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2019 Update to Samuel Estreicher & David L. Noll
Legislation and the Regulatory State: Document Supplement

Pereira v. Sessions
138 S. Ct. 2005 (2018)

JUSTICE SOTOMAYOR, delivered the opinion of the Court. * * *

I

A

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, the Attorney General of the United States has discretion to "cancel removal" and adjust the status of certain nonpermanent residents. §1229b(b). To be eligible for such relief, a nonpermanent resident must meet certain enumerated criteria, the relevant one here being that the noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation of removal. §1229b(b)(1)(A). * * *

Under the so-called "stop-time rule" set forth in §1229b(d)(1)(A), however, that period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." * * * Section 1229(a), in turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given. . . to the alien . . . specifying":

> "(A) The nature of the proceedings against the alien.
> "(B) The legal authority under which the proceedings are conducted.
> "(C) The acts or conduct alleged to be in violation of law.
> "(D) The charges against the alien and the statutory provisions alleged to have been violated.
> "(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.
> "(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.
> "(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
> "(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

> "**(G)(i) The time and place at which the [removal] proceedings will be held.**
> "(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings." §1229(a)(1) (boldface added).

The statute also enables the Government to "change or postpon[e] . . . the time and place of [the removal] proceedings." §1229(a)(2)(A). To do so, the Government must give the noncitizen "a written notice . . . specifying . . . the new time or place of the proceedings" and "the consequences. . . of failing, except under exceptional circumstances, to attend such proceedings." The Government is not required to provide written notice of the change in time or place of the proceedings if the noncitizen is "not in detention" and "has failed to provide [his] address" to the Government. §1229(a)(2)(B).

The consequences of a noncitizen's failure to appear at a removal proceeding can be quite severe. If a noncitizen who has been properly served with the "written notice required under paragraph (1) or (2) of section 1229(a)" fails to appear at a removal proceeding, he "shall be ordered removed in absentia" if the Government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." §1229a(b)(5)(A). Absent "exceptional circumstances," a noncitizen subject to an in absentia removal order is ineligible for some forms of discretionary relief for 10 years if, "at the time of the notice described in paragraph (1) or (2) of section 1229(a)," he "was provided oral notice . . . of the time and place of the proceedings and of the consequences" of failing to appear. §1229a(b)(7). In certain limited circumstances, however, a removal order entered in absentia may be rescinded—*e.g.*, when the noncitizen "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." §1229a(b)(5)(C)(ii).

B

In 1997, shortly after Congress passed IIRIRA, the Attorney General promulgated a regulation stating that a "notice to appear" served on a noncitizen need only provide "the time, place and date of the initial removal hearing, where practicable." 62 Fed. Reg. 10332 (1997). Per that regulation, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information. Instead, these notices state that the times, places, or dates of the initial hearings are "to be determined."

In *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011), the Board of Immigration Appeals (BIA) addressed whether such notices trigger the stop-time rule even if

they do not specify the time and date of the removal proceedings. The BIA concluded that they do. It reasoned that the statutory phrase "notice to appear 'under section [1229](a)'" in the stop-time rule "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but otherwise imposes no "substantive requirements" as to what information that document must include to trigger the stop-time rule.

C

[Petitioner Wescley Fonseca Pereira, a citizen of Brazil, came to the United States on a visitor's visa and remained after his visa expired.] In 2006, Pereira was arrested in Massachusetts for operating a vehicle while under the influence of alcohol. On May 31, 2006, while Pereira was detained, DHS served him (in person) with a document labeled "Notice to Appear." That putative notice charged Pereira as removable for overstaying his visa, informed him that "removal proceedings" were being initiated against him, and provided him with information about the "[c]onduct of the hearing" and the consequences for failing to appear. Critical here, the notice did not specify the date and time of Pereira's removal hearing. Instead, it ordered him to appear before an Immigration Judge in Boston "on a date to be set at a time to be set."

More than a year later, on August 9, 2007, DHS filed the 2006 notice with the Boston Immigration Court. The Immigration Court thereafter attempted to mail Pereira a more specific notice setting the date and time for his initial removal hearing for October 31, 2007, at 9:30 a.m. But that second notice was sent to Pereira's street address rather than his post office box (which he had provided to DHS), so it was returned as undeliverable. Because Pereira never received notice of the time and date of his removal hearing, he failed to appear, and the Immigration Court ordered him removed in absentia. Unaware of that removal order, Pereira remained in the United States.

In 2013, after Pereira had been in the country for more than 10 years, he was arrested for a minor motor vehicle violation (driving without his headlights on) and was subsequently detained by DHS. The Immigration Court reopened the removal proceedings after Pereira demonstrated that he never received the Immigration Court's 2007 notice setting out the specific date and time of his hearing. Pereira then applied for cancellation of removal, arguing that the stop-time rule was not triggered by DHS' initial 2006 notice because the document lacked information about the time and date of his removal hearing.

The Immigration Court disagreed, finding the law "quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective." The Immigration Court therefore concluded that Pereira could not meet the 10-year physical-presence requirement under §1229b(b), thereby rendering him

statutorily ineligible for cancellation of removal, and ordered Pereira removed from the country. The BIA dismissed Pereira's appeal. * * *

[The First Circuit concluded that it was required to follow the BIA's *Camarillo* decision under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and denied Pereira's petition for review of the immigration court's order.]

II

A

* * * Does a "notice to appear" that does not specify the "time and place at which the proceedings will be held," as required by §1229(a)(1)(G)(i), trigger the stop-time rule? * * * In addressing that * * * question, the Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand. A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)," and so does not trigger the stop-time rule.

B

The statutory text alone is enough to resolve this case. Under the stop-time rule, "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U. S. C. §1229b(d)(1). By expressly referencing §1229(a), the statute specifies where to look to find out what "notice to appear" means. Section 1229(a), in turn, clarifies that the type of notice "referred to as a 'notice to appear'" throughout the statutory section is a "written notice . . . specifying," as relevant here, "[t]he time and place at which the [removal] proceedings will be held." §1229(a)(1)(G)(i). Thus, based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, "specif[ies]" the "time and place" of the removal proceedings.

It is true, as the Government and dissent point out, that the stop-time rule makes broad reference to a notice to appear under "section 1229(a)," which includes paragraph (1), as well as paragraphs (2) and (3). But the broad reference to §1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a "notice to appear." By contrast, paragraph (2) governs the "[n]otice of change in time or place of proceedings," and paragraph (3) provides for a system to record noncitizens' addresses and phone numbers. Nowhere else within §1229(a) does the statute purport to delineate the requirements of a "notice to

appear." In fact, the term "notice to appear" appears only in paragraph (1) of §1229(a).

If anything, paragraph (2) of §1229(a) actually bolsters the Court's interpretation of the statute. Paragraph (2) provides that, "in the case of any change or postponement in the time and place of [removal] proceedings," the Government shall give the noncitizen "written notice . . . specifying . . . the new time or place of the proceedings." §1229(a)(2)(A)(i). By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section 1229(a)" that specified a time and place as required by §1229(a)(1)(G)(i). Otherwise, there would be no time or place to "change or postpon[e]." §1229(a)(2).

Another neighboring statutory provision lends further contextual support for the view that a "notice to appear" must include the time and place of the removal proceedings to trigger the stop-time rule. Section 1229(b)(1) gives a noncitizen "the opportunity to secure counsel before the first [removal] hearing date" by mandating that such "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." For §1229(b)(1) to have any meaning, the "notice to appear" must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing. Otherwise, the Government could serve a document labeled "notice to appear" without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing when it becomes available. Under that view of the statute, a noncitizen theoretically would have had the "opportunity to secure counsel," but that opportunity will not be meaningful if, given the absence of a specified time and place, the noncitizen has minimal time and incentive to plan accordingly, and his counsel, in turn, receives limited notice and time to prepare adequately. It therefore follows that, if a "notice to appear" for purposes of §1229(b)(1) must include the time-and-place information, a "notice to appear" for purposes of the stop-time rule under §1229b(d)(1) must as well. After all, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."

Finally, common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to appear" that triggers the stop-time rule. If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, *i.e.*, the "time" and "place," that would enable them "to appear" at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the

removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings. "'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,'" *United States v. Bryan*, 339 U. S. 323, 342 (1950), particularly where doing so has no basis in the statutory text. * * *

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE KENNEDY, concurring.

I agree with the Court's opinion and join it in full.

This separate writing is to note my concern with the way in which the Court's opinion in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has come to be understood and applied. The application of that precedent to the question presented here by various Courts of Appeals illustrates one aspect of the problem.

The first Courts of Appeals to encounter the question concluded or assumed that the notice necessary to trigger the stop-time rule found in 8 U. S. C. §1229b(d)(1) was not "perfected" until the immigrant received all the information listed in §1229(a)(1). *Guamanrrigra v. Holder*, 670 F. 3d 404, 410 (CA2 2012) (per curiam); *see also Dababneh v. Gonzales*, 471 F. 3d 806, 809 (CA7 2006); *Garcia-Ramirez v. Gonzales*, 423 F. 3d 935, 937, n. 3 (CA9 2005) (per curiam). That emerging consensus abruptly dissolved not long after the Board of Immigration Appeals (BIA) reached a contrary interpretation of §1229b(d)(1) in *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011). After that administrative ruling, in addition to the decision under review here, at least six Courts of Appeals, citing *Chevron*, concluded that §1229b(d)(1) was ambiguous and then held that the BIA's interpretation was reasonable. The Court correctly concludes today that those holdings were wrong because the BIA's interpretation finds little support in the statute's text.

In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the BIA's interpretation was reasonable. In [*Urbina v. Holder*, 745 F. 3d 736 (CA4 2014)], for example, the court stated, without any further elaboration, that "we agree with the BIA that the relevant statutory provision is ambiguous." It then deemed reasonable the BIA's interpretation of the statute, "for the reasons the BIA gave in that case." This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes.

The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. *See Arlington v. FCC*, 569 U. S. 290, 327 (2013) (ROBERTS, C. J., dissenting) ("We do not leave it to the agency to decide when it is in charge"). Given the concerns raised by some Members of this Court, *see, e.g.*, id., at 312-328; *Michigan v. EPA*, 576 U. S. ___, ___ (2015) (THOMAS, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149-1158 (CA10 2016) (Gorsuch, J., concurring), it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. *See, e.g.*, *Arlington*, *supra*, at 312-316 (ROBERTS, C. J., dissenting).

JUSTICE ALITO, dissenting.

Although this case presents a narrow and technical issue of immigration law, the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Under that decision, if a federal statute is ambiguous and the agency that is authorized to implement it offers a reasonable interpretation, then a court is supposed to accept that interpretation. Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*. * * *

Pereira, on one side, and the Government and the BIA, on the other, have a quasi-metaphysical disagreement about the meaning of the concept of a notice to appear. Is a notice to appear a document that contains certain essential characteristics, namely, all the information required by §1229(a)(1), so that any notice that omits any of that information is not a "notice to appear" at all? Or is a notice to appear a document that is conventionally called by that name, so that a notice that omits some of the information required by §1229(a)(1) may still be regarded as a "notice to appear"?

Picking the better of these two interpretations might have been a challenge in the first instance. But the Court did not need to decide that question, for under *Chevron* we are obligated to defer to a Government agency's interpretation of the statute that it administers so long as that interpretation is a "'permissible'" one. *INS v. Aguirre-Aguirre*, 526 U. S. 415, 424 (1999). All that is required is that the

Government's view be "reasonable"; it need not be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U. S. 208, 218 (2009). Moreover, deference to the Government's interpretation "is especially appropriate in the immigration context" because of the potential foreign-policy implications. In light of the relevant text, context, statutory history, and statutory purpose, there is no doubt that the Government's interpretation of the stop-time rule is indeed permissible under *Chevron*.

By its terms, the stop-time rule is consistent with the Government's interpretation. As noted, the stop-time rule provides that "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." §1229b(d)(1). A degree of ambiguity arises from Congress's use of the word "under," for as the Court recognizes, "'[t]he word "under" is [a] chameleon,'" having "'many dictionary definitions'" and no "uniform, consistent meaning," Everyone agrees, however, that "under" is often used to mean "authorized by." And when the term is used in this way, it does not necessarily mean that the act done pursuant to that authorization was done in strict compliance with the terms of the authorization. For example, one might refer to a litigant's disclosure "under" Rule 26(a) of the Federal Rules of Civil Procedure even if that disclosure did not comply with Rule 26(a) in every respect. Or one might refer to regulations promulgated "under" a statute even if a court later found those regulations inconsistent with the statute's text. * * *

That interpretation is bolstered by the stop-time rule's cross-reference to "section 1229(a)." §1229b(d)(1). Pereira interprets that cross-reference as picking up every substantive requirement that applies to notices to appear. But those substantive requirements are found only in §1229(a)(1). Thus, the cross-reference to "section 1229(a)," as opposed to "section 1229(a)(1)," tends to undermine Pereira's interpretation, because if Congress had meant for the stop-time rule to incorporate the substantive requirements located in §1229(a)(1), it presumably would have referred specifically to that provision and not more generally to "section 1229(a)." * * *

Finally, Pereira's contrary interpretation leads to consequences that clash with any conceivable statutory purpose. Pereira's interpretation would require the Government to include a date and time on every notice to appear that it issues. But at the moment, the Government lacks the ability to do that with any degree of accuracy. The Department of Homeland Security sends out the initial notice to appear, but the removal proceedings themselves are scheduled by the Immigration Court, which is part of the Department of Justice. *See* 8 CFR §1003.18(a) (2018). The Department of Homeland Security cannot dictate the scheduling of a matter on the docket of the Immigration Court, and at present, the Department of Homeland Security generally cannot even access the Immigration Court's calendar. The

Department of Homeland Security may thus be hard pressed to include on initial notices to appear a hearing date that is anything more than a rough estimate subject to considerable change.

Including an estimated and changeable date, however, may do much more harm than good. It is likely to mislead many recipients and to prejudice those who make preparations on the assumption that the initial date is firm. And it forces the Government to go through the pointless exercise of first including a date that it knows may very well be altered and then changing it once the real date becomes clear. Such a system serves nobody's interests.

Statutory interpretation is meant to be "a holistic endeavor," and sometimes language "that may seem ambiguous in isolation" becomes clear because "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." The real-world effects produced by Pereira's interpretation— arbitrary dates and times that are likely to confuse and confound all who receive them— illustrate starkly the merits of the Government's alternative construction. * * *

In recent years, several Members of this Court have questioned *Chevron*'s foundations. But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.

I respectfully dissent.

Lucia v. Securities and Exchange Commission
138 S. Ct. 2044 (2018)

Justice KAGAN, delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag v. Commissioner*, 501 U. S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. *See* 17 CFR § 201.110 (2017). But the Commission also may, and typically does, delegate that task to an ALJ. *See ibid.*; 15 U. S. C. § 78d-1(a). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all.

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. §§ 201.111, 200.14(a). Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of "the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" or violations of procedural requirements. §§ 201.111, 201.180; *see* §§ 200.14(a), 201.230. As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial.

After a hearing ends, the ALJ issues an "initial decision." § 201.360(a)(1). That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." § 201.360(b). The Commission can then review the ALJ's decision, either upon request or *sua sponte*. *See* § 201.360(d)(1). But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." § 201.360(d)(2). At that point, the initial decision is "deemed the action of the Commission." § 78d-1(c).

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, § 80b-1 *et seq.*, and assigned ALJ Cameron Elliot to adjudicate the case. [At the conclusion of administrative proceedings, Elliot issued a decision which found that Lucia violated the Act and imposed sanctions including civil penalties of $300,000 and a lifetime bar from the investment industry.]

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. [The commission concluded that its ALJs are not "Officers of the United States" but "mere employees"— officials who fall outside the Appointments Clause. Lucia petitioned for review of the Commission's order. A three-judge panel of the D.C. Circuit rejected Lucia's Appointments Clause argument. On rehearing *en banc*, the court divided 5-5 on the validity of the ALJ's appointment, leaving the panel's judgment in place.] That decision conflicted with one from the Court of Appeals for the Tenth Circuit. *See Bandimere v. SEC*, 844 F. 3d 1168, 1179 (2016).

Lucia asked us to resolve the split by deciding whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause." Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers. But in responding to Lucia's petition, the Government switched sides.[1] So when we granted the petition, we also appointed an amicus curiae to defend the judgment below. We now reverse.

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." * * * Two decisions set out this Court's basic framework for distinguishing between officers and employees. [*United States v.*] *Germaine* [99 U. S. 508, 510 (1879)], held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley* [*v. Valeo*, 424 U. S. 1 (1976) (per curiam)] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the amicus and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. * * * [I]n *Freytag v. Commissioner*, 501 U. S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. * * * The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. * * * This Court held that the Tax Court's STJs are officers, not mere employees. * * *

[1] In the same certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. When we granted certiorari, we chose not to take that step. The Government's merits brief now asks us again to address the removal issue. We once more decline. No court has addressed that question, and we ordinarily await "thorough lower court opinions to guide our analysis of the merits."

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. * * * And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag*, 501 U. S., at 881; *see* 5 U. S. C. §§ 556-557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. Second, the ALJs (like STJs) "conduct trials." As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) "rule on the admissibility of evidence." They thus critically shape the administrative record (as they also do when issuing document subpoenas). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too. * * *

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder v. United States*, 515 U. S. 177, 182-183 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. [*Ryder v. United States*, 515 U. S. 177, 188 (1995).] And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment.

Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.[6]

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag v. Commissioner*, 501 U. S. 868 (1991). * * * While precedents like *Freytag* discuss what is sufficient to make someone an officer of the United States, our precedents have never clearly defined what is necessary. I would resolve that question based on the original public meaning of "Officers of the United States." To the Founders, this term encompassed all federal civil officials "'with responsibility for an ongoing statutory duty.'"

[Relying on an article written by a former clerk that aimed to identify the "original public meaning" of the Appointments Clause via the "corpus linguistics" methodology, Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018), Justice Thomas argued that "[t]he Founders considered individuals to be officers even if they performed only ministerial statutory duties—including record-keepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)." "With exceptions not relevant here, Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause."]

Justice BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join as to Part III, concurring in the judgment in part and dissenting in part.

[Justice Breyer argued that ALJ Elliot had not been validly appointed under the APA. 5 U.S.C. § 3105 provides that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." But ALJ Elliot was appointed by the SEC's staff, not the Commission itself. Justice Breyer argued that, in light of this statutory defect, the Court should not address Lucia's Appointments Clause claim.]

The reason why it is important to go no further arises from the holding in a case this Court decided eight years ago, *Free Enterprise Fund* [*v. Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010)]. The case concerned statutory provisions protecting members of the Public Company Accounting Oversight Board from removal without cause. The Court held in that case that the Executive Vesting Clause of the Constitution, Art. II, §

[6] While this case was on judicial review, the SEC issued an order "ratif[ying]" the prior appointments of its ALJs. Order (Nov. 30, 2017), online at https://www.sec.gov/litigation/opinions/2017/33-10440.pdf (as last visited June 18, 2018). Lucia argues that the order is invalid. We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

1, forbade Congress from providing members of the Board with "multilevel protection from removal" by the President. Because, in the Court's view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution. * * * In addressing the constitutionality of the Board members' removal protections, the Court emphasized that the Board members were "executive officers"—more specifically, "inferior officers" for purposes of the Appointments Clause. * * *

> [T]he Administrative Procedure Act * * * says that an
>
> > "action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U. S. C. § 7521(a). * * *

The Administrative Procedure Act thus allows administrative law judges to be removed only "for good cause" found by the Merit Systems Protection Board. § 7521(a). And the President may, in turn, remove members of the Merit Systems Protection Board only for "inefficiency, neglect of duty, or malfeasance in office." § 1202(d). Thus, Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members.

The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme. *See Ramspeck v. Federal Trial Examiners Conference*, 345 U. S. 128, 130 (1953); *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46 (1950). Before the Administrative Procedure Act, hearing examiners "were in a dependent status" to their employing agency, with their classification, compensation, and promotion all dependent on how the agency they worked for rated them. As a result of that dependence, "[m]any complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." The Administrative Procedure Act responded to those complaints by giving administrative law judges "independence and tenure within the existing Civil Service system." *Id.*, at 132; *cf. Wong Yang Sung*, *supra*, at 41-46 (referring to removal protections as among the Administrative Procedure Act's "safeguards . . . intended to ameliorate" the perceived "evils" of commingling of adjudicative and prosecutorial functions in agencies).

If the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the "if"—then to hold that the administrative law judges are "Officers of the United States" is, perhaps, to hold that their removal protections are unconstitutional. * * * The *Free Enterprise Fund* Court gave three reasons why administrative law judges were distinguishable from the Board members at issue in that case. First, the Court said that "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed." Second, the Court said that "unlike members of

the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, *see* [5 U. S. C.] §§ 554(d), 3105, or possess purely recommendatory powers." And, third, the Court pointed out that the civil service "employees" and administrative law judges to whom I referred in my dissent do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." The Court added that the kind of "for cause" protection the statutes provided for Board members was "unusually high."

The majority here removes the first distinction, for it holds that the Commission's administrative law judges are inferior "Officers of the United States." The other two distinctions remain. *See, e.g.*, *Wiener v. United States*, 357 U. S. 349, 355-356 (1958) (holding that Congress is free to protect bodies tasked with "'adjudicat[ing] according to law' . . . 'from the control or coercive influence, direct or indirect,' . . . of either the Executive or Congress") (quoting *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1935)). But the Solicitor General has nevertheless argued strongly that we should now decide the constitutionality of the administrative law judges' removal protections as well as their means of appointment. And in his view, the administrative law judges' statutory removal protections violate the Constitution (as interpreted in Free Enterprise Fund), unless we construe those protections as giving the Commission substantially greater power to remove administrative law judges than it presently has. * * *

[N]ow it should be clear why the application of *Free Enterprise Fund* to administrative law judges is important. If that decision does not limit or forbid Congress' statutory "for cause" protections, then a holding that the administrative law judges are "inferior Officers" does not conflict with Congress' intent as revealed in the statute. But, if the holding is to the contrary, and more particularly if a holding that administrative law judges are "inferior Officers" brings with it application of *Free Enterprise Fund*'s limitation on "for cause" protections from removal, then a determination that administrative law judges are, constitutionally speaking, "inferior Officers" would directly conflict with Congress' intent, as revealed in the statute. * * *

[In the remainder of his opinion, Justice Breyer argued that Congress's intent was the most important signal of whether the Appointments Clause applied to an office created by law. He also disagreed with the majority's conclusion that the proper remedy for ALJ Elliot's defective appointment was a hearing before a different administrative law judge: "The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings. For him to preside once again would not violate the structural purposes that we have said the Appointments Clause serves, nor would it, in any obvious way, violate the Due Process Clause."]

Justice SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The Court today and scholars acknowledge that this Court's Appointments Clause jurisprudence offers little guidance on who qualifies as an "Officer of the United States." * * * As the majority notes, this Court's decisions currently set forth at least two prerequisites to officer status: (1) an individual must hold a "continuing" office established by law, *United States v. Germaine*, 99 U. S. 508, 511-512 (1879), and (2) an individual must wield

"significant authority," *Buckley v. Valeo*, 424 U. S. 1, 126 (1976) (per curiam). * * * To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of "significant authority" is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer. * * *

Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains "'plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.'" Commission ALJs can issue only "initial" decisions. 5 U. S. C. § 557(b). The Commission can review any initial decision upon petition or on its own initiative. 15 U. S. C. § 78d-1(b). The Commission's review of an ALJ's initial decision is *de novo*. 5 U. S. C. § 557(c). It can "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 CFR § 201.411(a) (2017). The Commission is also in no way confined by the record initially developed by an ALJ. The Commission can accept evidence itself or refer a matter to an ALJ to take additional evidence that the Commission deems relevant or necessary. In recent years, the Commission has accepted review in every case in which it was sought. Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte*, the initial decision still only becomes final when the Commission enters a finality order. 17 CFR. § 201.360(d)(2). And by operation of law, every action taken by an ALJ "shall, for all purposes, . . . be deemed the action of the *Commission*." 15 U. S. C. § 78d-1(c) (emphasis added). In other words, Commission ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties.

The majority concludes that this case is controlled by *Freytag v. Commissioner*, 501 U. S. 868 (1991). In *Freytag*, the Court suggested that the Tax Court's special trial judges (STJs) acted as constitutional officers even in cases where they could not enter final, binding decisions. In such cases, the Court noted, the STJs presided over adversarial proceedings in which they exercised "significant discretion" with respect to "important functions," such as ruling on the admissibility of evidence and hearing and examining witnesses. That part of the opinion, however, was unnecessary to the result. The Court went on to conclude that even if the STJs' duties in such cases were "not as significant as [the Court] found them to be," its conclusion "would be unchanged." The Court noted that STJs could enter final decisions in certain types of cases, and that the Government had conceded that the STJs acted as officers with respect to those proceedings. Because STJs could not be "officers for purposes of some of their duties . . ., but mere employees with respect to other[s]," the Court held they were officers in all respects. *Freytag* is, therefore, consistent with a rule that a prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties. * * *

Presidential Documents

Executive Order 13839 of May 25, 2018

Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 1104(a)(1), 3301, and 7301 of title 5, United States Code, and section 301 of title 3, United States Code, and to ensure the effective functioning of the executive branch, it is hereby ordered as follows:

Section 1. *Purpose*. Merit system principles call for holding Federal employees accountable for performance and conduct. They state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. Unfortunately, implementation of America's civil service laws has fallen far short of these ideals. The Federal Employee Viewpoint Survey has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies (as defined in section 105 of title 5, United States Code, but excluding the Government Accountability Office) (agencies) to accomplish their missions. This order advances the ability of supervisors in agencies to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections.

Sec. 2. *Principles for Accountability in the Federal Workforce*. (a) Removing unacceptable performers should be a straightforward process that minimizes the burden on supervisors. Agencies should limit opportunity periods to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, to the amount of time that provides sufficient opportunity to demonstrate acceptable performance.

(b) Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.

(c) Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time -- particularly where the employees are in different work units or chains of supervision -- and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions.

(d) Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts.

(e) When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct -- not only similar past misconduct. Agencies should provide an employee with appropriate notice when taking a disciplinary action.

(f) To the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75 of title 5, United States Code, within 15 business days of the end of the employee reply period following a notice of proposed removal.

(g) To the extent practicable, agencies should limit the written notice of adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code.

(h) The removal procedures set forth in chapter 75 of title 5, United States Code (Chapter 75 procedures), should be used in appropriate cases to address instances of unacceptable performance.

(i) A probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final.

(j) Following issuance of regulations under section 7 of this order, agencies should prioritize performance over length of service when determining which employees will be retained following a reduction in force.

Sec. 3. *Standard for Negotiating Grievance Procedures*. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. If an agreement cannot be reached, the agency shall, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel in the resolution of the disagreement. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of the Office of Personnel Management (OPM Director).

Sec. 4. *Managing the Federal Workforce*. To promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service, to the extent consistent with law, no agency shall:

(a) subject to grievance procedures or binding arbitration disputes concerning:

(i) the assignment of ratings of record; or

(ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;

(b) make any agreement, including a collective bargaining agreement:

(i) that limits the agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee;

(ii) that requires the use of procedures under chapter 43 of title 5, United States Code (including any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code), before removing an employee for unacceptable performance; or

(iii) that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline; or

(c) generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

Sec. 5. *Ensuring Integrity of Personnel Files*. Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

Sec. 6. *Data Collection of Adverse Actions*. (a) For fiscal year 2018, and for each fiscal year thereafter, each agency shall provide a report to the OPM Director containing the following information:

(i) the number of civilian employees in a probationary period or otherwise employed for a specific term who were removed by the agency;

(ii) the number of civilian employees reprimanded in writing by the agency;

(iii) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days;

(iv) the number of adverse personnel actions taken against civilian employees by the agency, broken down by type of adverse personnel action, including reduction in grade or pay (or equivalent), suspension, and removal;

(v) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period;

(vi) the number of adverse personnel actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code;

(vii) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse personnel actions; and

(viii) the resolutions of litigation about adverse personnel actions involving civilian employees reached by the agency.

(b) Compilation and submission of the data required by subsection (a) of this section shall be conducted in accordance with all applicable laws, including those governing privacy and data security.

(c) To enhance public accountability of agencies for their management of the Federal workforce, the OPM Director shall, consistent with applicable law, publish the information received under subsection (a) of this section, at the minimum level of aggregation necessary to protect personal privacy. The OPM Director may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information.

(d) Within 60 days of the date of this order, the OPM Director shall issue guidance regarding the implementation of this section, including with respect to any exemptions necessary for compliance with applicable law and the reporting format for submissions required by subsection (a) of this section.

Sec. 7. *Implementation*. (a) Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order. To the extent necessary or appropriate, the OPM Director shall, as soon as practicable, propose for notice and public

comment appropriate regulations to effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order.

(b) The head of each agency shall take steps to conform internal agency discipline and unacceptable performance policies to the principles and requirements of this order. To the extent consistent with law, each agency head shall:

(i) within 45 days of this order, revise its discipline and unacceptable performance policies to conform to the principles and requirements of this order, in areas where new final Office of Personnel Management (OPM) regulations are not required, and shall further revise such policies as necessary to conform to any new final OPM regulations, within 45 days of the issuance of such regulations; and

(ii) renegotiate, as applicable, any collective bargaining agreement provisions that are inconsistent with any part of this order or any final OPM regulations promulgated pursuant to this order. Each agency shall give any contractually required notice of its intent to alter the terms of such agreement and reopen negotiations. Each agency shall, to the extent consistent with law, subsequently conform such terms to the requirements of this order, and to any final OPM regulations issued pursuant to this order, on the earliest practicable date permitted by law.

(c) Within 15 months of the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director shall submit to the President a report, through the Director of the Office of Management and Budget, evaluating the effect of those rules, including their effect on the ability of Federal supervisors to hold employees accountable for their performance.

(d) Within a reasonable amount of time following the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director and the Chief Human Capital Officers Council shall undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules.

Sec. 8. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

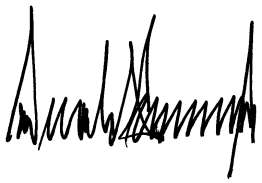
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) Agencies shall consult with employee labor representatives about the implementation of this order. Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.



THE WHITE HOUSE,
May 25, 2018.

[FR Doc. 2018–11939
Filed 5–31–18; 8:45 am]
Billing code 3295–F8–P

Presidential Documents

Executive Order 13843 of July 10, 2018

Excepting Administrative Law Judges From the Competitive Service

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The Federal Government benefits from a professional cadre of administrative law judges (ALJs) appointed under section 3105 of title 5, United States Code, who are impartial and committed to the rule of law. As illustrated by the Supreme Court's recent decision in *Lucia* v. *Securities and Exchange Commission,* No. 17–130 (June 21, 2018), ALJs are often called upon to discharge significant duties and exercise significant discretion in conducting proceedings under the laws of the United States. As part of their adjudications, ALJs interact with the public on issues of significance. Especially given the importance of the functions they discharge—which may range from taking testimony and conducting trials to ruling on the admissibility of evidence and enforcing compliance with their orders—ALJs must display appropriate temperament, legal acumen, impartiality, and sound judgment. They must also clearly communicate their decisions to the parties who appear before them, the agencies that oversee them, and the public that entrusts them with authority.

Previously, appointments to the position of ALJ have been made through competitive examination and competitive service selection procedures. The role of ALJs, however, has increased over time and ALJ decisions have, with increasing frequency, become the final word of the agencies they serve. Given this expanding responsibility for important agency adjudications, and as recognized by the Supreme Court in *Lucia,* at least some—and perhaps all—ALJs are ''Officers of the United States'' and thus subject to the Constitution's Appointments Clause, which governs who may appoint such officials.

As evident from recent litigation, *Lucia* may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs. Regardless of whether those procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion.

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.

Sec. 2. *Excepted Service.* Appointments of ALJs shall be made under Schedule E of the excepted service, as established by section 3 of this order.

Sec. 3. *Implementation.* (a) Civil Service Rule VI is amended as follows:

(i) 5 CFR 6.2 is amended to read:

OPM shall list positions that it excepts from the competitive service in Schedules A, B, C, and D, and it shall list the position of administrative law judge in Schedule E, which schedules shall constitute parts of this rule, as follows:

Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.

Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

Schedule D. Positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs. These positions, which are temporarily placed in the excepted service to enable more effective recruitment from all segments of society by using means of recruiting and assessing candidates that diverge from the rules generally applicable to the competitive service, shall be listed in Schedule D.

Schedule E. Position of administrative law judge appointed under 5 U.S.C. 3105. Conditions of good administration warrant that the position of administrative law judge be placed in the excepted service and that appointment to this position not be subject to the requirements of 5 CFR, part 302, including examination and rating requirements, though each agency shall follow the principle of veteran preference as far as administratively feasible.

(ii) 5 CFR 6.3(b) is amended to read:

(b) To the extent permitted by law and the provisions of this part, and subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary. These shall include, for the position of administrative law judge appointed under 5 U.S.C. 3105, the requirement that, at the time of application and any new appointment, the individual, other than an incumbent administrative law judge, must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. For purposes of this requirement, judicial status is acceptable in lieu of ''active'' status in States that prohibit sitting judges from maintaining ''active'' status to practice law, and being in ''good standing'' is also acceptable in lieu of ''active'' status in States where the licensing authority considers ''good standing''

as having a current license to practice law. This requirement shall constitute a minimum standard for appointment to the position of administrative law judge, and such appointments may be subject to additional agency requirements where appropriate.

(iii) 5 CFR 6.4 is amended to read:

Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, D, or E, or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedule B of persons who have competitive status.

(iv) 5 CFR 6.8 is amended to add after subsection (c):

(d) Effective on July 10, 2018, the position of administrative law judge appointed under 5 U.S.C. 3105 shall be listed in Schedule E for all levels of basic pay under 5 U.S.C. 5372(b). Incumbents of this position who are, on July 10, 2018, in the competitive service shall remain in the competitive service as long as they remain in their current positions.

(b) The Director of the Office of Personnel Management (Director) shall:

(i) adopt such regulations as the Director determines may be necessary to implement this order, including, as appropriate, amendments to or rescissions of regulations that are inconsistent with, or that would impede the implementation of, this order, giving particular attention to 5 CFR, part 212, subpart D; 5 CFR, part 213, subparts A and C; 5 CFR 302.101; and 5 CFR, part 930, subpart B; and

(ii) provide guidance on conducting a swift, orderly transition from the existing appointment process for ALJs to the Schedule E process established by this order.

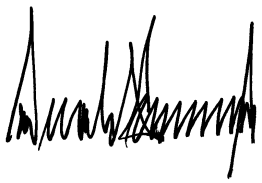
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
July 10, 2018.

[FR Doc. 2018–15202
Filed 7–12–18; 11:15 am]
Billing code 3295–F8–P

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

July 10, 2018

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DR. JEFF T.H. PON
DIRECTOR

Subject: Executive Order – Excepting Administrative Law Judges from the Competitive Service

On July 10, 2018, President Trump signed an Executive Order (EO) entitled "Excepting Administrative Law Judges from the Competitive Service." The EO places the position of administrative law judge (ALJ) in the excepted service and directs the U.S. Office of Personnel Management (OPM) to pursue any necessary revisions to its regulations swiftly.

By the terms of the order, agencies may begin making Schedule E appointments to the position of ALJ immediately, without prior OPM approval. The order also eliminates the need for OPM to conduct additional ALJ competitive examinations. This guidance is intended to address several issues that may arise as agencies transition to this new appointment process for ALJs.

New Appointments and Conditions of Employment

Section 3(a) of the EO places the position of ALJ in the excepted service beginning July 10, 2018. It further states that appointments to the position of ALJ are not subject to any examination or rating requirement, including the procedures of 5 Code of Federal Regulation (CFR) 302, Employment in the Excepted Service. However, an agency must follow the principle of veterans' preference as far as administratively feasible.

Incumbent ALJs will remain in the competitive service as long as they remain in their current position. ALJs appointed to positions in the excepted service will be covered by the agency's excepted service hiring policies.

Whether ALJs are in the competitive service or the excepted service, OPM's regulations continue to govern some aspects of ALJ employment, including those related to reassignments (5 CFR 930.204(f)), intra-agency details (5 CFR 930.207), interagency loans (5 CFR 930.208), senior ALJs (5 CFR 930.209), and reductions in force (5 CFR 930.210). Except as noted in the provisions immediately above, however, an agency need not obtain OPM's approval before appointing an individual to an ALJ position.

Like other excepted service appointments, ALJ appointments are generally subject to investigation, a determination of fitness, a determination of eligibility for logical and physical

been designated as public trust positions pursuant to 5 CFR 731.106 will continue to be subject to the periodic reinvestigation requirement of that section.

Qualifications and Licensure

Consistent with the requirement in Section 3(a)(ii) of the EO, the minimum qualification and licensure requirement for the position of ALJ is the possession of a professional license to practice law and being authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution at the time of selection and any new appointment (other than of an incumbent ALJ to another ALJ position). For purposes of this requirement, judicial status is acceptable in lieu of "active" status in States that prohibit sitting judges from maintaining "active" status to practice law, and being in "good standing" is also acceptable in lieu of "active" status in States where the licensing authority considers "good standing" as having a current license to practice law. An agency may prescribe additional qualification requirements as necessary. Any agency specific requirements must be provided to potential applicants.

Status of Existing ALJ Competitive Service Register

OPM will terminate the existing competitive service ALJ register. Eligible candidates currently listed on the register will be notified in writing of the termination and the disposition of their candidacy. We will provide additional information on the termination of the register at a later date.

Agencies with outstanding certificates of eligibles from the ALJ register should document any actions they have taken and return the certificates as soon as possible. ALJ eligibles selected but not yet appointed may be appointed under the Schedule E authority.

Status of Current ALJs Appointed to the Competitive Service

An ALJ appointed prior to the effective date of the EO is an employee in the competitive service. Such an employee is subject to the requirements of the competitive service. An ALJ serving in the competitive service who accepts a new appointment after July 10, 2018, moves from the competitive service to the excepted service. Accordingly, an appointment of an ALJ by reinstatement (5 CFR 930.204(g) or by interagency transfer (5 CFR 930.204(h)) is not available, as these are competitive service appointment methods. An ALJ serving in the competitive service may be promoted as allowed by 5 CFR 930.204(e).

Rates of Pay

The Executive Order does not affect the ALJ pay system. The 2018 ALJ rates of pay and the provisions of 5 United States Code (U.S.C.) 5372 and 5 CFR 930.205 will apply to ALJs in the competitive and excepted service.

Performance and Awards

An agency may not rate the job performance of an ALJ appointed in the competitive or the excepted service.

An agency may not grant any monetary or honorary award or incentive under 5 U.S.C. 4502, 4503, or 4504, or under any other authority, to an ALJ appointed in the competitive or the excepted service.

Adverse Actions

The procedures prescribed in 5 USC 7521 and 5 CFR part 1201 will apply to an agency action to remove, suspend, reduce in level, reduce pay, or furlough for 30 days or less of an ALJ in the competitive or excepted service.

Additional Information

As noted above, OPM will promulgate proposed regulations to address any provisions in the regulations, including those at 5 CFR part 930 and others identified in Section 3(b)(i) of the EO, that are inconsistent with service in the excepted service or use language that is generally inapplicable to the excepted service (e.g., references to the concepts of "probation" or "suitability").

The President's EO is located at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/ on the White House website. For additional information, agency Chief Human Capital Officers and/or Human Resources Directors may contact the following:

- Ms. Kimberly A. Holden, Deputy Associate Director for Talent Acquisition and Workforce Shaping, at Kimberly.Holden@opm.gov, or (202) 606-8097 for information on excepted service employment;
- Ms. Leslie Pollack, Deputy Associate Director for HR Strategy and Evaluation Solutions, at Leslie.Pollack@opm.gov, or (202) 606-3822 for information on ALJ program administration; and
- media@opm.gov for press inquiries.

Employees should contact their agency human resources offices for assistance.

cc: Chief Human Capital Officers and Human Resources Directors

Privileged and Confidential Attorney Work Product

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

To: Agency General Counsels

From: The Solicitor General

Subject: Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.)

This memorandum supplements our legal guidance to agencies that employ administrative law judges (ALJs) in the wake of the Supreme Court's decision in *Lucia v. SEC*, No. 17-130 (S. Ct.) (June 21, 2018), the President's recent Executive Order related to ALJs, and OPM's guidance related to that Executive Order.[1]

In light of *Lucia*, we offer the following legal advice to agencies with ALJs appointed under 5 U.S.C. 3105 and, as discussed below, similarly situated administrative judges. Our advice is designed to reduce litigation risk in the wake of *Lucia*, but we do not expect that these steps will insulate all administrative proceedings from challenge. We also recognize that agency-specific questions will arise. We encourage affected agencies to raise their specific issues with us, and we have provided a list of contacts for such questions at the end of this memorandum.

As discussed below, to the extent feasible and consistent with law, we advise agencies (1) to arrange promptly for the appropriate Department Head to ratify and approve the appointment of existing ALJs and similarly situated adjudicatory officers; (2) to fill new ALJ vacancies in the manner provided by the President's recent

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[1] The *Lucia* decision is available at https://www.supremecourt.gov/opinions/17pdf/17-130_4f14.pdf. The President's recent Executive Order placing the position of ALJ in the excepted service is available at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/. OPM's guidance regarding that Executive Order is available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service.

Executive Order; (3) in pending cases in which no Appointments Clause challenge was timely made and preserved, to argue that any such challenge is forfeited; and (4) in pending cases in which an Appointments Clause challenge was timely made and preserved, to seek a voluntary remand to the agency to provide a hearing before a different, properly appointed ALJ, consistent with *Lucia*. We also address the minimum contours of the "new hearing" required by *Lucia*, as well as the prospect of separation-of-powers challenges based on the statutory "for cause" removal protection for ALJs.

A. *Lucia* And Its Implications For Other ALJs And Similarly Situated Administrative Judges

A threshold question is who exactly is covered by the Supreme Court's decision in *Lucia*. Although the Court's specific holding is narrow, its reasoning sweeps more broadly. For the reasons discussed below, we conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause, and that Department Heads should ratify and approve the appointments of existing ALJs and administrative judges accordingly.

1. *SEC ALJs, and other ALJs who exercise similar powers, are inferior officers and must be appointed as such.* The Supreme Court held in *Lucia* that ALJs of the Securities and Exchange Commission are inferior officers, not regular employees, for essentially the same reasons that the special trial judges of the Tax Court were held to be inferior officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991). The Court emphasized that SEC ALJs possess "the four specific (if overlapping) powers *Freytag* mentioned": they take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. Slip op. 8-9. In this sense, the Court observed, SEC ALJs "have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges." *Id.* at 8. In addition, at the conclusion of the adversarial proceedings over which they preside, SEC ALJs issue initial decisions "containing factual findings, legal conclusions, and appropriate remedies," which can become the final decision of the agency without further review. *Id.* at 9. On that basis, the Court held that SEC ALJs are inferior officers of the United States who must be appointed in the manner required by the Appointments Clause.

The Supreme Court's holding in *Lucia* only addresses the constitutional status of the SEC's ALJs. The Department of Justice understands the Court's reasoning, however, to encompass all ALJs in traditional and independent agencies who preside over adversarial administrative proceedings and possess the adjudicative powers highlighted by the *Lucia* majority. All such ALJs must be appointed (or have their

prior appointments ratified) in a manner consistent with the Appointments Clause, as discussed in Part B below.

2. *Other ALJs should likewise be appointed as inferior officers.* The Court's decision in *Lucia* does not directly address the constitutional status of administrative law judges appointed under 5 U.S.C. 3105 who do not preside over adversarial administrative hearings or possess powers equivalent to those of the SEC ALJs in *Lucia*. For example, *Lucia* does not squarely resolve the status of ALJs who preside over ex parte hearings for applicants seeking federal benefits. Nonetheless, much of the reasoning of *Lucia* applies with equal force to such ALJs: while they may not preside over adversarial trials, they do take testimony, preside over hearings, receive and weigh evidence, and employ various mechanisms for obtaining compliance with their orders. Accordingly, taking into account both the Supreme Court's reasoning in *Lucia* and the importance of ensuring the President's oversight of the execution of the laws, the Department of Justice no longer plans to argue that such ALJs are employees rather than inferior officers. Agencies should appoint all ALJs as inferior officers.

3. *Similarly situated administrative judges should also be appointed as inferior officers.* The *Lucia* decision addresses only ALJs appointed under 5 U.S.C. 3105. Many agencies, however, use other non-ALJ officials—often termed "administrative judges" or "administrative appeals judges"—to preside over hearings and issue initial or appellate decisions in agency adjudications. While there will be case-by-case questions, we anticipate that many of these adjudicative officials will qualify as inferior officers under *Lucia*, especially if they preside over adversarial hearings and have the four specific forms of authority highlighted by the Court in *Lucia*. Again, taking into account both the Supreme Court's reasoning in *Lucia* and the importance of ensuring the President's oversight of the execution of the laws, the Department does not expect to defend the appointment of such officials by individuals other than the Department Head on the ground that they are mere employees. Accordingly, we recommend that agencies appoint such non-ALJ adjudicators as inferior officers in the same manner as ALJs, consistent with the advice in this memorandum, or contact us with further questions, as appropriate.

B. The Mechanics Of Appointing And Ratifying ALJs After *Lucia*

1. *In general—appointment by Department Head required.* As discussed, all ALJs and similarly situated adjudicative officers should be appointed in a manner consistent with the Appointments Clause. In most cases, this means the ALJ's appointment must be made or approved by the "[H]ead[]" of the relevant Executive "Department[]." U.S. Const., Art. II, sec. 2, cl. 2. The Department Head must have authority derived from a statute (or from a valid regulation promulgated through

statutory authority) to make the appointment. Although the Department Head may rely on agency human resources officials or other staff to vet applications, conduct interviews, and the like, the final appointment must be made or approved by the Department Head personally; this authority cannot be delegated.

For independent agencies headed by multi-member bodies, such as the SEC, the Department Head for Appointments Clause purposes is typically the multi-member body itself, acting by majority vote, rather than (for example) a commission chairman. For traditional agencies in the Executive Branch, the relevant Department Head is the head of the Executive Department to which your agency or office belongs. If you have questions about the identity of the appropriate Department Head, or if you have concerns about the appropriate authority for ALJ appointments under your agency's organic statute, please contact the Department of Justice at the email address below.

2. *New appointments.* On July 10, 2018, President Trump signed an Executive Order entitled "Excepting Administrative Law Judges from the Competitive Service." The Executive Order is available at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/. OPM guidance regarding that order is available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service. The Executive Order places the position of ALJ in the excepted service, and OPM will no longer administer competitive examinations for ALJ appointments. By the terms of the order, Department Heads may begin making Schedule E appointments to vacant ALJ positions immediately. For questions regarding the effect of the Executive Order, please contact the Office of Personnel Management using the contact information in the OPM guidance.

The Executive Order does not address the appointment of non-ALJ adjudicators, such as administrative judges. Vacancies in such positions should be filled using existing authorities, taking care to ensure that the Department Head personally makes or approves the appointment under proper authority.

3. *Ratification and approval of prior appointments.* Consistent with our advice during the pendency of the *Lucia* case, many Department Heads ratified the prior appointments of their agencies' ALJs. We now advise all Department Heads to ratify the prior appointments of any ALJs or similar adjudicative officials whose appointments have not yet been ratified. The ratification decision need not take any particular form, and it may be brief, but it should be properly memorialized, and it should make clear that the appropriate Department Head endorses and accepts responsibility for the prior appointments. We suggest appropriate language below.

We also recommend that Department Heads make clear in ratifying an ALJ's prior appointment that the Department Head not only accepts the prior appointment as of the time it was made, but also approves that appointment *today*. The Department Head's present approval therefore can satisfy the Appointments Clause, even if the retroactive ratification were for some reason held invalid. Again, we suggest appropriate language below.

Regardless, agencies should anticipate that ratifications will be challenged in court. Indeed, the *Lucia* petitioners challenged the SEC's ratification of the prior appointment of its ALJs. As we argued to the Supreme Court (Reply Br. 19-21), ratification is an established principle under the common law, and we have good arguments that ratification by the Department Head cures any constitutional defect in the initial appointment. *See Edmond* v. *United States*, 520 U.S. 651 (1997); *CFPB* v. *Gordon*, 819 F.3d 1179 (9th Cir. 2016); *Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). The Supreme Court in *Lucia* did not address the validity of the SEC's ratification order, however, concluding it was unnecessary to reach that question. Slip op. 13 n.6. Thus, there remains risk that a court might determine in a future case that a ratification was ineffective. Nevertheless, we strongly urge Department Heads to ratify and approve the prior appointments of ALJs and similarly situated adjudicators in order to limit litigation exposure and permit the important work of ALJs to continue.

4. *Model ratification language and practice.* As noted, a ratification order or decision need not take any particular form. As a guide, however, we offer the following model language.

For agencies that have not previously ratified the appointment their ALJs, we recommend language along the following lines:

> I hereby ratify the prior appointment of Jane Doe [or "the individuals listed below"] to the office of administrative law judge in [agency], and I today approve her appointment [or "these appointments"] as my own under the Constitution.

For agencies that previously ratified the appointment of their ALJs, it is not necessary to do so again after *Lucia*. Agencies that can do so easily and consistent with their practice, however, may wish to issue a supplemental order along the following lines:

> On [date], we ratified the appointment of Jane Doe to the office of administrative law judge in [agency]. In an abundance of caution and for avoidance of doubt, we today reiterate our approval of her appointment as our own under the Constitution.

Additionally, it would be fitting for the ratifications to be accompanied by an appropriate degree of public ceremony and formality. To the extent consistent with law and agency practice, for example, a Department Head might re-administer the oath of office to incumbent ALJs in a public ceremony, or on the record of a regular public hearing or meeting. These steps are not strictly necessary, but they will underscore that the Department Head has satisfied the purposes of the Appointments Clause by accepting public responsibility for the appointment of specific persons to the office of ALJ.

C. Recommended Steps In Pending Proceedings

1. *Agencies should no longer argue that ALJs are employees.* As noted above, in light of *Lucia,* the Department of Justice will no longer argue that ALJs or similarly situated adjudicators are employees rather than inferior officers. We urge agencies to take steps to ensure that enforcement staff or other agency representatives in pending administrative proceedings conform their arguments accordingly.

2. *Agencies should request voluntary remands in cases in which an Appointments Clause challenge has been timely made and preserved.* In *Lucia*, the Supreme Court explained that the "appropriate remedy" for "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is "a new hearing before a properly appointed official." Slip op. 12 (quotation marks omitted). The petitioner in *Lucia* made such a timely challenge, the Court stressed, because "[h]e contested the validity of [the ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court." *Id.*

Accordingly, in light of *Lucia*, the Department of Justice will seek voluntary remands of matters pending in federal court in which an invalidly appointed ALJ participated, but *only* in those cases in which an Appointments Clause challenge to the ALJ was timely raised and preserved both before the agency (consistent with applicable agency rules) and in federal court. The Department of Justice will not argue that any Appointments Clause defect constituted harmless error, or that a court of appeals can nevertheless affirm the final decision of an agency in a case where an improperly appointed ALJ participated and the issue was properly preserved. This is

true even in cases (like *Lucia* itself) in which the ALJ's initial decision was reviewed de novo by the Department Head. In short, we construe *Lucia* to require a remand in all cases in which a timely Appointments Clause challenge was raised. We recommend that agencies with independent litigating authority follow the same practice.

We stress that where a challenger has failed to properly raise and preserve an Appointments Clause challenge, agencies should consider arguing that any such challenge has been forfeited. Errors in the appointment of agency officials do not go to the jurisdiction of courts reviewing those officials' decisions. See, *e.g.*, *GGNSC Springfield LLC* v. *NLRB*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 878-79 (1991)). Especially in light of the *Lucia* Court's emphasis on the need for a timely objection, we have strong arguments that Appointments Clause challenges to ALJs are subject to the usual principles of waiver and forfeiture. See, *e.g.*, *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); see also *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). The Supreme Court's decision in *Lucia* therefore should not upset final administrative decisions made without a proper challenge to the appointment of any ALJ involved.

In this regard, we understand that agencies have different practices concerning when and how a party must raise a challenge for it to be properly considered by the agency and preserved for judicial review. See, *e.g.*, 15 U.S.C. 78y(c)(1) (Securities and Exchange Commission requires legal objections to be raised before the Commission itself). Each agency should evaluate whether an Appointments Clause claim has properly been raised in its own proceedings. To the extent possible, moreover, we encourage agencies to construe or clarify their rules to require the presentation of Appointments Clause claims in administrative proceedings. No principle of law prevents an administrative agency from entertaining such claims in the first instance, as the SEC did in *Lucia* itself, or from reassigning the case to an adjudicator who was appointed by the Department Head in order to avoid an Appointments Clause challenge. Requiring the timely presentation of such claims to the agency will reduce the ability of parties simply to await the outcome of their administrative proceedings and then, if dissatisfied, raise an Appointments Clause claim in federal court to secure a remand.

3. *Administrative proceedings with preserved Appointments Clause challenges should be assigned to a different ALJ for a new hearing.* As noted, the Supreme Court in *Lucia* stated that a person who raises a timely objection is entitled to "a new hearing before a properly appointed official." Slip op. 12. The Court additionally specified that this

new hearing could not be conducted by the same ALJ who heard the case initially, even if that ALJ subsequently received a constitutional appointment. *Id.* "To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing[.]" *Id.* at 12-13.

To the extent practical and permitted by law, therefore, all pending administrative proceedings—including proceedings remanded from the courts—in which litigants have properly raised Appointments Clause challenges should be assigned to a different, properly appointed ALJ for a "new hearing." (See below for advice concerning the minimum contours of that "new hearing.") This includes matters currently pending before ALJs, as well as matters on pending review before the agency itself. All such cases should be reassigned to a different, properly appointed ALJ—provided, again, that an Appointments Clause challenge to the presiding ALJ was duly raised and preserved under the agency's rules. For this purpose, a "properly appointed ALJ" includes either (1) a new ALJ appointed pursuant to the Executive Order, or (2) an ALJ whose prior appointment has been properly ratified by the Department Head.

We recognize that *Lucia*'s requirement that matters be assigned to different ALJs for further proceedings will pose a significant administrative burden, especially in those agencies with a high volume of cases. Some agencies, moreover, have only one ALJ, or only use ALJs on loan from other agencies. The Supreme Court stated in footnote 5 of the *Lucia* opinion that it was not "hold[ing] that a new officer is required for every Appointments Clause violation." Slip op. 12-13 n.5. But the Court appears to have contemplated deviations from that rule only in very narrow circumstances: the Court stated that the "rule of necessity would presumably kick in" if "no substitute decisionmaker" were available. *Id.* If your agency does not have a "substitute decisionmaker," or if reassigning cases would present similarly substantial obstacles, please contact us.

4. *The "new hearing" should include, at a minimum, a new opportunity for the parties to contest the admission, exclusion, or weighing of evidence, and must result in a new decision that does not presume the correctness of the prior ALJ decision.* Consistent with *Lucia*, the new decisionmaker should provide a "new hearing." Slip op. 13. While the Supreme Court did not elaborate on what the "new hearing" must entail, the Court plainly contemplated more than a perfunctory ratification of the prior ALJ's decision. If your agency is in a position to provide a full soup-to-nuts redo of the administrative proceeding, that will be the safest course. While litigants may be expected to argue otherwise, however, we do not believe a complete do-over is constitutionally required. We believe that a "new hearing" will be constitutionally adequate as long as the new ALJ is careful to avoid any taint from the prior ALJ's decision. Thus, we do not think

it is necessarily fatal if the new ALJ starts with the existing record in the proceeding (including hearing transcripts), much of which there would be little purpose in generating anew. But the new ALJ should at a minimum afford the parties a new opportunity to challenge the exclusion, admission, or weighing of particular evidence, thus ensuring that the final state of the record reflects the new ALJ's own judgment. Similarly, where credibility is at issue, it may be advisable for the new ALJ to rehear the disputed testimony of the relevant witnesses. The new ALJ should also issue a new decision in the proceeding. While the new ALJ may acknowledge and draw upon any opinion authored by the original ALJ, the new ALJ should make clear that she is not giving any weight to that earlier opinion or treating any factual finding or legal conclusion in that earlier decision as presumptively correct.

Agencies that wish to avoid any litigation over the issue in particular cases may prefer to conduct entirely new hearings.

5. *Agencies should notify the Department of Justice of challenges to the statutory removal restrictions for ALJs.* The Constitution not only specifies the manner in which officers of the United States must be appointed, but also limits the extent to which officers may permissibly be shielded from removal by the Department Head. *See generally Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Many litigants have already argued that ALJs are impermissibly shielded from removal because, by statute, ALJs can only be removed "for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). We expect more such challenges in the wake of *Lucia*. The Executive Order recently issued by the President does *not* alter ALJs' statutory removal protections, and will not insulate agencies from such challenges.

The Department of Justice is prepared to defend the constitutionality of Section 7521, as properly construed. As the government argued in the Supreme Court in *Lucia*, Section 7521's "good cause" standard for removal is properly read to allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions. Resp. Br. 50. An ALJ cannot, however, be removed for any invidious reason or to influence the outcome in a particular adjudication. As so construed, and provided MSPB review is suitably deferential to the determination of the Department Head, the Department of Justice will argue that Section 7521 gives the President a constitutionally adequate degree of control over ALJs. This is true of ALJs who work at independent agencies, as well as ALJs at traditional Executive Branch agencies.

If a plaintiff in one of your cases raises a removal-based challenge to an ALJ, please notify us immediately so that the Department of Justice may coordinate the government's arguments concerning the interpretation and validity of Section 7521.

* * * * *

We recognize that there will be case-by-case and agency-specific questions that arise in connection with the implementation of this guidance and the challenges raised by individual litigants. We anticipate working closely with your agencies to resolve those questions and provide additional guidance as needed. In the interim, please do not hesitate to contact us with questions about the implementation of the Supreme Court's *Lucia* decision and the Executive Order.

For litigation-related questions about ratification, removal, or other matters currently pending in the courts of appeals: Contact the DOJ litigation team at ALJLitigation.Appellate@usdoj.gov.

For questions about the Executive Order or how to make a proper appointment of your ALJs: Consult OPM guidance regarding the Executive Order, available at https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service. The OPM guidance also includes several points of contact if you have additional questions.

Trump v. Hawaii
138 S. Ct. 2392 (2018)

CHIEF JUSTICE ROBERTS, delivered the opinion of the Court. * * *

I

A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO-1). EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. §3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. §3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order.

In response, the President revoked EO-1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO-2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO-2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO-1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§2(c), 3(a). The order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. This Court granted certiorari and stayed the injunctions—allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a "credible claim of a bona fide relationship" with a person or entity in the United States. The temporary restrictions in EO-2 expired before this Court took any action, and we vacated the lower court decisions as moot.

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public safety threats." §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight

foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO-2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a "baseline" for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. §1(c). The baseline included three components. The first, "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as "at risk" of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists.

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. §§1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its "identity-management deficiencies" and "significant terrorist presence" presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. §1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. §1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity-management and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counterterrorism objectives" of the United States. Proclamation §1(h). The President

explained that these restrictions would be the "most likely to encourage cooperation" while "protect[ing] the United States until such time as improvements occur."

The Proclamation imposed a range of restrictions that vary based on the "distinct circumstances" in each of the eight countries. For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless "valuable counterterrorism partner[s]" (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); *see also* §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. * * * Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. * * * The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government's appeal. * * * The Court of Appeals affirmed [the district court's preliminary injunction].

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. *See, e.g.*, 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas. * * *

The text of §1182(f) states:

> "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale* [*v. Haitian Centers Council, Inc.*, 509 U. S. 155, 197 (1993)] (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States); *see also Abourezk v. Reagan*, 785 F. 2d 1043, 1049, n. 2 (CADC 1986) (describing the "sweeping proclamation power" in §1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments— several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United

States." Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur."

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to make a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under §1182(f).

Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§1182(f)] authority." *Sale*, 509 U. S., at 187-188. And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions." *Holder v. Humanitarian Law Project*, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," Webster's Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry "for such period as he shall deem necessary." It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition.

[Plaintiffs argue] that the President's entry suspension violates §1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."* They contend that we should interpret the provision as prohibiting nationality-

* 8 U.S.C. § 1152 is captioned "Numerical limitations on individual foreign states." Section 1152(a) provides as follows:

(a) **PER COUNTRY LEVEL**

based discrimination throughout the entire immigration process, despite the reference in §1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that §1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in §1152(a)(1)(A). * * *

[W]e reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission) into the United States. First, any alien who is inadmissible under §1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U. S. C. §1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"— including §1182(f). §1201(h).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility into the United States, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. * * *

IV

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. * * * Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. * * *

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. * * * The President of

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(1) **NONDISCRIMINATION**

(**A**) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(**B**) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

— Eds.

the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. * * * Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days— performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself. * * *

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U. S. 787, 792 (1977); *see Harisiades v. Shaughnessy*, 342 U. S. 580, 588-589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). * * * Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst v. Mandel* [408 U. S. 753, 762 (1972)], the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. * * *

Mandel's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. *Ziglar v. Abbasi*, 582 U. S. ___, ___ (2017) (slip op., at 19) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked."

"Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. *See* Tr. of Oral Arg. 16-17, 25-27 (*describing* Mandel as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is

plausibly related to the Government's stated objective to protect the country and improve vetting processes.

[Applying rational basis review, the majority rejected plaintiffs' Establishment Clause claim, because Proclamation 9645 "is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices" and "reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies." The removal of entry restrictions on Iraq, Sudan, and Chad, the "significant exceptions for various categories of foreign nationals," and the program allowing for case-by-case waivers of entry restrictions "support[ed] the Government's claim of a legitimate national security interest."]

Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U. S., at 248 (Jackson, J., dissenting).

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate. Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE KENNEDY, concurring. * * *

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial

scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise. * * *

THOMAS, J., concurring. * * *

I write separately to address the remedy that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President's Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called "universal" or "nationwide" injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system— preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. * * *

If district courts have any authority to issue universal injunctions, that authority must come from a statute or the Constitution. No statute expressly grants district courts the power to issue universal injunctions. So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is "[in]consistent with our history and traditions." * * *

Universal injunctions * * * are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. * * * [A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example. While these injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff. Woolhandler & Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 702 (2004); *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 564 (1852) (explaining that a private "injury makes [a public nuisance] a private nuisance to the injured party").

True, one of the recognized bases for an exercise of equitable power was the avoidance of "multiplicity of suits." Courts would employ "bills of peace" to consider and resolve a number of suits in a single proceeding. And some authorities stated that these suits could be filed by one plaintiff on behalf of a number of others. But the "general rule" was that "all persons materially interested . . . in the subject-matter of a suit, are to be made *parties* to it . . ., however numerous they may be, so that there may be a complete decree, which shall bind them all." And, in all events, these "protoclass action[s]" were limited to a small group of similarly situated plaintiffs having some right in common. * * *

By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those

questions only insofar as they are necessary to resolve individual cases and controversies. That is when what appears to be "the first [universal] injunction in the United States" emerged. [Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 348 (2017).] In *Wirtz v. Baldor Elec. Co.*, 337 F. 2d 518 (CADC 1963), the Court of Appeals for the District of Columbia Circuit addressed a lawsuit challenging the Secretary of Labor's determination of the prevailing minimum wage for a particular industry. The D.C. Circuit concluded that the Secretary's determination was unsupported, but remanded for the District Court to assess whether any of the plaintiffs had standing to challenge it. The D.C. Circuit also addressed the question of remedy, explaining that if a plaintiff had standing to sue then "the District Court should enjoin . . . the Secretary's determination with respect to the *entire industry*." To justify this broad relief, the D. C. Circuit explained that executive officers should honor judicial decisions "in all cases of essentially the same character." And it noted that, once a court has decided an issue, it "would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action." The D. C. Circuit added that the case was "clearly a proceeding in which those who have standing are here to vindicate the public interest in having congressional enactments properly interpreted and applied."

Universal injunctions remained rare in the decades following *Wirtz*. But recently, they have exploded in popularity. Some scholars have criticized the trend. *See generally* [Bray, *supra*], at 457-465; Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B. U. L. REV. 615, 633-653 (2017); Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 521-538 (2016).

No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the judiciary a powerful tool to check the Executive Branch. *See* Amdur & Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. FORUM 49, 51, 54 (2017); Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. FORUM 56, 57, 60-62 (2017). But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best "boi[l] down to a policy judgment" about how powers ought to be allocated among our three branches of government. * * *

[U]niversal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting. * * *

"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion.

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decisionmaker. * * *

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

> "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing '25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad' and 51% of those polled 'agreed that Muslims in America should have the choice of being governed according to Shariah.' Shariah authorizes such atrocities as murder against nonbelievers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> "Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.'— Donald J. Trump."

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." He answered, "No." A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim." Id., at 120-121. That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." A day later, he opined that Muslims "do not respect

us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things."

As Trump's presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim."

A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." He replied: "You know my plans. All along, I've proven to be right."

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO-1), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." That same day, President Trump explained to the media that, under EO-1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." Considering that past policy "very unfair," President Trump explained that EO-1 was designed "to help" the Christians in Syria. The following day, one of President Trump's key advisers candidly drew the connection between EO-1 and the "Muslim ban" that the President had pledged to implement if elected. According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO-1. The Ninth Circuit denied the Government's request to stay that injunction. Rather than appeal the Ninth Circuit's decision, the Government declined to continue defending EO-1 in court and instead announced that the President intended to issue a new executive order to replace EO-1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13209 (EO-2). One of the President's senior advisers publicly explained that EO-2 would "have the same basic policy outcome" as EO-1, and that any changes would address "very technical issues that were brought up by the court." After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump "continue[d] to deliver on . . . his most significant campaign promises." That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result."

Before EO-2 took effect, federal District Courts in Hawaii and Maryland enjoined the order's travel and refugee bans. In June 2017, this Court granted the Government's petition for certiorari and issued a per curiam opinion partially staying the District Courts' injunctions pending further review. In particular, the Court allowed EO-2's travel ban to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."

While litigation over EO-2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO-2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "very hard" for Muslims to assimilate into Western culture. During a rally in April 2017, President Trump recited the lyrics to a song called "The Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]." The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"

In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!" Those videos were initially tweeted by a British political party whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including . . . Islam." * * *

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. *See McCreary*, 545 U. S., at 862-863. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office,

then-candidate Trump stated that "Islam hates us," warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," promised to enact a "total and complete shutdown of Muslims entering the United States," and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban. The President continued to make similar statements well after his inauguration, as detailed above.[4]

In light of the Government's suggestion "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," the majority rightly declines to apply *Mandel*'s "narrow standard of review" and "assume[s] that we may look behind the face of the Proclamation." In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. * * *

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "'inexplicable by anything but animus.'" The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. * * *

[T]he majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. *See* [*IRAP v. Trump*, 883 F. 3d 233, 268 (CA4 2018) (IRAP II)] ("[T]he Government chose not to make the review publicly available" even in redacted form); *IRAP v. Trump*, No. 17-2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit's request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates

[4] At oral argument, the Solicitor General asserted that President Trump "made crystal-clear on September 25 that he had no intention of imposing the Muslim ban" and "has praised Islam as one of the great countries [sic] of the world." Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump's statement during a television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018). During that interview, the President was asked whether EO-1 was "the Muslim ban," and answered, "no it's not the Muslim ban." See Transcript: ABC News anchor David Muir interviews President Trump, ABC News, Jan. 25, 2017, http://abcnews.go.com/Politics/ transcript-abc-news-anchor-david-muir-interviews-president/story? id = 45047602. But that lone assertion hardly qualifies as a disavowal of the President's comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump's January 25th statement makes "crystal-clear" that he never intended to impose a Muslim ban given that, until May 2017, the President's website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

that the multiagency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages. *See Brennan Center for Justice v. United States Dept. of State*, No. 17-cv-7520 (SDNY), Doc. No. 31-1, pp. 2-3. That the Government's analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President's proclaimed national-security rationale.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. *See* Brief for Pars Equality Center et al. as Amici Curiae 11, 13-28 (explaining that "waivers under the Proclamation are vanishingly rare" and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. * * *

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U. S. 214 (1944). In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, inter alia, a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. *Compare Korematsu v. United States*, 584 F. Supp. 1406, 1418-1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order). And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U. S., at 234 (Murphy, J., dissenting). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure.

In the intervening years since Korematsu, our Nation has done much to leave its sordid legacy behind. *See, e.g.*, Civil Liberties Act of 1988, 50 U. S. C. App. §4211 et seq. (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. §4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the

important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another. * * *

[Dissenting opinion of Justice Breyer, joined by Justice Kagan, omitted.]

Presidential Documents

Proclamation 9645 of September 24, 2017

Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats

By the President of the United States of America

A Proclamation

In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.

As President, I must act to protect the security and interests of the United States and its people. I am committed to our ongoing efforts to engage those countries willing to cooperate, improve information-sharing and identity-management protocols and procedures, and address both terrorism-related and public-safety risks. Some of the countries with remaining inadequacies face significant challenges. Others have made strides to improve their protocols and procedures, and I commend them for these efforts. But until they satisfactorily address the identified inadequacies, I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations, as set forth more fully below, on entry into the United States of nationals of the countries identified in section 2 of this proclamation.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the

interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they aid our efforts to prevent such individuals from entering the United States.

(b) Information-sharing and identity-management protocols and practices of foreign governments are important for the effectiveness of the screening and vetting protocols and procedures of the United States. Governments manage the identity and travel documents of their nationals and residents. They also control the circumstances under which they provide information about their nationals to other governments, including information about known or suspected terrorists and criminal-history information. It is, therefore, the policy of the United States to take all necessary and appropriate steps to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems.

(c) Section 2(a) of Executive Order 13780 directed a ''worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.'' That review culminated in a report submitted to the President by the Secretary of Homeland Security on July 9, 2017. In that review, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, developed a baseline for the kinds of information required from foreign governments to support the United States Government's ability to confirm the identity of individuals seeking entry into the United States as immigrants and nonimmigrants, as well as individuals applying for any other benefit under the immigration laws, and to assess whether they are a security or public-safety threat. That baseline incorporates three categories of criteria:

(i) *Identity-management information*. The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be. The identity-management information category focuses on the integrity of documents required for travel to the United States. The criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.

(ii) *National security and public-safety information.* The United States expects foreign governments to provide information about whether persons who seek entry to this country pose national security or public-safety risks. The criteria assessed in this category include whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request, whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States.

(iii) *National security and public-safety risk assessment.* The national security and public-safety risk assessment category focuses on national security risk indicators. The criteria assessed in this category include whether the country is a known or potential terrorist safe haven, whether it is

a participant in the Visa Waiver Program established under section 217 of the INA, 8 U.S.C. 1187, that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.

(d) The Department of Homeland Security, in coordination with the Department of State, collected data on the performance of all foreign governments and assessed each country against the baseline described in subsection (c) of this section. The assessment focused, in particular, on identity management, security and public-safety threats, and national security risks. Through this assessment, the agencies measured each country's performance with respect to issuing reliable travel documents and implementing adequate identity-management and information-sharing protocols and procedures, and evaluated terrorism-related and public-safety risks associated with foreign nationals seeking entry into the United States from each country.

(e) The Department of Homeland Security evaluated each country against the baseline described in subsection (c) of this section. The Secretary of Homeland Security identified 16 countries as being ''inadequate'' based on an analysis of their identity-management protocols, information-sharing practices, and risk factors. Thirty-one additional countries were classified ''at risk'' of becoming ''inadequate'' based on those criteria.

(f) As required by section 2(d) of Executive Order 13780, the Department of State conducted a 50-day engagement period to encourage all foreign governments, not just the 47 identified as either ''inadequate'' or ''at risk,'' to improve their performance with respect to the baseline described in subsection (c) of this section. Those engagements yielded significant improvements in many countries. Twenty-nine countries, for example, provided travel document exemplars for use by Department of Homeland Security officials to combat fraud. Eleven countries agreed to share information on known or suspected terrorists.

(g) The Secretary of Homeland Security assesses that the following countries continue to have ''inadequate'' identity-management protocols, information-sharing practices, and risk factors, with respect to the baseline described in subsection (c) of this section, such that entry restrictions and limitations are recommended: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. The Secretary of Homeland Security also assesses that Iraq did not meet the baseline, but that entry restrictions and limitations under a Presidential proclamation are not warranted. The Secretary of Homeland Security recommends, however, that nationals of Iraq who seek to enter the United States be subject to additional scrutiny to determine if they pose risks to the national security or public safety of the United States. In reaching these conclusions, the Secretary of Homeland Security considered the close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS).

(h) Section 2(e) of Executive Order 13780 directed the Secretary of Homeland Security to ''submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means.'' On September 15, 2017, the Secretary of Homeland Security submitted a report to me recommending entry restrictions and limitations on certain nationals of 7 countries determined to be ''inadequate'' in providing such information and in light of other factors discussed in the report. According to the report, the recommended restrictions would help address the threats that the countries' identity-management protocols, information-sharing inadequacies, and other risk factors pose to the security and welfare of the United

States. The restrictions also encourage the countries to work with the United States to address those inadequacies and risks so that the restrictions and limitations imposed by this proclamation may be relaxed or removed as soon as possible.

(i) In evaluating the recommendations of the Secretary of Homeland Security and in determining what restrictions to impose for each country, I consulted with appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General. I considered several factors, including each country's capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors, such as whether it has a significant terrorist presence within its territory. I also considered foreign policy, national security, and counterterrorism goals. I reviewed these factors and assessed these goals, with a particular focus on crafting those country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances, and that would, at the same time, protect the United States until such time as improvements occur. The restrictions and limitations imposed by this proclamation are, in my judgment, necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States. These restrictions and limitations are also needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments; and to advance foreign policy, national security, and counterterrorism objectives.

(ii) After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be ''inadequate'' with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. These restrictions distinguish between the entry of immigrants and nonimmigrants. Persons admitted on immigrant visas become lawful permanent residents of the United States. Such persons may present national security or public-safety concerns that may be distinct from those admitted as nonimmigrants. The United States affords lawful permanent residents more enduring rights than it does to nonimmigrants. Lawful permanent residents are more difficult to remove than nonimmigrants even after national security concerns arise, which heightens the costs and dangers of errors associated with admitting such individuals. And although immigrants generally receive more extensive vetting than nonimmigrants, such vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States. For all but one of those 7 countries, therefore, I am restricting the entry of all immigrants.

(iii) I am adopting a more tailored approach with respect to nonimmigrants, in accordance with the recommendations of the Secretary of Homeland Security. For some countries found to be ''inadequate'' with respect to the baseline described in subsection (c) of this section, I am restricting the entry of all nonimmigrants. For countries with certain mitigating factors, such as a willingness to cooperate or play a substantial role in combatting terrorism, I am restricting the entry only of certain categories of nonimmigrants, which will mitigate the security threats presented by their entry into the United States. In those cases in which future cooperation seems reasonably likely, and accounting for foreign policy, national security, and counterterrorism objectives, I have tailored the restrictions to encourage such improvements.

(i) Section 2(e) of Executive Order 13780 also provided that the ''Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which

any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.'' The Secretary of Homeland Security determined that Somalia generally satisfies the information-sharing requirements of the baseline described in subsection (c) of this section, but its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States. Somalia's identity-management deficiencies and the significant terrorist presence within its territory make it a source of particular risks to the national security and public safety of the United States. Based on the considerations mentioned above, and as described further in section 2(h) of this proclamation, I have determined that entry restrictions, limitations, and other measures designed to ensure proper screening and vetting for nationals of Somalia are necessary for the security and welfare of the United States.

(j) Section 2 of this proclamation describes some of the inadequacies that led me to impose restrictions on the specified countries. Describing all of those reasons publicly, however, would cause serious damage to the national security of the United States, and many such descriptions are classified.

Sec. 2. *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk criterion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety

and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations—and their immediate family members, as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(h) *Somalia.*

(i) The Secretary of Homeland Security's report of September 15, 2017, determined that Somalia satisfies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia's territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department's 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists' freedom of movement, access to resources, and capacity to operate. The government of Somalia's lack of territorial control also compromises Somalia's ability, already limited because of poor record-keeping, to share information about its nationals who pose criminal or terrorist risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

Sec. 3. *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.,* a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.,* traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government–sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

Sec. 4. *Adjustments to and Removal of Suspensions and Limitations.* (a) The Secretary of Homeland Security shall, in consultation with the Secretary of State, devise a process to assess whether any suspensions and limitations imposed by section 2 of this proclamation should be continued, terminated, modified, or supplemented. The process shall account for whether countries have improved their identity-management and information-sharing protocols and procedures based on the criteria set forth in section 1 of this proclamation and the Secretary of Homeland Security's report of September 15, 2017. Within 180 days of the date of this proclamation, and every 180 days thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies, shall submit a report with recommendations to the President, through appropriate Assistants to the President, regarding the following:

(i) the interests of the United States, if any, that continue to require the suspension of, or limitations on, the entry on certain classes of nationals of countries identified in section 2 of this proclamation and whether the restrictions and limitations imposed by section 2 of this proclamation should be continued, modified, terminated, or supplemented; and

(ii) the interests of the United States, if any, that require the suspension of, or limitations on, the entry of certain classes of nationals of countries not identified in this proclamation.

(b) The Secretary of State, in consultation with the Secretary of Homeland Security, the Secretary of Defense, the Attorney General, the Director of National Intelligence, and the head of any other executive department or agency (agency) that the Secretary of State deems appropriate, shall engage the countries listed in section 2 of this proclamation, and any other countries that have information-sharing, identity-management, or risk-factor deficiencies as practicable, appropriate, and consistent with the foreign policy, national security, and public-safety objectives of the United States.

(c) Notwithstanding the process described above, and consistent with the process described in section 2(f) of Executive Order 13780, if the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, and the Director of National Intelligence, determines, at any time, that a country meets the standards of the baseline described in section 1(c) of this proclamation, that a country has an adequate plan to provide such information, or that one or more of the restrictions or limitations imposed on the entry of a country's nationals are no longer necessary for the security or welfare of the United States, the Secretary of Homeland Security may recommend to the President the removal or modification of any or all such restrictions and limitations. The Secretary of Homeland Security, the Secretary of State, or the Attorney General may also, as provided for in Executive Order 13780, submit to the President the names of additional countries for which any of them recommends any lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

Sec. 5. *Reports on Screening and Vetting Procedures.* (a) The Secretary of Homeland Security, in coordination with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies shall submit periodic reports to the President, through appropriate Assistants to the President, that:

(i) describe the steps the United States Government has taken to improve vetting for nationals of all foreign countries, including through improved collection of biometric and biographic data;

(ii) describe the scope and magnitude of fraud, errors, false information, and unverifiable claims, as determined by the Secretary of Homeland Security on the basis of a validation study, made in applications for immigration benefits under the immigration laws; and

(iii) evaluate the procedures related to screening and vetting established by the Department of State's Bureau of Consular Affairs in order to enhance the safety and security of the United States and to ensure sufficient review of applications for immigration benefits.

(b) The initial report required under subsection (a) of this section shall be submitted within 180 days of the date of this proclamation; the second report shall be submitted within 270 days of the first report; and reports shall be submitted annually thereafter.

(c) The agency heads identified in subsection (a) of this section shall coordinate any policy developments associated with the reports described in subsection (a) of this section through the appropriate Assistants to the President.

Sec. 6. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of this proclamation.

(b) In implementing this proclamation, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including those that provide an opportunity for individuals to enter the United States on the basis of a credible claim of fear of persecution or torture.

(c) No immigrant or nonimmigrant visa issued before the applicable effective date under section 7 of this proclamation shall be revoked pursuant to this proclamation.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 of January 27, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms and conditions of the visa marked revoked or marked canceled. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This proclamation shall not apply to an individual who has been granted asylum by the United States, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 7. *Effective Dates.* Executive Order 13780 ordered a temporary pause on the entry of foreign nationals from certain foreign countries. In two cases, however, Federal courts have enjoined those restrictions. The Supreme Court has stayed those injunctions as to foreign nationals who lack a credible claim of a bona fide relationship with a person or entity in the United States, pending its review of the decisions of the lower courts.

(a) The restrictions and limitations established in section 2 of this proclamation are effective at 3:30 p.m. eastern daylight time on September 24, 2017, for foreign nationals who:

(i) were subject to entry restrictions under section 2 of Executive Order 13780, or would have been subject to the restrictions but for section 3 of that Executive Order, and

(ii) lack a credible claim of a bona fide relationship with a person or entity in the United States.

(b) The restrictions and limitations established in section 2 of this proclamation are effective at 12:01 a.m. eastern daylight time on October 18, 2017, for all other persons subject to this proclamation, including nationals of:

(i) Iran, Libya, Syria, Yemen, and Somalia who have a credible claim of a bona fide relationship with a person or entity in the United States; and

(ii) Chad, North Korea, and Venezuela.

Sec. 8. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, foreign policy, and counterterrorism interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 9. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

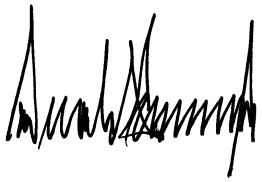
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of September, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-second.



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Wisconsin Central Ltd. v. United States
138 S. Ct. 2067 (2018)

JUSTICE GORSUCH, delivered the opinion of the Court.

As the Great Depression took its toll, struggling railroad pension funds reached the brink of insolvency. During that time before the modern interstate highway system, privately owned railroads employed large numbers of Americans and provided services vital to the nation's commerce. To address the emergency, Congress adopted the Railroad Retirement Tax Act of 1937. [Pub. L. No. 75-162, 50 Stat. 307.] That legislation federalized private railroad pension plans and it remains in force today. Under the law's terms, private railroads and their employees pay a tax based on employees' incomes. 26 U. S. C. §§3201(a)-(b), 3221(a)-(b). In return, the federal government provides employees a pension often more generous than the social security system supplies employees in other industries.

Our case arises from a peculiar feature of the statute and its history. At the time of the Act's adoption, railroads compensated employees not just with money but also with food, lodging, railroad tickets, and the like. Because railroads typically didn't count these in-kind benefits when calculating an employee's pension on retirement, neither did Congress in its new statutory pension scheme. Nor did Congress seek to tax these in-kind benefits. Instead, it limited itself to taxing employee "compensation," and defined that term to capture only "any form of money remuneration." §3231(e)(1).*

It's this limitation that poses today's question. To encourage employee performance and align employee and corporate goals, some railroads (like employers in many fields) have adopted employee stock option plans. Typical of many, the plan before us permits an employee to exercise stock options in various ways—purchasing stock with her own money and holding it as an investment; purchasing stock but immediately selling a portion to

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* Section 3231(e) provides:

> (e) **COMPENSATION**. For purposes of this chapter—
>
> > (1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer [that provides insurance for sickness, accidents, or death] * * * , (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses * * *.
> >
> > (12) **QUALIFIED STOCK OPTIONS** The term "compensation" shall not include any remuneration on account of—
> >
> > > (A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or
> > >
> > > (B) any disposition by the individual of such stock.* * *

– Eds.

finance the purchase; or purchasing stock at the option price, selling it all immediately at the market price, and taking the profits. The government argues that stock options like these qualify as a form of taxable "money remuneration" under the Act because stock can be easily converted into money. The railroads reply that stock options aren't "money" at all and remind us that when Congress passed the Act it sought to mimic existing industry pension practices that generally took no notice of in-kind benefits. * * *

We start with the key statutory term: "money remuneration." As usual, our job is to interpret the words consistent with their "ordinary meaning . . . at the time Congress enacted the statute." *Perrin v. United States*, 444 U. S. 37, 42 (1979). And when Congress adopted the Act in 1937, "money" was ordinarily understood to mean currency "issued by [a] recognized authority as a medium of exchange." Webster's New International Dictionary 1583 (2d ed. 1942); *see also* 6 Oxford English Dictionary 603 (1st ed. 1933) ("In mod[ern] use commonly applied indifferently to coin and to such promissory documents representing coin (esp. government and bank notes) as are currently accepted as a medium of exchange"); Black's Law Dictionary 1200 (3d ed. 1933) (in its "popular sense, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value"); *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359, 365 (1954) ("[M]oney . . . is a medium of exchange"). Pretty obviously, stock options do not fall within that definition. While stock can be bought or sold for money, few of us buy groceries or pay rent or value goods and services in terms of stock. When was the last time you heard a friend say his new car cost "2,450 shares of Microsoft"? Good luck, too, trying to convince the IRS to treat your stock options as a medium of exchange at tax time. *See* Rev. Rul. 76-350, 1976-2 Cum. Bull. 396; *see also*, *e.g.*, *In re Boyle's Estate*, 2 Cal. App. 2d 234, 236 (1934) ("[T]he word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks"); *Helvering v. Credit Alliance Corp.*, 316 U. S. 107, 112 (1942) (distinguishing between "money and . . . stock").

Nor does adding the word "remuneration" alter the calculus. Of course, "remuneration" can encompass any kind of reward or compensation, not just money. But in the sentence before us, the adjective "money" modifies the noun "remuneration." So "money" limits the kinds of remuneration that will qualify for taxation; "remuneration" doesn't expand what counts as money. When the statute speaks of taxing "any form of money remuneration," then, it indicates Congress wanted to tax monetary compensation in any of the many forms an employer might choose—coins, paper currency, checks, wire transfers, and the like. It does not prove Congress wanted to tax things, like stock, that aren't money at all.

The broader statutory context points to the same conclusion the immediate text suggests. The 1939 Internal Revenue Code, part of the same title as our statute and adopted just two years later, expressly treated "money" and "stock" as different things. [Justice Gorsuch quoted examples.]

That's not all. The same Congress that enacted the Railroad Retirement Tax Act enacted a companion statute, the Federal Insurance Contributions Act (FICA), to fund social security pensions for employees in other industries. And while the Railroad Retirement Tax Act taxes only "money remuneration," FICA taxes "all remuneration"—including benefits "paid in any medium other than cash." §3121(a) (emphasis added). * * *

Even the IRS (then the Bureau of Internal Revenue) seems to have understood all this back in 1938. Shortly after the Railroad Retirement Tax Act's enactment, the IRS issued a regulation explaining that the Act taxes "all remuneration in money, or in something which may be used in lieu of money." 26 CFR §410.5 (1938). By way of example, the regulation said the Act taxed things like "[s]alaries, wages, commissions, fees, [and] bonuses." §410.6(a). But it nowhere suggested that stock was taxable. Nor was the possibility lost on the IRS. The IRS said the Act did tax money payments related to stock—"[p]ayments made by an employer into a stock bonus . . . fund." §410.6(f). But the agency did not seek to extend the same treatment to stock itself. So even assuming the validity of the regulation, it seems only to confirm our understanding. * * *

What does the government have to say about all this? It concedes that money remuneration often means remuneration in a commonly used medium of exchange. But, it submits, the term can carry a much more expansive meaning too. At least sometimes, the government says, "money" means any "property or possessions of any kind viewed as convertible into money or having value expressible in terms of money." 6 Oxford English Dictionary 603. The dissent takes the same view. But while the term "money" *sometimes* might be used in this much more expansive sense, that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today). Baseball cards, vinyl records, snow globes, and fidget spinners all have "value expressible in terms of money." Even that "priceless" Picasso has a price. Really, almost *anything* can be reduced to a "value expressible in terms of money." But in ordinary usage does "money" mean almost *everything*?

The government and the dissent supply no persuasive proof that Congress sought to invoke their idiosyncratic definition. If Congress really thought everything is money, why did it take such pains to differentiate between money and stock in the Internal Revenue Code of 1939? Why did it so carefully distinguish "money remuneration" in the Act and "all remuneration" in FICA? Why did it include the word "money" to qualify "remuneration" if all remuneration counts as money? And wouldn't the everything-is-money interpretation encompass railroad tickets, food, and lodging—exactly the sort of in-kind benefits we know the Act was written to *exclude*? These questions they cannot answer.

To be sure, the government and dissent do seek to offer a different structural argument of their own. They point to certain of the Act's tax exemptions, most notably the exemption for qualified stock options. *See* 26 U. S. C. §3231(e)(12). Because the Act *excludes* qualified stock options from taxation, the argument goes, to avoid superfluity it must *include* other sorts of stock options like the nonqualified stock options the railroads issued here. The problem, though, is that the exemption covers "*any* remuneration on *account of*" qualified stock options. §3231(e)(12) (emphasis added). And, as the government concedes, companies sometimes include money payments when qualified stock options are exercised (often to compensate for fractional shares due an employee). As a result, the exemption does work under anyone's reading. * * *

Finally, the government seeks *Chevron* deference for a more recent IRS interpretation treating "compensation" under the Act as having "the same meaning as the term wages in" FICA "except as specifically limited by the Railroad Retirement Tax Act." 26 CFR §31.3231(e)-1 (2017). But in light of all the textual and structural clues before us, we

think it's clear enough that the term "money" excludes "stock," leaving no ambiguity for the agency to fill. * * *

The Court of Appeals in this case tried a different tack still, if over a dissent. The majority all but admitted that stock isn't money, but suggested it would make "good practical sense" for our statute to cover stock as well as money. Meanwhile, Judge Manion dissented, countering that it's a judge's job only to apply, not revise or update, the terms of statutes. The Eighth Circuit made much the same point when it addressed the question. Judge Manion and the Eighth Circuit were right. Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. * * *

This hardly leaves us, as the dissent worries, "trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930's." While every statute's meaning is fixed at the time of enactment, new applications may arise in light of changes in the world. So "money," as used in this statute, must always mean a "medium of exchange." But what qualifies as a "medium of exchange" may depend on the facts of the day. Take electronic transfers of paychecks. Maybe they weren't common in 1937, but we do not doubt they would qualify today as "money remuneration" under the statute's original public meaning. The problem with the government's and the dissent's position today is not that stock and stock options weren't common in 1937, but that they were not then—and are not now— recognized as mediums of exchange.

The judgment of the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting. * * *

I

A stock option consists of a right to buy a specified amount of stock at a specific price. If that price is lower than the current market price of the stock, a holder of the option can exercise the option, buy the stock at the option price, and keep the stock, or he can buy the stock, sell it at the higher market price, and pocket the difference. Companies often compensate their employees in part by paying them with stock options, hoping that by doing so they will provide an incentive for their employees to work harder to increase the value of the company.

Employees at petitioners' companies who receive and exercise a stock option may keep the stock they buy as long as they wish. But they also have another choice called the "cashless exercise" method. That method permits an employee to check a box on a form, thereby asking the company's financial agents to buy the stock (at the option price) and then immediately sell the stock (at the higher market price) with the proceeds deposited into the employee's bank account—just like a deposited paycheck. About half (around 49%) of petitioners' employees used this method (or a variation of it) during the relevant time period. The Solicitor General tells us that many more employees at other railroads also use this "cashless exercise" method—93% in the case of CSX, 90% to 95% in the case of BNSF.

II

A

Does a stock option received by an employee (along with, say, a paycheck) count as a "form"—some form, "any form"—of "money remuneration?" The railroads, as the majority notes, believe they can find the answer to this question by engaging in (and winning) a war of 1930's dictionaries. I am less sanguine. True, some of those dictionaries say that "money" primarily refers to currency or promissory documents used as "a medium of exchange." But even this definition has its ambiguities. A railroad employee cannot use her paycheck as a "medium of exchange." She cannot hand it over to a cashier at the grocery store; she must first deposit it. The same is true of stock, which must be converted into cash and deposited in the employee's account before she can enjoy its monetary value. Moreover, what we view as money has changed over time. Cowrie shells once were such a medium but no longer are; our currency originally included gold coins and bullion, but, after 1934, gold could not be used as a medium of exchange, *see* Gold Reserve Act of 1934, ch. 6, §2, 48 Stat. 337; perhaps one day employees will be paid in Bitcoin or some other type of cryptocurrency. Nothing in the statute suggests the meaning of this provision should be trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930's.

Regardless, the formal "medium of exchange" definition is not the only dictionary definition of "money," now or then. The Oxford English Dictionary, for example, included in its definition "property or possessions of any kind viewed as convertible into money," 6 Oxford English Dictionary 603 (1st ed. 1933); Black's Law Dictionary said that money was the representative of "everything that can be transferred in commerce," Black's Law Dictionary 1200 (3d ed. 1933); and the New Century Dictionary defined money as "property considered with reference to its pecuniary value," 1 New Century Dictionary of the English Language 1083 (1933). Although the majority brushes these definitions aside as contrary to the term's "ordinary usage," a broader understanding of money is perfectly intuitive—particularly in the context of compensation. Indeed, many of the country's top executives are compensated in both cash and stock or stock options. Often, as is the case with the president of petitioners' parent company, executives' stock-based compensation far exceeds their cash salary. But if you were to ask (on, say, a mortgage application) how much money one of those executives made last year, it would make no sense to leave the stock and stock options out of the calculation.

So, where does this duel of definitions lead us? Some seem too narrow; some seem too broad; some seem indeterminate. The result is ambiguity. Were it up to me to choose based only on what I have discussed so far, I would say that a stock option is a "form of money remuneration." Why? Because for many employees it almost immediately takes the form of an increased bank balance, because it strongly resembles a paycheck in this respect, and because the statute refers to "*any form*" of money remuneration. A paycheck is not money, but it is a means of remunerating employees monetarily. The same can be said of stock options.

B

Fortunately, we have yet more tools in our interpretive arsenal, namely, all the "traditional tools of statutory construction." *INS v. Cardoza-Fonseca*, 480 U. S. 421, 446 (1987). Let us look to purpose. What could Congress' purpose have been when it used the word "money"? The most obvious purpose would be to exclude certain in-kind benefits that are nonmonetary—either because they are nontransferrable or otherwise difficult to value. When Congress enacted the statute, it was common for railroad workers to receive free

transportation for life. Taxation of Interstate Carriers and Employees: Hearings on H. R. 8652 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 6 (1935). Unlike stock options, it would have been difficult to value this benefit. And even very broad definitions of "money" would seem to exclude it. *E.g.*, 6 Oxford English Dictionary, at 603.

Another interpretive tool, the statute's history, tends to confirm this view of the statutory purpose (and further supports inclusion of stock options for that reason). An earlier version of the Act explicitly excluded from taxation any "free transportation," along with such in-kind benefits as "board, rents, housing, [and] lodging" provided that their value was less than $10 per month (about $185 per month today). S. 2862, 74th Cong., 1st Sess., §1(e), p. 3 (1935). In other words, they were incidental benefits that were particularly difficult to value. Congress later dropped these specific provisions from the bill on the ground that they were "superfluous." S. Rep. No. 697, 75th Cong., 1st Sess., 8 (1937).

Excluding stock options from taxation under the statute would not further this basic purpose and would be inconsistent with this aspect of the statute's history, for stock options are financial instruments. They can readily be bought and sold, they are not benefits in kind (*i.e.*, they have no value to employees other than their financial value), and—compared to, say, meals or spontaneous train trips—they are not particularly difficult to value.

Nor is it easy to see what purpose the majority's interpretation would serve. Congress designed the Act to provide a financially stable, self-sustaining system of retirement benefits for railroad employees. *See* S. Rep. No. 6, 83d Cong., 1st Sess., pt. 1, pp. 64-65 (1953); *see also* 2 Staff of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 12-15 (Jt. Comm. Print 1972) (describing financial difficulties facing the private railroad pension programs that Congress sought to replace). Nevertheless, petitioners speculate that Congress intended to limit the Act's tax base to employees' "regular pay" because that more closely resembled the way private pensions in the railroad industry calculated a retiree's annuity. But the Act taxes not simply monthly paychecks but also bonuses, commissions, and contributions to an employee's retirement account (like a 401(k)), *see* §§3231(e)(1), (8)—none of which were customarily considered in railroad pension calculations. Why distinguish stock options from these other forms of money remuneration—particularly when almost half the employees who participated in petitioners' stock option plan (and nearly all such employees at other railroads) have the option's value paid directly into their bank accounts in cash?

The statute's structure as later amended offers further support. That is because a later amendment *expressly* excluded from taxation certain stock options, namely, "[q]ualified stock options," *see* §3231(e)(12), which tax law treats more favorably (and which are also excluded from the Social Security tax base, §3121(a)(22)). What need would there be to exclude expressly a subset of stock options if the statute already excluded *all* stock options from its coverage? * * *

C

There are, of course, counterarguments and other considerations, which the majority sets forth in its opinion. The majority asserts, for example, that Congress must have intended the Act to be read more narrowly because, shortly after enacting the statutory

language at issue in this dispute, Congress enacted the Federal Insurance Contributions Act (FICA), which uses different language to establish its tax base. * * * But there is no canon of interpretation forbidding Congress to use different words in different statutes to mean somewhat the same thing. And the meaning of the statutory terms as I read them are not identical, given FICA's definition of "wages" would include those types of noncash benefits that the Railroad Retirement Tax Act exempts from taxation.

At most, this conflicting statutory language leaves the meaning of "money remuneration" unclear. In these circumstances, I would give weight to the interpretation of the Government agency that Congress charged with administering the statute. "Where a statute leaves a 'gap' or is 'ambiguous' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. ___, ___ (2016) (slip op., at 13) (citing *United States v. Mead Corp.*, 533 U. S. 218, 229 (2001); *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984)). And even outside that framework, I would find the agency's views here particularly persuasive. *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140 (1944). The interpretation was made contemporaneously with the enactment of the statute itself, and the Government has not since interpreted the statute in a way that directly contradicts that contemporaneous interpretation. Congress, over a period of nearly 90 years, has never revised or repealed the agencies' interpretation, despite modifying other provisions in the statute, which "'is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U. S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U. S. 267, 274-275 (1974)). Nor did the railroad industry object to the taxation of stock options based on the Government's interpretation until recent years. *See, e.g.*, *Union Pacific R. Co. v. United States*, 2016 U. S. Dist. LEXIS 86023, *4-*5 (D Neb., July 1, 2016) (noting that Union Pacific began issuing stock options in tax year 1981 and paid railroad retirement taxes on them for decades, challenging the Government's interpretation only in 2014).

What is that interpretation? Shortly after the Act was passed, the Department of Treasury issued a regulation defining the term "compensation" in the Act as reaching both "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 CFR §410.5 (1938). In the 1930's, "scrip" could refer to "[c]ertificates of ownership, either absolute or conditional, of shares in a public company, corporate profits, etc." Black's Law Dictionary, at 1588; C. Alsager, Dictionary of Business Terms 321 (1932) ("A certificate which represents fractions of shares of stock"); 3 F. Stroud, Judicial Dictionary 1802 (2d ed. 1903) ("a [c]ertificate, transferable by delivery, entitling its holder to become a Shareholder or Bondholder in respect of the shares or bonds therein mentioned"). The majority, though clearly fond of 1930's-era dictionaries, rejects these definitions because, in its view, they do not reflect the term's "ordinary meaning." But the majority has no basis for this assertion. *Contra Eisner v. Macomber*, 252 U. S. 189, 227 (1920) (Brandeis, J., dissenting) (referring to "bonds, scrip or stock" as similar instruments of corporate finance). * * *

Here, in respect to stock options, the Act's language has a degree of ambiguity. But the statute's purpose, along with its amendments, argues in favor of including stock options. The Government has so interpreted the statute for decades, and Congress has never suggested it held a contrary view, despite making other statutory changes. In these

circumstances, I believe the Government has the stronger argument. I would read the statutory phrase as including stock options. And, with respect, I dissent from the majority's contrary view.

National Association for the Advancement of Colored People v. Trump

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 17-1907 (JDB)
August 3, 2018

JOHN D. BATES, United States District Judge.

This litigation concerns the Department of Homeland Security's ("DHS") September 5, 2017 decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program. In April 2018, this Court held that decision unlawful and set it aside, concluding both that it was reviewable under the Administrative Procedure Act ("APA") and that the reasons given to support it were inadequate. However, because the Court also determined that DHS could possibly remedy the decision's inadequacies—at least in theory—the Court stayed its order of vacatur for a period of ninety days.

That ninety-day period has now expired. In the interim, DHS has issued a new memorandum "concur[ring] with and declin[ing] to disturb" its September 2017 rescission decision. Also, the government has now moved the Court to revise its April 2018 order, arguing that the Nielsen Memo demonstrates that DACA's rescission was neither unlawful nor subject to judicial review.

For the reasons explained below, the government's motion will be denied. Although the Nielsen Memo purports to offer further explanation for DHS's decision to rescind DACA, it fails to elaborate meaningfully on the agency's primary rationale for its decision: the judgment that the policy was unlawful and unconstitutional. And while the memo offers several additional "policy" grounds for DACA's rescission, most of these simply repackage legal arguments previously made, and hence are "insufficiently independent from the agency's evaluation of DACA's legality" to preclude judicial review or to support the agency's decision. Finally, the memo does offer what appears to be one bona fide (albeit logically dubious) policy reason for DACA's rescission, but this reason was articulated nowhere in DHS's prior explanation for its decision, and therefore cannot support that decision now.

By choosing to stand by its September 2017 rescission decision, DHS has placed itself in a dilemma. On the one hand, it cannot rely on the reasons it previously gave for DACA's rescission, because the Court has already rejected them. On the other, because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), DHS also cannot rely on new reasons that it now articulates for the first time. The government's attempt to thread this needle fails. The motion to revise the Court's April 2018 order will therefore be denied, and the Court's vacatur of DACA's rescission will stand.

BACKGROUND

The DACA program offers renewable, two-year grants of deferred action to certain undocumented aliens who were brought to the United States as children. A grant of deferred action under DACA guarantees not only that the recipient will not be removed from the United States during the relevant time period, but also that she will be able to live, work, and contribute to society in various ways. Since DACA's implementation in 2012, nearly 800,000 individuals have received grants of deferred action under the program.

In 2014, DHS implemented a similar program, Deferred Action for Parents of Americans ("DAPA"), which would have offered renewable grants of deferred action to the noncitizen parents of U.S. citizens or lawful permanent residents. Before DAPA could take effect, however, several states—led by Texas—challenged it in federal court. A district court preliminarily enjoined DAPA in 2015, and the following year the Supreme Court affirmed the district court's preliminary injunction by an equally divided vote. Litigation over DAPA continued until June 2017, when, following the election of President Trump, DHS rescinded the program.

On September 5, 2017, purportedly in response to threats from the plaintiffs in the *Texas* litigation, DHS rescinded the DACA program as well. A flurry of court challenges followed, each of whose procedural history is described more fully in the Court's prior opinion. For present purposes, it suffices to say that DACA's rescission has been preliminarily enjoined by two district courts, one in California and one in New York, and that the government's appeals of those injunctions are currently pending.

The cases before this Court, which present challenges to DACA's rescission on both administrative and constitutional grounds, were filed in late 2017 and consolidated for purposes of the dispositive motions filed in each. After holding a hearing on those motions, the Court entered judgment in plaintiffs' favor on their APA claims. The Court held, among other things, that: (1) DHS's September 5, 2017 decision to rescind DACA was reviewable under the APA because it was predicated chiefly on the agency's legal judgment that DACA was unlawful; and (2) the decision was arbitrary and capricious because (a) DHS's legal judgment was inadequately explained, and (b) the other reasons offered for DACA's rescission—mainly, the purported "litigation risk" that DACA would be preliminarily enjoined by the district court in Texas—were insufficiently reasoned. Hence, the Court vacated DACA's rescission on administrative grounds, and deferred ruling on the bulk of plaintiffs' constitutional claims.

However, because the Court's decision was based in large part on its conclusion that DHS's legal judgment was "virtually unexplained," the Court stayed its order of vacatur for 90 days to allow DHS "to better explain its view that DACA is unlawful." During that 90-day period, the Court explained,

> the Secretary of Homeland Security or her delegate may reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority [to implement the program]. Should the Department fail to issue such a memorandum within 90 days, however, the Rescission Memo will be

vacated in its entirety, and the original DACA program will be restored in full. * * *

In late June, Secretary of Homeland Security Kirstjen M. Nielsen issued a memorandum responding to the Court's order. Instead of issuing a new decision rescinding DACA, as the Court's order had contemplated, Secretary Nielson simply "declin[ed] to disturb" the earlier decision to rescind the program by then-Acting Secretary of Homeland Security Elaine C. Duke.[4] Secretary Nielsen then went on to offer several reasons why "the decision to rescind the DACA policy was, and remains, sound."

Specifically, Secretary Nielsen opined that: (1) "the DACA policy was contrary to law"; (2) regardless of whether DACA was in fact contrary to law, the program "was appropriately rescinded . . . because there are, at a minimum, serious doubts about its legality"; and (3) other "sound reasons of enforcement policy" supported DACA's rescission. The reasons in this last category included that: (a) DHS "should not adopt public policies of non-enforcement of [federal] laws for broad classes and categories of aliens," particularly aliens whom "Congress has repeatedly considered but declined to protect"; (b) "DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis"; and (c) "it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws," particularly given that "tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years." Finally, Secretary Nielsen wrote that although she was "keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country," she nonetheless "do[es] not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons [given] for ending [it]."

In July, following the issuance of the Nielsen Memo, the government filed the instant motion to revise the Court's April 24, 2018 order. * * * [P]laintiffs ask the Court to deny DHS's motion and to allow the vacatur of DACA's rescission to take effect.

ANALYSIS * * *

II. Most of The Nielsen Memo's Arguments are Not *Post Hoc* Rationalizations

[P]laintiffs contend that the Court should disregard "nearly the entire Nielsen Memo" because none of the justifications it offers—aside from DACA's purported illegality—were articulated by Acting Secretary Duke in her initial September 5, 2017 memorandum rescinding the DACA program (the "Duke Memo"). With one notable exception, the Court disagrees. * * *

Although "*post hoc* rationalizations 'have traditionally been found to be an inadequate basis for review' of agency decisions," the D.C. Circuit has clarified that this rule "does not prohibit [an agency] from submitting an amplified articulation" of the reasons for its decision following a remand. Indeed, the rule's purpose is simply to prevent

[4] Secretary Nielsen replaced Acting Secretary Duke as Secretary of Homeland Security on December 6, 2017.

courts from considering "rationales offered by anyone other than the proper decisionmakers," such as those appearing "for the first time in litigation affidavits and arguments of counsel"; it is not meant to be "a time barrier which freezes an agency's exercise of its judgment . . . and bars it from further articulation of its reasoning." Hence, when faced with an explanation offered for the first time on remand, a court must determine whether it is an "amplified articulation" of the agency's prior reasoning (which must be considered), or instead "a new reason for why the agency could have" taken the action (which must be disregarded). * * *

Plaintiffs overstate the novelty of the Nielsen Memo's arguments. Although the Nielsen Memo certainly expands on the Duke Memo's points, most of its arguments are not so detached from the earlier document as to appear *post hoc*. For example, the Nielsen Memo contends that "serious doubts" about DACA's legality could "undermine public confidence in . . . the rule of law" and lead to "burdensome litigation." Similarly, the Duke Memo expressly relied on a September 4, 2017 letter from Attorney General Jeff Sessions, which cited "the costs and burdens" associated with rescinding DACA in response to "potentially imminent litigation," and opined that "[p]roper enforcement of our immigration laws is . . . critical . . . to the restoration of the rule of law in our country." The Nielsen Memo's "serious doubts" rationale strikes this Court as a permitted amplification, rather than a prohibited *post hoc* rationalization, of these statements in the Sessions Letter.

The same is true of the Nielsen Memo's remaining "policy" justifications (again, save one). Like the Nielsen Memo, which faults DACA for protecting a class of aliens whom Congress has "repeatedly considered but declined to protect," the Duke Memo relied on "Congress's repeated rejection of proposed legislation that would have accomplished a similar result" as DACA. Similarly, the Nielsen Memo's concerns about "individualized, case-by-case" discretion, parallel the Duke Memo's observation that DACA was "meant to be applied only on an individualized case-by-case basis" and that DHS "has not been able to identify specific denial cases . . . based solely upon discretion."

The same cannot be said, however, about the Nielsen Memo's concern with "project[ing] a message" to noncitizen children (and their parents) who would attempt to enter the United States unlawfully. Nothing in the Duke Memo or the Sessions Letter even remotely parallels the Nielsen Memo's discussion of a "pattern" of illegal immigration by minors, and neither document mentions the "tens of thousands of minor aliens [who] have illegally crossed or been smuggled across our border in recent years." Indeed, the closest either document comes is the Sessions Letter's assertion that "[p]roper enforcement of our immigration laws is . . . critical to the national interest," but this statement is far too vague—on some level, nearly any policy statement could be seen as an explication of an agency's view of the "national interest." Consequently, the Court will decline to consider the Nielsen Memo's "messaging" rationale, which appears for the first time on remand and is therefore impermissibly *post hoc*. * * *

III. The Nielsen Memo Provides No Reason to Revise the Court's Earlier Determination that DACA's Rescission Was Subject to Judicial Review

This Court previously held that DHS's September 2017 decision to rescind the DACA program was subject to judicial review despite the APA's exception for "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This was so,

the Court explained, because although the Supreme Court has held enforcement decisions to be "presumptively unreviewable," the D.C. Circuit recognizes an exception for "general enforcement polic[ies]" that "rel[y] solely on the agency's view of what the law requires." [*Crowley Caribbean Transp. v. Pena*, 37 F.3d 671 , 676-77 (D.C. Cir. 1994).] This rule reflects the commonsense notion that "an otherwise reviewable" legal interpretation "does not become presumptively unreviewable simply because the agency characterizes it as an exercise of enforcement discretion."

The Court held that DACA's rescission was reviewable under this exception because it was "predicated on DHS's legal determination that the program was invalid when it was adopted." The Court rejected what it took to be the government's attempt to distinguish between an agency's "interpretation of a specific statutory provision" (which the government conceded was reviewable) and its "conclusion that it lacks statutory authority" (which the government contended was unreviewable), explaining that "[t]o say that a particular agency action is 'without statutory authority' is simply to say that no statutory provision authorizes that action." The Court also rejected the government's reliance on what it had termed "litigation risk"—that is, the adverse consequences that would follow if DACA were struck down in litigation—explaining that "*Crowley* would be a dead letter" if an agency "could insulate from judicial review any legal determination simply by framing it as an enforcement policy" and then tacking on a boilerplate assertion that "a court would likely agree with the agency's interpretation."

Neither the Nielsen Memo nor the government's motion provides a sufficient basis for reconsidering the Court's earlier determination that DACA's rescission was judicially reviewable. To start with, Secretary Nielsen makes clear that her decision not to disturb DACA's rescission is predicated first and foremost on her view that "the DACA policy was contrary to law." Thus, this case continues to be like *Crowley* * * * : at bottom, it involves an enforcement policy that is predicated on the agency's view of what the law requires.

Secretary Nielsen [contends that] "serious doubts about [DACA's] legality" * * * would lead her to rescind the policy regardless of "whether the courts would ultimately uphold it or not." These doubts, Secretary Nielsen explains, raise concerns like "the risk that such policies may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency's work." According to the government, this rationale renders DACA's rescission unreviewable because it "cannot be meaningfully distinguished from other 'bona fide discretionary reasons' that this Court found acceptable" in its prior opinion, "such as an agency's fear that 'negative publicity . . . would undermine the policy's effectiveness.'"

[But] it is difficult to conclude that such policy assertions are "bona fide" when they are accompanied by an assertion from the agency that its longstanding policy is "unlawful." In this respect, the "serious doubts" rationale suffers from the same defect as the "litigation risk" rationale: accepting it here would permit agencies to insulate their legal judgments from judicial review simply by couching them as enforcement policies and then adding a boilerplate assertion that any other course of action would lead to litigation and undermine confidence in the rule of law. Judicial review of agency legal determinations cannot be so easily evaded.

Next, the Nielsen Memo asserts a handful of "sound reasons of enforcement policy" that it argues would justify DACA's rescission "regardless of whether . . . the DACA policy [is] illegal or legally questionable." First among these is the memo's claim that, "if a policy concerning the ability of this class of aliens to remain in the United States is to be adopted, it should be enacted legislatively." But the Court rejected the government's reliance on this argument in its prior opinion, concluding that the government had failed to explain why "an agency's view as to which branch of government ought to address a particular policy issue is an assessment appropriately committed to the agency's discretion." Like the litigation-risk and substantial-doubts rationales, then, this legislative-inaction rationale is simply another legal determination dressed up as a policy judgment, and it cannot render DACA's rescission immune from judicial review.

The memo's second "policy" justification asserts that "DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis." This is so, Secretary Nielsen claims, not because "a categorical deferred-action policy" like DACA raises legal or constitutional concerns—as previously argued—but rather because such a policy "tilts the scales significantly and has the practical effect of inhibiting assessments of whether deferred action is appropriate in a particular case." In essence, the Secretary claims that even though DACA "on its face . . . allow[s] for individual considerations," it should nonetheless be rescinded because its programmatic nature somehow misleads those charged with its implementation into applying it categorically.

As an initial matter, this rationale strikes the Court as specious. It would be one thing for a challenger *other than* DHS to claim that although DACA calls for case-by-case discretion in theory, its application is categorical in practice. Indeed, this argument was made by the plaintiffs in the *Texas* litigation. But when made by the agency itself, the argument becomes a non sequitur: if Secretary Nielsen believes that DACA is not being implemented as written, she can simply direct her employees to implement it properly. An agency head cannot point to her own employees' misapplication of a program as a reason for its invalidity. * * *

Taken in context, then, Secretary Nielsen's claim that rescinding DACA would further her policy objective of ensuring the distribution of deferred action grants on a "case-by-case" basis is simply a repackaging in policy terms of an oft-repeated objection to DACA's lawfulness. And while a remand provides an agency the opportunity to elaborate on its prior positions in good faith, it is not an opportunity for the agency to alter those positions—particularly where the chief design of doing so appears to be to defeat judicial review. The Court therefore concludes that the Nielsen Memo's individualized-discretion rationale does not preclude judicial review here.

Finally, the memo asserts that "it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws," particularly given that "tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years." As the Court has already explained, this rationale is a *post hoc* rationalization and hence is not entitled to consideration on remand. But even if the Court were to consider this rationale, it would not immunize DACA's rescission from judicial review.

With this messaging rationale, Secretary Nielsen finally articulates (albeit in a single sentence) what might be properly characterized as a policy reason for DACA's rescission: a judgment that DACA's benefits—whatever they may be—are outweighed by the fact that, in Secretary Nielsen's view, the policy encourages noncitizen children and their parents to enter the United States illegally. Of course, this rationale is not without its logical difficulties: after all, DACA is available only to those individuals who have lived in the United States since 2007, so the "tens of thousands of minor aliens" who Secretary Nielsen asserts have illegally entered the United States "in recent years" would not even be eligible under the program. But no matter. The question for reviewability purposes is not whether the rationale makes sense, but rather whether it transforms DACA's rescission from a decision based "solely on [DHS's] belief that it lacks jurisdiction," *Chaney*, 470 U.S. at 833 n.4, into a decision based on "factors which are peculiarly within [DHS's] expertise," such as "whether the particular enforcement action requested best fits the agency's overall policies," *id.* at 831 .

Even if the messaging rationale were sufficiently grounded in the Duke Memo so as to be an amplification rather than a *post hoc* rationalization, ultimately it would still be too little, too late. Although the Nielsen Memo states several paragraphs earlier that each of its reasons is "separate and independently sufficient" to support DACA's rescission, the document's cursory discussion of the messaging rationale—which is articulated in a single sentence on the last page of the three-page memorandum—does not support this assertion. The Court would not conclude that this solitary sentence in the Nielsen Memo wholly transmutes the explanation for DACA's rescission from an issue of law into an issue of policy.

In any case, the Court need not reach this conclusion because, as it has already explained, the messaging rationale is merely a post hoc rationalization of DACA's rescission. And because, as explained above, the other rationales offered by the Nielsen Memo are "insufficiently independent from the agency's evaluation of DACA's legality" to defeat review, the Court declines to reverse its prior conclusion that DACA's rescission is reviewable. The government's motion for reconsideration will therefore be denied as to reviewability.

IV. The Nielsen Memo Provides No Reason to Revise the Court's Earlier Determination that DACA's Rescission Was Arbitrary and Capricious

The Court now turns to whether the Nielsen Memo provides a basis for revising the Court's prior determination that DACA's rescission was arbitrary and capricious. * * * [A]s the D.C. Circuit has explained, "[w]here . . . an agency has set out multiple independent grounds for a decision," courts will uphold that decision "so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable."

Here, Secretary Nielsen states in a somewhat conclusory fashion that each of the grounds offered in her memo is "independently sufficient" to support DACA's rescission. The Court is skeptical of this assertion, particularly given its conclusion that three of those grounds—the substantial-doubts, legislative-inaction, and individualized-discretion rationales—simply recapitulate the Secretary's inadequately explained legal assessment, and that the remaining ground—projecting a message to would-be illegal immigrants—

appears nowhere in the Duke Memo and is therefore post hoc. Even assuming that these rationales are indeed independent and that at least one is sufficiently rational to survive APA review, however, DACA's rescission would still be arbitrary and capricious because the Nielsen Memo—like the Duke Memo before it—fails to engage meaningfully with the reliance interests and other countervailing factors that weigh against ending the program.

Although this time around the Nielsen Memo at least "acknowledge[s] how heavily DACA beneficiaries had come to rely on" the program, it does little more than that. Instead of considering DACA's benefits to DACA recipients and to society at large, Secretary Nielsen simply states that "the asserted reliance interests" are outweighed by DACA's "questionable legality . . . and the other reasons for ending the policy," and then goes on to suggest that she should not even have to consider those interests. However, it is not up to Secretary Nielsen—or even to this Court—to decide what she should or should not consider when reversing agency policy. Rather, the requirements are set by the APA, as interpreted by the Supreme Court: "When an agency changes its existing position, it . . . must . . . be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 , 2125-26 , 195 L. Ed. 2d 382 (2016).

Like the Duke Memo, the Nielsen Memo demonstrates no true cognizance of the serious reliance interests at issue here—indeed, it does not even identify what those interests are. "It would be arbitrary and capricious to ignore such matters," *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 , 1209 , 191 L. Ed. 2d 186 (2015) (citation omitted), and it is so here. Nor, given the inadequacy of the Nielsen Memo's explanation of why DACA is unlawful, can the Court accept as sufficient its bare determination that any reliance interests are outweighed by "the questionable legality of the DACA policy and the other" fatally intertwined reasons listed in the memo. Because the Nielsen Memo fails to provide an adequate justification for the decision to rescind DACA—much less the "more substantial justification" that the APA requires when an agency's "prior policy has engendered serious reliance interests," *Perez*, 135 S. Ct. at 1209 —the Court sees no reason to change its earlier determination that DACA's rescission was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Court again concludes that DHS's September 2017 decision to rescind the DACA program, as now explained in the Duke and Nielsen Memos, was both subject to judicial review and arbitrary and capricious. The Court has already once given DHS the opportunity to remedy these deficiencies—either by providing a coherent explanation of its legal opinion or by reissuing its decision for bona fide policy reasons that would preclude judicial review—so it will not do so again. * * *

Finally, a few words about the nature of the relief being granted by this Court. The Court did not hold in its prior opinion, and it does not hold today, that DHS lacks the statutory or constitutional authority to rescind the DACA program. Rather, the Court simply holds that if DHS wishes to rescind the program—or to take any other action, for that matter—it must give a rational explanation for its decision. See 5 U.S.C. § 706(2). A conclusory assertion that a prior policy is illegal, accompanied by a hodgepodge of illogical

or *post hoc* policy assertions, simply will not do. The Court therefore reaffirms its conclusion that DACA's rescission was unlawful and must be set aside.[13]

[13] The Court also notes that the propriety of so-called nationwide injunctions, such as the ones issued by district courts in California and New York in related litigation, has recently been called into question. That debate is not implicated here, however, where the Court is vacating an agency action pursuant to the APA, as opposed to enjoining it as a violation of the Constitution or other applicable law. See 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *Harmon v. Thornburgh*, 878 F.2d 484 , 495 n.21, 278 U.S. App. D.C. 382 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 22, 2018

MEMORANDUM FROM SECRETARY KIRSTJEN M. NIELSEN

On September 5, 2017, Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum (the "Duke memorandum") rescinding the enforcement policy known as Deferred Action for Childhood Arrivals (DACA). Acting Secretary Duke concluded that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation [over the enforcement policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)], and the September 4, 2017 letter from the Attorney General [concerning DACA], it is clear that the June 15, 2012 DACA program should be terminated." Accordingly, "in the exercise of [her] authority in establishing national immigration policies and priorities," she "rescind[ed] the June 15, 2012 memorandum," subject to certain exceptions.

On April 24, 2018, the U.S. District Court for the District of Columbia held that the Duke memorandum was subject to judicial review under the Administrative Procedure Act and that it provided insufficient justification for rescinding the DACA policy. The court vacated the Duke memorandum and remanded to the Department of Homeland Security (DHS). The court issued a 90-day stay of vacatur, however, to afford DHS an opportunity to provide further explanation for rescinding the DACA policy.

Because the D.C. district court has requested further explanation, I am providing such explanation here. Having considered the Duke memorandum and Acting Secretary Duke's accompanying statement, the administrative record for the Duke memorandum that was produced in litigation, and the judicial opinions reviewing the Duke memorandum, I decline to disturb the Duke memorandum's rescission of the DACA policy, and it is my understanding that the Department of Justice will continue to seek appellate review of preliminary injunctions that restrict DHS from implementing the Duke memorandum and rescinding the DACA policy. This explanation reflects my understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound.

The Secretary of Homeland Security is vested with authority over "the administration and enforcement" of the immigration laws, 8 U.S.C. § 1103(a)(1), including the discretion to "[e]stablish[ ] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). The DACA policy of deferred action was cast as an exercise of enforcement discretion to forbear from removing a certain class of aliens who are subject to removal under law. DHS also had concluded that under pre-existing statutory and regulatory provisions a grant of deferred action would trigger certain collateral benefits for such aliens, such as eligibility for employment authorization. In considering how DHS's discretion to establish enforcement policies and priorities should be exercised, the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons.

First, as the Attorney General concluded, the DACA policy was contrary to law. The Fifth Circuit ruled that DAPA should be enjoined on a nationwide basis on the ground, among other things, that it likely was contrary to the statutory scheme of the Immigration and Nationality Act (INA). As the Fifth Circuit held, "the INA does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens." *Texas v. United States*, 809 F.3d 134, 186 n.202 (5th Cir. 2015). An equally divided Supreme Court affirmed that decision. In light of those decisions and other factors, Secretary Kelly rescinded the DAPA policy in June 2017. Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.

The memorandum announcing the DAPA policy both expanded the DACA policy by loosening the age and residency criteria and adopted a similar deferred action policy for parents of U.S. citizens and lawful permanent residents. The Fifth Circuit's rejection of DAPA and expanded DACA did not turn on whether the covered aliens had a pathway to lawful status (which not all of them had). Rather, it turned on the incompatibility of such a major non-enforcement policy with the INA's comprehensive scheme. The Attorney General concluded that the DACA policy has the same statutory defects that the Fifth Circuit identified with DAPA—a determination and ruling by the Attorney General that, in any event, I am bound by pursuant to 8 U.S.C. § 1103(a)(1).

Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality. A central aspect of the exercise of a discretionary enforcement policy is a judgment concerning whether DHS has sufficient confidence in the legality of such policy. Like Acting Secretary Duke, I lack sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not.

There are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable. Those reasons include the risk that such policies may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency's work. The fact that some courts have recently held or suggested that the DACA policy is legal does not change my view that the DACA policy's legality is too questionable to warrant continuing the policy, especially in light of the Attorney General's contrary determination and ruling about the DACA policy and the contrary implication of the decisions of the Fifth Circuit Court of Appeals and the Supreme Court invalidating the DAPA policy.

Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy. To start, DHS should enforce the policies reflected in the laws adopted by Congress and should not adopt public policies of non-enforcement of those laws for broad classes and categories of aliens under the guise of prosecutorial discretion—particularly a class that Congress has repeatedly considered but declined to protect. Even if a policy such as DACA could be implemented lawfully through the exercise of prosecutorial discretion, it would necessarily lack the permanence and detail of statutory law. DACA recipients continue to be illegally present, unless and until Congress gives them permanent status.

Accordingly, I agree with Acting Secretary Duke and the Attorney General that if a policy concerning the ability of this class of aliens to remain in the United States is to be adopted, it should be enacted legislatively.

In addition, DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis. While the DACA policy on its face did allow for individual considerations, a categorical deferred-action policy, at the very least, tilts the scales significantly and has the practical effect of inhibiting assessments of whether deferred action is appropriate in a particular case. Without the DACA policy, DHS may consider deferred action on a case-by-case basis, consistent with the INA. Moreover, considering the fact that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years and then have been released into the country owing to loopholes in our laws—and that pattern continues to occur at unacceptably high levels to the detriment of the immigration system—it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens. All of those considerations lead me to conclude that Acting Secretary Duke's decision to rescind the DACA policy was, and remains, sound as a matter of both legal judgment and enforcement policy discretion.

I do not come to these conclusions lightly. I am keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives. Nevertheless, in considering DHS enforcement policy, I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons for ending the policy discussed above. That is especially so because issues of reliance would best be considered by Congress, which can assess and weigh a range of options. In contrast, the DACA policy was announced as a temporary stopgap measure, not a permanent fix; it was expressly limited to two-year renewal periods, it expressly conferred no substantive rights, and it was revocable at any time. In my judgment, neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress, a status that the DACA non-enforcement policy did not change. And in all events, the rescission of the DACA policy does not preclude the exercise of deferred action in individual cases if circumstances warrant.

For these reasons, in setting DHS enforcement policies and priorities, I concur with and decline to disturb Acting Secretary Duke's decision to rescind the DACA policy.

Kirstjen M. Nielsen
Secretary

Biestek v. Berryhill
139 S. Ct. 1148 (2019)

Justice KAGAN, delivered the opinion of the Court. ***

This case arises from the [Social Security Administration's] reliance on an expert's testimony about the availability of certain jobs in the economy. *** 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." ***

I

Petitioner Michael Biestek once worked as a carpenter and general laborer on construction sites. But he stopped working after he developed degenerative disc disease, Hepatitis C, and depression. He then applied for social security disability benefits, claiming eligibility as of October 2009.

After some preliminary proceedings, the SSA assigned an Administrative Law Judge (ALJ) to hold a hearing on Biestek's application. *** 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. *See* 20 CFR §§ 404.1560(c)(1), 416.960(c)(1). And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." §§ 404.1560(c)(1), 416.960(c)(1); see §§ 404.1566, 416.966.

For guidance on such questions, ALJs often seek the views of "vocational experts." *See* §§ 404.1566(e), 416.966(e); SSA, HEARINGS, APPEALS, AND LITIGATION LAW MANUAL I-2-5-50 (Aug. 29, 2014). Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. They must have "expertise" and "current knowledge" of "[w]orking conditions and physical demands of various" jobs; "[k]nowledge of the existence and numbers of [those jobs] in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers[ ] with disabilities[] into jobs." 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." Social Security Ruling, SSR 00-4p, 65 Fed. Reg. 75760 (2000).

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. O'Callaghan had served as a vocational expert in SSA proceedings for five years; she also had more than ten years' experience counseling people with disabilities about employment opportunities. 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.

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. ***

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."

Biestek sought review in federal court of the ALJ's denial of benefits for the period between October 2009 and May 2013. [The District Court rejected Biestek's argument that O'Callaghan's testimony could not constitute substantial evidence of non-disability because she had failed to produce data supporting her opinions about the availability of work in the national economy. The Sixth Circuit affirmed, continuing a circuit split with the Seventh Circuit, which had held that a vocational expert's testimony did not constitute substantial evidence of non-disability if the expert did not supply data supporting her opinions upon request.

The Supreme Court granted Biestek's petition for certiorari. The petitioned asked the Supreme Court to resolve the following question: "Whether a vocational expert's testimony can constitute substantial evidence of 'other work,' 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised."]

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. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (emphasis deleted). 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." ***

Biestek initially takes pains—and understandably so—to distinguish his argument from a procedural claim. At no stage in this litigation, Biestek says, has he ever espoused "a free-standing procedural rule under which a vocational expert would always have to produce [her underlying data] upon request." That kind of rule exists in federal court: There, an expert witness must produce all data she has considered in reaching her conclusions. *See* Fed. Rule

Civ. Proc. 26(a)(2)(B).* *** And Biestek also emphasizes a limitation within that proposed rule. For the rule to kick in, the applicant must make a demand for the expert's supporting data. ***

To assess Biestek's proposal, we begin with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data. Take an example. Suppose an expert has top-of-the-line credentials, including professional qualifications and many years' experience; suppose, too, she has a history of giving sound testimony about job availability in similar cases (perhaps before the same ALJ). Now say that she testifies about the approximate number of various sedentary jobs an applicant for benefits could perform. She explains that she arrived at her figures by surveying a range of representative employers; amassing specific information about their labor needs and employment of people with disabilities; and extrapolating those findings to the national economy by means of a well-accepted methodology. She answers cogently and thoroughly all questions put to her by the ALJ and the applicant's lawyer. And nothing in the rest of the record conflicts with anything she says. But she never produces her survey data. Still, her testimony would be the kind of evidence—far "more than a mere scintilla" —that "a reasonable mind might accept as adequate to support" a finding about job availability. *Consolidated Edison*, 305 U.S. at 229. ***

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.

* Rule 26(a)(2)(B) provides:

> (B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, [an expert's] disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
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> > (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> > (ii) the facts or data considered by the witness in forming them;
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> > (iii) any exhibits that will be used to summarize or support them;
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> > (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
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> > (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> >
> > (vi) a statement of the compensation to be paid for the study and testimony in the case.

– Eds.

Biestek *** contends that the expert's rejection of a request for backup data necessarily "cast[s her testimony] into doubt." And *second*, he avers that the refusal inevitably "deprives an applicant of the material necessary for an effective cross-examination." But Biestek states his arguments too broadly—and the nuggets of truth they contain cannot justify his proposed flat rule.

Consider Biestek's claim about how an expert's refusal undercuts her credibility. Biestek here invokes the established idea of an "adverse inference": If an expert declines to back up her testimony with information in her control, then the factfinder has a reason to think she is hiding something. We do not dispute that possibility—but the inference is far from always required. If an ALJ has no other reason to trust the expert, or finds her testimony iffy on its face, her refusal of the applicant's demand for supporting data may properly tip the scales against her opinion. (Indeed, more can be said: Even if the applicant makes no demand, such an expert's withholding of data may count against her.) But if (as in our prior hypothetical example) the ALJ views the expert and her testimony as otherwise trustworthy, and thinks she has good reason to keep her data private, her rejection of an applicant's demand need not make a difference. So too when a court reviews the ALJ's decision under the deferential substantial-evidence standard. In some cases, the refusal to disclose data, considered along with other shortcomings, will prevent a court from finding that "a reasonable mind" could accept the expert's testimony. *Consolidated Edison*, 305 U.S. at 229. But in other cases, that refusal will have no such consequence. Even taking it into account, the expert's opinion will qualify as "more than a mere scintilla" of evidence supporting the ALJ's conclusion. Which is to say it will count, contra Biestek, as substantial.

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 such questioning when deciding how much to credit an expert's opinion. *See Richardson v. Perales*, 402 U.S. 389, 402-406 (1971). 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. *See, e.g.*, *Chavez v. Berryhill*, 895 F.3d 962, 969-970 (CA7 2018). And even without significant testing, a factfinder may conclude that testimony has sufficient indicia of reliability to support a conclusion about whether an applicant could find work. Indeed, Biestek effectively concedes both those points in cases where supporting data is missing, so long as an expert has not refused an applicant's demand. But once that much is acknowledged, Biestek's argument cannot hold. For with or without an express refusal, the absence of data places the selfsame limits on cross-examination.

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. *** 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. ***

[A] Social Security proceeding is "inquisitorial rather than adversarial." The ALJ acts as "an examiner charged with developing the facts," *Richardson v. Perales*, 402 U.S. 389, 410 (1971), and has a duty to "develop the arguments both for and against granting benefits." Here, instead of taking steps to ensure that the claimant had a basis from which effective cross-examination could be made and thus the record could be developed, the ALJ cut off that process by intervening when Biestek's counsel asked about the possibility of redaction.

The result was that the expert offered no detail whatsoever on the basis for her testimony. She did not say whom she had surveyed, how many surveys she had conducted, or what information she had gathered, nor did she offer any other explanation of the data on which she relied. In conjunction with the failure to proffer the surveys themselves, the expert's conclusory testimony alone could not constitute substantial evidence to support the ALJ's factfinding.[1] ***

Justice GORSUCH, with whom Justice GINSBURG joins, dissenting. ***

[The Court bases its decision on a hypothetical case, in which a well-qualified expert did not provide the data supporting her conclusions.] But what more do we need to know about the facts of *this* case? All of the relevant facts are undisputed, and it remains only to decide the legal question whether they meet the substantial evidence standard. We know that the expert offered a firm and exact conclusion about the number of available jobs. We know that the expert claimed to have private information to support her conclusion. We know Mr. Biestek requested that information and we have no reason to think any confidentiality concerns could not have been addressed. We know, too, that the hearing examiner had "no other reason to trust the expert['s]" numbers beyond her say-so. Finally and looking to the law, we know that a witness's bare conclusion is regularly held insufficient to meet the substantial evidence threshold—and we know that the government hasn't cited a single case finding substantial evidence on so little. This is *exactly* the sort of case where an adverse inference should "tip the scales."

*** [W]e are asked to imagine that the expert had offered detailed oral testimony about the withheld data. Her testimony was so detailed, we are asked to suppose, that Mr. Biestek could have thoroughly tested the data's reliability through cross-examination. (You might wonder just how effective this cross-examination could be if Mr. Biestek didn't have access to the data. But overlook that.) Surely in *those* circumstances it wouldn't matter whether the expert failed to produce the data even in bad faith. Any failure to produce would be harmless as a matter of law because the expert's testimony, all by itself, would amount to substantial evidence on which a rational factfinder might rely.

The problem is that this imaginary case has nothing to teach us about our real one. In Mr. Biestek's case, it is undisputed that the expert offered only a bare conclusion about the number of available jobs. No other relevant testimony was offered or received: no

[1] I note that the agency's own handbook says that experts "should have available, at the hearing, any vocational resource materials that [they] are likely to rely upon and should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." SSA, VOCATIONAL EXPERT HANDBOOK 37 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (as last visited Mar. 29, 2019).

testimony about the underlying data, no testimony about its specific sources, no testimony about its reliability. In our real case, there is simply no way to shrug off the failure to produce the data as harmless error. To the contrary, and as we have seen, cases like *this* routinely fail to satisfy the substantial evidence standard. And if the government has a "duty to fully develop the record," [as Justice Sotomayor notes,] that conclusion should follow all the more strongly.

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: just point to a series of hypothetical cases where the record contains *additional* justification for the expert's failure to produce or *additional* evidence to support her opinion. In such counterfactual cases, the failure to produce either would not be enough to give rise to an adverse inference under traditional legal principles or could be held harmless as a matter of law.

But as I understand Mr. Biestek's submission, it does not require an all-or-nothing approach that would cover "every case." [I would hold that] cases like Mr. Biestek's fail the substantial evidence standard. *** If my understanding of the Court's opinion is correct, 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. ***

I respectfully dissent.

Department of Commerce v. New York
139 S. Ct. 2551 (June 27, 2019)

Chief Justice ROBERTS, delivered the opinion of the Court. ***

I
A

In order to apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, § 2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§ 2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. *Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996). The census additionally serves as a means of collecting demographic information, which "is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige v. Shapiro*, 455 U.S. 345, 353-354, n. 9 (1982). Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies. §§ 221, 8(b), 9(a).

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. [Beginning in 1960, the Census only asked about citizenship on a long-form questionnaire mailed to one in six households.] In explaining the decision to move the citizenship question to the long-form questionnaire, the Census Bureau opined that "general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed." DEPT. OF COMMERCE, BUREAU OF CENSUS, 1960 CENSUSES OF POPULATION AND HOUSING 194 (1966).

In 2010, the year of the latest census, the format changed again. [Beginning that year, the Census Bureau obtained citizenship data from] the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population.

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act's ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. According to DOJ, the existing citizenship data from the American Community Survey was not ideal: It was not reported at the level of the census block, the basic component of legislative districting plans; it had substantial margins of error; and it did not align in time with the census-based population counts used to draw legislative districts. DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire.

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. The first was to continue to collect citizenship information in the American Community Survey and attempt to develop a data model that would more accurately estimate citizenship at the census block level. The Secretary rejected that option because the Bureau "did not assert and could not confirm" that such ACS-based data modeling was possible "with a sufficient degree of accuracy."

The second option was to reinstate a citizenship question on the decennial census. The Bureau predicted that doing so would discourage some noncitizens from responding to the census. That would necessitate increased "nonresponse follow up" operations—procedures the Bureau uses to attempt to count people who have not responded to the census—and potentially lead to a less accurate count of the total population.

Option three was to use administrative records from other agencies, such as the Social Security Administration and Citizenship and Immigration Services, to provide DOJ with citizenship data. The Census Bureau recommended this option, and the Secretary found it a "potentially appealing solution" because the Bureau has long used administrative records to supplement and improve census data. But the Secretary concluded that administrative records alone were inadequate because they were missing for more than 10% of the population.

The Secretary ultimately asked the Census Bureau to develop a fourth option that would combine options two and three: reinstate a citizenship question on the census questionnaire, and also use the time remaining until the 2020 census to "further enhance" the Bureau's "administrative record data sets, protocols, and statistical models." The memo explained that, in the Secretary's judgment, the fourth option would provide DOJ with the "most complete and accurate" citizen voting-age population data in response to its request.

The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate. But after evaluating the Bureau's "limited empirical evidence" on the question— evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to "determine definitively" whether inquiring about citizenship in the census would materially affect response rates. *** Altogether, the Secretary determined that

"the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate."

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. *** The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. [The district court denied motions to dismiss plaintiffs' claims under the Administrative Procedure Act.]

In June 2018, the Government submitted to the District Court the Commerce Department's "administrative record": the materials that Secretary Ross considered in making his decision. That record included DOJ's December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, "intended to provide further background and context regarding" his March 2018 memo. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ "would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." According to the Secretary, DOJ "formally" requested reinstatement of the citizenship question after that inquiry.

[Respondents moved to compel the Government to "complete" the administrative record] and the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *** In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. We granted the Government's request to stay the Secretary's deposition pending further review, but we declined to stay the Acting AAG's deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and issued findings of fact and conclusions of law on respondents' statutory and equal protection claims. *** [T]he District Court ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. *** The court granted judgment to respondents on their statutory claims, vacated the Secretary's decision, and enjoined him from reinstating the citizenship question until he cured the legal errors the court had identified.

[The Supreme Court granted the government's petition for a writ of certiorari before judgment, based on the Government's representation that the design of the census form had to be finalized by June 2019 for the census to proceed on schedule.*]

IV

The District Court set aside the Secretary's decision to reinstate a citizenship question on the grounds that the Secretary acted arbitrarily and violated certain provisions of the Census Act. The Government contests those rulings, but also argues that the Secretary's decision was not judicially reviewable under the Administrative Procedure Act in the first place. We begin with that contention.

A

The Administrative Procedure Act embodies a "basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), and instructs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(2)(A). Review is not available, however, "to the extent that" a relevant statute precludes it, §701(a)(1), or the agency action is "committed to agency discretion by law," §701(a)(2). The Government argues that the Census Act commits to the Secretary's unreviewable discretion decisions about what questions to include on the decennial census questionnaire.

We disagree. To be sure, the Act confers broad authority on the Secretary. Section 141(a) instructs him to take "a decennial census of population" in "such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141. The Act defines "census of population" to mean "a census of population, housing, and matters relating to population and housing," § 141(g), and it authorizes the Secretary, in "connection with any such census," to "obtain such other census information as necessary," § 141(a). It also states that the "Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." § 5. And it authorizes him to acquire materials, such as

* After the case had been argued in the Supreme Court, the non-governmental respondents filed a letter motion in the district court seeking an "order to show cause whether sanctions or other appropriate relief are warranted in light of new evidence that contradicts sworn testimony" of two of the government's trial witnesses, A. Mark Neuman, a senior advisor to Commerce Secretary Ross, and John Gore, the Department of Justice official who signed the December 2017 letter requesting that the citizenship question be added to the census. Plaintiffs alleged that new evidence in the form of files from the personal hard drive of Dr. Thomas Hofeller, a deceased Republican redistricting expert, showed that Hofeller orchestrated the addition of the citizenship question to the census "to create a structural electoral advantage for . . . 'Republicans and Non-Hispanic Whites,' and that Defendants obscured [Hofeller's] role through affirmative misrepresentations." *See also* Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES, May 30, 2019, at A1 (reporting that the Hofeller files were discovered by his estranged daughter following his death, and that she turned them over to a voting rights group). Plaintiffs advised the Supreme Court of the filing of the motion by letter dated May 30, 2019. The government denied the allegations and contended that they were irrelevant to the citizenship question's lawfulness. Following the Supreme Court's decision, the non-governmental respondents on July 16, 2019, filed a formal motion for sanctions in the district court. – Eds.

administrative records, from other federal, state, and local agencies in aid of conducting the census. § 6. Those provisions leave much to the Secretary's discretion.

But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. ___, ____ (2018) (slip op., at 12) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). And we have generally limited the exception to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" such as a decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, *Webster v. Doe*, 486 U.S. 592, 600-601 (1988).

The taking of the census is not one of those areas traditionally committed to agency discretion. *** Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary's action. In contrast to the National Security Act in *Webster*, which gave the Director of Central Intelligence discretion to terminate employees whenever he "deem[ed]" it "advisable," the Census Act constrains the Secretary's authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c) *** circumscribes his power in certain circumstances to collect information through direct inquiries when administrative records are available. More generally, by mandating a population count that will be used to apportion representatives, see § 141(b), 2 U.S.C. §2a, the Act imposes "a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *** Because this is not a case in which there is "no law to apply," *Overton Park*, 401 U.S., at 410, the Secretary's decision is subject to judicial review.

B

*** The District Court set aside the Secretary's decision for two independent reasons: His course of action was not supported by the evidence before him, and his stated rationale was pretextual. ***

The evidence before the Secretary supported [the decision to include the citizenship question]. As the Bureau acknowledged, each approach [to measuring citizenship]—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

The Bureau explained that the "relative quality" of the citizenship data generated by each approach would depend on the "relative importance of the errors" in each, but it was not

able to "quantify the relative magnitude of the errors across the alternatives." The Bureau nonetheless recommended using administrative records alone because it had "high confidence" that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, "we will most likely never possess a fully adequate truth deck to benchmark" the model—which appears to be bureaucratese for "maybe, maybe not." The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

The District Court overruled that choice, agreeing with the Bureau's assessment that its recommended approach would yield higher quality citizenship data on the whole. But the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary's view, that risk was difficult to assess. The Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated. It relied for that prediction primarily on studies showing that, while noncitizens had responded at lower rates than citizens to the 2000 short-form and 2010 censuses, which did not ask about citizenship, they responded at even lower rates than citizens to the 2000 long-form census and the 2010 American Community Survey, which did ask about citizenship. The Bureau thought it was reasonable to infer that the citizenship question accounted for the differential decline in noncitizen responses. But, the Secretary explained, the Bureau was unable to rule out other causes. For one thing, the evidence before the Secretary suggested that noncitizen households tend to be more distrustful of, and less likely to respond to, any government effort to collect information. For another, both the 2000 long-form census and 2010 ACS asked over 45 questions on a range of topics, including employment, income, and housing characteristics. Noncitizen households might disproportionately fail to respond to a lengthy and intrusive Government questionnaire for a number of reasons besides reluctance to answer a citizenship question—reasons relating to education level, socioeconomic status, and less exposure to Government outreach efforts.

The Secretary justifiably found the Bureau's analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census. ***

V

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis ***. We start with settled propositions.

First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. ***

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. That principle reflects the recognition that further judicial inquiry into "executive motivation" represents "a substantial intrusion" into the workings of another branch of Government and should normally be avoided.

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. *** Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." *Sierra Club v. Costle*, 657 F.2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U.S., at 420. On a "strong showing of bad faith or improper behavior," such an inquiry may be warranted and may justify extra-record discovery.

The District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we think it was ultimately justified in light of the expanded administrative record. Recall that shortly after this litigation began, the Secretary, prodded by DOJ, filed a supplemental memo that added new, pertinent information to the administrative record. The memo disclosed that the Secretary had been considering the citizenship question for some time and that Commerce had inquired whether DOJ would formally request reinstatement of the question. That supplemental memo prompted respondents to move for both completion of the administrative record and extra-record discovery. The District Court granted both requests at the same hearing, agreeing with respondents that the Government had submitted an incomplete administrative record and that the existing evidence supported a prima facie showing that the VRA rationale was pretextual. ***

[T]he District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District

Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. *** In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action— and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F. 2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. ***

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

* * *

The judgment of the United States District Court for the Southern District of New York is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

Justice THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part. ***

Section 706(2) of the APA contemplates review of the administrative "record" to determine whether an agency's "action, findings, and conclusions" satisfy six specified standards. See §§706(2)(A)-(F). None instructs the Court to inquire into pretext. Consistent with this statutory text, we have held that a court is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." If an agency's stated findings and conclusions withstand scrutiny, the APA does not permit a court to set aside the decision solely because the agency had "other unstated reasons" for its decision, such as "political considerations" or the "Administration's priorities." ***

Undergirding our arbitrary-and-capricious analysis is our longstanding precedent affording the Executive a "presumption of regularity." This presumption reflects respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, as we do, Art. VI, but also are charged with "faithfully execut[ing]" our laws, Art. II, §3. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (presumption of regularity ensures that the "integrity of the administrative process" is appropriately respected). In practice, then, we give the benefit of the doubt to the agency. ***

The Court errs at the outset by proceeding beyond the administrative record to evaluate pretext. *** The District Court's initial order granting extra-record discovery relied on four categories of evidence:

> "evidence that [the Secretary] was predisposed to reinstate the citizenship question when he took office; that the [DOJ] hadn't expressed a desire for more detailed citizenship data until the Secretary solicited its view; that he overruled the objections of his agency's career staff; and that he declined to order more testing of the question given its long history."

None of this comes close to showing bad faith or improper behavior. Indeed, there is nothing even "unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." Today all Members of the Court who reach the question agree that the District Court abused its discretion in ordering extra-record discovery based on this evidence.

[Even accounting for the extra-record discovery, however, the record] still fails to establish pretext. None of the evidence cited by the Court or the District Court comes close to showing that the Secretary's stated rationale—that adding a citizenship question to the 2020 census questionnaire would "provide . . . data that are not currently available" and "permit more effective enforcement of the [VRA]"—did not factor *at all* into his decision. [At most], the evidence cited by the Court establishes *** that leadership at both the Department of Commerce and the DOJ believed it important—for a variety of reasons—to include a citizenship question on the census. ***

The Court's erroneous decision in this case is bad enough, as it unjustifiably interferes with the 2020 census. But the implications of today's decision are broader. With today's decision, the Court has opened a Pandora's box of pretext-based challenges in administrative law.

Today's decision marks the first time the Court has ever invalidated an agency action as "pretextual." Having taken that step, one thing is certain: This will not be the last time it is asked to do so. Virtually every significant agency action is vulnerable to the kinds of allegations the Court credits today. These decisions regularly involve coordination with numerous stakeholders and agencies, involvement at the highest levels of the Executive Branch, opposition from reluctant agency staff, and—perhaps most importantly—persons who stand to gain from the action's demise. Opponents of future executive actions can be expected to make full use of the Court's new approach.

The 2015 "Open Internet Order" provides a case in point. In 2015, the Federal Communications Commission (FCC) adopted a controversial order reclassifying broadband Internet access service as a "telecommunications service" subject to regulation under Title II of the Communications Act. According to a dissenting Commissioner, the FCC "flip-flopp[ed]" on its previous policy not because of a change in facts or legal understanding, but based on "one reason and one reason alone. President Obama told us to do so." His view was supported by a 2016 congressional Report in which Republican Senate staff concluded that "the FCC bent to the political pressure of the White House" and "failed to live up to standards of transparency." The Report cited evidence strikingly similar to that relied upon by the Court here— including agency-initiated "meetings with certain outside groups to support" the new result; "apparen[t] . . . concern from the career staff that there was insufficient notice to the public and affected stakeholders,"; and "regula[r] communicatio[n]" between the FCC Chairman and "presidential advisors."

Under the malleable standard applied by the Court today, a serious case could be made that the Open Internet Order should have been invalidated as "pretextual," regardless of whether any "particular step in the process stands out as inappropriate or defective." It is enough, according to the Court, that a judge believes that the ultimate rationale "seems to have been contrived" when the evidence is considered "as a whole."

Now that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them. Moreover, even if the effort to invalidate the action is ultimately unsuccessful, the Court's decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction. The Court's decision could even implicate separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws.

In short, today's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only.

Justice BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part. ***

I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA). ***

The agency's decision memorandum provided one and only one reason for [including the citizenship question]—namely, that the question was "necessary to provide complete and accurate data in response to" a request from the Department of Justice (DOJ). The DOJ had requested the citizenship question for "use [in] . . . determining violations of Section 2 of the Voting Rights Act."

The decision memorandum adds that the agency had not been able to "determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." The Secretary's decision thus rests upon a weighing of potentially adverse consequences (diminished responses and a less accurate census count) against potentially offsetting advantages (better citizenship data). ***

[T]he Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. That is to say, the question would cause households covering more than 1 million additional people to decline to respond to the census. When the Bureau does not receive a response, it follows up with in-person interviews in an effort to obtain the missing information. The Bureau often interviews what it calls "proxies," such as family members and neighbors. But this followup process is subject to error; and the error rate is much greater than the error rate for self-responses. The Bureau thus explained that lower self-response rates "degrade data quality" by increasing the risk of error and leading to hundreds of thousands of fewer correct enumerations. The Bureau added that its estimate was "conservative." It expected "differences between citizen and noncitizen response rates and data quality" to be "amplified" in the 2020 census "compared to historical levels." Thus, it explained, "the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points [it] observed during the 2010 Census." Its conclusion in light of this evidence was clear. Adding the citizenship question to the short form was "very likely to reduce the self-response rate" and thereby "har[m] the quality of the census count." ***

The Secretary's decision memorandum reached a quite different conclusion from the Census Bureau. The memorandum conceded that "a lower response rate would lead to . . . less accurate responses." But it concluded that neither the Census Bureau nor any stakeholders had provided "definitive, empirical support" for the proposition that the

citizenship question would reduce response rates. The memorandum relied for that conclusion upon a number of considerations, but each is contradicted by the record.

The memorandum first pointed to perceived short-comings in the Census Bureau's analysis of nonresponse rates. It noted that response rates are generally lower overall for the long form and ACS than they are for the short form. But the Bureau explained that its analysis accounted for this consideration, and no one has given us reason to think the contrary. The Secretary also noted that the Bureau "was not able to isolate what percentage of [the] decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." But the Bureau said attributing the decline to the citizenship question was a "reasonable inference," and again, nothing in the record contradicted the Bureau's judgment. And later analyses have borne out the Bureau's judgment that the citizenship question contributes to the decline in self-response. [Justice Breyer cited an August 2018 study by the Census Bureau.]

The memorandum next cast doubt on the Census Bureau's analysis of the rate at which people responded to particular questions on the ACS. It noted that the "no answer" rate to the citizenship question was comparable to the "no answer" rate for other questions on the ACS, including educational attainment, income, and property insurance. But as discussed above, the Bureau found it significant that the "no answer" rate for the citizenship question was "much greater" than the "no answer" rate for the other questions that appear on the short form—that is, the form on which the citizenship question would appear. The Secretary offered no reason why the demographic variables to which he pointed provided a better point of comparison.

Finally, the memorandum relied on information provided by two outside stakeholders. The first was a study conducted by the private survey company Nielsen, in which questions about place of birth and time of arrival had not led to any appreciable decrease in the response rate. But Nielsen, which in fact urged the Secretary not to add the question, stated that its respondents (unlike census respondents) were paid to respond, and it is consequently not surprising that they did so. The memorandum also cited statements by former Census Bureau officials suggesting that empirical evidence about the question's potential impact on response rates was "limited." But there was no reason to expect the former officials to provide more extensive empirical evidence as to a citizenship question when they were not privy to the internal Bureau analyses on this question. And, like Nielsen, the former officials strongly urged the Secretary not to ask the question. ***

Now consider the Secretary's conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, "the value of more complete and accurate data derived from surveying the entire population *outweighs* . . . concerns" about diminished accuracy. That conclusion was also arbitrary. The administrative record indicates that adding a citizenship question to the short form would produce less "complete and accurate data," not more. ***

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is available from administrative records maintained by the Social Security Administration and Internal Revenue Service. The Bureau further informed the Secretary that it had "high confidence" that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. The Bureau stated that these methods alone—using existing administrative records for 90% of the population and statistical modeling for the remaining 10%—would yield more accurate citizenship data than also asking a citizenship question. [Justice Breyer summarized the technical basis for the Census Bureau's statement in detail.]

If my description of the record is correct, it raises a serious legal problem. How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will *improve* the accuracy of citizenship data, when in fact the evidence indicates that adding the question will *harm* the accuracy of citizenship data? Of course it cannot. But, as I have just said, I have not been able to find evidence to suggest that adding the question would result in more accurate citizenship data. Neither could the District Court. After reviewing the record in detail, the District Court found that "all of the relevant evidence before Secretary Ross—all of it—demonstrated that using administrative records . . . would actually produce more accurate [citizenship] data than adding a citizenship question to the census."

What consideration did the Secretary give to this problem? He stated simply that "[a]sking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer," which "may eliminate the need for the Census Bureau to have to impute an answer for millions of people." He therefore must have assumed, *sub silentio*, exactly what the Census Bureau experts urged him not to assume—that answers to the citizenship question would be more accurate than statistical modeling. And he ignored the undisputed respects in which asking the question would make the existing data less accurate. Other than his assumption, the Secretary said nothing, absolutely nothing, to suggest a reasoned basis for disagreeing with the Bureau's expert statistical judgment.***

As I have said, I agree with the Court's conclusion as to pretext and with the decision to send the matter back to the agency. I do not agree, however, with several of the Court's conclusions concerning application of the arbitrary and capricious standard. In my view, the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion. I consequently concur in the Court's judgment to the extent that it affirms the judgment of the District Court.

[Opinion of Justice ALITO, concurring in part and dissenting in part, omitted.]

New York v. Department of Commerce
No. 18 Civ. 2921 (JMF) (S.D.N.Y.)

The following is an edited transcript of an oral decision delivered by Judge Jesse M. Furman on July 3, 2018.

In [ruling on plaintiffs' motions for completion of the administrative record and leave to take extra-record discovery], I am of course mindful of the Supreme Court's decision *In re United States*, 138 S. Ct. 443 (2017) (per curiam), holding in connection with lawsuits challenging the rescission of DACA that the district court should have resolved the government's threshold arguments before deciding whether to authorize discovery — on the theory that the threshold arguments, "if accepted, likely would eliminate the need for the district court to examine a complete Administrative Record." I do not read that decision, however, to deprive me of the broad discretion that district courts usually have in deciding whether and when to authorize discovery despite a pending motion to dismiss; indeed, the Supreme Court's decision was expressly limited to "the specific facts" of the case before it.

More to the point, several considerations warrant a different approach here. First, unlike the DACA litigation, this case does not arise in the immigration and national security context, where the Executive Branch enjoys broad, indeed arguably broadest authority. Second, time is of the essence here given that the clock is running on census preparations. If this case is to be resolved with enough time to seek appellate review, whether interlocutory or otherwise, it is essential to proceed on parallel tracks. Third, and most substantially, unlike the DACA litigation, defendants' threshold argument here are fully briefed, at least in the states' case. ***

With that, let me turn to the three broad categories of additional discovery that plaintiffs in the two cases have sought in their letters of June 26, namely, a privilege log for all materials withheld from the record on the basis of privilege; completion of the previously filed Administrative Record; and extra record discovery. For reasons I will explain, I find that plaintiffs have the better of the argument on all three fronts. I will address each in turn and then turn to the scope and timing of discovery that I will allow.

The first issue whether defendants need to produce a privilege log is easily resolved. Put simply, defendants' arguments are, in my view, squarely foreclosed by the Second Circuit's December 17, 2017 rejection of similar arguments *In re Nielsen* [Order Denying Mandamus Petition & Lifting Stay of Discovery, In re Nielsen, No. 17-3345 (2d Cir. Dec. 27, 2017).] ***

Second, plaintiffs seek an order directing the government to complete the Administrative Record. Although an agency's designation of the Administrative Record is generally afforded a presumption of regularity, that presumption can be rebutted where the seeking party shows that "materials exist that were actually considered by the agency decision-makers but are not in the record as filed." *Comprehensive Community Development Corp. v. Sebelius*, 890 F.Supp. 2d 305, 309 (S.D.N.Y. 2012). Plaintiffs have done precisely that

here. In his March 2018 decision memorandum produced in the Administrative Record at page 1313, Secretary Ross stated that he "set out to take a hard look" at adding the citizenship question "following receipt" of a request from the Department of Justice on December 12, 2017. Additionally, in sworn testimony before the House Ways and Means Committee *** Secretary Ross testified under oath that the Department of Justice had "initiated the request for inclusion of the citizenship question." It now appears that those statements were potentially untrue. On June 21, this year, without explanation, defendants filed a supplement to the Administrative Record, namely a half-page memorandum from Secretary Ross, also dated June 21, 2018. In this memorandum, Secretary Ross stated that "soon after" his appointment as Secretary, which occurred in February of 2017, almost ten months before the request from the Department of Justice, he "began considering" whether to add the citizenship question and that "as part of that deliberative process," he and his staff "inquired whether the department of justice would support, and if so would request, inclusion of a citizenship question." In other words, it now appears that the idea of adding the citizenship question originated with Secretary Ross, not the Department of Justice and that its origins long predated the December 2017 letter from the Justice Department. Even without that significant change in the timeline, the absence of virtually any documents predating DOJ's December 2017 letter was hard to fathom. But with it, it is inconceivable to me that there aren't additional documents from earlier in 2017 that should be made part of the Administrative Record.

That alone would warrant an order to complete the Administrative Record. But, compounding matters, the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record. For example, Secretary Ross claims that "additional empirical evidence about the impact of sensitive questions on the survey response rates came from the Senior Vice-President of Data Science at Nielsen." But the record contains no empirical evidence from Nielsen. Additionally, the record does not include documents relied upon by subordinates, upon whose advice Secretary Ross plainly relied in turn. For example, Secretary Ross's memo references "the department's review" of inclusion of the citizenship question, and advice of "Census Bureau staff." Yet the record is nearly devoid of materials from key personnel at the Census Bureau or Department of Commerce – apart from two memoranda from the Census Bureau's chief scientist which strongly recommend that the Secretary not add a citizenship question. The Administrative Record is supposed to include "materials that the agency decision-maker indirectly or constructively considered." *Batalla Vidal v. Duke*, 2017 WL 4737280 at *5 (E.D.N.Y. October 19, 2017). Here, for the reasons that I've stated, I conclude that the current Administrative Record does not include the full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded. Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." *National Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale. See, for example, *Tummino v. von Eschenbach*, 427 F.Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded that reinstating the citizenship question would be "very costly" and "harm the quality of the census count." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time – in some instances up to ten years – testing the proposed changes. Here, by defendants' own admission, defendants added an entirely new question after substantially less consideration and without any testing at all.

Finally, plaintiffs have made at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question — namely, that it is necessary to enforce Section 2 of the Voting Rights Act — was pretextual. To my knowledge, the Department of Justice and civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act casts further doubt on the stated rationale. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual – whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether – assuming the truth of the allegations in their complaints – plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. For the reasons I've just summarized, I conclude that the plaintiffs have done so.

In re United States
138 S.Ct. 443 (Dec. 20, 2017)

PER CURIAM.

This case arises from five related lawsuits that challenge a determination adopted by the Acting Secretary of the Department of Homeland Security (DHS). The determination, announced by the Acting Secretary, is to take immediate steps to rescind a program known as Deferred Action for Childhood Arrivals, or DACA, by March 5, 2018. The Acting Secretary stated that her determination was based in part on the Attorney General's conclusion that DACA is unlawful and likely would be enjoined in potentially imminent litigation.

The five suits were filed in the United States District Court for the Northern District of California, and the plaintiffs in those actions are the respondents in the matter now before this Court. The defendants in the District Court, and the petitioners here, include the Government of the United States, the Acting Secretary, and the President of the United States, all referred to here as the Government.

In the District Court litigation respondents argue that the Acting Secretary's determination to rescind DACA in the near future is unlawful because, among other reasons, it violates the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment, including the equal protection guarantee implicit in that Clause.

The issue to be considered here involves respondents' contention that the administrative record the Government filed to support the Acting Secretary's determination to rescind DACA is incomplete. The record consists of 256 pages of documents, and the Government contends that it contains all of the nondeliberative material considered by the Acting Secretary in reaching her determination. (Nearly 200 pages consist of published opinions from various federal courts.)

On October 17, the District Court, on respondents' motion, ordered the Government to complete the administrative record. [The Government unsuccessfully sought review of the district court's order in the Ninth Circuit and filed petitions for mandamus and certiorari in the Supreme Court.]

The District Court's October 17 order requires the Government to turn over all "emails, letters, memoranda, notes, media items, opinions and other materials" that fall within the following categories:

> "(1) all materials actually seen or considered, however briefly, by Acting Secretary [Elaine] Duke in connection with the potential or actual decision to rescind DACA ..., (2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with written advice or input regarding the actual or potential rescission of DACA, (3) all DACA-related materials considered by persons (anywhere in the

government) who thereafter provided Acting Secretary Duke with verbal input regarding the actual or potential rescission of DACA, (4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses, and (5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA."

The Government makes serious arguments that at least portions of the District Court's order are overly broad. (The Government appears to emphasize certain materials in categories 2, 3, and 4.) Under the specific facts of this case, the District Court should have granted respondents' motion on November 19 to stay implementation of the challenged October 17 order and first resolved the Government's threshold arguments (that the Acting Secretary's determination to rescind DACA is unreviewable because it is "committed to agency discretion," 5 U.S.C. § 701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction). Either of those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record.

On remand of the case, the Court of Appeals shall take appropriate action so that the following steps can be taken. The District Court should proceed to rule on the Government's threshold arguments and, in doing so, may consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate. Thereafter, the Court of Appeals or the District Court in the first instance may consider whether narrower amendments to the record are necessary and appropriate. In any event, the District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue. ***

It is so ordered.

Gundy v. United States
139 S. Ct. 2116 (2019)

Justice KAGAN, announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA) [enacted as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587], violates that doctrine. ***

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. In 1994, Congress first conditioned certain federal funds on States' adoption of registration laws meeting prescribed minimum standards. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, §170101, 108 Stat. 2038, 42 U.S.C. §14071 *et seq.* (1994 ed.). Two years later, Congress strengthened those standards, most notably by insisting that States inform local communities of registrants' addresses. *See* Megan's Law, § 2, 110 Stat. 1345, note following 42 U.S.C. §13701 (1994 ed., Supp. II). By that time, every State and the District of Columbia had enacted a sex-offender registration law. But the state statutes varied along many dimensions, and Congress came to realize that their "loopholes and deficiencies" had allowed over 100,000 sex offenders (about 20% of the total) to escape registration. *See* H. R. Rep. No. 109-218, pt. 1, pp. 20, 23-24, 26 (2005) (referring to those sex offenders as "missing" or "lost"). In 2006, to address those failings, Congress enacted SORNA. *See* 120 Stat. 590, 34 U.S.C. § 20901 et seq.

SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." § 20901. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. *See* 18 U.S.C. §2250(a).

The basic registration scheme works as follows. A "sex offender" is defined as "an individual who was convicted of" specified criminal offenses: all offenses "involving a sexual act or sexual contact" and additional offenses "against a minor." 34 U.S.C. §§ 20911(1), (5)(A), (7). Such an individual must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. See §§ 20913(a), 20914. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism). *See* §§ 20915, 20918.

Section 20913—the disputed provision here—elaborates the "[i]nitial registration" requirements for sex offenders. §§ 20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were "lost" to the system). And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."

Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897. The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. 75 Fed. Reg. 81850. That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of § 2250. He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. § 20913(d). The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari. ***

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. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42-43 (1825). But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U. S. 414, 425 (1944) (internal quotation marks omitted). Congress may "obtain[] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta v. United States*, 488 U. S. 361, 372 (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 409 (1928); brackets in original).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. *See, e.g.*, *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 473 (2001) (construing the text of a delegation to place constitutionally adequate "limits on the EPA's discretion"); *American Power & Light Co. v. SEC*, 329 U. S. 90, 104-105 (1946) (interpreting a statutory delegation, in light of its "purpose[,] factual background[, and] context," to provide sufficiently "definite" standards). ***

[Here,] § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. *** This Court has already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. *See Reynolds v. United States*, 565 U. S. 432, 442-43 (2012). *** Given that statutory meaning, Gundy's constitutional claim must fail. ***

A

*** In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. *** The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the 'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that includes offenders who committed their offenses before the Act became law." That purpose, the majority further noted, informed SORNA's "broad[]" definition of "sex offender," which "include[s] any 'individual who was convicted of a sex offense.'" And those two provisions were at one with "[t]he Act's history." Quoting statements from both the House and the Senate about the sex offenders then "lost" to the system, *Reynolds* explained that the Act's "supporters placed considerable importance upon the registration of pre-Act offenders." [Dissenting, Justice Scalia emphasized that] registration of pre-Act offenders was "what the statute sought to achieve."

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? The majority had a simple answer: "[I]nstantaneous registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." *** And attached to that broad feasibility concern was a more technical one. Recall that under SORNA "a sex offender must initially register before completing his 'sentence of imprisonment.'" But many pre-Act offenders were already out of prison, so could not comply with that requirement. That inability raised questions about "how[] the new registration requirements applied to them." ***

On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[] implementation delay." But no more than that. Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders. *** The delegation was a stopgap, and nothing more. ***

B

[In § 20913(d),] Congress gave the Attorney General authority to "specify the applicability" of SORNA's requirements to pre-Act offenders. And in the second half of the same sentence, Congress gave him authority to "prescribe rules for the registration of any such sex offenders . . . who are unable to comply with" subsection (b)'s initial registration requirement. ***

Gundy urges us to read §20913(d) to empower the Attorney General to do whatever he wants as to pre-Act offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between). Gundy bases that argument on the first half of §20913(d), isolated from everything else—from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. ***

This Court [however] has long refused to construe words "in a vacuum," as Gundy attempts. "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." And beyond context and structure, the Court often looks to "history [and] purpose" to divine the meaning of language. That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions. To define the scope of delegated authority, we have looked to the text in "context" and in light of the statutory "purpose." ***

So begin at the beginning, with the "[d]eclaration of purpose" that is SORNA's first sentence. §20901. There, Congress announced *** that "to protect the public," it was "establish[ing] a comprehensive national system for the registration" of "sex offenders and offenders against children." § 20901. The term "comprehensive" has a clear meaning—something that is all-encompassing or sweeping. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 467 (2002) ("covering a matter under consideration completely

or nearly completely"); NEW OXFORD AMERICAN DICTIONARY 350 (2d ed. 2005) ("complete; including all or nearly all elements or aspects of something"). That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. *** Gundy urges us to ignore SORNA's statement of purpose because it is "located in the Act's preface" rather than "tied" specifically to §20913(d). But the placement of such a statement within a statute makes no difference. *See* A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 220 (2012). Wherever it resides, it is "an appropriate guide" to the "meaning of the [statute's] operative provisions." And here it makes clear that SORNA was supposed to apply to all pre-Act offenders—which precludes Gundy's construction of §20913(d).

The Act's definition of "sex offender" *** makes the same point. Under that definition, a "sex offender" is "an individual who was convicted of a sex offense." §20911(1). Note the tense: "was," not "is." This Court has often "looked to Congress' choice of verb tense to ascertain a statute's temporal reach," including when interpreting other SORNA provisions. Here, Congress's use of the past tense to define the term "sex offender" shows that SORNA was not merely forwardlooking. The word "is" would have taken care of all future offenders. The word "was" served to bring in the hundreds of thousands of persons previously found guilty of a sex offense, and thought to pose a current threat to the public. The tense of the "sex offender" definition thus confirms that the delegation allows only temporary exclusions, as necessary to address feasibility issues. Contra Gundy, it does not sweep so wide as to make a laughingstock of the statute's core definition.

The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. *** Recall that Congress designed SORNA to address "loopholes and deficiencies" in existing registration laws. And no problem attracted greater attention than the large number of sex offenders who had slipped the system. According to the House Report, "[t]he most significant enforcement issue in the sex offender program is that over 100,000 sex offenders" are "'missing,' meaning that they have not complied with" then-current requirements. H. R. Rep. No. 109-218, at 26. There is a "strong public interest," the Report continued, in "having [those offenders] register with current information to mitigate the risks of additional crimes against children." *Id.*, at 24. Senators struck a similar chord in the debates preceding SORNA's passage, repeatedly stressing that the new provisions would capture the missing offenders. *See, e.g.*, 152 Cong. Rec. 15338 (2006) (statement of Sen. Kyl) ("The penalties in this bill should be adequate to ensure that [the 100,000 missing offenders] register"); *id.*, at 13050 (statement of Sen. Frist) ("Every day that we don't have this national sex offender registry, these missing sex predators are out there somewhere"). Imagine how surprising those Members would have found Gundy's view that they had authorized the Attorney General to exempt the missing "predators" from registering at all.

With that context and background established, we may return to § 20913(d). *** Both the title and the remaining text of that section pinpoint one of the "practical problems" discussed above: At the moment of SORNA's enactment, many pre-Act offenders were "unable to comply" with the Act's initial registration requirements. That was because, once

again, the requirements assumed that offenders would be in prison, whereas many pre-Act offenders were on the streets. In identifying that issue, § 20913(d) itself reveals the nature of the delegation to the Attorney General. It was to give him the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. "Specify the applicability" thus does not mean "specify whether to apply SORNA" to pre-Act offenders at all, even though everything else in the Act commands their coverage. The phrase instead means "specify how to apply SORNA" to pre-Act offenders if transitional difficulties require some delay. In that way, the whole of §20913(d) joins the rest of SORNA in giving the Attorney General only time-limited latitude to excuse pre-Act offenders from the statute's requirements. Under the law, he had to order their registration as soon as feasible.

And no Attorney General has used (or, apparently, thought to use) §20913(d) in any more expansive way. To the contrary. Within a year of SORNA's enactment (217 days, to be precise), the Attorney General determined that SORNA would apply immediately to pre-Act offenders. *See* Interim Rule, 72 Fed. Reg. 8897; supra, at 4. That rule has remained in force ever since (save for a technical change to one of the rule's illustrative examples). See Final Rule, 75 Fed. Reg. 81850.[3] And at oral argument here, the Solicitor General's office—rarely in a hurry to agree to limits on the Government's authority— acknowledged that §20913(d) does not allow the Attorney General to excuse a pre-Act offender from registering, except for reasons of "feasibility." *** The Attorney General's authority goes to transition-period implementation issues, and no further.

C

Now that we have determined what §20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. *J. W. Hampton, Jr.*, & Co., 276 U. S. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Those standards, the Court has made clear, are not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" Only twice

[3] Gundy tries to dispute that simple fact, but fails. He points to changes that Attorneys General have made in guidelines to States about how to satisfy SORNA's funding conditions. But those state-directed rules are independent of the only thing at issue here: the application of registration requirements to pre-Act offenders. Those requirements have been constant since the Attorney General's initial rule, as the guidelines themselves affirm. See 73 Fed. Reg. 38046 (2008); 76 Fed. Reg. 1639 (2011). Indeed, the guidelines to States are issued not under §20913(d) at all, but under a separate delegation in §20912(b). See 73 Fed. Reg. 38030; 76 Fed. Reg. 1631.

in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion. *Mistretta*, 488 U.S., at 373, n.7 (emphasis added); *see A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). By contrast, we have over and over upheld even very broad delegations. ***

In that context, the delegation in SORNA easily passes muster ***. The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. Those issues arose, as *Reynolds* explained, from the need to "newly register[] or reregister[] 'a large number' of pre-Act offenders" not then in the system. And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. *** That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. *** Among the judgments often left to executive officials are ones involving feasibility. In fact, standards of that kind are ubiquitous in the U.S. Code. *See, e.g.*, 12 U.S.C. § 1701z-2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction[] under [HUD] programs"); 47 U.S. C. §903(d)(1) (providing that "the Secretary of Commerce shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible" in "assigning frequencies for mobile radio services"). In those delegations, Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge. So too in SORNA. ***

We therefore affirm the judgment of the Court of Appeals.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

Justice ALITO, concurring in the judgment. ***

If a majority of this Court were willing to reconsider the approach [to congressional delegations of regulatory authority] we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

Justice GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting. ***

Our founding document begins by declaring that "We the People . . . ordain and establish this Constitution." At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,"[17] or the power to "prescribe general rules for the government of society."[18]

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. *** As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative." ***

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense."[29] Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.[30] Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to "'disguise . . . responsibility for . . . the decisions.'"[31] ***

[17] The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton).

[18] *Fletcher v. Peck*, 6 Cranch 87, 136 (1810); *see also* J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration §22, p. 13 (1947) (Locke, Second Treatise); 1 W. Blackstone, Commentaries on the Laws of England 44 (1765).

[29] Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002).

[30] The Federalist No. 47, at 303 (Madison); id., No. 62, at 378 (same).

[31] Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478 (2015). *See also* B. IANCU, LEGISLATIVE DELEGATION: THE EROSION OF NORMATIVE LIMITS IN MODERN CONSTITUTIONALISM 87 (2012).

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test? *** First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." In *Wayman v. Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain "alterations and additions."[35] Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details." The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make "alterations and additions" did no more than permit courts to fill up the details. ***

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. ***

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if "the discretion is to be exercised over matters already within the scope of executive power."[43]

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. *** As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details." ***

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions for offenders who do not present an "'imminent hazard to the public safety'" comparable to that posed by newly released post-Act offenders.

[35] 23 U.S. 1, 10 Wheat. 1 (1825).

[43] Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985).

It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. ***

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power. ***

[The government] invites us to reimagine SORNA as compelling the Attorney General to register pre-Act offenders "to the maximum extent feasible." And, as thus reinvented, the government insists, the statute supplies a clear statement of legislative policy, with only details for the Attorney General to clean up.

[However, the] only provision addressing pre-Act offenders, §20913(d), says *nothing* about feasibility. And the omission can hardly be excused as some oversight: No one doubts that Congress knows exactly how to write a feasibility standard into law when it wishes. Unsurprisingly, too, the existence of some imaginary statutory feasibility standard seemed to have escaped notice at the Department of Justice during the Attorney General's many rulemakings; in those proceedings, as we have seen, the Attorney General has repeatedly admitted that the statute affords him the authority to "balance" the burdens on sex offenders with "public safety interests" as and how he sees fit.

Unable to muster a feasibility standard from the only statutory provision addressing pre-Act offenders, the plurality invites us to hunt in other and more unlikely corners. It points first to SORNA's "[d]eclaration of purpose," which announces that Congress, "[i]n order to protect the public from sex offenders and offenders against children . . . establishes a comprehensive national system for the registration of those offenders." But nowhere is feasibility mentioned here either. *** Besides, even if we were to pretend that §20901 amounted to a directive *telling* the Attorney General to establish a "comprehensive national system" for pre-Act offenders, the plurality reads too much into the word "comprehensive." Comprehensive coverage does not mean coverage to the maximum extent feasible. "Comprehensive" means "having the attribute of comprising or including much; of large content or scope," "[i]nclusive of; embracing," or "[c]ontaining much in small compass; compendious." So, for example, a criminal justice system may be called "comprehensive" even though many crimes go unpursued. ***

Finding it impossible to conscript the statute's declaration of purpose into doing the work it needs done, the government and plurality next ask us to turn to SORNA's definition

of "'sex offender.'" They emphasize that SORNA defines a "sex offender" as "'an individual who was convicted of a sex offense'"—and, they note, pre-Act offenders meet this definition. Because pre-Act offenders fall within the definition of "sex offender[s]," the government and plurality continue, it follows that the Attorney General must ensure all of them are registered and subject to SORNA's demands.

That much, however, does not follow. To say that pre-Act sex offenders fall within the definition of "sex offenders" is merely a truism: Yes, of course, these people have already been convicted of sex offenses under state law. But whether these individuals are *also* subject to federal registration requirements is a different question entirely. And as we have seen, the only part of the statute that speaks to pre-Act sex offenders—§20913(d)—makes plain that they are not automatically subject to all the Act's terms but are left to their fate at the hands of the Attorney General. Look at it this way: If the statute's definitional section were really enough to command the registration of all sex offenders, the Act would have had no need to proceed to explain, as it does at great length, when *post*-Act sex offenders must register and when they need not.

If that argument won't work, the plurality points us to § 20913(d)'s second clause, which grants the Attorney General the authority "to prescribe rules for the registration of . . . sex offenders . . . who are unable to comply" with the Act's initial registration requirements. According to the plurality, this language suggests that Congress expected the Attorney General to register pre-Act offenders to the maximum extent feasible. But, of course, this clause, too, says nothing of the sort. And the authority provided under § 20913(d)'s first clause—which gives the Attorney General the blanket authority "to specify the applicability of the requirements of this subchapter"—is additional to the authority granted under the second clause. So not only does the Attorney General have the authority to prescribe rules for the registration of pre-Act offenders under the second clause, he is free to specify which statutory requirements he does and does not wish to apply under the first clause. Far from suggesting a maximalist approach then, the second clause read in light of the first only serves to underscore the breadth of the Attorney General's discretion.

With so little in statutory text to work with, the government and the plurality "can't resist" highlighting certain statements from the Act's legislative history. But "legislative history is not the law." Still less can committee reports or statements by individual legislators be used "to muddy clear statutory language" like that before us. And even taken on their own terms, these statements do no more than confirm that some members of Congress hoped and wished that the Attorney General would exercise his discretion to register at least some pre-Act offenders. None of these snippets mentions a "feasibility" standard, and none can obscure the absence of such a standard in the law itself. ***

In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling

up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[107]

[107] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 553 (1935) (Cardozo, J., concurring).

Kisor v. Wilkie
139 S. Ct. 2400 (2019)

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. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. ***

I

*** Kisor is a Vietnam War veteran seeking disability benefits from the Department of Veterans Affairs (VA). He first applied in 1982, alleging that he had developed post-traumatic stress disorder (PTSD) as a result of his participation in a military action called Operation Harvest Moon. The report of the agency's evaluating psychiatrist noted Kisor's involvement in that battle, but found that he "d[id] not suffer from PTSD." The VA thus denied Kisor benefits. There matters stood until 2006, when Kisor moved to reopen his claim. Based on a new psychiatric report, the VA this time agreed that Kisor suffered from PTSD. But it granted him benefits only from the date of his motion to reopen, rather than (as he requested) from the date of his first application.

The Board of Veterans' Appeals—a part of the VA, represented in Kisor's case by a single administrative judge—affirmed that timing decision, based on its interpretation of an agency rule. Under the VA's regulation, the agency could grant Kisor retroactive benefits if it found there were "relevant official service department records" that it had not considered in its initial denial. *See* 38 CFR §3.156(c)(1) (2013). The Board acknowledged that Kisor had come up with two new service records, both confirming his participation in Operation Harvest Moon. But according to the Board, those records were not "relevant" because they did not go to the reason for the denial—that Kisor did not have PTSD. *See* App. to Pet. for Cert. 43a ("[The] documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat"). The Court of Appeals for Veterans Claims, an independent Article I court that initially reviews the Board's decisions, affirmed for the same reason.

The Court of Appeals for the Federal Circuit also affirmed, but it did so based on deference to the Board's interpretation of the VA rule. Kisor had argued to the Federal Circuit that to count as "relevant," a service record need not (as the Board thought) "counter[] the basis of the prior denial"; instead, it could relate to some other criterion for obtaining disability benefits. The Federal Circuit found the regulation "ambiguous" as between the two readings. The rule, said the court, does not specifically address "whether 'relevant' records are those casting doubt on the agency's prior [rationale or] those relating to the veteran's claim more broadly." So how to choose between the two views? The court continued: "Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." Because that was so, the court believed *Auer* deference

appropriate: The agency's construction of its own regulation would govern unless "plainly erroneous or inconsistent with the VA's regulatory framework." Applying that standard, the court upheld the Board's reading—and so approved the denial of retroactive benefits.

We then granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*.

II

Before addressing that question directly, we spend some time describing what *Auer* deference is, and is not, for. *** [This] account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving.

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]." 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 CFR 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?

- 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 a traveler have to pack his jar of truffle pâté in that way?

- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 CFR §50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly?

- 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 CFR §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?

- 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 CFR §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. 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?

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. *** 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. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often. But the name is something of a misnomer. Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference—for the 1945 decision in which we declared that when "the meaning of [a regulation] is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S., at 414.[3] 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. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151-153 (1991). 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. *** To be sure, this justification has its limits. It does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule

[3] Our (pre-*Auer*) decisions applying *Seminole Rock* deference are legion. ***

(e.g., if the agency never thought about whether and when chest X-rays would count as a "diagnosis"). *** And the defense works yet less well when lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before. ***

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. *** 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 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. ***

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation." That preference may be strongest when the interpretive issue arises in the context of a "complex and highly technical regulatory program." After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing. (Is there anything to be said for courts all over the country trying to figure out what makes for a new active moiety?) But the uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading. ***

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. *** First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S., at 414 (deferring only "if the meaning of the words used is in doubt"). If uncertainty does not exist, there is no plausible reason for deference. ***

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." *** [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. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

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. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) 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." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). ***

[In addition,] a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. *See Christopher*, 567 U.S., at 155; *see also United States v. Mead Corp.*, 533 U.S. 218, 229-231, 236-237 (2001) (requiring an analogous though not identical inquiry for *Chevron* deference). As explained above, we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold. The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

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. That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. 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. *** 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. ***

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." So the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's 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. *See Christopher*, 567 U.S., at 155-156. Here too the lack of "fair warning" outweighed the reasons to apply *Auer*. ***

III

That brings us to the lone question presented here— whether we should abandon the longstanding doctrine just described. ***

A

Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administrative Procedure Act (APA). *See* 5 U.S. C. §706. *** Section 706 of the Act, governing judicial review of agency action, states (among other things) that reviewing courts shall "determine the meaning or applicability of the terms of an agency action" (including a regulation). According to Kisor, *Auer* violates that edict by thwarting "meaningful judicial review" of agency rules. ***

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. *** And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. 5 U.S. C. §706. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency's reading for reasonableness. ***

Section 706 was understood when enacted to "restate[] the present law as to the scope of judicial review." *See* DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947). We have thus interpreted the APA not to "significantly alter the common law of judicial review of agency action." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (internal quotation marks omitted). That pre-APA common law included *Seminole Rock* itself (decided the year before) along with prior decisions foretelling that ruling. Even assume that the deference regime laid out in those cases had not yet fully taken hold. At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*. ***

Kisor next claims that *Auer* circumvents the APA's rulemaking requirements. Section 553, as Kisor notes, mandates that an agency use notice-and-comment procedures before issuing legislative rules. See 5 U.S. C. §§553(b), (c). But the section allows agencies to issue "interpret[ive]" rules without notice and comment. See §553(b)(A). A key feature of those rules is that (unlike legislative rules) they are not supposed to "have the force and effect of law"—or, otherwise said, to bind private parties. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2015) (internal quotation marks omitted). Instead, interpretive rules are meant only to "advise the public" of how the agency understands, and is likely to apply, its binding statutes and legislative rules. But consider, Kisor argues, what happens when a court gives *Auer* deference to an interpretive rule. The result, he asserts, is to make a rule that has never gone through notice and comment binding on the public. Or put another way, the interpretive rule ends up having the "force and effect of law" without ever paying the procedural cost.

But this Court rejected the identical argument just a few years ago, and for good reason. In *Mortgage Bankers*, we held that interpretive rules, even when given *Auer* deference, do not have the force of law. An interpretive rule itself never forms "the basis for an enforcement action"—because, as just noted, such a rule does not impose any "legally binding requirements" on private parties. An enforcement action must instead rely on a

legislative rule, which (to be valid) must go through notice and comment. And in all the ways discussed above, the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. ***

To supplement his two APA arguments, Kisor turns to policy, leaning on a familiar claim about the incentives *Auer* creates. According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. *** But the claim has notable weaknesses, empirical and theoretical alike. *** No real evidence—indeed, scarcely an anecdote—backs up the assertion. *** And even the argument's theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction. "[R]egulators want their regulations to be effective, and clarity promotes compliance." Brief for Administrative Law Scholars as Amici Curiae 18-19. Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates "separation-of-powers principles." In his view, those principles prohibit "vest[ing] in a single branch the law-making and law-interpreting functions." If that objection is to agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. *** If Kisor's objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 54 (1975) (permitting such a combination of functions); *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (same). That sort of mixing is endemic in agencies, and has been "since the beginning of the Republic." *Arlington*, 569 U.S., at 304-305, n.4. It does not violate the separation of powers, we have explained, because even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of[] the 'executive Power'"—or otherwise said, ways of executing a statutory plan. *Ibid.* (quoting U.S. Const., Art. II, §1, cl. 1). ***

B

If all that were not enough, *stare decisis* cuts strongly against Kisor's position. *** Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. [B]ecause that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to "wrestle [with] whether or not *Auer*" had actually made a difference. It is the rare overruling that introduces so much instability into so many areas of law, all in one blow. ***

[E]ven if we are wrong about *Auer*, "Congress remains free to alter what we have done." *** Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could

amend the APA or any specific statute to require the sort of de novo review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history—and Congress's continuing ability to take up Kisor's arguments—we would need a particularly "special justification" to now reverse *Auer*.

Kisor offers nothing of that ilk. Nearly all his arguments about abandoning precedent are variants of his merits claims. *** But that is not the test for overturning precedent. Kisor does not claim that *Auer* deference is "unworkable," a traditional basis for overruling a case. Nor does he point to changes in legal rules that make *Auer* a "doctrinal dinosaur." All he can muster is that "[t]he administrative state has evolved substantially since 1945." We do not doubt the point (although we note that *Auer* and other key deference decisions came along after most of that evolution took place). Still more, we agree with Kisor that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse. That is one reason we have taken care today to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules. But it is no answer to the growth of agencies for courts to take over their expertise-based, policymaking functions. ***

IV

With that, we can finally return to Kisor's own case. You may remember that his retroactive benefits depend on the meaning of the term "relevant" records in a VA regulation. The Board of Veterans' Appeals, through a single judge's opinion, understood records to be relevant only if they relate to the basis of the VA's initial denial of benefits. By contrast, Kisor argued that records are relevant if they go to any benefits criterion, even one that was uncontested. The Federal Circuit upheld the Board's interpretation based on *Auer* deference.

Applying the principles outlined in this opinion, we hold that a redo is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the regulation ambiguous. We have insisted that a court bring all its interpretive tools to bear before finding that to be so. It is not enough to casually remark, as the court did here, that "[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning. ***

And second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. *** The Solicitor General *** explained that all 100 or so members of the VA Board act individually (rather than in panels) and that their roughly 80,000 annual decisions have no "precedential value." He thus questioned whether a Board member's ruling "reflects the considered judgment of the agency as a whole." *Cf. Mead*, 533 U.S., at 233 (declining to give *Chevron* deference to rulings "being churned out at a rate of 10,000 a year at an agency's 46 scattered offices"). We do not know what position the Government will take on that issue below. But

the questions the Solicitor General raised are exactly the kind the court must consider in deciding whether to award *Auer* deference to the Board's interpretation.

We accordingly vacate the judgment below and remand the case for further proceedings.

CHIEF JUSTICE ROBERTS, concurring in part.

I join Parts I, II-B, III-B, and IV of the Court's opinion. We took this case to consider whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For the reasons the Court discusses in Part III-B, I agree that overruling those precedents is not warranted. I also agree with the Court's treatment in Part II-B of the bounds of *Auer* deference.

I write separately to suggest that the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. JUSTICE GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in common.

That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. *See Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I do not regard the Court's decision today to touch upon the latter question.

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*. *** 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. ***

I. How We Got Here ***

[*Auer*] began as an unexplained aside in a decision about emergency price controls at the height of the Second World War. Even then, the dictum sat on the shelf, little noticed, for years. ***

Before the mid-20th century, few federal agencies engaged in extensive rulemaking, and those that did rarely sought [judicial] deference for their regulatory interpretations. But when the question arose, this Court did not hesitate to say that judges reviewing administrative action should decide all questions of law, including questions concerning the meaning of regulations. ***

[T]he seeds of the *Auer* doctrine were first planted only in 1945, in *Bowles v. Seminole Rock & Sand Co.*[16] That case involved regulations issued by the Office of Price Administration (OPA), which Congress had tasked with stabilizing the national economy during the Second World War through the use of emergency price controls. It was in that context that the Court declared—for the first time and without citing any authority—that "if the meaning of [the regulation were] in doubt," the agency's interpretation would merit "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Yet even then it was far from clear how much weight the Court really placed on the agency's interpretation. *** *Seminole Rock* began with an extended discussion of "the plain words of the regulation," which led it to conclude that the text "clearly" supported the government's position. Only after reaching that conclusion based on its own independent analysis did the Court proceed to add that "[a]ny doubts . . . are removed by reference to the administrative construction." *** [T]he Court decided *Seminole Rock* the same Term it issued *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)], where it reaffirmed the traditional rule that an agency's views about the law may persuade a court but can never control its judgment. In fact, the Court in *Seminole Rock* was careful to note that the OPA interpretation before it bore many of the characteristics *Skidmore* would have recognized as increasing its persuasive force: It had been announced concurrently with the regulation, disseminated widely to the regulated community, and adhered to consistently by the agency. ***

This Court did not cite *Seminole Rock*'s "controlling weight" dictum again until 1965, in *Udall v. Tallman*.[27] And though *Tallman* "did very little to advance the jurisprudential understanding of *Seminole Rock*," it certainly helped fuel the expansion of so-called "*Seminole Rock* deference." From the 1960s on, this Court and lower courts began to cite the *Seminole*

[16] 325 U.S. 410.

[27] 380 U.S.1, 4, 17-18 (accepting a regulatory interpretation by the Secretary of the Interior that was consistent, widely disseminated, and heavily relied upon, while not suggesting any disagreement with the Secretary's interpretation).

Rock dictum with increasing frequency and in a wider variety of circumstances, but still without much explanation. They also increasingly divorced *Seminole Rock* from *Skidmore*.

Auer represents the apotheosis of this line of cases. In the name of what some now call the *Auer* doctrine, courts have in recent years "mechanically applied and reflexively treated" *Seminole Rock*'s dictum "as a constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis."[30] Under *Auer*, judges are forced to subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court. After all, if the court agrees that the agency's reading is the best one, *Auer* does no real work; the doctrine matters only when a court would conclude that the agency's interpretation is not the best or fairest reading of the regulation. ***

II. The Administrative Procedure Act ***

The first problem [with deferring to an agency's interpretation of its own regulation] lies in §706 [of the Administrative Procedure Act (APA)]. That provision instructs reviewing courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law." Determining the meaning of a statute or regulation, of course, presents a classic legal question. But in case these directives were not clear enough, the APA further directs courts to "determine the meaning" of any relevant "agency action," including any rule issued by the agency. The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't "decid[ing]" the relevant "questio[n] of law" or "determin[ing] the meaning" of the regulation. Instead, it's allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.

JUSTICE KAGAN seeks to address the glaring inconsistency between our judge-made rule and the controlling statute this way. On her account, the APA tells a reviewing court to "determine the meaning" of regulations, but it does not tell the court "how" to do that. Thus, we are told, reading the regulation for itself and deferring to the agency's reading are just two equally valid ways for a court to fulfill its statutory duty to "determine the meaning" of the regulation.

But the APA isn't as anemic as that. Its unqualified command requires the court to determine legal questions—including questions about a regulation's meaning— by its own lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand. Nor can there be any doubt that, when Congress wrote the APA, it knew perfectly well how to require judicial deference to an agency when it wished—in fact, Congress repeatedly specified deferential standards for judicial review elsewhere in the statute. But when it comes to the business of interpreting regulations, no such command exists; instead, Congress told courts to "determine" those matters for themselves. ***

The problems don't end there. *Auer* is also incompatible with the APA's instructions in §553. That provision requires agencies to follow notice-and-comment procedures when

[30] *See* Knudsen & Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L. J. 47, 53 (2015).

issuing or amending legally binding regulations (what the APA calls "substantive rules"), but not when offering mere interpretations of those regulations. An agency wishing to adopt or amend a binding regulation thus must publish a proposal in the Federal Register, give interested members of the public an opportunity to submit written comments on the proposal, and consider those comments before issuing the final regulation. Under the APA, that regulation then carries the force of law unless and until it is amended or repealed. By contrast, an agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses.

Auer effectively nullifies the distinction Congress drew here. Under *Auer*, courts must treat as "controlling" not only an agency's duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment. For all practical purposes, "the new interpretation might as well be a new regulation." *Auer* thus obliterates a distinction Congress thought vital and supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law. ***

Certain *amici* contend this argument is "out of place" in this particular case because the VA happened to issue the interpretation challenged here in an adjudicative proceeding. But the premise on which they proceed—that the APA permits agencies to issue "controlling" amendments to their regulations in adjudicative proceedings—is not correct. Once an agency issues a substantive rule through notice and comment, it can amend that rule only by following the same notice-and-comment procedures.[60] Whether an agency issues its interpretation in a press release or something it chooses to call an "adjudication," all we have is the agency's opinion about what an existing rule means, something that the APA tells us is not binding in a court of law or on the American people. ***

III. The Constitution

Not only is *Auer* incompatible with the APA; it also sits uneasily with the Constitution. Article III, §1 provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is "'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.'"[70] As Chief Justice Marshall put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[71] And never, this Court has warned, should the "judicial power . . . be shared with [the] Executive Branch."[72] Yet that seems to be exactly what *Auer* requires. ***

IV. Policy Arguments ***

[60] *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); *Marseilles Land & Water Co. v. FERC*, 345 F. 3d 916, 920 (CADC 2003).
[70] *Patchak v. Zinke*, 583 U.S.___, ___ (2018) (plurality opinion) (slip op., at 5) (quoting *Massachusetts v. Mellon*, 262 U.S.447, 488 (1923)).
[71] *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see also Wayman v. Southard*, 10 Wheat. 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"); The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton).
[72] *Miller v. Johnson*, 515 U.S.900, 922 (1995).

JUSTICE KAGAN suggests that determining the meaning of a regulation is largely a matter of figuring out what the "person who wrote it . . . intended." In this way, we're told, a legally binding regulation isn't all that different from "a memo or an e-mail"—if you "[w]ant to know what [it] means," you'd better "[a]sk its author." But the federal government's substantive rules are not like memos or e-mails; they are binding edicts that carry the force of law for all citizens. And if the rule of law means anything, it means that we are governed by the public meaning of the words found in statutes and regulations, not by their authors' private intentions. ***

Nor does JUSTICE KAGAN's account of the interpretive process even wind up supporting *Auer*. If a court's goal in interpreting a regulation really were to determine what its author "intended," *Auer* would be an almost complete mismatch with the goal. Agency personnel change over time, and an agency's policy priorities may shift dramatically from one presidential administration to another. Yet *Auer* tells courts that they must defer to the agency's *current* view of what the regulation ought to mean, which may or may not correspond to the views of those who actually wrote it. ***

JUSTICE KAGAN asserts that resolving ambiguities in a regulation "sounds more in policy than in law" and is thus a task more suited to executive officials than judges. But this claim, too, contradicts a basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable—if not by all members of the public, then at least by lawyers who can advise them and judges who must apply the law to individual cases guided by the neutral principles found in our traditional tools of interpretation. The text of the regulation is treated as the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text. ***

JUSTICE KAGAN next suggests that *Auer* is justified by the respect due agencies' "technical" expertise. But no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court "would want to know what John Henry Wigmore said about an issue of evidence law [or] what Arthur Corbin thought about a matter of contract law," so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate.[100] The fact remains, however, that even agency experts "can be wrong; even Homer nodded." *Skidmore* and the traditional approach it embodied recognized both of these facts of life long ago, explaining that, while courts should of course afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting. Respect for an agency's technical expertise demands no more. ***

JUSTICE KAGAN's final policy argument is that *Auer* promotes "consistency" and "uniformity" in the interpretation of regulations. If we let courts decide what regulations mean, she warns, they might disagree, and it might take some time for higher courts to resolve those disagreements. But consistency and uniformity are hardly grounds on which

[100] Larkin & Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J. L. & PUB. POL'Y 625, 647 (2019).

Auer's advocates should wish to fight. The judicial process is how we settle disputes about the meaning of written law, and our judicial system is more than capable of producing a single, uniform, and stable interpretation that will last until the regulation is amended or repealed. Meanwhile, under *Auer* courts often disagree about whether deference is warranted, and a regulation's "meaning" can be transformed with the stroke of a pen any time there is a new presidential administration. "Consistency," "uniformity," and stability in the law are hardly among *Auer*'s crowning achievements.

V. *Stare Decisis*

In the end, a majority declines to endorse JUSTICE KAGAN's arguments and insists only that, even if *Auer* is not "right and well-reasoned," we're stuck with it because of the respect due precedent. ***

There are serious questions about whether *stare decisis* should apply here at all. To be sure, *Auer*'s narrow holding about the meaning of the regulation at issue in that case may be entitled to *stare decisis* effect. The same may be true for the specific holdings in other cases where this Court has applied *Auer* deference. But does *stare decisis* extend beyond those discrete holdings and bind future Members of this Court to apply *Auer*'s broader deference framework? ***

In other contexts, we do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or legislative history in statutory cases, as binding future Justices with the full force of horizontal *stare decisis*. Why, then, should we regard as binding *Auer*'s statements about the weight to afford agencies' interpretations in regulatory cases?

Even assuming for argument's sake that standard *stare decisis* considerations apply, they still do not require us to retain *Auer*. *** *First*, we've already seen that no persuasive rationale supports *Auer*. *** *Second*, today's ruling all but admits that *Auer* has not proved to be a workable standard. *** *Third*, the *Auer* doctrine is, as we have also already seen, out of step with how courts normally interpret written laws. *** *Fourth*, the explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief. *** As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U.S. Code. And agencies add thousands more pages of regulations every year. Whether you think this administrative fecundity is a good or a bad thing, it surely means that the cost of continuing to deny citizens an impartial judicial hearing on the meaning of disputed regulations has increased dramatically since this Court started down this road.

Fifth, *Auer* has generated no serious reliance interests. *** [T]he majority worries that "abandoning *Auer* deference would cast doubt on many settled constructions" of regulations on which regulated parties might have relied. But, again, decisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology. After all, decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor. Besides, if the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the

majority's revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court's lead and afforded *Auer* deference mechanically, without conducting the inquiry the Court now holds is required. Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*. ***

Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and "follow [the] agency's [view] only to the extent it is persuasive." By contrast, the majority's attempt to remodel *Auer*'s rule into a multistep, multi-factor inquiry guarantees more uncertainty and much litigation. Proceeding in this convoluted way burdens our colleagues on the lower courts, who will have to spend time debating deference that they could have spent interpreting disputed regulations. It also continues to deny the people who come before us the neutral forum for their disputes that they rightly expect and deserve. ***

[Opinion of JUSTICE KAVANAUGH, with whom JUSTICE ALITO joins, concurring in the judgment, omitted.]