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An Introduction to Judicial Review of Federal Agency Action

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An Introduction to Judicial Review of Federal Agency Action

SUMMARY

Congress has created numerous federal agencies charged with carrying out a broad array of delegated statutory responsibilities. These agencies administer their delegated authority in a variety of ways, including by promulgating rules, conducting adjudications, and bringing enforcement actions against parties for violating statutes or regulations. In addition to delegating authority to these agencies, Congress has also enacted statutes, such as the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, authorizing federal courts to review agency actions to ensure agencies conduct their business lawfully. Thus, in many circumstances, individuals aggrieved by agency action may bring claims to federal court for redress.

Not all agency actions are subject to judicial review. Whether judicial review of agency action is available in federal court turns on several factors. Courts must possess statutory jurisdiction to adjudicate a lawsuit, and plaintiffs generally must rely on a cause of action that allows a court to grant legal relief. Further, Article III of the Constitution limits the judicial power to adjudicating "cases" or "controversies." Thus, the justiciability doctrines of standing, ripeness, and mootness must be satisfied for a party's challenge to proceed. For suits brought under the APA, courts may only review *final* agency action that is not precluded from review by another statute or legally committed to the agency's discretion.

If the prerequisites for judicial review are met, a party may challenge agency action under the APA. That law directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions" that violate the law or are otherwise "arbitrary and capricious."

Pursuant to this mandate, courts can review agency action in a number of contexts. Courts can examine the statutory authority for an agency's action and invalidate agency action that exceeds these limits. In addition, a court may examine an agency's discretionary decisions to ensure they are reasonable and adequately explained. Finally, courts may also review an agency's compliance with statutory and regulatory procedural requirements, such as the APA's notice-and-comment rulemaking procedures.

This report offers an overview of issues concerning the justiciability of challenges to agency actions and the scope of review under the APA.

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Congress has created numerous federal agencies charged with carrying out a broad array of delegated statutory responsibilities.[1] Agencies administer their delegated authority in a variety of ways, including by promulgating rules that bind the public,[2] bringing enforcement actions against parties for violating a statute or regulation,[3] and determining whether to grant a benefit[4] or license.[5] These agency actions can have a significant impact on individuals and the public at large. Therefore, Congress has authorized courts, under certain circumstances, to review agency action to ensure agency compliance with the law.[6]

The Administrative Procedure Act (APA) is the most prominent statutory vehicle for challenging the actions of a federal agency.[7] Enacted in 1946 following the expansion of the administrative state during the New Deal era, the statute represents the first government-wide attempt to "systematize" the actions of federal agencies.[8] In addition to imposing a set of default procedural requirements for agency rulemaking and adjudication proceedings,[9] the APA provides for judicial review of agency conduct.[10] Courts may review agency action to ensure that agencies act within the scope of their delegated authority, that agency decisions are reasonable and adequately explained, and that an agency has complied with all applicable procedural requirements.[11]

To bring a claim in federal court, a plaintiff must satisfy certain prerequisites. Federal courts are courts of limited jurisdiction—they must adhere to limits placed on their authority by Congress and the Constitution.[12] Article III of the Constitution limits the judicial power to adjudicating "cases" or "controversies."[13] Thus, any case brought to federal court must satisfy the justiciability doctrines of standing, ripeness, and mootness to proceed. Further, Congress must provide the

[1] Although Congress's authority to create federal agencies is not explicitly mentioned in the Constitution, its power to do so is well established. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("No one doubts Congress's power to create a vast and varied federal bureaucracy.").

[2] *See, e.g.*, 38 U.S.C. § 501(a) ("The Secretary [of the Department of Veterans Affairs] has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . ."). For a discussion on agency rulemaking, see CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey (2021).

[3] *See, e.g.*, Pierce v. SEC, 786 F.3d 1027, 1031 (D.C. Cir. 2015) (denying an individual's petition for review of enforcement actions brought by the Securities and Exchange Commission). *But see* SEC v. Jarkesy, 603 U.S. 109, 125 (2024) (ruling that defendants are entitled to a jury trial when an agency seeks to impose certain civil monetary penalties).

[4] *See, e.g.*, 42 U.S.C. § 423 (authorizing the Social Security Administration to pay disability insurance benefits to certain individuals).

[5] *See, e.g.*, 16 U.S.C. § 836 (authorizing Federal Energy Regulatory Commission to issue license for construction of a power project).

[6] *See, e.g.*, 5 U.S.C. § 706.

[7] *Id.* §§ 701–706. For a further discussion of judicial review under the APA, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

[8] *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 202 (2009). *See generally* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) ("The APA has taken on quasi-constitutional status.").

[9] 5 U.S.C. §§ 553–558

[10] *Id.* §§ 701–706.

[11] *Id.* § 706.

[12] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.").

[13] *Id.*; U.S. CONST. art. III, § 2, cl. 1. *See* Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/ (last visited Sept. 11, 2025).

court with subject matter jurisdiction to hear the case, and a plaintiff must have a cause of action to seek redress. The circumstances under which a federal court will review agency actions thus involve questions of statutory and constitutional law.

The report opens with a discussion of the threshold requirements for seeking judicial review of agency action in federal court.[14] It then outlines the scope of review authorized by the APA.[15] It explains how courts review agency actions to ensure they comply with statutory authority,[16] as well as the standards employed in the review of an agency's discretionary decisions.[17] The report concludes with a brief examination of judicial review of agency compliance with statutorily prescribed procedural requirements.[18]

Requirements for Judicial Review

Not every agency action is subject to judicial review. Whether judicial review of agency action is available in federal court turns on several factors, including constitutional,[19] prudential,[20] and statutory[21] considerations. Courts must possess statutory jurisdiction to adjudicate a lawsuit, and plaintiffs must generally rely on a cause of action that allows a court to grant legal relief. Disputes must also present "cases" or "controversies" that satisfy the requirements of Article III of the Constitution. Finally, a suit must be presented to a court at the proper time for judicial review, in that it must be *ripe* for review and not *moot*.

Statutory Jurisdiction

The federal courts are courts of limited jurisdiction.[22] Their authority is restricted to matters entrusted to them by Congress.[23] Consequently, to adjudicate a case, a statute must bestow subject

[14] *See infra* "Requirements for Judicial Review."

[15] *See infra* "The Scope of Review Under the ."

[16] *See infra* "Review of an Agency's Interpretation of Statutory Authority."

[17] *See infra* "Arbitrary-and-Capricious Review"

[18] *See infra* "Review of Compliance with Procedural Requirements." This report does not describe every circumstance in which an agency action may be challenged. For example, it does not address the Freedom of Information Act, 5 U.S.C. §§ 552–552b, or common-law suits for damages against federal officials acting in their individual capacity, see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In addition, numerous issues relevant to federal court jurisdiction are not discussed, such as suits against state officers under 42 U.S.C. § 1983 and suits between private citizens pursuant to the federal courts' diversity jurisdiction, U.S. CONST. art. III, § 2, cl. 1.

[19] U.S. CONST. art. III, § 2, cl. 1; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite.") (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423 (1940), *superseded by,* Rapanos v. United States, 547 U.S. 715 (2006) (footnotes omitted).

[20] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'") (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

[21] *See, e.g.*, 5 U.S.C. § 704 (allowing judicial review of administrative action under the APA only when such action is "final").

[22] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); *In re* Madison Guar. Sav. & Loan Ass'n, 173 F.3d 866, 868 (D.C. Cir. 1999).

[23] Bowles v. Russell, 551 U.S. 205, 212–13 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). For a discussion on federal court jurisdiction, see CRS Report R47641, *Federal and State Courts: Structure and Interaction*, by Joanna R. Lampe and Laura Deal (2023).

matter jurisdiction in a federal court over a particular claim.[24] In addition, suits against the United States are barred absent a statutory waiver of sovereign immunity.[25] This section of the report provides an introduction to these matters in the context of challenging administrative actions.

Subject-Matter Jurisdiction

As a threshold matter, courts must possess subject-matter jurisdiction over a claim to hear a case.[26] Subject-matter jurisdiction refers to a court's "power" to hear a case.[27] Although the APA does not provide subject-matter jurisdiction,[28] a separate statute, 28 U.S.C. § 1331, bestows upon federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[29] This general federal-question jurisdiction authorizes federal courts to hear claims arising under the APA as well as nonstatutory and constitutional claims.[30] A variety of other statutes bestow jurisdiction in particular courts to review certain claims. For example, the Hobbs Act (Administrative Orders Review Act) establishes exclusive subject-matter jurisdiction for pre-enforcement review of certain agency orders in the U.S. Courts of Appeals.[31] Still other statutes specify that specific circuit courts have exclusive subject-matter jurisdiction over certain claims.[32]

Sovereign Immunity

The doctrine of sovereign immunity shields the United States from suit unless Congress has waived immunity by statute.[33] Absent such a waiver, federal courts lack jurisdiction over lawsuits

[24] *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

[25] *See* Loeffler v. Frank, 486 U.S. 549, 554 (1988).

[26] *See, e.g.*, United States v. Cotton, 535 U.S. 625, 630 (2002).

[27] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *Cotton*, 535 U.S. at 630; *Ruhrgas AG*, 526 U.S. at 583.

[28] Califano v. Sanders, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.").

[29] 28 U.S.C. § 1331.

[30] Trudeau v. FTC, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that "[s]ection 1331 is an appropriate source of jurisdiction for" APA, nonstatutory, and constitutional claims). Nonstatutory review of federal agency action is available when an agency action is ultra vires, Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 689–90 (1949); Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003), that is, when the agency has plainly violated an unambiguous and mandatory legal requirement, Leedom v. Kyne, 358 U.S. 184, 188–89 (1958); Key Med. Supply, Inc. v. Burwell, 764 F.3d 955, 962 (8th Cir. 2014). While nonstatutory claims are those suits brought without "a specific or a general statutory review provision," *see, e.g.*, Chamber of Com. v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996); Puerto Rico v. United States, 490 F.3d 50, 59 (1st Cir. 2007), a federal statute nonetheless authorizes subject matter jurisdiction in the federal courts, 28 U.S.C. § 1331; *Trudeau*, 456 F.3d at 185.

[31] 28 U.S.C. § 2342. In *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. 146, 159 (2025), the Supreme Court held that, although the Hobbs Act provides for exclusive subject matter jurisdiction for *pre-enforcement* review of the validity of certain agency orders in the federal courts of appeals, the Act does not preclude a district court from determining the validity of an agency order in an enforcement proceeding. ("When Congress wants to bar a district court in an enforcement proceeding from reviewing an agency's interpretation of a statute, Congress can and must say so.").

[32] *See, e.g.*, 42 U.S.C. § 4915 (establishing exclusive jurisdiction in the D.C. Circuit for review of certain rules and regulations promulgated by the Environmental Protection Agency and the Federal Aviation Administration).

[33] *See* Martin v. United States, 145 S. Ct. 1689, 1695 (2025); Loeffler v. Frank, 486 U.S. 549, 554 (1988); Fed. Hous. Admin. v. Burr, 309 U.S. 242, 244 (1940); Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). The application of sovereign immunity in federal courts stems from the English common law tradition, which barred suits against the Crown absent consent. Santana-Rosa v. United States, 335 F.3d 39, 41–42 (1st Cir. 2003) ("This notion derives from (continued...)

against the United States.[34] A waiver of sovereign immunity will not be implied from legislative history or the background context of a statute; rather, it must be clearly expressed in the statutory text.[35] Three primary statutes waive sovereign immunity, thereby permitting lawsuits against the United States in federal court under certain circumstances.[36] First, the APA was amended in 1976 to permit individuals aggrieved by agency action to bring suit in federal court against the United States and government employees in their official capacity.[37] This statutory waiver, however, does not authorize money damages as a remedy.[38] Second, the Federal Tort Claims Act (FTCA) permits suits to be heard in federal court for certain torts committed by agency employees in the course of their employment.[39] In these cases, the United States is substituted as a defendant for the employee who allegedly committed the tort.[40] Unlike the APA, the FTCA permits money damages as a remedy.[41] Third, the Tucker Act permits suits against the United States for breach of contract and certain other monetary claims that do not arise in tort.[42]

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the British legal fiction that 'the King can do no wrong.'" (quoting Feather v. The Queen (1865) 122 Eng. Rep. 1191, 1205, 6 B&S 257 (QB))). While the term does not appear in the Constitution, "it has always been treated as an established doctrine" by the federal courts. United States v. Lee, 106 U.S. 196, 207 (1882).

[34] United States v. Miller, 145 S. Ct. 839, 849 (2025) ("As our precedents explain, '[s]overeign immunity is jurisdictional in nature' and deprives courts of the power to hear suits against the United States absent Congress's express consent." (quoting FDIC v. Meyer, 510 U.S. 471, 475 (1994))); United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

[35] Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." (citations omitted)).

[36] Although less relevant after the passage of general statutes waiving the federal government's sovereign immunity, the Supreme Court has held that, even absent a waiver, individuals may sue government officials for prospective injunctive relief as a result of ultra vires conduct. *See, e.g.*, Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 689–90 (1949). However, "[b]ecause ultra vires review could become an easy end-run around the limitations of the Hobbs Act and other judicial-review statutes," the Supreme Court has "strictly limited nonstatutory ultra vires review." Nuclear Regul. Comm'n v. Texas, 605 U.S. 665, 681 (2025). The Court explained that nonstatutory ultra vires review only applies "when an agency has taken action entirely 'in excess of its delegated powers and contrary to a *specific prohibition*' in a statute." *Id.* (quoting Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Ass'n for the Benefit of Non-Cont. Emps., 380 U.S. 650, 660 (1965)). Such review is also unavailable if aggrieved persons have an opportunity for meaningful review pursuant to statute. *Id.*

[37] 5 U.S.C. § 702.

[38] *Id.*; Veluchamy v. FDIC, 706 F.3d 810, 812 (7th Cir. 2013) ("But this request for substitute monetary relief constitutes a request for "money damages," which the APA does not authorize.").

[39] 28 U.S.C. § 2679; *see* CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Michael D. Contino and Andreas Kuersten (2023).

[40] 28 U.S.C. § 2679.

[41] *Id.* §§ 1346(b), 2671–2680.

[42] *Id.* §§ 1346, 1491; United States v. Navajo Nation, 556 U.S. 287, 290 (2009) (noting that the Tucker Act "waive[s] sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)"); United States v. Testan, 424 U.S. 392, 398–400 (1976) ("The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. . . . We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications."); Burkins v. United States, 112 F.3d 444, 449 (10th Cir. 1997) ("The Tucker Act, 28 U.S.C. §§ 1346, 1491, 'vests exclusive jurisdiction' with the Court of Federal Claims for claims against the United States founded upon the Constitution, Acts of Congress, executive regulations, or contracts and seeking amounts greater than $10,000.") (quoting New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984)).

Cause of Action

To challenge the actions of a federal agency, a plaintiff must also demonstrate that he or she possesses a legal right to seek judicial redress.[43] A plaintiff will have a "cause of action" if he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[44] Various statutes explicitly provide such causes of action to enforce legal requirements against federal agencies.[45] Absent a specific statutory framework creating a cause of action, the APA provides a general cause of action for individuals aggrieved by a "final agency action" if "there is no other adequate remedy in a court."[46]

There are other, less common bases for challenges to agency actions. In limited situations, even lacking an express statutory cause of action, individuals may seek "nonstatutory" review of an agency action that is ultra vires.[47] In addition, when a federal official owes a plaintiff a "clear nondiscretionary duty,"[48] federal district courts[49] and appellate courts[50] may issue mandamus relief, which is an order compelling an official "to perform a duty owed to the plaintiff."[51] However, the remedy is to be invoked only in "extraordinary circumstances"[52] when "no adequate alternative remedy exists."[53] Finally, the Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, recognized a common law cause of action against federal officers

[43] Trudeau v. FTC, 456 F.3d 178, 188–191 (D.C. Cir. 2006).

[44] *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979); Harold Bruff, *Availability of Judicial Review*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 5–6 (Michael Herz et al. eds., 2d ed. 2015).

[45] *See, e.g.*, 15 U.S.C. § 2618 (authorizing individuals to seek judicial review of rules promulgated under the Toxic Substances Control Act); 33 U.S.C. § 1369 (authorizing interested person to seek judicial review of agency actions taken under the Clean Water Act).

[46] 5 U.S.C. § 704. An agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

[47] Puerto Rico v. United States, 490 F.3d 50, 59 (1st Cir. 2007) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.") (quoting R.I. Dep't of Env't Mgmt. v. United States, 304 F.3d 31, 44 (1st Cir. 2002)); *R.I. Dep't of Env't Mgmt.*, 304 F.3d at 42 ("As a general matter, there is no statute expressly creating a cause of action against federal officers for constitutional or federal statutory violations. Nevertheless, our courts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringements of federal rights. Such actions are based on the grant of general federal-question jurisdiction under 28 U.S.C. § 1331 and the inherent equity powers of the federal courts.") (citations omitted); Chamber of Com. v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("If a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action.").

[48] Heckler v. Ringer, 466 U.S. 602, 616 (1984).

[49] 28 U.S.C. § 1361 (authorizing mandamus relief against government officials and agencies but not the United States).

[50] *Id.* § 1651(a).

[51] *Id.* § 1361. Federal courts may also issue declaratory relief—a legal judgement stating the rights and obligation of relevant parties—under the Declaratory Judgement Act. 28 U.S.C. § 2201.

[52] Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980).

[53] Barnhart v. Devine, 771 F.2d 1515, 1524 (D.C. Cir. 1985).

for damages resulting from violations of constitutional rights.[54] This remedy does not apply to federal agencies.[55]

Constitutional and Prudential Limits on Federal Court Jurisdiction

In addition to statutory prerequisites for judicial review, certain constitutional and prudential considerations limit when courts will entertain a suit in a case challenging agency action. Plaintiffs must demonstrate that they have standing to challenge a federal agency's action. They must also bring a lawsuit at the appropriate time.

Standing

Article III of the Constitution limits the scope of federal court jurisdiction to adjudicating "cases" and "controversies."[56] The Supreme Court has articulated several legal doctrines emanating from Article III, as well as various prudential considerations, that further limit the circumstances under which federal courts will adjudicate disputes regarding federal agencies, such as standing, ripeness, and mootness.[57] In particular, the doctrine of standing is a frequent barrier to plaintiffs challenging agency action.[58] The Supreme Court has expressed the important separation of powers principles that underlie the doctrine,[59] emphasizing that while the judiciary is authorized to say what the law is,[60] invalidation of congressional legislation or actions of the executive

[54] 403 U.S. 388 (1971). Nevertheless, even if a cause of action is available under *Bivens*, two important affirmative defenses may bar federal officers from being sued. The Supreme Court has recognized that absolute civil immunity is owed to judges, Pierson v. Ray, 386 U.S. 547, 554–55 (1967); prosecutors, Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976), legislators, Tenney v. Brandhove, 341 U.S. 367, 376 (1951), and the President, Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982), when such officials are acting within the scope of their discretionary duties. More generally, executive branch officials may be absolutely immune if performing similar functions. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 512–13 (1978) (concerning officers performing adjudicatory functions). In addition, the doctrine of qualified immunity protects federal government employees performing discretionary functions from being sued in their individual capacity in suits for damages unless their actions violate clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

[55] FDIC v. Meyer, 510 U.S. 471, 475 (1994).

[56] U.S. CONST. art. III, § 2; *see* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'").

[57] *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring))). Under the political question doctrine, federal courts may also decline to adjudicate cases presenting questions more properly suited to resolution by the political branches. *See* CRS Legal Sidebar LSB10758, *The Political Question Doctrine: The Doctrine in the Modern Era (Part 3)*, by Joanna R. Lampe (2022). *See infra* "Timing of Judicial Review" for a discussion of ripeness and mootness.

[58] *See generally* Erwin Chemerinsky, *What's Standing After Transunion LLC v. Ramirez*, 96 NYU L. REV. ONLINE 269, 272–73 (2021) ("Perhaps the most important of these [Article III] restrictions is standing to sue, which focuses on whether the plaintiff is the proper party to bring a matter to the court for adjudication."); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) (noting that the Supreme Court has interpreted standing doctrine restrictively to bar certain suits challenging agency inactions).

[59] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) ("The [standing] doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood."); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

[60] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

branch should not be taken lightly.[61] Courts must vindicate individual rights, but the judicial power may not be harnessed into a supervisory role over federal agencies that should be reserved for Congress.[62]

To satisfy the constitutional requirement of standing, a plaintiff must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."[63] With regard to the injury, a plaintiff must assert more than a generalized interest in governance shared by all citizens and instead must have suffered an injury in fact or invasion of a legally protected interest that is concrete and particularized and actual or imminent.[64] For the injury to be "fairly traceable" to the defendant's actions, the "line of causation between the [defendant's actions] and [the] injury" cannot be "too attenuated."[65] Finally, it must be likely, rather than "merely speculative, that the injury will be redressed by a favorable decision."[66] The doctrine of standing often bars suits challenging agency action, for example, when plaintiffs seek to vindicate the public interest but personally have not suffered a concrete injury traceable to an agency action.[67]

Timing of Judicial Review

A variety of statutory and constitutional considerations related to the timing of a lawsuit also dictate whether a federal court is permitted to adjudicate a challenge to agency action. Foremost among these are statutes of limitations and the doctrines of ripeness, mootness, and exhaustion.

[61] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473–474 (1982).

[62] Allen v. Wright, 468 U.S. 737, 760 (1984).

[63] Bennet v. Spear, 520 U.S. 154, 162 (1997).

[64] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[65] *See Allen*, 468 U.S. at 752, 757–58 (holding that plaintiff lacked standing because the "line of causation between" the IRS's action of granting tax exemptions to some racially discriminatory schools and the plaintiff's asserted injury of being unable to attend a racially integrated school was "attenuated at best").

[66] *Lujan*, 504 U.S. at 560. In addition to constitutional standing requirements, courts have invoked a judicially constructed doctrine of "prudential standing" to limit review of certain types of claims. This includes "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751. However, in *Lexmark International Inc., v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), a unanimous Supreme Court characterized the "zone of interests" test described above as simply posing the question of whether Congress has created a cause of action that "encompasses a particular plaintiff's claim." In addition, the Court described the rule barring adjudication of generalized grievances as a constitutional requirement because such claims simply do not present a case or controversy under Article III. *Id.* at 127 n.3. The Court did not decide whether another prudential standing doctrine—the prohibition on raising another individual's legal rights—was more properly understood as a constitutional requirement. *Id.* Given the Court's description of prudential standing principles, the future of the doctrine is disputed. *See* Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149 (2014) ("[I]nteresting questions arise from the Court's explicit shift away from the traditional rubric of prudential standing. That shift raises a number of questions that are likely to bedevil the lower courts.").

[67] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

Statutes of Limitations

A party challenging an agency action must file suit within the appropriate statute of limitations.[68] Unless an agency's enabling legislation provides for a specific statutory deadline,[69] the default six-year statute of limitations for bringing civil actions against the United States will apply.[70] In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court clarified when the clock begins to run on that six-year limitation when challenging an agency action.[71] Although numerous circuit courts for decades had held that the six-year statute of limitations began to run when the agency finalized its action,[72] the Supreme Court ruled that the statute of limitations begins to run when the party bringing the challenge is *injured* by the agency action.[73] The Court's decision turned on the language in the statute that states that a claim is "barred unless the complaint is filed within six years after the right of action first *accrues*."[74] Holding that an action does not accrue until an injury occurs, the Court held that a facial challenge may be brought more than six years after the date an agency finalizes an action if the injury giving rise to the claim occurs after that date.[75] For example, in *Corner Post*, the corporate plaintiff had not yet been incorporated when the agency finalized the regulation at issue in the case.[76] Once incorporated, the entity raised a facial challenge against the agency's final rule in court, more than six years after the rule had been finalized.[77] The Court allowed the suit to proceed because the corporate plaintiff's injury did not (and could not) occur until the corporation existed and was injured by the regulation.[78] The Court's decision effectively extends, for some parties, the time period during which they can raise a facial challenge to an agency action.[79]

As indicated above, the default six-year statute of limitations only applies if Congress has not enacted a specific statutory deadline to govern a specific agency action. Many statutes authorizing judicial review of particular agency actions impose their own filing deadlines for such

[68] Citizens Ass'n of Georgetown v. Fed. Aviation Admin., 896 F.3d 425, 436–37 (D.C. Cir. 2018) (dismissing claim for failing to file suit within required timeframe and noting that "[f]iling deadlines, replete throughout the United States Code, promote prompt and final judicial review of agency decisions and ensure that agencies and affected parties can proceed free from the uncertainty that an action may be undone at any time").

[69] For a discussion on the variety of statutes of limitations found in the *U.S. Code*, see JONATHAN R. SIEGEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 42–51 (2022).

[70] 28 U.S.C. § 2401.

[71] Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 811 (2024).

[72] *See, e.g.*, Trafalgar Cap. Assocs., Inc. v. Cuomo, 159 F. 3d 21, 34–37 (1st Cir. 1998); Wind River Min. Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991); *but see* Herr v. U.S. Forest Serv., 803 F.3d 809, 821 (6th Cir. 2015).

[73] *Corner Post*, 603 U.S. at 811 ("[A] claim does not 'accrue' as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court."); *see also* CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

[74] 28 U.S.C. § 2401 (emphasis added).

[75] *Corner Post*, 603 U.S. at 825. Both before and after *Corner Post*, a party could raise an as-applied challenge (such as when an agency enforces a rule against the party), as opposed to a facial challenge, to the validity of an agency action even if more than six years had passed after the agency finalized the action. *See id.* at 823 ("Regulated parties 'may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them.'" (quoting *Herr*, 803 F.3d at 821)).

[76] *Id.* at 806.

[77] *Id.*

[78] *Id.* at 825.

[79] *Id.* at 823–24.

challenges.[80] These specific deadlines can vary significantly in length, depending on the policy preferences enacted by Congress.[81] Further, as emphasized in *Corner Post*, the date on which the clock begins to run will depend on the text of the statute—that is, a statute may provide that an action must be brought within a certain time after the action accrues, like in *Corner Post*, or, alternatively, within a certain time after a specific event has occurred.[82]

Ripeness and Mootness

Article III's cases or controversies requirement also mandates that a matter must be *ripe* for a federal court to review an agency action.[83] Ripeness concerns the "timing of judicial intervention" and prevents federal courts from adjudicating cases prematurely.[84] The doctrine protects courts "from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[85] In deciding whether a case is ripe, a court considers whether the issues presented in the case are ready for a judicial decision and whether a delay would cause hardship to the parties in the case.[86]

In analyzing whether a delay would cause hardship, a court may require a party to show that an agency's action has "adverse effects of a strictly legal kind" or requires the party to adjust their behavior in some way.[87] In the context of a challenge to an agency rule, the promulgation of a regulation can make a judicial challenge sufficiently ripe when the rule requires parties to comply with new restrictions or risk serious penalties.[88] In contrast, if a regulation does not require parties to alter their day-to-day conduct, judicial review may be more appropriate in the future after application of a rule to parties in a concrete way.[89] When determining whether a case is fit for judicial decision, a court may examine whether "further factual development would 'significantly

[80] *See, e.g.*, 30 U.S.C. § 1276(a)(1) (requiring petitions for review of certain EPA actions to be filed within sixty days).

[81] *Compare* 12 U.S.C. § 4623(a)(1) (requiring judicial challenge to be filed "within 10 days after receiving written notice of the Director's action"), *with* 42 U.S.C. § 6976(a)(1) ("[A] petition for review of action of the Administrator in promulgating any regulation . . . shall be filed within ninety days from the date of such promulgation . . . .").

[82] *Compare* 28 U.S.C. § 2401 (providing that a claim is "barred unless the complaint is filed within six years after the right of action first *accrues*") (emphasis added), *with* 15 U.S.C. § 2060(2) ("Not later than 60 days *after the promulgation* . . . of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition . . . for judicial review of such rule.") (emphasis added).

[83] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" (quoting Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993))); Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003).

[84] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)).

[85] *Abbott Labs.*, 387 U.S. at 148–49.

[86] *Id.* at 149.

[87] Ohio Forestry Ass'n., Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

[88] *Abbott Labs.*, 387 U.S. at 152–53.

[89] Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 58 (1993) (holding that a challenge to agency regulations was not ripe because the rule "impose[d] no penalties for violating any newly imposed restriction, but limit[ed] access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens"); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 164 (1967) (denying review of an agency regulation until it was applied in a particular circumstance, in part, because the plaintiff's primary conduct was not affected).

advance [a court's] ability to deal with the legal issues presented.'"[90] If not, the issue may not be ripe for review.[91]

The *mootness doctrine* imposes another limitation on justiciability derived from Article III's case-or-controversy requirement.[92] While the ripeness doctrine ensures that a matter is ready for adjudication, the mootness doctrine requires that "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation."[93] Thus, federal courts must decline to hear (or continue to preside over) a case challenging an administrative action if it is moot.[94] A case is moot if the controversy initially existing at the time the lawsuit was filed is no longer "live" due to a change in the law or in the status of the parties involved.[95]

An act by one of the parties that dissolves the dispute can also render a case moot.[96] However, the voluntary cessation doctrine provides that "a defendant cannot automatically moot a case by simply ending its unlawful conduct once sued."[97] This doctrine prevents a litigant from evading review by temporarily ceasing the unlawful activity and then, after the suit is dismissed, reengaging in the challenged conduct.[98] Courts will only dismiss a case as moot due to the voluntary acts of a litigant if it is "absolutely clear" that the allegedly wrongful behavior will not recur.[99] At least some federal appellate courts, however, are more willing to dismiss a case as moot when a government actor (such as a federal agency), rather than a private actor, voluntarily ceases challenged conduct.[100] As such, when an agency voluntarily repeals or withdraws a

[90] Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003) (quoting Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 82 (1978)).

[91] *Id.* (holding that legal challenge to an agency policy statement explaining the agency's views on the Contract Dispute Act was not ripe because additional factual development on how the agency would apply the law to particular contracts would advance the Court's ability to consider the legal issues presented); Nat'l Treasury Emps. Union v. Vought, No. 25-5091, 2025 WL 2371608, at *14 (D.C. Cir. Aug. 15, 2025) (holding challenge to agency head's alleged decision to "shutdown" an agency was unripe for review because "the exact scope of the putative shutdown" was unclear and the court's review would benefit from further factual development) (quoting *Toilet Goods Ass'n*, 387 U.S. at 164).

[92] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) (The Constitution's case-or-controversy limitation on federal judicial authority . . . underpins . . . our mootness jurisprudence.). For further discussion of the mootness doctrine, see Cong. Rsch. Serv., *Overview of Mootness Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-8-1/ALDE_00000722/ (last visited Sept. 11, 2025).

[93] Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 168 (2016) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013)).

[94] *See, e.g.*, Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 251 F.3d 1007, 1010 (D.C. Cir. 2001) (holding that a party's challenge to agency rules was moot because new rules applied).

[95] Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964).

[96] *See* De Funis v. Odegaard, 416 U.S. 312, 319 (1974) (holding that a challenge to a law school's admission standards was moot because the student has already been admitted, was entering his final term, and would remain in school regardless of the resolution of the case).

[97] *Already, LLC*, 568 U.S. at 91.

[98] *See id.* (explaining that, in the absence of the voluntary cessation doctrine, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends").

[99] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 457 n.1 (2017) (quoting Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

[100] Citizens for Resp. & Ethics in Wash. v. Wheeler, 352 F. Supp. 3d 1, 13 (D.D.C. 2019) ("This Court and other Circuits have previously and 'consistently recognized that where the defendant is a government actor — and not a private litigant — there is less concern about the recurrence of objectionable behavior.'" (quoting Citizens for Resp. & Ethics in Wash. v. SEC, 858 F. Supp. 2d 51, 61–62 (D.D.C. 2012))); *see also* People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 918 F.3d 151, 157 (D.C. Cir. 2019) ("In analyses of 'voluntary cessation,' many of our sister circuits have been ready to give declarations by (or on behalf of) government officials—public servants (continued...)

challenged rule or policy, courts have declared cases moot despite the agency's potential ability to reinstate the action at a future date.[101] Nonetheless, a court must be satisfied that the agency will not resume the challenged conduct.[102]

Exhaustion of Remedies

A court might deny review because a party failed to exhaust its administrative remedies before suing in federal court.[103] Among other things, the doctrine of exhaustion seeks to avoid unnecessary litigation by requiring the full development of an administrative record before a court examines a case.[104] However, the Supreme Court has held that in suits brought under the APA, federal courts lack the power to require parties to exhaust their administrative remedies if no statute or agency rule requires such exhaustion.[105] Nonetheless, if a challenge to administrative action is brought under a different statute, or if agency regulations require exhaustion, failure to pursue required administrative remedies could preclude immediate judicial challenges to federal agency action.[106]

Supreme Court precedent provides an exception to exhaustion requirements for certain constitutional challenges. In *Axon Enterprise, Inc. v. Federal Trade Commission (FTC)*, the Supreme Court held that parties can bring to federal court constitutional challenges to an agency's structure without first exhausting administrative remedies during an enforcement proceeding.[107] Although the FTC brought an enforcement action against the party in its own administrative forum, the Supreme Court held that the party could immediately bring constitutional challenges directly to federal court without first raising those arguments before the agency's own tribunal.[108]

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sworn to uphold the law—somewhat higher credence than statements made by private parties."); Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1117 n.15 (10th Cir. 2010) ("Indeed, despite *Laidlaw*'s heavy burden, some courts have expressly treated governmental officials' voluntary conduct 'with more solicitude' than that of private actors." (quoting Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988))).

[101] *See, e.g.*, Lewis v. Becerra, No. CV 18-2929 (RBW), 2023 WL 3884595, at *12 (D.D.C. June 8, 2023) (dismissing challenge as moot after agency rescinded and replaced challenged agency rulings); *Citizens for Resp. & Ethics in Wash.*, 352 F. Supp. 3d at 14 (holding voluntary cessation doctrine does not apply when agency "has taken the affirmative step of revising its records-management policy" and it "would have to decide to promulgate a new policy" to resume the challenged conduct).

[102] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 720 (2022) ("Here the Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose emissions limits predicated on generation shifting; indeed, it 'vigorously defends' the legality of such an approach [and w]e do not dismiss a case as moot in such circumstances." (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007))); *People for the Ethical Treatment of Animals*, 918 F.3d at 158 ("[The USDA letter] doesn't express the agency's position clearly enough to convince us that, as to *all* requested document types, it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" (quoting *Ladlaw*, 528 U.S. at 189)).

[103] McCarthy v. Madigan, 503 U.S. 140 (1992). This doctrine often derives from prudential considerations but is also sometimes required by statute. *See* Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247–48 (D.C. Cir. 2004).

[104] *Avocados Plus*, 370 F.3d at 1247; Portela-Gonzalez v. Sec'y of the Navy, 109 F.3d 74, 76 (1st Cir. 1997) ("We agree with the district court that [the plaintiff] impermissibly failed to exhaust her administrative remedies.").

[105] Darby v. Cisneros, 509 U.S. 137, 146–47 (1993); DSE, Inc. v. United States, 169 F.3d 21, 26–27 (D.C. Cir. 1999) ("Under the APA, a party can seek judicial review from a final agency action without pursuing an intra-agency appeal unless required to do so by statute or by regulation.").

[106] *See, e.g.*, Conservation Force v. Salazar, 919 F. Supp. 2d 85, 90 (D.D.C. 2013) (dismissing claim because plaintiff failed to exhaust administrative remedies required by agency regulations); Career Educ., Inc. v. Dep't of Educ., 6 F.3d 817, 820 (D.C. Cir. 1993) (requiring exhaustion pursuant to agency regulation "in order to give the Department's top level of appeal an opportunity to place an official imprimatur on the Department's interpretation of its regulations before it is reviewed by a federal court").

[107] Axon Enter., Inc. v. FTC, 598 U.S. 175, 195–96 (2023).

[108] *Id.* at 182, 195–96.

Although the FTC Act provides that review of an FTC order shall be brought to a federal court of appeals, the Supreme Court allowed the suit to enjoin the enforcement action to proceed in federal district court because the questions regarding the constitutionality of the agency's structure were not the type of questions that the agency were equipped to answer.[109]

APA-Specific Requirements

As discussed above, the APA is perhaps the most prominent statutory vehicle for challenging the actions of a federal agency.[110] It provides a "strong presumption that Congress intends judicial review of administrative action."[111] Nonetheless, in addition to the limits on the availability to judicial review discussed in the above sections, the APA also provides certain limits on the availability of judicial review for claims brought under the act. For suits brought under the APA, judicial review is available only for "final agency action."[112] Further, judicial review is unavailable if another statute precludes judicial review or if the action is "committed to agency discretion by law."[113] This section of the report discusses these limitations on the availability of judicial review under the APA.

Review of "Final Agency Action"

Under the APA, a federal court is limited to reviewing "final agency action."[114] Thus, a preliminary question is what constitutes an *agency* for the purposes of the APA. The APA defines the term broadly as "each authority of the Government of the United States" but then enumerates various entities that are excluded from that definition.[115] The definition generally includes all executive branch agencies, including the independent regulatory agencies, but specifically excludes Congress and the judiciary,[116] as well as courts-martial, military commissions, and military authorities in times of war or in the field.[117] Further, the Supreme Court has held that the definition of *agency* in the APA does not encompass the President.[118]

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[109] *Id.*

[110] *See* SIEGEL, *supra* note 69, at 14 ("Litigants and courts rely on [the APA's] general judicial review provisions thousands of times every year.").

[111] Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); *see also* McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 606 U.S. 146, 155 (2025) ("[T]his Court has long recognized a 'basic presumption of judicial review' of agency action." (quoting Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 586 U.S. 9, 22 (2018).

[112] 5 U.S.C. § 704.

[113] *Id.* §§ 701, 704; Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

[114] 5 U.S.C. § 704.

[115] *Id.* § 551(1).

[116] *Id.* This exemption would appear to apply to not only Congress and the courts directly but also agencies within the legislative and judicial branches. *See, e.g.*, Ethnic Emps. of Libr. of Cong. v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985) ("[T]he Library [of Congress] is not an agency under the Administrative Procedure Act."); Wash. Legal Found. v. U.S. Sent'g Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994) ("Over the years, virtually every case interpreting the APA exemption for 'the courts of the United States' has held that the exemption applies to the entire judicial branch.").

[117] 5 U.S.C. § 551(1).

[118] Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (citing the "respect for the separation of powers and the unique constitutional position of the President" and holding that the APA's "textual silence" concerning whether the law applies to the President was "not enough to subject the President to the provisions of the APA"). However, the Court ruled that the President is still subject to constitutional claims arising outside of the APA. *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952)).

Review under the APA is also limited to agency *action*, which is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[119] Courts thus may review a wide variety of issues, including agency rules, denials of licenses and permits, and sanctions issued against private parties.[120] Courts will deny review if the agency's challenged conduct does not fit within the statutory definition of action.[121] For example, some courts have denied requests for review of agency negotiating positions, publications, and press releases, as those documents do not necessarily qualify as rules, orders, or sanctions within the meaning of the APA.[122] Further, the Supreme Court has held that a plaintiff may not "seek *wholesale* improvement of a [broad regulatory] program by court decree . . . [but] must direct its attack against some particular 'agency action' that causes it harm."[123] Thus, courts have held that challenges must target "specific" agency actions, rather than the general operation of broad agency programs or plans.[124]

Judicial review is only available if the agency action is *final*.[125] The Supreme Court has articulated two requirements for an agency's action to qualify as final. First, the action may not be tentative or interlocutory in nature but must represent the "'consummation' of the agency's decisionmaking process."[126] Second, it must be an action "by which 'rights or obligations have

[119] 5 U.S.C. § 551(13).

[120] *Id.* § 551(4) (defining a "rule" for purposes of the APA), (8) (defining "license"), (10) (defining "sanction").

[121] *See, e.g.*, Nat'l Veterans Legal Servs. Program v. U.S. Dep't of Def., 990 F.3d 834, 839 (4th Cir. 2021) ("When authorizing review of 'agency action,' the APA 'does not provide judicial review for everything done by an administrative agency.'" (quoting Hearst Radio v. FCC, 167 F.2d 225, 227 (D.C. Cir. 1948))); Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484, 490 (5th Cir. 2014) ("Because the Tribe fails to point to any identifiable 'agency action' within the meaning of § 702 for both claims, we hold that the Tribe has failed to prove that subject-matter jurisdiction exists for this lawsuit."); *Hearst Radio*, 167 F.2d at 227 ("Broad as is the judicial review provided by the Administrative Procedure Act, it covers only those activities included within the statutory definition of 'agency action.'").

[122] *See, e.g.*, Walmart Inc. v. U.S. Dep't of Just., 21 F.4th 300, 309 (5th Cir. 2021) (holding that agency negotiating positions did not constitute agency action and barring suit for failure to "identify agency action"); Indus. Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1118–19 (D.C. Cir. 1988); *see also* Trudeau v. FTC, 456 F.3d 178, 189 (D.C. Cir. 2006) (noting that "we have never found a press release of the kind at issue here to constitute 'final agency action' under the APA"). *See also* Barry v. SEC, No. 10-CV-4071, 2012 WL 760456, at *5 (E.D.N.Y. Mar. 7, 2012) (reviewing the definition of "agency action" under the APA and determining that the definition "does not appear to embrace the press release" in question).

[123] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891–93 (1990) (holding that it is "certain that the flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA"). The Supreme Court stated that the political branches were the appropriate venue for seeking broad programmatic change. *Id.*

[124] *See, e.g.* City of New York v. Dep't of Def., 913 F.3d 423, 432 (4th Cir. 2019) (providing that the APA limits review to "only those acts that are specific enough to avoid entangling the judiciary in programmatic oversight, clear enough to avoid substituting judicial judgments for those of the executive branch, and substantial enough to prevent an incursion into internal agency management"); Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 20 (D.C. Cir. 2006) (holding agency strategy established in agency budget request is not agency action under APA because it is a "broad 'programmatic' statement that *Lujan* keeps from our review" (citing *Lujan*, 497 U.S. at 891)).

[125] 5 U.S.C. § 704. Some courts have wrapped this requirement into the ripeness inquiry, concluding that a claim is not ripe if it does involve final agency action. *See, e.g.*, Los Alamos Study Grp. v. U.S. Dep't of Energy, 692 F.3d 1057, 1065 (10th Cir. 2012); Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992).

[126] Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). An action may meet this first requirement even if it is potentially subject to revision at a future date. For example, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597–98 (2016), the Supreme Court held that this first prong was satisfied upon the agency's issuance of a jurisdictional determination that was valid for five years and subject to revision upon receipt of new information. *Id.*

been determined,' or from which 'legal consequences will flow.'"[127] This principle limits the judicial review of a variety of agency actions that do not have a final, legally binding consequence. For example, this restriction may bar judicial review of an agency's recommendation to the President to take certain actions.[128] The finality requirement can also, at times, shield certain agency guidance documents from judicial review if such guidance does not legally bind the public.[129]

Statutory Preclusion of Review

Although the APA generally provides for judicial review of final agency action, the law contains certain exceptions.[130] One exception is that judicial review will not be available when a separate statute precludes such review.[131] However, the Supreme Court has interpreted the APA as establishing a "strong presumption that Congress intends judicial review of administrative action,"[132] and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[133] Some statutes expressly preclude judicial review of agency actions.[134] In other situations, review may be precluded by implication.[135] Determining whether another statute precludes review under the APA may include an examination of that statute's "express language[,] . . . the structure of the overall statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."[136] In some cases, judicial review may be precluded because it would contradict congressional intent, such as by disrupting or impeding the intended swift operation of a complex regulatory framework.[137] However, in the context of lawsuits alleging constitutional violations,

[127] *Bennett*, 520 U.S. at 178 (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)). The Supreme Court considers the effect that the action has on parties and has stated that it takes a "'pragmatic' approach . . . to finality" determinations. *Hawkes Co.*, 578 U.S. at 599. For example, the Court held that an agency's issuance of a jurisdictional determination had legal consequences for the plaintiff even though no action could be brought against plaintiff for failing to conform to the determination itself. *Id.* The Supreme Court held the action had legal consequences because the determination was binding on the government and its issuance had the effect of providing or denying plaintiffs with a five-year safe harbor from enforcement actions under the Clean Water Act. *Id.*

[128] Dalton v. Specter, 511 U.S. 462, 469–70 (1994); Franklin v. Massachusetts, 505 U.S. 788, 798 (1992).

[129] The situations in which guidance documents constitute final agency action are disputed. *Compare* Nat'l Mining Assoc. v. McCarthy, 758 F.3d 243, 247 (D.C. Cir. 2014) (ruling that a guidance document did not constitute final agency action), *with* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000) (concluding that a guidance document was final agency action). For a discussion on judicial review and guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers (2021).

[130] 5 U.S.C. § 701(a).

[131] *Id.* § 701(a)(1).

[132] Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)); *see also* McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 606 U.S. 146, 155 (2025) ("[T]his Court has long recognized a 'basic presumption of judicial review' of agency action." (quoting Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv., 586 U.S. 9, 22 (2018))).

[133] *Abbott Labs.*, 387 U.S. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962)).

[134] *See, e.g.*, 5 U.S.C. § 805 (barring judicial review of any "determination, finding, action, or omission under" the Congressional Review Act). Most courts have concluded this provision to preclude judicial review of questions such as whether an agency should have submitted an action to Congress pursuant to the CRA. *See, e.g.*, Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009). For a survey of judicial review bars appearing in the *U.S. Code*, see Laura E. Dolbow, *Barring Judicial Review*, 77 VAND. L. REV. 307, 323 (2024).

[135] *See, e.g.*, Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

[136] *Id.* at 345.

[137] *Id.* at 346–47. In addition, judicial review may be precluded in one court because the statute establishes a comprehensive scheme that funnels review into a particular court in specific circumstances. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 208–09 (1994); Elgin v. Dep't of the Treasury, 567 U.S. 1, 10–12 (2012).

courts have read preclusion provisions narrowly to preserve a federal court's role of reviewing constitutional claims.[138] The Supreme Court has required Congress to provide a clear statement that it intends to preclude constitutional claims from judicial review.[139]

Committed to Agency Discretion

Review under the APA is also unavailable if the agency's action is committed to the agency's discretion.[140] An agency's action is committed to its discretion when a statute's terms are so broad that there simply is "no law to apply" in evaluating its requirements.[141] In other words, if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then judicial review is unavailable.[142] The Supreme Court has cautioned, however, that this exception to judicial review is "narrow" and only applied in rare circumstances.[143]

A prominent example of a matter usually committed to an agency's discretion is the decision not to initiate an enforcement action against a third party.[144] The Court has explained that the decision to initiate an enforcement action involves a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise" and is "generally committed to an agency's absolute discretion."[145] However, the Court characterized such decisions as *presumptively* unreviewable—"the presumption may be rebutted where the substantive statute [at issue] has provided guidelines for the agency to follow in exercising its enforcement powers."[146] Similarly, the Court has held that an agency's decision to allocate funds from a lump-sum appropriation is committed to an agency's discretion, because the purpose of such an appropriation is to grant the agency flexibility to spend funds.[147] Likewise, the Court has held that the decision by the Director of the Central Intelligence Agency (CIA) to discharge an employee for reasons in the "interests of the United States" is committed to agency discretion, a ruling based in part on the overall structure of the relevant statute directing the CIA to gather and protect intelligence sources.[148]

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[138] *See* McNary v. Haitian Refugee Ctr. Inc., 498 U.S. 479, 498 (1991) (holding that a statutory preclusion provision did not deprive courts of constitutional challenges to agency conduct); Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding that a statutory preclusion provision did not deprive courts of constitutional challenges to the statutory scheme); *see also* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 178 (2019) ("[T]he constitutionality of jurisdiction-stripping proposals remains one of the most significant unanswered questions in the field of federal courts.").

[139] Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." (quoting Weinberger v. Salfi, 422 U.S. 749, 762 (1975)).

[140] 5 U.S.C. § 701(a)(2).

[141] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[142] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[143] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 16 (2020); Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 586 U.S. 9, 23 (2018).

[144] *Id.*

[145] *Id.* at 831–32; *see* Cass Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675–83 (1985).

[146] *Heckler*, 470 U.S. at 833. The Court also provided that if an agency adopted a non-enforcement policy "so extreme as to amount to an abdication of its statutory responsibilities," the presumption of nonreviewability could also be overcome. *Id.*

[147] Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

[148] Webster v. Doe, 486 U.S. 592, 601 (1988). The *Webster* Court did preserve the plaintiff employee's ability to bring constitutional claims in federal court, ruling that the statute did not preclude such suits. *Id.* at 604–05.

The Scope of Review Under the APA

As discussed above, the APA contains a waiver of the United States' sovereign immunity under certain circumstances,[149] providing a cause of action for individuals aggrieved by agency conduct to seek judicial review of an agency's decision.[150] The APA directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions" that are

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to [5 U.S.C. §§] 556 and 557 [concerning formal rulemaking and adjudicatory proceedings] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[151]

As a result, courts are generally authorized to direct an agency to comply with the law and can invalidate actions that are inconsistent with the agency's statutory authority.[152] Courts may also review an agency's compliance with statutory procedural requirements, such as notice-and-comment rulemaking procedures imposed by other provisions of the APA.[153] In addition, a court may examine an agency's discretionary decisions and invalidate actions that are arbitrary or capricious.[154]

Review of an Agency's Interpretation of Statutory Authority

When agencies exercise the authority delegated to them by Congress, they are limited to taking actions authorized by law.[155] The Supreme Court has stated that "an agency literally has no power to act . . . unless and until Congress confers power upon it."[156] Consequently, agencies may not exceed the statutory bounds of their authority.[157]

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[149] *See supra* "Sovereign Immunity."

[150] *See supra* "Cause of Action."

[151] 5 U.S.C. § 706. A separate provision, 5 U.S.C. § 553(e), provides interested parties the right to petition a government agency to issue, amend, or repeal a rule. This provision requires agencies that deny such a petition to provide a brief statement of their reasons for that decision. An agency's denial is judicially reviewable, *see* Massachusetts v. EPA, 549 U.S. 497, 527 (2007), but the scope of that review "is 'extremely limited' and 'highly deferential,'" *id*. (quoting Nat'l Customs Brokers & Forwarders Assn. of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

[152] 5 U.S.C. § 706(2)(C).

[153] *Id.* § 706(2)(D).

[154] *Id.* § 706(A). Courts may overturn decisions that are unsupported by substantial evidence in formal proceedings, although review of an agency's factual findings in other circumstances is governed by the arbitrary-and-capricious standard. *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984); *see* discussion *infra* note 231.

[155] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

[156] *Id.*

[157] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022) ("Agencies have only those powers given to them by (continued...)

The APA authorizes courts to "set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or otherwise "not in accordance with law."[158] It directs courts to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions."[159] Courts, therefore, interpret the meaning of statutory provisions to determine whether an agency's actions accord with its statutory authority. In 2024, the Supreme Court held in *Loper Bright v. Raimondo* that courts should conduct this review de novo.[160] That is, a court shall afford an agency's interpretation of the statute no deference when determining the meaning of an applicable statute.[161]

Since at least the 1940s, the Supreme Court has developed various judicial doctrines to address agency interpretations of federal law. In 1946, the Court's opinion in *Skidmore v. Swift & Co.*—which remains good law after the Court's 2024 *Loper Bright* decision—directed courts to give an agency's interpretation of a statute appropriate "weight" according to its "power to persuade" when determining the meaning of a statute. [162] Then, from 1984 to 2024, the Supreme Court's *Chevron* doctrine—overruled in the *Loper Bright* decision—required courts to *defer* to certain agency interpretations of ambiguous statutes, so long as the agency's interpretation was reasonable.[163] In the years following the Court's *Chevron* decision, the Court also articulated the *major questions doctrine*, requiring agencies to point to "clear congressional authorization" to regulate on issues of great "economic and political significance."[164] This section of the report provides a brief overview of *Chevron* and *Skidmore*, the Supreme Court's controlling opinion in *Loper Bright*, and the Court's major questions doctrine.

Chevron Deference and *Skidmore* Weight

Prior to being overruled in 2024, *Chevron* established a two-step framework that courts applied when reviewing an agency's interpretation of a statute it administered.[165] Pursuant to that framework, courts first examined whether the meaning of a statute was clear.[166] If so, "that [was] the end of the matter," and courts enforced the "unambiguously expressed intent of Congress."[167] Where a statute contained an ambiguity or a gap, however, a court proceeded to the framework's second step. At "step two," courts examined whether an agency's interpretation of the ambiguous provision of the statute was reasonable.[168] If the agency's interpretation was reasonable, the court was required to defer to the agency's interpretation, even if the court would have otherwise reached a contrary conclusion.[169] The *Chevron* decision rested on several assumptions, including

Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (quoting Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999))).

[158] 5 U.S.C. § 706(2)(A), (C).

[159] *Id.* § 706.

[160] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024).

[161] *Id.*

[162] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[163] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[164] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 721 (2022); Nat'l Fed'n of Ind. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (per curiam); King v. Burwell, 576 U.S. 473, 485–86 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[165] *Chevron*, 467 U.S. at 842–43 (1984).

[166] *Id.* at 842.

[167] *Id*. at 842–43.

[168] *Id.*

[169] *Id*. at 843.

that statutory ambiguity indicated Congress's intent to delegate interpretive authority to agencies, that agencies may possess significant expertise concerning the law's administration, and that agencies are more politically accountable than courts and thus have superior claim to render policy decisions.[170] Some commentators had noted that agency statutory interpretations were more likely to be upheld when the doctrine applied, particularly if a court reached *Chevron*'s second step.[171]

Even when *Chevron* did not apply,[172] a court could still accord an agency interpretation of a statute some respect or weight. Under the Court's pre-*Chevron* decision of *Skidmore v. Swift & Co*., an interpretation by the relevant agency "made in pursuance of official duty" and premised on "specialized experience" counts as a "body of experience and informed judgment" that courts can look to when determining a statute's meaning.[173] Under *Skidmore*, courts can, but are not required to, give weight or respect to an agency interpretation to the extent the interpretation is persuasive.[174] The *Skidmore* Court explained that the persuasiveness of an agency interpretation "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade," but not control.[175] Unlike *Chevron*, as discussed below, *Skidmore* remains good law.

Loper Bright Enterprises v. Raimondo

In 2024, the Supreme Court overruled *Chevron* in *Loper Bright*.[176] The Court held that the *Chevron* framework contradicted Section 706 of the APA's requirement that courts "decide all relevant questions of law" and "interpret . . . statutory provisions."[177] The majority opinion rejected *Chevron*'s presumption that a statutory ambiguity indicates a delegation to agencies to

[170] *Id*. at 843–44, 864–66.

[171] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) ("In other words, agencies won significantly more in the circuit courts when *Chevron* deference applied, at least when the court expressly considered whether to apply *Chevron*. Indeed, there was nearly a twenty-five-percentage-point difference in agency-win rates with *Chevron* deference (77.4%) than without (53.6%)."); Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J.REG. 1, 31 (1998) (determining that in 1995 and 1996 courts that reached step two of the *Chevron* test "upheld the agency view in 89% of the applications."). *But see* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 138 (2010) ("[C]ourts do not, in the end, discern the differences among these various doctrines, frequently do not distinguish among the doctrines in application, and probably do not really care which standard of review they apply most of the time."); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (reviewing various studies examining agency win-rates and concluding that "doctrinally-based differences in outcome are barely detectable").

[172] *Chevron* did not apply every time a court evaluated an agency's proffered interpretation of a statute. *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). The initial step of determining whether the *Chevron* doctrine would apply to a particular case is often referred to as "*Chevron* step zero." *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

[173] Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

[174] *Id.* at 140.

[175] *Id*.

[176] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024). For more information on *Loper Bright*, see CRS Report R48320, *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, by Benjamin M. Barczewski (2024).

[177] *Loper Bright*, 603 U.S. at 398–99; *see* 5 U.S.C. § 706.

choose one among the multiple possible reasonable interpretations of a statute.[178] Statutes, the Court held, have a single best meaning fixed at the time of enactment, and the APA's command requires courts to determine the meaning of a statute using their "independent legal judgment."[179] The Court explained that, as part of their traditional role in determining the meaning of federal law, courts—and not agencies—have special expertise in resolving the meaning of ambiguous statutes.[180]

The Court recognized the possibility that an agency's interpretation might be due weight or respect given the agency's "body of experience and informed judgment."[181] Quoting its decision in *Skidmore*, the Court observed that such expertise has long been one of the factors which can give an agency's interpretation the "power to persuade," though not control.[182] A "better presumption," the Court concluded, is thus that Congress expects that courts will do their "ordinary job" in determining the best reading of a statute, "with due respect for the views of the Executive Branch."[183]

The Supreme Court also acknowledged that sometimes the best reading of a statute is that Congress *did* delegate authority to an agency to exercise discretion when administering a statute.[184] The Court provided examples of statutes in which Congress explicitly authorized an agency to define statutory terms[185] or gave agencies broad discretionary authority to regulate when "appropriate" or "reasonable."[186] The Court concluded that, in such circumstances, a court's role is to fix the permissible boundaries of the statutory delegation and to then ensure that the agency has acted reasonably.[187]

The *Loper Bright* decision means that courts will no longer defer to an agency's interpretation of a statute.[188] Instead, a court must "deploy[] its full interpretive toolkit"[189] to determine and give legal effect to the best meaning of the law.[190] The Court repeatedly cited and quoted from its prior *Skidmore* decision in explaining the proper role for courts when interpreting an ambiguous statute.[191] These positive references suggest that, going forward, *Skidmore* may play a more prominent role in guiding lower courts' interpretations of ambiguous statutes where an agency

[178] *Loper Bright*, 603 U.S. at 399–400.

[179] *Id.* at 400–01.

[180] *Id*. The Court also rejected *Chevron's* background presumption that Congress intends for agency experts to resolve statutory ambiguities. *Id*. at 401–02. Even when ambiguity concerns a technical question, the Court reasoned, that does not indicate that Congress has wrested the power to authoritatively interpret the law from courts and given it to an agency. *Id*. Instead, Congress expects courts to resolve "technical statutory questions." *Id*.

[181] *Id.* at 402 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[182] *Id*. (quoting *Skidmore*, 323 U.S. at 140).

[183] *Id.* at 402–03.

[184] *Id.* at 394 ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes.").

[185] *Id.* at 394–95 ("For example, some statutes 'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term.") (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)).

[186] *Id.* at 395 ("Other[statutes] empower an agency . . . to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'") (quoting Michigan v. E.P.A., 576 U.S. 743, 752 (2015) (citations omitted).

[187] *Id.*

[188] *Id.* at 412–13.

[189] *Id.* at 408–09.

[190] *Id*. at 400.

[191] *Id*. at 388, 394, 399, 402; *id*. at 474–76 (Kagan, J., dissenting) ("First, the majority makes clear that what is usually called *Skidmore* deference continues to apply.").

with "specialized experience" has supplied its own interpretation.[192] That said, the "due respect" that courts can afford interpretations of the executive branch under *Skidmore* does not mean that the agency's interpretation will receive controlling weight.[193]

Major Questions Doctrine

The major questions doctrine mandates that an agency be able to show that it has clear congressional authorization to regulate in areas of great "economic and political significance."[194] In applying the doctrine, the Court has cautioned that Congress does not authorize agencies to regulate on issues of significant societal import in vague or subtle terms[195]—as the Court opined in *Whitman v. American Trucking Associations*, Congress "does not . . . hide elephants in mouseholes."[196] As such, courts should "hesitate before concluding that Congress has intended" to confer such authority.[197] Instead, the agency "must point to 'clear congressional authorization' for the power it claims."[198] The Court has not articulated a specific test to determine whether a particular action constitutes a "major question" but has used the doctrine to analyze agency authority in myriad subject areas.

For example, in *Biden v. Nebraska*, the Court invalidated the Department of Education's plan to cancel approximately $430 billion worth of student loans pursuant to authority granted by the Higher Education Relief Opportunities for Students Act (HEROES Act).[199] The Secretary of Education moved to cancel the loans pursuant to a provision allowing for the waiver or modification of the law's statutory and regulatory provisions during an emergency.[200] The Court found that prior uses of the waiver authority were "extremely modest and narrow in scope"[201] compared to the "staggering" action taken by the Secretary to cancel billions of dollars in loans.[202] In holding that the agency did not have the statutory authority to implement the action,

[192] Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[193] *Loper Bright*, 603 U.S. at 386 ("Whatever respect an Executive Branch interpretation was due, a judge 'certainly would not be bound to adopt the construction given by the head of a department.'" (quoting Decatur v. Paulding, 39 U.S. 497, 515 (1840))).

[194] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 721 (2022); Nat'l Fed'n of Ind. Business v. OSHA, 595 U.S. 109, 117 (2022) (per curiam); King v. Burwell, 576 U.S. 473, 485–86 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014). For more information on the major questions doctrine, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022), and CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers (2022). For a discussion on the major questions doctrine, its relationship to *Chevron* deference, and potential future applications following the Court's decision in *Loper Bright*, see Barczewski, Loper Bright Enterprises, *supra* note 176.

[195] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

[196] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

[197] *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159.

[198] *West Virginia*, 597 U.S. at 700.

[199] Biden v. Nebraska, 600 U.S. 477, 506–07 (2023).

[200] *Id.* at 494.

[201] *Id.* at 501.

[202] *Id.* at 502–03 (noting that the economic impact of the loan forgiveness program "amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending").

the Court stated "it is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle devise as permission to "modify."'"[203]

Review of Agency Interpretations of Regulations

An agency's interpretation of its own regulations can also be the subject of judicial review. The APA provides that a "reviewing court shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action."[204] Just as ambiguities arise in statutory provisions that agencies implement,[205] similar uncertainties sometimes accompany agency regulations.[206] Supreme Court doctrine, reiterated in *Auer v. Robbins*[207] and further developed in *Kisor v. Wilkie*, instructs courts to defer to certain reasonable interpretations of a genuinely ambiguous regulation—a practice commonly referred to as *Auer* deference.[208] In *Kisor*, the Supreme Court cabined the scope of *Auer* deference,[209] explaining that deference should not be "reflexive" and clarifying that courts are obligated "to perform their reviewing and restraining functions."[210]

For *Auer* deference to apply, a court first must determine that the regulation at issue is "genuinely ambiguous."[211] In making this determination, a court must use all the available tools of construction to discern the regulation's meaning.[212] If this endeavor reveals the meaning of the regulation, "the court must give it effect."[213] If the court determines that the regulation is truly ambiguous, a court should only defer to an agency's *reasonable* interpretation.[214]

The *Kisor* Court further explained that not every reasonable agency interpretation is deserving of judicial deference.[215] Certain kinds of interpretations, even if reasonable, should not be accorded controlling weight. To receive deference, the interpretation must represent the agency's

[203] *Id.* at 496 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).

[204] 5 U.S.C. § 706.

[205] As discussed above, after *Loper Bright v. Raimondo*, courts are required to use independent judgment to determine the best meaning of any ambiguous statute without deferring to an agency's interpretation. *See supra "Loper Bright Enterprises v. Raimondo."*

[206] Kisor v. Wilkie, 588 U.S. 558, 566 (2019) ("[We b]egin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading.").

[207] Auer v. Robbins, 519 U.S. 452, 46 (1997).

[208] *Kisor*, 588 U.S. at 563 ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it."); *see also* Auer v. Robbins, 519 U.S. 452, 46 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

[209] *Kisor*, 588 U.S. at 564.

[210] *Id.* at 573–74.

[211] *Id.* at 574–75 ("[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.").

[212] *Id.* at 575 (stating that courts must consider "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on").

[213] *Id.* at 575–76.

[214] *Id.*; *see also* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (stating that a court will not defer to an agency interpretation that "is plainly erroneous or inconsistent with the regulation."). The Court in *Kisor* explained that, for the agency's interpretation to be reasonable, "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Kisor*, 588 U.S. at 575–76. That is, a court should use the "text, structure, [and] history" of the regulation to "establish the outer bounds of permissible interpretation." *Id.*

[215] *Id.* at 576.

authoritative or official position on the matter,[216] "implicate the agency's substantive expertise,"[217] and exhibit "fair and considered judgment."[218] Thus, a court may decline to extend *Auer* deference if the agency's otherwise reasonable interpretation creates an "unfair surprise" to regulated parties,[219] is inconsistent with prior agency interpretations,[220] or emanates from a nonauthoritative source.[221] Finally, if an agency regulation simply "parrot[s]" or "paraphrase[s]" the relevant statutory language, then the agency receives no special authority to interpret the regulation.[222]

Although the Supreme Court upheld the *Auer* deference doctrine in its 2019 *Kisor* decision, some commenters question whether the Supreme Court could overrule *Auer* after the Court's decision in *Loper Bright*.[223] As discussed above, the Supreme Court recently overturned the *Chevron* doctrine, which required courts to defer to an agency's reasonable interpretation of an ambiguous statute, because it conflicted with APA's command that courts must "decide all relevant questions of law."[224] It appears that *Auer* deference may conflict with the APA in a similar manner given the APA's direction that courts shall "determine the meaning or applicability of the terms of an agency action," which includes regulations.[225] If the Court interprets the scope of courts' review of regulations under the APA as similar to that of statutes, then the Court might overrule *Auer*.[226]

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[216] *Id.* at 577 (explaining that agency pronouncements from lower-level staff may not qualify for such deference).

[217] *Id.* at 577–78 (explaining that some questions, such as ones "concerning the award of an attorney's fee" or clarifying "a simple common-law property term," could "fall more naturally into a judge's bailiwick").

[218] *Id.* at 579 (citing *SmithKline Beecham Corp.*, 567 U.S. at 155).

[219] *Id.* (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

[220] *Id.* at 579; *SmithKline Beecham Corp.*, 567 U.S. at 155 (noting that if an "agency's interpretation conflicts with a prior interpretation" it might indicate that the "interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997))). Although an inconsistent position may indicate that an interpretation does not represent the "fair and considered judgment" of the agency, it does not necessarily negate judicial deference to the agency's position. *Compare* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (noting that an interpretation that contradicts a prior interpretation receives less deference than a view held consistently), *with* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) ("But as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.").

[221] *Kisor*, 588 U.S. at 577.

[222] *Id.* at 588 n.5 (citing Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006)).

[223] *See, e.g.*, Cass R. Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 DUKE L.J. 1893, 1916 n. 6 (2025) (noting "that *Loper Bright* sits . . . uneasily with *Kisor*"); Sean Lyness, Chevron *Deference's Demise Suggests* Auer *Won't Last Much Longer*, BLOOMBERG LAW (July 10, 2024), https://news.bloomberglaw.com/us-law-week/chevron-deferences-demise-suggests-auer-wont-last-much-longer [https://perma.cc/YS8B-SNNR]; *but see* Thomas E. Nielsen & Krista A. Stapleford, *What* Loper Bright *Might Portend for* Auer *Deference*, HARVARD LAW REVIEW (July 5, 2024), https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference/ [https://perma.cc/MTL3-HJTC].

[224] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412, (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

[225] 5 U.S.C. § 706.

[226] Since the Court's decision in *Loper Bright*, lower courts, though recognizing potential tension between *Kisor* and *Loper Bright*, generally have continued to apply *Kisor* to agency interpretations of ambiguous regulations. *See, e.g.*, United States v. James, 135 F.4th 1329, 1334 n.1 (11th Cir. 2025) ("Although perhaps *Loper Bright* has the potential to cast doubt on *Kisor* and *Dupree*'s reasoning in future cases, it dealt with agency interpretations of ambiguous statutes, not agency interpretations of their own regulations."); United States v. Peralta, No. 23-13647, 2024 WL 4603297, at *2 n.2 (11th Cir. Oct. 29, 2024) ("It's worth noting, however, that while the Supreme Court mentioned *Kisor* several times in *Loper Bright*, it never said it had overruled it, which is unsurprising since the two cases involve different types of deference—*Loper Bright* addressed agency interpretation of statutes, whereas *Kisor* involved agency interpretation of its own regulations."); United States v. Boler, 115 F.4th 316, 322 n.4 (4th Cir. 2024) (noting that the Court's *Loper* (continued...)

Arbitrary-and-Capricious Review

In addition to ensuring that agencies act within the scope of their statutory authority, courts will also review agency action to ensure the agency has acted reasonably.[227] The APA instructs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[228] This "catch-all" provision of the APA applies to factual determinations made during "informal" proceedings,[229] such as notice-and-comment rulemaking,[230] and most other policy determinations an agency makes.[231]

The seminal Supreme Court decision elaborating the arbitrary-and-capricious standard, *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Insurance Co*., explains that the scope of this review is "narrow," as "a court is not to substitute its judgment for that of the agency."[232] That said, courts will invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[233] When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[234] In general, the Court noted, an agency decision is arbitrary

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[235]

Given the broad scope of federal agency actions that are subject to judicial review, whether an agency decision is arbitrary and capricious is largely a situation-specific question.

Bright decision "calls into question the viability of *Auer* deference" but ultimately deciding to apply the *Auer* deference doctrine because *Loper Bright* "did not address the issue of agency interpretations of their own regulations").

[227] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 16 (2020) (explaining that the APA "requires agencies to engage in 'reasoned decisionmaking'" (citing Michigan v. EPA, 576 U.S. 743, 750 (2015))).

[228] 5 U.S.C. § 706(2)(A).

[229] *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984) (stating that "the 'arbitrary or capricious' provision–is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs. . . . enabling the courts to strike down, as arbitrary, agency action that is devoid of needed factual support").

[230] 5 U.S.C. § 553.

[231] Agency factual findings made during *formal* proceedings are reviewed under a substantial evidence standard, 5 U.S.C. § 706(2)(E), under which the agency's findings will be upheld if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). However, the difference in the amount of necessary supporting evidence between this standard and the arbitrary-and-capricious standard appears nominal. *Data Processing*, 745 F.2d at 684; Dolan v. Fed. Emergency Mgmt. Agency, No. CIV 23-0869 JB/JFR, 2025 WL 2023315, at *15 (D.N.M. July 18, 2025) ("The APA's two linguistic formulations amount to a single substantive standard of review."). Although formal proceedings must be supported with evidence found within the closed hearing record, decisions in informal proceedings can be supported with any evidence an agency possessed when it made its determination. *See* Safe Extensions, Inc. v. FAA, 509 F.3d 593, 604 (D.C. Cir. 2007).

[232] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[233] *Id*. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[234] *Id*. (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[235] *Id*. Courts and commentators often refer to this doctrine as "hard look" review. *See, e.g.,* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763 (2008) ("In its seminal decision in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*., the Court entrenched hard look review and clarified its foundations.").

The arbitrary-and-capricious standard requires an agency to demonstrate that it engaged in reasoned decisionmaking when reaching its determination.[236] Courts "must judge the propriety of [an agency's] action solely by the grounds invoked by the agency," and they may not create their own justifications to support an agency's decision beyond the reasons presented by the agency.[237] Further, courts require agencies to provide the "essential facts upon which the administrative decision was based"[238] and explain what justifies their determinations with actual evidence beyond a "conclusory statement."[239] An agency's failure to provide an adequate explanation for its decision will typically result in remand or invalidation of its decision.[240]

Similarly, a court may find an agency to have acted arbitrarily and capriciously when the agency fails to provide an adequate response to significant comments raised during notice-and-comment rulemaking.[241] For example, in its 2024 *Ohio v. Environmental Protection Agency (EPA)* decision, which stayed implementation of an EPA Clean Air Act rule pending appeal, the Supreme Court held that the EPA would likely lose on the merits because it likely acted arbitrarily and capriciously when it failed to adequately respond to a particular public comment when it implemented its final rule.[242]

Beyond those circumstances in which courts find that an agency failed to provide an adequate explanation for its decision, courts may also find the decision itself to be arbitrary and capricious.[243] For example, courts will invalidate agency actions that are the product of "illogical"[244] or inconsistent reasoning.[245] In addition, courts will find an agency action to be arbitrary and capricious if the agency simply failed to consider an important factor relevant to its action,[246] such as the policy effects of its decision[247] or vital aspects of the problem in the issue

[236] *State Farm*, 463 U.S. at 52 ("In this case, the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking."); Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[237] *State Farm*, 463 U.S. at 43; SEC v. Chenery, 332 U.S. 194, 196 (1947). A reviewing court may, however, uphold a rule where the agency's decision is "of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc., 419 U.S. 281, 286 (1974)).

[238] Seventh Dimension, LLC v. United States, 160 Fed. Cl. 1, 15 (2022) (quoting Bagdonas v. Dep't of the Treasury, 93 F.3d 422, 426 (7th Cir. 1996)).

[239] Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 224 (2016) ("Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all [and] the Department's conclusory statements do not suffice to explain its decision."); Allied-Signal, Inc. v. Nuclear Reg. Comm'n, 988 F.2d 146, 152 (D.C. Cir. 1993).

[240] *See, e.g.*, Cboe Futures Exch., LLC v. Sec. & Exch. Comm'n, 77 F.4th 971, 974 (D.C. Cir. 2023) (vacating agency order after finding agency did not adequately explain the reasons for its decision); Williams Gas Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319, 329 (D.C. Cir. 2006).

[241] *See, e.g.*, Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 449 (D.C. Cir. 2012); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94 (D.C. Cir. 2010). The D.C. Circuit has held that "[s]ignificant comments are those 'which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule.'" City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted) (quoting Home Box Off., Inc. v. FCC, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977).

[242] Ohio v. EPA, 603 U.S. 279, 293–94 (2024) ("Although commenters posed this concern to EPA during the notice and comment period . . . EPA offered no reasoned response . . . . As a result, the applicants are likely to prevail on their argument that EPA's final rule was not 'reasonably explained.'" (citations omitted)).

[243] *See* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.")

[244] Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Lab. Rels. Auth., 470 F.3d 375, 380 (D.C. Cir. 2006).

[245] Venetian Casino Resort, L.L.C. v. EEOC, 530 F.3d 925, 934 (D.C. Cir. 2008).

[246] Michigan v. EPA, 576 U.S. 743, 751–54 (holding action arbitrary and capricious for failure to consider cost of regulation).

[247] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1124 (9th Cir. 2012).

before it.[248] Likewise, courts may invalidate or remand a determination to the agency if the agency decision failed to consider regulatory alternatives that would similarly serve the agency's goals[249] or provide "less restrictive, yet easily administered" options.[250] It bears mention that courts are sometimes particularly deferential to agencies' expertise when making predictive judgments based on scientific or technical determinations.[251]

Because of the wide range of statutory authorities and agency missions, what counts as a relevant factor that must be considered by an agency when reaching a decision can be context specific. An illustrative case is *Judulang v. Holder*, where the Supreme Court found the Board of Immigration Appeals' (BIA's) policy for deciding whether resident aliens may apply for relief from removal to be arbitrary and capricious.[252] The Court noted that the relevant factors for the BIA to consider were the "purposes of the immigration laws or the appropriate operation of the immigration system."[253] Because the BIA failed to root its determination in consideration of such factors and instead based its policy on an "irrelevant comparison between statutory provisions" unconnected to the merits of a removal decision or the administration of immigration laws, the Court held that the agency's determination was arbitrary and capricious.[254]

Agencies, of course, often change prior policies in response to changing circumstances or administrative preferences. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court held that review under the arbitrary-and-capricious standard is not heightened or more stringent simply because an agency's action alters its prior policy.[255] An agency must set forth a "reasoned explanation" for changing course,[256] but if the agency's action is permissible under its authorizing statute and reasonably supported, then the agency need not show that new policies are better than old ones.[257] In other words, an agency may be authorized to pursue a range of policy outcomes under its governing statutes, and courts may not scrutinize an agency's shift in policy more strictly than other agency decisions.[258]

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[248] *See, e.g.*, *Ohio*, 603 U.S. at 294; Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1147 (D.C. Cir. 2005).

[249] Off. of Commc'n of United Church of Christ v. FCC, 779 F.2d 702, 714 (D.C. Cir. 1985); Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1039 (9th Cir. 2010).

[250] Cin. Bell Tel. Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995).

[251] Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983); Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654, 668 (7th Cir. 2016); Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n, 823 F.3d 641, 649 (D.C. Cir. 2016).

[252] Judulang v. Holder, 565 U.S. 42, 53 (2011).

[253] *Id.* at 55–56.

[254] *Id.*

[255] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009). In ruling that the standard of review when considering the substance of a rule rescission is no more or less stringent, the Court rejected the Second and D.C. Circuits' position that the APA and the Court's precedent required a more substantial justification when an agency changes its position. *Id.* (discussing Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 456–57 (2d Cir. 2007), and NAACP v. FCC, 682 F.2d 993, 998 (D.C Cir. 1982)). *See also* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 225 (2016) (Ginsburg, J., concurring) (emphasizing that "where an agency has departed from a prior position, there is no 'heightened standard' of arbitrary-and-capricious review"); California by and through Becerra v. Azar, 950 F.3d 1067, 1096 (9th Cir. 2020) (noting that initial agency positions are "not instantly carved in stone," and changes in agency policy therefore are not subject to heightened review).

[256] *Fox Television*, 556 U.S. at 514 (stating that agencies "may not . . . depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

[257] *Id.* at 514–15.

[258] *Id.* That said, agencies still must adequately explain the changes when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 515; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. (continued...)

Review of Compliance with Procedural Requirements

The APA also provides for judicial review to ensure compliance with procedures required by law.[259] Consequently, assuming that a court is otherwise authorized to adjudicate a case,[260] individuals aggrieved by agency conduct may challenge an agency's failure to comply with required procedures established in the APA, agency regulations, or another applicable statute.[261] Although courts may invalidate an agency action if the agency fails to comply with mandated procedures, the Supreme Court has consistently ruled that courts may not *add* to the procedural requirements imposed on agencies.[262] For example, prior to the Court's 2015 decision in *Perez v. Mortgage Bankers Association*, certain lower courts had imposed a requirement that agencies undergo notice-and-comment procedures to change an interpretive rule under certain circumstances.[263] The APA, however, exempts interpretive rules from these procedures.[264] The Court held that the lower court's "doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA." The Court emphasized that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[265]

The APA itself imposes various procedural requirements on agencies when they take particular actions.[266] Many procedural challenges arising under the APA center around an agency's compliance with the APA's informal rulemaking requirements for promulgating legislative rules.[267] In brief, those requirements require an agency to publish a notice of the proposed rule in the *Federal Register* and provide "interested persons" an opportunity to comment on the

1, 30–33 (2020) (holding recission of the Deferred Action for Childhood Arrivals initiative to be arbitrary and capricious when agency failed to consider "serious reliance interests" that the long-standing policy may have engendered). This requirement, however, does not stem from the change itself; rather, it derives from the need for a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 516.

[259] 5 U.S.C. § 706(2)(D).

[260] *See supra* "Requirements for Judicial Review."

[261] 5 U.S.C. § 706(2)(D).

[262] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978). Although agencies enjoy discretion to develop and apply their own procedures that supplement the APA's requirements, courts lack authority to impose additional requirements upon agencies. *Vermont Yankee*, 435 U.S. at 544 (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

[263] *Perez*, 575 U.S. at 99 (describing D.C. Circuit doctrine formulated by *Paralyzed Veterans of America. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), whereby courts require agencies that change certain interpretive rules to undergo notice-and-comment rulemaking).

[264] 5 U.S.C. § 553(b)(A).

[265] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).

[266] 5 U.S.C. §§ 553–554, 556–557. In general, under the APA, every agency action falls into one of four categories: (1) formal rulemaking, (2) informal rulemaking, (3) formal adjudication, or (4) informal adjudication. *See* Aaron L. Nielson, *D.C. Circuit Review – Reviewed: 73 Years of APA Evolution (In One Chart)*, YALE J. ON REG.: NOTICE & COMMENT (Dec. 6, 2019), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-73-years-of-apa-evolution-in-one-chart/ [https://perma.cc/5VYN-55H5]. The APA outlines procedures for each of these types of actions. *See* 5 U.S.C. §§ 553–557. Further, the APA provides an avenue for review for other potentially applicable procedural statutes and regulations. 5 U.S.C. § 706(2)(D) (providing for review of compliance with "procedure required by law"). Thus, procedural challenges are myriad. This report focuses on common challenges to the notice-and-comment rulemaking process of 5 U.S.C. § 553.

[267] 5 U.S.C. § 553.

proposed rule.[268] After consideration of the comments, if the agency elects to issue the rule, the agency must publish the final rule in the *Federal Register* along with a "concise general statement" of the rule's "basis and purpose."[269] The notice must "'fairly apprise interested persons' of the nature of the rulemaking."[270] Similarly, the *logical outgrowth test* provides that the final rule cannot differ so greatly from the proposed rule that regulated parties, caught by surprise, are denied an opportunity to meaningfully participate in the rulemaking.[271] Courts will also set aside a rule if an agency fails to provide a comment period for a legislative rule.[272] However, an agency may forgo the notice-and-comment requirements of the APA if it has good cause to find that the procedures would be "impracticable, unnecessary, or contrary to the public interest."[273]

Conclusion

The Constitution confers upon Congress expansive authority to define the jurisdiction of federal courts, determine the types of agency actions subject to judicial review, and subject agencies to certain procedural requirements when implementing their statutory authority. Important constitutional and statutory limits also determine when a federal court may render a decision. One of the most prominent statutory bases of judicial review of agency action is the Administrative Procedure Act. Judicial interpretation of the APA's provisions plays a central role in determining what types of agency actions are subject to review in federal court. These developments are, nonetheless, subject to future modification by Congress, which enjoys authority to alter the APA or any other statute to shape the contours of judicial review of agency action.

[268] *Id.* § 553(b), (c).

[269] *Id.* § 553(c).

[270] United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (quoting Am. Iron & Steel Inst. V. EPA, 568 F.2d 284, 293 (3d Cir. 1977); MCI Telecomm. Corp. v. FCC, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (holding notice inadequate when information stating that certain parties would be subject to rule was found in a footnote in the proposed rule).

[271] *See* Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1073 (N.D. Cal. 2007).

[272] *See* Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002) (ruling that a guidance document issued by the EPA that advised the public of how to engage in risk assessments in order to comply with EPA regulations qualified as a legislative rule and should have been promulgated pursuant to notice-and-comment procedures). Procedural challenges often stem from when an agency issues a publication without providing opportunity to comment because the agency presents it as guidance, which is exempt from notice-and-comment requirements 5 U.S.C. § 553(b)(A). If a court determines that the issued publication is actually a legislative rule, then the court will require the agency to undergo Section 553 procedures. *See, e.g.*, Chamber of Com. v. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999) (holding that a directive issued by the Occupational Safety and Health Administration that specified that certain industries would be subject to inspection absent adoption of specific procedures was a legislative rule). For a discussion on guidance documents and judicial review, see Bowers, *Agency Use of Guidance Documents*, *supra* note 129.

[273] 5 U.S.C. § 553(b)(B). A court will review an agency's findings and require the agency to undergo notice and comment procedures if the court finds the agency lacked good cause to skip the procedural requirements. *See, e.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 90–91 (2012) (vacating and remanding agency rule issued without notice and comment because "EPA lacked good cause"). For a discussion of the APA's good cause exception, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking*, by Andrew S. Coghlan (2025).

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