (e),[90] require that the Attorney General's report and all agency FOIA reports be made available online. Also, the reports are required to be more useful to the public by, for example, answering such basic questions as how to make a FOIA request.[91]

Subsection (f) defines the term "agency" so as to subject nearly all executive branch entities to FOIA.[92] FOIA's mandate does not, however, extend to records maintained by Congress, by the courts (including judicial agencies, such as the U.S. Sentencing Commission), or by state governments.[93] Nor does FOIA apply to entities that "are neither chartered by the Federal Government nor controlled by it."[94] The

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81 5 U.S.C. § 552(a)(7)(A)–(B).

82 *Id.*

83 *See* Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976) (existence of some exempt information does not justify nondisclosure of the entire record).

84 In regard to certain types of requested information—such as that pertaining to intelligence-gathering operations or matters of national security—this painstaking process of review can result in the release of heavily redacted documents of little or no practical value to anyone. Such concerns prompted Congress to exempt CIA operational files from FOIA's "release of segregable portions" requirement. *See* Central Intelligence Information Act, Pub. L. No. 98–477, 98 Stat. 2209 (1984).

85 5 U.S.C. § 552(a)(6)(F).

86 5 U.S.C. § 552(b)(9).

87 5 U.S.C. § 552(c).

88 FOIA's exemptions cannot be used to justify withholding from Congress as a body or from one of its committees; individual members of Congress, however, have only the right of access guaranteed to "any person" under subsection (a)(3). *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11–12 (1966).

89 5 U.S.C. § 552(e)(1).

90 5 U.S.C. § 552(e)(2)–(3).

91 5 U.S.C. § 552(g).

92 *See* 5 U.S.C. § 551(1).

93 *See, e.g*., Goland v. CIA, 607 F.2d 339, 348 (D.C.Cir.1978), *vacated in part and reh'g denied* 607 F.2d 367 (D.C.Cir.1978), *cert. denied*, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980) (Congress); Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir.1979) (courts); Davidson v. State of Georgia, 622 F.2d 895, 897 (5th Cir.1980) (state government).

94 H.R.Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974).

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proliferation in recent years of quasi-governmental advisory boards, investigative commissions, and corporate entities serving particular public interests has resulted in a spate of FOIA cases concerning this threshold issue.[95]

For example, units of the Executive Office and other bodies whose sole function is to advise and assist the President are not considered "agencies" subject to FOIA, while entities whose functions are not so limited must respond to FOIA requests.[96] In determining whether an entity is an agency for the purpose of FOIA, courts usually assess a variety of considerations, typically including the origin of the entity, the manner in which its members were appointed, whether the body has rulemaking authority, whether its employees are deemed federal employees, and the amount of government supervision of day-to-day operations.[97]

The 1996 Amendments also make explicit under Subsection (f) that a "record" for the purposes of FOIA includes electronically stored information. The policy is broad and does not discriminate against different types of storage media. The form in which an agency's data are stored, therefore, cannot improve agency attempts to evade disclosure.[98] The 1996 Amendments also added Subsection (g), which requires agencies to make available a guide for requesting records from the agency. It was anticipated that such guides would be made available by electronic means.[99]

The OPEN Government Act of 2007 added several subsections to the 1996 Amendments. Subsection (h)(1) establishes an Office of Government Information Services within the National Archives and Records Administration.[100] This Office reviews policies of administrative agencies, ensures agency compliance, recommends policy changes to improve administration of FOIA[101] and offers mediation services and advisory opinions.[102] Subsection (i) creates a Government Accountability Office that audits and reports on administrative agency implementation of FOIA.[103]

Subsection (j) requires each agency to designate a chief FOIA officer,[104] whose authority Subsection (k) outlines, including: 1) agency-wide responsibility for efficient and appropriate compliance with the FOIA; 2) monitoring agency implementation of FOIA and informing agency leadership, the chief legal officer, and the Attorney General of agency performance; 3) recommending improvements to agency practices, policies, personnel, and funding as may be necessary for the implementation of FOIA; 4) reviewing and reporting to the Attorney General on agency-wide FOIA implementation; 5) facilitating public understanding of FOIA exemptions through publications of concise exemption descriptions and

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95 *See, e.g.*, Rushforth v. Council of Economic Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (President's Council of Economic Advisers not a federal "agency" for purposes of FOIA); Forsham v. Harris, 445 U.S. 169, 179–80, 100 S. Ct. 977, 983–84, 63 L. Ed. 2d 293 (1980) (private grantee of federal agency not subject to FOIA); Ehm v. National Railroad Passenger Corp., 732 F.2d 1250, 1252–55 (5th Cir. 1984)(Amtrak not a federal agency for purposes of Privacy Act; subject to FOIA only because of express statutory reference); *see also*, Sweetland v. Walters, 60 F.3d 852, 855 (D.C.Cir.1995) (President's Executive Residence is not a federal agency for the purpose of FOIA); Dong v. Smithsonian Inst., 125 F.3d 877, 883 (D.C. Cir. 1997)(Smithsonian Institution is not a federal agency for the purpose of the Privacy Act); Armstrong v. Executive Office of the President, 90 F.3d 553, 555–56 (D.C. Cir. 1996) (National Security Council not an agency within the meaning of FOIA). The *Irwin* memorial line of cases includes *Dong v. Smithsonian*.

96 *See Rushforth, supra* note 143, 762 F.2d at 1043; Sweetland v. Walters, *supra* note 143, 60 F.3d 852 at 855.

97 *See, e.g.*, Ehm v. National Railroad Passenger Corporation, 732 F.2d 1250, 1255 (5th Cir.1984), *cert. denied*, 469 U.S. 982, 105 S. Ct. 387, 83 L. Ed. 2d 322 (1984).

98 This portion of the Act effectively overrules *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976) (finding that an agency-created database was library material exempt from FOIA requests under the Records Disposal Act's library material exclusion provision).

99 H.R. Rep. No. 104–795, 104th Cong., 2d Sess., 30 (1996). See note 158, *infra.*

100 5 U.S.C. § 552(h)(1).

101 *Id.*

102 *Id.*

103 5 U.S.C. § 552(i).

104 5 U.S.C. § 552(j).

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exemption-eligible categories of agency records in both the agency's handbook issued under Subsection (g) and the agency's annual FOIA report; and 6) designating one or more FOIA Public Liaisons.[105]

Subsection (*l*) sets forth the duties of the FOIA Public Liaisons, who report to the agency chief FOIA officer and act as the supervisory official to whom a requester may raise additional concerns about the service received from the FOIA Requester Center.[106] FOIA Public Liaisons assist in reducing delays, increasing transparency and understanding the status of requests, and assisting in the resolution of disputes.[107]

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Even with a presumption of openness, two basic questions, as we will see below, must be confronted in all FOIA cases: what is an agency? and what is an agency record? The following cases address these fundamental questions.

B. Defining Agency and Agency Records

Forsham v. Harris
445 U.S. 169 (1980)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U.S.C. § 552, empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552(a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which is a federal "agency" under the terms of the Act.

I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a long-term study of the effectiveness of five diabetes treatment regimens. Two of these treatment regimens involved diet control in combination with the administration of either tolbutamide, or phenformin hydrochloride, both "oral hypoglycemic" drugs. The UGDP's participating physicians were located at 12 clinics nationwide and the study was coordinated at the Coordinating Center of the University of Maryland.

The study generated more than 55 million records documenting the treatment of over 1,000 diabetic patients who were monitored for a 5-to 8-year period. In 1970, the UGDP presented the initial results of its study indicating that the treatment of adult-onset diabetics with tolbutamide increased the risk of death from cardiovascular disease over that present when diabetes was treated by the other methods studied. The UGDP later expanded these findings to report a similarly increased incident of heart disease when patients were treated with phenformin hydrochloride. These findings have in turn generated substantial professional

105 5 U.S.C. § 552(k).
106 *Id.*
107 *Id.*

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debate.

The Committee on the Care of the Diabetic (CCD), a national association of physicians involved in the treatment of diabetes mellitus patients, have been among those critical of the UGDP study. CCD requested the UGDP to grant it access to the raw data in order to facilitate its review of the UGDP findings, but UGDP has declined to comply with that request. CCD therefore sought to obtain the information under the Freedom of Information Act. The essential facts are not in dispute, and we hereafter set forth those relevant to our decision.

The UGDP study has been solely funded by federal grants in the neighborhood of $15 million between 1961 and 1978. These grants were awarded UGDP by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a federal agency, pursuant to the Public Health Service Act, 42 U.S.C. § 241(c). NIAMDD has not only awarded the federal grants to UGDP, but has exercised a certain amount of supervision over the funded activity. Federal regulations governing supervision of grantees allow for the review of periodic reports submitted by the grantee and on-site visits, and require agency approval of major program or budgetary changes. It is undisputed, however, both that the day-to-day administration of grant-supported activities is in the hands of a grantee, and that NIAMDD's supervision of UGDP conformed to these regulations.

The grantee has also retained control of its records: the patient records and raw data generated by UGDP have at all times remained in the possession of that entity, and neither the NIAMDD grants nor related regulations shift ownership of such data to the Federal Government.

Although no employees of the NIAMDD have reviewed the UGDP records, the Institute did contract in 1972 with another private grantee, the Biometric Society, for an assessment of the validity of the UGDP study. The Biometric Society was given direct access to the UGDP raw data by the terms of its contract with NIAMDD. The contract with the Biometric Society, however, did not require the Society to seek access to the UGDP raw data, nor did it require that any data actually reviewed be transmitted to the NIAMDD. While the Society did review some UGDP data, it did not submit any raw data reviewed by it to the NIAMDD. The Society issued a report to the Institute in 1974 concluding that the UGDP results were "mixed" but "moderately strong."

An additional connection between the Federal Government and the UGDP study has occurred through the activities of the Food and Drug Administration. After the FDA was apprised of the UGDP results, the agency issued a statement recommending that physicians use tolbutamide in the treatment of diabetes only in limited circumstances. After the UGDP reported finding a similarly higher incidence of cardiovascular disease with the administration of phenformin, the FDA proposed changes in the labeling of these oral hypoglycemic drugs to warn patients of cardiovascular hazards. The FDA deferred further action on this labeling proposal, however, until the Biometric Society completed its review of the UGDP study.

After the Biometric study was issued, FDA renewed its proposal to require a label warning that oral hypoglycemics should be used only in cases of adult onset, stable diabetes that could not be treated adequately by a combination of diet and insulin. The FDA clearly relied on the UGDP study in renewing this position. …

Although this labeling proposal has not yet become final, other FDA regulatory action has been taken. On July 25, 1977, the Secretary of HEW suspended the New Drug Application for phenformin, one of the oral hypoglycemic medications studied by the UGDP. The decision was premised in part on the findings of the UGDP study. …

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Petitioners had long since initiated a series of FOIA requests seeking access to the UGDP raw data. On August 7, 1975, HEW denied their request for the UGDP data on the grounds that no branch of HEW had ever reviewed or seen the raw data; that the FDA's proposed relabeling action relied on the UGDP published reports and not on an analysis of the underlying data; that the data were the property of the UGDP, a private group; and that the agencies were not required to acquire and produce those data under the FOIA. The following month petitioners filed this FOIA suit in the United States District Court for the District of Columbia to require HEW to make available all of the raw data compiled by UGDP. The District Court granted summary judgment in favor of respondents, holding that HEW properly denied the request on the ground that the patient data did not constitute "agency records" under the FOIA.

The Court of Appeals affirmed on the same rationale. … The court found that although NIAMDD is a federal agency, its grantees are not federal agencies. … Although HEW has a right of access to the documents, the court reasoned that this right did not render the documents "agency records" since the FOIA only applies to records which have been "created or obtained … in the course of doing its work." …

II

As we hold in the companion case of *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, it must be established that an "agency" has "improperly withheld agency records" for an individual to obtain access to documents through an FOIA action. We hold here that HEW need not produce the requested data because they are *not* "agency records" within the meaning of the FOIA. In so holding, we reject three separate but related claims of petitioners: (1) the data they seek are "agency records" because they were at least "records" of UGDP, and UGDP in turn received its funds from a federal agency and was subject to some supervision by the agency in its use of those funds; (2) the data they seek are "agency records" because HEW, concededly a federal agency, had sufficient authority under its grant agreement to have obtained the data had it chosen to do so; and (3) the data are "agency records" because they formed the basis for the published reports of UGDP, which in turn were relied upon by the FDA in the actions described above.

Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," 5 U.S.C. § 552(a)(4)(B), but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency (hereafter a grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.

A

We first examine petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provides the close connection necessary to render *its* records "agency records" as that term is used in the Freedom of Information Act. Congress did not define "agency record" under the FOIA, but it did define "agency." The definition of "agency" reveals a great deal about congressional intent as to the availability of records from private grantees under the FOIA, and thus, a great deal about the relevance of federal funding and supervision to the definitional scope of "agency records." Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of "agency," an action consistent with its prevalent practice of preserving grantee autonomy. It has, for example, disclaimed any federal property rights in grantee records by virtue of its funding. We cannot agree with petitioners in light of these circumstances that the very federal funding and supervision

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which Congress found insufficient to make the grantee an *agency* subject to the FOIA nevertheless makes its *records* accessible under the same Act.

Under 5 U.S.C. § 552(e) an "agency" is defined as:

> "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government … , or any independent regulatory agency."

The legislative history indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of "agency." In their Report, the conferees stated that they did "not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." H. Conf. Rep. No. 93-1380, pp. 14–15 (1974), reprinted in Freedom of Information Act and Amendments of 1974 Source Book 231–232 (Jt. Comm. Print 1975). Through operation of this exclusion, Congress chose not to confer any direct public rights of access to such federally funded project information.

Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so, reflecting the same regard for the autonomy of the grantee's records as for the grantee itself. Congress expressly requires an agency to use "procurement contracts" when the "principal purpose of the instrument is the acquisition … of property or services for the direct benefit or use of the Federal Government … ." Federal Grant and Cooperative Agreement Act of 1977, § 4, 92 Stat. 4, 41 U.S.C. § 503 (1976 ed., Supp. II). In contrast, "grant agreements" must be used when money is given to a recipient "in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition … of property or services. …" § 5, 41 U.S.C. § 504 (1976 ed., Supp. II). As in this case, where a grant was used, there is no dispute that the documents created are the property of the recipient and not the Federal Government. *See* 45 CFR § 74.133 (1979). The HEW regulations do retain a right to acquire the documents. Those regulations, however, clearly demonstrate that unless and until that right is exercised the records are only the "records of grantees." …

The fact that Congress has chosen not to make a federal grantee an "agency" or to vest ownership of the records in the Government does not resolve with mathematical precision the question of whether the granting agency's funding and supervisory activities nevertheless make the grantee's records "agency records." Records of a nonagency certainly could become records of an agency as well. But if Congress found that federal funding and supervision did not justify direct access to the grantee's records as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Such a conclusion would not implement the intent of Congress; it would defeat it.

These considerations do not finally conclude the inquiry, for conceivably other facts might indicate that the documents could be "agency records" even though generated by a private grantee. The definition of "agency" and congressional policy towards grantee records indicate, however, that Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records "agency records" under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA. … .

B

Petitioners seek to prevail on their second and third theories, even though their first be rejected, by

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invoking a broad definition of "agency records," so as to include all documents created by a private grantee to which the Government has access, and which the Government has used. We do not believe that this broad definition of "agency records," a term undefined in the FOIA, is supported by either the language of that Act or its legislative history. We instead agree with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. …

We think the foregoing reasons dispose of all petitioners' arguments. We therefore conclude that the data petitioners seek are not "agency records" within the meaning of the FOIA. UGDP is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish this threshold requirement, petitioners' FOIA claim must fail, and the judgment of the Court of Appeals is accordingly

AFFIRMED.

JUSTICES BRENNAN and MARSHALL dissented.

U.S. Department of Justice v. Tax Analysts

492 U.S. 136 (1989)

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552 (1982 ed. and Supp. V), requires the United States Department of Justice (Department) to make available copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government. We hold that it does.

I

The Department's Tax Division represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court. Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders issued by these courts in such cases. Copies of these decisions are made for the Tax Division's staff attorneys. The original documents are sent to the official files kept by the Department.…

Respondent Tax Analysts publishes a weekly magazine, Tax Notes, which reports on legislative, judicial, and regulatory developments in the field of federal taxation to a readership largely composed of tax attorneys, accountants, and economists. As one of its regular features, Tax Notes provides summaries of recent federal-court decisions on tax issues. To supplement the magazine, Tax Analysts provides full texts of these decisions in microfiche form. Tax Analysts also publishes Tax Notes Today, a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions.

In late July 1979, Tax Analysts filed a FOIA request in which it asked the Department to make available all district court tax opinions and final orders received by the Tax Division earlier that month. The Department denied the request on the ground that these decisions were not Tax Division records. …

II

In enacting the FOIA 23 years ago, Congress sought " 'to open agency action to the light of public

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scrutiny.' " Congress did so by requiring agencies to adhere to " 'a general philosophy of full agency disclosure.' " Congress believed that this philosophy, put into practice, would help "ensure an informed citizenry, vital to the functioning of a democracy."

The FOIA confers jurisdiction on the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." § 552(a)(4)(B). Under this provision, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.' " Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements.

In this case, all three jurisdictional terms are at issue. Although these terms are defined neither in the Act nor in its legislative history, we do not write on a clean slate. Nine Terms ago we decided three cases that explicated the meanings of these partially overlapping terms. *Kissinger v. Reporters Committee for Freedom of Press,* 445 U.S. 136 (1980); *Forsham v. Harris,* 445 U.S. 169 (1980); *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375 (1980). These decisions form the basis of our analysis of Tax Analysts' requests.

A

We consider first whether the district court decisions at issue are "agency records," a term elaborated upon both in *Kissinger* and in *Forsham. Kissinger* involved three separate FOIA requests for written summaries of telephone conversations in which Henry Kissinger had participated when he served as Assistant to the President for National Security Affairs from 1969 to 1975, and as Secretary of State from 1973 to 1977. Only one of these requests — for summaries of specific conversations that Kissinger had had during his tenure as National Security Adviser — raised the "agency records" issue. At the time of this request, these summaries were stored in Kissinger's office at the State Department in his personal files. We first concluded that the summaries were not "agency records" at the time they were made because the FOIA does not include the Office of the President in its definition of "agency." 445 U.S. at 156. We further held that these documents did not acquire the status of "agency records" when they were removed from the White House and transported to Kissinger's office at the State Department, a FOIA-covered agency:

> "We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an 'agency record' Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA."

Forsham, in turn, involved a request for raw data that formed the basis of a study conducted by a private medical research organization. Although the study had been funded through federal agency grants, the data never passed into the hands of the agencies that provided the funding, but instead was produced and possessed at all times by the private organization. We recognized that "[r]ecords of a nonagency certainly could become records of an agency as well," 445 U.S. at 181, but the fact that the study was financially supported by a FOIA-covered agency did not transform the source material into "agency records." Nor did the agencies' right of access to the materials under federal regulations change this result. As we explained, "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been obtained.*" (emphasis in original; footnote omitted).

Two requirements emerge from *Kissinger* and *Forsham,* each of which must be satisfied for

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requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. To restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. As we noted in *Forsham,* "The legislative history of the FOIA abounds with … references to records *acquired* by an agency." (emphasis added).

Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger's* teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. This requirement is suggested by *Forsham* as well, where we looked to the definition of agency records in the Records Disposal Act. Under that definition, agency records include "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business … ."* (emphasis added)[108]. …

Applying these requirements here, we conclude that the requested district court decisions constitute "agency records." First, it is undisputed that the Department has obtained these documents from the district courts. This is not a case like *Forsham,* where the materials never in fact had been received by the agency. The Department contends that a district court is not an "agency" under the FOIA, but this truism is beside the point. The relevant issue is whether an agency covered by the FOIA has "create[d] or obtaine[d] the materials sought, *Forsham,* 445 U.S., at 182, not whether the organization from which the documents originated is itself covered by the FOIA.

Second, the Department clearly controls the district court decisions that Tax Analysts seeks. Each of Tax Analysts' FOIA requests referred to district court decisions in the agency's possession at the time the requests were made. … Furthermore, the court decisions at issue are obviously not personal papers of agency employees. …

For the reasons stated, the Department improperly withheld agency records when it refused Tax Analysts' requests for copies of the district court tax decisions in its files. Accordingly, the judgment of the Court of Appeals is

AFFIRMED.

JUSTICE WHITE concurs in the judgment.

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[108] In *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375, 385 (1980), we noted that Congress intended the FOIA to prevent agencies from refusing to disclose, among other things, agency telephone directories and the names of agency employees. We are confident, however, that requests for documents of this type will be relatively infrequent. Common sense suggests that a person seeking such documents or materials housed in an agency library typically will find it easier to repair to the Library of Congress, or to the nearest public library, rather than to invoke the FOIA's disclosure mechanisms. To the extent such requests are made, the fact that the FOIA allows agencies to recoup the costs of processing requests from the requester may discourage recourse to the FOIA where materials are readily available elsewhere.

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JUSTICE BLACKMUN, dissenting.

The Court in this case has examined once again the Freedom of Information Act (FOIA), 5 U.S.C. § 552. It now determines that under the Act the Department of Justice on request must make available copies of federal district court orders and opinions it receives in the course of its litigation of tax cases on behalf of the Federal Government. The majority holds that these qualify as agency records, within the meaning of § 552(a)(4)(B), and that they were improperly withheld by the Department when respondent asked for their production. The Court's analysis, I suppose, could be regarded as a fairly routine one.

I do not join the Court's opinion, however, because it seems to me that the language of the statute is not that clear or conclusive on the issue and, more important, because the result the Court reaches cannot be one that was within the intent of Congress when the FOIA was enacted.

Respondent Tax Analysts, although apparently a nonprofit organization for federal income tax purposes, is in business and in that sense is a commercial enterprise. It sells summaries of these opinions and supplies full texts to major electronic data bases. The result of its now-successful effort in this litigation is to impose the cost of obtaining the court orders and opinions upon the Government and thus upon taxpayers generally. There is no question that this material is available elsewhere. But it is quicker and more convenient, and less "frustrat[ing]," *see ante,* at 2845, for respondent to have the Department do the work and search its files and produce the items than it is to apply to the respective court clerks.

This, I feel, is almost a gross misuse of the FOIA. What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of Government operations. That, I had thought, and the majority acknowledges, was the real purpose of the FOIA and the spirit in which the statute has been interpreted thus far. I also sense, I believe not unwarrantedly, a distinct lack of enthusiasm on the part of the majority for the result it reaches in this case.

If, as I surmise, the Court's decision today is outside the intent of Congress in enacting the statute, Congress perhaps will rectify the decision forthwith and will give everyone concerned needed guidelines for the administration and interpretation of this somewhat opaque statute.

Notes & Questions

S5-1. How does the Court in *Forsham* define agency? Why is the definition so important to the function of this Act? What is the significance of the fact that the documents sought were created by an agency exempt from FOIA? Are departments within the Executive Office of the President that assist the president with administrative functions, but do not have administrative authority, exempt? The D.C. Circuit has held that many of these departments are exempt. *See, Citizens for Responsibility and Ethics in Washington v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009).

S5-2. In 1998 Congress passed the Data Access Act (DAA), [Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998)], commonly referred to as the Shelby Amendment. The Shelby Amendment requires, in part, "that the Director of OMB [Office of Management and Budget] amend … the OMB Circular A-110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act." In October, 1999, OMB implemented the required changes to Circular A-110. The amended circular provides, in part:

> … [I]n response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal

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> Government in developing a regulation, the Federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA.[109]

Does this adequately implement the intent of Congress expressed in the DAA?

The question of what constitutes "an action that has the force and effect of law" is one that will likely generate some conflict in the coming years. The OMB interpretive material states that a rule … or an administrative order … falls within the meaning of the key phrase. In contrast, agency guidance documents fall outside of the agency actions that trigger publication under the OMB requirements.…[110] How would *Forsham* have been decided under your reading of the DAA? How does it come out in light of OMB's guidelines?

S5-3. To what extent has information placed on agency websites obviated the need to file FOIA requests to obtain information? *See* Martin E. Halstuk, *Speed Bumps on the Information Superhighway: A Study on Federal Agency Compliance with the Electronic Freedom of Information Act of 1996,* 5 COMM. L. & POL'Y 423 (2000). *See also* Paul M. Schoenhard, Note *Disclosure of Government Information Online: A New Approach from an Existing Framework,* 15 HARV. J. LAW & TEC. 497 (2002).

S5-4. What if an agency file is created by one agency and then given to a private entity? Is it still an agency record? Must the private entity give it up? How does *Tax Analyst* define agency file? What if this information is then used to gain a competitive advantage? For instance, what if the requested documents provide information about future government plans that are going to affect the securities markets? Would acting on such information violate federal securities laws? *See* Donna Nagy & Richard Painter, *Plugging Leaks and Lowering Levees in the Federal Government: Practical Solutions for Securities Trading Based on Political Intelligence*, 2014 U. ILL. L. REV (forthcoming Spring 2014). For a discussion of how unauthorized government leaks fit into this picture *see* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

S5-5. In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 169 (1980), the Court dealt with the related issue of whether agency records obtained or created by an agency subject to FOIA records obtained or created by an agency subject to FOIA and then transferred to a nonagency remain accessible under FOIA. The Court noted that for FOIA to apply, it must be shown that the agency remained in "possession or control" of the records. In *Kissinger,* the Court concluded that certain records created by the Secretary of State and subsequently transferred to a nonagency were no longer in that agency's control and thus, not subject to FOIA.

S5-6. What if the agency simply says that it cannot find the records being asked for? How thoroughly must the agency search? Courts have held that the agency's search process, not the outcome of the search, is the deciding factor. Whether or not the search is adequate turns on whether the search process is reasonable. *See*, *Trentadue v. F.B.I.*, 572 F.3d 794 (10th Cir. 2009).

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[109] Fed. Reg. 54926, vol. 64, No. 195.

[110] Robert L. Fischman & Vicky J. Meretsky, *Endangered Species Information: Access and Control*, 41 WASHBURN L. J. 90, 102–03 (2001). Copyright © 2001 Washburn Law Journal. All rights reserved.

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C. FOIA Exemptions

Adapted from Aman, Rookard and Mayton, Administrative Law § 16.4

FOIA … designates nine exemptions from the Act's disclosure requirements.[111] For an exemption to apply to requested agency material, the agency must reasonably foresee that disclosure would be harmful to the agency interest protected by the exemption.[112] In addition, under President Obama's earlier-mentioned 2009 Memoranda, all agencies "should adopt a presumption in favor of disclosure" with regard to "all decisions involving FOIA."**[113]** As a result, per Attorney General Eric Holder's own 2009 Memorandum, the mere fact that an agency can legally, technically demonstrate that records are within the scope of a FOIA exception is insufficient cause to withhold those records.[114] The DOJ will only defend a FOIA denial if the agency foresees the disclosure would harm an interest protected by the exemption or disclosure is prohibited by law.**[115]**

Exemption (b)(1): National Security Information

FOIA does not apply to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."[116]

Congress amended the national security exemption in 1974, … overruling *EPA v. Mink*,[117] … and authorizing judicial *in camera* review of classified documents. The 1974 FOIA amendments sought to minimize automatic deference to the Executive.

The current judicial approach to Exemption 1, as outlined in *King v. U.S. Department of Justice* (presented *infra*),[118] allows the agency significant discretion to determine what Exemption 1 does and does not cover. As in all FOIA cases of contested exemptions, the district court must review *de novo* any claim advanced[119] and the agency must bear the burden of justifying its decision to withhold the information.[120] Congress intended the courts to accord substantial weight to an agency's affidavit concerning the details of the classification of the disputed record.

Exemption (b)(2): Internal Rules and Practices

FOIA's disclosure mandate does not apply to matters "related solely to the internal personnel rules and practices of an agency."[121] …

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111 According to K.C. Davis, FOIA as interpreted by the courts is far superior to the Act as written. He also notes that the right at common law to inspect and copy public records is generally overlooked. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 34–36 (2d ed. Supp. 1982).

112 *Id.*

113 WENDY R. GINSBURG, CONG. RESEARCH SERV., R40766, FREEDOM OF INFORMATION ACT (FOIA): ISSUES FOR THE 111TH CONGRESS, 12 (2009).

114 *Id.*

115 *Id.*

116 5 U.S.C. § 552(b)(1); *see also* ACLU v. DOJ, 640 F. App'x 9, 10 (D.C. 2016) (confirming Exemption 1 applies to classified information under national security executive order).

117 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973), *superseded by statute as stated in* Halpern v. FBI, 181 F.3d 279 (2d Cir.1999).

118 830 F.2d 210 (D.C.Cir.1987) (Exemption 1 categorization by FBI of files kept on civil rights lawyer who died in 1952 remanded to district court for further examination).

119 5 U.S.C. § 552(a)(4)(B).

120 *Id.*

121 5 U.S.C. § 552(b)(2).

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[T]hree elements that must be satisfied in order for information to fit within Exemption 2: 1) the information must be related to "personnel" rules and practices; 2) the information must relate "solely" to those personnel rules and practices;[122] and 3) the information must be "internal."[123] …

There is no doubt that the primary criterion for determining the exemption's scope is … the requirement that the information be related to "personnel."[124] To the extent the material requested also relates solely to the internal personnel rules and practices of an agency, which means there is no genuine and significant public interest in its disclosure, the material is eligible for protection.[125]

Exemption (b)(3): Exemption by Statute

Under FOIA, an agency may refuse to release information if the information is

> specifically exempted from disclosure by statute (other than § 552b of this title) [The Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[126]

Courts employ a two-step approach in reviewing Exemption 3 claims. First, the court determines whether the statute is a withholding statute by the standards set forth in Exemption (b)(3).[127] Secondly, the court then ascertains whether the information withheld falls within the boundaries of the nondisclosure statute.[128] The (b)(3) Exemption does not provide a list of specific Federal statutes that would override FOIA's disclosure mandate. Rather, Congress chose to provide a generic exemption standard so that courts could decide what these statutory conflicts were on a case-by-case basis.

Exemption 3 is applicable only to Federal statutes…

Exemption (b)(4): Trade Secrets

Also exempt from disclosure under FOIA are "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[129]

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122 *See, e.g.,* Rojas v. FAA, 941 F.3d 394, 402 (9th Cir. 2019) (ensuring Exemption 2 protection for screening test used in the selection of employees). Specifically, Exemption 2 protects records *about* personnel rather than records created *for* personnel. *See*, Nat'l Sec. Counselors v. CIA, 960 F. Supp. 2d 101, 172 (D.D.C. 2013) (finding internal training documents are not protected under Exemption 2 not because they "are not human resources documents" but because they "concern an agency's internal rules and practices for its personnel to follow. . .").

123 *Milner*, 131 S. Ct. at 1264–65. *See Milner v. U.S. Dep't of the Navy* (*infra*)

124 *Id.*

125 *Id.* For additional discussion regarding *Milner*, see Sullivan, *supra* note 12, at 74–76 ("As *Milner* shows, the government regularly invokes exemptions other than Exemption 1 to withhold records on national security grounds. In many cases, the government cannot invoke Exemption 1 because the records are not classified.").

126 5 U.S.C. § 552(b)(3). .

127 CIA v. Sims, 471 U.S. 159, 167, 105 S. Ct. 1881, 1887, 85 L. Ed. 2d 173, 182 (1985), *distinguished by* Wolk L. Firm v. United States of Am. Nat'l Transportation Safety Bd., 392 F. Supp. 3d 514 (E.D. Pa. 2019) (while the issue of deference remains unclear, even if the Court does not give deference to the agency's interpretation, the Court finds that cell phone video falls within the material covered by the asserted Exemption 3 statute, 49 U.S.C. § 1114(c)(1)); *see also* Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (D.C.Cir.1987), *remanded* 831 F.2d 1124 (1987), *rev'd*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); Essential Info, Inc. v. USIA, 134 F.3d 1165, 1168 (D.C.Cir.1998) (holding that a statute that prohibits "dissemination" and "distribution" of information qualifies as a "nondisclosure" statute).

128 Irons & Sears v. Dann, 606 F.2d 1215, 1219 (D.C.Cir.1979), *cert. denied sub nom*. Irons & Sears v. Commissioner of Patents & Trademarks, 444 U.S. 1075, 100 S. Ct. 1021, 62 L. Ed. 2d 757 (1980). *See also* City of Chicago v. U.S. Department of Treasury, 384 F.3d 429 (7th Cir.2004) (holding that there is no irreconcilable conflict between the prohibition of the use of federal funds to process FOIA requests in § 644 of the Consolidated Appropriations Resolution of 2003 and granting the City access to the databases; rather, City should use a court-appointed special master paid for by the City to produce the files).

129 5 U.S.C. § 552(b)(4).

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There is no clear definition of "trade secrets." Although the term arguably encompasses virtually any information that provides anyone a competitive advantage, the D.C. Circuit has defined the phrase more narrowly, as "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[130] The same court also required that there be a "direct relationship" between the trade secret and the productive process.[131] As we have seen, the Trade Secrets Act[132] is not a valid Exemption (b)(3) withholding statute.[133] The D.C. Circuit, however, has held that Exemption 4 and the Trade Secrets Act are coextensive.[134]

The majority of Exemption 4 cases focus on whether the information sought falls within the second category of the exemption. To do so, the information must be commercial or financial *and* obtained from a person *and* be privileged[135] or confidential.[136]

Exemption (b)(5): Intra and Inter Agency Memoranda

The fifth exemption of FOIA permits an agency to withhold "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[137]

Exemption 5 is generally construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context."[138] Its three main components are the deliberative process privilege (executive privilege), the attorney work-product privilege, and the attorney-client privilege.[139] Under Exemption 5, the threshold issue is whether a record is the type covered by the statutory language "inter-

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130 Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C.Cir.1983). *See also* Anderson v. Department of HHS, 907 F.2d 936, 944 (10th Cir.1990) ("We agree with the D.C. Circuit's narrow definition because we believe that it is more consistent with the policies behind the FOIA than the broad Restatement definition. Of the arguments put forth by that court in support of its construction, we find most compelling the observation the adoption of the Restatement definition of 'trade secrets' would render superfluous the 'commercial or financial information' prong of Exemption 4 because there would be no category of information falling within the latter but outside the former. Like the D.C. Circuit, we are reluctant to construe the FOIA in such a manner.").

131 *Id. See also* United Technologies Corp. v. U.S. Department of Defense, 601 F.3d 557 (D.C. Cir.2010) (holding that documents, even when redacted, that appear to reveal details about proprietary manufacturing and quality control systems and could be used by competitors to improve their own manufacturing and quality control systems constitute an affirmative use of proprietary information and are not allowed under FOIA).

132 18 U.S.C. § 1905.

133 *See* CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1137–43 (D.C.Cir.1987), *cert. denied sub nom*. CNA Financial Corp. v. McLaughlin, 485 U.S. 977, 108 S. Ct. 1270, 99 L. Ed. 2d 481 (1988).

134 *Id.* at 1144. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317–19 and n. 49, 99 S. Ct. 1705, 1725–26 and n. 49, 60 L. Ed. 2d 208 (1979).

135 *See* Washington Post Co. v. U.S. Department of HHS, 795 F.2d 205, 208 (D.C.Cir.1986), *appeal after remand* 865 F.2d 320 (1989) (J. Scalia) (agency waived its right to raise "privilege" defense on remand by not doing so at the outset of the case).

136 *See, e.g*., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C.Cir.1979); Consumers Union v. VA, 301 F.Supp. 796, 802 (S.D.N.Y.1969), *appeal dismissed as moot* 436 F.2d 1363 (2d Cir.1971).

137 5 U.S.C. § 552(b)(5).

138 *Sears, Roebuck & Co*., *supra* note 201, 421 U.S. at 149, 95 S. Ct. at 1516, 44 L. Ed. 2d 29 (1975); *see also* FTC v. Grolier, Inc., 462 U.S. 19, 26, 103 S. Ct. 2209, 2214, 76 L. Ed. 2d 387 (1983) ("The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' dismissed upon a showing of relevance.").

139 The U.S. Supreme Court also extended Exemption 5 to include confidential factual statements made to air crash investigators (United States v. Weber Aircraft, Corp., 465 U.S. 792, 798, 104 S. Ct. 1488, 1492, 79 L. Ed. 2d 814 (1984); Machin v. Zuckert, 316 F.2d 336 (D.C.Cir.1963)) and confidential commercial information protected by FED.R.CIV.P. 26c(7) (Federal Open Market Committee v. Merrill, 443 U.S. 340, 360, 99 S. Ct. 2800, 2812, 61 L. Ed. 2d 587 (1979)). *But see* Burka v. Department of HHS, 87 F.3d 508, 517 (D.C.Cir.1996) (ruling that agency must show that discovery material is protected for reasons similar to FOIA material before court will deem the information privileged).

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agency or intra-agency memorandums."[140] The courts have construed the scope of Exemption 5 broadly to include documents created outside of an agency.[141]

Exemption (b)(6): Privacy Protection

FOIA also authorizes agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[142] In *Department of the Air Force v. Rose*,[143] the U.S. Supreme Court declared "the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters."[144] Consequently, judicial review of Exemption 6 claims focuses not on the physical nature of the information, but rather on the information itself and the impact it will have on the privacy of the individual.[145] …

Typical privacy interests falling easily under Exemption 6 include marital status, religious affiliation, medical information, welfare payments, legitimacy of children, reputation and the like.

Exemption (b)(7): Law Enforcement Purposes

FOIA also gives the various agencies the right to withhold:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (E) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.[146]

Exemption (b)(8): Records of Financial Institutions

FOIA permits agencies to withhold information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or

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140 *See* United States Dep't of Justice v. Julian, 486 U.S. 1, 11 n. 9, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988) (Scalia, J., dissenting) (stating that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency-as opposed to an 'inter-agency memorandum,' which would be a memorandum between employees of two different agencies").

141 *See, e.g.*, General Electric Co. v. EPA, 18 F.Supp.2d 138, 142 (D.Mass.1998) (exempting state agency data sent to a federal agency at the request of the federal agency).

142 5 U.S.C. § 552(b)(6). For reform proposals, *see* Chapter 13, § 13.3 *supra*.

143 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

144 *Id.* at 376 n. 14, 96 S. Ct. at 1606 n. 14. *But see* Norwood v. FAA, 993 F.2d 570, 575 (6th Cir.1993) (holding that only items such as names and social security numbers, which "by themselves" would identify an individual, could be withheld) *modified*, No. 92–5820 (6th Cir. July 9, 1993) (stating that there might be occasions in which an agency could justifiably withhold information other than "those items which 'by themselves' would identify the individuals," but that the FAA "made no such particularized effort, relying generally on the claim that 'fragments of information' might be able to be pieced together into an identifiable set of circumstances").

145 *See* New York Times Co. v. NASA, 852 F.2d 602 (D.C.Cir.1988) (voice recording of shuttle launch containing nonpersonal information previously released to media held not exempt under (b)(6)); *see also* Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir.1974); Rural Housing Alliance v. U.S. Department of Agriculture, 498 F.2d 73 (D.C.Cir.1974); Howard Johnson Co. v. NLRB, 618 F.2d 1 (6th Cir.1980).

146 5 U.S.C. § 552(b)(7).

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supervision of financial institutions."[147] There are two main purposes of Exemption 8: (1) to protect the security and stability of banks by withholding frank evaluations and (2) to promote employee-examiner cooperation.[148] The courts tend to interpret Exemption 8 expansively;[149] in general entire documents relating to banks' conditions are exempt, with little need to show cause.[150]

Exemption (b)(9): Records of Oil Exploration

Finally, FOIA specifically exempts from disclosure "geological and geophysical information and data, including maps, concerning wells."[151] Although few agencies have invoked Exemption 9 and few courts have interpreted it,[152] one court has held that the exemption only applies to "well information of a technical or scientific nature."[153]

Exclusions

Three special protection provisions under Subsection (c), referred to as record "exclusions," authorize federal law enforcement agencies to treat certain sensitive records "as not subject to the requirements of [the FOIA]."[154] An agency that applies one of the three record exclusions will simply inform the FOIA requester that no records responsive to his FOIA request exist.[155] The (c)(1) Exclusion authorizes federal law enforcement agencies to hide the existence of records of ongoing investigations or proceedings.[156] The

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147 5 U.S.C. § 552(b)(8) (1994 & Supp. IV 1998). Courts have declined to restrict the scope of Exemption 8. *See* FOIA GUIDE, *supra* note 445, at 448. *See also* Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293–94 (D.C.Cir.1991) (construing the term "financial institutions" broadly and holding that it is not limited to "depository" institutions); Gregory v. FDIC, 631 F.2d 896, 898 (D.C.Cir.1980) (finding that that Exemption 8 provides "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports"); Feshbach v. SEC, 5 F.Supp.2d 774, 781 (N.D.Cal.1997) (holding that the term "financial institutions" includes "brokers and dealers of securities or commodities as well as self-regulatory organizations, such as the [National Association of Securities Dealers])"; Berliner, Zisser, Walter & Gallegos v. SEC, 962 F.Supp. 1348, 1352 (D.Colo.1997) (ruling that an "investment advisor company" is a "financial institution" under Exemption 8).

148 *See, e.g.,* Pub. Investors Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 64 (D.D.C. 2013) (stating Exemption 8 is primarily to "ensure the security of financial institutions" and secondarily to "safeguard the relationship between the banks and their supervising agencies"), aff'd, 771 F.3d 1(D.C.Cir. 2014).

149 *See Gregory*, 631 F.2d at 898; *Berliner*, 962 F.Supp. at 1353 (describing Exemption 8 "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"). *But see* McKinley v. FDIC, 268 F. Supp. 3d 234, 246 (D.D.C. 2017) (holding Exemption 8 "is not so broad as to permit the agency to refuse to identify which of the many grounds within Exemption 8 purportedly applies to each document that the agency seeks to withhold").

150 FOIA GUIDE, *supra* note 445, at 450.

151 5 U.S.C. § 552(b)(9) (1994 & Supp. IV 1998).

152 United States Dep't of Justice, Freedom of Information Act Guide & Privacy Act Overview 454 (2000). *See, e.g.*, Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203–04 & n. 20 (5th Cir.1977) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629–30 & n. 2 (5th Cir.1976) (non-FOIA case); National Broad. Co. v. SBA, 836 F.Supp. 121, 124 n. 2 (S.D.N.Y.1993) (mentioning Exemption 9). *See generally* Ecee, Inc. v. Federal Energy Regulatory Comm'n, 645 F.2d 339, 348–49 (5th Cir.1981) (holding that requirement that producers of natural gas submit confidential geological information was valid) (non-FOIA case); Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (denying Exemption 9 when the information at issue was outside the scope); Story of Stuff Project v. U.S. Forest Service, 366 F. Supp. 3d 66, 81 (D.D.C. 2019) (interpreting the term "wells" to include borehole maps and related information and holding that the Government was correct when it withheld information claiming Exemption 9).

153 Black Hills Alliance v. United States Forest Serv., 603 F.Supp. 117, 122 (D.S.D.1984) (withholding technical information about proposed uranium exploration drill holes).

154 5 U.S.C. § 552(c)(1)–(3) (1994 & Supp. IV 1998).

155 FOIA GUIDE, *supra* note 445, at 455.

156 *Id.* at 456.

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(c)(2) Exclusion guards against identifying confidential informants in criminal proceedings.[157] The (c)(3) Exclusion guards certain FBI foreign intelligence, counterintelligence, and antiterrorism records.[158]

King v. U.S. Dept. of Justice

830 F.2d 210 (D.C. Cir. 1987)

SPOTTSWOOD W. ROBINSON, III, CIRCUIT JUDGE:

In this Freedom of Information Act (FOIA) case, appellant, Cynthia King, seeks production by the Federal Bureau of Investigation (FBI) of documents relating to her deceased mother-in-law, Carol King, a civil rights attorney and activist about whose career appellant is writing a book. The FBI has released many of the documents — most, however, in redacted form. The agency contends that its decision to withhold portions of the requested information is authorized by Exemptions 1 and 7 of the Act, which respectively except from FOIA's disclosure mandate, documents classified for national security reasons and certain other material gathered during investigations for law-enforcement purposes. Appellant challenges the applicability of either exemption in the circumstances presented here.

The District Court denied motions by appellant for summary judgment or in the alternative to compel discovery, rejected appellant's request for in-camera inspection, and granted the FBI's motion for summary judgment. This appeal ensued.

I

The records whose disclosure is here at issue are part of an FBI surveillance file on Carol King compiled during the 1940's and 1950's. She was a prominent civil rights attorney who devoted her practice to defending minorities, aliens, radicals and union members both famous and obscure; and a substantial portion of her practice consisted in representation of aliens facing deportation during the McCarthy era. The nature of Carol King's law practice and her political associations aroused [the] suspicions of the FBI. In 1941, the FBI opened a surveillance file on her, and subjected her to continuous investigation until her death in 1952. The FBI represents that its investigation was devoted exclusively to determining whether Carol King was guilty of political sedition. While the eleven-year investigation amassed a file 1,665 pages in length, no charge was ever made.

Appellant is a writer by profession who intends to publish a biography on her mother-in-law and longtime friend, Carol King. As yet, no significant history of the latter's career has been published. In the course of her research, appellant attempted to obtain information pertaining to Carol King by means of a FOIA request. The FBI eventually responded by releasing to appellant redacted portions of its King investigative file. Ultimately provided were 1,500 pages of the 1,665-page file, and, from most of the 1,500 pages supplied, names and, frequently, substantial passages were deleted.

Contesting the sufficiency of the FBI's response to her FOIA request, appellant filed suit in the District Court, and moved for a *Vaughn* index[159] detailing the grounds for the FBI's exemption claims. Production of the *Vaughn* index was ordered. Thereafter, the FBI submitted the joint declaration of Special

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157 *Id.* at 458.

158 *Id.* at 461. *See also* Exec. Order No. 12,958, 3 C.F.R. 333 (1996), *reprinted in* 50 U.S.C. § 435 note (Supp. II 1996) (classifying certain records for national security purposes).

159 *See Vaughn v. Rosen,* 340, 484 F.2d 820 (1973), *cert. denied,* 415 U.S. 977 (1974). [A *Vaughn* index is an itemized index which correlates each withheld document with a specific FOIA exemption and the relevant part of the agency's statement refusing disclosure.]

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Agents Richard C. Stayer and Walter Scheuplein, Jr.,[160] and the declaration of John H. Walker of the Immigration and Naturalization Service, attesting to the reasons for excising portions of the King file; it then moved for summary judgment. Appellant in turn moved for summary judgment, or in the alternative to compel a response to outstanding discovery requests.

The District Court granted the FBI's motion for summary judgment. It sustained the Exemption 1 contentions, relying on the Staver-Scheuplein declaration, which it found to set forth with "reasonable specificity of detail rather than mere conclusory statements" an adequate description of the portions of the King file withheld, as well as the national security considerations advanced in support of the FBI's refusal to disclose. Similarly, the District Court deemed the declaration a sufficient foundation for the FBI's claims under Exemptions 7(C) and 7(D) that information withheld was gathered pursuant to an investigation for law-enforcement purposes and that its release would constitute an unwarranted invasion of personal privacy or compromise assurances of source confidentiality.

Appellant urges us to hold that the District Court erred in crediting the FBI's Exemption 1 and 7 arguments, contending that they shield information in contravention of FOIA's broad disclosure mandate. Specifically, appellant asserts that the Staver-Scheuplein declaration presents only a vague and conclusory description of the material excised pursuant to Exemption 1, wholly inadequate for purposes of ascertaining whether the documents in question have in fact been properly classified, or what harm might result from their production. "How," appellant queries, "can release of … records of this nature and at this late date possibly damage the national security?" Appellant further contends that the Staver-Scheuplein declaration does not make the threshold showing required for resort to Exemption 7: that the documents in question were compiled for *bona fide* law-enforcement purposes pursuant to an investigation whose relation to the agency's law-enforcement duties is based on information sufficient to support at least a " 'colorable claim' of its rationality." And, whether or not a law-enforcement purpose originally animated the investigation, appellant insists no considerations of privacy or confidentiality warrant continued withholding of its fruits. While we reject appellant's challenge to the disposition of the Exemption 7 claims in this case, we believe valid objections to the FBI's showing on the Exemption 1 claims have been raised, and remand in order that the District Court secure a fuller elaboration of the FBI's basis for asserting them.

II

Exemption 1 of the Freedom of Information Act protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to such Executive order." An agency may invoke this exemption only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification. Appellant challenges, on substantive and not procedural grounds, the propriety of the classification decisions underlying the FBI's Exemption 1 claims.

A.

Both appellant and the FBI believe that the directive pertinent to disposition of the Exemption 1 issues in this case is Executive Order 12065, which was in effect when the FBI's classification

[160] … The declaration consists of two parts: the first, by Special Agent Stayer, sets forth the grounds for the FBI's Exemption 1 position and the second, by Special Agent Scheuplein, addresses the FBI's remaining withholding claims, including those under Exemption 7.

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determinations were made. This order provided that information could be classified only if it concerned:

> (a) military plans, weapons, or operations;
> (b) foreign government information;
> (c) intelligence activities, sources or methods;
> (d) foreign relations or foreign activities of the United States;
> (e) scientific, technological, or economic matters relating to the national security;
> (f) United States Government Programs for safeguarding nuclear materials or facilities; or
> (g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.

Executive Order 12065 further specified that information concerning any of the enumerated matters was eligible for classification as "confidential," the lowest security designation, only if its "unauthorized disclosure … reasonably could be expected to cause at least identifiable damage to the national security." It also established a presumption against classification: "If there is reasonable doubt … whether the information should be classified at all … the information should not be classified."

Subsequent to the decision to classify the documents involved in this case, and after commencement of this litigation, President Reagan promulgated Executive Order 12356. This order retains all categories of classifiable information enumerated in Executive Order 12065, but diverges from that order in several other significant respects. The new executive order eliminates the prior order's presumption against classification and modifies the standard for classifying information. While the earlier order prohibited an agency from classifying information unless it could be shown that "unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security," the new order seemingly commands classification of all material within certain enumerated categories of sensitive information whose "unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." While the old executive order in some instances required declassification decisions to be made by weighing the need to protect information against the public interest in disclosure, the new executive order eliminates this balancing provision from the declassification calculus. Absent as well from the new order are certain procedures contained in Executive Order 12065 designed to ensure systematic declassification review of older material.

The parties have conformed their arguments regarding the propriety of the classification decisions in dispute to the terms of Executive Order 12065, under which those decisions were made, notwithstanding the fact that Executive Order 12065 is now superseded by Executive Order 12356. Their position finds support in our holding in *Lesar v. United States Department of Justice,* 636 F.2d 472 (D.C. Cir. 1980), that "[o]n review, the court should … assess the documents according to the terms of the Executive Order under which the agency made its ultimate classification determination." …

Lesar [directs] a reviewing court to assess the propriety of a classification decision purportedly supporting an Exemption 1 claim in terms of the executive order in force at the time the agency's ultimate classification decision is actually made. …

B

Turning to the general principles affecting this appeal, we begin with a reminder that, as in all FOIA cases, the district courts are to review *de novo* all exemption claims advanced, and that the agency bears the burden of justifying its decision to withhold requested information. The agency may meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption

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claimed; and the court owes substantial weight to detailed agency explanations in the national security context. However, a district court may award summary judgment to an agency invoking Exemption 1 only if (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency. On appeal, the court is to determine, from inspection of the agency affidavits submitted, whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding. …

The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected. As we observed in *Vaughn v. Rosen,* "[t]his lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution," with the result that "[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a lower court's factual determination." Even should the court undertake *in camera* inspection of the material — an unwieldy process where hundreds or thousands of pages are in dispute — "[t]he scope of the inquiry will not have been focused by the adverse parties. …"

Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review."

C

The District Court examined the affidavits submitted by the FBI in the instant case, and concluded that they substantiated its reliance on Exemption 1. On appeal, then, we are to determine as a threshold matter whether the affidavits in fact provided the District Court with "an adequate basis to decide" the Exemption 1 issues: to ascertain whether the material withheld is within the categories of classifiable information enumerated in Executive Order 12065 and, further, whether its unauthorized disclosure reasonably could be expected to cause the requisite amount of damage to the national security. We turn to the *Vaughn* index and the accompanying declaration prepared by Special FBI Agent, Richard C. Stayer.

Stayer advised the District Court that "[t]o provide a more workable *'Vaughn* index' format and thus reduce the burden of analyzing Exemption One claims" he was departing from the practice of preparing typed pages separately describing each withheld document, and was submitting instead copies of the documents released pursuant to appellant's FOIA demand with each deletion annotated by means of a four-character code referring in turn to an accompanying code-catalogue. The copy of the redacted documents

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and the explanatory code-catalogue together comprise the FBI's *Vaughn* filing.

In brief, the system works as follows. For every instance in which information was withheld, the documents released have been marked with the four character code. The first two characters of the code identify the FOIA exemption assertedly authorizing the withholding — for example, (b)(1); the third character identifies the category in Executive Order 12065 under which the material has been classified — such as Section 1-301(c) (intelligence activities, sources or methods); and the fourth character refers to a statement in the code-catalogue that is offered as a description of the material withheld, intended to demonstrate that it lies within one or more of the classification categories of Executive Order 12065, and to point to the likely harm to the national security attending its release. In sum, the District Court was presented with an intensively redacted and annotated 1500-page reproduction of the requested file, as well as numerous inserts, similarly annotated, representing the remaining 165 pages of the file withheld.

Stayer opines that this new method of presentation represents "a vast improvement over previous formats" and that "the required specificity has been enhanced." We regret to differ. The system Stayer has adopted imposes a significant burden upon the reviewing court without commensurate benefit. Stayer system of annotation neither adequately describes redacted material nor explains, with sufficient specificity to enable meaningful review, how its disclosure would likely impair national security. …

The *Vaughn* index here submitted is, in a word, inadequate — wholly lacking in that specificity of description we have repeatedly warned is necessary to ensure meaningful review of an agency's claim to withhold information subject to a FOIA request. A withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information. This requirement, if indeed not explicit in *Vaughn,* is unmistakably implicit in the principles supporting our decision in that case, as our subsequent decisions have made very clear. When, in *Vaughn,* we first insisted that agencies tender an index and affidavits as a precondition to review of exemptions claims, we emphasized the necessity of identifying which exemption was relied upon for each item withheld. In *Mead Data Central v. United States Department of the Air Force,* we elaborated on *Vaughn's* requirements, explaining that the withholding agency must supply "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." As we subsequently reiterated in *Dellums v. Powell, Vaughn's* call for specificity imposes on the agency the burden of demonstrating applicability of the exemptions invoked *as to each document or segment withheld.*

D

We conclude that the *Vaughn* index tendered in this case provides an insufficient basis for the *de novo* review that FOIA mandates for Exemption 1 claims. This requires a remand of the case to the District Court for further proceedings. Then, the court may employ any of several measures to acquire enough information to conduct the review requisite.

The District Court may, in its discretion, order production of the excised material or some sample thereof for *in camera* inspection. An opportunity for "first-hand inspection [enables the court to] determine whether the weakness of the affidavits is a result of poor draftsmanship or a flimsy exemption claim," but "the district court's inspection prerogative is not a substitute for the government's burden of proof, and should not be resorted to lightly." Moreover, should the task of *in camera* examination appear too burdensome, the court may allow appellant to engage in further discovery, or order the FBI to supplement its *Vaughn* filings. If so ordered, the FBI must provide on an item specific basis the maximum amount of information consistent with protection of the interests of national security and the exigencies of forecasting events in this domain.

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Whether the District Court proceeds by ordering supplemental affidavits or by *in camera* inspection of documents or samplings, it must ensure that it has an adequate foundation for review of the FBI's withholding claims before giving the agency's expert opinion on national security matters the substantial weight to which it is entitled. At a minimum, the court must secure more information with respect to excisions involving whole documents or substantial parts thereof, where no contextual information is available to supplement and particularize the FBI's code descriptions. Having garnered this additional information on material withheld, the court should then scrutinize afresh the FBI's assessment of the consequences of disclosure, allowing appropriate latitude for opinion but ensuring that the enumeration of alternate consequences presently characterizing the agency's submission reflects predictive uncertainty rather than mere categorical response.

In reviewing the FBI's predictions on disclosure, the court should devote particular attention to the age of the file in this case. It was compiled between 1941 and 1952; all documents it contains are now at least 35 years old. Executive Order 12065 directs declassification "as early as national security considerations permit," and identifies "the occurrence of a declassification event" or "loss of the information's sensitivity with the passage of time" as circumstances sufficient to warrant dissolution of a prior classification determination. … [The Court then discussed Exemption 7, upholding the District Court's decision in this regard.]

Glen Scott Milner v. Department of the Navy

562 U.S. 562 (2011)

JUSTICE KAGAN delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material. This case concerns the scope of Exemption 2, which protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency." § 552(b)(2). Respondent Department of the Navy (Navy or Government) invoked Exemption 2 to deny a FOIA request for data and maps used to help store explosives at a naval base in Washington State. We hold that Exemption 2 does not stretch so far.

I

Congress enacted FOIA to overhaul the public disclosure section of the Administrative Procedure Act (APA), 5 U.S.C. § 1002 (1964 ed.). That section of the APA "was plagued with vague phrases" and gradually became more "a withholding statute than a disclosure statute." *EPA v. Mink*, 410 U.S.73, 79 (1973). Congress intended FOIA to "permit access to official information long shielded unnecessarily from public view." *Id*. at 80. FOIA thus mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are "explicitly made exclusive," *id*., at 79, and must be "narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

At issue here is Exemption 2, which shields from compelled disclosure documents "related solely to the internal personnel rules and practices of an agency." § 552(b)(2). Congress enacted Exemption 2 to replace the APA's exemption for "any matter relating solely to the internal management of an agency," 5 U.S.C. § 1002 (1964 ed.). Believing that the "sweep" of the phrase "internal management" had led to excessive withholding, Congress drafted Exemption 2 "to have a narrower reach." *Department of Air Force v. Rose*, 425 U.S. 352, 362–363 (1976).

We considered the extent of that reach in *Department of Air Force v. Rose*. There, we rejected the

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Government's invocation of Exemption 2 to withhold case summaries of honor and ethics hearings at the United States Air Force Academy. The exemption, we suggested, primarily targets material concerning employee relations or human resources: "use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." *Id*., at 363. … But we stated a possible caveat to our interpretation of Exemption 2: That understanding of the provision's coverage governed, we wrote, "at least where the situation is not one where disclosure may risk circumvention of agency regulation." *Id*., at 369.

In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981), the D. C. Circuit converted this caveat into a new definition of Exemption 2's scope. *Crooker* approved the use of Exemption 2 to shield a manual designed to train Government agents in law enforcement surveillance techniques. The D. C. Circuit noted that it previously had understood Exemption 2 to "refe[r] only to 'pay, pensions, vacations, hours of work, lunch hours, parking, etc.' *Id*. at 1056. … But the court now thought Exemption 2 should also cover any "predominantly internal" materials, whose disclosure would "significantly ris[k] circumvention of agency regulations or statutes," *id*., at 1074. This construction of Exemption 2, the court reasoned, flowed from FOIA's "overall design," its legislative history, "and even common sense," because Congress could not have meant to "enac[t] a statute whose provisions undermined … the effectiveness of law enforcement agencies." *Ibid*.

In the ensuing years, three Courts of Appeals adopted the D. C. Circuit's interpretation of Exemption 2. *See* 575 F.3d 959, 965 (CA9 2009) (case below); *Massey v. FBI*, 3 F.3d 620, 622 (CA2 1993); *Kaganove v. EPA*, 856 F.2d 884, 889 (CA7 1988). And that interpretation spawned a new terminology: Courts applying the *Crooker* approach now refer to the "Low 2" exemption when discussing materials concerning human resources and employee relations, and to the "High 2" exemption when assessing records whose disclosure would risk circumvention of the law. Congress, as well, took notice of the D. C. Circuit's decision, borrowing language from *Crooker* to amend Exemption 7(E) when next enacting revisions to FOIA. The amended version of Exemption 7(E) shields certain "records or information compiled for law enforcement purposes" if their disclosure "could reasonably be expected to risk circumvention of the law." § 552(b)(7)(E); *see* Freedom of Information Reform Act of 1986, § 1802(a).

II

The FOIA request at issue here arises from the Navy's operations at Naval Magazine Indian Island, a base in Puget Sound, Washington. The Navy keeps weapons, ammunition, and explosives on the island. To aid in the storage and transport of these munitions, the Navy uses data known as Explosive Safety Quantity Distance (ESQD) information. ESQD information prescribes "minimum separation distances" for explosives and helps the Navy design and construct storage facilities to prevent chain reactions in case of detonation. The ESQD calculations are often incorporated into specialized maps depicting the effects of hypothetical explosions.

In 2003 and 2004, petitioner Glen Milner, a Puget Sound resident, submitted FOIA requests for all ESQD information relating to Indian Island. The Navy refused to release the data, stating that disclosure would threaten the security of the base and surrounding community. In support of its decision to withhold the records, the Navy invoked Exemption 2.

The District Court granted summary judgment to the Navy, and the Court of Appeals affirmed, relying on the High 2 interpretation developed in *Crooker*. The Court of Appeals explained that the ESQD information "is predominantly used for the internal purpose of instructing agency personnel on how to do their jobs." And disclosure of the material, the court determined, "would risk circumvention of the law" by "point[ing] out the best targets for those bent on wreaking havoc" — for example, "[a] terrorist who wished to hit the most damaging target." *Id.* at 971. The ESQD information, the court concluded, therefore qualified

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for a High 2 exemption.

We granted certiorari in light of the Circuit split respecting Exemption 2's meaning, and we now reverse.

III

Our consideration of Exemption 2's scope starts with its text. Judicial decisions since FOIA's enactment have analyzed and reanalyzed the meaning of the exemption. But comparatively little attention has focused on the provision's 12 simple words: "related solely to the internal personnel rules and practices of an agency."

The key word in that dozen — the one that most clearly marks the provision's boundaries — is "personnel." When used as an adjective, as it is here to modify "rules and practices," that term refers to human resources matters. "Personnel," in this common parlance, means "the selection, placement, and training of employees and … the formulation of policies, procedures, and relations with [or involving] employees or their representatives." Webster's Third New International Dictionary 1687 (1966) (hereinafter Webster's). So, for example, a "personnel department" is "the department of a business firm that deals with problems affecting the employees of the firm and that usually interviews applicants for jobs." Random House Dictionary 1075 (1966) (hereinafter Random House). "Personnel management" is similarly "the phase of management concerned with the engagement and effective utilization of manpower to obtain optimum efficiency of human resources." Webster's 1687. And a "personnel agency" is "an agency for placing employable persons in jobs; employment agency." Random House 1075.

FOIA itself provides an additional example in Exemption 6. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears"). That exemption … protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). Here too, the statute uses the term "personnel" as a modifier meaning "human resources." As we recognized in *Rose*, "the common and congressional meaning of … 'personnel file' " is the file "showing, for example, where [an employee] was born, the names of his parents, where he has lived from time to time, his … school records, results of examinations, [and] evaluations of his work performance." 425 U.S. at 377. It is the file typically maintained in the human resources office — otherwise known (to recall an example offered above) as the "personnel department."

Exemption 2 uses "personnel" in the exact same way. An agency's "personnel rules and practices" are its rules and practices dealing with employee relations or human resources. … But all the rules and practices referenced in Exemption 2 share a critical feature: They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits. Courts in practice have had little difficulty identifying the records that qualify for with-holding under this reading: They are what now commonly fall within the Low 2 exemption. Our construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all).

The statute's purpose reinforces this understanding of the exemption. We have often noted "the Act's goal of broad disclosure" and insisted that the exemptions be "given a narrow compass." *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). This practice of "constru[ing] FOIA exemptions narrowly," *Department of Justice v. Landano*, 508 U.S. 165, 181 (1993), stands on especially firm footing with respect to Exemption 2. As described earlier, Congress worded that provision to hem in the prior APA exemption for "any matter relating solely to the internal management of an agency," which agencies had used to prevent access to masses of documents. *See Rose*, 425 U.S. at 362. We would ill-serve Congress's purpose

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by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt. Our reading instead gives the exemption the "narrower reach" Congress intended, through the simple device of confining the provision's meaning to its words.

The Government resists giving "personnel" its plain meaning on the ground that Congress, when drafting Exemption 2, considered but chose not to enact language exempting "internal employment rules and practices." This drafting history, the Navy maintains, proves that Congress did not wish "to limit the Exemption to employment-related matters," even if the adjective "personnel" conveys that meaning in other contexts. But we think the Navy's evidence insufficient: The scant history concerning this word change as easily supports the inference that Congress merely swapped one synonym for another. Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.

Exemption 2, as we have construed it, does not reach the ESQD information at issue here. These data and maps calculate and visually portray the magnitude of hypothetical detonations. By no stretch of imagination do they relate to "personnel rules and practices," as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees. The Navy therefore may not use Exemption 2, interpreted in accord with its plain meaning to cover human resources matters, to prevent disclosure of the requested maps and data.

IV

[The Court rejected two alternative readings of exemption 2 offered by the government, as inconsistent with the language of the statute].…

The dissent offers one last reason to embrace High 2, and indeed stakes most of its wager on this argument. *Crooker*, the dissent asserts, "has been consistently relied upon and followed for 30 years" by other lower courts. But this claim, too, trips at the starting gate. It would be immaterial even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so. And in any event, it is not true. Prior to *Crooker*, three Circuits adopted the reading of Exemption 2 we think right, and they have not changed their minds. Since *Crooker*, three other Circuits have accepted the High 2 reading. One Circuit has reserved judgment on the High 2-Low 2 debate. *See Audubon Society v. Forest Serv*., 104 F.3d 1201, 1203–1204 (CA10 1997). And the rest have not considered the matter. (No one should think *Crooker* has been extensively discussed or debated in the Courts of Appeals. In the past three decades, *Crooker's* analysis of Exemption 2 has been cited a sum total of five times in federal appellate decisions outside the D. C. Circuit — on average, once every six years.) The result is a 4 to 3 split among the Circuits. We will not flout all usual rules of statutory interpretation to take the side of the bare majority.

B

Presumably because *Crooker* so departs from Exemption 2's language, the Government also offers another construction, which it says we might adopt "on a clean slate," "based on the plain text … alone." On this reading, the exemption "encompasses records concerning an agency's internal rules and practices for its personnel to follow in the discharge of their governmental functions." According to the Government, this interpretation makes sense because "the phrase 'personnel rules and practices of an agency' is logically understood to mean an agency's rules and practices for its personnel."

But the purported logic in the Government's definition eludes us. We would not say, in ordinary

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parlance, that a "personnel file" is any file an employee uses, or that a "personnel department" is any department in which an employee serves. No more would we say that a "personnel rule or practice" is any rule or practice that assists an employee in doing her job. The use of the term "personnel" in each of these phrases connotes not that the file or department or practice/rule is for personnel, but rather that the file or department or practice/rule is about personnel — *i.e.*, that it relates to employee relations or human resources. This case well illustrates the point. The records requested, as earlier noted, are explosives data and maps showing the distances that potential blasts travel. This information no doubt assists Navy personnel in storing munitions. But that is not to say that the data and maps relate to "personnel rules and practices." No one staring at these charts of explosions and using ordinary language would describe them in this manner. …

Interpreted in this way, Exemption 2 — call it "Super 2" now — would extend, rather than narrow, the APA's former exemption for records relating to the "internal management of an agency." 5 U.S.C. § 1002 (1964 ed.). We doubt that even the "internal management" provision, which Congress thought allowed too much withholding, would have protected all information that guides employees in the discharge of their duties, including the explosives data and maps in this case. And perhaps needless to say, this reading of Exemption 2 violates the rule favoring narrow construction of FOIA exemptions. Super 2 in fact has no basis in the text, context, or purpose of FOIA, and we accordingly reject it.

V

Although we cannot interpret Exemption 2 as the Government proposes, we recognize the strength of the Navy's interest in protecting the ESQD data and maps and other similar information. The Government has informed us that "[p]ublicly disclosing the [ESQD] information would significantly risk undermining the Navy's ability to safely and securely store military ordnance," and we have no reason to doubt that representation. The Ninth Circuit similarly cautioned that disclosure of this information could be used to "wrea[k] havoc" and "make catastrophe more likely." Concerns of this kind — a sense that certain sensitive information should be exempt from disclosure — in part led the *Crooker* court to formulate the High 2 standard. And we acknowledge that our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.

We also note, however, that the Government has other tools at hand to shield national security information and other sensitive materials. Most notably, Exemption 1 of FOIA prevents access to classified documents. § 552(b)(1); *see* 575 F.3d, at 980 (W. Fletcher, J., dissenting) (Exemption 1 is "specifically designed to allow government agencies to withhold information that might jeopardize our national security"). The Government generally may classify material even after receiving a FOIA request, *see* Exec. Order No. 13526, § 1.7(d), 75 Fed. Reg. 711 (2009); an agency therefore may wait until that time to decide whether the dangers of disclosure outweigh the costs of classification. Exemption 3 also may mitigate the Government's security concerns. That provision applies to records that any other statute exempts from disclosure, § 552(b)(3), thus offering Congress an established, streamlined method to authorize the withholding of specific records that FOIA would not otherwise protect. And Exemption 7, as already noted, protects "information compiled for law enforcement purposes" that meets one of six criteria, including if its release "could reasonably be expected to endanger the life or physical safety of any individual." § 552(b)(7)(F). The Navy argued below that the ESQD data and maps fall within Exemption 7(F), and that claim remains open for the Ninth Circuit to address on remand.

If these or other exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress. *See* Tr. of Oral Arg. 48. All we hold today is that Congress has not enacted the FOIA exemption the Government desires. We leave to Congress, as is appropriate, the question whether it should do so.

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VI

Exemption 2, consistent with the plain meaning of the term "personnel rules and practices," encompasses only records relating to issues of employee relations and human resources. The explosives maps and data requested here do not qualify for withholding under that exemption. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

I agree with the Court that the text of Exemption 2 of the Freedom of Information Act of 1966 cannot support the "High 2" interpretation that courts have adopted and applied over the years. As the Court explains, however, the Government may avail itself of numerous other exemptions, exemptions that may have been overshadowed in recent years by the broad reach of High 2. I write separately to underscore the alternative argument that the Navy raised below, which rested on Exemption 7(F) and which will remain open on remand. …

Documents compiled for multiple purposes are not necessarily deprived of Exemption 7's protection. The text of Exemption 7 does not require that the information be compiled solely for law enforcement purposes. Cf. § 552(b)(2) ("related solely to the internal personnel rules and practices of an agency"). Therefore, it may be enough that law enforcement purposes are a significant reason for the compilation.

In this case, the Navy has a fair argument that the Explosive Safety Quantity Distance (ESQD) information falls within Exemption 7(F). The ESQD information, the Navy argues, is used "for the purpose of identifying and addressing security issues" and for the "protection of people and property on the base, as well as in [the] nearby community, from the damage, loss, death, or injury that could occur from an accident or breach of security." If, indeed, the ESQD information was compiled as part of an effort to prevent crimes of terrorism and to maintain security, there is a reasonable argument that the information has been "compiled for law enforcement purposes." § 552(b)(7). Assuming that this threshold requirement is satisfied, the ESQD information may fall comfortably within Exemption 7(F).

JUSTICE BREYER, dissenting.

JUSTICE STEVENS has explained that, once "a statute has been construed, either by this Court *or by a consistent course of decision by other federal judges* and agencies," it can acquire a clear meaning that this Court should hesitate to change. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (opinion concurring in part and dissenting in part) (emphasis added). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). I would apply that principal to this case and accept the 30-year-old decision by the D.C. Circuit in *Crooker* as properly stating the law. …

The majority acknowledges that "our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments." But how are these adjustments to be made? Should the Government rely upon other exemptions to provide the protection it believes necessary? As JUSTICE ALITO notes, Exemption 7 applies where the documents consist of "records or information compiled for law enforcement purposes" and release would, *e.g.*, "disclose techniques and procedures for law enforcement investigations," or "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7). But what about information that is *not* compiled for law

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enforcement purposes, such as building plans, computer passwords, credit card numbers, or safe deposit combinations? The Government, which has much experience litigating FOIA cases, warns us that Exemption 7 "targets only a subset of the important agency functions that may be circumvented." Today's decision only confirms this point, as the Court's insistence on narrow construction might persuade judges to avoid reading Exemption 7 broadly enough to provide *Crooker*-type protection.

The majority suggests that the Government can classify documents that should remain private. See 5 U.S.C. § 552(b)(1) (permitting withholding of material "properly classified" as authorized to be "kept secret in the interest of national defense or foreign policy"). But classification is at best a partial solution. It takes time. It is subject to its own rules. As the Government points out, it would hinder the sharing of information about Government buildings with "first responders," such as local fire and police departments. And both Congress and the President believe the Nation currently faces a problem of too much, not too little, classified material. *See* Reducing Over-Classification Act, 124 Stat. 2648; Exec. Order No. 13526, §§ 1.3(d), 2.1(d), 5.4(d)(10), 3 CFR 298, 299–300, 304, 321 (2009 Comp.). Indeed, Congress recently found:

> "The 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information.
>
> "Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector." Reducing Over-Classification Act, §§ 2(2), (3), 124 Stat. 2648.

These legislative findings suggest that it is "over-classification," not *Crooker*, that poses the more serious threat to the FOIA's public information objectives.

That leaves congressional action. As the Court points out, Congress remains free to correct whatever problems it finds in today's narrowing of Exemption 2. But legislative action takes time; Congress has much to do; and other matters, when compared with a FOIA revision, may warrant higher legislative priority. In my view, it is for the courts, through appropriate interpretation, to turn Congress' public information objectives into workable agency practice, and to adhere to such interpretations once they are settled.

That is why: Where the courts have already interpreted Exemption 2, where that interpretation has been consistently relied upon and followed for 30 years, where Congress has taken note of that interpretation in amending other parts of the statute, where that interpretation is reasonable, where it has proved practically helpful and achieved commonsense results, where it is consistent with the FOIA's overall statutory goals, where a new and different interpretation raises serious problems of its own, and where that new interpretation would require Congress to act just to preserve a decades-long status quo, I would let sleeping legal dogs lie.

For these reasons, with respect, I dissent.

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Center for National Security Studies v. Dept of Justice

331 F.3d 918 (D.C. Cir. 2003)

SENTELLE, CIRCUIT JUDGE:

Various "public interest" groups (plaintiffs) brought this Freedom of Information Act (FOIA) action against the Department of Justice (DOJ or government) seeking release of information concerning persons detained in the wake of the September 11 terrorist attacks, including: their names, their attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention. The government objected to release, and asserted numerous exceptions to FOIA requirements in order to justify withholding the information. The parties filed cross-motions for summary judgment. The district court ordered release of the names of the detainees and their attorneys, but held that the government could withhold all other detention information pursuant to FOIA Exemption 7(A), which exempts "records or information compiled for law enforcement purposes … to the extent that the production" of them "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000). Attorneys filed cross-appeals. Upon *de novo* review, we agree with the district court that the detention information is properly covered by Exemption 7(A); but we further hold that Exemption 7(A) justifies withholding the names of the detainees and their attorneys. … We therefore affirm in part, reverse in part, and remand the case to the district court for the entry of a judgment of dismissal.

I. Background

A. The Investigation

Consistent with the mutual decision of the parties to seek resolution to this controversy on summary judgment, the facts are not in serious dispute. In response to the terrorist attacks of September 11, 2001, President George W. Bush ordered a worldwide investigation into those attacks and into "threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests." The Department of Justice, defendant in this action, has been conducting the investigation in conjunction with other federal, state and local agencies. The investigation continues today.

In the course of the post-September 11 investigation, the government interviewed over one thousand individuals about whom concern had arisen. The concerns related to some of these individuals were resolved by the interviews, and no further action was taken with respect to them. Other interviews resulted in the interviewees being detained. As relevant here, these detainees fall into three general categories.

The first category of detainees consists of individuals who were questioned in the course of the investigation and detained by the INS for violation of the immigration laws (INS detainees). INS detainees were initially questioned because there were "indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals or organizations who perpetrated them." Based on the initial questioning, each INS detainee was determined to have violated immigration law; some of the INS detainees were also determined to "have links to other facets of the investigation." Over 700 individuals were detained on INS charges. As of June 13, 2002, only seventy-four remained in custody. Many have been deported. INS detainees have had access to counsel, and the INS has provided detainees with lists of attorneys willing to represent them, as required by 8 U.S.C. § 1229(b)(2) (2000). INS detainees have had access to the courts to file *habeas corpus* petitions. They have also been free to disclose their names to the public.

The second category of detainees consists of individuals held on federal criminal charges (criminal

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detainees). The government asserts that none of these detainees can be eliminated as a source of probative information until after the investigation is completed. According to the most recent information released by the Department of Justice, 134 individuals have been detained on federal criminal charges in the post-September 11 investigation; 99 of these have been found guilty either through pleas or trials. While many of the crimes bear no direct connection to terrorism, several criminal detainees have been charged with terrorism-related crimes, and many others have been charged with visa or passport forgery, perjury, identification fraud, and illegal possession of weapons. Zacarias Moussaoui, presently on trial for participating in the September 11 attacks, is among those who were detained on criminal charges.

The third category consists of persons detained after a judge issued a material witness warrant to secure their testimony before a grand jury, pursuant to the material witness statute, 18 U.S.C. § 3144 (2000) (material witness detainees). Each material witness detainee was believed to have information material to the events of September 11. The district courts before which these material witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about the proceedings. The government has not revealed how many individuals were detained on material witness warrants. At least two individuals initially held as material witnesses are now being held for alleged terrorist activity.

The criminal detainees and material witness detainees are free to retain counsel and have been provided court-appointed counsel if they cannot afford representation, as required by the Sixth Amendment to the Constitution. In sum, each of the detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large.

B. The Litigation

On October 29, 2001, plaintiffs submitted a FOIA request to the Department of Justice seeking the following information about each detainee: 1) name and citizenship status; 2) location of arrest and place of detention; 3) date of detention/arrest, date any charges were filed, and the date of release; 4) nature of charges or basis for detention, and the disposition of such charges or basis; 5) names and addresses of lawyers representing any detainees; 6) identities of any courts which have been requested to enter orders sealing any proceedings in connection with any detainees, copies of any such orders, and the legal authorities relied upon by the government in seeking the sealing orders; 7) all policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings. To support its FOIA request, plaintiffs cited press reports about mistreatment of the detainees, which plaintiffs claimed raised serious questions about "deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury."

In response to plaintiffs' FOIA request, the government released some information, but withheld much of the information requested. As to INS detainees, the government withheld the detainees' names, locations of arrest and detention, the dates of release, and the names of lawyers. As to criminal detainees, the government withheld the dates and locations of arrest and detention, the dates of release, and the citizenship status of each detainee. The government withheld all requested information with respect to material witnesses. Although the government has refused to disclose a comprehensive list of detainees' names and other detention information sought by plaintiffs, the government has from time to time publicly revealed names and information of the type sought by plaintiffs regarding a few individual detainees, particularly those found to have some connection to terrorism.

On December 5, 2001, plaintiffs filed this action in district court seeking to compel release of the withheld information pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Plaintiffs also argued that the First Amendment, as interpreted in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980)

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and its progeny, and the common law doctrine of access to public records require the government to disclose the names and detention information of the detainees.

The parties filed cross-motions for summary judgment. In its motion, the government contended that FOIA Exemptions 7(A), 7(C), and 7(F), 5 U.S.C. § 552(b)(7)(A), (C) & (F), allow the government to withhold the requested documents as to all three categories of detainees. These exemptions permit withholding information "compiled for law enforcement purposes" whenever disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, … or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7)(A), (C), (F). As to the material witness detainees, the government also invoked Exemption 3, 5 U.S.C. § 552(b)(3), which exempts from FOIA requirements matters that are "specifically exempted from disclosure by [other statutes] … ," contending that Federal Rule of Criminal Procedure 6(e), which limits the disclosure of grand jury matters, bars the release of information concerning material witnesses. …

As to Exemption 7(A), the declarations state that release of the requested information could hamper the ongoing investigation by leading to the identification of detainees by terrorist groups, resulting in terrorists either intimidating or cutting off communication with the detainees; by revealing the progress and direction of the ongoing investigation, thus allowing terrorists to impede or evade the investigation; and by enabling terrorists to create false or misleading evidence. As to Exemption 7(C), the declarations assert that the detainees have a substantial privacy interest in their names and detention information because release of this information would associate detainees with the September 11 attacks, thus injuring detainees' reputations and possibly endangering detainees' personal safety. Finally, as to Exemption 7(F), the government's declarations contend that release of the information could endanger the public safety by making terrorist attacks more likely and could endanger the safety of individual detainees by making them more vulnerable to attack from terrorist organizations. For these same reasons, the counterterrorism officials state that the names of the detainees' lawyers should also be withheld.

C. The Judgment

On August 2, 2002, the district court rendered its decision, ruling in part for the plaintiffs and in part for the government. Briefly put, the court ordered the government to disclose the names of the detainees and detainees' lawyers, but held that the government was entitled to withhold all other detention information under Exemptions 7(A) and 7(F).

Addressing the names of the detainees, the court held that disclosure could not reasonably be expected to interfere with ongoing enforcement proceedings, and thus the names were not exempt under 7(A). The court rejected the government's argument that disclosure of detainees' names would deter them from cooperating with the government because terrorist groups likely already know which of their cell members have been detained. Moreover, the court reasoned that the government's voluntary disclosure of the names of several detainees undermined the force of its argument about the harms resulting from disclosure. The court further held that "the government has not met its burden of establishing a 'rational link' between the harms alleged and disclosure" because its declarations provided no evidence that the detainees actually have any connection to, or knowledge of, terrorist activity.

The court next rejected the government's 7(A) argument that disclosure of names would allow terrorist groups to map the course of, and thus impede, its investigation. The government had advanced a

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"mosaic" argument, contending that the court should consider the aggregate release of the names under 7(A) rather than the release of each in isolation, on the reasoning that the release of the names *in toto* could assist terrorists in piecing together the course, direction and focus of the investigation. The district court rejected this argument, holding, *inter alia,* as a matter of law that FOIA Exemption 7(A) requires an individualized assessment of disclosure, and that the government's mosaic theory could not justify a blanket exclusion of information under Exemption 7(A). In the district court's view, the mosaic theory is only cognizable under Exemption 1, which protects information authorized by Executive Order to be kept secret in the interest of national defense or foreign policy. The court further rejected the government's final 7(A) argument, concluding that there was insufficient evidence that disclosure would enable terrorist groups to create false and misleading evidence.

Turning to Exemptions 7(C) and 7(F), the court rejected the government's claims, holding that the admittedly substantial privacy and safety interests of the detainees do not outweigh the vital public interest in ensuring that the government is not abusing its power. The court noted that plaintiffs have raised "grave concerns" about the mistreatment of detainees and have provided evidence of alleged mistreatment in the form of media reports, and firsthand accounts given to Congress and human rights groups. While rejecting the government's attempt to withhold detainees' names, the court ruled that it would permit detainees to opt out of disclosure by submitting a signed declaration within fifteen days. The court did not address the government's argument that disclosure could harm public safety.

Having rejected the government's Exemption 7 claims, the court further held that Exemption 3 does not bar the release of the names of material witnesses. Specifically, the court held that Exemption 3 does not apply, reasoning Federal Rule of Criminal Procedure 6(e) does not bar the disclosure of the identities of persons detained as material witnesses, but only bars "disclosure of a matter occurring before a grand jury." Fed.R.Crim.P. 6(e)(6). The government's evidence did not establish that any of the detainees were actual grand jury witnesses or were scheduled to testify before a grand jury. Further, the government's disclosure of the identities of twenty-six material witness detainees undercut its argument that disclosure is barred by statute. As to the government's contention that court sealing orders prevent the government from releasing the names of material witnesses, the court ordered the government to submit such orders for *in camera* review or to submit a "supplemental affidavit explaining the nature and legal basis for these sealing orders."

For reasons not unlike its rejection of the government's attempt to withhold the names of detainees, the court also held that the government must reveal the names of the detainees' lawyers. The court determined that the names of the attorneys were not covered by Exemptions 7(A), 7(C), or 7(F) for the same reason it had rejected the government's attempt to withhold the names of detainees; because attorneys have no expectation of anonymity; and because any concerns about physical danger were purely speculative.

Turning to the other information sought by plaintiffs — the dates and locations of arrest, detention, and release — the court granted summary judgment for the government on its claim that such detention information was covered under 7(A) and 7(F). The court credited the counterterrorism officials' judgment that the detention information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy," and that disclosure would make detention facilities "vulnerable to retaliatory attacks." Finally, the court rejected plaintiffs' claim that the First Amendment and common law entitle them to the dates and locations of arrest, detention, and release.

The court ordered the government to release the names of detainees and their lawyers in fifteen days, subject to the right of detainees to opt out of disclosure. On August 15, 2002, the district court stayed its order pending appeal. …

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II. The FOIA Claims

We review *de novo* the district court's grant of summary judgment, and therefore consider anew each of the claims and defenses advanced before the district court. We turn first to the government's claims of exemption from disclosure under FOIA of the names of the detainees and their lawyers.

A. Names of Detainees

"Public access to government documents" is the "fundamental principle" that animates FOIA. "Congress recognized, however, that public disclosure is not always in the public interest." Accordingly, FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential. To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions, *see* 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," courts must not fail to give them "a meaningful reach and application," The government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. § 552(a)(4)(b).

The government invokes four exemptions — 7(A), 7(C), 7(F), and 3 — to shield the names of detainees from disclosure. Upon review, we hold that Exemption 7(A) was properly invoked to withhold the names of the detainees and their lawyers. Finding the names protected under 7(A), we need not address the other exemptions invoked by the government and reserve judgment on whether they too would support withholding the names.

Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In enacting this exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." Exemption 7(A) does not require a presently pending "enforcement proceeding." Rather, as the district court correctly noted, it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings.

The threshold question here is whether the names of detainees were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Because the DOJ is an agency "specializ[ing] in law enforcement," its claim of a law enforcement purpose is entitled to deference. To establish a law enforcement purpose, DOJ's declarations must establish (1) "a rational nexus between the investigation and one of the agency's law enforcement duties;" and (2) "a connection between an individual or incident and a possible security risk or violation of federal law." The government's proffer easily meets this standard. The terrorism investigation is one of DOJ's chief "law enforcement duties" at this time, and the investigation concerns a heinous violation of federal law as well as a breach of this nation's security. Moreover, the names of the detainees and their connection to the investigation came to the government's attention as a result of that law enforcement investigation.

Nonetheless, plaintiffs contend that detainees' names fall outside Exemption 7 because the names are contained in arrest warrants, INS charging documents, and jail records. Since these documents have traditionally been public, plaintiffs contend, Exemption 7 should not be construed to allow withholding of the names. We disagree. Plaintiffs are seeking a comprehensive listing of individuals detained during the post-September 11 investigation. The names have been compiled for the "law enforcement purpose" of successfully prosecuting the terrorism investigation. As compiled, they constitute a comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law

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enforcement purposes.

Next, plaintiffs urge that Exemption 7(A) does not apply because disclosure is not "reasonably likely to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). We disagree. Under Exemption 7(A), the government has the burden of demonstrating a reasonable likelihood of interference with the terrorism investigation. The government's declarations, viewed in light of the appropriate deference to the executive on issues of national security, satisfy this burden.

It is well-established that a court may rely on government affidavits to support the withholding of documents under FOIA exemptions, and that we review the government's justifications therein *de novo,* 5 U.S.C. § 552(a)(4)(B). It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches"); *Dep't of the Navy v. Egan,* 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs"). Indeed, both the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security.

In *CIA v. Sims,* 471 U.S. 159 (1985), the Supreme Court examined the CIA's claims that the names and institutional affiliations of certain researchers in a government-sponsored behavior modification program were exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). The agency claimed that the information was protected from disclosure by a statute charging the CIA to prevent unauthorized disclosure of "intelligence sources and methods," 50 U.S.C. § 403(d)(3). In accepting the CIA Director's judgment that disclosure would reveal intelligence sources and methods, the Court explained that "the decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake." *Sims,* 471 U.S. at 179. The Court further held that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."

The same is true of the Justice Department officials in charge of the present investigation. We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated. …

Given this weight of authority counseling deference in national security matters, we owe deference to the government's judgments contained in its affidavits. Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one. …

The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it "could reasonably be expected" that the harm will result. 5 U.S.C. § 552(b)(7)(A). It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security. We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues. Judicial deference depends on the substance of the danger posed by disclosure — that is, harm to the national

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security — not the FOIA exemption invoked.

In light of the deference mandated by the separation of powers and Supreme Court precedent, we hold that the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable. A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not. This information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts. In short, the "records could reveal much about the focus and scope of the [agency's] investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret."

As the district court noted, courts have relied on similar mosaic arguments in the context of national security. In *Sims*, for example, the Supreme Court cautioned that "bits and pieces" of data " 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.' " Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." (quotations omitted). Such a danger is present here. While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation. Importantly, plaintiffs here do not request "bits and pieces" of information, but rather seek the names of every single individual detained in the course of the government's terrorism investigation. It is more than reasonable to expect that disclosing the name of every individual detained in the post-September 11 terrorism investigation would interfere with that investigation.

Similarly, the government's judgment that disclosure would deter or hinder cooperation by detainees is reasonable. The government reasonably predicts that if terrorists learn one of their members has been detained, they would attempt to deter any further cooperation by that member through intimidation, physical coercion, or by cutting off all contact with the detainee. A terrorist organization may even seek to hunt down detainees (or their families) who are not members of the organization, but who the terrorists know may have valuable information about the organization.

On numerous occasions, both the Supreme Court and this Court have found government declarations expressing the likelihood of witness intimidation and evidence tampering sufficient to justify withholding of witnesses' names under Exemption 7(A). …

For several reasons, plaintiffs contend that we should reject the government's predictive judgments of the harms that would result from disclosure. First, they argue that terrorist organizations likely already know which of their members have been detained. We have no way of assessing that likelihood. Moreover, even if terrorist organizations know about some of their members who were detained, a complete list of detainees could still have great value in confirming the status of their members. For example, an organization may be unaware of a member who was detained briefly and then released, but remains subject to continuing government surveillance. After disclosure, this detainee could be irreparably compromised as a source of information.

More importantly, some detainees may not be members of terrorist organizations, but may nonetheless have been detained on INS or material witness warrants as having information about terrorists. Terrorist organizations are less likely to be aware of such individuals' status as detainees. Such detainees

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could be acquaintances of the September 11 terrorists, or members of the same community groups or mosques. These detainees, fearing retribution or stigma, would be less likely to cooperate with the investigation if their names are disclosed. Moreover, tracking down the background and location of these detainees could give terrorists insights into the investigation they would otherwise be unlikely to have. After disclosure, terrorist organizations could attempt to intimidate these detainees or their families, or feed the detainees false or misleading information. It is important to remember that many of these detainees have been released at this time and are thus especially vulnerable to intimidation or coercion. While the detainees have been free to disclose their names to the press or public, it is telling that so few have come forward, perhaps for fear of this very intimidation.

We further note the impact disclosure could have on the government's investigation going forward. A potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public.

Plaintiffs next argue that the government's predictive judgment is undermined by the government's disclosure of some of the detainees' names. The Supreme Court confronted a similar argument in *Sims*, in which respondents contended that "because the Agency has already revealed the names of many of the institutions at which [behavior modification] research was performed, the Agency is somehow estopped from withholding the names of others." In rejecting the argument, the Court stated that "[t]his suggestion overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries." We likewise reject the plaintiffs' version of this discredited argument. The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation. Furthermore … strategic disclosures can be important weapons in the government's arsenal during a law enforcement investigation. The court should not second-guess the executive's judgment in this area. "It is the responsibility of the [executive] not that of the judiciary" to determine when to disclose information that may compromise intelligence sources and methods.

Contrary to plaintiffs' claims, the government's submissions easily establish an adequate connection between both the material witness and the INS detainees and terrorism to warrant full application of the deference principle. First, all material witness detainees have been held on warrants issued by a federal judge pursuant to 18 U.S.C. § 3144. Under this statute, a federal judge may issue a material witness warrant based on an affidavit stating that the witness has information relevant to an ongoing criminal investigation. Consequently, material witness detainees have been found by a federal judge to have relevant knowledge about the terrorism investigation. It is therefore reasonable to assume that disclosure of their names could impede the government's use of these potentially valuable witnesses. As to the INS detainees, the government states that they were

> originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation.

Reynolds Decl. P 10. "Other INS detainees may have been questioned because of their association with an organization believed to be involved in providing material support to terrorist organizations." Moreover, "[i]n the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined

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that they had links to other facets of the investigation." Furthermore, the Watson Declaration speaks of the INS detainees being subject to "public hearings involving evidence about terrorist links," and states that "concerns remain" about links to terrorism. The clear import of the declarations is that many of the detainees have links to terrorism. This comes as no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several detainees have been charged with federal terrorism crimes or held as enemy combatants. Accordingly, we conclude that the evidence presented in the declarations is sufficient to show a rational link between disclosure and the harms alleged.…

B. Identity of Counsel

We next address whether the government properly withheld the names of the attorneys for INS and material witness detainees under Exemptions 7(A), 7(C), and 7(F). As with the identities of the detainees, we hold that their attorneys' names are also protected from disclosure by Exemption 7(A).

The government contends that a list of attorneys for the detainees would facilitate the easy compilation of a list of all detainees, and all of the dangers flowing therefrom. It is more than reasonable to assume that plaintiffs and amici press organizations would attempt to contact detainees' attorneys and compile a list of all detainees. As discussed above, if such a list fell into the hands of al Qaeda, the consequences could be disastrous. Having accepted the government's predictive judgments about the dangers of disclosing a comprehensive list of detainees, we also defer to its prediction that disclosure of attorneys' names involves the same danger.

C. Other Detention Information

Having held that the government properly withheld the names of the detainees pursuant to Exemption 7(A), we easily affirm the portion of the district court's ruling that allowed withholding, under Exemption 7(A), of the more comprehensive detention information sought by plaintiffs.

As outlined above, plaintiffs sought the dates and locations of arrest, detention, and release for each of the detainees. Even more than disclosure of the identities of detainees, the information requested here would provide a complete roadmap of the government's investigation. Knowing when and where each individual was arrested would provide a chronological and geographical picture of the government investigation. Terrorists could learn from this information not only where the government focused its investigation but how that investigation progressed step by step. Armed with that knowledge, they could then reach such conclusions as, for example, which cells had been compromised, and which individuals had been cooperative with the United States. They might well be able to derive conclusions as to how more adequately secure their clandestine operations in future terrorist undertakings. Similarly, knowing where each individual is presently held could facilitate communication between terrorist organizations and detainees and the attendant intimidation of witnesses and fabrication of evidence. As explained in detail above, these impediments to an ongoing law enforcement investigation are precisely what Exemption 7(A) was enacted to preclude. Accordingly, we affirm the district court and hold that the government properly withheld information about the dates and locations of arrest, detention, and release for each detainee.

III. Alternative Grounds

[The majority rejected plaintiff's alternative grounds for disclosure based on the First Amendment and a common law right of access to government information.]

IV. Conclusion

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For the reasons set forth above, we conclude that the government was entitled to withhold under FOIA Exemption 7(A) the names of INS detainees and those detained as material witnesses in the course of the post-September 11 terrorism investigation; the dates and locations of arrest, detention, and release of all detainees, including those charged with federal crimes; and the names of counsel for detainees. Finally, neither the First Amendment nor federal common law requires the government to disclose the information sought by plaintiffs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TATEL, CIRCUIT JUDGE, dissenting:

….

I.

I begin with some preliminary observations about the principles that govern this case. First, no one can doubt that uniquely compelling governmental interests are at stake: the government's need to respond to the September 11 attacks — unquestionably the worst ever acts of terrorism on American soil — and its ability to defend the nation against future acts of terrorism. But although this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation — by, as the plaintiffs allege, detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge, or preventing them from seeking or communicating with legal counsel. The government claims that the detainees have access to counsel and freedom to contact whomever they wish, but the public has a fundamental interest in being able to examine the veracity of such claims. Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.

Second, while the governmental interests in this case may be uniquely compelling, the legal principles that govern its resolution are not at all unique. The court's opinion emphasizes the national-security implications of the September 11 investigation, but as the government conceded at oral argument, this case is not just about September 11. The law that governs this case is the same law that applies whenever the government's need for confidentiality in a law enforcement investigation runs up against the public's right to know "what [its] government is up to." In all such situations, FOIA fully accommodates the government's concerns about the harms that might arise from the release of information pertaining to its investigations. To be sure, the statute strongly favors openness, since Congress recognized that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." But Congress also recognized that "legitimate governmental and private interests could be harmed by release of certain types of information." It therefore "provided … specific exemptions under which disclosure could be refused," including the four exemptions relevant to this case. … But " 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " Accordingly, courts must "narrowly construe" the exemptions, and "the burden is on the agency to sustain its action." The government may in some situations withhold entire categories of records from disclosure, as it seeks to do here by withholding names and other information pertaining to all terrorism-investigation detainees. In order to sustain its burden, however, the government must demonstrate that "the range of circumstances included in the category 'characteristically support[s] an inference' that the statutory requirements for exemption are satisfied."

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The third principle relates to the level of deference we owe the government. Invoking the "heightened deference to the judgments of the political branches with respect to matters of national security," the government refuses to identify the specific categories of information that would actually interfere with its investigation, but rather asks us simply to trust its judgment. This court obeys, declaring that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." But requiring agencies to make the detailed showing FOIA requires is not second guessing their judgment about matters within their expertise. And in any event, this court is also in an extremely poor position to second-guess the legislature's judgment that the judiciary must play a meaningful role in reviewing FOIA exemption requests. Neither FOIA itself nor this circuit's interpretation of the statute authorizes the court to invoke the phrase "national security" to relieve the government of its burden of justifying its refusal to release information under FOIA.

Notes & Questions

S5-8. Why should there be a national security exemption to FOIA? How would you draft the exemption, if you believe there should be one? What do you think of the interpretation of this exemption, as expressed by Executive Order 12,065?

S5-9. What is the purpose of exemption 7? When does that purpose cease to exist?

S5-10. How does the majority's interpretive approach to FOIA in *Milner* differ from that of Justice Breyer? Does the textualist approach taken here narrow the scope of the exemption 2? Were the old formulations of High 2 and Low 2 based on legislative history rather than statutory language? Is that why they no longer are controlling?

S5-11. What remains of Exemption 2 after this opinion? Based on the text of this exemption what three elements must be satisfied for that Exemption to apply? For a discussion of this case and the role that FOIA plays in national security cases generally, see Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know*," 72 MD L. REV. 1, 84 (2012) ("the promise of FOIA remains unfulfilled particularly when national security considerations can be interposed as plausible objections to disclosure, no matter how transient, ephemeral, or remote the danger to national security may be").

S5-12. What impact did 9/11 have on the court's reasoning in *Center for National Security Studies?*

S5-13. Is the majority's categorical all or nothing approach to Exemption 7(A) justified? Were there any parts of the plaintiff's request that could have been provided?

S5-14. How much deference does the majority give to executive determinations of national security? How much deference should it give? On what basis, does the dissent differ in its approach to these issues?

S5-15. In the aftermath of the September 11, 2001, attack on the World Trade Center, the federal government significantly restricted the information it makes available to the public — lest the government provide information that facilitates another terrorist attack. *See generally* Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration,* 46 ARIZ. L. REV. 815 (2004); Kristen E. Uhl, Note, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security,* 53 AM. U. L. REV. 261 (2003).

The Department of Justice then announced that it would defend in court an agency's decision to withhold information so long as the denial has a "sound legal basis or [release of the information] present

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[s] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies re: The Freedom of Information Act (Oct. 12, 2001), available at http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm. This represented a change from the policy under the Clinton administration, which had "adopted the policy that the Justice Department would only defend an assertion of a FOIA exemption by agencies 'in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.' " William A. Wilcox, Jr., *Access to Environmental Information in the United States and the United Kingdom,* 23 LOY. L.A. INT'L & COMP. L. REV. 121, 215 (2001).

S5-16. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, created a new FOIA exemption, the critical infrastructure information exemption, 6 U.S.C. § 133 (2005). It provides as follows:

§ 133. Protection of voluntarily shared critical infrastructure information

a) Protection

(1) In general. Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)

(A) shall be exempt from disclosure under section 552 of Title 5 (commonly referred to as the Freedom of Information Act) … .

(2) Express statement. For purposes of paragraph (1), the term "express statement", with respect to information or records, means—

(A) in the case of written information or records, a written marking on the information or records substantially similar to the following: "This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002."; or

(B) in the case of oral information, a similar written statement submitted within a reasonable period following the oral communication.…

*

Note that the exemption covers "information" rather than "records," and also note that the exemption does not apply to information that an entity is required to submit to the federal government, 6 C.F.R. § 29.3 (2005).

D. Reverse FOIA Suits

FOIA is replete with the word "shall," underscoring its heralded goal of *mandatory* information disclosure. But in regard to its exemptions (Section 552(b)), the Act is silent as to whether an agency "may" or "shall" refuse to

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disclose such exempt information.[161] A "reverse" FOIA action is one in which the submitter of information—usually a corporation or other business entity—seeks to enjoin an agency from releasing that information in response to a third-party FOIA request. In *Chrysler Corporation v. Brown*,[162] the U.S. Supreme Court held that those who submit information could bring suit to prevent its release.[163]

***

Given that citizens can seek to obtain information from the Government, can those who submitted that information prevent its disclosure? What are the rights of submitters of information under FOIA? Consider the following case.

Chrysler Corp. v. Brown

441 U.S. 281 (1979)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter FOIA) was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corp. (hereinafter Chrysler) seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905. …

In contending that the FOIA bars disclosure of the requested equal employment opportunity

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161 CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n. 1 (D.C.Cir.1987). *See also* Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C.Cir.1997); Cortez III Serv. Corp. v. NASA, 921 F.Supp. 8, 11 (D.D.C.1996) (holding that in reverse FOIA actions "courts have jurisdiction to hear complaints brought by parties claiming that an agency decision to release information adversely affects them").

162 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), *on remand*, 611 F.2d 439 (3d Cir.1979). For agency regulations dealing with this issue, *see* 28 C.F.R. § 16.7 (1980).

163 The Court noted:

> The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The [FOIA] was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence. . . .

441 U.S. at 285, 99 S. Ct. at 1709.

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information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> "(b) [FOIA] does not apply to matters that are—
>
> … (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. …"

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic, or history of the Act.

The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making. Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.[164]

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[164] It is informative in this regard to compare the FOIA with the Privacy Act of 1974, 5 U.S.C. § 552a. In the latter Act, Congress explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission. Even more telling is 49 U.S.C. § 1357, a section which authorizes the Administrator of the FAA to take anti-hijacking measures, including research and development of protection devices.

> "Notwithstanding [the FOIA], the Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information— . …
>
> "(B) would reveal trade secrets or privileged or confidential commercial or financial information obtained from any person. …" § 1357(d)(2)(B).

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III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

The origins of the Trade Secrets Act can be traced to Rev. Stat. § 3167, an Act which barred unauthorized disclosure of specified business information by Government revenue officers. There is very little legislative history concerning the original bill, which was passed in 1864. It was re-enacted numerous times, with some modification, and remained part of the revenue laws until 1948. Congressional statements made at the time of these reenactments indicate that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information.

In 1948, Rev. Stat. § 3167 was consolidated with two other statutes — involving the Tariff Commission and the Department of Commerce — to form the Trade Secrets Act. The statute governing the Tariff Commission was very similar to Rev. Stat. § 3167, and it explicitly bound members of the Commission as well as Commission employees. The Commerce Department statute embodied some differences in form. It was a mandate addressed to the Bureau of Foreign and Domestic Commerce and to

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its Director, but there was no reference to Bureau employees and it contained no criminal sanctions. Unlike the other statutes, it also had no exception for disclosures "authorized by law." In its effort to "consolidat[e]" the three statutes, Congress enacted § 1905 and essentially borrowed the form of Rev. Stat. § 3167 and the Tariff Commission statute. We find nothing in the legislative history of § 1905 and its predecessors which lends support to Chrysler's contention that Congress intended the phrase "authorized by law," as used in § 1905, to have a special, limited meaning.

Nor do we find anything in the legislative history to support the respondents' suggestion that § 1905 does not address formal agency action — *i.e*., that it is essentially an "antileak" statute that does not bind the heads of governmental departments or agencies. That would require an expansive and unprecedented holding that any agency action directed or approved by an agency head is "authorized by law," regardless of the statutory authority for that action. …

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other. A "substantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. But in *Morton v. Ruiz,* 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule — or a "legislative-type rule," as one "affecting individual rights and obligations." This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law."

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. As this Court noted in *Batterton v. Francis,* 432 U.S. 416, 425 n.9:

> "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and … implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. … Such rules have the force and effect of law."

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the respondents in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.…

We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant legislative authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here. … [The court went on to discuss certain procedural issues under the APA.]

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B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In *Cort v. Ash,* 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute, and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in *Cort* present here. As our review of the legislative history of § 1905 — or lack of same — might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA.

IV

While Chrysler may not avail itself of any violations of the provisions of § 1905 in a separate cause of action, any such violations may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA. Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … , is entitled to judicial review thereof." Two exceptions to this general rule of reviewability are set out in § 10. Review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1), (2). In *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971), the Court held that the latter exception applies "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " … Were we simply confronted with the authorization in 5 U.S.C. § 301 to prescribe regulations regarding "the custody, use, and preservation of [agency] records, papers, and property," it would be difficult to derive any standards limiting agency conduct which might constitute "law to apply." But our discussion in Part III demonstrates that § 1905 and any "authoriz[ation] by law" contemplated by that section place substantive limits on agency action. Therefore, we conclude that DLA's decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person "adversely affected or aggrieved" within the meaning of § 10(a).

Both Chrysler and the respondents agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be *de novo* review, while the respondents contend that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10(e) of the APA, 5 U.S.C. § 706, provide that a reviewing court shall

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
…

"(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court."

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). *De novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider

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whether the contemplated disclosures would violate the prohibition of § 1905.[165] Since the decision regarding this substantive issue — the scope of § 1905 — will necessarily have some effect on the proper form of judicial review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

[MR. JUSTICE MARSHALL, concurred and raised the issue of the validity of the executive orders involved in this case.]

Notes & Questions

S5-17. A decision by an agency to release information covered by one of the exemptions to FOIA is subject to judicial review. A court could find that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Did the Court resolve the relationship of Exemption 4 to the Trade Secrets Act in this case? The D.C. Circuit subsequently ruled that Exemption 4 and the Trade Secrets Act are coextensive, thereby making Exemption 4's bar against disclosure mandatory. *See CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1144 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

S5-18. Exemption 4 protects against the disclosure of "trade secrets and commercial or financial information." 5 U.S.C. § 552(b)(4). Courts have held that if a reverse-FOIA plaintiff has shown that competitive harm will result from the disclosure, the agency must provide more than an "unelaborated contrary conclusion" to survive a reverse-FOIA challenge. *See, United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010). Competitive harm does not include the disclosure of information that would harm the reputation of the plaintiff. However, it does include the traditional trade secrets protected by Exemption 4. What about the disclosure of quality control audit reports of companies fulfilling government contracts? In *United Technologies Corp*. the court held that the reports were protected to the extent that they "reveal[ed] details about … [the plaintiff's] proprietary manufacturing and quality control processes." *Id*. at 565. How does this affect the ability of interested parties to use FOIA to examine whether appropriate oversight of government contracts was being conducted?

[165] Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. § 552(b)(3). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "authorization by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

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§ 5.11 Administrative Adjudication and Jury Trials

Delete note 5-55 and insert the following materials

Adapted from
Alfred C. Aman, Jr., Landyn Wm. Rookard & William T. Mayton
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The Seventh Amendment, like Article III, provides a facially simple directive: "In Suits at common law, . . . the right of trial by jury shall be preserved . . . ."[166] Until very recently, it has played (at most) a peripheral role in constraining the authority of agency adjudicators. This is because, "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'"[167] In short, a finding that an agency adjudication does not violate Article III yields the same conclusion under the Seventh Amendment.[168] Because of this feature, cases addressing whether the Seventh Amendment applies to a particular statutory action brought in federal court address a separate question—whether an action and its remedy are analogous to those from legal actions at common law rather than equitable in nature.[169] This is a very important issue that requires, for example, a jury determination as to liability in actions in federal court seeking civil penalties under the Clean Water Act, but not as to the amount of the penalty.[170] It likewise requires a jury to decide claims in federal court seeking backpay for breach of the duty of fair representation under the National Labor Relations Act[171] and seeking damages under the Fair Housing Act.[172] But our focus in the remainder of the chapter is the "quite distinct inquiry" into when the Seventh Amendment jury requirement constrains Congress's authority to assign a matter to a federal agency.[173]

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[166] U.S. CONST. amend. VII.

[167] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989)); *see, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1564, 1570–71 (2020) (explaining that *Oil States* "flatly rejected the relevance of the Seventh Amendment such that "[t]he Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored").

[168] *Cf., e.g.*, *Granfinanciera*, 492 U.S. at 54 ("In addition to our Seventh Amendment precedents, we therefore rely on our decisions exploring the restrictions Article III places on Congress' choice of adjudicative bodies to resolve disputes over statutory rights to determine whether petitioners are entitled to a jury trial.").

[169] *See, e.g.*, Tull v. United States, 481 U.S. 412, 417 (1987) ("The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'"); Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under [42 U.S.C. § 3612] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."); Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855) ("[The Seventh Amendment], correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law.").

[170] *Tull*, 481 U.S. at 427 ("Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.").

[171] Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 571 (1990) (observing that the requested relief was not restitutionary and contrasting the statutory context for backpay under the NLRA with backpay under Title VII of the Civil Rights Act).

[172] Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach.").

[173] *Granfinanciera*, 492 U.S. at 42, n. 4.

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Seventh Amendment and Public Rights

Atlas Roofing Co. v. Occupational Safety & Health Review Commission,[174] a leading Supreme Court case on agency adjudications and the Seventh Amendment,[175] was decided after *Crowell* but before its subsequent treatment in cases like *Northern Pipeline* and *Schor*. Like *Crowell*, the Court framed the issue in familiar terms of public and private rights. The Court asked whether the Seventh Amendment permitted Congress, via the Occupational Safety and Health Act (OSH Act), to "create[] a new statutory duty to avoid maintaining unsafe or unhealthy working conditions" and a new, concomitant "cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial."[176] Under the OSH Act, enforcement actions began with a citation issued by inspectors from the Department of Labor., which If the inspectors discovered a violation, they issued a citation, directed the employer to correct the issue, and proposed a civil penalty of up to $10,000. Employers could challenge the citation and obtain an evidentiary hearing before an ALJ from the OSH Review Commission, with a further right to an administrative appeal before the full Commission. If still unsatisfied, an employer could seek review before a court of appeals, though the Commission's factual finding were subject only to review for substantial evidence.

The Court upheld this arrangement under the Seventh Amendment. The Court initially explained that the Seventh Amendment's jury requirement was, by its own terms, applicable only to "Suits at common law," a class of cases that (at the time the Amendment was adopted in 1791) were heard "in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not."[177] An enforcement action under the OSH Act was not, as the employers maintained, "classically a suit at common law," but instead was a suit by the Government "in its sovereign capacity to enforce public rights created by statutes . . . ."[178] The Court thus held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[179] But the Court spoke more generally of Congress's expansive power to assign adjudications to administrative agencies, adding a dose of pragmatism:

> Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.[180]

To the contrary, "the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases."[181] And it did not erect "an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statute."[182] With regard to the OSH Act, "Congress found the common-law and other existing remedies for work injuries resulting from unsafe working

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[174] 430 U.S. 442 (1977).
[175] *See, e.g.*, Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 361, 388 (2017) (describing *Atlas Roofing* as "the key precedent" regarding "broad transfers of adjudicatory authority from the judiciary to executive agencies and non-Article III courts" and critiquing the decision for "failing to distinguish administrative law's core [*i.e.*, "proceedings involving private citizens solely in their capacity as subjects of governmental action"] from its outlying areas"); *cf., e.g.*, Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 39 (2018) (describing *Atlas Roofing* as one of "the most striking expansions of the category of public rights").
[176] 430 U.S. at 444–45.
[177] *Id.* at 449.
[178] *Id.* at 449–50.
[179] *Id.* 455.
[180] *Id.*
[181] *Id.* at 460.
[182] *Id.*

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conditions to be inadequate . . . ."[183] Congress was entitled to craft a new action and remedy, "unknown to the common law," and "place[] [its] enforcement in a tribunal supplying speedy and expert resolutions of the issues involved."[184]

History supported the Court's holding that not all cases required a jury determination. At the time the Seventh Amendment was adopted, "[c]ritical factfinding was performed [in the United States and England] without juries in suits in equity, and there were no juries in admiralty; nor were there juries in the military justice system." The use of juries turned not on how important factfinding was to litigant — it was equally important in cases at equity as at law — it "turned on whether courts of law supplied a cause of action and an adequate remedy to the litigant." Because the Seventh Amendment only "preserved" the right to jury trial

In *Granfinanciera v. Nordberg*, a case finding a Seventh Amendment right to a jury trial in a fraudulent transfer action brought by a bankruptcy trustee, the Court echoed the "general teaching" of *Atlas Roofing*.[185] In particular, the Court emphasized that "Congress may devise novel causes of action involving public rights," even "causes of action that are closely *analogous* to common-law claims[,] and place them beyond the ambit of the Seventh Amendment by assigning their resolution" to an administrative agency."[186] But Congress could not simply "strip parties contesting matters of private right of their constitutional right to a trial by jury" "by assigning to administrative agencies . . . all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears."[187] The Court thus explained that, "whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal," effectively importing cases such as *Northern Pipeline* (and subsequent cases such as *Oil States*) to guide the public rights analysis. The Court concluded: "If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court."[188]

* * *

As the above discussion suggested, the ordinary Seventh Amendment analysis in the administrative law context has long required first conducting the Article III analysis "on its own. And then . . . if the non-Article III adjudication is permissible," the Seventh Amendment is not implicated.[189]

The following decision has transformed the public rights analysis and raised questions as to the constitutionality of large swaths of administrative adjudications.

Securities and Exchange Commission v. Jarkesy
603 U.S. 109 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-house before one of its administrative law judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment

[183] *Id.* at 461.
[184] *Id.*
[185] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989).
[186] *Id.* at 51–52.
[187] *Id.*
[188] *Id.* at 54–55.
[189] Baude, *supra* note 9, at 1571.

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permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. 15 U.S.C. §§ 77a *et seq*., 78a *et seq*., 80b–1 *et seq*. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Their protections are mutually reinforcing and often overlap. Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions"—target the same basic behavior: misrepresenting or concealing material facts.

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits regulated individuals from "obtain[ing] money or property by means of any untrue statement of a material fact," as well as causing certain omissions of material fact. As implemented by Rule 10b–5, Section 10(b) prohibits using "any device, scheme, or artifice to defraud," making "untrue statement[s] of ... material fact," causing certain material omissions, and "engag[ing] in any act ... which operates or would operate as a fraud." And finally, Section 206(b), as implemented by Rule 206(4)–8, prohibits investment advisers from making "any untrue statement of a material fact" or engaging in "fraudulent, deceptive, or manipulative" acts with respect to investors or prospective investors.

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. Alternatively, it can file a suit in federal court. The SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC.

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U. S. Const., Amdt. 7. In addition, a life-tenured, salary-protected Article III judge presides, see Art. III, § 1, and the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. See 15 U.S.C. § 78d–1. In these proceedings, the Commission or its delegee decides discovery disputes, and the SEC's Rules of Practice govern. The Commission or its delegee also determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court.

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. Judicial review is also available once the proceedings have concluded. But such review is deferential. By law, a reviewing court must treat the agency's factual findings

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as "conclusive" if sufficiently supported by the record, *e.g.*, § 78y(a)(4); see *Richardson v. Perales*, 402 U.S. 389, 401 (1971), even when they rest on evidence that could not have been admitted in federal court.

The remedy at issue in this case, civil penalties, also originally depended upon the forum chosen by the SEC. Except in cases against registered entities, the SEC could obtain civil penalties only in federal court. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. Rep. No. 111–687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings. See Dodd-Frank Act, § 929P(a).

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. And the SEC may levy these penalties even when no investor has actually suffered financial loss.

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. Between 2007 and 2010, Jarkesy launched two investment funds, raising about $24 million from 120 "accredited" investors . . . . Patriot28, which Jarkesy managed, served as the funds' investment adviser. According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. The SEC initiated an enforcement action . . . and sought civil penalties and other remedies.

Relying on the new authority conferred by the Dodd-Frank Act, the SEC opted to adjudicate the matter itself rather than in federal court. In 2014, the presiding ALJ issued an initial decision. The SEC reviewed the decision and then released its final order in 2020. The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.

Jarkesy and Patriot28 petitioned for judicial review. A divided panel of the Fifth Circuit granted their petition and vacated the final order. Applying a two-part test from *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the panel held that the agency's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. . . . Based on this Seventh Amendment violation, the panel vacated the final order.

It also identified two further constitutional problems. First, it determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers. Judge Davis dissented. The Fifth Circuit denied rehearing en banc, and we granted certiorari.

II

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This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in *Granfinanciera* and *Tull v. United States*, 481 U.S. 412 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778), and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for "subvert[ing] the rights and liberties of the colonists." Resolutions of the Stamp Act Congress, Art. VIII (Oct. 19, 1765). Representatives gathered at the First Continental Congress demanded that Parliament respect the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law." 1 Journals of the Continental Congress, 1774–1789, p. 69 (Oct. 14, 1774). And when the English continued to try Americans without juries, the Founders cited the practice as a justification for severing our ties to England. See Declaration of Independence ¶20.

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a . . . provision for the trial by jury in civil cases." The Federalist No. 83, p. 49 (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." . . .

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons*, 3 Pet. at 446. The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id*. at 447.

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The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*, 492 U.S. at 53. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. In that case, the Government sued a real estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*, 481 U.S. at 422. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." The same is true here.

To start, the Securities Exchange Act and the Investment Advisers Act condition the availability of civil penalties on six statutory factors . . . . Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable. The same is true of the criteria that determine the size of the available remedy, [which increases if the defendant acted with fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, and if those acts also resulted in substantial gains to the defendant or losses to another, or created a "significant risk" of the latter.]

Like the considerations that determine the availability of civil penalties in the first place, the criteria that divide these tiers are also legal in nature. Each tier conditions the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. . . . [T]hese factors show that these civil penalties are designed to be punitive.

The final proof that this remedy is punitive is that the SEC is not obligated to return any money to victims. Although the SEC can choose to compensate injured shareholders from the civil penalties it collects, it admits that it is not required to do so. . . .

In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. That is no

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accident. Congress deliberately used "fraud" and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. *E.g.*, 15 U.S.C. § 77q(a)(3) (prohibiting any practice "which operates . . . as a fraud"). In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed suit in rulemakings. Rule 10b–5, for example, prohibits "any device, scheme, or artifice to defraud," and "engag[ing] in any act . . . which operates or would operate as a fraud."

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." "[W]hen Congress transplants a common-law term, the old soil comes with it." Our precedents therefore often consider common law fraud principles when interpreting federal securities law.

That is not to say that federal securities fraud and common law fraud are identical. In some respects, federal securities fraud is narrower. For example, federal securities law does not "convert every common-law fraud that happens to involve securities into a violation." It only targets certain subject matter and certain disclosures. In other respects, federal securities fraud is broader. For example, federal securities fraud employs the burden of proof typical in civil cases, while its common law analogue traditionally used a more stringent standard. Courts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC. Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature." *Granfinanciera*, 492 U.S. at 53.

B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under 'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution, 'the judicial Power of the United States' " cannot be shared with the other branches. *Id.*, at 483. Or, as Alexander Hamilton wrote in The Federalist Papers, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*, 18 How. at 284; *Granfinanciera*, 492 U.S. at 51–52; *Stern*, 564 U.S. at 484. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. " *Id.*, at 484. If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory. *Stern*, 564 U.S. at 484.

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At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," *id.*, at 493, even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*, 18 How. at 284. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement..

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. The challenge to the sale thus lacked merit.

This principle extends beyond cases involving the collection of revenue. In *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. When a steamship company challenged the penalty under Article III, we upheld it. Congress's power over foreign commerce, we explained, was so total that no party had a " 'vested right' " to import anything into the country. By the same token, Congress could also prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury.

In *Ex parte Bakelite Corp*., we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." 279 U.S. 438, 446 (1929). The law permitted him to set whatever tariff was necessary, subject to a statutory cap, to produce fair competition. If the President was "satisfied the unfairness [was] extreme," the law even authorized him to "exclude[ ]" foreign goods entirely. Because the political branches had traditionally held exclusive power over this field and had exercised it, we explained that the assessment of tariffs did not implicate Article III.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011), the administration of public lands, *Crowell v. Benson*, 285 U.S. 22, 51 (1932), and the granting of public benefits such as payments to veterans, *id*., pensions, *id*., and patent rights, *United States v. Duell*, 172 U.S. 576, 582–583 (1899).

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985). The Court "has not 'definitively explained' the distinction between

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public and private rights," and we do not claim to do so today. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018).

Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles. *Murray's Lessee* itself, for example, took pains to justify the application of the exception in that particular instance by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign. Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.[190]

From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee*, 18 How. at 284. We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. *Stern*, 564 U.S. at 501 "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co.*, 458 U.S. at 69, n. 23 (plurality opinion). And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern*, 564 U.S. at 484.

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim permitted a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(2)(A) (1982 ed., Supp. V). Actions for fraudulent conveyance were well known at common law. Even when Congress added these claims to the Bankruptcy Code in 1978, it preserved parties' rights to a trial by jury. In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries.

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[190] The dissent would brush away these careful distinctions and unfurl a new rule: that whenever Congress passes a statute "entitl[ing] the Government to civil penalties," the defendant's right to a jury and a neutral Article III adjudicator disappears. It bases this rule not in the constitutional text (where it would find no foothold), nor in the ratification history (where again it would find no support), nor in a careful, category-by-category analysis of underlying legal principles of the sort performed by *Murray's Lessee* (which it does not attempt), nor even in a case-specific functional analysis (also not attempted). Instead, the dissent extrapolates from the outcomes in cases concerning unrelated applications of the public rights exception and from one opinion, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). The result is to blur the distinctions our cases have drawn in favor of the legally unsound principle that just because the Government may extract civil penalties in administrative tribunals in some contexts, it must always be able to do so in all contexts.

The dissent also appeals to practice, ignoring that the statute Jarkesy and Patriot28 have been prosecuted under is barely over a decade old. It is also unclear how practice could transmute a private right into a public one, or how the absence of legal challenges brought by one generation could waive the individual rights of the next. Practice may be probative when it reflects the settled institutional understandings of the branches. That case is far weaker when the rights of individuals are directly at stake.

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The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. We explained that it was not. Although Congress had assigned fraudulent conveyance claims to bankruptcy courts, that assignment was not dispositive. What mattered, we explained, was the substance of the suit. "[T]raditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull*. We examined whether the matter was "from [its] nature subject to 'a suit at common law.' " A survey of English cases showed that "actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England." The remedy the trustee sought was also one "traditionally provided by law courts." Fraudulent conveyance actions were thus "quintessentially suits at common law."

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," are highly interdependent and require coordination. Resolving such claims fairly is only possible if they are all submitted at once to a single adjudicator. Otherwise, parties with lower priority claims can rush to the courthouse to seek payment before higher priority claims exhaust the estate, and an orderly disposition of a bankruptcy is impossible. Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime.

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory scheme," what matters is the substance of the action, not where Congress has assigned it. And in this case, the substance points in only one direction.

According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." *Tull*, 481 U.S. at 422. And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[ ] of private rather than public right." *Granfinanciera*, 492 U.S. at 56. Therefore, "Congress may not 'withdraw' " it " 'from judicial cognizance.' " *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 18 How. at 284).

4

Notwithstanding *Granfinanciera*, the SEC contends the public rights exception still applies in this case because Congress created "new statutory obligations, impose[d] civil penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred."

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The foregoing from *Granfinanciera* already does away with much of the SEC's argument. Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." Nor does the fact that the SEC action "originate[d] in a newly fashioned regulatory scheme" permit Congress to siphon this action away from an Article III court. The constructive fraud claim in *Granfinanciera* was also statutory, but we nevertheless explained that the public rights exception did not apply. Again, if the action resembles a traditional legal claim, its statutory origins are not dispositive.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. But we have never held that "the presence of the United States as a proper party to the proceeding is . . . sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co.*, 458 U.S. at 69, n. 23 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market. To do so, the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Because the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control. And for that same reason, we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals.[191]

The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. If a party violated the regulations, the agency could impose civil penalties.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. § 654(a)(2) (1976 ed.). These standards bring no common law soil with them. Rather than reiterate common law terms of art, they instead resembled a detailed building code. For example, the OSH Act regulations directed that a ground trench wall of "Solid Rock, Shale, or Cemented Sand and Gravels" could be constructed at a 90 degree angle to the ground. But a wall of "Compacted Angular Gravels" needed to be sloped at 63 degrees, and a wall of "Well Rounded Loose Sand" at 26 degrees. The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. § 651(b)(5) (1976 ed.). In both concept and execution, the Act was self-consciously novel.

[191] The dissent chides us for "leav[ing] open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*." But the author of *Atlas Roofing* certainly thought that *Granfinanciera* may have done so. See *Granfinanciera*, 492 U.S. at 79 (White, J., dissenting) ("Perhaps . . . *Atlas Roofing* is no longer good law after today's decision.").

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Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. The Court rejected the challenge, concluding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[ ]." As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." The Seventh Amendment, the Court concluded, was accordingly "no bar to . . . enforcement outside the regular courts of law."

The cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims." Instead, they applied the exception to actions that were " 'not . . . suit[s] at common law or in the nature of such ... suit[s].' " Indeed, the Court recognized that if a case did involve a common law action or its equivalent, a jury was required. See 430 U.S. at 455, 97 S.Ct. 1261 (" '[W]here the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial.' "); *Atlas Roofing*, 430 U.S. at 458–59 (jury required when "courts of law supplied a cause of action and an adequate remedy to the litigant").

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." The case therefore does not control here, where the statutory claim is " 'in the nature of ' " a common law suit. As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts.

The reasoning of *Atlas Roofing* cannot support any broader rule. The dissent chants "*Atlas Roofing*" like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing* substance that it lacks.[192] Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which 'public rights' are being litigated—*e. g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes."

After *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera*, 492 U.S. at 52.

For its part, the dissent also seems to suggest that *Atlas Roofing* establishes that the public rights exception applies whenever a statute increases governmental efficiency. Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception. Otherwise, evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment.

[192] Reading the dissent, one might also think that *Atlas Roofing* is among this Court's most celebrated cases. As the concurrence shows, *Atlas Roofing* represents a departure from our legal traditions. This view is also reflected in the scholarship. Commentators writing comprehensively on Article III and agency adjudication have often simply ignored the case. Others who have considered it have offered nothing but a variety of criticisms. We express no opinion on these various criticisms.

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The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today. Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

In short, *Atlas Roofing* does not conflict with our conclusion. When a matter "from its nature, is the subject of a suit at the common law," Congress may not "withdraw [it] from judicial cognizance." *Murray's Lessee*, 18 How. at 284.

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot28 are entitled to a jury trial in an Article III court. We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone. . . .

Justice GORSUCH, with whom Justice THOMAS joins, concurring.
. . . As the Court details, the government has historically litigated suits of this sort before juries, and the Seventh Amendment requires no less.

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal."

I

In March 2013, the SEC's Commissioners approved charges against Mr. Jarkesy. The charges were serious; the agency accused him of defrauding investors. The relief the agency sought was serious, too: millions of dollars in civil penalties. For most of the SEC's 90-year existence, the Commission had to go to federal court to secure that kind of relief against someone like Mr. Jarkesy. Proceeding that way in this case hardly would have promised him an easy ride. But it would have at least guaranteed Mr. Jarkesy a jury, an independent judge, and traditional procedures designed to ensure that anyone caught up in our judicial system receives due process.

In 2010, however, all that changed. With the passage of the Dodd Frank Act, Congress gave the SEC an alternative to court proceedings. Now, the agency could funnel cases like Mr. Jarkesy's through its own "adjudicatory" system. That is the route the SEC chose when it filed charges against Mr. Jarkesy.

There is little mystery why. The new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves and issue judgment. To be sure, the Commissioners opted, as they often do, to send Mr. Jarkesy's case in the first instance to an "administrative law judge" (ALJ). But the title "judge" in this context is not quite what it might seem. Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who

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pursue charges on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarkesy. This close relationship, as others have long recognized, can make it "extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder." And with a jury out of the picture, the ALJ decides not just the law but the facts as well.[193]

Going in, then, the odds were stacked against Mr. Jarkesy. The numbers confirm as much: According to one report, during the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court. Reportedly, too, one of the SEC's handful of ALJs even warned individuals during settlement discussions that he had found defendants liable in every contested case and never once " 'ruled against the agency's enforcement division.' "

The shift from a court to an ALJ didn't just deprive Mr. Jarkesy of the right to an independent judge and a jury. He also lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake. After an agency files a civil complaint in court, a defendant may obtain from the SEC a large swathe of documents relevant to the lawsuit. See Fed. Rule Civ. Proc. 26(b)(1). He may subpoena third parties for testimony and documents and take 10 oral depositions—more with the court's permission. Rule 45; Rule 30(a)(2)(A)(i). A court has flexibility, as well, to set deadlines for discovery and other matters to meet the needs of the case. See Rule 16. And come trial, the Federal Rules of Evidence apply, meaning that hearsay is generally inadmissible and witnesses must usually testify in person, subject to cross-examination. See Fed. Rule Evid. 802.

Things look very different in agency proceedings. The SEC has a responsibility to provide "documents that contain material exculpatory evidence." 17 C.F.R. § 201.230(b)(3). But the defendant enjoys no general right to discovery. Though ALJs enjoy the power to issue subpoenas on the request of litigants like Mr. Jarkesy, § 201.232(a), they "often decline to issue [them] or choose to significantly narrow their scope." Oral depositions are capped at five, with another two if the ALJ grants permission. § 201.233(a). In some cases, an administrative trial must take place as soon as 1 month after service of the charges, and that hearing must follow within 10 months in even the most complex matters. § 201.360(a)(2)(ii). The rules of evidence, including their prohibition against hearsay, do not apply with the same rigor they do in court. § 201.235(a)(5). For that reason, live testimony often gives way to "investigative testimony"—that is, a "sworn statement" taken outside the presence of the defendant or his counsel. § 201.235(b).

How did all this play out in Mr. Jarkesy's case? Accompanying its charges, the SEC disclosed 700 gigabytes of data—equivalent to between 15 and 25 million pages of information—it had collected during its investigation. Over Mr. Jarkesy's protest that it would take "two lawyers or paralegals working twelve-hour days over four decades to review," the ALJ gave Mr. Jarkesy 10 months to prepare for his hearing. Then, after conducting that hearing, the ALJ turned around and obtained from the Commission "an extension of six months to file [her] initial decision." The reason? The " 'size and complexity of the proceeding.' "When that decision eventually arrived seven months after the hearing, the ALJ agreed with the SEC on every charge.

[193] In many agencies, litigants are not even entitled to have ALJs, with their modicum of protections, decide their cases. These agencies use "administrative judges." Some agencies can replace these administrative judges if they don't like their decisions. And some of these judges may move in and out of prosecutorial and adjudicatory roles, or move in and out of the very industries their agencies regulate.

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Mr. Jarkesy had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect. The Commission may decline to review the ALJ's decision. § 201.411(b)(2). If it chooses to hear the case, it may *increase* the penalty imposed on the defendant. A defendant unhappy with the result can seek further review in court, though that process will take more time and money, too. Nor will he find a jury there, only a judge who must follow the agency's findings if they are supported by " 'more than a mere scintilla' " of evidence.

Mr. Jarkesy filed an appeal anyway. The Commission agreed to review the ALJ's decision. It then afforded itself the better part of six years to issue an opinion. And, after all that, it largely agreed with the ALJ. one of this likely came as a surprise to the SEC employees in the Division of Enforcement responsible for pressing the action against Mr. Jarkesy. While his appeal was pending, employees in that division—including an " 'Enforcement Supervisor'" in the regional office prosecuting Mr. Jarkesy—accessed confidential memos by the Commissioners' advisors about his appeal.

II

A

If administrative proceedings like Mr. Jarkesy's seem a thoroughly modern development, the British government and its agents engaged in a strikingly similar strategy in colonial America. Colonial administrators routinely steered enforcement actions out of local courts and into vice-admiralty tribunals where they thought they would win more often. These tribunals lacked juries. They lacked truly independent judges. And the procedures materially differed from those available in everyday common-law courts. . . .

B

The abuses of these courts featured prominently in the calls for revolution. . . . The answer to these concerns was the Bill of Rights.

C

[Article III, the Seventh Amendment, and the Due Process Clause] were meant to work together, and together they make quick work of this case. In fact, each provision requires the result the Court reaches today.

First, because the " 'matter' " before us is one "which, from its nature, is the subject of a suit at the common law," *id.*, at 284, "the responsibility for deciding [it] rests with Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). Nor does it make a difference whether we think of the SEC's action here as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts. See also, *e.g.*, *Pasley* v. *Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (K. B. 1789) (action for fraud). And that tells us all we need to know that the SEC's in-house civil-penalty scheme violates Article III by "withdraw[ing]" the matter "from judicial cognizance" and handing it over to the Executive Branch for an in-house trial. *Murray's Lessee*, 18 How. at 284.

Second, because the action the SEC seeks to pursue is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts, the Seventh Amendment guarantees Mr. Jarkesy the right to have his case decided by a jury of his peers. In this regard, it is irrelevant that the SEC derived its power to sue under a "new statut[e]" or that the agency proceeded under "a new cause of action." . . .

Third, were there any doubt, the Due Process Clause confirms these conclusions. Because the penalty the SEC seeks would "depriv[e]" Mr. Jarkesy of "property," Amdt. 5, due process demands nothing less than "the process and proceedings of the common law." That means the regular course of trial proceedings with their usual protections, not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review. . . .

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People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built "high walls and clear distinctions" to safeguard individual liberty. Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample powers and recourse. The agency is free to pursue all of its charges against Mr. Jarkesy. And it is free to pursue them exactly as it had always done until 2010: In a court, before a judge, and with a jury. . . .

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction' " all along; indeed, " 'from the beginning.' " *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 460 (1977). Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary. . . .

I

The story of this case is straightforward. The Securities and Exchange Commission (investigated respondents George Jarkesy and his advisory firm Patriot28, LLC, for alleged violations of federal-securities laws in connection with the launch of two hedge funds.

In deciding how and where to enforce these laws, the SEC could have filed suit in federal court or adjudicated the matter in an administrative enforcement action subject to judicial review. The SEC opted for the latter. In 2013, the SEC initiated an administrative enforcement action against respondents . . . . Specifically, the SEC alleged that respondents falsely told brokers and investors that: (1) a prominent

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accounting firm would audit the hedge funds; (2) a prominent investment bank would serve as the funds' prime broker; and (3) one of the funds would invest 50% of its capital in certain life-insurance policies. In reality, the audit never took place, the bank never opened a prime brokerage account, and the hedge fund invested less than 20% of its capital in the life-insurance policies. In addition to misrepresenting the funds' investment strategies, respondents allegedly overvalued the funds' holdings to charge higher management fees.

The SEC assigned the action to one of its administrative law judges, who held an evidentiary hearing and issued a lengthy initial decision, concluding that respondents in fact had violated the three securities laws. The full Commission reviewed the initial decision and reached the same determination. The Commission also denied respondents' constitutional challenges to the order, including that the agency's in-house adjudication violated respondents' Seventh Amendment right to a jury trial in federal court. Ultimately, the SEC ordered respondents to pay a civil penalty of $300,000 and to cease and desist from violating the federal-securities laws. It also barred Jarkesy from doing certain things in the securities industry and ordered Patriot28 to disgorge $685,000 in illicit profits. . . .

II

The majority did not need to break any new ground to resolve respondents' Seventh Amendment challenge. This Court's longstanding precedent and established government practice uniformly support the constitutionality of administrative schemes like the SEC's: agency adjudications of statutory claims for civil penalties brought by the Government in its sovereign capacity. . . .

A

There are two key constitutional provisions at issue here. One is the Seventh Amendment, which "preserve[s]" the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The other is Article III's Vesting Clause, which provides that the "judicial Power of the United States . . . shall be vested" in federal Article III courts. This case presents the familiar interplay between these two provisions.

Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers. That is because, as the majority rightly acknowledges, the Seventh Amendment's jury-trial right "applies" only in "an Article III court." That conclusion follows from both the text of the Constitution and this Court's precedents.

As to the text, the Amendment is limited to "Suits at common law." That means two things. First, that the right applies only in judicial proceedings. . . . [T]his Court has held repeatedly that "the Seventh Amendment is not applicable to administrative proceedings." *Tull v. United States*, 481 U.S. 412, 418, n. 4 (1987); accord, *Atlas Roofing*, 430 U.S. at 454–455. Factfinding by a jury is "incompatible with the whole concept of administrative adjudication," which empowers executive officials to find the relevant facts and apply the law to those facts like juries do in a courtroom.

Second, the requirement that the " '[s]uit' " must be one " 'at common law' " means that the claim at issue must be " 'legal in nature.' " So, whether a defendant is entitled to a jury under the Seventh Amendment depends on both the forum and the cause of action. If the claim is in an Article III proceeding, then the right to a jury attaches if the claim is "legal in nature" and the amount in controversy exceeds $20. Yet when, as here, the claim proceeds in a non-Article III forum, the relevant question becomes whether "Congress properly assign[ed the] matter" for decision to that forum consistent with Article III and the separation of

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powers. In other words, the question is whether Congress improperly bestowed federal judicial power on a non-Article III forum.[194]

The conclusion that Congress properly assigned a matter to an agency for adjudication therefore necessarily "resolves [any] Seventh Amendment challenge." *Oil States*, 584 U.S. at 345 (explaining that if non-Article III adjudication is permissible, then " 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder' "). When executive power is at stake, Congress does not violate Article III or the Seventh Amendment by authorizing a nonjury factfinder to adjudicate the dispute.

So, the critical issue in this type of case is whether Congress can assign a particular matter to a non-Article III factfinder.

B

For more than a century and a half, this Court has answered that Article III question by pointing to the distinction between "private rights" and "public rights." See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). The distinction is helpful because public rights always can be assigned outside of Article III. . . .

The majority says that aspects of the public-rights doctrine have been confusing. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party.[195] It has long been settled and undisputed that, at a minimum, a matter of public rights arises "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U.S. at 50; *Oil States*, 584 U.S. at 335. Indeed, "from the time the doctrine of public rights was born, in 1856," everyone understood that public rights " 'arise "between the government and others," ' " and refer to "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U.S. at 68–69 (Scalia, J., concurring in part and concurring in judgment). So, while this Court has recognized public rights in certain disputes between private parties, the doctrine's heartland consists of claims belonging to the Government.

When a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty.[196] This Court has repeatedly emphasized these unifying principles through an unbroken series of cases over almost 200 years.

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[194] Since the founding, Executive Branch officials have adjudicated certain matters, while others have required resolution in an Article III court. An executive official properly vested with the authority to find facts, apply the law to those facts, and impose the consequences prescribed by law exercises executive power under Article II, not judicial power under Article III.

[195] Every case that has expressed consternation about the precise contours of the public-rights doctrine, including those cited by the majority, involve only private disputes—or, more precisely, "disputes to which the Federal Government is not a party in its sovereign capacity." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 55, n. 10 (1989) (involving dispute between private parties in bankruptcy court); see *ante Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 332–334 (2018) (involving patent dispute between private parties before the U. S. Patent and Trademark Office); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 575 (1985) (involving challenge to arbitration procedure for private parties disputing data compensation under federal pesticide registration program)); see also *Stern v. Marshall*, 564 U.S. 462, 469–470 (2011) (involving dispute between private parties in bankruptcy court); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56–57 (1982) (plurality opinion) (same).

[196] Judicial review of these agency decisions allows Congress to avoid any due process concerns that might arise from having executive officials deprive someone of their property without review in an Article III court. The concurrence reproaches this dissent for declining to address any potential deficiencies in this administrative scheme, as well as

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1

[Justice Sotomayor canvassed various cases applying the public rights doctrine to uphold an agency's authority to adjudicate.]

. . . This Court has repeatedly approved Congress's assignment of public rights to agencies in diverse areas of the law, reflecting Congress's varied constitutional powers. A nonexhaustive list includes "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans."

The list could go on and on. That is because, in every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

2

A unanimous Court made this exact point nearly half a century ago in *Atlas Roofing*. That was the last time this Court considered a public-rights case where the constitutionality of an in-house adjudication of statutory claims brought by the Government was at issue. That case presented the same question as this one: Whether the Seventh Amendment permits Congress to commit the adjudication of a new cause of action for civil penalties to an administrative agency. The Court said it did.

In *Atlas Roofing*, the Court explained how Congress identified a national problem, concluded that existing legal remedies were inadequate to address it, and then created a new statutory scheme that endorsed Executive in-house enforcement as a solution. Specifically, Congress found "that work-related deaths and injuries had become a 'drastic' national problem," and that existing causes of action, including tort actions for negligence and wrongful death, did not adequately "protect the employee population from death and injury due to unsafe working conditions." In response, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA) to require employers "to avoid maintaining unsafe or unhealthy working conditions." OSHA in turn "empower[ed] the Secretary of Labor to promulgate health and safety standards," and the Occupational Safety and Health Review Commission to impose civil penalties on employers maintaining unsafe working conditions, regardless of whether any worker was in fact injured or killed.

Two employers that had been assessed civil penalties for OSHA violations resulting in the death of employees challenged the constitutionality of the statute's enforcement procedures. They observed that "a suit in a federal court by the Government for civil penalties for violation of a statute is a suit for a money judgment[,] which is classically a suit at common law." Therefore, the employers claimed, the Seventh Amendment right to a jury attached and Congress could not assign the matter to an agency for resolution.

This Court upheld OSHA's statutory scheme. It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. In light of this "history and our cases," the Court concluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown

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failing to specify which forms of judicial review may be constitutionally required, even though respondents did not raise any due process challenge in this case. Deciding whether this statutory scheme is procedurally deficient and so circumscribes judicial review that it violates due process would be inconsistent with the "settled principles of party presentation and adversarial testing."

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to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law."

. . . "[T]he Government could commit the enforcement of statutes and the imposition and collection of fines ... for administrative enforcement, without judicial trials," even if the same action would have required a jury trial if committed to an Article III court. *Atlas Roofing*, 430 U.S. at 460 (collecting cases).

C

It should be obvious by now how this case should have been resolved under a faithful and straightforward application of *Atlas Roofing* and a long line of this Court's precedents. The constitutional question is indistinguishable. The majority instead wishes away *Atlas Roofing* by burying it at the end of its opinion and minimizing the unbroken line of cases on which *Atlas Roofing* relied. That approach to precedent significantly undermines this Court's commitment to *stare decisis* and the rule of law.

This case may involve a different statute from *Atlas Roofing*, but the schemes are remarkably similar. Here, just as in *Atlas Roofing*, Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action. The solution was a comprehensive federal scheme of securities regulation consisting of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. In particular, Congress enacted these securities laws to ensure "full disclosure" and promote ethical business practices "in the securities industry," as well as to "protect investors against manipulation of stock prices."

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing*. Among other things, these securities laws prohibit the misrepresentation or concealment of various material facts through the imposition of federal registration and disclosure requirements. Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." OSHA too prohibits conduct that could, but does not necessarily, injure a private person. The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing*, Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. In bringing a securities claim, the SEC seeks redress for a "violation" that "is committed against the United States rather than an aggrieved individual," which "is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." Put differently, the SEC seeks to " 'remedy harm to the public at large' " for violation of the Government's rights. The Government likewise seeks to remedy a public harm when it enforces OSHA's prohibition of unsafe working conditions.

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States in order to vindicate the public interest. They both involve, as *Atlas Roofing* put it, "new cause[s] of action, and remedies therefor, unknown to the common law."

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Neither Article III nor the Seventh Amendment prohibits Congress from assigning the enforcement of these new "Governmen[t] rights to civil penalties" to non-Article III adjudicators, and thus "supplying speedy and expert resolutions of the issues involved." In a world where precedent means something, this should end the case. Yet here it does not.

III

A

To start, it is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law, and that *Atlas Roofing* involved OSHA and not "civil penalty suits for fraud." Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee* of executive officials issuing warrants of distress to collect revenue. Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further? This Court has rejected that kind of arbitrary line-drawing in cases like *Stranahan* and *Atlas Roofing*. How does the requirement of a historical practice dating back to the founding, or "flow[ing] from centuries-old rules" account for the broad universe of public-rights cases in the United States Reporter? The majority does not say. . . .

It is not clear what else, if anything, might qualify as a public right, or what is even left of the doctrine after today's opinion. Rather than recognize the long-settled principle that a statutory right belonging to the Government in its sovereign capacity falls within the public-rights exception to Article III, the majority opts for a "we know it when we see it" formulation. This Court's precedents and our coequal branches of Government deserve better.

B

1

The majority bafflingly proclaims that "the remedy is all but dispositive" in this case, ignoring that *Atlas Roofing* and countless precedents before it rejected that proposition. . . . *Atlas Roofing* and its predecessors could not have been clearer on this point: Congress can assign the enforcement of a statutory obligation for in-house adjudication to executive officials, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." Although "the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," the Government "could also validly opt for administrative enforcement, without judicial trials." . . .

C

. . . In sum, all avenues by which the majority attempts to distinguish *Atlas Roofing* fail. . . . In both statutory schemes, regardless of any perceived resemblance to the common law, Congress enacted a new cause of action that created a statutory right belonging to the United States for the Government to enforce pursuant to its sovereign powers.

IV

A faithful and straightforward application of this Court's longstanding precedent should have resolved this case. . . . "[E]ven in constitutional cases, a departure from precedent 'demands special justification.' "

Today's decision disregards these foundational principles. Time will tell what is left of the public-rights doctrine. Less uncertain, however, are the momentous consequences that flow from the majority's insistence that the Government's rights to civil penalties must now be tried before a jury in federal court. . . .

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Following this Court's precedents . . . , Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. These statutes are sometimes enacted in addition to, but often instead of, "the traditional civil enforcement statutes that permitted agencies to collect civil penalties only after federal district court trials." "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. See also, *e.g.*, 5 U.S.C. § 1215(a)(3)(A)(ii) (Merit Systems Protection Board); 7 U.S.C. §§ 9(10)(C), 13a (Commodity Futures Trading Commission); §§ 499c(a), 586, 2279e(a) (Department of Agriculture); 8 U.S.C. §§ 1324c, 1324d (Department of Justice); 12 U.S.C. §§ 5563(a)(2), (c), (Consumer Financial Protection Bureau); 16 U.S.C. § 823b(c) (Federal Energy Regulatory Commission); 20 U.S.C. § 1082(g) (Department of Education); 21 U.S.C. § 335b (Department of Health and Human Services/Food and Drug Administration); 29 U.S.C. § 666(j) (Occupational Safety and Health Review Commission); 30 U.S.C. §§ 820(a) and (b) (Federal Mine Safety and Health Review Commission); 31 U.S.C. § 5321(a)(2) (Department of the Treasury); 33 U.S.C. §§ 1319(d) and (g) (Environmental Protection Agency); 39 U.S.C. § 3018(c) (Postal Service); 42 U.S.C. § 3545(f) (Department of Housing and Urban Development); 46 U.S.C. § 41107(a) (Federal Maritime Commission); 47 U.S.C. § 503(b)(3) (Federal Communications Commission); 49 U.S.C. § 521 (Federal Railroad Administration); § 46301 (Department of Transportation).

Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. Others do not have that choice. As the above-cited statutes confirm, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others, can pursue civil penalties only in agency enforcement proceedings. For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.

Against this backdrop, our coequal branches will be surprised to learn that the rule they thought long settled, and which remained unchallenged for half a century, is one that, according to the majority and the concurrence, my dissent just announced today. Unfortunately, that mistaken view means that the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress. Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to "civil penalty suits for fraud" pursuant to a statute that is "barely over a decade old," an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. . . . Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate.

* * *

Today's ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best. See, *e.g.*, *Collins* v. *Yellen*, 594 U. S. 220, 227 (2021) (concluding that the Federal Housing Finance Agency's "structure violates the separation of powers" because the Agency was led by a single Director removable by the President only " 'for cause' "); *United States v. Arthrex, Inc.*, 594 U.S. 1, 6, 23 (2021) (holding that "authority wielded by

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[Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office"); *Seila Law*, 591 U.S. at 202–205 (holding that "the structure of the [Consumer Financial Protection Bureau] violates the separation of powers" because it was led by a single Director removable by the President only "for cause"); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 483–484, 492 (2010) (holding "that the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers"). The Court tells Congress how best to structure agencies, vindicate harms to the public at large, and even provide for the enforcement of rights created for the Government. . . .

There are good reasons for Congress to set up a scheme like the SEC's. It may yield important benefits over jury trials in federal court, such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as uniformity, predictability, and greater political accountability. Others may believe those benefits are overstated, and that a federal jury is a better check on government overreach. Those arguments take place against the backdrop of a philosophical (and perhaps ideological) debate on whether the number of agencies and authorities properly corresponds to the ever-increasing and evolving problems faced by our society.

This Court's job is not to decide who wins this debate. These are policy considerations for Congress in exercising its legislative judgment and constitutional authority to decide how to tackle today's problems. It is the electorate, and the Executive to some degree, not this Court, that can and should provide a check on the wisdom of those judgments.

Make no mistake: Today's decision is a power grab. Once again, "the majority arrogates Congress's policymaking role to itself." *Garland* v. *Cargill*, 602 U.S. 406, 442 (2024) (SOTOMAYOR, J., dissenting). It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. Its decision offends the Framers' constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. The Federalist No. 51, p. 349 (J. Madison). Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches. . . .

Notes & Questions

S5-19. What is the public rights doctrine after *Jarkesy*? When does it apply? Why?

S5-20. Can you explain how the public rights test differs from the threshold question of whether the Seventh Amendment applies at all?

S5-21. Why didn't the public rights doctrine apply to the SEC's securities fraud complaint against Jarkesy?

S5-22. How does the dissent respond to the majority's articulation of the public rights doctrine? How does the dissent respond to the majority's application of the public rights doctrine? Are you persuaded by the way that the majority distinguishes *Atlas Roofing*?

§ 5.12 [Deleted]

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Chapter 6. Executive Control of Agency Discretion

§ 6.03 The Power to Appoint

A. Appointments Clause

Insert the following principal case after note 6-8 on page 535.

Consider the following case. What factors does the Court consider to evaluate whether the Preventive Services Task Force members are principal or inferior officers? In the short excerpt from the dissent, can you discern the dissent's primary disagreement with the majority's analysis?

Kennedy v. Braidwood Management, Inc.

606 U.S. ____ (2025)

Justice KAVANAUGH delivered the opinion of the Court.

This case concerns the Appointments Clause in Article II of the Constitution. The U. S. Preventive Services Task Force, an entity within the Department of Health and Human Services, issues public recommendations about preventive healthcare services—for example, cancer and diabetes screenings. Before 2010, the Task Force's recommendations were purely advisory. But the Affordable Care Act of 2010 now mandates that health insurers cover some of the recommended services at no cost to the insured.

The Secretary of Health and Human Services appointed the 16 current members of the Task Force. The question in this case is whether appointment of Task Force members by the Secretary is consistent with the Appointments Clause in Article II. That question turns on whether the Task Force members are principal officers or inferior officers. Principal officers must be nominated by the President and confirmed by the Senate. That process can be lengthy and therefore can hinder the Executive Branch's ability to promptly fill offices—and thus also impede the President's ability to execute the laws through his subordinate executive officers. By contrast, inferior executive officers may be directly appointed by the President or by the head of a department, such as by the Secretary of HHS—a more efficient and expeditious process.

The Executive Branch under both President Trump and President Biden has argued that the Preventive Services Task Force members are inferior officers and therefore may be appointed by the Secretary of HHS. We agree. The Task Force members are removable at will by the Secretary of HHS, and their recommendations are reviewable by the Secretary before they take effect. So Task Force members are supervised and directed by the Secretary, who in turn answers to the President, preserving the chain of command in Article II. . . .

I

A

In 1984, the Department of Health and Human Services created . . . the U. S. Preventive Services Task Force. . . . In 1999, Congress enacted legislation codifying the role of the Task Force. That legislation established the Task Force as an entity within the Agency for Healthcare Research and Quality (AHRQ),

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which in turn is an agency in the Public Health Service within HHS. Under that 1999 statute, the Director of AHRQ "convene[s]" the Task Force . . . .

As presently constituted, the Task Force consists of 16 members who are now appointed by the Secretary of HHS to staggered 4-year terms. Those members are "nationally recognized experts in prevention, evidence-based medicine, and primary care." . . . They serve on a volunteer basis, so they are not paid by the Federal Government for their service on the Task Force. . . .

The Task Force develops recommendations through a standardized process. It selects a topic to study, reviews the relevant scientific evidence, formulates a draft recommendation statement, takes public comments, and then votes on the final recommendation.

The Task Force uses a letter grading system for its recommendations. It assigns an "A" grade to services with a high certainty of substantial net benefit and a "B" grade to services with at least a moderate certainty of a moderate net benefit. It also issues "C" and "D" grades to services with little to no net benefit, and an "I" grade to services for which the current evidence is "insufficient" to assess the balance of benefits and harms. . . .

The Task Force has given an "A" or "B" rating to more than 40 preventive services. Those services include screenings to detect lung, breast, cervical, and colorectal cancer; risk-reducing medications for women at high risk of breast cancer; nicotine patches for adults trying to quit smoking; statin medications to reduce the risk of heart disease and stroke; physical therapy to help the elderly avoid falls; and diabetes screenings.

[The advisory character of the Task Force's recommendations] changed in 2010 when Congress passed and President Obama signed the Affordable Care Act. That Act requires most health insurers and group health plans to cover certain preventive services without cost sharing—that is, without imposing copayments, deductibles, or other charges on patients.

Rather than set forth a fixed list, the Act tied coverage for preventive services to the recommendations of several entities within the Federal Government, including the Preventive Services Task Force. Specifically, the Act mandates no-cost coverage of "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations" of the Task Force. 42 U.S.C. § 300gg–13(a)(1).

After the Task Force makes an "A" or "B" recommendation, the insurance coverage requirements for that preventive service do not take effect immediately. Rather, the law directs the Secretary of HHS to "establish a minimum interval," not less than one year, between when an "A" or "B" recommendation is issued by the Task Force and when insurers must cover the recommended service without cost sharing. During that interval, the Secretary can review the Task Force's recommendation and block it from going into effect.

The Affordable Care Act also amended the statute governing the Task Force to describe the Task Force as "independent" and to provide that the members of the Task Force and their recommendations "shall be independent and, to the extent practicable, not subject to political pressure." §§ 299b–4(a)(1), (6).

B

The question in this case is whether the Task Force members were appointed in a manner consistent with the Appointments Clause in Article II of the Constitution. § 2, cl. 2. [The Fifth Circuit had held that "the

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Task Force cannot be 'independent' and free from 'political pressure' on the one hand, and at the same time be supervised by the HHS Secretary, a political appointee, on the other."] . . .

II

A

The Appointments Clause in Article II of the Constitution specifies how "Officers of the United States," as distinct from employees, must be appointed. § 2, cl. 2. An officer exercises " 'significant authority pursuant to the laws of the United States.' " *Lucia v. SEC*, 585 U.S. 237, 245 (2018). An employee, by contrast, does not exercise significant governmental authority. See *ibid*.

The text of the Appointments Clause "very clearly divides all its officers into two classes": principal officers and inferior officers. Here, all agree that the Preventive Services Task Force members are officers. The question is whether they are principal or inferior.

Principal officers must be appointed by the President "with the Advice and Consent of the Senate." Art. II, § 2, cl. 2. The constitutionally mandated joint participation of the President and Senate in the appointments process is designed to promote "a judicious choice" for "filling the offices of the Union." The Federalist No. 76 (A. Hamilton). The President and the Senate are accountable " for both the making of a bad appointment and the rejection of a good one. "

Inferior officers may also be appointed via Presidential nomination and Senate confirmation. See Art. II, § 2, cl. 2. The Framers, though, recognized that requiring *all* officers of the Federal Government to run the gauntlet of Presidential nomination and Senate confirmation would prove administratively unworkable as offices became "numerous" and "sudden removals" and prompt replacements became "necessary." So on one of the last days of the Constitutional Convention—September 15, 1787—they authorized an additional and streamlined method of appointment for inferior officers. Specifically, Congress may "by Law vest" appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Congress therefore may provide that inferior executive officers be unilaterally appointed by the President or a Head of Department.

The Appointments Clause is "more than a matter of 'etiquette or protocol' "—it is "among the significant structural safeguards of the constitutional scheme." The Appointments Clause ensures that the President or his subordinate Heads of Departments play a central role in selecting the officers within the Executive Branch who will assist in exercising the "executive Power." Art. II, § 1, cl. 1. The Clause thereby helps protect the independence of the Executive Branch and maintain the Constitution's separation of powers.

How does a court determine whether an executive officer is principal (and must be appointed by the President with the advice and consent of the Senate) or inferior (and may be appointed by the President or Head of Department alone)?

Principal officers in the Executive Branch encompass at least the Heads of Departments, who report directly to the President. Examples include the Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.

Inferior officers are most readily defined by their relationship to principal officers. "Generally speaking," whether "one is an 'inferior' officer depends on whether he has a superior" other than the President, and

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how much power the officer "exercises free from control by a superior." . . . Inferior officers are those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

. . . Justice Scalia[] once explained: "It is perfectly obvious" that the language in Article II authorizing department heads to appoint inferior officers "was intended merely to make clear ... that those officers appointed by the President with Senate approval could on their own appoint their subordinates, who would, of course, by chain of command still be under the direct control of the President." *Morrison v. Olson*, 487 U.S. 654, 720–721 (1988) (Scalia, J., dissenting).

B

Before 2010, members of the Preventive Services Task Force were not officers at all. The Task Force was an advisory body, and the Task Force members made only non-binding recommendations. As a result of the 2010 Affordable Care Act, however, the Task Force's "A" and "B" recommended preventive services now must be covered by health insurers at no cost to the insured. For that reason, the parties here agree that the Task Force members exercise significant governmental authority and qualify as "officers" of the United States. . . .

We conclude that Task Force members are inferior officers because their work is "directed and supervised" by the Secretary of HHS, a principal officer. The Secretary's ability to direct and supervise the Task Force derives from two main sources: the Secretary's authority to remove Task Force members at will; and the Secretary's authority to review and block the Task Force's recommendations before they can take effect.

1

An officer such as a Task Force member who is removable at will by a principal officer (here, by the Secretary of HHS) typically qualifies as an inferior officer. . . . This Court has said that the authority to remove an officer at will is a "powerful tool for control." The reason is straightforward: " 'Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.' " An officer's " 'presumed desire to avoid removal' " generally creates a " 'here-and-now subservience.' " . . .

Historical practice supports treating an officer who is removable at will by a principal officer as an inferior officer. Since the Founding, Congress has routinely tied inferior-officer status to at-will removability by Heads of Departments. [The court cited as examples a pair of 1789 statutes creating chief clerks in the Department of Foreign Affairs and the Department of War, both of whom were inferior officers removable at will.] On the other side of the ledger, Braidwood has not identified any instance where an executive officer was removable at will by someone other than the President and nonetheless deemed a principal officer.

Here, because the Secretary of HHS appoints the Task Force members, he also has the authority to remove the Task Force members at will. When a statute empowers a department head to appoint an officer, the default presumption is that the officer holds his position "at the will and discretion of the head of the department," even if "no power to remove is expressly given." That is because the "power of removal of executive officers" is "incident to the power of appointment." *Myers v. United States*, 272 U.S. 52, 119 (1926). . . .

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The Secretary of HHS has the power to appoint (and has appointed) the Task Force members. And no statute restricts removal of Task Force members. Therefore, "there can be no doubt" that the Secretary may remove Task Force members at will.

The Secretary's authority to remove Task Force members at will in turn enables him to supervise and direct them. When a Task Force member makes a decision that the Secretary disagrees with, the Secretary may remove that member. In other words, the Secretary "may consider the decision after its rendition as a reason for removing" the Task Force member, "on the ground that the discretion regularly entrusted to" that member "has not been on the whole intelligently or wisely exercised." *Myers*, 272 U.S., at 135.

In addition, the Secretary can block a Task Force recommendation from taking effect by combining his at-will removal authority with his authority to determine *when* Task Force recommendations become binding.

. . . [D]uring the minimum 1-year period after the Task Force makes a recommendation before it becomes binding, the Secretary can request that the Task Force reconsider or withdraw a recommendation that he disfavors. He has plenty of time to remove and replace Task Force members who refuse. And he can then request that the reconstituted Task Force modify or rescind the recommendation. Therefore, in this statutory scheme, the Secretary can use his at-will removal power to stop any preventive-services recommendation contrary to his judgment from taking effect.

In short, through the power to remove and replace Task Force members at will, the Secretary can exert significant control over the Task Force—including by blocking recommendations he does not agree with. The Secretary's power to supervise and direct Task Force members in that way is a strong indication that the Task Force members are inferior officers.

2

Regardless of whether the Secretary's authority to remove Task Force members at will suffices on its own to render them inferior officers, the Secretary also has statutory power to directly review and block Task Force recommendations before they take effect. That power confirms that the Task Force members are inferior officers.

. . . If an adjudicative officer's decisions are reviewable by a superior, then the officer may be considered inferior even if not removable at will. See *Arthrex*, 594 U.S., at 16–17 (opinion of ROBERTS, C. J.).

Here, the Secretary's power to supervise and direct the Task Force members derives from more than simply at-will removal authority. As explained, at-will removal provides the Secretary with a means of ensuring that no recommendation that he disapproves will take effect. But the Secretary also has the statutory authority to directly review—and, if necessary, block—Task Force recommendations before they take effect. So members of the Task Force cannot make any legally binding, final decision on behalf of the United States if the Secretary disagrees and wants to block it. As a result, the Secretary retains ultimate responsibility over whether Task Force recommendations become final decisions that mandate no-cost coverage by health insurers.

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To spell this out: A collection of statutes grants the Secretary general supervisory authority over the Task Force. That supervisory authority in turn enables the Secretary to review and, if he chooses, directly block a recommendation he disagrees with.

First, 42 U.S.C. § 202 provides that the Public Health Service, which houses the Task Force, "shall be administered ... under the supervision and direction of the Secretary."

Second, Reorganization Plan No. 3 of 1966 grants the Secretary authority to perform "all functions of the Public Health Service" and its "officers," "employees," and "agencies."

Third, 42 U.S.C. § 300gg–92 states that the Secretary "may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter"—including the section of the Affordable Care Act that requires no-cost coverage of Task Force "A" and "B" recommendations.

The Affordable Care Act mandates coverage without cost sharing of "evidence-based items or services that have *in effect* a rating of 'A' or 'B' " from the Task Force. § 300gg–13(a)(1) (emphasis added). During the minimum 1-year interval, the Secretary can use his general supervisory authority under § 202 and Reorganization Plan No. 3 to direct that the Task Force's recommendation not be "in effect" and therefore not be binding on health insurers. Moreover, the Secretary can use his rulemaking authority under § 300gg–92 to establish a formal review process. For example, the Secretary can issue a regulation providing that no Task Force recommendation shall be deemed "in effect" until he or his designee has affirmatively reviewed and approved it.

Taken together, those complementary review authorities ensure that the Task Force members "have no power to render a final decision on behalf of the United States unless permitted to do so by" the Secretary of HHS. To be clear, to supervise and direct for purposes of the Appointments Clause, the Secretary "need not review every decision." *Arthrex*, 594 U.S., at 27. Rather, "[w]hat matters is that" the Secretary "have the *discretion* to review decisions rendered by" the Task Force. *Ibid*. (emphasis added). Under the statutory provisions described above, the Secretary possesses that authority.[5]

C

Given the multiple and mutually reinforcing means by which the Secretary of HHS can supervise and direct the Task Force—namely, both the general authority to remove Task Force members at will and the more specific statutory authority to review and block their recommendations before they take effect—this Court's precedents preordain the conclusion that the Task Force members are inferior officers. [The Court concluded that the Task Force exercised authority similar to or less than the Coast Guard Court of Criminal Appeals (*Edmond v. United States*), the Public Company Accounting Oversight Board (*Free Enterprise Fund*), and Administrative Patent Judges (*United States v. Arthrex*), all of which are inferior officers. In *Arthrex*, " after ensuring that the Director of the Patent and Trademark Office had authority to review final decisions issued by Administrative Patent Judges," the Court reached this conclusion even though the APJs "were removable only *for cause* and thus insulated from at-will removal."]

In light of those precedents, "we have no hesitation in concluding" that Task Force members are inferior officers whose appointment by the Secretary of HHS is permissible under the Appointments Clause.

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D

. . .

1

Braidwood first claims that the Secretary cannot remove Task Force members at will. It rests that argument on 42 U.S.C. § 299b–4(a)(6). That provision states that Task Force members and their recommendations shall be "independent and, to the extent practicable, not subject to political pressure."

According to Braidwood, it is impossible for Task Force members to be "independent" if they are also removable at will. So they must not be removable at will, Braidwood reasons.

In essence, Braidwood invites the Court to read a for-cause removal restriction into a statute that does not explicitly provide for one. We decline to do so. The Court has said that to "take away" the power of at-will removal from an appointing officer, Congress must use "very clear and explicit language." . . .

2

Next, Braidwood insists that the Task Force members cannot be inferior officers because, in Braidwood's view, they exercise unreviewable authority in making final recommendations that are binding on health insurers. In other words, Braidwood contends that the Secretary cannot prevent the Task Force's "A" and "B" recommendations from taking effect, and that the Task Force members are therefore not inferior officers.

The premise is wrong. As we have explained, the Secretary in fact has authority to review the Task Force's recommendations and can block them from taking effect. . . .

3

Braidwood's third argument is that Task Force members are not inferior officers because, even assuming that the Secretary can review and block recommendations, the Secretary cannot directly compel the Task Force *to make* an "A" or "B" recommendation in the first place.

To begin with, in light of the Secretary's at-will removal power, he could in effect require the Task Force to make certain recommendations—at least in some situations. Specifically, if the circumstances so warranted, the Secretary could remove and replace members of the Task Force who were unwilling to assign an "A" or "B" recommendation to a particular service.

In any event, even assuming that Braidwood's argument on this point is correct, that would not affect the Task Force members' inferior-officer status.

For one thing, when the Task Force declines to issue an "A" or "B" recommendation, there is less cause for concern about executive officers exercising significant governmental authority without adequate supervision and direction. That is because when the Task Force decides *not* to issue an "A" or "B" recommendation, the Government is not regulating private parties: Health insurers are free to cover or not cover the preventive service at issue as they wish. Congress made that freedom of choice explicit in the statute: "Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage

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for services in addition to those recommended by" the Task Force "or to deny coverage for services that are not recommended by such Task Force." § 300gg–13(a).

More fundamentally, this Court has not suggested that a principal officer must be able to compel a subordinate to take an affirmative act affecting private parties in order for the subordinate to qualify as an inferior officer. . . .

4

In essence, Braidwood urges this Court to read the relevant statutes as having created an independent agency—the U. S. Preventive Services Task Force—whose members wield unchecked power in making preventive-services recommendations of great consequence for the healthcare and health-insurance industries and the American people more broadly. At oral argument, Braidwood went so far as to assert that, with respect to preventive-services recommendations, the Task Force members are "more powerful than the Secretary of HHS or the President."

It would be odd, however, for this Court to attribute to Congress the intent to create such a powerful independent agency—whose members would therefore require Presidential nomination and Senate confirmation—when the text of the statute says nothing of the sort.

When Congress wants to create an independent agency, it generally does so by explicitly conferring for-cause removal protection on the agency's leadership. And Congress usually couples that express for-cause protection from removal with an express statement that those agency heads shall be nominated by the President and confirmed by the Senate. See, *e.g.*, 15 U.S.C. § 41 (The Federal Trade Commission "shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate"); 42 U.S.C. § 7171(b) (The Federal Energy Regulatory Commission "shall be composed of five members appointed by the President, by and with the advice and consent of the Senate"); 49 U.S.C. § 1301(b)(1) (The Surface Transportation Board "shall consist of 5 members, to be appointed by the President, by and with the advice and consent of the Senate").

The statute establishing the Task Force contains none of that customary language—either with respect to for-cause removal or appointment by the President with the advice and consent of the Senate. That silence speaks volumes. Contrary to the argument advanced by Braidwood, we will not judicially construct a powerful new independent agency that Congress and the President did not themselves establish by statute.

III

[The Court rejected the Respondent's argument that the "Secretary lacks statutory authority to make appointments to the Task Force."] [T]he AHRQ Director's power to "convene" is naturally read to include the power to appoint in this specific context. Of course, "convene" in the abstract could mean to merely "call together" or "assemble." But where as here there is no separate statutory provision specifying who is to appoint the individuals to be called together or assembled, the obvious conclusion is that the person with the power to convene is also the person with the power to appoint. That is especially so when the person charged with convening is required to ensure that members of the body to be convened meet certain qualifications, such as "appropriate expertise." § 299b–4(a)(1). . . .

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[The dissent] asserts that we should not read "convene" to mean "appoint" because the Appointments Clause supplies a default rule for how inferior officers should be appointed: by the President with Senate confirmation. But § 299b–4(a)(1), together with Reorganization Plan No. 3 of 1966 as ratified by Congress in 1984, expressly vests appointment authority in the Secretary and therefore displaces any such default rule.

The dissent all but concedes that between 1999 and 2010—before the Task Force members were officers and therefore before the Appointments Clause was relevant—the statutory authorization to "convene" was best read to confer appointment authority. But according to the dissent, the meaning of the statute suddenly changed in 2010 after the enactment of the Affordable Care Act. The problem with that theory is that the relevant statutory text *did not* change in 2010. Both before and after the enactment of the Affordable Care Act, the statute has granted authority to "convene" a Task Force "composed of individuals with appropriate expertise." So in effect, the dissent reads the same words to mean different things before and after 2010.

2

[The Court next rejected the argument that "Reorganization Plan No. 3 does not actually transfer the Director's appointment authority to the Secretary and thus does not vest appointment authority in the Secretary."]

3

Braidwood's and the dissent's arguments that Congress has not properly vested the Secretary with authority to appoint Task Force members fail on their own terms. But if there were any doubt on that score, the canon of constitutional avoidance as applied in this Court's prior Appointments Clause cases would again dispel it.

. . . Here, reading the statutes at issue to vest appointment authority in the AHRQ Director alone would likewise render them "clearly unconstitutional." Meanwhile, it is at a minimum "reasonable" to read Reorganization Plan No. 3 to have transferred the AHRQ Director's appointment power to the Secretary, such that the statutes together vest the Secretary with authority to appoint the members of the Task Force.

C

Not only has Congress vested authority to appoint the Task Force members in the Secretary of HHS, the Secretary has now in fact exercised that authority. The Task Force members have been inferior officers since 2010 when the Affordable Care Act was enacted. Until June 2023, the Task Force members were appointed by the AHRQ Director alone, not by the Secretary. Then in June 2023, after litigation belatedly alerted the Government to the fact that Task Force members had become officers, the Secretary both ratified the Director's previous appointments of the Task Force members and also re-appointed them (a sequence of events that similarly occurred in *Edmond*). The Secretary has continued to appoint members of the Task Force, including all current members. . . .

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, dissenting.
. . . At the beginning of this suit, a subordinate official within the Department of Health and Human Services (HHS) had for years appointed the Task Force's members. Everyone now agrees that this practice was unlawful. Everyone further agrees that no one statute provides for a department head to appoint the Task

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Force's members. But, rather than accept that the default mode of [presidential] appointment applies, the Government invented a new theory on appeal, arguing that the combination of two ambiguously worded statutes enacted decades apart establishes that the Secretary of HHS can appoint the Task Force's members.

The Court today rushes to embrace this theory. I cannot. To begin with, I would not rule on the Government's new theory before any lower court has done so. But, if we are to decide this question now, I do not see how Congress has spoken with the clarity needed to depart from the default rule established by the Appointments Clause. In ruling otherwise, the Court treats the default rule as an inconvenient obstacle to be overcome, not a constitutional principle to be honored. And, it distorts Congress's design for the Task Force, changing it from an independent body that reports directly to the President to one subject to the control of the Secretary of HHS. . . .

. . . A key premise of the majority's analysis is . . . that the Task Force is part of the Public Health Service. By statute, the Public Health Service "shall consist of " AHRQ and four other agencies not relevant here. 42 U.S.C. § 203. Thus, the only way to conclude that the Task Force is part of the Public Health Service is to find that it is part of AHRQ.

The Task Force is not part of AHRQ. Section 299b–4(a)(1) provides that the AHRQ Director shall convene an "*independent* Preventive Services Task Force." (Emphasis added.) When modifying a federal agency, the term "independent" often means "not part of and ... therefore independent of any other unit of the Federal Government." . . . This language implies that the Task Force is not subject to supervision beyond the supervisory authority that the President holds over all executive officers under Article II. . . .

Notes & Questions

S6-1. Identify the factors the Court discusses in concluding that the Task Force members are inferior officers. Why does it matter whether the members are removable at will by a principal officer? What other factor(s) does the Court consider?

S6-2. Much of the debate between the parties and the members of the Court is about the text of the statute. What are the main areas of debate? Why does the text of the statute matter so much for the principal/inferior officer inquiry? What would have been the result if the dissent were correct that the "default rule" of presidential appointment applied to Task Force members?

United States v. Arthrex, Inc., 594 U.S. 1 (2021) (case note)

S6-3. *United States v. Arthrex, Inc.*, cited in *Braidwood Mgmt.*, involved the appointments process for Administrative Patent Judges (APJs), who collectively made up the bulk of the members of the Patent Trial and Appeal Board (PTAB). Among other things, PTAB decided challenges to the validity of previously issued patents through the "inter partes review" process. APJs were appointed by the Secretary of Commerce, a head of an executive department. APJs were removable by the Secretary only for cause.

Another presidentially-appointed principal officer—the Director of the Patent and Trademark Office (PTO) Director—possessed "powers of 'administrative oversight'" over APJs, including the power to select the panels of APJs who perform inter partes review for the PTAB. But PTAB decisions regarding patentability were reviewable only through rehearing (which only the PTAB could grant) or judicial review in the Federal Circuit. Thus, as Chief Justice Roberts and the majority described the arrangement, the PTO Director "is the boss [over the APJs], except when it comes to the one thing that makes the APJs officers exercising

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'significant authority' in the first place—their power to issue decisions on patentability. In contrast to the scheme approved by *Edmond*, no principal officer at any level within the Executive Branch 'direct[s] and supervise[s]' the work of APJs in that regard."

The appropriate remedy, according to the Chief Justice, was to permit the PTO Director to review PTAB decisions and "issue decisions himself on behalf of the Board." In conclusion, Roberts wrote that the decision

> reaffirm[ed] and appl[ied] the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate. . . . What matters is that the Director have the discretion to review decisions rendered by APJs. In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.

Justice Thomas, joined in relevant part by Justices Breyer, Sotomayor, and Kagan, rejected the Court's analysis, asking:

> Just who are these "principal" officers that Congress unsuccessfully sought to smuggle into the Executive Branch without Senate confirmation? About 250 administrative patent judges who sit at the bottom of an organizational chart, nestled under at least two levels of authority. Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President.

Thomas raised practical concerns as well:

> [I]nterpreting the Appointments Clause to bar any nonprincipal officer from taking "final" action poses serious line-drawing problems. The majority assures that not every decision by an inferior officer must be reviewable by a superior officer. But this sparks more questions than it answers. Can a line prosecutor offer a plea deal without sign off from a principal officer? If faced with a life-threatening scenario, can an FBI agent use deadly force to subdue a suspect? Or if an inferior officer temporarily fills a vacant office tasked with making final decisions, do those decisions violate the Appointments Clause?

§ 6.04 The Power to Remove

Delete notes 6-37 and 6-38 on page 590 and replace them with the following materials:

This next case picks up where *Free Enterprise* left off, continuing to narrow the circumstances where Congress might impose restrictions on presidential removal of agency heads.

Seila Law LLC v. Consumer Financial Protection Bureau

591 U.S. 197 (2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

> In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection

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Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties.: "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.*, at 514.

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. . . . Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control. . . .

I

A

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. Professor Warren believed the financial products marketed to ordinary American households—credit cards, student loans, mortgages, and the like—had grown increasingly unsafe due to a "regulatory jumble" that paid too much attention to banks and too little to consumers. To remedy the lack of "coherent, consumer-oriented" financial regulation, she proposed "concentrat[ing] the review of financial products in a single location"—an independent agency modeled after the multimember Consumer Product Safety Commission.

That proposal soon met its moment. Within months of Professor Warren's writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes. . . .

In 2010, Congress . . . created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have

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access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. § 5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations.

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. Since its inception, the CFPB has obtained over $11 billion in relief for over 25 million consumers, including a $1 billion penalty against a single bank in 2018.

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order."

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. The CFPB Director is appointed by the President with the advice and consent of the Senate. The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office."

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems "reasonably necessary to carry out" the agency's duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). In recent years, the CFPB's annual budget has exceeded half a billion dollars.

B

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services." The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices. Seila Law asked the CFPB to set aside the demand, objecting that the agency's leadership by a single Director removable only for cause violated the separation of powers. . . .

Because the Government agrees with petitioner on the merits of the [removal issue], we appointed Paul Clement to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

II

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[The Court rejected several arguments as to why the Court should not reach the merits of the dispute.]

III

We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334.

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey." *Bowsher*, 478 U.S., at 726.

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*, 561 U.S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning" and has long been the "settled and well understood construction of the Constitution."

The Court recognized the President's prerogative to remove executive officials in *Myers v. United States*, 272 U.S. 52. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed."

We recently reiterated the President's general removal power in *Free Enterprise Fund*. . . . Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties."

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that

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protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office."

Because the Court limited its holding "to officers of the kind here under consideration," the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers."[197]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."

In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied "[t]he philosophy of *Humphrey's Executor*" to uphold for-cause removal protections for the members of the War Claims Commission—a three-member "adjudicatory body" tasked with resolving claims for compensation arising from World War II.

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power ... to remove purely executive officers." The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration."

We have recognized a second exception for *inferior* officers in two cases . . . . Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power."

---

[197] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."

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B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor.* Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.[198]

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U.S., at 483. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

1

[198] The dissent would have us ignore the reasoning of *Humphrey's Executor* and instead apply the decision only as part of a reimagined *Humphrey's*-through-*Morrison* framework. But we take the decision on its own terms, not through gloss added by a later Court in dicta. The dissent also criticizes us for suggesting that the 1935 FTC may have had lesser responsibilities than the present FTC. Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court.

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"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.,* at 505. An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. "[T]hese few scattered examples"—four to be exact—shed little light.

First, the CFPB's defenders point to the Comptroller of the Currency, who enjoyed removal protection for *one year* during the Civil War. That example has rightly been dismissed as an aberration. It was "adopted without discussion" during the heat of the Civil War and abandoned before it could be "tested by executive or judicial inquiry." (At the time, the Comptroller may also have been an inferior officer, given that he labored "under the general direction of the Secretary of the Treasury.")

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978. But this first enduring single-leader office, created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. In any event, the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB's defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA's new single-Director structure upon signing it into law. In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same financial crisis. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy. Indeed, it was recently held unconstitutional by the Fifth Circuit, sitting en banc.

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual. . . .

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the

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chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See The Federalist No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. Presidents frequently use these budgetary tools "to influence the policies of independent agencies." But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U.S., at 499.[199]

3

[199] *Amicus* and the dissent try to diminish the CFPB's insulation from Presidential control by observing that the CFPB's final rules can be set aside by a super majority of the Financial Stability and Oversight Council (FSOC). But the FSOC's veto power is statutorily reserved for extreme situations, when two-thirds of the Council concludes that a CFPB regulation would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. §§ 5513(a), (c)(3). That narrow escape hatch has no impact on the CFPB's enforcement or adjudicatory authority and has never been used in the ten years since the agency's creation. It certainly does not render the CFPB's independent, single-Director structure constitutional.

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Amicus raises three principal arguments in the agency's defense. . . . It is true that "there is no 'removal clause' in the Constitution," but neither is there a "separation of powers clause" or a "federalism clause." These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies. . . . [T]he President's removal power stems from Article II's vesting of the "executive Power" in the President. . . .

Next, *amicus* offers a grand theory of our removal precedents that, if accepted, could leave room for an agency like the CFPB—and many other innovative intrusions on Article II. According to *amicus, Humphrey's Executor* and *Morrison* establish a general rule that Congress may impose "modest" restrictions on the President's removal power, with only two limited exceptions. Congress may not reserve a role *for itself* in individual removal decisions (as it attempted to do in *Myers* and *Bowsher*). And it may not eliminate the President's removal power altogether (as it effectively did in *Free Enterprise Fund*). . . .

[T]he President's removal power is the rule, not the exception. While we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority. . . .

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. . . . The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions . . . .

In *Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of "functioning independently" and "nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected."

Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.

* * *

. . . In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to

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the people. . . .

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and dissenting in part.

The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), rather than overruling it. At the same time, the Court takes an aggressive approach on severability by severing a provision when it is not necessary to do so. I would do the opposite. . . .

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent. [The remainder of Justice Thomas's opinion, advocating for the overruling of *Humphrey's* and a rejection of the plurality's severability holding (in part IV of the Chief Justice's opinion), is omitted.]

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct presidential control. As the years passed, and governance became ever more complicated, Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to "endure for ages to come." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President's control over regulatory agencies, including through his removal power, have never abated. But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's

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explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power[] operates." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. See Schoolhouse Rock! Three Ring Government (Mar. 13, 1979), http://www.youtube.com/watch?v=pKSGyiT-o3***o*** ("Ring one, Executive. Two is Legislative, that's Congress. Ring three, Judiciary"). The Constitution's first three articles, the majority recounts, "split the atom of sovereignty" among Congress, the President, and the courts. And by that mechanism, the Framers provided a "simple" fix "to governmental power and its perils."

There is nothing wrong with that as a beginning (except the adjective "simple"). . . . The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete. . . .

II

As the majority explains, the CFPB emerged out of disaster. The collapse of the subprime mortgage market "precipitat[ed] a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." In that moment of economic ruin, the President proposed and Congress enacted legislation to address the causes of the collapse and prevent a recurrence. . . . No one had a doubt that the new agency should be independent. . . .

B

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The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural. . . . I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. . . .

[T]he majority again reveals its lack of interest in how agencies work. First, the premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control—is wrong. As this Court has seen in the past, independent agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves "ample" control over agency heads in the hands of the President. He can discharge them for failing to perform their duties competently or in accordance with law, and so ensure that the laws are "faithfully executed." And he can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls. Second, the majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director (even supposing that were a suitable issue for a court to address). Maybe the CFPB would be. Or maybe not. . . . At the least: If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.

III

. . . The majority tells Congress that it may "pursu[e] alternative responses" to the identified constitutional defect—"for example, converting the CFPB into a multimember agency." But there was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design. Because this Court ignores that sensible—indeed, that obvious—division of tasks, I respectfully dissent.

Notes & Questions

S6-4. How would you compare Justice Roberts' view of Congress with Justice Kagan's view in dissent? How would you compare their views of the Executive?

S6-5. Why do you think that both President Obama and Elizabeth Warren assumed this would be a multimember commission? Why might Congress decide on a single director?

S6-6. By whose conception of the Take Care Clause are you more convinced? What does it mean for laws to "be faithfully executed?"

S6-7. Do you think Justice Thomas is correct that there is very little left of *Humphrey's* and that it should be overruled? Does Chief Justice Roberts' treatment of *Humphrey's* suggest that it has any remaining vitality?

S6-8. Does *Seila Law* foreclose all single-director, for-cause arrangements? What potential agencies or areas of regulation could tolerate such a system? Would it be worth the risk?

Collins v. Yellen, 594 U.S. 220 (2021) (case note)
S6-9. *Collins v. Yellen* held that Congress could not provide for-cause protection for the single Director of the Federal Housing Finance Agency. The FHFA is an independent agency tasked with regulating Frannie Mae and Freddie Mac ("two of the Nation's leading sources of mortgage financing") and, "if necessary, stepping in as their conservator or receiver."

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The Court held that the decision in "*Seila Law* is all but dispositive" of the constitutionality of the for-cause removal protection for the FHFA Director. Justice Alito, writing for the majority, summarized: "A straightforward application of our reasoning in *Seila Law* dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power."

Critically, the Court minimized the importance of several of the features that the *Seila Law* Court highlighted as ostensibly salient in invalidating the for-cause protection for the CFPB Director. For example, recall *Seila Law*'s extensive discussion of the CFPB's enforcement, adjudication, and rulemaking powers. While *Collins* acknowledged that the Court had "noted differences between" the FHFA and CFPB, it rejected the argument that the "nature and breadth of an agency's authority" could be "dispositive in determining whether Congress may limit the President's power to remove its head." Alito explained:

> The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies. . . . Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.

The Court also minimized the distinction between agencies that regulate private actors and agencies that regulate special "Government-sponsored enterprises" like Frannie Mae and Freddie Mac, explaining that "the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives. And there can be no question that the FHFA's control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes."

Finally, the Court "acknowledge[d]" that the FHFA Director had a more modest removal restriction than other removal provisions, but, turning to *Seila Law*, explained that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."

Note S6-11. Firing Cases on the Supreme Court's Shadow Docket (case notes)

Despite the continued (though significantly weakened) vitality of *Humphrey's Executor*, Donald Trump has continued to assert absolute authority to fire federal employees and officers. Trump has also sought to overhaul the federal government through reductions in force. Many of these cases have ended up on the Supreme Court's "shadow docket" as the Trump Administration has sought stays of adverse lower court decisions. These cases are rapidly evolving; a sampling of the courts' decisions follows.

Officer Removal Cases

Special Counsel of the Office of Special Counsel – *Bessent v. Dellinger*, 605 U.S. ____ (2025) (case note)

One of Trump's first personnel decisions was to fire Hampton Dellinger on February 7, 2025 from his position as Special Counsel of the Office of the Special Counsel, a position that is dedicated to investigating and prosecuting prohibited personnel practices under federal whistleblower laws and other statutes.[200] Moreover, "[b]y statute, the Special Counsel may be removed 'only for inefficiency, neglect of duty, or malfeasance in office.'" *Dellinger v. Bessent*, No. 25-5052, 2025 WL 887518, at *1 (D.C. Cir. Mar. 10, 2025) (quoting 5 U.S.C. § 1211).

[200] https://osc.gov/Agency.

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After the district court entered a temporary restraining order on February 12 in Dellinger's favor pending a ruling on his motion for preliminary injunction,[201] the government appealed to the D.C. Circuit. The D.C. Circuit dismissed the appeal for lack of jurisdiction on February 15. The government applied to the Supreme Court to vacate the TRO. Noting the short duration of the TRO, which was set to expire in less than a week, on February 21 the Supreme Court held the government's application in abeyance until after the TRO was scheduled to expire.[202] Justice Gorsuch, joined by Justice Alito, dissented, arguing that the district court's TRO had exceeded the "boundaries of traditional equitable relief." Without explanation, Justices Sotomayor and Jackson noted that they would deny the government's application.

Subsequently, on March 1, the district court granted a permanent injunction restoring Dellinger to his office.[203] The D.C. Circuit stayed the district court's order on March 10, concluding in part that "Dellinger is all but certain to be designated as a principal officer" because "only the President has the authority to remove the Special Counsel and he is a Presidential appointee who must be confirmed by the Senate."[204] Quoting from *Collins v. Yellin*, the court explained that "[t]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." Moreover, while "arguments about the scope and functions of the Special Counsel as a sole agency head do not affect the President's removal power," the court noted that "Dellinger exercises at least enough authority to contradict the President's directives"—for example, the Office of Special Counsel had requested and received stays of the (presidentially-directed) termination of probationary federal employees.

After the D.C. Circuit's adverse ruling, Dellinger decided to no longer pursue his claims, and court dismissed the appeal as moot.[205]

National Labor Relations Board & Merit Systems Protection Board – *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (case note)

Though members of the NLRB and MSPB may only be removed for cause, Trump fired a member from each of the two agencies. The district court permanently enjoined the removals, and the D.C. Circuit sitting en ban refused to stay the injunction pending appeal, citing *Humphrey's Executor*. Thereafter, the government applied to the Supreme Court for a stay of the district court's injunction pending the disposition of its appeal in the D.C. Circuit.

In a terse shadow docket opinion, on May 22, 2025, the Supreme Court granted the government's application for stay, writing in part:

> Because the Constitution vests the executive power in the President, see Art. II, § 1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents, see *Seila Law*. The stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power. But we do not ultimately decide in this posture whether the NLRB or MSPB falls within such a recognized exception; that question is better left for resolution after full briefing and argument. The stay also reflects our

[201] Dellinger v. Bessent, 766 F. Supp. 3d 57 (D.D.C. 2025), *appeal dismissed*, No. 25-5028, 2025 WL 559669 (D.C. Cir. Feb. 15, 2025).
[202] *Bessent v. Dellinger*, 605 U.S. ____ (2025).
[203] Dellinger v. Bessent, 768 F. Supp. 3d 33 (D.D.C. 2025), vacated and remanded, No. 25-5052, 2025 WL 935211 (D.C. Cir. Mar. 27, 2025)
[204] Dellinger v. Bessent, No. 25-5052, 2025 WL 887518, at *3 (D.C. Cir. Mar. 10, 2025).
[205] Dellinger v. Bessent, No. 25-5052, 2025 WL 935211, at *1 (D.C. Cir. Mar. 27, 2025)

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> judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty. A stay is appropriate to avoid the disruptive effect of the repeated removal and reinstatement of officers during the pendency of this litigation.

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented at length, writing in part:

> For 90 years, *Humphrey's Executor* v. *United States* (1935) has stood as a precedent of this Court. And not just any precedent. *Humphrey's* undergirds a significant feature of American governance: bipartisan administrative bodies carrying out expertise-based functions with a measure of independence from presidential control. The two such agencies involved in this application are the National Labor Relations Board (NLRB) and Merit Systems Protection Board (MSPB). But there are many others—among them, the Federal Communications Commission (FCC), Federal Trade Commission (FTC), and Federal Reserve Board. Congress created them all, though at different times, out of one basic vision. It thought that in certain spheres of government, a group of knowledgeable people from both parties—none of whom a President could remove without cause—would make decisions likely to advance the long-term public good. And that congressional judgment, *Humphrey's* makes clear, creates no conflict with the Constitution. Rejecting a claim that the removal restriction enacted for the FTC interferes with "the executive power," the *Humphrey's* Court held that Congress has authority, in creating such "quasi-legislative or quasi-judicial" bodies, to "forbid their [members'] removal except for cause." . . .
>
> The current President believes that *Humphrey's* should be either overruled or confined. And he has chosen to act on that belief—really, to take the law into his own hands. Not since the 1950s (or even before) has a President, without a legitimate reason, tried to remove an officer from a classic independent agency—a multi-member, bipartisan commission exercising regulatory power whose governing statute contains a for-cause provision. Yet now the President has discharged, concededly without cause, several such officers, including a member of the NLRB (Gwynne Wilcox) and a member of the MSPB (Cathy Harris). Today, this Court effectively blesses those deeds. I would not. Our *Humphrey's* decision remains good law, and it forecloses both the President's firings and the Court's decision to award emergency relief.
>
> Our emergency docket, while fit for some things, should not be used to overrule or revise existing law. We consider emergency applications "on a short fuse without benefit of full briefing and oral argument"; and we resolve them without fully (or at all) stating our reasons. It is one thing to grant relief in that way when doing so vindicates established legal rights, which somehow the courts below have disregarded. It is a wholly different thing to skip the usual appellate process when issuing an order that itself changes the law. And nowhere is short-circuiting our deliberative process less appropriate than when the ruling requested would disrespect—by either overturning or narrowing—one of this Court's longstanding precedents, like our nearly century-old *Humphrey's* decision.

Justice Kagan concluded:

> Today's order, however, favors the President over our precedent; and it does so unrestrained by the rules of briefing and argument—and the passage of time—needed to discipline our

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> decision-making. I would deny the President's application. I would do so based on the will of Congress, this Court's seminal decision approving independent agencies' for-cause protections, and the ensuing 90 years of this Nation's history.

The D.C. Circuit held oral argument in the matter on May 16, 2025.

Consumer Protection Safety Commission – *Trump v. Boyle*, 606 U.S. ____ (2025) (case note)
On July 23, 2025, the Supreme Court granted the Trump Administration's request to stay an injunction requiring the government to reinstate the Democratic members of the Consumer Protection Safety Commission. In a terse order, the Court explained:

> Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases. The stay we issued in *Wilcox* [discussed above] reflected "our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." The same is true on the facts presented here, where the Consumer Product Safety Commission exercises executive power in a similar manner as the National Labor Relations Board, and the case does not otherwise differ from *Wilcox* in any pertinent respect.

Again, Justice Kagan, joined by Justices Sotomayor and Jackson, dissented:

> Once again, this Court uses its emergency docket to destroy the independence of an independent agency, as established by Congress. Two months ago, in *Trump* v. *Wilcox*, the majority issued a stay allowing the President to discharge, without any cause, Democratic members of the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB). Today, the same majority's stay permits the President to fire, again without cause, the Democratic members of the Consumer Product Safety Commission (CPSC). Congress provided that the CPSC, like the NLRB and MSPB, would operate as "a classic independent agency—a multi-member, bipartisan commission" whose members serve staggered terms and cannot be removed except for good reason. In Congress's view, that structure would better enable the CPSC to achieve its mission—ensuring the safety of consumer products, from toys to appliances—than would a single-party agency under the full control of a single President. The CPSC has thus operated as an independent agency for many decades, as the NLRB and MSPB also did. But this year, on its emergency docket, the majority has rescinded that status. By allowing the President to remove Commissioners for no reason other than their party affiliation, the majority has negated Congress's choice of agency bipartisanship and independence.
>
> In doing so, the majority has also all but overturned *Humphrey's Executor* v. *United States*, a near-century-old precedent of this Court. . . . The majority, through its stays, has prevented Congress from prohibiting removals without cause. On the Court's emergency docket—which means "on a short fuse without benefit of full briefing and oral argument"—the majority has effectively expunged *Humphrey's* from the U. S. Reports.
>
> And it has accomplished those ends with the scantiest of explanations. The majority's sole professed basis for today's stay order is its prior stay order in *Wilcox*. But *Wilcox* itself was minimally (and, as I have previously shown, poorly) explained. It contained one sentence (ignored today) hinting at but not deciding the likelihood of success on the merits, plus two more respecting the "balance [of] the equities." So only another under-reasoned emergency

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> order undergirds today's. Next time, though, the majority will have two (if still under-reasoned) orders to cite. "Truly, this is 'turtles all the way down.'"

Reductions in the Federal Workforce

***Trump v. American Federation of Government Employees*, 606 U.S. ____ (2025) (case note)**

The Trump Administration has directed dramatic reductions in the federal workforce.[206] The U.S. District Court for the Northern District of California preliminarily enjoined the RIFs on the grounds that the president and other executive agencies lacked the authority to "conduct large-scale reorganizations and reductions in force in blatant disregard of Congress's mandates" and "without partnering with Congress."[207]

On July 8, 2025, the Supreme Court stayed the injunction pending the disposition of the appeal in the Ninth Circuit. The Court wrote:

> The District Court's injunction was based on its view that Executive Order No. 14210 and a joint memorandum from the Office of Management and Budget and Office of Personnel Management implementing that Executive Order are unlawful. Because the Government is likely to succeed on its argument that the Executive Order and Memorandum are lawful—and because the other factors bearing on whether to grant a stay are satisfied—we grant the application. We express no view on the legality of any Agency RIF and Reorganization Plan produced or approved pursuant to the Executive Order and Memorandum.

Justice Sotomayor concurred in the grant of the stay because "the relevant Executive Order directs agencies to plan reorganizations and reductions in force 'consistent with applicable law,' and the resulting joint memorandum from the Office of Management and Budget and Office of Personnel Management reiterates as much. The plans themselves are not before this Court, at this stage, and we thus have no occasion to consider whether they can and will be carried out consistent with the constraints of law."

Only Justice Jackson dissenting, citing (among other things) the district court's extensive evidentiary hearing and findings of fact that supported the preliminary injunction.

Department of Education RIF and Wind Down – *McMahon v. New York*, 606 U.S. ____ (2025) (case note)

In March 2025, Trump and Education Secretary Linda McMahon took steps toward dramatically reducing the statutorily-created Department of Education, eliminating many positions and whole offices from the Department. The point of these measures, as explained in Executive Order 14,242, was "to facilitate the closure of the Department of Education."

Twenty states, the District of Columbia, and various school districts and unions brought suit, challenging the administration's actions under the APA and various other statutory and constitutional grounds. The district court preliminarily enjoined the RIF and related steps taken toward closing the Department of Education, and the Trump Administration sought a stay from the Supreme Court.

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[206] *See* Exec. Order 14210, Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative (February 11, 2025) ("Agency Heads shall promptly undertake preparations to initiate large-scale reductions in force (RIFs), consistent with applicable law . . . .").

[207] Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, No. 25-CV-03698-SI, 2025 WL 1482511, at *1 (N.D. Cal. May 22, 2025).

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On July 14, 2025, without explanation, the Supreme Court granted the Trump Administration's application for a stay pending the disposition of the appeal in the First Circuit. Justice Sotomayor, joined by Justices Kagan and Jackson, dissented, explaining in part:

> This case arises out of the President's unilateral efforts to eliminate a Cabinet-level agency established by Congress nearly half a century ago: the Department of Education. As Congress mandated, the Department plays a vital role in this Nation's education system, safeguarding equal access to learning and channeling billions of dollars to schools and students across the country each year.
>
> Only Congress has the power to abolish the Department. The Executive's task, by contrast, is to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3. Yet, by executive fiat, the President ordered the Secretary of Education to "take all necessary steps to facilitate the closure of the Department." Exec. Order No. 14242. Consistent with that Executive Order, Secretary Linda McMahon gutted the Department's work force, firing over 50 percent of its staff overnight. In her own words, that mass termination served as "the first step on the road to a total shutdown" of the Department.
>
> When the Executive publicly announces its intent to break the law, and then executes on that promise, it is the Judiciary's duty to check that lawlessness, not expedite it. Two lower courts rose to the occasion, preliminarily enjoining the mass firings while the litigation remains ongoing. Rather than maintain the status quo, however, this Court now intervenes, lifting the injunction and permitting the Government to proceed with dismantling the Department. That decision is indefensible. It hands the Executive the power to repeal statutes by firing all those necessary to carry them out. The majority is either willfully blind to the implications of its ruling or naive, but either way the threat to our Constitution's separation of powers is grave. Unable to join in this misuse of our emergency docket, I respectfully dissent.[208]

[208] *McMahon*, 606 U.S. ____.

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Chapter 7. Judicial Control of Agency Discretion

§ 7.03 Judicial Review of Findings of Fact – The Substantial Evidence Standard

Note 7-15 discusses *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019). Below is an edited version of the full case with additional questions.

Biestek v. Berryhill

587 U.S. 97 (2019)

JUSTICE KAGAN delivered the opinion of the Court.

The Social Security Administration (SSA) provides benefits to individuals who cannot obtain work because of a physical or mental disability. To determine whether an applicant is entitled to benefits, the agency may hold an informal hearing examining (among other things) the kind and number of jobs available for someone with the applicant's disability and other characteristics. The agency's factual findings on that score are "conclusive" in judicial review of the benefits decision so long as they are supported by "substantial evidence." The Social Security Administration (SSA) provides benefits to individuals who cannot obtain work because of a physical or mental disability. To determine whether an applicant is entitled to benefits, the agency may hold an informal hearing examining (among other things) the kind and number of jobs available for someone with the applicant's disability and other characteristics. The agency's factual findings on that score are "conclusive" in judicial review of the benefits decision so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g).

This case arises from the SSA's reliance on an expert's testimony about the availability of certain jobs in the economy. The expert largely based her opinion on private market-survey data. The question presented is whether her refusal to provide that data upon the applicant's request categorically precludes her testimony from counting as "substantial evidence. We hold it does not.

I

. . . To rule on Biestek's application, the ALJ had to determine whether the former construction laborer could successfully transition to less physically demanding work. That required exploring two issues. The ALJ needed to identify the types of jobs Biestek could perform notwithstanding his disabilities. And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." For guidance on such questions, ALJs often seek the views of "vocational experts." Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. . . . Many vocational experts simultaneously work in the private sector locating employment for persons with disabilities. When offering testimony, the experts may invoke not only publicly available sources but also "information obtained directly from employers" and data otherwise developed from their own "experience in job placement or career counseling."

At Biestek's hearing, the ALJ asked a vocational expert named Erin O'Callaghan to identify a sampling of "sedentary" jobs that a person with Biestek's disabilities, education, and job history could perform. . . . In response to the ALJ's query, O'Callaghan listed sedentary jobs "such as a bench assembler [or] sorter" that did not require many skills. And she further testified that 240,000 bench assembler jobs and 120,000 sorter jobs existed in the national economy.

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On cross-examination, Biestek's attorney asked O'Callaghan "where [she was] getting those [numbers] from." O'Callaghan replied that they came from the Bureau of Labor Statistics and her "own individual labor market surveys." The lawyer then requested that O'Callaghan turn over the private surveys so he could review them. O'Callaghan responded that she wished to keep the surveys confidential because they were "part of [her] client files." The lawyer suggested that O'Callaghan could "take the clients' names out." But at that point the ALJ interjected that he "would not require" O'Callaghan to produce the files in any form. Biestek's counsel asked no further questions about the basis for O'Callaghan's assembler and sorter numbers.

After the hearing concluded, the ALJ issued a decision granting Biestek's application in part and denying it in part. According to the ALJ, Biestek was entitled to benefits beginning in May 2013, when his advancing age (he turned fifty that month) adversely affected his ability to find employment. But before that time, the ALJ held, Biestek's disabilities should not have prevented a "successful adjustment to other work." The ALJ based that conclusion on O'Callaghan's testimony about the availability in the economy of "sedentary unskilled occupations such as bench assembler [or] sorter." . . .

II

The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla." It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Today, Biestek argues that the testimony of a vocational expert who (like O'Callaghan) refuses a request for supporting data about job availability can never clear the substantial-evidence bar. As that formulation makes clear, Biestek's proposed rule is categorical, rendering expert testimony insufficient to sustain an ALJ's factfinding whenever such a refusal has occurred. . . .

To assess Biestek's proposal, we begin with the parties' common ground: Assuming no demand [by a party for the supporting data], a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data. Of course, the testimony would be even better—more reliable and probative—if she had produced supporting data; that would be a best practice for the SSA and its experts. And of course, a different (maybe less qualified) expert failing to produce such data might offer testimony that is so feeble, or contradicted, that it would fail to clear the substantial-evidence bar. The point is only—as, again, Biestek accepts—that expert testimony can sometimes surmount that bar absent underlying data.

But if that is true, why should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate? Assume that an applicant challenges our hypothetical expert to turn over her supporting data; and assume the expert declines because the data reveals private information about her clients and making careful redactions will take a fair bit of time. Nothing in the expert's refusal changes her testimony (as described above) about job availability. Nor does it alter any other material in the record. So if our expert's opinion was sufficient—*i.e.*, qualified as substantial evidence—before the refusal, it is hard to see why the opinion has to be insufficient afterward. . . .

And much the same is true of Biestek's claim that an expert's refusal precludes meaningful cross-examination. We agree with Biestek that an ALJ and reviewing court may properly consider obstacles to

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such questioning when deciding how much to credit an expert's opinion. But Biestek goes too far in suggesting that the refusal to provide supporting data always interferes with effective cross-examination, or that the absence of such testing always requires treating an opinion as unreliable. Even without specific data, an applicant may probe the strength of testimony by asking an expert about (for example) her sources and methods—where she got the information at issue and how she analyzed it and derived her conclusions. . . .

Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, *e.g.*, *Perales*, 402 U. S., at 399, 410 (rejecting a categorical rule pertaining to the substantiality of medical reports in a disability hearing). It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

That much is sufficient to decide this case. Biestek petitioned us only to adopt the categorical rule we have now rejected. He did not ask us to decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits. Accordingly, we affirm the Court of Appeals' judgment. . . .

JUSTICE SOTOMAYOR, dissenting.

The Court focuses on the propriety of a categorical rule that precludes private data that a vocational expert refuses to provide upon request from qualifying as " 'substantial evidence.' " I agree with JUSTICE GORSUCH that the question presented by this case encompasses an inquiry not just into the propriety of a categorical rule in such circumstances but also into whether the substantial evidence standard was met in the narrower circumstances of Michael Biestek's case. . . . For the reasons that JUSTICE GORSUCH sets out, the vocational expert's conclusory testimony in this case, offered without even a hint of support, did not constitute substantial evidence. . . .

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

Walk for a moment in Michael Biestek's shoes. As part of your application for disability benefits, you've proven that you suffer from serious health problems and can't return to your old construction job. Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. When it comes to that question, the Social Security Administration bears the burden of proof. To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 "sorter" and 240,000 "bench assembler" jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can't be the source; its numbers aren't that specific. The source—if there is a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants "great weight" and is more than enough evidence to deny your application. Case closed.

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Would you say this decision was based on "substantial evidence"? Count me with Judge Easterbrook and the Seventh Circuit in thinking that an agency expert's bottom line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work. . . .

Start with the legal standard. The Social Security Act of 1935 requires the agency to support its conclusions about the number of available jobs with "substantial evidence." 42 U. S. C. §405(g). Congress borrowed that standard from civil litigation practice, where reviewing courts may overturn a jury verdict when the record lacks "substantial evidence"—that is, evidence sufficient to permit a reasonable jury to reach the verdict it did. Much the same standard governs summary judgment and directed verdict practice today.

Next, consider what we know about this standard. Witness testimony that's clearly wrong as a matter of fact cannot be substantial evidence. Falsified evidence isn't substantial evidence. Speculation isn't substantial evidence. And, maybe most pointedly for our purposes, courts have held that a party or expert who supplies only conclusory assertions fails this standard too.

If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either. The case hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that? . . .

What leads the Court to a different conclusion? It says that it views Mr. Biestek's petition as raising only the "categorical" question whether an expert's failure to produce underlying data always and in "every case" precludes her testimony from qualifying as substantial evidence. And once the question is ratcheted up to that level of abstraction, of course it is easy enough to shoot it down . . . .

If my understanding of the Court's opinion is correct [in narrowly ruling to reject Biestek's proposed "categorical rule"], the good news is that the Court remains open to the possibility that in real world cases like Mr. Biestek's, lower courts may—and even should—find the substantial evidence test unmet. The bad news is that we must wait to find out, leaving many people and courts in limbo in the meantime. Cases with facts like Mr. Biestek's appear to be all too common. . . .

The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. …Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88 (1913), the government sought to justify an agency order binding private parties without producing the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." In essence, the government sought the right to "act upon any sort of secret evidence." This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.

Notes & Questions

S7-1.What's wrong with the use of a categorical rule in cases such as Biestek's? If a witness in a different kind of proceeding testified that there may be health concerns based on research not yet available, should that evidence be discounted as less than substantial? What about evidence in the early days of climate change research? If experts testified that societal risks were substantial but had no hard data as yet existed,

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is that too to be considered as failing the substantial evidence test? Is the expert's opinion enough? On the other hand, if reports that suggested climate change was a hoax were relied upon but the data upon which they were based was not revealed, could that testimony constitute substantial evidence?

S7-2. What standard does the majority articulate for determining what is substantial evidence in this case? How does it compare to standards used in civil trial and appellate practice?

§ 7.04 Questions of Law

Add the following paragraphs to the section introduction, page 641-43.
The most important change to the way courts resolve questions of law comes from the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which overruled the key deference doctrine established in *Chevron v. NRDC*. Now, as we will describe in § 7.05, courts "must exercise independent judgment in determining the meaning of statutory provisions."

But *Loper Bright* leaves open many issues for future resolution. For one, the Court cited several of its pre-*Chevron* precedents (such as *NLRB v. Hearst* and *Skidmore v. Swift*, principal cases in § 7.04 of the casebook) with apparent favor. These earlier cases might show us how the doctrine could develop in the post-*Chevron* world.

Additionally, the Court suggested in dicta that caselaw should not be overruled merely because it cited *Chevron*. Thus, we continue to recommend carefully reading *Chevron* (§ 7.05 of the casebook) so that you can understand the pre-*Loper Bright* cases you would encounter as a regulatory attorney, the reasoning underlying the *Chevron* doctrine, and the consequences of its overruling. (Most of the cases elaborating the intricacies of the *Chevron* doctrine are now omitted from the scheduled curriculum, though you may find them instructive in understanding how the doctrine evolved and functioned.)

Finally, *Loper Bright* did not overrule another deference doctrine called *Auer* deference, which applies to an agency's informal interpretations of its ambiguous regulations. *Kisor v. Wilkie*, an important case from 2019 restricting *Auer* deference, is excerpted in § 7.07 of this Supplement.

§ 7.05 The *Chevron* Revolution

Delete the following:

- **Notes 7-25 to 7-27 (pp. 663-65)** (Your professor may ask you to read Note 7-28 for perspectives on textualism and *Chevron*, which may provide helpful context for the Court's later decision in *Loper Bright*.)
- ***INS v. Cardoza-Fonseca* and accompanying notes 7-29 through 33 (pp. 669-77)**
- ***FDA v. Brown & Williamson Tobacco Corp.* and accompanying notes 7-35 through 7-40 (pp. 677-697)** (Your professor may ask you to review some of these materials as part the new section on the Major Questions Doctrine, discussed below in the new § 7.07 to this Supplement.)

§ 7.05A *Loper Bright* and the End of *Chevron* Deference [new section – replaces § 7.06 in the casebook]

Delete the contents of § 7.06 in the casebook (pp. 697-705) and replace them with the following materials.
After years of various members of the Court writing opinions questioning the validity of *Chevron* Deference, six of the members voted to overrule the 40-year-old decision in *Chevron v. NRDC*. Consider

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the arguments for and against *Chevron* Deference—textual and policy—as you read the Court's decision and dissent's views below. Consider, too, how this decision will change how courts interpret administrative statutes going forward. Will agencies play any role in statutory interpretation after *Loper Bright*? If so, what role will they play?

Loper Bright Enterprises v. Raimondo

603 U.S. 369 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

[The Court recounted the facts of the matters before it; though interesting, those facts played no role in the Court's ultimate decision to overrule *Chevron*.]

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. . . . The Federalist No. 37 (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.* To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the

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meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. That is because "the longstanding 'practice of the government' "—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.' " *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (first quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret." *United States v. Moore*, 95 U.S. 760, 763 (1878).

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." Otherwise, judicial judgment would not be independent at all. . . .

B

The New Deal ushered in a "rapid expansion of the administrative process." But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936). "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."

But the Court did not extend similar deference to agency resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." . . . It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight."

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts

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and litigants [could] properly resort for guidance," even on legal questions. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. . . .

Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray v. Powell*, 314 U.S. 402 (1941), and *NLRB v. Hearst Publications*, Inc., 322 U.S. 111 (1944). . . . At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. . . .

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that *courts* must "decide all relevant questions of law." 5 U.S.C. § 706.

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers."

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." § 706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

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In a statute designed to "serve as the fundamental charter of the administrative state," *Kisor v. Wilkie*, 588 U.S. 558, 580 (2019) (plurality opinion), Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment).[209]

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." Some of the legislation's most prominent supporters articulated the same view. Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); see also *Kisor*, 588 U.S. at 582 (plurality opinion) (same). That "present law," as we have described, adhered to the traditional conception of the judicial function

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. [The Court's discussion of the contemporaneous academic literature is omitted.]

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U.S. at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term.[210] Others

[209] The dissent observes that Section 706 does not say expressly that courts are to decide legal questions using "a *de novo* standard of review." That much is true. But statutes can be sensibly understood only "by reviewing text in context." Since the start of our Republic, courts have "decide[d] . . . questions of law" and "interpret[ed] constitutional and statutory provisions" by applying their own legal judgment. § 706. Setting aside its misplaced reliance on *Gray* and *Hearst*, the dissent does not and could not deny that tradition. But it nonetheless insists that to codify that tradition, Congress needed to expressly reject a sort of deference the courts had never before applied—and would not apply for several decades to come. It did not. "The notion that some things 'go without saying' applies to legislation just as it does to everyday life."

[210] See, *e.g.*, 29 U.S.C. § 213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U.S.C. § 5846(a)(2) (requiring notification to Nuclear Regulatory

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empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752 (2015), such as "appropriate" or "reasonable."[211]

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in " 'reasoned decisionmaking' " within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

In the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. As an early proponent (and later critic) of *Chevron* recounted, courts during this period thus identified delegations of discretionary authority to agencies on a "statute-by-statute basis." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516.

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' " was consistent with the term "stationary source" as used in the Clean Air Act. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," To discern such intent, the Court noted, a reviewing court was to "employ[ ] traditional tools of statutory construction." .

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the

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Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

[211] See, *e.g.*, 33 U.S.C. § 1312(a) (requiring establishment of effluent limitations "[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator ..., discharges of pollutants from a point source or group of point sources ... would interfere with the attainment or maintenance of that water quality ... which shall assure" various outcomes, such as the "protection of public health" and "public water supplies"); 42 U.S.C. § 7412(n)(1)(A) (directing EPA to regulate power plants "if the Administrator finds such regulation is appropriate and necessary").

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absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." It did not matter *why* Congress, as the Court saw it, had not squarely addressed the question, or that "the agency ha[d] from time to time changed its interpretation." The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

Initially, *Chevron* "seemed destined to obscurity." The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740–741 (1996).

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U.S. at 109 (Scalia, J., concurring in judgment).

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U.S. at 843, n. 11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, see, *e.g.*, *Edwards' Lessee*, 12 Wheat. at 210; *Skidmore*, 323 U.S. at 140, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

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Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, . . . the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." Dissent, *infra*. Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. . . . But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

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Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U.S. at 578 (opinion of the Court). We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting), and courts did so without issue in agency cases before *Chevron*. Courts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U.S. at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. . . .

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U.S. at 575 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See The Federalist, No. 78. They were to construe the law with "[c]lear heads . . . and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 Works of James Wilson 363 (J. Andrews ed. 1896).

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That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction.. So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.' " *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation."

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.' " *King v. Burwell*, 576 U.S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],' " *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, or to statutory schemes not administered by the agency seeking deference. And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications.

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another. And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. . . .

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents—understandably continue to apply it.

. . . At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added).

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IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. . . . [Most of the Court's stare decisis analysis is omitted.]

Chevron was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a " 'special justification' " for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: " 'Judges are not experts in the field.' " That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch at 177. The rest of the dissent's selected epigraph is that judges " 'are not part of either political branch.' " Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous. . . .

Justice THOMAS, concurring.

I join the Court's opinion in full because it correctly concludes that *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* must finally be overruled. . . .

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. See *Baldwin*, 589 U. S., at –— (dissenting opinion); *Michigan v. EPA*, 576 U.S. 743, 761–763 (2015) (concurring opinion). And, I agree with Justice GORSUCH that we should not overlook *Chevron*'s constitutional defects in overruling it. To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Perez*, 575 U.S. at 118 (opinion of THOMAS, J.). *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits. . . . [The remainder of Justice Thomas's concurrence is omitted.]

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Justice GORSUCH, concurring. [Justice Gorsuch's concurrence, primarily focusing on stare decisis, is omitted.]

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, dissenting.
For 40 years, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740–741 (1996).

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. See, *e.g.*, *National Federation of Independent Business v. OSHA*, 595 U.S. 109 (2022); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden* v. *Nebraska*, 600 U. S. 477 (2023). But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have

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enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 388 (2022) (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. . . . The majority disdains restraint, and grasps for power.

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress "consciously desired" the administering agency to fill in aspects of the legislative scheme, believing that regulatory experts would be "in a better position" than legislators to do so. *Chevron*, 467 U.S. at 865. Or "perhaps Congress was unable to forge a coalition on either side" of a question, and the contending parties "decided to take their chances with" the agency's resolution. *Id.* Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." *Kisor*, 588 U.S. at 566 (plurality opinion). Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question *is*. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U.S.C. § 262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids? See *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F. Supp. 3d 66, 79–80, 93–106 (D.D.C. 2020).

- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U.S.C. § 1532(16); see § 1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct" because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest? See *Northwest Ecosystem Alliance v. United States Fish and Wildlife Serv.*, 475 F.3d 1136, 1140–1145, 1149 (9th Cir. 2007).

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- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U.S.C. § 1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area? See *Bellevue Hospital Center v. Leavitt*, 443 F.3d 163, 174–176 (2d Cir. 2006).

- Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." § 3(b)(1), 101 Stat. 676; see § 3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met? See *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 466–467, 474–475 (D.C. Cir. 1998).

- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U.S.C. § 7502(c)(5). Does the term "stationary source[ ]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another?

In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). A question thus arises: Who decides which of the possible readings should govern?

This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. . . .

That rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. And every once in a while, Congress provides an explicit instruction for dealing with that contingency—assigning primary responsibility to the courts, or else to an agency. But much more often, Congress does not say. Thus arises the need for a presumption—really, a default rule—for what should happen in that event. Does a statutory silence or ambiguity then go to a court for resolution? Or to an agency? This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. Or said otherwise, Congress would select the agency it has put in control of a regulatory scheme to exercise the "degree of discretion" that the statute's lack of clarity or completeness allows. Of course, Congress can always refute that presumptive choice—can say that, really, it would prefer courts to wield that discretionary power. But until then, the presumption cuts in the agency's favor.[212] The next question is why.

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[212] Note that presumptions of this kind are common in the law. In other contexts, too, the Court responds to a congressional lack of direction by adopting a presumption about what Congress wants, rather than trying to figure that out in every case. And then Congress can legislate, with "predictable effects," against that "stable background" [Justice Kagan lists as examples the presumption against extraterritoriality, the presumption against retroactivity, the presumption against repeal of statutes by implication, and the presumption against treating a procedural requirement as jurisdictional.] The *Chevron* deference rule is to the same effect: The Court generally assumes that Congress intends to confer discretion on agencies to handle statutory ambiguities or gaps, absent a direction to the contrary. The majority calls that presumption a "fiction," but it is no more so than any of the presumptions listed above. They all are best guesses—and usually quite good guesses—by courts about congressional intent.

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For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? I don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take the perhaps more accessible-sounding second case, involving the Endangered Species Act. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. Let's stick with squirrels for a moment, except broaden the lens. In construing a term like "distinct" in a case about squirrels, the Service likely would benefit from its "historical familiarity" with how the term has covered the population segments of other species. Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. Or consider, for another way regulatory familiarity matters, the example about adjusting Medicare reimbursement for geographic wage differences. According to a dictionary, the term "geographic area" could be as large as a multi-state region or as small as a census tract. How to choose? It would make sense to gather hard information about what reimbursement levels each approach will produce, to explore the ease of administering each on a nationwide basis, to survey how regulators have dealt with similar questions in the past, and to confer with the hospitals themselves about what makes sense. See *Kisor*, 588 U.S. at 571 (plurality opinion) (noting that agencies are able to "conduct factual investigations" and "consult with affected parties"). Congress knows the Department of Health and Human Services can do all those things—and that courts cannot.

Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. Or consider *Chevron* itself. As the Court there understood, the choice between defining a "stationary source" as a whole plant or as a pollution-emitting device is a choice about how to "reconcile" two "manifestly competing interests." The plantwide definition relaxes the permitting requirement in the interest of promoting economic growth; the device-specific definition strengthens that requirement to better reduce air pollution. Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are "subject to the supervision of the President, who in turn answers to the public." *Kisor*, 588 U.S. at 571–572 (plurality opinion). So when faced with a statutory ambiguity, "an agency to which

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Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865.

None of this is to say that deference to agencies is always appropriate. . . . [The Court's *Chevron* jurisprudence] give[s] interpretive primacy to the agency when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority. . . .

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a *presumption*. . . . [A]s with any default rule, if Congress decides otherwise, all it need do is say.

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that *Chevron* chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality"). Over the last four decades, Congress has authorized or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. See 12 U.S.C. § 25b(b)(5)(A) (exception #1); 15 U.S.C. § 8302(c)(3)(A) (exception #2). Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. See S. 909, 116th Cong., 1st Sess., § 2 (2019) (still a bill, not a law); H. R. 5, 115th Cong., 1st Sess., § 202 (2017) (same). So to the extent the majority is worried that the *Chevron* presumption is "fiction[al]"—as all legal presumptions in some sense are—it has gotten less and less so every day for 40 years. The congressional reaction shows as well as anything could that the *Chevron* Court read Congress right.

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are *not* entitled to deference."

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And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

That text, contra the majority, "does not resolve the *Chevron* question." C. Sunstein, *Chevron* As Law, 107 Geo. L. J. 1613, 1642 (2019). Or said a bit differently, Section 706 is "generally indeterminate" on the matter of deference. The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[ ] of law" as when it uses a *de novo* standard. The deferring court then conforms to Section 706 "by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed [the statute it administers] reasonably."

Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" from *de novo* review. Surely? In another part of Section 706, Congress explicitly referred to *de novo* review. § 706(2)(F). With all those references to standards of review—both deferential and not—running around Section 706, what is "telling" is the absence of any standard for reviewing an agency's statutory constructions. . . . Section 706 neither mandates nor forbids *Chevron*-style deference.[213] . . .

III

And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. . . . In particular, the majority's decision today will cause a massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years. [The dissent's stare decisis analysis is omitted.]

IV

Judges are not experts in the field, and are not part of either political branch of the Government.

[213] In a footnote responding to the last two paragraphs, the majority raises the white flag on Section 706's text. Yes, it finally concedes, Section 706 does not *say* that *de novo* review is required for an agency's statutory construction. Rather, the majority says, "some things go without saying," and *de novo* review is such a thing. But why? What extra-textual considerations force us to read Section 706 the majority's way? In its footnote, the majority repairs only to history. But as I will explain below, the majority also gets wrong the most relevant history, pertaining to how judicial review of agency interpretations operated in the years before the APA was enacted.

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— *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (See *Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. . . . All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. . . . .

And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary. See *SEC* v. *Jarkesy*, 603 U. S. ____ (2024). As to the second, just my own defenses of *stare decisis*—my own dissents to this Court's reversals of settled law—by now fill a small volume. Once again, with respect, I dissent.

Notes & Questions

S7-3. What is the basis for the Court's decision? Does it rely on constitutional principles or statutory interpretation? Is the Court's decision to disavow *Chevron* deference something that Congress could reverse?

S7-4. Outline the majority's analysis. What steps does the Court take to conclude that *Chevron* analysis is incompatible with the Administrative Procedure Act?

S7-5. What caveats does the Court offer to its holding that courts must independently interpret statutes? Can agencies ever definitively interpret statutes after *Loper Bright*? Can agencies ever influence judicial interpretations? If so, how and when?

* * *

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Note *Loper Bright*'s discussion of *Skidmore*. What role should that doctrine—conventionally referred to as a "deference" doctrine—play? Consider the following circuit court opinions. How do they grapple with the *Loper Bright* issues?

Mayfield v. U.S. Department of Labor

117 F.4th 611 (5th Cir. 2024)

Jennifer Walker Elrod, Circuit Judge:

For more than eighty years, the Department of Labor has defined the so-called White Collar Exemption in the Fair Labor Standards Act to include a minimum-salary requirement. Robert Mayfield challenges the latest rule, which updates the minimum salary necessary to fall within the Exemption, on the ground that promulgating any rule imposing a salary requirement exceeds the Department's statutorily conferred authority or else violates the nondelegation doctrine. The district court granted the Department's motion for summary judgment. Because the 2019 Minimum Salary Rule falls within the Department's explicitly delegated authority to define and delimit the terms of the Exemption, and because that power is not an unconstitutional delegation of legislative power, we AFFIRM.

I

The Fair Labor Standards Act sets out a variety of standards and protections governing labor conditions. *See* 29 U.S.C. § 201, *et seq.* For example, it sets a minimum wage and requires overtime for work beyond forty hours per week. *Id.* §§ 206(a), 207(a)(1). Though the FLSA defines the workers to whom the statute applies broadly, *see id.* § 203(e)(1) (defining "employee" as "any individual employed by an employer"), it also contains a series of exemptions that exclude certain types of employees from that definition. Relevant here, the FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity." *Id.* § 213(a)(1). That exemption is known as the "EAP Exemption" or the "White Collar Exemption," and it gives the Secretary of the Department of Labor the power to "define[ ] and delimit[ ]" the "terms" of the exemption.

Though the EAP Exemption, like many of the other FLSA exemptions, defines qualifying workers through duties and job types, DOL has repeatedly issued a minimum-salary rule that prevents workers from qualifying for the Exemption if their salary falls below a specified level. DOL has long justified its rules on the ground that the terms used in the EAP Exemption connote a particular status and prestige that is inconsistent with low salaries. As the district court explained . . . , "[h]istorically, the Department has justified the use of a salary-level test by pointing to its effectiveness as a screen for an employee's actual duties."

In 2019, DOL issued a new version of what is known as the "Minimum Salary Rule," raising the minimum salary required to qualify for the Exemption from $455 per week to $684 per week . . . . DOL is currently considering a proposed rule that would raise the minimum salary to $1,059 per week, a roughly 55% increase from the 2019 Rule.

Mayfield sued DOL, claiming that the 2019 Rule exceeds DOL's statutorily conferred authority. Mayfield is a small-business owner who runs thirteen fast-food restaurants in Austin, Texas. . . . Mayfield argues that DOL lacks, and has always lacked, the authority to define the EAP Exemption in terms of salary level.

II

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[The court's discussion of the major questions doctrine is excerpted below in § 7.07, note S7-15 of this Supplement.]

III

Having determined that the major questions doctrine does not apply, we turn to Mayfield's argument that the 2019 Minimum Salary Rule exceeds DOL's statutory authority. In *Loper Bright Enterprises v. Raimondo*, the Supreme Court clarified "the unremarkable, yet elemental proposition reflected in judicial practice dating back to *Marbury*" that "courts decide legal questions by applying their own judgment," even in agency cases. Where, as here, Congress has clearly delegated discretionary authority to an agency, we discharge our duty by "independently interpret[ing] the statute and effectuat[ing] the will of Congress subject to constitutional limits." This means that we must "independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." Doing so requires using "all relevant interpretive tools" to determine the "best" reading of a statute; a merely "permissible" reading is not enough.

A

Here, because there is an uncontroverted, explicit delegation of authority, the question is whether the Rule is within the outer boundaries of that delegation. We start with the text of the explicit delegation, which gives DOL the authority to "define[ ] and delimit[ ]" the terms of the Exemption. 29 U.S.C. § 213(a)(1). "Define" means to "set forth or explain what a word (or expression) means." Oxford English Dictionary; Black's Law Dictionary. "Delimit" means to "mark or determine (a limit or boundary)" of something. *Id.*

Promulgating the Minimum Salary Rule can be construed in two ways, both of which are consistent with DOL's statutorily conferred authority. By promulgating the Rule, DOL defines, in part, what it means to work in an executive, administrative, or professional capacity (namely, to earn at least a particular amount of money). . . . The Minimum Salary Rule can also be construed as an exercise of the power to delimit the scope of the Exemption. By promulgating the Rule, DOL sets a limit on what is otherwise defined by the text of the Exemption. On either construal of what DOL is doing when it promulgates the Rule, its action is within the scope of its authority.

B

Mayfield's arguments to the contrary are unavailing. He contends that the power to "define and delimit" the terms of the Exemption is only the power to further specify and enumerate the types of duties that qualify an employee for the Exemption. On Mayfield's view, the Minimum Salary Rule arbitrarily imposes a new requirement that lacks a textual basis because the statute only speaks of duties. Any classification based on a characteristic other than duties, then, would exceed DOL's authority. . . . Mayfield points to the fact that many FLSA exemptions are defined in terms of job duties and that other exemptions explicitly reference salary level, demonstrating that Congress knows how to impose such a requirement when it wants one.

We are not persuaded. Using salary level as a criterion for EAP status has a far stronger textual foundation than Mayfield acknowledges. As DOL correctly points out, the terms in the EAP Exemption, particularly "executive," connote a particular status or level for which salary may be a reasonable proxy. Indeed, the EAP Exemption is also frequently referred to as the "White Collar Exemption." Distinctions based on salary level are also consistent with the FLSA's broader structure, which sets out a series of salary protections for workers that common sense indicates are unnecessary for highly paid employees.

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Mayfield's argument nevertheless raises an important point: adding an additional characteristic is consistent with the power to define and delimit, but that power is not unbounded. A characteristic with no rational relationship to the text and structure of the statute would raise serious questions. And so would a characteristic that differs so broadly in scope from the original that it effectively replaces it.

The same is true if one characterizes the Rule as DOL implementing a proxy to determine who falls within the Exemption. Using salary as a proxy for EAP status is a permissible choice because, as we have explained, the link between the job duties identified and salary is strong. That does not mean, however, that use of a proxy characteristic will always be a permissible exercise of the power to define and delimit. If the proxy characteristic frequently yields different results than the characteristic Congress initially chose, then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them. That is not the case here.

Mayfield also argues that Congress knows how to impose a salary requirement when it wants to. For example, application of the Baseball Exemption turns, in part, on whether the player surpasses a minimum weekly salary. 29 U.S.C. § 213(a)(19). That argument is inapposite. True, we "generally presume" that Congress acted "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." Here, however, the question is not whether the Exemption's terms should be interpreted to contain a salary requirement. The question is whether the power conferred by the explicit delegation to "define[ ] and delimit[ ]" the terms of the statute allows DOL to impose a salary requirement. Even if Congress acted intentionally by omitting a salary requirement from the EAP Exemption, that does not mean that the power it conferred excludes the option of imposing the requirement.

C

Finally, a note about *Skidmore* deference. In *Loper Bright*, the Supreme Court explained that "courts may ... seek aid from the interpretations of those responsible for implementing particular statutes." Under *Skidmore*, the weight given to the agency's interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." "The last factor, persuasiveness, is the touchstone in determining how much to defer to an agency interpretation." *Midship Pipeline, Co., LLC v. FERC*, 45 F.4th 867, 875 (5th Cir. 2022).

One might ask what work *Skidmore* deference can do given the Supreme Court's statements that (1) statutes have a "best reading ... the reading the court would have reached if no agency were involved," and (2) "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright*, 144 S. Ct. at 2266. Taking these statements together, it seems that either the agency's interpretation is the best interpretation (in which case no deference is needed) or the agency's interpretation is not best (in which case it lacks persuasive force and is not owed deference). We need not address that issue here because DOL's interpretation of the statute is "best" based on traditional tools of statutory interpretation and without reliance on deference of any kind. We note, however, that if *Skidmore* deference does any work, it applies here. DOL has consistently issued minimum salary rules for over eighty years. Though the specific dollar value required has varied, DOL's position that it has the authority to promulgate such a rule has been consistent. Furthermore, it began doing so immediately after the FLSA was passed. And for those who subscribe to legislative acquiescence, Congress has amended the FLSA numerous times without modifying, foreclosing, or otherwise questioning the Minimum Salary Rule.

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We join four of our sister circuits in holding that DOL has the statutory authority to promulgate the Minimum Salary Rule.

IV

Finally, we consider Mayfield's argument that the EAP Exemption, when interpreted to grant DOL the authority to issue the 2019 Minimum Salary Rule, violates the nondelegation doctrine because it lacks an intelligible principle to guide DOL's power to define and delimit the EAP Exemption's terms. As currently constituted,[214] the intelligible-principle test requires Congress to set out guidance that "delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." As the Supreme Court recently explained, "[t]hose standards ... are not demanding," and the Supreme Court has only twice found an excessive delegation of power, doing so in each case because "Congress had failed to articulate *any* policy or standard to confine discretion." . . .

Here, as the district court correctly noted, there are at least two principles that guide and confine the authority delegated to DOL: the FLSA's statutory directive to eliminate substandard labor conditions that are detrimental to the health, efficiency, and general wellbeing of workers, 29 U.S.C. § 202(a), (b), and the text of the Exemption itself, *id.* § 213(a)(1). The guidance provided by these provisions is admittedly not straightforward, and the boundaries it delineates are neither clear nor uncontroversial. But as the Supreme Court has said, the existing standard is not demanding. Under that standard, both the FLSA's purpose and the text of the Exemption itself provide at least *some* guidance for how DOL can exercise its authority. Therefore, they are each independently sufficient to satisfy the nondelegation doctrine's requirements.

True, the Minimum Salary Rule determines *which* workers are protected by the FLSA. By contrast, the FLSA's purpose speaks to *what* workers should be protected from. But it nevertheless provides guidance. DOL can look to whether a particular group of workers is subject to the very problems the Act seeks to remedy to determine whether the Exemption should be clarified to include or exclude that group of workers. DOL is also constrained by the qualification that the FLSA should improve working conditions "without substantially curtailing employment or earning power." 29 U.S.C. § 202(b). So while the FLSA's purpose speaks to *what* workers should be protected from, it nevertheless guides and limits DOL's authority to enact a rule determining *which* workers require protection.

So too with the text of the Exemption itself. The words "executive," "administrative," and "professional" each have meaning. That meaning both guides and limits DOL's power to "define[ ] and delimit[ ]" them. DOL can enact rules that clarify the meaning of those terms or, as in the case of the Minimum Salary Rule, impose *some* limitations on their scope. By contrast, DOL cannot enact rules that replace or swallow the meaning those terms have. It is true that the Exemption's text does not provide a precise line for what is permissible and what is not. As we have discussed, a rule that uses a proxy to determine whether something falls within the Exemption poses the difficult question of how accurate the proxy must be to be permissible.

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[214] The current formulation of the nondelegation doctrine has been called into serious question. In *Gundy v. United* States, three justices wrote that the intelligible-principle test, as applied by the Court, "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." 588 U.S. 128, 164, 139 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). . . . On the Gundy dissent's view, the test should be whether the statute only assigns the executive fact-finding duties, makes clear the facts to be considered and the criteria against which to evaluate them, and leaves all policy judgments to Congress, not the executive branch. Of course, it is not our prerogative to decide cases based on what the Supreme Court might do.

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And a rule imposing a new characteristic raises the question of whether that characteristic is sufficiently connected to the existing definition. But an intelligible principle is a guide, not a definitive guide, to what can and cannot be done. As such, the Exemption itself provides an intelligible principle for the power to define and delimit its terms.

The lack of clarity in both intelligible principles raises reasonable concerns, but they are concerns that are only legally relevant under a test that has been floated but never grounded in law. To require more is to ask for a level of specificity that the law does not currently demand. . . .

Notes & Questions

S7-6. How does the Fifth Circuit analyze the Department of Labor's interpretation of the Fair Labor Standards Act? Can you explain why the court took the approach it took? What role did *Loper Bright* play in the analysis?

What do you make of the court's nondelegation discussion? Take this opportunity to review your notes and understanding of that doctrine, covered in §§ 5.04 to 5.06 of the Casebook and § 5.06 of this Supplement.

Lopez v. Garland

116 F.4th 1032 (9th Cir. 2024)

THOMAS, Circuit Judge:

Christian Lopez, a native and citizen of Mexico, seeks review of a decision by the Board of Immigration Appeals ("BIA") dismissing his appeal from a decision by an immigration judge ("IJ") finding him removable due to the commission of crimes involving moral turpitude ("CIMTs") and denying asylum and related relief. We deny the petition for review. . . .

We review legal questions, including questions of statutory interpretation, *de novo.* Prior to the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, we would determine whether the agency's interpretation was due deference under *Chevron*. However, after *Loper Bright Enterprises*, we may look to agency interpretations for guidance, but do not defer to the agency. 144 S. Ct. at 2266–67; *see Skidmore v. Swift & Co.* We review factual findings, including those that underlie eligibility determinations for asylum and related relief, under the substantial evidence standard. . . .

I

Lopez was brought to the United States by his mother, Yadira, when Lopez was approximately two years old. Yadira left Mexico with her children due to domestic violence perpetrated by Lopez's father, Rodrigo. According to Yadira, Rodrigo routinely inflicted serious physical violence on her that sometimes resulted in bleeding and loss of consciousness. The violence was especially brutal during Yadira's pregnancy with Lopez, when Rodrigo "beat [her] in the stomach" and tried to choke her. Yadira also testified that Rodrigo was violent towards their children. When asked to speculate about Rodrigo's motive, Yadira testified that the violence seemed to "start out of nothing" and was likely exacerbated by drug use. Yadira contacted the police at least once but reported that they did nothing to help. Yadira testified that, after Lopez was born, Rodrigo "rejected" his son and expressed suspicions that Yadira had been unfaithful. Lopez required special assistance in school throughout his childhood.

Upon arriving in the United States in 2000, Yadira and Lopez lived for approximately thirteen years without lawful immigration status and did not file for asylum. In 2013, one of Lopez's relatives received a T visa,

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which made Lopez eligible for T-5 nonimmigrant status as a family beneficiary. However, in 2017, Lopez inadvertently allowed his T-5 status to expire. . . .

In July 2019, Lopez was arrested while driving a friend's borrowed car that had been reported as stolen. Once in custody, Lopez was charged with numerous offenses including trespassing, shoplifting, and carrying a concealed weapon without a permit. Lopez pleaded guilty in September 2021 to the felony weapons charge and four municipal charges of petit larceny under section 8.10.040 of the Reno Municipal Code ("RMC") in exchange for dismissal of the remaining charges. . . . After serving 14 months, Lopez was released from prison in January 2021 and placed directly in the custody of the Department of Homeland Security ("DHS").

On January 22, 2021, DHS initiated removal proceedings by serving Lopez with a notice to appear ("NTA") charging him as removable under Section 237 of the Immigration and Nationality Act ("INA"). The NTA lists, as the sole basis for removability, the fact that Lopez was "convicted of two crimes involving moral turpitude [CIMT] not arising out of a single scheme of criminal misconduct." *See* 8 U.S.C. § 1227(a)(2)(A)(ii). The convictions referenced in the NTA are the four counts of petit larceny under RMC § 8.10.040.

Lopez argued before the IJ that his municipal charges did not provide a valid basis for removal . . . . Concurrently, Lopez filed an application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT") in May 2021. . . .

The BIA affirmed the IJ's determination that Lopez did not demonstrate circumstances warranting an exception to the asylum filing deadline. The BIA also affirmed the IJ's denial of withholding and CAT relief on the merits, holding that the IJ's factual findings were supported by substantial evidence. Lopez timely petitioned for review before this Court, challenging both the basis for removability and denial of his claim for asylum and withholding.

II

The BIA correctly concluded that Lopez is removable based on his municipal convictions for petty larceny. We review Lopez's three arguments contesting removability and conclude that each is foreclosed by the proper interpretation of the INA.

A

We begin by considering Lopez's argument that the ordinance under which he was convicted does not categorically define a CIMT because it does not specify whether the deprivation of property is permanent or temporary. We conclude that the BIA's most recent interpretation of the INA holding that a theft offense constitutes a CIMT if it includes an intent to deprive "either permanently *or* under circumstances where the owner's property rights are substantially eroded," *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 854 (BIA 2016), is entitled to respect under *Skidmore*. Applying the BIA's interpretation, we conclude that a conviction under Reno's petit larceny ordinance, RMC § 8.10.040, is categorically a CIMT.

To determine whether an offense is a CIMT, we employ the "categorical approach" which focuses on the elements of the crime as stated in the relevant statute or ordinance rather than the specific conduct of the individual. *Pereida v. Wilkinson*, 592 U.S. 224, 233 (2021). Under this approach, "we compare the elements of the state offense"—or in this case, municipal offense—"to the elements of the generic offense defined by federal law." If the elements of the state or municipal crime are "the same as or narrower than" the elements of a generic CIMT, it is a "categorical match" and "every conviction qualifies as [a CIMT]." If,

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by contrast, the state or local statute sweeps more broadly and criminalizes conduct that falls out the generic federal definition, a conviction does not qualify as a CIMT.

Prior to *Loper Bright Enterprises*, we would, under *Chevron*, defer to the BIA's specification of the "subset of theft offenses" that constitute CIMTs "when articulated by the BIA in a published opinion." Now, our task is to evaluate the statute independently under *Skidmore*, giving "due respect," but not binding deference to the agency's interpretation. *Loper Bright Enter.*[215]

As the Supreme Court explained in *Skidmore*, agency decisions "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." And "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Under *Skidmore*, "[t]he deference given to an agency action may range from great respect to near indifference, depending on the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position." *Bax v. Doctors Med. Ctr. of Modesto, Inc.*, 52 F.4th 858, 872 (9th Cir. 2022). Thus, we have upheld BIA interpretations under *Skidmore* when the BIA " 'confront[ed] an issue germane to the eventual resolution of the case' and 'resolve[d] it after reasoned consideration.' " . . .

The BIA's decision in *Diaz-Lizarraga* is thorough and well-reasoned. It is . . . also consistent with judicial precedent. We have previously stated that "the generic definition of a crime involving moral turpitude is a crime involving conduct that (1) is base, vile, or depraved and (2) violates accepted moral standards." "Our understanding of the general meaning of this amorphous phrase does not vary materially from that of the BIA," which has defined morally turpitudinous conduct as that which is "inherently base, vile or depraved." For theft offenses, we have consistently held that acts of theft, are "crime[s] of moral turpitude" regardless of "whether the theft be petty or grand." However, like the BIA, we have also recognized that convictions under certain "theft" statutes do not qualify as CIMTs because they sweep more broadly to criminalize "conduct involving [a] less culpable mens rea," such as "joyriding," "receipt of stolen property," or "failure to make required disposition of funds." *Diaz-Lizarraga* retains this core distinction, expressly affirming that it is still "appropriate to distinguish between substantial and de minimis takings when evaluating whether theft offenses involve moral turpitude." 26 I. & N. Dec. at 851.

The BIA's revised interpretation is also consistent with the generic definition of theft that has been adopted for other purposes by the Supreme Court and the Model Penal Code. . . .

Given these considerations, we conclude that *Diaz-Lizarraga* is entitled to "*Skidmore* deference." Exercising our independent evaluation of the statute, we conclude that as applied to theft offenses, the statutory phrase "crimes involving moral turpitude," 8 U.S.C. § 1227(a)(2)(A)(ii), encompasses offenses that require the government to prove the defendant acted with an intent to permanently deprive an owner's property *or* substantially erode the owner's property rights. Offenses that criminalize less culpable conduct,

[215] *Loper Bright Enterprises* also instructed that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." Here, we are mindful that the governing statute provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and ... determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1). However, for the purposes of this case, we need not—and do not–determine whether this provision is a statute that expressly delegates interpretative authority to the agency.

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including temporary takings with the intent return to the owner shortly thereafter, however, are still categorically overbroad.

In reaching this conclusion, we are mindful that *Diaz-Lizarraga* overruled long-standing BIA precedent that created a sharp distinction between permanent and temporary property deprivations and holding that an intent to deprive permanently was a necessary element of a CIMT.

We have historically endorsed this BIA's prior interpretation under *Chevron*. Applying the prior BIA permanent deprivation requirement, for example, we held that state theft statutes that are broad enough to "penalize[ ] temporary takings" do not categorically describe CIMTs. We have not yet, however, had occasion to decide whether the BIA's revised interpretation in *Diaz-Lizarraga* reflects the correct interpretation of "moral turpitude" in the context of theft offenses, nor whether it was entitled to *Chevron* deference. In light of the BIA's thoroughness, persuasive reasoning, and consistency with the longstanding distinction between substantial and de minimis takings, we conclude that the BIA's 2016 interpretation is correct.

With this revised definition of a CIMT in mind, we must decide whether Lopez's convictions meet that definition. *Garcia-Martinez*, 886 F.3d at 1293. The ordinance under which Lopez was convicted provides that:

> It is unlawful for any person to take or carry away the property of another with the intent to deprive the owner of his property therein in any value less than $650.00 and for his conviction therefore, he shall be fined in an amount not more than $1,000.00 and/or be incarcerated not more than six months. In addition to any other penalty, the court shall order the person to pay restitution.

RMC § 8.10.040.

The RMC does not define "deprive," but instructs that "[w]ords and phrases not specifically defined shall be construed according to the context and approved usage." RMC § 1.01.030(4). To ascertain the commonly accepted "usage" of the term, we consult both the Model Penal Code and Nevada state law, both of which define "deprive" as a "withholding" that is either permanent or for so long that a substantial portion of its value to the owner is lost. *See* Model Penal Code § 223.0; Nev. Rev. Stat. § 205.0824.

Reading the RMC § 8.10.040 with these definitions of "deprive" in mind, we conclude that the ordinance does not encompass de minimis temporary takings. Under *Diaz-Lizarraga*, with which we agree, RMC § 8.10.040 categorically defines a CIMT. As such, Lopez's convictions under the ordinance provide a proper basis for removal under 8 U.S.C. § 1227(a)(2)(A)(ii) because RMC § 8.10.040 requires an intent to permanently deprive or substantially erode an owner's property interest. . . .

III

Having concluded that the BIA did not err in finding Lopez removable based on his municipal convictions, we turn to Lopez's application for asylum and withholding of removal. [The discussion of the untimeliness of Lopez's asylum application is omitted.]

B

Substantial evidence supports the agency's denial of Lopez's application for withholding of removal based its conclusion that he did not demonstrate likelihood of persecution based on family membership.

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As to past persecution, the agency concluded that the harm Lopez suffered "in utero" did not constitute past persecution because it was not motivated by animosity on account of his familial relationship with his mother. The record demonstrates that Yadira suffered serious domestic abuse during her pregnancy that impacted Lopez physically, emotionally, and cognitively. The record does not, however, compel the conclusion that the abuse was directed intentionally at Lopez, who was not yet born at the time. In the agency's view, Lopez was an incidental victim of the abuse against his mother—not the direct target. The record does not compel reversal of this conclusion.

The record also supports the agency's conclusion that Lopez will not face future persecution based on his identity as Yadira's son. Lopez did not provide any evidence that Lopez's father or paternal relatives have any interest in harming him as an adult. To the contrary, the record shows that Rodrigo has been absent from his children's lives. Accordingly, the record does not compel the conclusion that Lopez will face persecution at the hands of his father if he his returns to Mexico.

IV

In sum, Lopez's larceny convictions constitute CIMTs that render him properly removable. His asylum application was untimely, and no circumstances permit excusing the untimeliness. Substantial evidence supports the agency's denial of withholding of removal. We deny the petition for review. . . .

PETITION DENIED.

Notes & Questions

S7-7. What work does *Skidmore* do in this case? How does the court apply *Skidmore*? Compare the Ninth Circuit's use of that doctrine with the Fifth Circuit's discussion in *Mayfield*. What is the best reading of *Loper Bright*'s discussion of *Skidmore*?

The court also engages in a short substantial evidence discussion (see § 7.03). We have excerpted that discussion so that you can see the standard in action.

§ 7.05B Deference to Informal Interpretation of Agency Rules (*Kisor*/*Auer* Deference) [new section]

Agencies often issue informal interpretations of their own notice-and-comment regulations, *see supra* § 4.03G, and courts must often grapple with those informal interpretations. For a time, reviewing courts often granted greater deference to an agency's informal interpretation of its own rules than the deference that agencies received under *Chevron* when interpreting their organic statutes. With little explanation or justification, the Supreme Court first announced its deference standard in 1945 in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In that case, the Court held that an agency's interpretation of its own regulation should receive "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Supreme Court reaffirmed this basic rule in *Auer v. Robbins*, 519 U.S. 452 (1997), the case from which the doctrine now enjoys its familiar title: *Auer* deference. In *Auer*, the Supreme Court addressed the Secretary of Labor's interpretation of a regulation implementing an exemption from the overtime pay requirements of the Fair Labor Standards Act (FLSA). Employees of the St. Louis Police Department sued the St. Louis Board of Police Commissioners seeking overtime pay. The FLSA exempted "bona fide executive, administrative, or professional" employees from the overtime pay requirements, and the Department of Labor had promulgated the "salary-basis" test to determine the kind of employee to which

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the exemption applied. Under the regulation, an employee was paid on a "salary basis, and therefore, exempt if his or her salary was not subject to reduction because of the quality of 'work performed.' " The primary question in *Auer* was whether members of the police department, whose pay could be adjusted for disciplinary reasons were truly "executive, administrative, or professional employee[s]" and consequently exempt from overtime pay requirements.

Ruling against the Police Department, the Supreme Court, in a unanimous decision written by Justice Scalia, deferred to the Secretary's interpretation of the ambiguous "salary-basis" test. Citing *Seminole Rock*, Justice Scalia stated that the Secretary's interpretation was "controlling unless 'plainly erroneous or inconsistent with the regulation.' " The fact that the Secretary presented its interpretation in a legal brief was irrelevant because the interpretation was "in no sense a 'post hoc rationalzatio[n]' advanced by an agency seeking to defend past agency action against attack … ." Moreover, there was no reason to suspect that the interpretation presented in the brief did not "reflect the agency's fair and considered judgment on the matter in question." Justice Scalia did not elaborate upon the underlying rationale for why deference to the agency's interpretation was appropriate beyond mentioning briefly that because the agency was free to write regulations as broadly as it wished, it was not bound to narrowly construe the regulations.

In 2013, however, Justice Scalia expressed serious doubts about the doctrine. *See*, *Decker v. Northwest Environmental Defense Ctr*., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) ("[H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."). In separate opinions concurring in the judgment in *Perez v. Mortgage Bankers Ass'n*, discussed *supra* in Note 4-55, Justices Scalia and Thomas raised serious concerns about the *Auer* doctrine.

Justice Scalia stated:

> By giving . . . . interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

Id. at 1212 (Scalia, J., concurring in judgment). Justice Thomas raised separations-of-powers concerns in his concurrence: "Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent." *Id.* at 1213 (Thomas, J., concurring in judgment).

What do you make of Scalia's and Thomas's concerns? Do the safeguards on *Auer* deference identified in Justice Kagan's opinion sufficiently mitigate those concerns? You've already read *Loper Bright*—is the holding in *Kisor v. Wilkie*, below, compatible with that decision?

Kisor v. Wilkie

588 U.S. 558 (2019)

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Justice KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

I

[The Court summarized the facts of the case, admitting that, "[t]ruth be told, nothing recounted in this Part has much bearing on the rest of our decision."]

II

. . .

A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Or a "problem[ ] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.,* at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F.3d 579, 581–582 (CADC 1997).
- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does

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a traveler have to pack his jar of truffle pâté in that way? See *Laba v. Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).

- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 C.F.R. § 50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1107–1108 (CADC 1993).
- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 C.F.R. § 314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 762–763 (CADC 2010).
- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime if they are paid on a "salary basis." 29 C.F.R. § 541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? 519 U.S. at 459–462.

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. . . . . And *Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution ... is entitled to the greatest weight").

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The

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agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. . . .

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns." Return to our TSA example. In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. It is easy enough to know what "comparable lines of sight" means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. Or finally, take the more technical "moiety" example. Or maybe, don't. If you are a judge, you probably have no idea of what the FDA's rule means, or whether its policy is implicated when a previously approved moiety is connected to lysine through a non-ester covalent bond.

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." . . .

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. . . . Consider *Auer* itself. There, four Circuits held that police captains were "subject to" pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. Two other Circuits held that captains were "subject to" pay deductions only if the department's actual practice made that punishment a realistic possibility. Had the agency issued an interpretation before all those rulings (rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty. . . .

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference. . . . [W]hen the reasons for [deference] do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade." *Christopher*, 567 U.S. at 159 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). . . . . And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is "unwarranted." In particular, that will be so when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, "fair[, or] considered judgment."

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. . . [I]n a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U.S. at 414—may suggest a caricature of the doctrine, in which deference is "reflexive." . . . So before we turn to Kisor's specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Auer* does not, and indeed could not, go that far.

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. . . . To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. . . .

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. . . . Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. . . . But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. . . .

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. . . . Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. . . .

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Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency." . . . Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, or one concerning the award of an attorney's fee. When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. . . .

* * *

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

[The Chief Justice's opinion concurring in part, agreeing not to overrule *Auer* on *stare decisis* grounds and "agree[ing] with the Court's treatment in Part II–B of the bounds of *Auer* deference," is omitted.]

Justice GORSUCH, with whom Justice THOMAS joins, with whom Justice KAVANAUGH joins as to Parts I, II, III, IV, and V, and with whom Justice ALITO joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*. In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this

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Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

[The remainder of Gorsuch's opinion is omitted, as is Kavanaugh's opinion (joined by Alito) concurring in the judgment.]

Notes and Questions

S7-8. The classic formulation of *Auer* deference (prior to *Kisor*) was that courts would defer to an agency's interpretation (i.e. an interpretive rule or similar) of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation. Further, as the main text suggests, *Auer* was once thought of as the strongest form of deference – even stronger than *Chevron*. *Kisor* put the kibosh on that view, even as it reaffirmed (and restricted) *Auer*. Note that much of the analysis commanded only a plurality – Roberts, C.J., concurred in omitted sections dealing with stare decisis, and the opinions concurring in the judgment (see note 7-53 of the principal casebook) all wanted to do away entirely with Auer.

S7-9. Part II.A of the opinion begins with some excellent examples of where interpretive rules would be welcome, assuming the agency ticks all of the new boxes. Why does the plurality think it worthwhile to keep *Auer* around, despite the restrictions?

S7-10. What are the boxes that must be ticked? When is *Auer* deference to an agency's interpretation of its own regulations appropriate? What is the rationale for *Auer*? What is the rationale for retaining *Auer*?

S7-11. What might be the rationale for keeping *Auer* deference but not *Chevron* deference? Does keeping *Auer* deference in any form still make sense?

§ 7.07 The Major Questions Doctrine [new section]

Delete the materials in § 7.07 (except as specified) and replace them with the following.

The Major Questions Doctrine originated as a limitation on *Chevron* deference—*FDA v. Brown & Williamson Tobacco Corp.* (§ 7.05 in the Casebook, p. 677), for example, said, "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." That is, as the doctrine was initially formulated, it suggested that the "economic and political" importance of an issue might be a reason to conclude that Congress did not intend for an agency to have authority to interpret a particular statute in a particular way. So, a court applying the doctrine would not defer to the agency's interpretation.

However, and before *Loper Bright* overruled *Chevron* altogether, the doctrine morphed from a *Chevron*-focused principle to what is best described as a substantive canon of statutory interpretation that applies specially to statutes administered by an agency. Now, as *West Virginia v. EPA* (the most important Major Questions Doctrine case) explains, a court may conclude that an agency lacks authority to make "major policy decisions," despite identifying a "colorable textual basis" for that power.

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Depending on how much time your professor decides to dedicate to this topic, you may be asked to read any of the following cases and accompanying notes and questions:

- *FDA v. Brown & Williamson Tobacco Corp.* (§ 7.05 in the Casebook, p. 677)
- *Gonzales v. Oregon* (§ 7.07 in the Casebook, p. 731)
- *King v. Burwell* (§ 7.07 in the Casebook, p. 741)

You might also be asked to dive right into *West Virginia v. EPA*, where the majority opinion spends a lot of time canvassing the precedents that underlie the new, refined Major Questions Doctrine. What is the Major Questions Doctrine? When does it apply? What instructions does the majority opinion provide for courts needing to apply the doctrine in future cases?

West Virginia v. Environmental Protection Agency

597 U.S. 697 (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 84 Stat. 1683, 42 U. S. C. § 7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§ 7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. § 7401 *et seq.* One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, 42 U.S.C. §§ 7408–7410, and the Hazardous Air Pollutants (HAP) program, set out in Section 112, § 7412. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." § 7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." [Initially, the states submit plans for maintaining these standards.]

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The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." § 7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. . . . EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. § 7412(d)(3).

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "*technology-based* standard[s] for hazardous emissions." . . .

The third air pollution control scheme is the New Source Performance Standards program of Section 111. § 7411. That section directs EPA to list "categories of stationary sources" that it determines "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," § 7411(b)(1)(B). A "standard of performance" is one that

> "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

. . . Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), once EPA "has set *new* source standards addressing emissions of a particular pollutant under . . . section 111(b)," it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. § 7411(d)(1). Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities. . . .

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. . . . It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law."

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. Carbon dioxide is not subject to a NAAQS and has not been listed as a hazardous pollutant [HAP].

. . . Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. It did so through what it called the Clean Power Plan rule. . . .

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The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included [several options. The EPA said that the first such option, "heat rate improvements" that would help plants "burn coal more efficiently,"] would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency.

So the Agency included [additional options. In essence, to meet the BSER, a coal-fired plant operator could do one of three things: it could (1) "simply reduce the regulated plant's own production of electricity"; (2) "build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there"; or (3) "purchase emission allowances or credits as part of a cap-and-trade regime." Option (3) allows "sources that achieve a reduction in their emissions [to] sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps."]

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. . . . [C]oal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction" . . . was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U.S.C. § 7411(a)(1). . . . The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

. . . [T]he emissions limit the Clean Power Plan established for existing power plants was actually *stricter* than the cap imposed by the simultaneously published standards for *new* plants. The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry." EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040.

C

These projections were never tested, because the Clean Power Plan never went into effect. [The Supreme Court stayed the rule in response to petitions for review filed "dozens of parties (including 27 States)." Before those petitions could be reviewed on their merits,] there was a change in Presidential administrations. . . .

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). . . .

D

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A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan . . . .

II

[The Court held that the case was justiciable, notwithstanding the EPA's decision, under yet another administration, to promulgate a new rule under Section 111(d).]

III

A

. . . The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159. In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. —— (2021) (*per curiam*), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so.

Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U.S. at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U.S.C. § 823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation ... not sustainable."

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Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans ... either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U.S. —— (2022) (*per curiam*). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure.

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases ... there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization"—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[ ]," it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. . . .

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).

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Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. The legality of that choice was controversial at the time and was never addressed by a court. Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap" . . . based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.[1]

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. . . .

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." . . .

Instead [of adopting such measures here], to attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was "not about pollution control" so much as it was "an investment opportunity" for States, especially "investments in renewables and clean energy."

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. . . . Under its newly "discover[ed]" authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants . . . to cease making power altogether.

. . . On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding [when it stated that] "[u]196nderstand[ing] and project[ing] system-wide ... trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." "When [an] agency has no

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comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 588 U. S. —— (2019).

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal- based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust. . . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, ... makes the oblique form of the claimed delegation all the more suspect."

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." 42 U. S. C. § 7411(a)(1). As a matter of "definitional possibilities," generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction." But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

[The Court next discussed different instances in the Clean Air Act where the word "system" or similar words referred to a cap-and-trade system and rejected the argument that the term "system" as set forth in § 7411(a)(1) could encompass a cap-and-trade system.]

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. . . .

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Justice GORSUCH, with whom Justice ALITO joins, concurring.
To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to " 'clear congressional authorization' " when they claim the power to make decisions of vast " 'economic and political significance.' " Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests. [Justice Gorsuch argued that the doctrine acts as a "clear statement rule" that protects the separation of powers. He observes that other clear statement rules protect against inappropriate retroactive liability and sovereign immunity. That lengthy discussion and various rebuttals to the dissent are omitted.]

When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives. In our Republic, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society." Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.
Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts v. EPA*, 549 U.S. 497, 505 2007).

Climate change's causes and dangers are no longer subject to serious doubt. Modern science is "unequivocal that human influence"—in particular, the emission of greenhouse gases like carbon dioxide—"has warmed the atmosphere, ocean and land." The Earth is now warmer than at any time "in the history of modern civilization," with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017). The rise in temperatures brings with it "increases in heat-related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths."

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." Carbon dioxide and other greenhouse gases fit that description. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—

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more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. . . .

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. § 7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system . . . . The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms. . . .

Section 111(d) thus ensures that EPA regulates existing power plants' emissions of *all* pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated: . . . In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control.

Section 111 describes the prescribed regulatory effort in expansive terms. . . . [T]he core command—go find the best system of emission reduction—gives broad authority to EPA.

. . . Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions." Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." Does that sound like a "system" to you? It does to me too. . . . Rarely has a statutory term so clearly applied.

Other statutory provisions confirm the point. . . .

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. . . .

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Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. . . . Congress faced a choice: confine EPA to technological controls, or not. And replicating its earlier action for existing sources, Congress chose not. . . .

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. . . .

A

"[T]he words of a statute," as the majority states, "must be read in their context and with a view to their place in the overall statutory scheme." . . . In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate." Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. But Congress does so in a sensible way. . . . In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

The majority today goes beyond tho"e se'sible principles. It announces the arrival of the "major questions doctrine," which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an "extraordinary case[ ]." If it does, the agency "must point to clear congressional authorization for the power it claims," someplace over and above the normal statutory basis we require. The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?

The majority claims It Is just following precedent, but that Is not so. . . .

The eyebrow-raise is indeed a consistent presence in [past] cases [that the majority says give rise to the major questions doctrine] . . . . In each case, the Court thought, the agency had strayed out of its lane, to an

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area where it had neither expertise nor experience. The Attorney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. There, according to the Court, the statutory framework was "not designed to grant" the authority claimed. The agency's "singular" assertion of power "would render the statute unrecognizable to the Congress" that wrote it.

B

. . . Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. . . . In fact, there is nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). And the front half of the argument doesn't work either. The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter. . . .

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. . . . Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." . . . So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). . . .

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. . . .

The kind of agency delegations at issue here go all the way back to this Nation's founding. . . . The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." That Congress, to use a few examples, gave the Executive power to devise a licensing scheme for trading with Indians; to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. . . .

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It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." . . .

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines. . . .

[W]hen it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

Notes & Questions

S7-12. What is the Major Questions Doctrine? When does it apply? How would you describe the test to a court or to someone unfamiliar with the doctrine? What sorts of arguments and evidence might you marshal if you were pursuing or opposing a major questions argument?

S7-13. What is the purpose of the Major Questions Doctrine? Why do you think it's a relatively modern innovation? How does the Major Questions Doctrine shift the balance of powers among the three branches?

S7-14. How does the majority square the doctrine with its otherwise avowedly textualist approach to statutory interpretation?

Mayfield v. U.S. Department of Labor, 117 F.4th 611, 616–17 (5th Cir. 2024) (case note)

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S7-15. Review the facts of *Mayfield v. U.S. Department of Labor*, excerpted above in § 7.05A of this Supplement. Above, we focused on the Fifth Circuit's *Loper Bright* analysis. Now, review the court's major questions doctrine analysis. What tests or factors does the court identify from *West Virginia v. EPA*? How does it apply those factors?

> We must next consider whether the major questions doctrine plays a role in our analysis. "[I]n certain extraordinary cases, both separation of powers principles and practical understanding of legislative intent make [the court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince [the court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims." *West Virginia v. EPA*.
>
> There are three indicators that each independently trigger the doctrine: (1) when the agency "claims the power to resolve a matter of great political significance"; (2) when the agency "seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities"; and (3) when an agency "seeks to intrude into an area that is the particular domain of state law." *Id.* (Gorsuch, J., concurring).
>
> But even once triggered, whether the doctrine is one interpretative tool among many or a clear-statement rule is the subject of ongoing debate. We need not opine on that heady question because, as the district court ably put it, this case neither is one of vast political or economic significance . . . nor intrudes into an area that is the particular domain of state law.
>
> While no case has set the threshold for "economic significance," the recent cases applying the doctrine based on economic significance have involved hundreds of billions of dollars of impact. *See, e.g., Nebraska*, 143 S. Ct. at 2362 ($430 billion); *West Virginia*, 597 U.S. at 715, 142 S.Ct. 2587 ($1 trillion by 2040). Here, the impact of the Rule is roughly $472 million in the first year, including both the costs of implementing the Rule and the transfers from employers to employees. While the Supreme Court's recent decisions by no means set the lower bound of economic significance, we think the gap between the economic impact in those cases and this case too large to warrant applying the major questions doctrine here based on economic significance.
>
> We must also consider whether DOL seeks to regulate a significant portion of the American economy. The 2019 Rule removes 1.2 million workers from the Exemption who would otherwise be exempt. Because 1.2 million workers is a small percentage of the overall workforce, regulating that number of workers does not trigger the major questions doctrine.
>
> Turning to political significance, even if we assume that labor relations are a politically controversial topic, whether to use salary level to determine which employees should be exempt from various FLSA protections is not in line with the types of issues that have been considered politically contentious enough to trigger the doctrine. *E.g., West Virginia*, 597 U.S. at 729–30, 142 S.Ct. 2587 (how much coal-based energy generation the country should engage in). Nor is this a case in which the agency "newly uncover[s] [power that]

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> conveniently enable[s] it to enact a program that . . . Congress considered and rejected multiple times." *West Virginia* .
>
> Finally, the Supreme Court's major-questions analysis turns in part on whether the agency has previously claimed the authority at issue. *West Virginia*. Here, DOL asserts an authority that it has asserted continuously since 1938. While a particular minimum-salary rule could raise issues because of its size, Mayfield's argument is that any consideration of salary is improper. That means that even though the particular salary level in question here is novel, the assertion of authority to consider salary is not. . . . [T]his is not an instance where the agency "discover[s] in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.' "[216]

§ 7.08 Judicial Review of Agency Rules

Add the following materials to the end of § 7.08, p. 802.

This next case is an important elaboration of the *State Farm*/*Fox Television* test, especially as it pertains to an agency's obligation to consider interested parties' reliance interests on past agency policies. What does an agency have to do when it changes a policy?

Department of Homeland Security v. Regents of the University of California

591 U.S. 1 (2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part IV.

In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

A

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program for "certain young people who were brought to this country as children." Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not threaten national security or public safety. DHS concluded that individuals who meet these criteria warrant favorable treatment under the immigration laws because they "lacked the intent to violate the law," are "productive" contributors to our society, and "know only this country as home."

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[216] 117 F.4th at 616–17.

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"[T]o prevent [these] low priority individuals from being removed from the United States," the DACA Memorandum instructs Immigration and Customs Enforcement to "exercise prosecutorial discretion[] on an individual basis . . . by deferring action for a period of two years, subject to renewal." In addition, it directs U.S. Citizenship and Immigration Services (USCIS) to "accept applications to determine whether these individuals qualify for work authorization during this period of deferred action" as permitted under regulations long predating DACA's creation, see 8 CFR § 274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish "economic necessity"). Pursuant to other regulations, deferred action recipients are considered "lawfully present" for purposes of, and therefore eligible to receive, Social Security and Medicare benefits.

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U.S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients. . . .

[I]n June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect [due to injunctions], and the new administration's immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, "advis[ing]" that DHS "should rescind" DACA as well. Citing the Fifth Circuit's opinion [finding DAPA to be unconstitutional and in violation of the INA] and this Court's equally divided affirmance [of that decision], the Attorney General concluded that DACA shared the "same legal . . . defects that the courts recognized as to DAPA" and was "likely" to meet a similar fate. "In light of the costs and burdens" that a rescission would "impose[ ] on DHS," the Attorney General urged DHS to "consider an orderly and efficient wind-down process."

The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated."

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal.

B

Within days of Acting Secretary Duke's rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U.S. District Courts for the Northern District of California, the Eastern District of New York, and the District of Columbia. The relevant claims are that the rescission was arbitrary and capricious in violation of the APA

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and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. . . . .

The Government appealed the various District Court decisions. . . . The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." It requires agencies to engage in "reasoned decisionmaking," *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015), and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under this "narrow standard of review, . . . a court is not to substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), but instead to assess only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). . . .

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D.C. District Court vacated the Duke rescission and gave DHS an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. . . .

It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning *at the time of the agency action*." *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 654 (1990). This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*). Alternatively, the agency can "deal with the problem afresh" by taking *new* agency action. *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*). An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. . . .

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than

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take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "*post hoc* rationalization." *Overton Park*, 401 U.S. at 420. . . .

The Government, echoed by Justice Kavanaugh, protests that requiring a new decision before considering Nielsen's new justifications would be "an idle and useless formality." Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," *Bowen v. American Hospital Assn.*, 476 U.S. 610, 643 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation. . . .

Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated."

. . . [W]e focus our attention on respondents' . . . argument [] that Acting Secretary Duke "failed to consider . . . important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General [because the DHS Secretary is bound by the Attorney General's determinations on "all questions of law" under the organic statute]. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals.

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal . . . defects that the courts recognized as to DAPA." So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." . . .

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But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. . . .

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of " automatic seatbelts. It did "not cast doubt" on the "efficacy of airbag technology" or upon "the need for a passive restraint standard." Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement."

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy.

The Government acknowledges that "[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands." It insists, however, that "DHS was not required to consider whether DACA's illegality could be addressed by separating" the two. According to the Government, "It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked." Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. It contends, however, that we should not "dissect" agency action "piece by piece." The dissent instead rests on the Attorney General's legal determination—which considered only benefits—"to supply the 'reasoned analysis'" to support rescission of both benefits and forbearance. But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the "alternative[s]" that are "within the ambit of the existing [policy]." Here forbearance was not simply "within the ambit of the existing [policy]," it was the centerpiece of the policy: DACA, after all, stands for "*Deferred Action* for Childhood Arrivals." But the rescission memorandum contains no discussion of forbearance or the option

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of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem."

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" "It would be arbitrary and capricious to ignore such matters." Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years.. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with "administrative complexities." She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or

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finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." *State Farm*, 463 U.S. at 51. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of man." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). But, because DHS was "not writing on a blank slate," it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result.

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

[The Court rejected Respondents' equal protection claim.]

* * *

We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." *Chenery II*, 332 U.S. at 207. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew. . . .

[**Justice SOTOMAYOR** concurred in the majority's opinion as to the APA issues, but dissented from the Court's equal protection holding.]

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, concurring in the judgment in part and dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and

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state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

[Justice THOMAS explained that the Court's decision "has given the green light" to move political debates from the political branches, where it belongs, to the Court. Justice Thomas lamented the "perverse incentives" of the Court's holding for outgoing administrations:] Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. . . .

[The dissent stated that DACA was an *ulra vires* agency action—outside the power accorded to DHS by Congress—because it "alters how the immigration laws apply to a certain class of aliens" by conferring lawful presence. "This conclusion should begin and end our review.

[The dissent determined that Congress's "complex and detailed" scheme for achieving lawful permanent residence and relief from removal left no doubt that the issue was not one for DHS to resolve.

[Beyond the substantive shortcomings with DACA, the policy likewise "flouted the APA's procedural requirements" by failing to undergo the notice-and-comment rulemaking process. Because of that failure, "it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill *any* ink justifying the rescission of an invalid legislative rule . . . ."

Finally, the dissent argued that the reasons given for the change (to "restore the rule of law") were sufficient under *State Farm*.]

Justice ALITO's opinion concurring in the judgment in part and dissenting in part is omitted.

Justice KAVANAUGH likewise concurred in the judgment in part and dissented in part, accepting the majority's premise that DHS could not rescind DACA in an arbitrary and capricious manner, but arguing that the Nielsen Memorandum suffices. Justice Kavanaugh criticized the majority for "jettison[ing] the Nielsen Memorandum by classifying it as a *post hoc* justification," arguing that the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges). . . . Indeed, the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the *post hoc* justification doctrine today. The Court's refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider."

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Notes & Questions

S7-16. What was the Secretary's justification for rescinding DACA? What did the Court find unconvincing about that justification? What lessons should agencies learn from this decision?

S7-17. Does it matter that DACA was not itself issued as a legislative rule (i.e., was not issued after notice and comment)? Should it matter? Does the majority meaningfully discuss or refute this point?

S7-18. Does this decision mean that the Trump Administration lacked the authority or ability to rescind DACA?

* * *

The next case is a rare Supreme Court opinion focused on the *State Farm* standard. As is often the case with challenges under the arbitrary-or-capricious standard, the majority and dissenting opinions are highly detailed, especially when discussing the administrative record and the agency's actions.

Ohio v. Environmental Protection Agency

603 U.S. 279 (2024)

Justice GORSUCH delivered the opinion of the Court.

The Clean Air Act envisions States and the federal government working together to improve air quality. Under that law's terms, States bear "primary responsibility" for developing plans to achieve air-quality goals. 42 U.S.C. § 7401(a)(3). Should a State fail to prepare a legally compliant plan, however, the federal government may sometimes step in and assume that authority for itself. § 7410(c)(1). Here, the federal government announced its intention to reject over 20 States' plans for controlling ozone pollution. In their place, the government sought to impose a single, uniform federal plan. This litigation concerns whether, in adopting that plan, the federal government complied with the terms of the Act.

I

A

"The Clean Air Act regulates air quality through a federal-state collaboration." Periodically, the Environmental Protection Agency (EPA) sets standards for common air pollutants, as necessary to "protect the public health." §§ 7409(a)(1), (b)(1). Once EPA sets a new standard, the clock starts ticking: States have three years to design and submit a plan—called a State Implementation Plan, or SIP—providing for the "implementation, maintenance, and enforcement" of that standard in their jurisdictions. § 7410(a)(1). Under the Act, States decide how to measure ambient air quality. § 7410(a)(2)(B). States pick "emission limitations and other control measures." § 7410(a)(2)(A). And States provide for the enforcement of their prescribed measures. § 7410(a)(2)(C).

At the same time, States must design these plans with their neighbors in mind. Because air currents can carry pollution across state borders, emissions in upwind States sometimes affect air quality in downwind States. To address that externality problem, under the Act's "Good Neighbor Provision," state plans must prohibit emissions "in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other State" of the relevant air-quality standard. § 7410(a)(2)(D)(i)(I).

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Because the States bear "primary responsibility" for developing compliance plans, § 7401(a)(3), EPA has "no authority to question the wisdom of a State's choices of emission limitations." So long as a SIP satisfies the "applicable requirements" of the Act, including the Good Neighbor Provision, EPA "shall approve" it within 18 months of its submission. § 7410(k)(3); see §§ 7410(k)(1)(B), (k)(2). If, however, a SIP falls short, EPA "shall" issue a Federal Implementation Plan, or FIP, for the noncompliant State—that is, "unless" the State corrects the deficiencies in its SIP first. § 7410(c)(1). . . .

B

A layer of ozone in the atmosphere shields the world from the sun's radiation. But closer to earth, ozone can hurt more than it helps. Forming when sunlight interacts with a wide range of precursor pollutants, ground-level ozone can trigger and exacerbate health problems and damage vegetation.

To mitigate those and other problems, in 2015 EPA revised its air-quality standards for ozone from 75 to 70 parts per billion. That change triggered a requirement for States to submit new SIPs. Along the way, EPA issued a guidance document advising States that they had "flexibility" in choosing how to address their Good Neighbor obligations. See EPA, Memorandum, Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards 3 (Mar. 27, 2018). With that and other guidance in hand, many (though not all) States submitted SIPs. And many of the States that did submit SIPs said that they need not adopt emissions-control measures to comply with the Good Neighbor Provision because, among other things, they were not linked to downwind air-quality problems or they could identify no additional cost-effective methods of controlling the emissions beyond those they were currently employing.

For over two years, EPA did not act on the SIPs it received. Then, in February 2022, the agency announced its intention to disapprove 19 of them on the ground that the States submitting them had failed to address adequately their obligations under the Good Neighbor Provision. A few months later, the agency proposed disapproving four more SIPs. Pursuant to the Act, the agency issued its proposed SIP disapprovals for public comment before finalizing them. See § 7607(d)(3).

C

During that public comment period, the agency proposed a single FIP to bind all 23 States. Rather than continue to encourage " 'flexibilit[y]' " and different state approaches, EPA now apparently took the view that "[e]ffective policy solutions to the problem of interstate ozone transport" demanded that kind of "uniform framework" and "[n]ationwide consistency." . . .

In broad strokes, here is how EPA's proposed rule worked to eliminate a State's "significant contribution" to downwind ozone problems. First, the agency identified various emissions-control measures and, using nationwide data, calculated how much each typically costs to reduce a ton of nitrogen-oxide emissions. Next, the agency sought to predict how much each upwind State's nitrogen-oxide emissions would fall if emissions-producing facilities in the State adopted each measure. In making those predictions, EPA often considered data specific to the emissions-producing facilities in the State, and fed "unit-level and state-level" values into its calculations. Then, the agency estimated how much, on average, ozone levels would fall in downwind States with the adoption of each measure. In making those estimations, too, EPA calibrated its modeling to each State's features, "determin[ing] the relationship between changes in emissions and changes in ozone contributions on a state-by-state ... basis."

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To pick which measures would "maximiz[e] cost-effectiveness" in achieving "downwind ozone air quality improvements," EPA focused on what it called the " 'knee in the curve,' " or the point at which more expenditures in the upwind States were likely to produce "very little" in the way of "additional emissions reductions and air quality improvement" downwind. EPA used this point to select a "uniform level" of cost, and so a uniform package of emissions-reduction tools, for upwind States to adopt. And EPA performed this analysis on two "parallel tracks"—one for power plants, one for other industries. Pursuant to the Clean Air Act, §§ 7607(d)(1)(B), (d)(3)–(6), the agency published its proposed FIP for notice and comment in April 2022.

Immediately, commenters warned of a potential pitfall in the agency's approach. EPA had determined which emissions-control measures were cost effective at addressing downwind ozone levels based on an assumption that the FIP would apply to all covered States. But what happens if some or many of those States are not covered? As the commenters portrayed the SIPs, this was not an entirely speculative possibility. Many believed EPA's disapprovals of the SIPs were legally flawed. They added that EPA's FIP was "inextricably linked" to the SIP disapprovals. Without a SIP disapproval or missing SIP, after all, EPA could not include a State in its FIP.

Commenters added that failing to include a State could have consequences for the proposed FIP. If the FIP did not wind up applying to all 23 States as EPA envisioned, commenters argued, the agency would need "to conduct a new assessment and modeling of contribution and subject those findings to public comment." *E.g.*, Comments of Air Stewardship Coalition 13–14 (June 21, 2022); Comments of Portland Cement Association 7 (June 21, 2022). Why? As noted above, EPA assessed "significant contribution" by determining what measures in upwind States would maximize cost-effective ozone-level improvements in the States downwind of them. And a different set of States might mean that the "knee in the curve" would shift. After all, each State differs in its mix of industries, in its preexisting emissions-control measures, and in the impact those measures may have on emissions and downwind air quality.

As it happened, ongoing litigation over the SIP disapprovals soon seemed to vindicate at least some of the commenters' concerns. Two circuits issued stays of EPA's SIP denials for four States.

Despite those comments and developments, the agency proceeded to issue its final FIP. In response to the problem commenters raised, EPA adopted a severability provision stating that, should any jurisdiction drop out, its rule would "continue to be implemented as to any remaining jurisdictions." But in doing so, EPA did not address whether or why the same emissions-control measures it mandated would continue to further the FIP's stated purpose of maximizing cost-effective air-quality improvement if fewer States remained in the plan.

D

After EPA issued its final FIP, litigation over the agency's SIP disapprovals continued. One court after another issued one stay after another. Each new stay meant another State to which EPA could not apply its FIP. Ultimately, EPA recognized that it could not apply its FIP to 12 of the 23 original States. Together, these 12 States accounted for over 70 percent of the emissions EPA had planned to address through its FIP.

A number of the remaining States and industry groups challenged the remnants of the FIP in the D. C. Circuit. . . . [T]hey asked that court to stay any effort to enforce the FIP against them while their appeal

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unfolded. After that court denied relief, the applicants renewed their request here. The Court has received and reviewed over 400 pages of briefing and a voluminous record, held over an hour of oral argument on the applications, and engaged in months of postargument deliberations as we often do for the cases we hear.

II

A

Stay applications are nothing new. They seek a form of interim relief perhaps "as old as the judicial system of the nation." Like any other federal court faced with a stay request, we must provide the applicants with an answer—"grant or deny."

In deciding whether to issue a stay, we apply the same "sound ... principles" as other federal courts. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Specifically, in this litigation, we ask (1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies. . . .

Because each side has strong arguments about the harms they face and equities involved, our resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail at the end of this litigation.

B

. . . The applicants argue that a court is likely to hold EPA's final FIP "arbitrary" or "capricious" within the meaning of the Act and thus enjoin its enforcement against them. 42 U.S.C. § 7607(d)(9)(A); see also 5 U.S.C. § 706(2)(A). An agency action qualifies as "arbitrary" or "capricious" if it is not "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). In reviewing an agency's action under that standard, a court may not " 'substitute its judgment for that of the agency.' " But it must ensure, among other things, that the agency has offered "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, an agency cannot simply ignore "an important aspect of the problem." *Ibid*.

We agree with the applicants that EPA's final FIP likely runs afoul of these long-settled standards. The problem stems from the way EPA chose to determine which emissions "contribute[d] significantly" to downwind States' difficulty meeting national ozone standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Recall that EPA's plan rested on an assumption that all 23 upwind States would adopt emissions-reduction tools up to a "uniform" level of "costs" to the point of diminishing returns. But as the applicants ask: What happens—as in fact did happen—when many of the upwind States fall out of the planned FIP and it may now cover only a fraction of the States and emissions EPA anticipated? Does that affect the "knee in the curve," or the point at which the remaining States might still "maximiz[e] cost-effectiv[e]" downwind ozone-level improvements? As "the mix of states changes, ... and their particular technologies and industries drop out with them," might the point at which emissions-control measures maximize cost-effective downwind air-quality improvements also shift?

Although commenters posed this concern to EPA during the notice and comment period, EPA offered no reasoned response. Indeed, at argument the government acknowledged that it could not represent with

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certainty whether the cost-effectiveness analysis it performed collectively for 23 States would yield the same results and command the same emissions-control measures if conducted for, say, just one State. Perhaps there is some explanation why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvements. But if there is an explanation, it does not appear in the final rule. As a result, the applicants are likely to prevail on their argument that EPA's final rule was not "reasonably explained," that the agency failed to supply "a satisfactory explanation for its action[,]"and that it instead ignored "an important aspect of the problem" before it. The applicants are therefore likely to be entitled to "revers[al]" of the FIP's mandates on them. § 7607(d)(9).

III

A

Resisting this conclusion, EPA advances three alternative arguments.

First, the government insists, the agency did offer a reasoned response to the applicants' concern, just not the one they hoped. When finalizing its rule in response to public comments, the government represents, "the agency *did* consider whether the [FIP] could cogently be applied to a subset of the 23 covered States." And that consideration, the government stresses, led EPA to add a "severability" provision to its final rule in which the agency announced that the FIP would " 'continue to be implemented' " without regard to the number of States remaining, even if just one State remained subject to its terms. In support of its severability provision, EPA cited, among other things, its intent to address " 'important public health and environmental benefits" and encourage reliance by others "on th[e] final rule in their planning.' "

None of this, however, solves the agency's problem. True, the severability provision highlights that EPA was aware of the applicants' concern. But awareness is not itself an explanation. The severability provision highlights, too, the agency's desire to apply its rule expeditiously and " 'to the greatest extent possible,' " no matter how many States it could cover. But none of that, nor anything else EPA said in support of its severability provision, addresses whether and how measures found to maximize cost effectiveness in achieving downwind ozone air-quality improvements with the participation of 23 States remain so when many fewer States, responsible for a much smaller amount of the originally targeted emissions, might be subject to the agency's plan. Put simply, EPA's response did not address the applicants' concern so much as sidestep it.[217]

Second, the government pivots in nearly the opposite direction. Now, it says, if its final rule lacks a reasoned response to the applicants' concern, it is because no one raised that concern during the public comment period. And, the agency stresses, a litigant may pursue in court only claims premised on objections first " 'raised with reasonable specificity' " before the agency during the public comment period. (quoting § 7607(d)(7)(B)).

We cannot agree. The Act's "reasonable specificity" requirement does not call for "a hair-splitting approach." A party need not "rehears[e]" the identical argument made before the agency; it need only

[217] As the applicants conceded at oral argument, EPA did not need to address every possible permutation when it sought to adopt a multi-State FIP. Our conclusion is narrower: When faced with comments like the ones it received, EPA needed to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the States it originally intended to cover. . . .

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confirm that the government had "notice of [the] challenge" during the public comment period and a chance to consider "in substance, if not in form, the same objection now raised" in court.

Here, EPA had notice of the objection the applicants seek to press in court. Commenters alerted the agency that, should some States no longer participate in the plan, the agency would need to return to the drawing board and "conduct a new assessment and modeling of contribution" to determine what emissions-control measures maximized cost effectiveness in securing downwind ozone air-quality improvements. And, as we have just seen, EPA's own statements and actions confirm the agency appreciated that concern. In preparing the final rule in response to public comments, the agency emphatically insists, it "*did* consider whether the [r]ule could cogently be applied to a subset of the 23 covered States." And as a result of that consideration, the agency observes, it opted to add a severability provision to its final rule. By its own words and actions, then, the agency demonstrated that it was on notice of the applicants' concern. Yet, as we have seen, it failed to address the concern adequately.

Third, the government pursues one more argument in the alternative. As the agency sees it, the applicants must return to EPA and file a motion asking it to reconsider its final rule before presenting their objection in court. They must, the agency says, because the "grounds for [their] objection arose after the period for public comment." § 7607(d)(7)(B). As just discussed, however, EPA had the basis of the applicants' objection before it during the comment period. It chose to respond with a severability provision that in no way grappled with their concern. Nothing requires the applicants to return to EPA to raise (again) a concern EPA already had a chance to address.

Taking the government's argument (much) further, the dissent posits that every "objection that [a] final rule was not reasonably explained" must be raised in a motion for reconsideration. But there is a reason why the government does not go so far. The Clean Air Act opens the courthouse doors to those with objections the agency already ignored. If an "objection [is] raised with reasonable specificity during the period for public comment" but not reasonably addressed in the final rule, the Act permits an immediate challenge. § 7607(d)(7)(B). A person need not go back to the agency and insist on an explanation a second time. Tellingly, the case on which the dissent relies involves an entirely different situation: a " 'logical outgrowth' challeng[e]." There, the objection was that EPA had supposedly " 'significantly amend[ed] the [r]ule between the proposed and final versions,' " making it impossible for people to comment on the rule during the comment period. That is nothing like the challenge here, where EPA failed to address an important problem the public could and did raise during the comment period.

B

With the government's theories unavailing, the dissent advances others of its own. It begins by suggesting that the problem the applicants raise was not " '*important*' " enough to warrant a reasoned reply from the agency because the methodology EPA employed in its FIP "appear[s] not to depend on the number of covered States." Then, coming at the same point from another direction, the dissent seeks to excuse the agency's lack of a reasoned reply as "harmless" given, again, "the apparent lack of connection between the number of States covered and the FIP's methodology."

The trouble is, if the government had arguments along these lines, it did not make them. It did not despite its ample resources and voluminous briefing. This Court "normally decline[s] to entertain" arguments "forfeited" by the parties. And we see no persuasive reason to depart from that rule here.

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If anything, we see one reason for caution after another. Start with the fact the dissent itself expresses little confidence in its own theories, contending no more than it "*appear*[*s*]" EPA's methodology did not depend on the number of covered States. Add to that the fact that, at oral argument, even the government refused to say with certainty that EPA would have reached the same conclusions regardless of which States were included in the FIP. . . . Finally, observe that, while the Act seems to anticipate, as the dissent suggests, that the agency's "procedural determinations" may be subject to harmless-error review, § 7607(d)(8), the Act also seems to treat separately challenges to agency "actions" like the FIP before us, authorizing courts to "reverse any ... action," found to be "arbitrary" or "capricious," § 7607(d)(9)(A). With so many reasons for caution, we think sticking to our normal course of declining to consider forfeited arguments the right course here. [218] . . .

Justice BARRETT, with whom Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON join, dissenting.

The Court today enjoins the enforcement of a major Environmental Protection Agency rule based on an underdeveloped theory that is unlikely to succeed on the merits. In so doing, the Court grants emergency relief in a fact-intensive and highly technical case without fully engaging with both the relevant law and the voluminous record. . . .

The Court holds that applicants are likely to succeed on a claim that the Good Neighbor Plan is "arbitrary" or "capricious." 42 U.S.C. § 7607(d)(9). The "arbitrary-and-capricious standard requires that agency action" be both "[1] reasonable and [2] reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). The Court's theory is that EPA did not " 'reasonably *explai[n]* ' " "why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvement." So to be clear, the Court does not conclude that EPA's actions were *substantively* unreasonable—*e.g.*, that the FIP cannot rationally be applied to fewer States because a change in the number of participants would undermine its rationale or render it ineffective. . . .

A

The Clean Air Act imposes a procedural bar on the challenges that a plaintiff can bring in court: Only objections that were "raised with reasonable specificity during the period for public comment ... may be raised during judicial review." § 7607(d)(7)(B). If it was "impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment," the challenger may petition for reconsideration of the rule and can obtain judicial review only if EPA refuses. *Ibid.* . . .

First, consider the Court's basic theory: that EPA offered "no reasoned response" to comments allegedly questioning whether the plan's emissions limits depend on the States covered. hat EPA failed to adequately

[218] Admittedly, the dissent points to some statements in the FIP suggesting EPA considered nationwide data in parts of its analysis. But other statements in that rule and supporting documents also seem to suggest EPA considered state-specific information. If, as the dissent posits, only nationwide data informed EPA's analysis, why would EPA say that, "for purposes of identifying the appropriate level of control," it focused on "the 23 upwind states that were linked" to the downwind States, rather than, say, "all states in the contiguous U.S."? Why would EPA explain that its "findings regarding air quality improvement" downwind were a "central component" of picking the appropriate cost levels and so defining a State's significant contribution? And why would EPA bother to "determine the relationship between changes in emissions and changes in ozone contributions on a state-by-state ... basis" and "calibrat[e]" that relationship "based on state-specific source apportionment"? In asking these questions, we do not profess answers; we simply highlight further reasons for caution.

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explain its final rule in response to comments is "an objection to the notice and comment process itself," which applicants "obviously did not and could not have raised ... during the period for public comment." No one could have raised *during the proposal's comment period* the objection that the "*final* rule was not 'reasonably explained.' "

The D. C. Circuit, on remand in *EME Homer*, considered a similar objection that EPA had "violated the Clean Air Act's notice and comment requirements": EPA had "significantly amend[ed] the Rule between the proposed and final versions without providing additional opportunity for notice and comment." 795 F.3d at 137. But because this procedural objection could not have been raised during the comment period, "the only appropriate path for petitioners" under § 7607(d)(7)(B) was to raise it "through an initial petition for reconsideration to EPA." So the D. C. Circuit lacked "authority at th[at] time to reach this question." While such "logical outgrowth" challenges typically are cognizable under the Administrative Procedure Act, the Clean Air Act channels these challenges through reconsideration proceedings. This Court's failure-to-explain objection may face the same problem: It is not judicially reviewable in its current posture.

Second, even putting aside this aspect of § 7607(d)(7)(B), it is not clear that any commenter raised with "reasonable specificity" the underlying substantive issue: that the exclusion of some States from the FIP would undermine EPA's cost-effectiveness analyses and resulting emissions controls. § 7607(d)(7)(B). The Court concludes otherwise only by putting in the commenters' mouths words they did not say. It first cites a bevy of *****comments arguing that EPA's "disapprovals of the SIPs were legally flawed" and noting the obvious point that EPA cannot "include a State in its FIP" unless it validly disapproves the State's SIP. These comments do not address the continued efficacy of a FIP that applies to a subset of the originally covered States.

. . .

The closest comment that the Court can find—which it quotes repeatedly—is one sentence that obliquely refers to some "new assessment and modeling of contribution" that EPA might need to perform. Comments of Air Stewardship Coalition 13–14. The Court dresses up this comment by characterizing it as a warning about what might happen "[i]f the FIP did not wind up applying to all 23 States" and responding to the concern that a "different set of States might mean that the 'knee in the curve' would shift" and change the cost-effective "emissions-control measures." But those words are the Court's, not the commenter's.

The commenter's actual objection was to EPA's sequencing of its actions—proposing a FIP before it finalized its SIP disapprovals. The commenter titled this section "EPA Step Two Screening is Premised on the Premature Disapproval of 19 Upwind States['] Good Neighbor SIPs." Air Stewardship Comments 13 (boldface omitted). And the relevant sentence reads in full:

> "The proposed FIP essentially prejudges the outcome of those pending SIP actions and, in the event EPA takes a different action on those SIPs than contemplated in this proposal, it would be required to conduct a new assessment and modeling of contribution and subject those findings to public comment."

This sentence says nothing about what would be required if *after* EPA finalizes its SIP disapprovals and issues a final FIP, some States drop out of the plan. Nor does it suggest that the plan's cost-effectiveness thresholds or emissions controls would change with a different number of States. Nor is it clear what the comment means by its bare reference to a "new assessment and modeling of contribution": Would EPA be required to perform a new evaluation of which upwind States cause pollution in downwind States? A new

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analysis of how much pollution each source must eliminate? A new assessment of the plan's impact on downwind States?

It is therefore difficult to see how this comment raised with "reasonable specificity" the objection that the removal of some States from the final plan would invalidate EPA's cost-effectiveness thresholds and chosen emissions-control measures. That is not how EPA understood it. . . . If a *commenter* had said with reasonable specificity what *the Court* says today—that "a different set of States might mean that the 'knee in the curve' would shift"—EPA could have responded with more explanation of why its methodology did not depend on the number of covered States—as it has recently explained. But EPA cannot be penalized if it did not have reasonable notice of this objection.

In sum, § 7607(d)(7)(B)'s procedural bar likely forecloses both the failure-to-explain objection that the Court credits and any substantive challenge to the reasonableness of applying the FIP to a subset of the originally covered States.

B

Even if applicants clear § 7607(d)(7)(B)'s procedural bar, they face an uphill battle on the merits. To prevail on the Court's theory, applicants must show that EPA's actions were "arbitrary" or "capricious." §§ 7607(d)(9)(A), (D). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. A rule is arbitrary and capricious if the agency "*entirely failed* to consider an *important* aspect of the problem." But we will " 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " Given the explanations and state-agnostic methodology apparent in the final rule and its supporting documentation—and the paucity of comments specifically raising the issue—EPA may well have done enough to justify its plan's severability.

To begin, the rule and its supporting documents arguably make clear that EPA's methodology for calculating cost-effectiveness thresholds and imposing emissions controls did not depend on the number of covered States. [The dissent's detailed discussion of the EPA's rule and methodology is omitted.]

Crucially, the final rule suggests that EPA calculated cost-effectiveness thresholds based on the likely cost and impact of available emissions-reduction technology given *national, industry-wide data*. Contrary to the Court's speculations, these thresholds and the FIP's resulting emissions limits appear not to depend on the number of covered States. . . . In fact, some commenters criticized EPA's reliance on a "nationwide data set" to calculate emissions limits, arguing that EPA should "limit the dataset to ... just the covered states"—an approach that *would* have made the cost-effectiveness thresholds depend on which States were covered. . . .

Thus, EPA generally characterized the FIP's emissions limits as dependent on nationwide data, not on any particular set of States. Confirming this interpretation, the final rule contemplates its application to a different number of States. It recognizes that "states may replace FIPs with SIPs if EPA approves them," and several sections explain how States may exit *this* FIP. And the rule's severability provision explains that EPA views the plan as "severable along ... state and/or tribal jurisdictional lines."

Moreover, EPA justified the FIP's severability: EPA "must address good neighbor obligations as expeditiously as practicable and by no later than the next applicable attainment date"; severability serves

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"important public health and environmental benefits" and ensures that stakeholders can "rely on this final rule in their planning." These rationales align with EPA's response to critics of its decision to propose a FIP before finalizing its SIP disapprovals: Quickly proposing a FIP—just like keeping the FIP in place even if some States drop out—"is a reasonable and prudent means *of assuring that [EPA's] statutory obligation to reduce air pollution affecting the health and welfare of people in downwind states is implemented without delay."

Given these justifications and the state-agnostic methodology apparent in the final rule, EPA's " 'path may reasonably be discerned.' " *State Farm*, 463 U.S. at 43 . The FIP's cost thresholds and emissions limits did not depend in any significant way on the number of States included, so the drawbacks of severability were minimal. . . .

Finally, it is unlikely that EPA's response to comments evinces a "fail[ure] to consider an *important* aspect of the problem." *State Farm*, 463 U.S. at 43 (emphasis added). An agency must respond to " '*relevant*' and '*significant*' public comments," and that requirement is not "particularly demanding"; the "agency need not respond at all to comments that are 'purely speculative and do not disclose the factual or policy basis on which they rest.' " EPA received hundreds of comments, and its response numbered nearly 1,100 pages. Given the likelihood that the FIP's emissions limits did not depend on the covered States, the risk of it applying to fewer States may not be "important," and comments purportedly raising that possibility might not be "relevant" and "significant." Moreover, the one comment that vaguely referred to a need for a "new assessment and modeling" was "purely speculative" and "disclose[d]" no "factual or policy basis"; it likely merited no response8. Requiring more from EPA risks the "sort of unwarranted judicial examination of perceived procedural shortcomings" that might "seriously interfere with that process prescribed by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978).[219]

C

Applicants face one more impediment: the Clean Air Act's stringent harmless-error rule. A court "reviewing alleged procedural errors ... may invalidate [an EPA] rule only if the errors were *so serious* and related to matters of *such central relevance* to the rule that there is a *substantial likelihood* that the rule would have been *significantly changed* if such errors had not been made." § 7607(d)(8) (emphasis added). This provision appears "tailor-made to undo" any "rigid presumption of vacatur" that might apply in other contexts.

The alleged error here plausibly is subject to § 7607(d)(8)'s harmless-error rule. As explained above, the Court does not suggest that it is *substantively* "[un]reasonable" to apply the FIP to fewer States, only that EPA did not "reasonably explai[n]" the FIP's severability in response to comments. *Prometheus*, 592 U.S. at 423. That is arguably an "alleged procedural error" within the meaning of § 7607(d)(8). In fact, the Act contemplates that at least some "arbitrary or capricious" challenges allege failures to "observ[e] ... procedure required by law," and such challenges may only succeed if § 7607(d)(8)'s "condition is ... met." . . .

[219] Despite the Court's suggestion of forfeiture, EPA could not have forfeited the argument that the comments the Court cites were too insubstantial to merit a response. The Court relies on comments that were not raised until the applicants' reply briefs or that were uncovered later by the Court itself.

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* * *

With little to say in response to the FIP's apparent state-agnostic methodology for setting emissions limits and the Clean Air Act's stringent harmless-error rule, the Court resorts to raising forfeiture. But it is the Court that goes out of its way to develop a failure-to-explain theory largely absent from applicants' briefs. . . .

Given that applicants' theory has evolved throughout the course of this litigation, we can hardly fault EPA for failing to raise every potentially meritorious defense in its response brief. That is particularly true given the compressed briefing schedule in this litigation's emergency posture: The Court gave EPA less than two weeks to respond to multiple applications raising a host of general and industry-specific technical challenges, filed less than a week earlier. Even still, EPA raised § 7607(d)(7)(B)'s procedural bar. And on the merits, EPA expressly argued that the FIP's "viability and validity do not depend on the number of jurisdictions it covers"; the "Rule need not apply to any minimum number of States in order to operate coherently." EPA could also have demonstrated how the FIP's state-agnostic methodology for selecting cost thresholds was apparent in the final rule. But EPA cannot have forfeited that more specific point because applicants did not raise it to begin with. . . .

III

Given the emergency posture of this litigation, my views on the merits of the failure-to-explain objection and the application of the Clean Air Act's procedural bar and harmless-error rule are tentative. But even a tentative adverse conclusion can undermine applicants' likelihood of success. And applicants, to prevail, must run the table; they face the daunting task of surmounting *all* of these significant obstacles. They are unlikely to succeed.

The Court, seizing on a barely briefed failure-to-explain theory, grants relief anyway. . . . The Court justifies this decision based on an alleged procedural error that likely had no impact on the plan. So its theory would require EPA only to confirm what we already know: EPA would have promulgated the same plan even if fewer States were covered. Rather than require this years-long exercise in futility, the equities counsel restraint. . . .

Notes & Questions

S7-19. Where did the EPA go wrong? About what do the majority and dissent disagree? How does the dissent characterize the majority's approach in this case? What lessons would you take from this case as an attorney for an agency? For a party challenging an agency action? If you represent a party that supports an agency's proposed action, is there anything you could do to try to help prevent a similar result in a future case?

S7-20. Though the APA provides the default rules for judicial review of agency actions, many statutes separately provide for procedural requirements and standards of review. The Clean Air Act, at issue in *Ohio v. EPA*, is one such statute, even though the Court relies primarily on caselaw interpreting the Administrative Procedure Act's arbitrary or capricious standard. 42 U.S.C. § 7607(d)(9)(A) provides in part that a court "may reverse" an "action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." And while § 7607(d)(7)(B) provides that "[o] nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review," § 7607(d)(6)(B) obligates the

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agency to "respon[d] to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."

Though the majority does not cite § 7607(d)(6)(B) or address the qualifier that the EPA must respond to *significant* comments, the dissent raises this point. What do you make of the different language in the Clean Air Act compared to the APA? Do the citations to *State Farm* and other APA cases make sense? How does the language in § 7607(d)(6)(B) compare with the text of § 553(b) and how the Second Circuit interpreted that provision in *United States v. Nova Scotia Food Products Corp.* (§ 4.03B in the Casebook)?

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Chapter 8. The Availability and Timing of Judicial Review

§ 8.03 Who Has Standing to Seek Judicial Review?

A. Constitutional Requirements

Insert after note 8-38 on page 849.[220] Summary of *TransUnion LLC v. Ramirez.*

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (5–4 decision), Justice Kavanaugh took the *Spokeo* mantle and effectively slammed the door shut on the viability of purely statutory injuries. The Court also imposed a new, completed injury requirement for pursuing damages, rebuking *Spokeo*'s suggestion that a "real" or "material risk" of harm could suffice. A class of over 8,000 litigants sued TransUnion alleging that it created misleading credit reports–specifically, wrongly flagging individuals as being on the Office of Foreign Assets Control's list of potential terrorists. Nearly 2,000 of those individuals established standing because their credit reports were provided to third-party businesses, which resulted in reputational harm, among other things. But the balance, over 6,000 class members, lacked standing because their credit files were not provided to others.

Justice Kavanaugh explained that, while "*Spokeo* does not require an exact duplicate" between the alleged intangible harm and the "traditional" cause of action recognized in American courts, *Spokeo* was "not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." Congress's historic ability to create new procedural rights, the violation of which formerly satisfied the injury required to establish standing, was downgraded to a recognition "that Congress's views may be instructive" in identifying concrete injuries. But Congress could not "us[e] its lawmaking power to transform something that is not remotely harmful into something that is."

The Court thus held that there was "an important" (and, likely, a dispositive) "difference" between "(i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff 's suffering concrete harm because of the defendant's violation of federal law." Practically speaking, this meant that a Maine citizen could sue a nearby factory for violating a federal environmental law and polluting her property, but "a second plaintiff in Hawaii" could not establish standing based on the same facts. "The violation did not personally harm the plaintiff in Hawaii." This is the case even if Congress, by statute, would allow either plaintiff to bring suit to vindicate the broader public interest in eliminating pollution. Kavanaugh thus took *Lujan*'s separation-of-powers rationale (which, recall, dealt with a lawsuit against a federal agency) a step further. He explained that Congress could not deputize private plaintiffs, who "are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law," without "infring[ing] on the Executive Branch's Article II authority."

Applying these principles, the Court held that the class members whose incorrect credit reports (flagging them as potential terrorists) were actually disseminated had "suffered a harm with a 'close relationship' to the harm associated with the tort of defamation." But the others did not suffer any such harm, just "as if someone wrote a defamatory letter and then stored it in her desk drawer." Walking back *Spokeo*'s reasoning, the Court rejected these plaintiffs' suggestion that they had suffered an injury for which damages were available because TransUnion's mistake subjected them to an increased risk of harm. Though that sort of injury could support a request for injunctive relief, only harm that "materializes" can "constitute a basis" for damages. Kavanaugh reasoned by analogy to a situation where "a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes" yet arrives home safely, which is "cause for celebration, not a lawsuit."

In dissent, Justice Thomas (joined by Justices Breyer, Sotomayor, and Kagan) argued that the effect of *Spokeo* and *TransUnion* has been to "constitutionally preclude[]" Congress "from creating legal rights enforceable in federal courts if those rights deviate too far from their common-law roots." Now, "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights."

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[220] The following summation is adapted from Aman, Rookard & Mayton, Administrative Law 337–40 (4th ed. 2023).

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Instead, Justice Thomas argued that a reasonable line could have been drawn based on *Lujan*, distinguishing between suits against the government to vindicate "public rights," which "require more than just a legal violation," and suits that "create[] a private right and a cause of action," which "*does* give[] plaintiffs an adequate interest in vindicating their public rights in federal court." Justice Thomas also echoed longstanding academic criticism of the majority's historical analysis, challenging the very requirement of concreteness; "[a]fter all, it was not until 1970—180 years after the ratification of Article III—that this Court even introduced the "injury in fact" (as opposed to injury in law) concept of standing." He closed with a parting shot at the majority's reasoning:

> Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

By constitutionalizing a narrow definition of "injury," Congress's judgment carries less weight.

The *TransUnion* majority left open one avenue to the group of plaintiffs whose erroneous credit reports were not disclosed, suggesting in a footnote that "exposure to the risk of future harm" could "cause[] a separate concrete harm," such as where a "plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm" causes "its own current emotional or psychological harm." But the Court declined to take a "position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress."

That issue is the subject of an "entrenched" circuit split.[221] A majority of a Seventh Circuit panel tersely held, in response to a claim that a plaintiff "experienced emotional distress" about possibly being sued after receiving a communication about collecting a stale debt, that "worry, like confusion, is insufficient to confer standing in [the FDCPA] context."[222] This prompted Judge Hamilton to exhaustively canvas circuit and national precedent on emotional harm and to implore his colleagues to "give due respect to Congress's judgment about making harms actionable" and to acknowledge the "many areas of common law that recognize such intangible but real harms [such as stress, fear, anxiety, confusion, and embarrassment] and offer protection against them."[223] Judge Hamilton nonetheless suggested that it may be the Supreme Court's responsibility to "provide a correction."

Insert after note 8-42 on page 855.[224] Summary of *California v. Texas.*

By now, you should be able to identify the discrete requirements to establish standing under the Supreme Court's Article III jurisprudence: (1) injury in fact that is both (a) concrete and particularized and (b) actual or imminent; (2) redressability; and (3) traceability. These latter two requirements are distinct requirements; as the D.C. Circuit once observed, "[C]ausation [traceability] does not inevitably imply redressability, because a new status quo may be held in place by other forces besides the government action at issue."[225] But often both are absent.

California v. Texas, 141 S. Ct. 2104 (2021), involved tenuous traceability and redressability theories, raised by a variety of individuals and states seeking a declaration that the Affordable Care Act's minimal essential coverage provision[226] was unconstitutional. But their real goal was to obtain a declaration that the minimal coverage provision was inseverable from the rest of the Act and an injunction against enforcement against the rest of the Act. The individuals claimed that they were injured by the insurance payments that they had made previously and by those that they would have to make in the future to meet the minimum coverage requirements. The problem, however, was that Congress had already amended the Act to remove the penalty for noncompliance. "Because of this, there is no possible

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[221] Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 950–55 (7th Cir. 2022) (Hamilton, J., dissenting) (discussing state of the circuit split).
[222] *Id.* at 939 (majority opinion).
[223] *Id.* at 953 (Hamilton, J., dissenting).
[224] The following summation is adapted from Aman, Rookard & Mayton, Administrative Law 347 (West Academic Publishing, 4th ed. 2023).
[225] Competitive Enter. Inst. v. FCC, 970 F.3d 372, 381 (D.C. Cir. 2020).
[226] 26 U.S.C. § 5000A(a).

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Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance." Thus, the plaintiffs could not show traceability. Nor was their pocketbook injury redressable by the injunctive and declaratory relief sought: "What is that relief [that will redress the individual plaintiffs' injuries]? The plaintiffs did not obtain damages [in the trial court]. Nor . . . did the plaintiffs obtain an injunction in respect to the provision they attack as unconstitutional. But, more than that: How could they have sought any such injunction? The provision is unenforceable. There is no one, and nothing, to enjoin." In short, the individual plaintiffs lacked standing to use the minimum coverage provision, which Congress had already effectively nullified by eliminating the penalty provision, to topple the rest of the Act.

The states likewise lacked standing. They first theorized that minimum coverage requirements would cause their residents to enroll in state-subsidized insurance programs in greater numbers. But this theory rested on the "decision of an independent third party (here an individual's decision to enroll in, say, Medicaid)," and the states failed to demonstrate, with competent evidence, "that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo." Their second theory was that the minimum coverage provision "causes them to incur additional costs directly," such as "the costs of providing beneficiaries of state health plans with information about their health insurance coverage, as well as the cost of furnishing the IRS with that related information." Here, too, the states had a dispositive traceability problem because "other provisions of Act, not the minimum essential coverage provision, impose these other requirements."

We now turn to special issues that may arise when states assert standing to challenge the federal government's policies.

A. Do States Have Standing?

Insert the following principal case after note 8-48 on page 866.

The uncertain contours of *Massachusetts v. EPA* contributed to confusion in the circuit courts over whether states had standing to challenge the Biden Administration's immigration enforcement priorities.[227] But, in the following case, the majority dealt with *Massachusetts* in a footnote, though the case features prominently in the concurring and dissenting opinions.

United States v. Texas

599 U.S. 670 (2023)

Justice KAVANAUGH delivered the opinion of the Court.

In 2021, after President Biden took office, the Department of Homeland Security issued new Guidelines for immigration enforcement. The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example. Texas and Louisiana sued the Department of Homeland Security. According to those States, the Department's new Guidelines violate federal statutes that purportedly require the Department to arrest *more* criminal noncitizens pending their removal.

The States essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests. But this Court has long held "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R. S. v. Richard D.*, 410 U. S. 614, 619 (1973). Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit.

I

[227] *Compare* Texas v. United States, 40 F.4th 205, 216 & n.4 (5th Cir. 2022) (citing *Massachusetts* favorably but rev'd in the case below), *with* Arizona v. Biden, 40 F.4th 375, 385–86 (6th Cir. 2022) (concluding that *Massachusetts* did not give state standing).

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In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, § 1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government. [The Court's recitation of the procedural history is omitted.]

II

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes. See, *e.g., TransUnion LLC* v. *Ramirez*, 594 U. S. ——, ——, 141 S.Ct. 2190, 2203 (2021); *California* v. *Texas*, 593 U. S. ——, ——, 141 S.Ct. 2104, 2113 (2021).

As this Court's precedents amply demonstrate, Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 (1982). The principle of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen*, 468 U. S., at 752. Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U. S., at 408.

A

. . . The threshold question is whether the States have standing under Article III to maintain this suit. The answer is no.

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. See *Lujan*, 504 U. S., at 560–561. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the alleged injury must be legally and judicially cognizable." *Raines*, 521 U. S., at 819. That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. In adhering to that core principle, the Court has examined "history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider."

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

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The leading precedent is *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution . . . of another." The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. See *id.,* at 617, 619, 93 S.Ct. 1146; *Castle Rock v. Gonzales*, 545 U.S. 748, 760–761, 767, n.13 (2005); cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (citing *Linda R. S.* principle in immigration context and stating that the petitioners there had "no judicially cognizable interest in procuring enforcement of the immigration laws" by the Executive Branch). And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise. A "telling indication of the severe constitutional problem" with the States' assertion of standing to bring this lawsuit "is the lack of historical precedent" supporting it. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted).

In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.

B

Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.

To begin with, when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. See *Lujan*, 504 U. S., at 561–562. And for standing purposes, the absence of coercive power over the plaintiff makes a difference: When "a plaintiff 's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing. *Id.* at 562.[228]

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to the President and provides that the President "shall take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC*, 594 U. S., at ——, 141 S.Ct. at 2207. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only "normal domestic law enforcement priorities" but also "foreign-policy objectives." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–491 (1999). In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States. *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all").

[228] By contrast, when "the plaintiff is himself an object of the action (or forgone action) at issue," "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."

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In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by § 1226(c) and § 1231(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since § 1226(c) and § 1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. Cf. *Heckler v. Chaney*, 470 U.S. 821, 830–832 (1985); *Lincoln v. Vigil*, 508 U.S. 182, 190–192 (1993). Therefore, in both Article III cases and Administrative Procedure Act cases, this Court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions. See *Linda R. S.*, 410 U. S., at 619; cf. *Heckler*, 470 U. S., at 831 (recognizing the "general unsuitability for judicial review of agency decisions to refuse enforcement"); *ICC v. Locomotive Engineers*, 482 U.S. 270, 283 (1987) ("it is entirely clear that the refusal to prosecute cannot be the subject of judicial review").[229]

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers "contemplates a more restricted role for Article III courts."

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions against other possible defendants.

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.

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[229] Also, the plaintiffs here are States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer. To be sure, States sometimes have standing to sue the United States or an executive agency or officer. But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated.

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Here, however, the relevant statutes do not supply such specific authorization. The statutes, even under the States' own reading, simply say that the Department "shall" arrest certain noncitizens. Given the "deep-rooted nature of law-enforcement discretion," a purported statutory arrest mandate, without more, does not entitle any particular plaintiff to enforce that mandate in federal court. *Castle Rock*, 545 U. S., at 761, 764–765, 767, n. 13; cf. *Heckler*, 470 U.S., at 835. For an arrest mandate to be enforceable in federal court, we would need at least a "stronger indication" from Congress that judicial review of enforcement discretion is appropriate—for example, specific authorization for particular plaintiffs to sue and for federal courts to order more arrests or prosecutions by the Executive. *Castle Rock*, 545 U. S., at 761, 125 S.Ct. 2796. We do not take a position on whether such a statute would suffice for Article III purposes; our only point is that no such statute is present in this case.

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U. S., at 833, n.4; cf. 5 U.S.C. § 706(1). So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing. But the States have not advanced a *Heckler*-style "abdication" argument in this case or argued that the Executive has entirely ceased enforcing the relevant statutes. Therefore, we do not analyze the standing ramifications of such a hypothetical scenario.

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Cf. *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. ——, —— – ——, 140 S.Ct. 1891, 1906–07 (2020) (benefits such as work authorization and Medicare eligibility accompanied by non-enforcement meant that the policy was "more than simply a non-enforcement policy"); *Texas v. United States*, 809 F.3d 134, 154 (CA5 2015) (*Linda R. S.* "concerned only nonprosecution," which is distinct from "both nonprosecution and the conferral of benefits"), aff'd by an equally divided Court, 579 U.S. 547 (2016). Again, we need not resolve the Article III consequences of such a policy.

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. Cf. *Biden* v. *Texas*, 597 U. S. ——, 142 S.Ct. 2528 (2022). But this case does not concern a detention policy, so we do not address the issue here.

D

The discrete standing question raised by this case rarely arises because federal statutes that purport to *require* the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive's Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law. Indeed, the States cite no similarly worded federal laws. This case therefore involves both a highly unusual provision of federal law and a highly unusual lawsuit.

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions

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against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.[230]

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes . . . . We hold only that the federal courts are not the proper forum to resolve this dispute.

. . . [O]ther forums remain open for examining the Executive Branch's arrest policies. For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance.

The Court's standing decision today is narrow and simply maintains the longstanding jurisprudential status quo. The Court's decision does not alter the balance of powers between Congress and the Executive, or change the Federal Judiciary's traditional role in separation of powers cases.

* * *

. . . [B]ecause the States lack Article III standing, the District Court did not have jurisdiction. We reverse the judgment of the District Court.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice BARRETT join, concurring in the judgment.

The Court holds that Texas and Louisiana lack Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. I agree. But respectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.

I

Article III vests federal courts with the power to decide "Cases" and "Controversies." Standing doctrine honors the limitations inherent in this assignment by ensuring judges attend to actual harms rather than abstract grievances. "If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." *American Legion* v. *American Humanist Assn*., 588 U. S. ——, ——, 139 S.Ct. 2067, 2099 (2019) (GORSUCH, J., concurring in judgment).

To establish standing to sue in federal court, a plaintiff must show that it has suffered a concrete and particularized injury, one that is both traceable to the defendant and redressable by a court order. If a plaintiff fails at any step, the court cannot reach the merits of the dispute. This is true whether the plaintiff is a private person or a State. After all, standing doctrine derives from Article III, and nothing in that provision suggests a State may have standing when a similarly situated private party does not. See *Massachusetts v. EPA*, 549 U. S. 497, 536–538, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (ROBERTS, C. J., dissenting).

[230] As part of their argument for standing, the States also point to *Massachusetts v. EPA*, 549 U. S. 497 (2007). Putting aside any disagreements that some may have with *Massachusetts* v. *EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion.

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The Court holds that Texas and Louisiana lack standing to challenge the Guidelines because "a party lacks a judicially cognizable interest in the prosecution . . . of another." To be sure, the district court found that the Guidelines have led to an increase in the number of aliens with criminal convictions and final orders of removal who are released into the States. The district court also found that, thanks to this development, the States have spent, and continue to spend, more money on law enforcement, incarceration, and social services. Still, the Court insists, "[s]everal good reasons explain why" these harms are insufficient to afford the States standing to challenge the Guidelines..

I confess to having questions about each of the reasons the Court offers. Start with its observation that the States have not pointed to any "historical practice" of courts ordering the Executive Branch to change its arrest or prosecution policies. The Court is right, of course, that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." But, again, the district court found that the Guidelines impose "significant costs" on the States. The Court today does not set aside this finding as clearly erroneous. Nor does anyone dispute that even one dollar's worth of harm is traditionally enough to "qualify as concrete injur[y] under Article III." Indeed, this Court has allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms. So why are these States now forbidden from doing the same?

Next, the Court contends that, "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." Here again, in principle, I agree. But if an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts* v. *EPA*? There the Court held that Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. See 549 U. S., at 516–526. And what could be less coercive than a decision not to regulate? In *Massachusetts* v. *EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved "special solicitude." *Id.,* at 520. I have doubts about that move. Before *Massachusetts* v. *EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." *Id.*, at 536, 127 S.Ct. 1438 (ROBERTS, C. J., dissenting). Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

Finally, the Court points to the fact that Article II vests in the President considerable enforcement discretion. So much so that "courts generally lack meaningful standards for assessing the propriety of [the Executive Branch's] enforcement choices.". But almost as soon as the Court announces this general rule, it adds a caveat, stressing that "[t]his case concerns only arrest and prosecution policies." It's a curious qualification. Article II does not have an Arrest and Prosecution Clause. It endows the President with the "executive Power," § 1, cl. 1, and charges him with "tak[ing] Care" that federal laws are "faithfully executed," § 3. These provisions give the President a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution. So if the Court means what it says about Article II, can it mean what it says about the narrowness of its holding? There's another curious qualification in the Court's opinion too. "[T]he standing calculus might change," we are told, "if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." But the Court declines to say more than that because "the States have not advanced" such an argument. *Ibid.* Is that true, though? . . .

II

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

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To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied " 'by a favorable decision.' " Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them [under the relevant statute, 8 U.S.C. § 1252(f)(1), which provides "that 'no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of' certain immigration laws, including the very laws the States seek to have enforced in this case."] . . .

The district court thought it could sidestep § 1252(f)(1). Instead of issuing an injunction, it purported to "vacate" the Guidelines pursuant to § 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). Vacatur, as the district court understood it, is a distinct form of relief that operates directly on agency action, depriving it of legal force or effect. And vacatur, the district court reasoned, does not offend § 1252(f)(1), because it does not entail an order directing any federal official to do anything. The States embrace this line of argument before us.

It's a clever workaround, but it doesn't succeed. . . . [A] vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. It's a point even the States have acknowledged.

. . .

III

Beyond these redressability problems may lie still another. Recall the essential premise on which the district court proceeded—that the APA empowers courts to vacate agency action. The federal government vigorously disputes this premise, arguing that the law does not contemplate this form of relief. The reasons the government offers are plenty and serious enough to warrant careful consideration. [Justice Gorsuch argued that § 706(2), which allows courts to "set aside" agency action, allows courts only to "disregard" rather than "vacate" an agency's action. He situated this critique within his larger disapproval of universal injunctions and addressed various counterarguments.]

. . .

*

In our system of government, federal courts play an important but limited role by resolving cases and controversies. Standing doctrine honors this limitation at the front end of every lawsuit. It preserves a forum for plaintiffs seeking relief for concrete and personal harms while filtering out those with generalized grievances that belong to a legislature to address. Traditional remedial rules do similar work at the back end of a case. They ensure successful plaintiffs obtain meaningful relief. But they also restrain courts from altering rights and obligations more broadly in ways that would interfere with the power reserved to the people's elected representatives. In this case, standing and remedies intersect. The States lack standing because federal courts do not have authority to redress their injuries. Section 1252(f)(1) denies the States any coercive relief. A vacatur order under § 706(2) supplies them no effectual relief. And such an order itself may not even be legally permissible. . . . The Constitution affords federal courts considerable power, but it does not establish "government by lawsuit." R. Jackson, The Struggle for Judicial Supremacy 286–287 (1941).

Justice BARRETT, with whom Justice GORSUCH joins, concurring in the judgment.

I agree with the Court that the States lack standing to challenge the Federal Government's Guidelines for the enforcement of immigration law. But I reach that conclusion for a different reason: The States failed

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to show that the District Court could order effective relief. Justice GORSUCH ably explains why that is so. And because redressability is an essential element of Article III standing, the District Court did not have jurisdiction.

The Court charts a different path. In its view, this case can be resolved based on what it calls the "fundamental Article III principle" that " 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' " In other words, the Court says, the States have not asserted a " 'judicially cognizable interest' " in this case. Respectfully, I would not take this route.

I

To begin with, I am skeptical that *Linda R. S.* suffices to resolve this dispute. First, the Court reads that decision too broadly. Consider the facts. The "mother of an illegitimate child" sued in federal court, "apparently seek[ing] an injunction running against the district attorney forbidding him from declining prosecution" of the child's father for failure to pay child support. 410 U. S., at 614–616. She objected, on equal protection grounds, to the State's view that "fathers of illegitimate children" were not within the ambit of the relevant child-neglect statute.

We agreed that the plaintiff "suffered an injury stemming from the failure of her child's father to contribute support payments." But if the plaintiff "were granted the requested relief, it would result only in the jailing of the child's father." Needless to say, the prospect that prosecution would lead to child-support payments could, "at best, be termed only speculative." For this reason, we held that the plaintiff lacked standing. Only then, after resolving the standing question on redressability grounds, did we add that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." In short, we denied standing in *Linda R. S.* because it was speculative that the plaintiff 's requested relief would redress her asserted injury, not because she failed to allege one.

Viewed properly, *Linda R. S.* simply represents a specific application of the general principle that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" given the causation and redressability issues that may arise. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 562d(1992). That is true for the States here. I see little reason to seize on the case's bonus discussion of whether "a private citizen" has a "judicially cognizable interest in the prosecution or nonprosecution of another" to establish a broad rule of Article III standing.

Second, even granting the broad principle the Court takes from *Linda R. S.*, I doubt that it applies with full force in this case. Unlike the plaintiff in *Linda R. S.*, the States do not seek the prosecution of any particular individual—or even any particular class of individuals. . . .

The upshot is that the States do not dispute that the Government can prosecute whomever it wants. They seek, instead, the temporary detention of certain noncitizens during elective removal proceedings of uncertain duration. And the States' desire to remove the Guidelines' influence on the Government's admittedly broad discretion to enforce immigration law meaningfully differs from the *Linda R. S.* plaintiff 's desire to channel prosecutorial discretion toward a particular target. . . .

II

In addition to its reliance on *Linda R. S.*, the Court offers several reasons why "federal courts have not traditionally entertained lawsuits of this kind." I am skeptical that these reasons are rooted in Article III standing doctrine.

Take, for example, the Court's discussion of *Castle Rock v. Gonzales*, 545 U. S. 748 (2005). There, we reasoned that given "[t]he deep-rooted nature of law-enforcement discretion," a "true mandate of police action would require some stronger indication" from the legislature than, for example, the bare use of the word " 'shall' " in a statutory directive. The Court today concludes that "no such statute is present in this

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case." But *Castle Rock* is not a case about Article III standing. It addressed "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest" under the Fourteenth Amendment "in having the police enforce the restraining order when they have probable cause to believe it has been violated." 545 U. S., at 750–751. I see no reason to opine on *Castle Rock*'s application here, especially given that the parties (correctly) treat *Castle Rock* as relevant to the *merits* of their statutory claims rather than to the States' *standing* to bring them.

The Court also invokes "the Executive's Article II authority to enforce federal law." I question whether the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3, is relevant to the standing analysis. While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury. Moreover, the Court works the same magic on the Take Care Clause that it does on *Castle Rock*: It takes an issue that entered the case on the merits and transforms it into one about standing.

The Court leans, too, on principles set forth in *Heckler v. Chaney*, 470 U.S. 821 (1985). But, again, *Heckler* was not about standing. It addressed a different question: "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act." 470 U. S., at 823; see also 5 U.S.C. § 701(a)(2) (the APA's judicial-review provisions do not apply "to the extent" that "agency action is committed to agency discretion by law"). *Heckler* held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under" the APA. But such a decision "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Whatever *Heckler*'s relevance to cases like this one, it does not establish a principle of Article III standing. And elevating it to the status of a constitutional rule would transform it from a case about statutory provisions (that Congress is free to amend) to one about a constitutional principle (that lies beyond Congress's domain). Although the Court notes that *Heckler* involved the APA, its conflation of *Heckler* with standing doctrine is likely to cause confusion.

* * *

. . . In my view, this case should be resolved on the familiar ground that it must be " 'likely,' as opposed to merely 'speculative,' " that any injury "will be 'redressed by a favorable decision.' " I respectfully concur only in the judgment.

Justice ALITO, dissenting.

The Court holds Texas lacks standing to challenge a federal policy that inflicts substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes. In order to reach this conclusion, the Court brushes aside a major precedent that directly controls the standing question, refuses to apply our established test for standing, disregards factual findings made by the District Court after a trial, and holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress's power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. . . .

This Court has long applied a three-part test to determine whether a plaintiff has standing to sue. Under that test, a plaintiff must plead and ultimately prove that it has been subjected to or imminently faces an injury that is: (1) "concrete and particularized," (2) "fairly traceable to the challenged action," and (3) "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks and alterations omitted). Under that familiar test, Texas clearly has standing to bring this suit.

Nevertheless, the United States (the defendant in this case) has urged us to put this framework aside and adopt a striking new rule. At argument, the Solicitor General was asked whether it is the position of the United States that the Constitution does not allow any party to challenge a President's decision not to enforce laws he does not like. . . .

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[A]ccording to the United States, even if a party clearly meets our three-part test for Article III standing, the Constitution bars that party from challenging a President's decision not to enforce the law. Congress may wield what the Solicitor General described as "political . . . tools"—which presumably means such things as withholding funds, refusing to confirm Presidential nominees, and impeachment and removal—but otherwise Congress and the American people must simply wait until the President's term in office expires.

The Court—at least for now—does not fully embrace this radical theory and instead holds only that, with some small and equivocal limitations . . . , no party may challenge the Executive's "arrest and prosecution policies." But the Court provides no principled explanation for drawing the line at this point, and that raises the concern that the Court's only reason for framing its rule as it does is that no more is needed to dispose of *this* case. . . .

II

Before I address the Court's inexplicable break from our ordinary standing analysis, I will first explain why Texas easily met its burden to show a concrete, particularized injury that is traceable to the Final Memorandum and redressable by the courts.

A

Injury in fact. The District Court's factual findings, which must be accepted unless clearly erroneous, quantified the cost of criminal supervision of aliens who should have been held in DHS custody and also identified other burdens that Texas had borne and would continue to bear going forward. These findings sufficed to establish a concrete injury that was specific to Texas.

Traceability. The District Court found that each category of cost would increase "*because of* the Final Memorandum," rather than decisions that DHS personnel would make irrespective of the directions that memorandum contains.

The majority does not hold—and in my judgment, could not plausibly hold—that these findings are clearly erroneous. Instead, it observes only that a "State's claim for standing can become more attenuated" when based on the "indirect effects" of federal policies "on state revenues or state spending." But while it is certainly true that indirect injuries may be harder to prove, an indirect financial injury that *is* proved at trial supports standing. And that is what happened here. . . .

In any event, many of the costs in this case are not indirect. When the Federal Government refuses or fails to comply with §§ 1226(a) and (c) as to criminal aliens, the *direct* result in many cases is that the State must continue its supervision [of detained individuals]. . . .

Redressability. A court order that forecloses reliance on the memorandum would likely redress the States' injuries. If, as the District Court found, DHS personnel rescind detainers "because of" the Final Memorandum, then vacating that memorandum would likely lead to those detainers' remaining in place.

B

While the majority does not contest redressability, Justice GORSUCH's concurrence does, citing two reasons. [Justice Alito proceeded to contest Justice Gorsuch's statutory analysis.] . . .

To be clear, I would be less troubled than I am today if Justice GORSUCH's concurrence had commanded a majority. At least then, Congress would be free to amend § 1252(f). But the majority reaches out and redefines our understanding of the *constitutional* limits on otherwise-available lawsuits. It is to this misunderstanding that I now turn.

III

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The majority adopts the remarkable rule that injuries from an executive decision not to arrest or prosecute, even in a civil case, are generally not "cognizable." Its reasoning has three failings. First, it fails to engage with contrary precedent that is squarely on point. Second, it lacks support in the cases on which it relies. Third, the exceptions (or possible exceptions) that it notes do nothing to allay concern about the majority's break from our established test for Article III standing. I address each of these problems in turn.

A

Prior to today's decision, it was established law that plaintiffs who suffer a traditional injury resulting from an agency "decision not to proceed" with an enforcement action have Article III standing. The obvious parallel to the case before us is *Massachusetts v. EPA*, 549 U.S. 497 (2007), which has been called "the most important environmental law case ever decided by the Court." In that prior case, Massachusetts challenged the Environmental Protection Agency's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. Massachusetts argued that it was harmed because the accumulation of greenhouse gases would lead to higher temperatures; higher temperatures would cause the oceans to rise; and rising sea levels would cause the Commonwealth to lose some of its dry land. The Court noted that Massachusetts had a "quasi-sovereign interes[t]" in avoiding the loss of territory and that our federalist system had stripped the Commonwealth of "certain sovereign prerogatives" that it could have otherwise employed to defend its interests. Proclaiming that Massachusetts' standing claim was entitled to "special solicitude," the Court held that the Commonwealth had standing.

The reasoning in that case applies with at least equal force in the case at hand. In *Massachusetts* v. *EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union. In the present case, Texas's entry into the Union stripped it of the power that it undoubtedly enjoyed as a sovereign nation to police its borders and regulate the entry of aliens. The Constitution and federal immigration laws have taken away most of that power, but the statutory provisions at issue in this case afford the State at least *some* protection—in particular by preventing the State and its residents from bearing the costs, financial and non-financial, inflicted by the release of certain dangerous criminal aliens. Our law on standing should not deprive the State of even that modest protection. We should not treat Texas less favorably than Massachusetts. And even if we do not view Texas's standing argument with any "special solicitude," we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing.

Despite the clear parallel with this case and the States' heavy reliance on *Massachusetts* throughout their briefing, the majority can only spare a passing footnote for that important precedent. It first declines to say *Massachusetts* was correctly decided and references the "disagreements that some may have" with that decision. But it then concludes that *Massachusetts* "does not control" since the decision itself refers to " 'key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action,' " with the latter " 'not *ordinarily* subject to judicial review.' "

The problem with this argument is that the portion of *Massachusetts* to which the footnote refers deals not with its key Article III holding, but with the scope of review that is "ordinarily" available under the statutory scheme. Importantly, *Massachusetts* frames its statement about declining enforcement as restating the rule of *Heckler v. Chaney*. And as the Court acknowledges when it invokes *Heckler* directly, that decision is not about standing; it is about the interpretation of the statutory exception to APA review for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). And even in that context, *Heckler* expressly contemplates that any "presumption" of discretion to withhold enforcement can be rebutted by an express statutory limitation of discretion—which is exactly what we have here.

So rather than answering questions about this case, the majority's footnote on *Massachusetts* raises more questions about *Massachusetts* itself—most importantly, has this monumental decision been quietly interred? . . . [The remainder of Part III is omitted.]

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IV

The Court declares that its decision upholds "[o]ur constitutional system of separation of powers," but as I said at the outset, the decision actually damages that system by improperly inflating the power of the Executive and cutting back the power of Congress and the authority of the Judiciary. And it renders States already laboring under the effects of massive illegal immigration even more helpless.

Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that "the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.' " *Zivotofsky v. Kerry*, 576 U. S. 1, 61 (2015) (ROBERTS, C. J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring)).

That is the situation here. To put the point simply, Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced. [The remainder of Justice Alito's dissent is omitted.]

Notes & Questions

S8-1. The opinions in *United States v. Texas* cover a lot of ground and show the extremely blurry lines between jurisdiction and merits. They discuss due process property interests (citing *Castle Rock v. Gonzales*, Casebook notes 2-30 and 2-31), the "committed to agency discretion by law" provision of the APA (Casebook § 8.02), the Take Care Clause, and standing, underscoring the interrelatedness of the materials we cover throughout administrative law.

What is the general standing principle the majority establishes (or, in their view, applies from *Linda R.S.*) in this case? How does that principle fit in with the tripartite standing framework set forth in *Lujan*?

S8-2. What problem do the concurring and dissenting opinions have with the majority's approach? Where do Gorsuch's, Barrett's, and Alito's opinions diverge? How would you describe the separation of powers approaches of the various opinions in this case?

S8-3. On June 30, 2023, the Supreme Court decided a pair of cases challenging the Secretary of Education's decision to cancel approximately $430 billion of federal student loans under the HEROES Act.

***Dep't of Educ. v. Brown*, 600 U.S. 551 (2023) (case note)**

The first, *Dep't of Educ. v. Brown*, 600 U.S. 551 (2023), involved suits by individual borrowers who did not quality for maximum relief under the Secretary's relief scheme. They alleged that the Secretary failed to comply with notice and comment and negotiated rulemaking. For a unanimous court, Justice Alito concluded that the borrowers lacked standing:

> [W]e now understand respondents' claim and theory of standing as follows. First, because the HEROES Act does not substantively authorize the [debt cancellation plan], the Department was obligated to follow the typical negotiated-rulemaking and notice-and-comment requirements. Second, if the Department had observed those procedures, respondents might have used those opportunities to convince the Department (1) that proceeding under the HEROES Act is unlawful

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> or otherwise undesirable, and (2) that it should adopt a different loan-forgiveness plan under the [Higher Education Act] HEA instead, one that is more generous to them than the HEROES Act plan that they allege is unlawful.
>
> Describing respondents' claim illustrates how unusual it is. They claim they are injured because the Government has not adopted a lawful benefits program under which they would qualify for assistance. But the same could be said of anyone who might benefit from a benefits program that the Government has not chosen to adopt. It is difficult to see how such an injury could be particular (since all people suffer it) or concrete (since an as-yet-uncreated benefits plan is necessarily " 'abstract' " and not " 'real' ").
>
> Nonetheless, we think the deficiencies of respondents' claim are clearest with respect to traceability. They cannot show that their purported injury of not receiving loan relief under the HEA is fairly traceable to the Department's (allegedly unlawful) decision to grant loan relief under the HEROES Act. . . .
>
> A decision by this Court that the Plan is lawful would have no effect on the Department's ability to forgive respondents' loans under the HEA. Thus, the Plan poses no legal obstacle to the Department's choosing to find other ways to remedy the harm respondents experience from not having their loans forgiven.
>
> Put differently, the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want. The cause of their supposed injury is far more pedestrian than that: The Department has simply *chosen* not to give them the relief they want. Ordinarily, a party's recourse to induce an agency to take a desired action is to file not a lawsuit, but a "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The denial of such a petition "must be justified by a statement of reasons," which in turn "can be appealed to the courts" if the litigant has standing to maintain such a suit. *Auer v. Robbins*, 519 U.S. 452, 459 (1997). Contesting a separate benefits program based on a theory that it crowds out the desired one, however, is an approach for which we have been unable to find any precedent.

***Biden v. Nebraska*, 600 U.S. 477 (2023) (case note)**

The Court held by 6–3 vote in *Biden v. Nebraska*, 600 U.S. 477 (2023), that at least one state had standing to challenge the debt cancellation. Chief Justice Roberts wrote that Missouri had standing by virtue of the financial impact of debt cancellation on MOHELA, a "nonprofit government corporation" that owned $1 billion of Federal Family Education Loans and serviced $150 billion of federal loans:

> MOHELA receives an administrative fee for each of the five million federal accounts it services, totaling $88.9 million in revenue last year alone.
>
> Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. This financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede.
>
> The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. § 173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans

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> needed to pay for college. *Id.* . . . Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students. . . .
>
> By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.

Insert the following new section after § 8.04.E (p. 896).

F. Statutes of Limitations (new section)

Statutes of limitations ensure that parties promptly assert their rights and provide predictability and finality. The default statute of limitations governing suits against the United States provides, in relevant part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

For a while, the courts of appeals unanimously agreed that § 2401(a) required a party to challenge an agency rule within six years of the date of final agency action. In the case below, the Supreme Court takes a different approach. What is the rule now? Why does the Court arrive at that conclusion? What are the potential consequences of the Court's holding, particularly in light of recent watershed cases like *Loper Bright*?

Corner Post, Inc. v. Board of Governors of the Federal Reserve System

603 U.S. 799 (2024)

Justice BARRETT delivered the opinion of the Court.

The default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). We must decide when a claim brought under the Administrative Procedure Act "accrues" for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.

I

Corner Post is a truckstop and convenience store located in Watford City, North Dakota. It was incorporated in 2017, and in 2018, it opened for business. Like most merchants, Corner Post accepts debit cards as a form of payment. While convenient for customers, debit cards are costly for merchants: Every transaction requires them to pay an "interchange fee" to the bank that issued the card. The amount of the fee is set by the payment networks, like Visa and Mastercard, that process the transaction between the banks of merchants and cardholders. The cost quickly adds up. Since it opened, Corner Post has paid hundreds of thousands of dollars in interchange fees—which has meant higher prices for its customers.

Interchange fees have long been a sore point for merchants. For many years, payment networks had free rein over the fee amount—and because they used the promise of per-transaction profit to compete for the banks' business, they had significant incentive to raise the fees. Merchants—who would lose customers if

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they declined debit cards—had little choice but to pay whatever the networks charged. Left unregulated, interchange fees ballooned.

Congress eventually stepped in. The Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasks the Federal Reserve Board with setting "standards for assessing whether the amount of any interchange transaction fee ... is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693*o*–2(a)(3)(A). Discharging this duty, the Board promulgated Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value. The Board published the rule on July 20, 2011.

Four months later, a group of retail-industry trade associations and individual retailers sued the Board, arguing that Regulation II allows costs that the statute does not. . . . [T]he D. C. Circuit [concluded] "that the Board's rules generally rest on reasonable constructions of the statute,"

Corner Post, of course, did not exist when the Board adopted Regulation II or even during the D. C. Circuit litigation. But after opening its doors, it too became frustrated by interchange fees, and in 2021, joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint alleges that Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits. See 5 U.S.C. §§ 706(2)(A), (C).

. . . At least six Circuits now hold that the limitations period for "facial" APA challenges begins on the date of final agency action—*e.g.*, when the rule was promulgated—regardless of when the plaintiff was injured. By contrast, the Sixth Circuit has stated a generally applicable rule that § 2401(a)'s limitations period begins when the plaintiff is injured by agency action, even if that injury did not occur until many years after the action became final. . . .

II

Three statutory provisions control our analysis: 5 U.S.C. § 702 and § 704, the relevant APA provisions, and 28 U.S.C. § 2401(a), the relevant statute of limitations. The APA provisions grant Corner Post a cause of action subject to certain conditions, and § 2401(a) sets the window within which Corner Post can assert its claim.

Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees. It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. We have explained that § 702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." Thus, a litigant cannot bring an APA claim unless and until she suffers an injury.[1]

While § 702 equips injured parties with a cause of action, § 704 limits the agency actions that are subject to judicial review. Unless another statute makes the agency's action reviewable (and none does for Regulation II), judicial review is available only for "final agency action." § 704. In most cases, then, a plaintiff can only challenge an action that "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997) (internal quotation marks omitted). Note that § 702's injury requirement and § 704's finality requirement work hand in hand: Each is a "necessary, but not by itself ... sufficient, ground for stating a claim under the APA."

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The applicable statute of limitations, 28 U.S.C. § 2401(a), contains the language we must interpret: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*." (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it. See, *e.g.*, 33 U.S.C. § 1369(b) (deadline to challenge certain agency actions under the Clean Water Act).

The Board contends that an APA claim "accrues" when agency action is "final" for purposes of § 704—injury, it says, is necessary for the suit but irrelevant to the statute of limitations.[231] We disagree. A right of action "accrues" when the plaintiff has a "complete and present cause of action"—*i.e.*, when she has the right to "file suit and obtain relief." An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.

III

Congress enacted § 2401(a) in 1948, two years after it enacted the APA. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which gave district courts jurisdiction over non-tort monetary claims not exceeding $10,000 against the United States. See § 24, 36 Stat. 1093 ("That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made"). When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into a general statute of limitations for all suits against the Government—replacing "under this paragraph" with "every civil action commenced against the United States." But Congress continued to start the 6-year limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with § 2401(a) ("after the right of action first accrues").

In 1948, as now, "accrue" had a well-settled meaning: A "right accrues when it comes into existence"—*i.e.*, " 'when the plaintiff has a complete and present cause of action.' " This definition has appeared "in dictionaries from the 19th century up until today." Legal dictionaries in the 1940s and 1950s uniformly explained that a cause of action " 'accrues' when a suit may be maintained thereon." Black's Law Dictionary 37 (4th ed. 1951). Thus, we have explained that a cause of action "does not become 'complete and present' for limitations purposes"—it does not *accrue*—"until the plaintiff can file suit and obtain relief."

Importantly, contemporaneous dictionaries also explained that a cause of action accrues "on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury." Black's 37. "[I]f an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and *in such case no cause of action accrues until the loss or damage occurs*." Thus, when Congress used the phrase "right of action first accrues" in § 2401(a), it was well understood that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

[231] . . . Justice KAVANAUGH asserts that "Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules." Whether the APA authorizes vacatur has been subject to thoughtful debate by Members of this Court. We took this case only to decide how § 2401(a)'s statute of limitations applies to APA claims. We therefore assume without deciding that vacatur is available under the APA.

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Our precedent treats this definition of accrual as the "standard rule for limitations periods." "We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.' " . . . Conversely, we have "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles."

This traditional rule constitutes a strong background presumption. While the "standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit," we " 'will not infer such an odd result in the absence of any such indication' in the text of the limitations period." "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."

There is good reason to conclude that Congress codified the traditional accrual rule in § 2401(a). Nothing "in the text of [§ 2401(a)'s] limitations period" gives any indication that it begins to run before the plaintiff has a complete and present cause of action. Rather, § 2401(a) uses standard language that had a well-settled meaning in 1948: "right of action first accrues." Moreover, Congress knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action instead of the plaintiff 's injury: Just six years before it enacted § 2401(a), Congress passed the Emergency Price Control Act of 1942, which required challenges to Office of Price Administration actions to be filed "[w]ithin a period of sixty days *after the issuance of any regulation or order*." § 203(a), 56 Stat. 31 (emphasis added); see also Administrative Orders Review Act (Hobbs Act), § 4, 64 Stat. 1130 (1950) (allowing petitions for review "within sixty days after entry of " a "final order reviewable under this Act"). Section 2401(a), by contrast, stuck with the standard accrual language.

Section 2401(a) thus operates as a statute of limitations rather than a statute of repose. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.' " . . . "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action" that is "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." Such statutes bar " 'any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury.' " That describes statutes like the Hobbs Act, which sets a filing deadline of 60 days from the "entry" of the agency order. Statutes of limitations "require plaintiffs to pursue diligent prosecution of known claims"; statutes of repose reflect a "legislative judgment that a defendant should be free from liability after the legislatively determined period of time." The Board asks us to interpret § 2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. But § 2401(a)'s plaintiff-focused language makes it an accrual-based statute of limitations.

* * *

Section 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action. Because injury, not just finality, is required to sue under the APA, Corner Post's cause of action was not complete and present until it was injured by Regulation II. Therefore, its suit is not barred by the statute of limitations.

IV

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The Board. . . argues that facial challenges to agency rules are different, accruing when agency action is final rather than when the plaintiff can assert her claim. . . .

A

The Board puts the most weight on the many specific statutory review provisions that start the clock at finality. The Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations of the Federal Communications Commission, Secretary of Agriculture, and Secretary of Transportation, among others, to petition for review "within 60 days after [the] entry" of the final agency action. 28 U.S.C. §§ 2342, 2344; see also, *e.g.*, 29 U.S.C. § 655(f) (suits challenging Occupational Safety and Health Administration standards must be filed "prior to the sixtieth day after such standard is promulgated"). The Board contends that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff " can challenge the final agency action. There is "no sound basis," it insists, "for instead applying a challenger-by-challenger approach to calculate the limitations period on APA claims."

1

This argument hits the immutable obstacle of § 2401(a)'s text. Unlike the specific review provisions that the Board cites, § 2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. To begin, the latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions actually undercut the Board's argument, because they illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in § 2401(a). . . .

[T]he dissent ignores the textual differences between § 2401(a) and finality-focused specific review provisions . . . .

2

The standard accrual rule that § 2401(a)'s limitations period exemplifies is *plaintiff specific*—even if repose provisions like the Hobbs Act eschew a "challenger-by-challenger" approach. The Board's rule would start the limitations period applicable to the plaintiff not when *she* had a complete and present cause of action but when the agency action was final and, theoretically, some *other* plaintiff was injured and could have sued. But § 2401(a)'s text focuses on a specific plaintiff: "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added.)

The dissent disputes § 2401(a)'s plaintiff specificity by pointing out that it does not say "*the plaintiff 's* right of action first accrues." True, but it does use the definite article "the" to link "*the* complaint" with "*the* right of action." So the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint*—the plaintiff 's cause of action—is complete. And while the dissent cites dictionary definitions of "accrue" that mention " '*a* right to sue,' " *ibid*., the statute's use of the definite article "the" takes precedence. The Board and the dissent read § 2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e*., *anyone's* right of action] first accrues"—which, of course, it does not.

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In fact, we have explained that the traditional accrual rule looks to when "*the* plaintiff "—this particular plaintiff—"has a complete and present cause of action." No precedent suggests that the traditional rule contemplates the Board's hypothetical "when could someone else have sued" sort of inquiry.[232] Rather, the "statute of limitations begins to run at the time *the plaintiff* has the right to apply to the court for relief."

Importing the Board's special administrative-law rule into § 2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted § 2401(a). The Board's interpretation would thereby decouple the statute of limitations from any injury "such that the limitations period begins to run before a plaintiff can file a suit"—for *some*, *but not all*, suits governed by § 2401(a). We "will not infer such an odd result in the absence of any such indication in the text of the limitations period."

[Sections B and C, discussing the tolling provision in § 2401(a) and other Supreme Court precedent, respectively, are omitted.]

D

Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff. After that point, facial challenges impose significant burdens on agencies and courts. Moreover, if they are successful, such challenges upset the reliance interests of the agencies and regulated parties that have long operated under existing rules.

"[P]leas of administrative inconvenience ... never 'justify departing from the statute's clear text.' " Congress could have chosen different language in § 2401(a) or created a general statute of repose for agencies. It did not.

That is enough to dispatch the Board's policy arguments, but we add that its concerns are overstated. Put aside facial challenges like Corner Post's. Regulated parties "may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them" or "petition an agency to reconsider a longstanding rule and then appeal the denial of that petition." So even on the Board's preferred interpretation, "[a] federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge." \ Likewise, the dissent imagines an alternative reality of total finality that simply does not exist.

Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other

[232] . . . [T]he dissent's assertion that "administrative-law claims" are *not* "plaintiff specific" is mystifying given that an APA plaintiff cannot sue until *she* suffers an injury. See 5 U.S.C. § 702. By emphasizing the plaintiff-agnostic aspects of facial challenges to agency action, the dissent conflates the defendant-focused *substance* of an APA claim with its plaintiff-specific *cause of action*.

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authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.[233]

Turning to the other side of the policy ledger, the Board slights the arguments supporting the plaintiff-centric accrual rule. In addition to being compelled by § 2401(a)'s text, this rule vindicates the APA's "basic presumption" that anyone injured by agency action should have access to judicial review. It also respects our "deep-rooted historic tradition that everyone should have his own day in court." Under the Board's finality rule, only those fortunate enough to suffer an injury within six years of a rule's promulgation may bring an APA suit. Everyone else—no matter how serious the injury or how illegal the rule—has no recourse.[9]

The dissent also raises a host of policy arguments masquerading as "matter[s] of congressional intent." And it warns that today's opinion will "devastate the functioning of the Federal Government." This claim is baffling—indeed, bizarre—in a case about a statute of limitations. The Solicitor General, whose mandate is to protect the interests of the Federal Government, comes nowhere close to suggesting that a plaintiff-centric interpretation of § 2401(a) spells the end of the United States as we know it. Perhaps the dissent believes that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges; or perhaps it believes that meritless challenges will flood federal courts that are too incompetent to reject them. We have more confidence in both the Executive Branch and the Judiciary. But we do agree with the dissent on one point: " '[T]he ball is in Congress' court.' " Section 2401(a) is 75 years old. If it is a poor fit for modern APA litigation, the solution is for Congress to enact a distinct statute of limitations for the APA.

* * *

An APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Because Corner Post filed suit within six years of its injury, § 2401(a) did not bar its challenge to Regulation II. . . .

Justice KAVANAUGH, concurring.
. . . I write separately to explain a crucial additional point: Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules.

Corner Post challenged an agency rule that regulates the fees that banks may charge. But Corner Post is not a bank regulated by the rule. Rather, it is a business that must pay the fees charged by the banks who are regulated by the rule. Corner Post complains that the agency rule allows banks to charge fees that are unreasonably high.

Corner Post's suit is a typical APA suit. An unregulated plaintiff such as Corner Post often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse

[233] It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case *are* procedural" is confused. Even if some of Corner Post's claims might be procedural, its central claim—that the regulation violates the statute—is a prototypical substantive challenge.

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downstream effects on the plaintiff. In those cases, an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff, because the plaintiff is not regulated by the rule in the first place. Instead, the unregulated plaintiff can obtain meaningful relief only if the APA authorizes vacatur of the agency rule, thereby remedying the adverse downstream effects of the rule on the unregulated plaintiff.

The APA empowers federal courts to "hold unlawful and set aside agency action" that, as relevant here, is arbitrary and capricious or is contrary to law. 5 U.S.C. § 706(2). The Federal Government and the federal courts have long understood § 706(2) to authorize vacatur of unlawful agency rules, including in suits by unregulated plaintiffs who are adversely affected by an agency's regulation of others.

Recently, the Government has advanced a far-reaching argument that the APA does not allow vacatur. Invoking a few law review articles, the Government contends that the APA's authorization to "set aside" agency action does not allow vacatur, but instead permits a court only to enjoin an agency from enforcing a rule against the plaintiff.

If the Government were correct on that point, Corner Post could not obtain any relief in this suit because, to reiterate, Corner Post is not regulated by the rule to begin with. And the APA would supply no remedy for most other *unregulated* but adversely affected parties who traditionally have brought, and regularly still bring, APA suits challenging agency rules.

The Government's position would revolutionize long-settled administrative law—shutting the door on entire classes of everyday administrative law cases. The Government's newly minted position is both novel and wrong. [The remainder of Justice Kavanaugh's concurrence is omitted.]

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.
More than half a century ago, this Court highlighted the long-recognized "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.' " Today, the majority throws that caution to the wind and engages in the same kind of misguided reasoning about statutory limitations periods that we have previously admonished.

The flawed reasoning and far-reaching results of the Court's ruling in this case are staggering. First, the reasoning. The text and context of the relevant statutory provisions plainly reveal that, for facial challenges to agency regulations, the 6-year limitations period in 28 U.S.C. § 2401(a) starts running when the rule is published. The Court says otherwise today, holding that the broad statutory term "accrues" requires us to conclude that the limitations period for Administrative Procedure Act (APA) claims runs from the time of a plaintiff 's injury. Never mind that this Court's precedents tell us that the meaning of "accrues" is context specific. Never mind that, in the administrative-law context, limitations statutes uniformly run from the moment of agency action. Never mind that a plaintiff 's injury is utterly irrelevant to a facial APA claim. According to the Court, we must ignore all of this because, for other kinds of claims, accrual begins at the time of a plaintiff 's injury.

Next, the results. The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.

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The majority refuses to accept the straightforward, commonsense, and singularly plausible reading of the limitations statute that Congress wrote. In doing so, the Court wreaks havoc on Government agencies, businesses, and society at large. I respectfully dissent.

I

When a claim accrues depends on the nature of the claim. So, understanding the context in which *these* claims arose is essential to determining when Congress meant for them to accrue. The facts of this very case illustrate the absurdity of the majority's one-size-fits-all approach. The procedural history is also a prime example of the gamesmanship that statutory limitations periods are enacted to prevent.

A

Start with the relevant agency regulation. In 2010, Congress required the Federal Reserve Board to issue rules for debit-card transaction fees. See 15 U.S.C. § 1693*o*–2(a)(1). . . . As often happens, affected parties challenged Regulation II almost immediately after the Board issued it Several large trade groups sued under the APA, alleging that Regulation II was, in several respects, arbitrary, capricious, and not in accordance with law. Ultimately, the D. C. Circuit rejected that challenge in relevant part. . . .

B

Now consider the facts of this challenge. In the majority's telling, this is about a single "truckstop and convenience store located in Watford City, North Dakota."

Not quite. Rather, two large trade groups initially filed this action in 2021—a full decade after the Federal Reserve Board finalized the debit-card-fee regulations at issue. Those groups were the North Dakota Petroleum Marketers Association, a "trade association that has existed since the mid-1950s," and the North Dakota Retail Association, another trade group. Corner Post, which had only opened its doors in 2018, was not a party to the trade groups' initial complaint. The Government moved to dismiss the pleading, invoking § 2401(a)'s 6-year statute of limitations. In response, the trade groups sought leave to amend.

It was only then that Corner Post was added as a plaintiff. And, importantly, other than the addition of Corner Post, the trade groups' complaint remained practically identical to the untimely one they had filed before. Other than a few changes of phrasing and some newly available 2019 data, the amended complaint alleged the same facts and sought the same relief as the original pleading. It also included the exact same legal claims—verbatim. The only material change to the amended complaint was the addition of Corner Post.

Thus, . . . one can see that this case is the poster child for the type of manipulation that the majority now invites—new groups being brought in (or created) just to do an end run around the statute of limitations.[234] . . .

[234] If this case illustrates one type of gamesmanship, one does not need to think hard to imagine other examples. A cash-only business that announces its intent to accept debit cards and thereby claiming injury from the debit-card rule. New owners that buy out a shop, insisting that they too are entitled to challenge the debit-card rule based on their status as new entrants into the marketplace. It is telling that, even as the majority says that the moment of the plaintiff 's injury marks the start of the limitations period for facial APA challenges, the majority fails to describe precisely when that injury occurs in this context.

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This time, however, when the Government renewed its motion to dismiss, the plaintiffs made the case all about Corner Post. The plaintiffs argued that, because Corner Post had not yet formed as a company when the Board issued Regulation II, it simply could not be subjected to a 6-year limitations period that ran from when the challenged regulation issued back in 2011. (One wonders how a company that formed against the backdrop of a long-settled rule could possibly be entitled to complain, or claim injury, related to the regulatory environment in which it willingly entered—but I digress.) Rather than accepting that the untimely challenge remained so, Corner Post demanded a personalized, plaintiff-specific limitations rule, giving an entity six years from when *it* was first affected by a Government action to file a facial challenge.

The District Court rejected Corner Post's argument, following the lead of every court of appeals that had ever addressed accrual of an APA facial challenge.[235] . . .

II

. . . All agree that there are two key terms in [§ 2401(a)]—"accrues" and "the right of action." The majority misreads both. Contrary to the Court's rigid reading, the word "accrues" lacks any fixed meaning. Instead, the meaning of accrue for the purpose of a statute of limitations is determined by the particular "right of action" at issue. For many kinds of legal claims, accrual is plaintiff specific because the claims themselves are plaintiff specific. But facial administrative-law claims are not. This means that, in the administrative-law context, the limitations period begins not when a plaintiff is injured, but when a rule is finalized. . . .

IV

Today's ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress's unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.

The majority's ruling makes legal challenges to decades-old agency decisions fair game, even though courts of appeals had previously applied § 2401(a) to find untimely a range of belated APA challenges. For example, a lower court rejected an APA challenge to the Food and Drug Administration's approval of the abortion medication mifepristone that was brought more than two decades after the relevant agency action. A 2008 APA challenge to a 1969 ruling by the Bureau of Alcohol, Tobacco, Firearms and Explosives implementing the Gun Control Act was also bounced on statute of limitations grounds. Se Other unquestionably tardy APA suits have been dismissed on similar grounds too.

No more. After today, even the most well-settled agency regulations can be placed on the chopping block. And please take note: The fallout will not stop with new challenges to old rules involving the most contentious issues of today. *Any* established government regulation about *any* issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by *any* new regulated entity within six years of the entity's formation. A brand new entity could pop up and challenge a regulation that is *decades* old;

[235] The majority's opinion says we took this case to resolve a circuit split, suggesting that the Sixth Circuit had reached the contrary conclusion. It had not. . . . [T]he Sixth Circuit addressed accrual in the context of an *as-applied* challenge after the Government had threatened enforcement. There, the Circuit pegged accrual to the moment of the injury allegedly caused by application of the rule to the plaintiff and did not discuss whether that same accrual rule would apply to facial challenges.

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perhaps even one that is as old as the APA itself. No matter how entrenched, heavily relied upon, or central to the functioning of our society a rule is, the majority has announced open season.

Still, in issuing its ruling in this case, the Court seems oddly oblivious to the most foreseeable consequence of the accrual rule it is adopting: Giving every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations affects our Nation's economy. Why? Because administrative agencies establish the baseline rules around which businesses and individuals order their lives. When an agency publishes a final rule, and the period for challenging that rule passes, people in that industry understand that the agency's policy choice is the law and act accordingly. They make investments because of it. They change their practices because of it. They enter contracts in light of it. They may not like the rule, but they live and work with it, because that is what the Rule of Law requires. It is profoundly destabilizing—and also acutely unfair—to permit newcomers to bring legal challenges that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment.

. . . It is extraordinarily presumptuous that an entity formed in full view of an agency's rules, by founders who can choose to enter the industry or not, can demand that well-established rules of engagement be revisited. But even setting aside those commonsense fairness concerns, the constant churn of potential attacks on an agency's rules by new entrants can harm *all* entities in a regulated industry. At any time, anyone can come along and potentially cause every entity to have to adjust its whole operations manual, since any rule (no matter how well settled) might be subject to alteration. Indeed, the obvious need for stability in the rules that govern an industry is precisely why a defined period for challenging the rules was needed at all. . . .

Seeking to minimize the fully foreseeable and potentially devastating impact of its ruling, the majority maintains that there is nothing to see here, because not every lawsuit brought by a new industry upstart will win, and, at any rate, many agency regulations are already subject to challenge. But this myopic rationalization overlooks other significant changes that this Court has wrought this Term with respect to the longstanding rules governing review of agency actions. The discerning reader will know that the Court has handed down other decisions this Term that likewise invite and enable a wave of regulatory challenges—decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs. . . .

* * *

At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government. Even more to the present point, that result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and vested them with authority to set the ground rules for the individuals and entities that participate in our economy and our society. It is utterly inconceivable that § 2401(a)'s statute of limitations was meant to permit fresh attacks on settled regulations from all new comers forever. Yet, that is what the majority holds today.

But Congress still has a chance to address this absurdity and forestall the coming chaos. It can opt to correct this Court's mistake by clarifying that the statutes it enacts are designed to facilitate the functioning of agencies, not to hobble them. In particular, Congress can amend § 2401(a), or enact a specific review

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provision for APA claims, to state explicitly what any such rule *must* mean if it is to operate as a limitations period in this context: Regulated entities have six years from the date of the agency action to bring a lawsuit seeking to have it changed or invalidated; after that, facial challenges must end. By doing this, Congress can make clear that lawsuits bringing facial claims against agencies are not personal attack vehicles for new entities created just for that purpose. So, while the Court has made a mess of this pivotal statute, and the consequences are profound, "the ball is in Congress' court."

Notes & Questions

S8-4. What were the points of disagreement between the majority and dissent? What role did policy play in the analyses? How might the Court's holding in *Corner Post* interact with the Chief Justice's dictum in *Loper Bright* ("By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite our change in interpretive methodology. Mere reliance on Chevron cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.' ").

S8-5. As the *Corner Stone* opinions discuss, Congress has displaced the default statute of limitations for numerous administrative review provisions. One important provision, the Administrative Orders Review Act (commonly known as the Hobbs Act), applies to certain decisions of the FCC, Department of Agriculture, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission, Surface Transportation Board, and Department of Housing and Urban Development. 28 U.S.C. § 2342. The Hobbs Act provides: "Any party aggrieved by [a] final order may, within 60 days after its entry, file a petition to review the order file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. Thus, as the *Corner Stone* majority explains, the clock for challenging an order covered by the Hobbs Act starts at the time the agency issues its final order. Another provision provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of an agency action challenged under the Hobbs Act. 28 U.S.C. § 2342.

McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 606 U.S. ____ (2025) (case note)

S8-6. The language of the Hobbs Act statute of limitations left open a critical question: What impact does the Hobbs Act—and particularly the "exclusive jurisdiction to . . . determine the validity" language—have on subsequent enforcement actions? Could a party-defendant to an enforcement action challenge, for example, the validity of an agency's statutory interpretation or the arbitrariness of its rule, despite not judicial review of the underlying rule within the 60-day limitations period?

In *McLaughlin Chiropractic Associates v. McKesson Corporation*, decided on June 20, 2025, a six-justice majority answered the latter question in the affirmative. Justice Kavanaugh, writing for the Court, began by describing the purpose of facial challenges to agency rules:

> Pre-enforcement review under the Hobbs Act allows regulated and affected parties to obtain greater clarity about their legal rights and obligations—rather than taking their chances and hoping to prevail in later enforcement proceedings. The Hobbs Act requires parties who want to challenge the legality of agency rules or orders in a pre-enforcement proceeding to do so both promptly and in a court of appeals. That pre-enforcement review process avoids the delays and uncertainty that otherwise could ensue from multiple pre-enforcement suits filed across time in multiple district courts and from subsequent appeals in the courts of appeals.

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The Court identified "three categories of statutes that authorize pre-enforcement review of agency rules and orders":

> Statutes in the first category authorize pre-enforcement judicial review and expressly *preclude* judicial review in subsequent enforcement proceedings. Examples include the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and the Clean Air Act. The Clean Water Act provides for pre-enforcement review of certain agency actions in a court of appeals and generally requires parties to seek review within 120 days. See 33 U.S.C. § 1369(b)(1). Importantly, the Act also states that those agency actions "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." § 1369(b)(2). CERCLA likewise allows parties to seek pre-enforcement review of any covered regulation in the D. C. Circuit within 90 days. See 42 U.S.C. § 9613(a). Like the Clean Water Act, CERCLA specifies that those regulations "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." Similarly, the Clean Air Act generally authorizes parties to file pre-enforcement petitions for review in the appropriate court of appeals within 60 days. See § 7607(b)(1). The Clean Air Act, too, states that those agency actions "shall not be subject to judicial review in civil or criminal proceedings for enforcement." § 7607(b)(2).
>
> The second category lies at the opposite pole—it consists of pre-enforcement judicial review statutes that also expressly *authorize* (or at least expressly contemplate) judicial review in subsequent enforcement proceedings. For instance, the Toxic Substances Control Act states that courts of appeals "shall have exclusive jurisdiction of any action to obtain judicial review (*other than in an enforcement proceeding*)." 15 U.S.C. §§ 2618(a)(1)(A), (a)(1)(B) (emphasis added). A similar provision authorizes review of certain Federal Trade Commission rules. § 57a(e)(5)(B). Those statutes recognize judicial review in pre-enforcement suits and enforcement proceedings alike.
>
> Statutes in the third category fall between the first two categories. Those statutes provide for pre-enforcement review but are silent on the question of whether a party may contest the agency's legal interpretation in subsequent enforcement proceedings. The Hobbs Act is one example. .See §§ 77i(a), 80a–42(a), 80b–13(a); 29 U.S.C. § 655(f).

For this third category, the Court held that "[f]undamental principles of administrative law establish the proper default rule: In an enforcement proceeding, a district court must independently determine for itself whether the agency's interpretation of a statute is correct. District courts are not bound by the agency's interpretation, but instead must determine the meaning of the law under ordinary principles of statutory interpretation, affording appropriate respect to the agency's interpretation. *Loper Bright*."

The Court explained that this holding was consistent with the "basic presumption of judicial review" recognized in its caselaw and codified in the APA. Section 703, the Court explained, provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, *agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement*." "Indeed, in 1947, the year after the APA was enacted, the Attorney General's Manual on the Administrative Procedure Act explained that in 'many situations,' 'an appropriate method of attacking the validity of agency action is to set up the alleged invalidity as a defense in a civil or criminal enforcement proceeding.'"

The Court also explained that this "default rule also avoids unnecessary litigation and unfairness. It would be impractical—and an enormous waste of resources—to demand that every potentially affected party bring or join pre-enforcement Hobbs Act challenges against every agency rule or order that might possibly affect them at some point in the future." Furthermore, many entities "may not have existed when the relevant

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agency rule or order was first issued" or "may have had no reason to suspect that they could be ensnared in future enforcement proceedings involving that agency action."

The Court held that this default rule applied to the Hobbs Act because it "does not expressly preclude review in enforcement proceedings." In a pre-enforcement action, the Hobbs Act provides the court of appeals with "'exclusive jurisdiction' to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity' of the agency order." But the Court held that this language only limits which courts can enter a pre-enforcement declaratory judgment with respect to the agency's decision. Kavanaugh explained that "a district court may consider the validity of" an agency order as part of an enforcement action without "determin[ing]" its validity.

In a footnote, the Court explained that respondents to enforcement matters are not limited to raising arguments about an agency's statutory interpretation. They can also raise arguments that the agency action "was arbitrary and capricious under the APA or otherwise was unlawful." In another footnote, the Court underscored that "if a party challenges an agency action in a pre-enforcement suit in a court of appeals and loses, that specific party may be barred by ordinary estoppel or preclusion principles from relitigating the same question in a future enforcement proceeding. Moreover, if the district court in the enforcement proceeding sits in the same circuit as the court of appeals that decided a pre-enforcement suit, the district court may be bound under principles of vertical *stare decisis* to adhere to the court of appeals holding."

The dissent, written by Justice Kagan and joined by Justices Sotomayor and Jackson, disagreed with the majority's reading of the Hobbs Act and the APA and the policy implications of allowing for litigating (or relitigating) the validity of an agency rule as part of a defense to an enforcement action. First, the dissent turned to Black's Law Dictionary to help interpret the meaning of "exclusive jurisdiction to . . . determine the validity" of an agency action:

> [T]he Hobbs Act gives courts of appeals exclusive authority to "determine the validity" of specified agency actions. "Exclusive," of course, means courts of appeals alone, not district courts. And there lies the problem for a party challenging agency action [as a party to an enforcement action] in a district court, not a court of appeals. When he objects to an order because it misconstrues a statute, he asks the district court to "determine the [order's] validity." The court, to address the claim, has to settle or decide ("determine") whether the challenged agency action is lawful ("valid"). See, e.g., Black's Law Dictionary. So the party's request is for the district court to do exactly what the Hobbs Act says it cannot.

The dissent also disagreed with the majority's interpretation of Section 703, emphasizing the exception to the default availability of judicial review:

> The majority relies on Section 703, which it presents as follows:
>
> "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, *agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement*." *Ante,* at 2015 (emphasis supplied by majority).
>
> But what if we instead present Section 703 like this:
>
> "*Except to the extent that prior*, *adequate*, *and exclusive opportunity for judicial review is provided by law*, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

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> The point, of course, is that under Section 703 the majority's preferred kind of judicial review is subject to an exception: Congress may replace it with a "prior, adequate, and exclusive opportunity for judicial review." To me, that phrase reads like a description of the Hobbs Act.

Finally, the dissent raised concerns that the majority's approach would, like *Corner Post*, upset "the certainty and finality Congress sought in designing a mechanism for judicial review; it subjects all administrative schemes, and the many businesses and individuals relying on them, to the ever-present risk of disruption." Additionally, because the majority's holding applies to private enforcement actions to which the government will not be a party, "the holding allows parties to put agency action in jeopardy without suing, or even notifying, the Government. And the holding makes more likely that regulated parties will put off submitting to lawful agency action, including in areas where Congress would have most valued sure and immediate compliance."

S8-7. Summarize the holdings from *Corner Post* and *McLaughlin Chiropractic*. What do the decisions have in common? What concerns do the dissents raise?