Legislation and the Regulatory State

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2023 SUPPLEMENT

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LEGISLATION AND THE REGULATORY STATE (3d ed.)

United States v. Arthrex
141 S. Ct. 1970 (2021)

Chief Justice ROBERTS delivered the opinion of the Court with respect to Parts I and II.

The validity of a patent previously issued by the Patent and Trademark Office can be challenged before the Patent Trial and Appeal Board, an executive tribunal within the PTO. The Board, composed largely of Administrative Patent Judges appointed by the Secretary of Commerce, has the final word within the Executive Branch on the validity of a challenged patent. Billions of dollars can turn on a Board decision. *** The question presented is whether the authority of the Board to issue decisions on behalf of the Executive Branch is consistent with [the Appointments Clause and the Take Care Clause].

I

A

[The patent system] is administered by the Patent and Trademark Office (PTO), an executive agency within the Department of Commerce “responsible for the granting and issuing of patents” in the name of the United States. 35 U.S.C. §§ 1(a), 2(a)(1). Congress has vested the “powers and duties” of the PTO in a sole Director appointed by the President with the advice and consent of the Senate. § 3(a)(1). As agency head, the Director “provid[es] policy direction and management supervision” for PTO officers and employees. § 3(a)(2)(A).

This suit centers on the Patent Trial and Appeal Board (PTAB), an executive adjudicatory body within the PTO established by the Leahy-Smith America Invents Act of 2011. 125 Stat. 313. The PTAB sits in panels of at least three members drawn from the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and more than 200 Administrative Patent Judges (APJs). 35 U.S.C. §§ 6(a), (c). The Secretary of Commerce appoints the members of the PTAB (except for the Director), including the APJs at issue in this dispute. §§ 3(b)(1), (b)(2)(A), 6(a). [The PTAB] decides whether an invention satisfies the standards for patentability on review of decisions by primary examiners. §§ 6(b)(1), 134(a).

Through a variety of procedures, the PTAB can also take a second look at patents previously issued by the PTO. §§ 6(b)(2)-(4). One such procedure is inter partes review. Established in 2011, inter partes review is an adversarial process by which members of the PTAB reconsider whether existing patents satisfy the novelty and nonobviousness requirements for inventions. Any person— other than the patent owner himself—can file a petition to institute inter partes review of a patent. 35 U.S.C. § 311(a). The Director can institute review only if, among other requirements, he determines that the petitioner is reasonably likely to prevail on at least one challenged patent claim. § 314(a). Congress has committed the decision to institute inter partes review to the Director’s unreviewable discretion. By regulation, the Director has delegated this authority to the PTAB itself. 37 CFR § 42.4(a) (2020).

The Director designates at least three members of the PTAB (typically three APJs) to conduct an inter partes proceeding. 35 U.S.C. § 6(c). The PTAB then assumes control of the process, which resembles civil litigation in many respects. § 316(c). The PTAB must issue a final written decision on all of the challenged patent claims within 12 to 18 months of institution. § 316(a)(11). A party who disagrees with a decision may request rehearing by the PTAB. 35 U.S.C. § 6(c); 37 CFR § 42.71(d).

The PTAB is the last stop for review within the Executive Branch. A party dissatisfied with the final decision may seek judicial review in the Court of Appeals for the Federal Circuit. 35 U.S.C. § 319. At this stage, the Director can intervene before the court to defend or disavow the Board's decision. § 143. The Federal Circuit reviews the PTAB's application of patentability standards de novo and its underlying factual determinations for substantial evidence. *See Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S.Ct. 1365, 1371-1372 671 (2018). Upon expiration of the time to appeal or termination of any appeal, "the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable." § 318(b).

B

Arthrex, Inc. develops medical devices and procedures for orthopedic surgery. In 2015, it secured a patent on a surgical device for reattaching soft tissue to bone without tying a knot, U.S. Patent No. 9,179,907 ('907 patent). Arthrex soon claimed that Smith & Nephew, Inc. and ArthroCare Corp. (collectively, Smith & Nephew) had infringed the '907 patent, and the dispute eventually made its way to inter partes review in the PTO. Three APJs formed the PTAB panel that conducted the proceeding and ultimately concluded that a prior patent application "anticipated" the invention claimed by the '907 patent, so that Arthrex's patent was invalid.

On appeal to the Federal Circuit, Arthrex *** argued that the APJs were principal officers and therefore that their appointment by the Secretary of Commerce was unconstitutional. The Government intervened to defend the appointment procedure.

The Federal Circuit agreed with Arthrex that APJs were principal officers. *** To fix this constitutional violation, the Federal Circuit invalidated the tenure protections for APJs. Making APJs removable at will by the Secretary, the panel held, prospectively "renders them inferior rather than principal officers." The Federal Circuit vacated the PTAB's decision and remanded for a fresh hearing before a new panel of APJs, who would no longer enjoy protection against removal.

The parties then requested review of different aspects of the panel's decision in three petitions for certiorari. *** We granted those petitions to consider whether the PTAB's structure is consistent with the Appointments Clause, and the appropriate remedy if it is not.

II

*** Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department. The question presented is whether the nature of their responsibilities is consistent with their method of appointment. As an initial matter, no party disputes that APJs are officers—not "lesser functionaries" such as employees or contractors —because they "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126, and n. 162 (1976) (per curiam); *see Lucia v. SEC*, 138 S.Ct. 2044, 2052-2054. APJs do so when reconsidering an issued patent, a power that (the Court has held) involves the adjudication of public rights that Congress may appropriately assign to executive officers rather than to the Judiciary. *See Oil States*, 138 S. Ct., at 1374-1375.

The starting point for each party's analysis is our opinion in *Edmond*. There we explained that "[w]hether one is an 'inferior' officer depends on whether he has a superior" other than the President. An inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

In *Edmond*, we applied this test to adjudicative officials within the Executive Branch—specifically, Coast Guard Court of Criminal Appeals judges appointed by the Secretary of Transportation. We held that the judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch: first, the Judge Advocate General, who "exercise[d] administrative oversight over the Court of Criminal Appeals" by prescribing rules of procedure and formulating policies for court-martial cases, and could also "remove a Court of Criminal Appeals judge from his judicial assignment without cause"; and second, the Court of Appeals for the Armed Forces, an executive tribunal that could review the judges' decisions under a de novo standard for legal issues and a deferential standard for factual issues. "What is significant," we concluded, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."

Congress structured the PTAB differently, providing only half of the "divided" supervision to which judges of the Court of Criminal Appeals were subject. Like the Judge Advocate General, the PTO Director possesses powers of "administrative oversight." The Director fixes the rate of pay for APJs, controls the decision whether to institute inter partes review, and selects the APJs to reconsider the validity of the patent. 35 U.S.C. §§ (b)(6), 6(c), 314(a). The Director also promulgates regulations governing inter partes review, issues prospective guidance on patentability issues, and designates past PTAB decisions as "precedential" for future panels. §§ 3(a)(2)(A), 316(a)(4). He is the boss, except when it comes to the one thing that makes the APJs officers exercising "significant authority" in the first place—their power to issue decisions on patentability. In contrast to the scheme approved by *Edmond*, no principal officer at any level within the Executive Branch "direct[s] and supervise[s]" the work of APJs in that regard.

Edmond goes a long way toward resolving this dispute. What was "significant" to the outcome there—review by a superior executive officer—is absent here: APJs have the "power to render a final decision on behalf of the United States" without any such review by their nominal superior or any other principal officer in the Executive Branch. The only possibility of review is a petition for rehearing, but Congress unambiguously specified that "[o]nly the Patent and Trial Appeal Board may grant rehearings." § 6(c). Such review simply repeats the arrangement challenged as unconstitutional in this suit.

This "diffusion of power carries with it a diffusion of accountability." *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 497. The restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge. The principal dissent's observation that "the Director alone has the power to take final action to cancel a patent claim or confirm it," simply ignores the undisputed fact that the Director's "power" in that regard is limited to carrying out the ministerial duty that he "shall issue and publish a certificate" canceling or confirming patent claims he had previously allowed, as dictated by the APJs' final decision. § 318(b); see §§ 131, 153. The chain of command runs not from the Director to his subordinates, but from the APJs to the Director.

The Government and Smith & Nephew assemble a catalog of steps the Director might take to affect the decisionmaking process of the PTAB, despite his lack of any statutory authority to review its decisions. The Government reminds us that it is the Director who decides whether to initiate inter partes review. § 314(a). The Director can also designate the APJs who will decide a particular case and can pick ones predisposed to his views. § 6(c). And the Director, the Government asserts, can even vacate his institution decision if he catches wind of an unfavorable ruling on the way. The "proceeding will have no legal consequences" so long as the Director jumps in before the Board issues its final decision.

If all else fails, the Government says, the Director can intervene in the rehearing process to reverse Board decisions. The Government acknowledges that only the PTAB can grant rehearing under § 6(c). But the Director, according to the Government, could manipulate the composition of the PTAB panel that acts on the rehearing petition. For one thing, he could "stack" the original panel to rehear the case with additional APJs assumed to be more amenable to his preferences. For another, he could assemble an entirely new panel consisting of himself and two other officers appointed by the Secretary—in practice, the Commissioner for Patents and the APJ presently designated as Chief Judge—to decide whether to overturn a decision and reach a different outcome binding on future panels. The Government insists that the Director, by handpicking (and, if necessary, re-picking) Board members, can indirectly influence the course of inter partes review.

That is not the solution. It is the problem. The Government proposes (and the dissents embrace) a roadmap for the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision. Even if the Director succeeds in procuring his preferred outcome, such machinations blur the lines of accountability demanded by the Appointments Clause. The parties are left with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility. ***

Review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision. While the duties of APJs "partake of a Judiciary quality as well as Executive," APJs are still exercising executive power and must remain "dependent upon the President." The activities of executive officers may "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power,'" for which the President is ultimately responsible.

Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor "attribute the Board's failings to those whom he can oversee." *Free Enterprise Fund*, 561 U.S., at 496. APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Edmond*, 520 U.S., at 663. ***

C

*** Early congressional statutes expressly empowered department heads to supervise the work of their subordinates, sometimes by providing for an appeal in adjudicatory proceedings to a Presidentially nominated and Senate confirmed officer. See, e.g., 1 Stat. 66-67 (authorizing appeal of auditor decisions to Comptroller); § 4, 1 Stat. 378 (permitting supervisors of the revenue to issue liquor licenses "subject to the superintendence, control and direction of the department of the treasury"). For the most part, Congress left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit. See J. Mashaw, Creating the Administrative Constitution 254 (2012). ***

Congress has carried the model of principal officer review into the modern administrative state. As the Government forthrightly acknowledged at oral argument, it "certainly is the norm" for principal officers to have the capacity to review decisions made by inferior adjudicative officers. The Administrative Procedure Act, from its inception, authorized agency heads to review such decisions. 5 U.S.C. § 557(b). And "higher-level agency reconsideration" by the agency head is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of § 557(b). Walker & Wasserman, *The New World of Agency Adjudication*, 107 Cal. L. Rev. 141, 157 (2019). To take one example recently discussed by this Court in *Free Enterprise Fund*, the Public Company Accounting Oversight Board can issue sanctions in disciplinary proceedings, but such sanctions are reviewable by its superior, the Securities and Exchange Commission. 15 U.S.C. §§ 7215(c)(4), 7217(c).

The Government and Smith & Nephew point to a handful of contemporary officers who are appointed by heads of departments but who nevertheless purportedly exercise final decisionmaking authority. Several examples, however, involve inferior officers whose decisions a superior executive officer can review or implement a system for reviewing. For instance, the special trial judges in *Freytag v. Commissioner*, 501 U.S. 868 (1991), may enter a decision on behalf of the Tax Court—whose members are nominated by the President and confirmed by the Senate, 26 U.S.C. § 7443(b)—but only "subject to such conditions and review as the court may provide." § 7443A(c); see also 8 CFR § 1003.0(a) (2020) (establishing Executive Office for Immigration Review under control of Attorney General). And while the Board of Veteran Affairs does make the final decision within the Department of Veteran Affairs, 38 U.S.C. §§ 7101, 7104(a), its decisions are reviewed by the Court of Appeals for Veterans Claims, an Executive Branch entity, §§ 7251, 7252(a). Other examples are potentially distinguishable, such as the Benefits Review Board members who appear to serve at the pleasure of the appointing department head. See 33 U.S.C. § 921(c).

* * *

We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an inferior office. *** In reaching this conclusion, we do not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond*, 520 U.S., at 661. Many decisions by inferior officers do not bind the Executive

Branch to exercise executive power in a particular manner, and we do not address supervision outside the context of adjudication. Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal.

III

We turn now to the appropriate way to resolve this dispute given this violation of the Appointments Clause. In general, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by disregarding the "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-329 (2006). This approach derives from the Judiciary's "negative power to disregard an unconstitutional enactment" in resolving a legal dispute. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). In a case that presents a conflict between the Constitution and a statute, we give "full effect" to the Constitution and to whatever portions of the statute are "not repugnant" to the Constitution, effectively severing the unconstitutional portion of the statute. *Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492, 526 (1829) (Marshall, C. J.). This principle explains our "normal rule that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, (1985).

Arthrex asks us to hold the entire regime of inter partes review unconstitutional. In its view, any more tailored declaration of unconstitutionality would necessitate a policy decision best left to Congress in the first instance. Because the good cannot be separated from the bad, Arthrex continues, the appropriate remedy is to order outright dismissal of the proceeding below. ***

In our view, however, the structure of the PTO and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director. Congress vested the Director with the "powers and duties" of the PTO, 35 U.S.C. § 3(a)(1), tasked him with supervising APJs, § 3(a)(2)(A), and placed the PTAB "in" the PTO, § 6(a). *** While shielding the ultimate decisions of the 200-plus APJs from review, Congress also provided the Director means of control over the institution and conduct of inter partes review. 35 U.S.C. §§ 314(a), 316(a). In every respect save the insulation of their decisions from review within the Executive Branch, APJs appear to be inferior officers—an understanding consistent with their appointment in a manner permissible for inferior but not principal officers. ***

Section 6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. Because Congress has vested the Director with the "power and duties" of the PTO, § 3(a)(1), the Director has the authority to provide for a means of reviewing PTAB decisions. See also §§ 3(a)(2)(A), 316(a)(4). The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB. ***

To be clear, the Director need not review every decision of the PTAB. What matters is that the Director have the discretion to review decisions rendered by APJs. In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.

The judgment of the United States Court of Appeals for the Federal Circuit is vacated, and the cases are remanded for further proceedings consistent with this opinion.

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, concurring in the judgment in part and dissenting in part.

[I]n my view, the Court should interpret the Appointments Clause as granting Congress a degree of leeway to establish and empower federal offices. Neither that Clause nor anything else in the Constitution describes the degree of control that a superior officer must exercise over the decisions of an inferior officer. To the contrary, the Constitution says only that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, ... in the Heads of Departments." Art. II, § 2, cl. 2. The words "by Law ... as they think proper" strongly suggest that Congress has considerable freedom to determine the nature of an inferior officer's job, and that courts ought to respect that judgment. ***

Congress' scheme is consistent with our Appointments Clause precedents. They require only that an inferior officer be "directed and supervised at some level," *Edmond v. United States*, 520 U.S. 651, 663 (1997), and the Administrative Patent Judges (APJs) are supervised by two separate Senate-confirmed officers, the Secretary of Commerce and the Director of the Patent and Trademark Office (PTO). Even were I to assume, with the majority, that the Director must have power to "control" the APJs, the statutes grant the Director considerable control. As the Court recognizes, the Director "fixes" their "rate[s] of pay," decides "whether to institute inter partes review," "selects the APJ's" who will preside at each particular proceeding, "promulgates regulations governing inter partes review," "issues prospective guidance on patentability issues," and "designates past PTAB decisions as 'precedential' for future panels." All told, the Director maintains control of decisions insofar as they determine policy. The Director cannot rehear and decide an individual case on his own; but Congress had good reason for seeking independent Board determinations in those cases— cases that will apply, not create, Director-controlled policy. ***

Most agencies (and courts for that matter) have the power to reconsider an earlier decision, changing the initial result if appropriate. Congress believed that the PTO should have that same power and accordingly created procedures for reconsidering issued patents. Congress also believed it important to strengthen the reconsideration power with procedural safeguards that would often help those whom the PTO's initial decision had favored, such as the requirement that review be available only when there is a "reasonable likelihood" that the patent will be invalid. 35 U.S.C. § 314(a). Given the technical nature of patents, the need for expertise, and the importance of avoiding political interference, Congress chose to grant the APJs a degree of independence. These considerations set forth a reasonable legislative objective sufficient to justify the restriction upon the Director's authority that Congress imposed. ***

The Court does not take these realities into account. Instead, for the first time, it examines the APJs' office function by function and finds, in *Edmond*, a judicially created rule: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in [inter partes review] proceeding[s]." ***

[T]he Constitution is not a detailed tax code, and for good reason. The Nation's desires and needs change, sometimes over long periods of time. In the 19th century the Judiciary may not have foreseen the changes that produced the New Deal, along with its accompanying changes in the nature of the tasks that Government was expected to perform. We may not now easily foresee just what kinds of tasks present or future technological changes will call for. The Founders wrote a Constitution that they believed was flexible enough to respond to new needs as those needs developed and changed over the course of decades or centuries. At the same time, they designed a Constitution that would protect certain basic principles. A principle that prevents Congress from affording inferior level adjudicators some decisionmaking independence was not among them. ***

For the reasons I have set forth above, I do not agree with the Court's basic constitutional determination. For purposes of determining a remedy, however, I recognize that a majority of the Court has reached a contrary conclusion. On this score, I believe that any remedy should be tailored to the constitutional violation. Under the Court's new test, the current statutory scheme is defective only because the APJ's decisions are not reviewable by the Director alone. The Court's remedy addresses that specific problem, and for that reason I agree with its remedial holding. ***

FCC v. Prometheus Radio Project
141 S. Ct. 1150 (2021)

Justice KAVANAUGH delivered the opinion of the Court.

Under the Communications Act of 1934, the Federal Communications Commission possesses broad authority to regulate broadcast media in the public interest. Exercising that statutory authority, the FCC has long maintained strict ownership rules. The rules limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. Under Section 202(h) of the Telecommunications Act of 1996, the FCC must review the ownership rules every four years, and must repeal or modify any ownership rules that the agency determines are no longer in the public interest.

In a 2017 order, the FCC concluded that three of its ownership rules no longer served the public interest. The FCC therefore repealed two of those rules—the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule. And the Commission modified the third—the Local Television Ownership Rule. In conducting its public interest analysis under Section 202(h), the FCC considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets. The FCC concluded that the three rules were no longer necessary to promote competition, localism, and viewpoint diversity, and that changing the rules was not likely to harm minority and female ownership.

A non-profit advocacy group known as Prometheus Radio Project, along with several other public interest and consumer advocacy groups, petitioned for review, arguing that the FCC's decision was arbitrary and capricious under the Administrative Procedure Act. *** On this record, we conclude that the FCC's 2017 order was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard.

I

The Federal Communications Commission possesses broad statutory authority to regulate broadcast media "as public convenience, interest, or necessity requires." 47 U.S.C. § 303; see also § 309(a). Exercising that authority, the FCC has historically maintained several strict ownership rules. The rules limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. The FCC has long explained that the ownership rules seek to promote competition, localism, and viewpoint diversity by ensuring that a small number of entities do not dominate a particular media market.

This case concerns three of the FCC's current ownership rules. The first is the Newspaper/Broadcast Cross-Ownership Rule. Initially adopted in 1975, that rule prohibits a single entity from owning a radio or television broadcast station and a daily print newspaper in the same media market. The second is the Radio/Television Cross-Ownership Rule. Initially adopted in 1970, that rule limits the number of combined radio stations and television stations that an entity may own in a single market. And the third is the Local Television Ownership Rule. Initially adopted in 1964, that rule restricts the number of local television stations that an entity may own in a single market.

The FCC adopted those rules in an early-cable and pre-Internet age when media sources were more limited. By the 1990s, however, the market for news and entertainment had changed dramatically. Technological advances led to a massive increase in alternative media options, such as cable television and the Internet. Those technological advances challenged the traditional dominance of daily print newspapers, local radio stations, and local television stations.

In 1996, Congress passed and President Clinton signed the Telecommunications Act. To ensure that the FCC's ownership rules do not remain in place simply through inertia, Section 202(h) of the Act directs the FCC to review its ownership rules every four years to determine whether those rules remain "necessary in the public interest as the result of competition." § 202(h), 110 Stat. 111-112, as amended § 629, 118 Stat. 99-100, note following 47 U.S.C. § 303. After conducting each quadrennial Section 202(h) review, the FCC "shall repeal or modify" any rules that it determines are "no longer in the public interest." *Ibid.* Section 202(h) establishes an iterative process that requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace.

Soon after Section 202(h) was enacted, the FCC stated that the agency's traditional public interest goals of promoting competition, localism, and viewpoint diversity would inform its Section 202(h) analyses. The FCC has also said that, as part of its public interest analysis under Section 202(h), it would assess the effects of the ownership rules on minority and female ownership.

Since 2002, the Commission has repeatedly sought to change several of its ownership rules—including the three rules at issue here—as part of its Section 202(h) reviews. But for the last 17 years, the Third Circuit has rejected the FCC's efforts as unlawful under the APA. As a result, those three ownership rules exist in substantially the same form today as they did in 2002.

The current dispute arises out of the FCC's most recent attempt to change its ownership rules. In its quadrennial Section 202(h) order issued in 2016, the FCC concluded that the Newspaper/Broadcast Cross-Ownership, Radio/Television Cross-Ownership, and Local Television Ownership Rules remained necessary to serve the agency's public interest goals of promoting "competition and a diversity of viewpoints in local markets." The FCC therefore chose to retain the existing rules with only "minor modifications."

A number of groups sought reconsideration of the 2016 Order. In 2017, the Commission (with a new Chair) granted reconsideration. On reconsideration, the FCC performed a new public interest analysis. The agency explained that rapidly evolving technology and the rise of new media outlets—particularly cable and Internet —had transformed how Americans obtain news and entertainment, rendering some of the ownership rules obsolete. As a result of those market changes, the FCC concluded that the three ownership rules no longer served the agency's public interest goals of fostering competition, localism, and viewpoint diversity. The FCC explained that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers.

The Commission also considered the likely impact of any changes to its ownership rules on minority and female ownership. The FCC concluded that repealing or modifying the three ownership rules was not likely to harm minority and female ownership.

Based on its analysis of the relevant factors, the FCC decided to repeal the Newspaper/Broadcast and Radio/Television Cross-Ownership Rules, and to modify the Local Television Ownership Rule.

Prometheus and several other public interest and consumer advocacy groups petitioned for review, arguing that the FCC's decision to repeal or modify those three rules was arbitrary and capricious under the APA.

The Third Circuit vacated the 2017 Reconsideration Order. The court did not dispute the FCC's conclusion that those three ownership rules no longer promoted the agency's public interest goals of competition, localism, and viewpoint diversity. But the court held that the record did not support the FCC's conclusion that the rule changes would "have minimal effect" on minority and female ownership. The court directed the Commission, on remand, to "ascertain on record evidence" the effect that any rule changes were likely to have on minority and female ownership, "whether through new empirical research or an in-depth theoretical analysis." ***

The FCC and a number of industry groups petitioned for certiorari. We granted certiorari.

II

*** Prometheus argues that the FCC's predictive judgment regarding minority and female ownership was arbitrary and capricious under the APA. See 5 U.S.C. § 706(2)(A). We disagree.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-514 (2009); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

In its 2017 Reconsideration Order, the FCC analyzed the significant record evidence of dramatic changes in the media market over the past several decades. After thoroughly examining that record evidence, the Commission determined that the Newspaper/Broadcast Cross-Ownership, Radio/Television Cross-Ownership, and Local Television Ownership Rules were no longer necessary to serve the agency's public interest goals of promoting competition, localism, and viewpoint diversity. The FCC therefore concluded that repealing the two cross-ownership rules and modifying the Local Television Ownership Rule would fulfill "the mandates of Section 202(h)" and "deliver on the Commission's promise to adopt broadcast ownership rules that reflect the present, not the past."

In analyzing whether to repeal or modify those rules, the FCC also addressed the possible impact on minority and female ownership. The Commission explained that it had sought public comment on the issue of minority and female ownership during multiple Section 202(h) reviews, but "no arguments were made" that would lead the FCC to conclude that the existing rules were "necessary to protect or promote minority and female ownership." Indeed, the FCC stated that it had received several comments suggesting the opposite—namely, comments suggesting that eliminating the Newspaper/Broadcast Cross-Ownership Rule "potentially could increase minority ownership of newspapers and broadcast stations." Based on the record, the Commission concluded that repealing or modifying the three rules was not likely to harm minority and female ownership.

In challenging the 2017 Reconsideration Order in this Court, Prometheus does not seriously dispute the FCC's conclusion that the existing rules no longer serve the agency's public interest goals of competition, localism, and viewpoint diversity. Rather, Prometheus targets the FCC's assessment that altering the ownership rules was not likely to harm minority and female ownership. ***

Prometheus initially points to two data sets on which the FCC relied in the 2016 Order and the 2017 Reconsideration Order. Those data sets measured the number of minority-owned media outlets before and after the Local Television Ownership Rule and the Local Radio Ownership Rule were relaxed in the 1990s. Together, the data sets showed a slight decrease in the number of minority-owned media outlets immediately after the rules were relaxed, followed by an eventual increase in later years. The 2016 Order cited those data sets and explained that the number of minority-owned media outlets had increased over time. But the FCC added that there was no record evidence suggesting that past changes to the ownership rules had caused minority ownership levels to increase.

In the 2017 Reconsideration Order, the FCC referred to the 2016 Order's analysis of those data sets. The FCC stated that data in the record suggested that the previous relaxations of the Local Television Ownership and Local Radio Ownership Rules "have not resulted in reduced levels of minority and female ownership." The FCC further explained that "no party" had "presented contrary evidence or a compelling argument demonstrating why" altering the rules would have a different impact today. The FCC therefore concluded that "the record provides no information to suggest" that eliminating or modifying the existing rules would harm minority and female ownership.

Prometheus insists that the FCC's numerical comparison was overly simplistic and that the data sets were materially incomplete. But the FCC acknowledged the gaps in the data. And despite repeatedly asking for data on the issue, the Commission received no other data on minority ownership and no data at all on female ownership levels. The FCC therefore relied on the data it had (and the absence of any countervailing evidence) to predict that changing the rules was not likely to harm minority and female ownership.

Prometheus also asserts that countervailing —and superior—evidence was in fact in the record, and that the FCC ignored that evidence. Prometheus identifies two studies submitted to the FCC by Free Press, a media reform group. Those studies purported to show that past relaxations of the ownership rules and increases in media market concentration had led to decreases in minority and female ownership levels. According to

Prometheus, the Free Press studies undercut the FCC's prediction that its rule changes were unlikely to harm minority and female ownership.

The FCC did not ignore the Free Press studies. The FCC simply interpreted them differently. In particular, in the 2016 Order, the Commission explained that its data sets and the Free Press studies showed the same long-term increase in minority ownership after the Local Television Ownership and Local Radio Ownership Rules were relaxed. Moreover, as counsel for Prometheus forthrightly acknowledged at oral argument, the Free Press studies were purely backward-looking, and offered no statistical analysis of the likely future effects of the FCC's proposed rule changes on minority and female ownership.

In short, the FCC's analysis was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard. The FCC considered the record evidence on competition, localism, viewpoint diversity, and minority and female ownership, and reasonably concluded that the three ownership rules no longer serve the public interest. The FCC reasoned that the historical justifications for those ownership rules no longer apply in today's media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers. The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.

To be sure, in assessing the effects on minority and female ownership, the FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. *Cf. Fox Television*, 556 U.S., at 518-520; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). And nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h). Here, the FCC repeatedly asked commenters to submit empirical or statistical studies on the relationship between the ownership rules and minority and female ownership. Despite those requests, no commenter produced such evidence indicating that changing the rules was likely to harm minority and female ownership. In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.

In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA.

* * *

We reverse the judgment of the U. S. Court of Appeals for the Third Circuit.

United States v. Texas
143 S. Ct. 1964 (2023)

Justice KAVANAUGH, delivered the opinion of the Court.

In 2021, after President Biden took office, the Department of Homeland Security issued new Guidelines for immigration enforcement. The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example. Texas and Louisiana sued the Department of Homeland Security. According to those States, the Department's new Guidelines violate federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal.

The States essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests. But this Court has long held "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R. S. v. Richard D.*, 410 U. S. 614, 619 (1973). Consistent with that fundamental Article III principle, we conclude that the States lack Article III standing to bring this suit.

I

In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, § 1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government.

The U. S. District Court for the Southern District of Texas found that the States would incur costs as a result of the Department's Guidelines. Based on those costs, the District Court determined that the States have standing. On the merits, the District Court ruled that the Guidelines are unlawful, and vacated the Guidelines. The U. S. Court of Appeals for the Fifth Circuit declined to stay the District Court's judgment. This Court granted certiorari before judgment.

II

Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes.

As this Court's precedents amply demonstrate, Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." The principle of Article III standing is "built on a single basic idea—the idea of separation of powers." Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches."

A ***

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. *See Lujan*, 504 U. S., at 560-561. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the alleged injury must be legally and judicially cognizable." That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. In adhering to that core principle, the Court has examined "history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U. S. 269, 274 (2008).

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

The leading precedent is *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution . . . of another." The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. *See id.*, at 617, 619; *Castle Rock v. Gonzales*, 545 U. S. 748, 760-761, 767, n. 13 (2005); *cf. Sure-Tan, Inc. v. NLRB*, 467 U. S. 883, 897 (1984) (citing *Linda R. S.* principle in immigration context and stating that the petitioners there had "no judicially cognizable interest in procuring enforcement of the immigration laws" by the Executive Branch). And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise. A "telling indication of the severe constitutional problem" with the States' assertion of standing to bring this lawsuit "is the lack of historical precedent" supporting it. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) (internal quotation marks omitted). ***

B

Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.

To begin with, when the Executive Branch elects not to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. ***

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to the President and provides that the President "shall take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC*, 594 U. S., at ___ (slip op., at 13). The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.

That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only "normal domestic law enforcement priorities" but also "foreign-policy objectives." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 490-491 (1999). In line with those principles, this Court has declared that the Executive Branch also retains discretion over whether to remove a noncitizen from the United States. *Arizona v. United States*, 567 U. S. 387, 396 (2012) ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all").

In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. *** That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by § 1226(c) and § 1231(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since § 1226(c) and § 1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. *Cf. Heckler v. Chaney*, 470 U. S. 821, 830-832 (1985); *Lincoln v. Vigil*, 508 U. S. 182, 190-192 (1993). Therefore, in both Article III cases and Administrative Procedure Act cases, this Court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions.

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers "contemplates a more restricted role for Article III courts." *Raines*, 521 U. S., at 828.

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause. In those cases, however, a party typically seeks to prevent his or her own prosecution, not to mandate additional prosecutions against other possible defendants.

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates de facto injuries to the status of legally cognizable injuries redressable by a federal court. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.

Here, however, the relevant statutes do not supply such specific authorization. The statutes, even under the States' own reading, simply say that the Department "shall" arrest certain noncitizens. *** For an arrest mandate to be enforceable in federal court, we would need at least a "stronger indication" from Congress that judicial review of enforcement discretion is appropriate—for example, specific authorization for particular plaintiffs to sue and for federal courts to order more arrests or prosecutions by the Executive. ***

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U. S., at 833, n. 4 (internal quotation marks omitted); see id., at 839 (Brennan, J., concurring); *cf.* 5 U. S. C. § 706(1). So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing. But the States have not advanced a *Heckler*-style "abdication" argument in this case or argued that the Executive has entirely ceased enforcing the relevant statutes. Therefore, we do not analyze the standing ramifications of such a hypothetical scenario.

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. *Cf. Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U. S. ___, ___-___ (2020) (slip op., at 11-12) (benefits such as work authorization and Medicare eligibility accompanied by nonenforcement meant that the policy was "more than simply a non-enforcement policy"); *Texas v. United States*, 809 F. 3d 134, 154 (CA5 2015) (Linda R. S. "concerned only nonprosecution," which is distinct from "both nonprosecution and the conferral of benefits"), *aff'd by an equally divided* Court, 579 U. S. 547 (2016). Again, we need not resolve the Article III consequences of such a policy.

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. But this case does not concern a detention policy, so we do not address the issue here.

D

The discrete standing question raised by this case rarely arises because federal statutes that purport to *require* the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive's Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law. Indeed, the States cite no similarly worded federal laws. This case therefore involves both a highly unusual provision of federal law and a highly unusual lawsuit.

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

This case is categorically different, however, because it implicates only one discrete aspect of the executive power— namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.[6]

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[6] As part of their argument for standing, the States also point to *Massachusetts v. EPA*, 549 U.S. 497 (2007). Putting aside any disagreements that some may have with *Massachusetts v. EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion. Id., at 520, 526; see also id., at 527 (noting that there are "key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action" and that "an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review").

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes—here, § 1226(c) and § 1231(a)(2). In other words, the question of reviewability is different from the question of legality. We take no position on whether the Executive Branch here is complying with its legal obligations under § 1226(c) and § 1231(a)(2). We hold only that the federal courts are not the proper forum to resolve this dispute.

On that point, even though the federal courts lack Article III jurisdiction over this suit, other forums remain open for examining the Executive Branch's arrest policies. For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance. ***

[B]ecause the States lack Article III standing, the District Court did not have jurisdiction. We reverse the judgment of the District Court.

Justice GORSUCH, with whom JUSTICE THOMAS and JUSTICE BARRETT join, concurring in the judgment. ***

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied "'by a favorable decision.'" *Lujan*, 504 U. S., at 561. Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them.

It is not available because of 8 U. S. C. § 1252(f)(1). There, Congress provided that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of " certain immigration laws, including the very laws the States seek to have enforced in this case. If there were any doubt about how to construe this command, we resolved it in *Garland v. Aleman Gonzalez*, 596 U. S. ___ (2022). In that case, we held that § 1252(f)(1) "prohibits lower courts from . . . order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.

The district court thought it could sidestep § 1252(f)(1). Instead of issuing an injunction, it purported to "vacate" the Guidelines pursuant to § 706(2) of the

Administrative Procedure Act (APA), 5 U. S. C. § 706(2). Vacatur, as the district court understood it, is a distinct form of relief that operates directly on agency action, depriving it of legal force or effect. And vacatur, the district court reasoned, does not offend § 1252(f)(1), because it does not entail an order directing any federal official to do anything. The States embrace this line of argument before us. ***

[But a] vacatur order still does nothing to redress the States' injuries. The Guidelines merely advise federal officials about how to exercise their prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal. A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion. Nor does such a decree require federal officials to change how they exercise that discretion in the Guidelines' absence. ***

Beyond these redressability problems may lie still another. *** The federal government vigorously disputes [that the APA empowers a district court to vacate agency action at all]. The reasons the government offers are plenty and serious enough to warrant careful consideration. ***

Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally. *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."); *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (CA2 1930) (L. Hand, J.) ("[A] court of equity . . . cannot lawfully enjoin the world at large."); *see also Trump v. Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 6). This tracks the founding-era understanding that courts "render a judgment or decree upon the rights of the litigant[s]." *Rhode Island v. Massachusetts*, 12 Pet. 657, 718 (1838). ***

Despite these foundational principles, in recent years a number of lower courts have asserted the authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them. *** Today's case presents a variation on the theme. The district court ordered "wholesale vacatur" of the Guidelines, rendering them inoperable with respect to any person anywhere. As authority for its course, the district court cited § 706(2) of the APA. That provision does not say anything about "vacating" agency action ("wholesale" or otherwise). Instead, it authorizes a reviewing court to "set aside" agency action. Still, from those two words alone, the district court thought the power to nullify the Guidelines with respect to anyone anywhere surely follows.

Color me skeptical. ***

Begin with the words "set aside" in isolation. If they might suggest to some a power to "vacate" agency action in the sense of rendering it null and void, just as naturally they might mean something else altogether. They might simply describe what a court usually does when it finds a federal or state statute unconstitutional, or a state law preempted by a federal one. Routinely, a court will disregard offensive provisions like these and proceed to decide the parties' dispute without respect to them. In *Dennis v. United States*, 341 U. S. 494 (1951), for example, Justice Frankfurter observed that "[w]e are to set aside the judgment of those whose duty it is to legislate only if " the Constitution requires it. Id., at 525 (concurring opinion). Justice Frankfurter hardly meant to suggest the Court had the power to erase statutes from the books. ***

There are many reasons to think § 706(2) uses "set aside" to mean "disregard" rather than "vacate." For one thing, at the time of the APA's adoption, conventional wisdom regarded agency rules as "quasi-legislative" in nature. *See Humphrey's Executor v. United States*, 295 U. S. 602, 624, 628 (1935); *see also* D. Currie & F. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 40 (1975). And federal courts have never enjoyed the power to "vacate" legislation. Instead, they possess "little more than the negative power to disregard an unconstitutional enactment." *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923). Reading "set aside" to mean "disregard" ensures parallel judicial treatment of statutes and rules.

For another thing, the term "set aside" appears in § 706 of the APA. That section is titled "Scope of review," a title it has borne since the law's enactment in 1946. 60 Stat. 243. And ordinarily, when we think about the scope of a court's review, we do not think about the remedies the court may authorize after reaching its judgment on the merits. Instead, we think about the court's decisional process leading up to that judgment. Understanding "set aside" as a command to disregard an unlawful rule in the decisional process fits perfectly within this design. Understanding the phrase as authorizing a remedy does not.

What follows in § 706 appears to confirm the point. The statute begins by providing that, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action." Exactly as expected, we find an instruction about the decisional process—one requiring the court to apply "de novo review on questions of law" as it considers the parties' arguments in the course of reaching its judgment. *Kisor v. Wilkie*, 588 U. S. ___, ___ (2019) (GORSUCH, J., concurring in judgment) (slip op., at 15) (internal quotation marks omitted). Nothing here speaks to remedies.

The remaining statutory language is more of the same. Section 706 goes on to instruct that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary," "capricious," "contrary to constitutional right," "in excess of " statutory authority, or "unsupported by substantial evidence." § 706(2). Looking at the provision as a whole, rather than focusing on two words in isolation, we see further evidence that it governs a court's scope of review or decisional process. The statute tells judges to resolve the cases that come to them without regard to deficient agency action, findings, or conclusions—an instruction entirely consistent with the usual "negative power" of courts "to disregard" that which is unlawful. *Mellon*, 262 U.S., at 488.

Other details are telling too. Consider the latter part of § 706(2)'s directive to "set aside agency action, findings, and conclusions." The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U. S. C. § 551(13). A court can disregard any of those things. But what would it even mean to say a court must render null and void an agency's failure to act? Notice, too, the language about "findings." Often, judges disregard factual findings unsupported by record evidence and resolve the case at hand without respect to them. *See* Fed. Rule Civ. Proc. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous."). None of that means we may pretend to rewrite history and scrub any trace of faulty findings from the record.

Consider as well the larger statutory context. Section 702 restricts judicial review to "person[s]" who have "suffer[ed] legal wrong because of agency action, or [been] adversely affected or aggrieved by agency action." The provision also instructs that "any mandatory or injunctive decree shall specify the Federal officer or officers . . . personally responsible for compliance." Here, it seems, Congress nodded to traditional standing rules and remedial principles. Yet under the district court's reading, we must suppose Congress proceeded just a few paragraphs later to plow right through those rules and empower a single judge to award a novel form of relief affecting parties and nonparties alike.

Then there is § 703. That is where the APA most clearly discusses remedies. Section 703 authorizes aggrieved persons to bring "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Conspicuously missing from the list is vacatur. And what exactly would a "form of legal action" seeking vacatur look like anyway? Would it be a creature called a "writ of vacatur"? Nobody knows (or bothers to tell us). Nor is it apparent why Congress would have listed most remedies in § 703 only to bury another (and arguably the most powerful one) in a later section addressed to the scope of review.

As always, there are arguments on the other side of the ledger, and the States tee up several. They first reply that § 706(2) must allow vacatur of agency action because the APA models judicial review of agency action on appellate review of judgments, and appellate courts sometimes vacate judgments. But just because "Congress may sometimes refer to collateral judicial review of executive action as 'an appeal' . . . does not make it an 'appeal' akin to that taken from the district court to the court of appeals." *Garland v. Ming Dai*, 593 U. S. ___, ___ (2021) (slip op., at 9). Nor does any of that tell us in which respects the APA models judicial review of agency action on appellate review of lower court judgments. According to one scholar, the "salient" similarities between appellate review and judicial review of agency action concern the standards of review—in both types of proceedings, a reviewing court engages in a more rigorous review of legal questions and a more deferential review of factual findings. T. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 940-941 (2011). None of that has to do with remedies; once again, it concerns a court's scope of review or decisional process.

The States next invoke § 706(1) and § 705. The former provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." The latter says courts "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." The States insist that "[i]t would be illogical" for the APA to authorize these remedies but not vacatur. Is it so clear, though, that § 706(1) and § 705 authorize remedies? Section 706(1) does seem to contemplate a remedy. But it's one § 703 mentions—mandatory injunctions. So § 706(1) might not authorize a remedy as much as confirm the availability of a traditional remedy to address agency inaction. The same could be said about § 705; it might just confirm courts' authority to issue traditional equitable relief pending judicial review.

Cf. Sampson v. Murray, 415 U. S. 61, 69, n. 15 (1974) (explaining that § 705 was "primarily intended to reflect existing law").

The States also direct us to scholarship that in turn purports to identify a few instances of federal courts "setting aside" agency action in the years leading up to the APA. It is not obvious, however, that these few cases stand for so much. In two of them, this Court *upheld* the agency action in question and thus had no occasion to opine on appropriate relief. *See Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 486-487 (1919); *The Assigned Car Cases*, 274 U. S. 564, 584 (1927). In a third case, the plaintiff sought "to enjoin enforcement of " an order of the Federal Communications Commission. *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, 408 (1942). That is a claim for traditional equitable relief, and indeed, the Court held that the complaint "state[d] a cause of action in equity" and remanded for further proceedings. A fourth case, involving an order of the Interstate Commerce Commission, seems of a piece. There, a district court held the Commission's order invalid and "restrain[ed] . . . enforcement" of it. *Baltimore & Ohio R. Co. v. United States*, 5 F. Supp. 929, 936 (ND Ohio 1933). This Court affirmed. *See United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454 (1935). True, this Court described the case as an "appeal from [a] decree . . . setting aside" the Commission's order. But the fact that the lower court had only restrained enforcement of the order goes to show that "set aside" did not then (and does not now) necessarily translate to "vacate." ***

In raising questions about the district court's claim that § 706(2) authorizes vacatur of agency action, I do not pretend that the matter is open and shut. *** But the questions here are serious ones. And given the volume of litigation under the APA, this Court will have to address them sooner or later. Until then, we would greatly benefit from the considered views of our lower court colleagues. ***

Biden v. Nebraska
143 S. Ct. 2355 (2023)

To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958—up to a total of $1,000 per student each year. National Defense Education Act of 1958, 72 Stat. 1584. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Letter from Congressional Budget Office to Members of Congress, p. 3 (Sept. 26, 2022) (CBO Letter). Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

I

A

The Higher Education Act of 1965 (Education Act) was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education." 20 U. S. C. §1070(a). To that end, Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans. Direct Loans are, as the name suggests, made directly to students and funded by the federal fisc; they constitute the bulk of the Federal Government's student lending efforts. *See* §1087a *et seq*. The Government also administers Perkins Loans— government-subsidized, low-interest loans made by schools to students with significant financial need—and Federal Family Education Loans, or FFELs—loans made by private lenders and guaranteed by the Federal Government. *See* §§1071 *et seq*., 1087aa *et seq*. While FFELs and Perkins Loans are no longer issued, many remain outstanding. §§1071(d), 1087aa(b).

The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and—for undergraduate students with financial need—government payment of interest while the borrower is in school.

The Education Act specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default. See §§1077, 1080, 1087e, 1087dd. It also authorizes the Secretary to cancel or reduce loans, but only in certain limited circumstances and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§1078-10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." §1087(a)(1). Bankrupt borrowers may have their loans forgiven. §1087(b). And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. §1087(c).

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis—particularly those who served in the military—would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks. 115 Stat. 2386. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. That Act extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks. By its terms, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1).

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." §1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§1098ee(2)(C)-(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." §1098ee(4).

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. Among other changes, the Secretary waived the requirement that "affected individuals" must "return or repay an overpayment" of certain grant funds erroneously disbursed by the Government, , and the requirement that public service work must be uninterrupted to qualify an "affected individual" for loan cancellation. Additional adjustments were made in 2012, with similar limited effects.

But the Secretary took more significant action in response to the COVID-19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994, 85 Fed. Reg. 15337-15338 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. See Dept. of Ed., Breaking News: Testing Waivers and Student Loan Relief (Mar. 20, 2020). The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. 134 Stat. 404-405. Before that extension expired, the President directed the Secretary, "[i]n light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act—this time to reduce and eliminate student debts directly. [The Department] determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic." Upon receiving this new opinion, the Secretary issued his proposal to cancel student debt under the HEROES Act. Two months later, he published the required notice of his "waivers and modifications" in the Federal Register.

The terms of the debt cancellation plan are straightforward: For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower ("modif[ying] the provisions of" 20 U. S. C. §§1087, 1087dd(g); 34 CFR pt. 647, subpt. D (2022); 34 CFR §§682.402, 685.212). Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation. Eligible loans include "Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department." The Department of Education estimates that about 43 million borrowers qualify for relief, and the Congressional Budget Office estimates that the plan will cancel about $430 billion in debt principal.

B

Six States moved for a preliminary injunction, claiming that the plan exceeded the Secretary's statutory authority. The District Court held that none of the States had standing to challenge the plan and dismissed the suit. The States appealed, and the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal. ***

II ***

Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it. *** Because we conclude that the Secretary's plan harms MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.

Missouri created MOHELA as a nonprofit government corporation to participate in the student loan market. Mo. Rev. Stat. §173.360 (2016). *** Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. Brief for Respondents 16. This financial harm is an injury in fact directly traceable to the Secretary's plan ***.

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. §173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college. *Ibid.*; *see Todd v. Curators of University of Missouri*, 347 Mo. 460, 464, 147 S. W. 2d 1063, 1064 (1941) ("Our constitution recognizes higher education as a governmental function."). To fulfill this public purpose, the Authority is empowered by the State to invest in or finance student loans, including by issuing bonds. §§173.385(1)(6)-(7). It may also service loans and collect "reasonable fees" for doing so. §§173.385(1)(12), (18). Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students. ***

With Article III satisfied, we turn to the merits.

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1). That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." That is how the word is ordinarily used. *See, e.g.*, Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID-19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations.

Here, the Secretary purported to "modif[y] the provisions of" two statutory sections and three related regulations governing student loans. The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U. S. C. §§1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§1087(a)-(d), 1087dd(g). The corresponding regulatory provisions detailed rules and procedures for such discharges. They also defined the terms of the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance. See 34 CFR §§682.402, 685.212; 34 CFR pt. 674, subpt. D.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. ***

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals.

Here, the Secretary does not identify any provision that he is actually waiving. No specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"—as used in the HEROES Act—cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower. Tr. of Oral Arg. 9, 64. Contrast 20 U. S. C. §1091b(b)(2)(D) (allowing the Secretary to "waive the amounts that students are required to return" in specified circumstances of overpayment by the Government). Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply "waiv[es] the elements of the discharge and cancellation provisions that are inapplicable in this [debt cancellation] program that would limit eligibility to other contexts."

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U. S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text. ***

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope."[6] ***

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* involved similar concerns over the exercise of administrative power. 597 U. S. ___ (2022). That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority."

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions "perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years." That waiver simply eased the requirement that service be uninterrupted to qualify for the public service loan forgiveness program. In sum, "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of

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[6] The States further contend that the Secretary's program violates the requirement in the HEROES Act that any waivers or modifications be "necessary to ensure that . . . affected individuals are not placed in a worse position financially in relation to" federal financial assistance. 20 U.S.C. § 1098bb(a)(2)(A). While our decision does not rest upon that reasoning, we note that the Secretary faces a daunting task in showing that cancellation of debt principal is "necessary to ensure" that borrowers are not placed in "worse position[s] financially in relation to" their loans, especially given the Government's prior determination that pausing interest accrual and loan repayments would achieve that end.

the Secretary's program. . *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S., at ___ (slip op., at 7).

The "'economic and political significance'" of the Secretary's action is staggering by any measure. *West Virginia*, 597 U. S., at ___ (slip op., at 17) (quoting *Brown & Williamson*, 529 U. S., at 160). Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. App. 108. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 6). It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159).

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program" that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___ (slip op., at 27). Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022. ***

The Secretary *** objects that its principles apply only in cases concerning "agency action[s] involv[ing] the power to regulate, not the provision of government benefits." In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers."

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U. S. Const., Art. I, §9, cl. 7; *see also Office of Personnel Management v. Richmond*, 496 U. S. 414, 427 (1990) (the Appropriations Clause is "a most useful and salutary check upon profusion and extravagance" (internal quotation marks omitted)). It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in *West Virginia*, experience shows that major questions cases "have arisen from all corners of the administrative state," and administrative action resulting in the conferral of benefits is no exception to that rule. 597 U. S., at ___ (slip op., at 17). In *King v. Burwell*, 576 U. S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." Because the interpretation of the provision was "a question of deep 'economic and political significance' that is central to [the] statutory scheme," we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here. ***

The judgment of the District Court for the Eastern District of Missouri is reversed, and the case is remanded for further proceedings consistent with this opinion. The Government's application to vacate the Eighth Circuit's injunction is denied as moot.

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to "'clear congressional authorization'" for it. *West Virginia v. EPA*, 597 U. S. ___, ___ (2022) (slip op., at 19). *** I take seriously the charge that the doctrine is inconsistent with textualism. West Virginia. *** Yet for the reasons that follow, I do not see the major questions doctrine that way. Rather, I understand it to emphasize the importance of context when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation.

I

A

Substantive canons are rules of construction that advance values external to a statute. A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). *** While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. Barrett 123-124. The usual textualist enterprise involves "hear[ing] the words as they would sound in the mind of a skilled, objectively reasonable user of words." F. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J. L. & Pub. Pol'y 59, 65 (1988). But a strong-form canon "load[s] the dice for or against a particular result" in order to serve a value that the judiciary has chosen to specially protect. A. Scalia, A Matter of Interpretation 27 (1997) (Scalia); see also Barrett 124, 168-169. Even if the judiciary's adoption of such canons can be reconciled with the Constitution, it is undeniable that they pose "a lot of trouble" for "the honest textualist." Scalia 28.

B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. *** On this view, the Court overprotects the non-delegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power. ***

This "clarity tax" might prevent Congress from getting too close to the nondelegation line, especially since the "intelligible principle" test largely leaves Congress to self-police. (So the doctrine would function like constitutional avoidance.) In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, §1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible antidelegation interpretation wins even if the agency's interpretation is better. ***

[In my view, the] doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000).

II

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. ***

To strip a word from its context is to strip that word of its meaning. Context is not found exclusively " 'within the four corners' of a statute." Background legal conventions, for instance, are part of the statute's context. Thus, courts apply a presumption of mens rea to criminal statutes, *Xiulu Ruan v. United States*, 597 U. S. ___, ___ (2022) (slip op., at 5), and a presumption of equitable tolling to statutes of limitations, *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990). It is also well established that "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (internal quotation marks omitted). I could go on. ***

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. When an agent acts on behalf of a principal, she "has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations." Restatement (Third) of Agency §2.02(1) (2005). Whether an agent's understanding is reasonable depends on "[t]he context in which the principal and agent interact," including their "[p]rior dealings," industry "customs and usages," and "the nature of the principal's business or the principal's personal situation." Id., §2.02, Comment e (emphasis added). ***

Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter's trip consistent with the parent's instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent's instruction? Highly doubtful. ***

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.

This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). *** Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, §1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. ***

My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on "important subjects" while delegating away only "the details." *Wayman v. Southard*, 10 Wheat. 1, 43 (1825). That is different from a normative rule that *discourages* Congress from empowering agencies. To see what I mean, return to the ambitious babysitter. Our expectation of clearer authorization for the amusement park trip is not about discouraging the parent from giving significant leeway to the babysitter or forcing the parent to think hard before doing so. Instead, it reflects the intuition that the parent is in charge and sets the terms for the babysitter—so if a judgment is significant, we expect the parent to make it. If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." *Utility Air*, 573 U. S., at 324. That skepticism is neither "made-up" nor "new." Post at ___ (KAGAN, J., dissenting). On the contrary, it appears in a line of decisions spanning at least 40 years. *E.g.*, *King v. Burwell*, 576 U. S. 473, 485-486 (2015); *Gonzales v. Oregon*, 546 U. S. 243, 267-268 (2006); *Brown & Williamson*, 529 U. S., at 159-160; *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion).***

Consider *Brown & Williamson*, in which we rejected the Food and Drug Administration's (FDA's) determination that tobacco products were within its regulatory purview. The agency's assertion of authority— which depended on the argument that nicotine is a "'drug'" and that cigarettes and smokeless tobacco are "'drug delivery devices'"—would have been plausible if the relevant statutory text were read in a vacuum. Ibid. But [this conclusion would have overlooked] tobacco's "unique political history": the FDA's longstanding disavowal of authority to regulate it, Congress's creation of "a distinct regulatory scheme for tobacco products," and the tobacco industry's "significant" role in "the American economy." Id., at 159-160. In light of those considerations, we concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

We have also been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power." *In re MCP No. 165, OSHA, Interim Final Rule: Covid-19 Vaccination and Testing*, 20 F.4th 264, 272 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *cf. Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). This principle explains why the Centers for Disease Control and Prevention's (CDC's) general authority to "'prevent the . . . spread of communicable diseases'" did not authorize a nationwide eviction moratorium. *Alabama Assn. of Realtors*, 594 U. S., at ___-___, ___ (slip op., at 2-3, 6). ***

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. For instance, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. This judgment, we explained, was a medical one that lay beyond the Attorney General's expertise, and so a sturdier source of statutory authority than "an implicit delegation" was required. ***

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air*, 573 U. S., at 324. Of course, an agency's post-enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner v. United States*, 598 U. S. 85, 97 (2023) (citing *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)). ***

The major questions doctrine has an important role to play when courts review agency action of "vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting. ***

I ***

A court may address the legality of a government action only if the person challenging it has standing—which requires that the person have suffered a "concrete and particularized injury." *TransUnion LLC v. Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 8). It is not enough for the plaintiff to assert a "generalized grievance[ ]" about government policy. *Gill v. Whitford*, 585 U. S. ___, ___ (2018) (slip op., at 13). And critically here, the plaintiff cannot rest its claim on a third party's rights and interests. *See Warth v. Seldin*, 422 U. S. 490, 499 (1975). The plaintiff needs its own stake—a "personal stake"—in the outcome of the litigation. *TransUnion*, 594 U. S., at ___ (slip op., at 7). If the plaintiff has no such stake, a court must stop in its tracks. To decide the case is to exceed the permissible boundaries of the judicial role.

That is what the Court does today. The plaintiffs here are six States: Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. They oppose the Secretary's loan cancellation plan on varied policy and legal grounds. But as everyone agrees, those objections are just general grievances; they do not show the particularized injury needed to bring suit. *** So the States have thrown no fewer than four different theories of injury against the wall, hoping that a court anxious to get to the merits will say that one of them sticks. The most that can be said of the theory the majority selects, proffered solely by Missouri, is that it is less risible than the others. It still contravenes a bedrock principle of standing law—that a plaintiff cannot ride on someone else's injury. Missouri is doing just that in relying on injuries to the Missouri Higher Education Loan Authority (MOHELA), a legally and financially independent public corporation. And that means the Court, by deciding this case, exercises authority it does not have. It violates the Constitution. ***

II

The majority finds no firmer ground when it reaches the merits. ***

A

A bit of background first, to give a sense of where the HEROES Act came from. In 1991 and again in 2002, Congress authorized the Secretary to grant student-loan relief to borrowers affected by a specified war or emergency. The first statute came out of the Persian Gulf Conflict. It gave the Secretary power to "waive or modify any statutory or regulatory provision" relating to student-loan programs in order to assist "the men and women serving on active duty in connection with Operation Desert Storm." §§372(a)(1), (b), 105 Stat. 93. The next iteration responded to the impacts of the September 11 terrorist attacks. It too gave the Secretary power to "waive or modify" any student-loan provision, but this time to help borrowers affected by the "national emergency" created by September 11. §2(a)(1), 115 Stat. 2386.

With those one-off statutes in its short-term memory, Congress decided there was a need for a broader and more durable emergency authorization. So in 2003, it passed the HEROES Act. Instead of specifying a particular crisis, that statute enables the Secretary to act "as [he] deems necessary" in connection with any military operation or "national emergency." §1098bb(a)(1). But the statute's greater coverage came with no sacrifice of potency. When the law's emergency conditions are satisfied, the Secretary again has the power to "waive or modify any statutory or regulatory provision" relating to federal student-loan programs. *Ibid.*

[T]he Secretary can act only when the President has declared a national emergency. See §1098ee(4). Further, the Secretary may provide benefits only to "affected individuals"—defined as anyone who "resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency" or who has "suffered direct economic hardship as a direct result of a . . . national emergency." §§1098ee(2)(C)-(D). And the Secretary can do only what he determines to be "necessary" to ensure that those individuals "are not placed in a worse position financially in relation to" their loans "because of" the emergency. §1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond alleviating the economic effects of an emergency on affected borrowers' ability to repay their loans.

But if those conditions are met, the Secretary's delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to "waive or modify any statutory or regulatory provision" applying to the student-loan programs. §1098bb(a)(1). To start with the phrase after the verbs, "the word 'any' has an expansive meaning." United States v. Gonzales, 520 U. S. 1, 5 (1997). "Any" of the referenced provisions means, well, any of those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. See §§1087, 1087dd(g); 34 CFR §§682.402, 685.212 (2022). Now go back to the twin verbs: "waive or modify." To "waive" means to "abandon, renounce, or surrender"—so here, to eliminate a regulatory requirement or condition. Black's Law Dictionary 1894 (11th ed. 2019). To "modify" means "[t]o make somewhat different" or "to reduce in degree or extent"—so here, to lessen rather than eliminate such a requirement. Id., at 1203. Then put the words together, as they appear in the statute: To "waive or modify" a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. Of course, making such changes may leave gaps to fill. So the statute says what is anyway obvious: that the Secretary's waiver/modification power includes the ability to specify "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." §1098bb(b)(2). Finally, attach the "waive or modify" power to all the provisions relating to loan cancellation: The Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers.

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. As noted above, a precursor to the HEROES Act was a statute authorizing the Secretary to assist student-loan borrowers affected by September 11. See supra, at 14. The HEROES Act, as Congress designed it, would give him the identical power to address similar terrorist attacks in the future. So imagine the horrific. A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge $10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. ***

The HEROES Act applies to the COVID loan forgiveness program in just the same way. Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies. It is true, too, that the Secretary's use of the HEROES Act delegation has proved politically controversial, in a way that assistance to terrorism victims presumably would not. But [that] is irrelevant to the lawfulness of the program. If the hypothetical plan just discussed is legal, so too is this real one. *** The President declared the COVID pandemic a "national emergency." §1098ee(4); see 87 Fed. Reg. 10289 (2022). The eligible borrowers all fall within the law's definition of "affected individual[s]." §1098ee(2). And the Secretary "deem[ed]" relief "necessary to ensure" that the pandemic did not put low- and middle-income borrowers "in a worse position" to repay their loans. §§1098bb(a)(1)-(2).[2] With those boxes checked, the Secretary's waiver/modification powers kick in. And the Secretary used them just as described in the hypothetical above. For purposes of the COVID program, he scratched the conditions for loan discharge contained in several provisions. See App. 261-262 (citing §§1087, 1087dd(g); 34 CFR §§682.402, 685.212). He then altered those provisions by specifying different conditions, which opened up loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" pre-existing law and, in so doing, applied new "terms and conditions" "in lieu of" the old. §§1098bb(a)(1), (b)(2). As in the prior hypothetical, then, he used his statutory emergency powers in the manner Congress designed.

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress's authorization as if it had nothing to do with the others. For the first several pages—really, the heart—of its analysis, the majority proceeds as though the statute contains only the word "modify." It eventually gets around to the word "waive," but similarly spends most of its time treating that word alone. Only when that discussion is over does the majority inform the reader that the statute also contemplates the Secretary's addition of new terms and conditions. But once again the majority treats that authority in isolation, and thus as insignificant. Each aspect of the Secretary's authority—waiver, modification, replacement—is kept sealed in a vacuum-packed container. *** The majority fails to read the statutory authorization right because it fails to read it whole. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167-169 (2012) (discussing the importance of the whole-text—here, really, the whole-sentence—canon). ***

The tell comes in the last part of the majority's opinion, [where it] expresses the Court's own "concerns over the exercise of administrative power." Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. It insists that "[h]owever broad" Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is "who has the authority" to make such significant calls. The answer, as is now becoming commonplace, is this Court.

The majority's stance *** prevents Congress from doing its policy-making job in the way it thinks best. *** Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things

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[2] More specifically, the Secretary determined that without a loan discharge, borrowers making less than $125,000 are likely to experience higher delinquency and default rates because of the pandemic's economic effects. In a puzzling footnote, the majority expresses doubt about that finding, though says that its skepticism plays no role in its decision. See ante n.6. Far better if the majority had ruled on that alternative ground. Then, the Court's invalidation of the Secretary's plan would not have neutered the statute for all future uses.

wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not themselves elected, serve a President with the broadest of all political constituencies. *** The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. ***

The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. ***

Loper Bright Enterprises, Inc. v. Raimondo
45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S.Ct. 2429 (2023)

Rogers, Circuit Judge:

In implementing an Omnibus Amendment that establishes industry-funded monitoring programs in New England fishery management plans, the National Marine Fisheries Service promulgated a rule that required industry to fund at-sea monitoring programs. A group of commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs and that the process by which the Service approved the Omnibus Amendment and promulgated the Final Rule was improper. We affirm the district court's grant of summary judgment to the Service based on its reasonable interpretation of its authority and its adoption of the Amendment and the Rule through a process that afforded the requisite notice and opportunity to comment.

I.

The Magnuson-Stevens Fishery Conservation and Management Act of 1976 (the "Act"), 16 U.S.C. §§ 1801–1884, in furtherance of its goal "to conserve and manage the fishery resources ... of the United States," 16 U.S.C. § 1801(b)(1), authorizes the Secretary of Commerce, and the National Marine Fisheries Service ("the Service") as the Secretary's delegee, to implement a comprehensive fishery management program, *id.* § 1801(a)(6) ; *see id.* §§ 1854, 1855(d). Key to the statutory scheme is the promulgation and enforcement of "fishery management plans." Plans and periodic amendments are developed by regional fishery management councils, *id.* § 1852(h)(1), and include measures "necessary and appropriate for the conservation and management of the fishery," *id.* § 1853(a)(1)(A). The proposing council may include specific conservation and management measures enumerated in 16 U.S.C. § 1853(b), as well as any other measures "determined to be necessary and appropriate," *id.* § 1853(b)(14). In addition, the council may propose implementing regulations. *Id.* § 1853(c).

Nine fisheries, including the Atlantic herring fishery, are managed by the New England Fishery Management Council (the "Council"). *Id.* § 1852(a)(1)(A), (h)(1). The Council submitted the Omnibus Amendment to the Service, which published a notice of availability and subsequently opened a comment period. Notice of Availability, 83 Fed. Reg. 47,326 (Sept. 19, 2018); Notice of Proposed Rulemaking ("NPRM"), 83 Fed. Reg. 55,665 (Nov. 7, 2018). The Service approved the Omnibus Amendment on December 18, 2018, and published the Final Rule on February 7, 2020.[1] The Amendment and the Rule set out a standardized process to implement and revise industry-funded monitoring programs in the New England fisheries. Plan coverage requirements may be waived if monitoring is unavailable or certain exemptions based on use of monitoring equipment or catch size apply.

The monitoring program for the Atlantic herring fishery covers 50 percent of herring trips. The 50-percent coverage target is met through a combination of limited Service-

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[1] *Industry-Funded Monitoring: An Omnibus Amendment to the Fishery Management Plans of the New England Fishery Management Council* (2018) ("Omnibus Amendment"); *Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring Final Rule*, 85 Fed. Reg. 7,414 (Feb. 7, 2020) ("Final Rule").

funded monitoring pursuant to the fishery management plan, *see* 16 U.S.C. § 1853(a)(11), and, for the difference between the target and Service-funded monitoring, industry-funded monitoring, with owners of vessels selected by the Service to carry an industry-funded monitor and pay the associated costs (other than administrative costs). The Service estimated industry costs to the herring fishery "at $710 per day," which in the aggregate could reduce annual returns by "approximately 20 percent."

Appellants are commercial fishermen who regularly participate in the Atlantic herring fishery. They filed a lawsuit alleging, as relevant, that the Act did not authorize the Service to create industry-funded monitoring requirements and that the rulemaking process was procedurally irregular. The district court ruled on the parties' cross-motions for summary judgment in the government's favor.

II ***

A.

Appellants contend the Act permits the Service to require at-sea monitors but prohibits any industry-funded monitoring programs beyond three circumstances. The Service responds that the Act unambiguously authorizes it to implement industry-funded monitoring requirements. The court applies the familiar two-step *Chevron* framework. *See, e.g.* , *Cigar Ass'n of Am. v. FDA* , 5 F.4th 68, 77 (D.C. Cir. 2021) (citing *Chevron* , 467 U.S. at 842–43, 104 S.Ct. 2778). At *Chevron* Step One, the court, "employing traditional tools of statutory interpretation," evaluates "whether Congress has directly spoken to the precise question at issue." *Chevron* , 467 U.S. at 842–43 & n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the statute considered as a whole is ambiguous, then at *Chevron* Step Two the court defers to any "permissible construction of the statute" adopted by the agency. *Cigar Ass'n of Am.* , 5 F.4th at 77 (quoting *Chevron* , 467 U.S. at 843, 104 S.Ct. 2778).

At *Chevron* Step One, the court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.* , 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (internal quotation marks omitted). Section 1853(b)(8) provides fishery management plans may "require that one or more observers be carried on board a vessel ... for the purpose of collecting data necessary for the conservation and management of the fishery." That text makes clear the Service may direct vessels to carry at-sea monitors but leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan. When Congress has not "directly spoken to the precise question at issue," the agency may fill this gap with a reasonable interpretation of the statutory text. *Chevron* , 467 U.S. at 842.

The Service maintains that two additional features of the Act, when paired with Section 1853(b)(8), unambiguously establish authority to require industry-funded monitoring. First, Section 1853 contains two "necessary and appropriate" clauses that permit plans approved by the Service to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." *Id.* § 1853(b)(14); *see also id.* § 1853(a)(1)(A) (mandating "measures ... necessary and appropriate for the conservation and management of the fishery"). Second, the penalty provisions allow the Service to impose permit sanctions for failure to make "any payment required for observer services provided to or contracted by an owner or operator," *id.* § 1858(g)(1)(D), and make unlawful various acts committed against "any data collector employed by the [Service] or under contract to any person to carry out responsibilities under [the Act]," *id.* § 1857(1)(L).

Taken together, these provisions of the Act signal the Service may approve fishery management plans that mandate at-sea monitoring for a statutory purpose. Section 1853(b)(8) grants authority to require that vessels carry at-sea monitors. Sections 1853(a)(1)(A) and (b)(14) grant authority to implement measures "necessary and appropriate" — a "capacious[ ]" grant of power that "leaves agencies with flexibility," *Michigan v. EPA* , 576 U.S. 743—to achieve the Act's conservation and management goals. The penalties in Sections 1857 and 1858 further indicate that Congress anticipated industry's use of private contractors. Still unresolved, however, is the question of whether the Service may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan.

When an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them. In *Michigan v. EPA* , 576 U.S. 743 (2015), the Supreme Court held that an agency implementing a policy under wide-ranging "necessary and appropriate" authority must consider the costs of compliance. That principle presupposes that a "necessary and appropriate" clause vests an agency with some authority to impose compliance costs. Here, the Act's national standards for fishery management plans direct the Service to "minimize costs" of conservation and management measures, 16 U.S.C. § 1851(a)(7), and to "minimize adverse economic impacts" of such measures "on [fishing] communities," *id.* § 1851(a)(8). Those statutory admonitions to reduce costs seem to presume that the Service may impose some costs, as "minimize" does not mean eliminate entirely. In addition, neither Section 1853(b)(8) nor any other provision of the Act imposes a funding-related restriction on the Service's authority to require monitoring in a plan. That also suggests the Act permits the Service to require industry-funded monitoring.

The inference that the Service may require fishing vessels to incur costs associated with meeting the 50-percent monitoring coverage target is not, however, wholly unambiguous. Nothing in the record definitively establishes whether at-sea monitors are the type of regulatory compliance cost that might fall on fishing vessels by default or whether Congress would have legislated with that assumption. Absent such an indication, the court cannot presume that Section 1853(b)(8), even paired with the Act's "necessary and appropriate" and penalty provisions, unambiguously affords the Service power to mandate that vessels pay for monitors. *See N.Y. Stock Exch. LLC v. SEC* , 962 F.3d 541, 554 (D.C. Cir. 2020).

Appellants maintain that Sections 1821, 1853a(e), and 1862, which create monitoring programs with some similarities to the Omnibus Amendment's monitoring program, give rise by negative implication to the inference that the Act unambiguously deprives the Service of authority to create additional industry-funded monitoring requirements. This *expressio unius* reasoning, "when countervailed by a broad grant of authority contained within the same statutory scheme, ... is a poor indicator of Congress' intent." *Adirondack Med. Ctr. v. Sebelius* , 740 F.3d 692, 697 (D.C. Cir. 2014). Examination of each of the three monitoring programs further illustrates why appellants' view is unfounded.

First, the limited access privilege program created in Section 1853a(e) authorizes a council to establish "a program of fees ... that will cover the costs of management, data collection and analysis, and enforcement activities." It does not list monitoring as a covered activity. *See id.* Although monitoring might qualify as "data collection and analysis," this provision does not speak directly to this point, nor does it say anything about who may fund observers. The canon that "the specific governs the general," *RadLAX Gateway Hotel, LLC v. Amalg. Bank* , 566 U.S. 639, 645 (2012) ; *see Genus Med. Techs. LLC v. FDA*, 994 F.3d 631, 638 (D.C. Cir. 2021), is unhelpful to appellants in this context because there is no relevant "conflict" between statutory terms that do not address the same subject, *Genus Med. Techs.*, 994 F.3d at 638–39. Section 1853a(e) therefore does not suggest any limitation on the Service's discretion to impose monitoring costs on industry under Section 1853(b)(8).

Second, the North Pacific Council monitoring program created by Section 1862, which "requires that observers be stationed on fishing vessels" and "establishes a system ... of fees ... to pay for the cost of implementing the plan," 16 U.S.C. § 1862(a)(1)–(2), is similarly distinguishable. These fees are to be "collected" by the Service, *id.* § 1862(b)(2), and deposited into a North Pacific Fishery Observer Fund established by the Act and "in the Treasury," *id.* § 1862(d), for disbursement to cover the costs of the monitoring program, *see id.* § 1862(a), (e). This special fee program also does not suggest that the Service lacks authority to require industry-funded observers in all other fisheries. The fee program in Section 1862 institutes a different funding mechanism from that of the Omnibus Amendment and Final Rule: under Section 1862, money collected from regulated parties passes through government coffers, while under the Omnibus Amendment and Final Rule, regulated vessel owners pay third-party monitors directly to supply services required for regulatory compliance. Congress's specific authorization of a single fishery program funded by fees paid to the government does not unambiguously demonstrate that the Act prohibits the Service from implementing a separate program in which industry pays the costs of compliance to service providers without any government pass-through.

Section 1821 creates a foreign fishing vessel monitoring program, which authorizes the Secretary to impose a "surcharge" to "cover all the costs of providing a United States observer" aboard foreign vessels. *Id.* § 1821(h)(4). Generally, observers on foreign vessels are funded through "surcharges [to owners] collected by the Secretary" and deposited in an earmarked U.S. government fund, *id.*, a fee program roughly analogous to the North Pacific Council monitoring program. In the event of insufficient appropriations, however, Section 1821 establishes a "supplementary observer program" by which "certified observers or their agents" are "paid by the owners and operators of foreign fishing vessels for observer services." *Id.* § 1821(h)(6). This provision for industry-funded observers in the foreign-fishing section of the Act, does not show that Congress implicitly intended to preclude the Service from requiring any other industry-funded monitoring. *See Util. Air Regul. Grp.* , 573 U.S. at 323–24. Its contingency plan for monitoring in the foreign-fishing context has no unambiguous consequences for the Service's authority to implement industry-funded monitoring in other contexts. By providing for industry-funded observers as part of a contingency in the foreign-fishing provisions of the Act, it appears doubtful that Congress intended implicitly to preclude the Service from requiring industry-funded monitoring in all other circumstances. Further, the Act's penalty provisions offset negative inferences that might be drawn from Section 1821. *See* 16 U.S.C. §§ 1857(1)(L), 1858(g)(1)(D). Rather, these broad provisions indicate that Congress anticipated the use of privately retained contractors to comply with the Act's requirements. And the penalties in a broadly applicable section of the Act appear to recognize the possibility of industry-contracted and funded observers beyond the foreign-vessel context. If Congress had intended for penalties associated with industry-funded monitoring to apply only in the foreign fishing context, the court would expect that Congress in the penalty provisions would have specifically referenced foreign vessels or included a cross-reference to the foreign fishing provision. Finally, appellants claim that, given the substantial costs of industry-funded monitoring to herring fishing companies, "Congress would not have delegated 'a decision of such economic and political significance to an agency in so cryptic a fashion' " as reliance on "necessary and appropriate" authority.

Nonetheless, the text does not compel the Service's interpretation of the Act as granting authority by omission to require industry-funded monitoring. Courts "construe [a statute's] silence as exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.* , 575 U.S. 768 (2015). Neither Section 1853(b)(8) nor any other provision of the Act explicitly allows the Service to pass on to industry the costs of monitoring requirements included in fishery management plans. Nor do the traditional tools of statutory interpretation provide another basis on which to conclude that the Act unambiguously supports the Service's interpretation. Congress has thus provided no wholly unambiguous answer at *Chevron* Step One as to whether the Service may require industry-funded monitoring in the Omnibus Amendment and Final Rule. Although an agency's interpretation need not be compelled by the text for it to prevail at Step One, here, where there may be some question as to Congress's intent, particularly in view of appellants' cost objection, it behooves the court to proceed to Step Two of the *Chevron* analysis.

Pursuant to Step Two, an agency's interpretation can prevail if it is a "reasonable resolution of an ambiguity in a statute that the agency administers," *Michigan* , 135 S. Ct. at 2707, and "the agency has offered a reasoned explanation for why it chose that interpretation," *Cigar Ass'n of Am.* , 5 F.4th at 77 (internal quotation marks omitted). Under this deferential standard, the Service's interpretation of the Act as authorizing additional industry-funded monitoring programs is reasonable. Section 1853(b)(8), paired with the Act's "necessary and appropriate" clauses, demonstrates that the Act considers monitoring "necessary and appropriate" to further the Act's conservation and management goals. That conclusion provides a reasonable basis for the Service to infer that the practical steps to implement a monitoring program, including the choice of funding mechanism and cost-shifting determinations, are likewise "necessary and appropriate" to implementation of the Act.

In addition, the Final Rule provides a reasoned explanation for the Service's interpretation. The Rule noted that Section 1853(b)(8) authorizes the Service to require at-sea monitors "for the purpose of collecting data necessary for the conservation and management of the fishery. *Id.* at 7,422 (quoting 16 U.S.C. § 1853(b)(8)). It further explained that industry-funded monitoring to reach the new 50-percent coverage target would best serve the Act's conservation and management goals. In particular, increased monitoring would permit the Service "to assess the amount and type of catch, to more accurately monitor annual catch limits, and/or provide other information for management." The Rule also stated that industry-funded monitoring was consistent with other provisions of the Act that impose compliance costs on industry. This explanation reasonably tied the industry-funded monitoring requirement to the Act's purposes. The Service's interpretation of the Act is therefore owed deference at *Chevron* Step Two.

Our dissenting colleague agrees that the *Chevron* framework governs this case but disagrees about how it applies, asserting that the court should reach *Chevron* Step Two only if "the statute is ambiguous" *and* "Congress either explicitly or implicitly delegated authority to cure that ambiguity." The dissent suggests that "Congress's silence on a given issue ... [generally] indicates a lack of authority," but *Chevron* instructs that judicial deference is appropriate "if the statute is silent *or* ambiguous with respect to the specific issue." The Supreme Court has affirmed its *Chevron* analysis, *see, e.g.* , *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), and this court has reacknowledged its binding force, *see, e.g.* , *Sierra Club v. EPA* , 21 F.4th 815, 818–19 (D.C. Cir. 2021). The dissent's reference to recent cases in which the Supreme Court has not applied the framework does not affect the obligation of this court to "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions," *Agri Processor Co. v. NLRB* , 514 F.3d 1, 8 (D.C. Cir. 2008) (second alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Not every statutory silence functions as an implicit delegation. *See U.S. Telecom Ass'n v. FCC* , 359 F.3d 554, 566 (D.C. Cir. 2004). But Section 1853(b)(8)'s silence on the issue of cost of at-sea monitoring provides no basis for applying different standards of review here. Under *Chevron*, such silence in the context of a comprehensive statutory fishery management program for the Service to implement, 16 U.S.C. §§ 1801(a)(6), 1854, 1855(d), is a lawful delegation, *Chevron,* 467 U.S. at 842–44. Furthermore, the Supreme Court has instructed that a broad "necessary and appropriate" provision, as appears in the Act, "leaves agencies with flexibility" to act in furtherance of statutory goals, *Michigan*, 135 S. Ct. at 2707, and here the Service pointed to the Act's conservation and management goals. Speculation that the Service's interpretation of its authority may lead to exorbitant regulatory costs to industry overlooks *Chevron* Step Two's reasonableness limitation. Nor, in these circumstances, is Congress's provision for industry-funded monitoring in three unique situations properly understood to eliminate the Service's authority to create industry-funded monitoring programs in any other situation. Under the well-established *Chevron* Step Two framework, the Service's interpretation of the Act to allow industry-funded monitoring was reasonable. ***

Note: On March 1, 2023, the Supreme Court granted a writ of certiorari limited to the second of the following questions:

> 1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.
>
> 2. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.