2024 DOECAA Fall Conference

Agenda & Materials

October 17 – 18, 2024

Hyatt Regency Crystal City Hotel

2799 Richmond Highway, Arlington VA 22202

Contents

Welcome

Dear DOECAA members, speakers, and conference attendees:

The DOECAA Board and I are delighted to welcome you to the Fall 2024 DOECAA conference! We are excited to see that over 120 of you have registered to attend and can't wait to see you.

This conference would not have been possible without the hard work of Kristen Merrick and Nicole Shoemaker, who generously volunteered their time to organize the substance of the conference, as well as Josh Miller, who led the new breakout session for attorneys new to the complex. We are also grateful for all the volunteers who have supported DOECAA leading up to this event, including all of our knowledgeable speakers and panelists, Kristen Clark and Ritu Bhatnagar (for our new FAQ page), and Matt Williams and Devon Mobley-Ritter (for organizing CLEs, with invaluable support from Chris Parlo and colleagues at Morgan Lewis). Thanks as always to Erica Trout, our wonderful event planner, and the commitment of the DOECAA Board and Officers, without whom DOECAA would not function.

As you know, we recently restarted the tradition of hosting two annual conferences: one in Washington, D.C. and one at a DOE site. If you haven't already completed our survey about this change and provided your feedback for DOECAA generally, we sincerely hope you will take a few minutes to do it now. We will listen and make improvements.

As we will discuss at the member meeting, DOECAA is expanding its volunteer Board by one member so that we can continue to support multiple conferences and initiatives per year. Among these include continuing education and outreach focusing on new attorneys joining the complex, as well as additional enhancements to the website to facilitate connections and engagement. We will also share what you told us in the survey and look forward to discussion on what else we should be doing to serve you better.

Please do not hesitate to reach out to me or any of the DOECAA Board members should you have any feedback.

Sincerely,

Saurabh Anand, DOECAA President

Sanand3@stanford.edu

Agenda

DOECAA

Department of Energy Contractor Attorneys' Association

2024 FALL CONFERENCE AGENDA
OCTOBER 17 & 18, 2024
Virginia Conference Rooms, Hyatt Hotel Crystal City, Washington D.C.

Thursday, October 17, 2024

Time (Eastern)	Item	Speaker
9:00 am – 9:40 am	Registration, Continental Breakfast, Networking	
9:40 am – 9:50 am	Welcome and Opening Remarks; Logistics	Saurabh Anand Chief Counsel, SLAC National Accelerator Laboratory DOECAA President
9:50 am – 10:00 am	Video: Spotlight on NREL	Co-Chairs: Nicole Shoemaker and Kristen Merrick
10:00 am – 10:45 am	Keynote Address: NNSA General Counsel	Timothy Fischer National Nuclear Security Administration General Counsel
10:45 am – 11:00 am	Break	
11:00 am – 12:00 pm	Panel: Research Security Guidelines and Best Practices	Nathaniel Sloan DOE Patent Counsel Susan Cassidy Partner, Covington & Burling LLP

		Rebecca Jackson Attorney, Sandia National Laboratories Moderator: Eric Johnson
12:10 pm – 1:20 pm	Conference Lunch ALTERNATIVE: New DOE/NNSA Contractor Attorney Program with Lunch Prince William conference room	Joshua Miller Assistant General Counsel, Kansas City National Security Campus Don Thress Chief Counsel, US Department of Energy, Oak Ridge Office John Myer Senior Counsel, Husch Blackwell Ivy Gibson Associate General Counsel, Fermi National Accelerator Laboratory
1:30 pm – 2:15 pm	Workforce Resilience	Therese Leone Chief Counsel, Lawrence Berkeley National Laboratory Tania Faransso Partner, Wilmer Hale
2:15 pm – 2:45 pm	Trends and Perspectives from the DOE Inspector General	Teri L. Donaldson DOE Inspector General
2:45 pm – 3:00 pm	Networking Break	
3:00 pm – 4:00 pm	2024 Supreme Court Update: Chevron and Beyond	Angela B. Styles Partner, Akin Gump Strauss Hauer & Feld LLP Brent Allen DOE Deputy GC for Environment and Litigation

		Cindy Lovato-Farmer General Counsel, Pacific Northwest National Laboratory Moderator: Steven Neely Husch Blackwell
4:00 pm – 5:00 pm	NNSA Contractor Morale, Recreation, and Welfare Programs: Perspectives on Cost Allowability Requirements and Compliance Best Practices	Irvin Gray Assistant General Counsel, Kansas City National Security Campus William Mayers Attorney, National Nuclear Security Agency OGC
5:00 pm – 5:30 pm	DOECAA Business Meeting: Board Actions and Elections	DOECAA Board
5:30 pm – 6:30 pm	Networking Reception - Chesapeake View Rooftop (advance registration required)	

Friday, October 18, 2024

Time (Eastern)	Item	Speaker
8:00 am – 8:30 am	Continental Breakfast	
8:30 am – 9:00 am	Trends and Perspectives from DOE Worker Safety & Health Enforcement	Shannon Holman Director, Office of Worker Safety and Health Enforcement
9:00 am – 10:00 am	Panel: Maintaining Confidentiality in Internal Investigations	Andrea Reagan General Counsel and Sr. Vice President, Savannah River Nuclear Solutions Thomas Watson General Counsel, Strategic Petroleum Reserve Scott P. Fitzsimmons Senior Partner Watt, Tieder, Hoffar & Fitzgerald LLP

10:00 am – 10:45 am	Keynote Address: Perspectives from DOE General Counsel	Samuel Walsh DOE General Counsel
10:45 am – 11:00 am	Networking Break	
11:00 am – 12:00 pm	Legal Ethics: A Look Inside the Office of Disciplinary Counsel and Perspectives on Investigation and Technology Issues from the Standpoint of a Lawyer's Professional Responsibility	Hamilton P. 'Phil' Fox Disciplinary Counsel DC Bar Office of Disciplinary Counsel Phillip R. Seckman Partner, Dentons LLC Mark Meagher Founder, Meagher GC Law, LLC
12:00 pm – 12:15 pm	Closing Remarks, Conference Ends	Saurabh Anand Chief Counsel, SLAC National Accelerator Laboratory DOECAA President

Conference Co-Chairs

Kristen Merrick
National Renewable Energy Laboratory
Kristen.Merrick@nrel.gov

Nicole Shoemaker
National Renewable Energy Laboratory
Nicole.Shoemaker@nrel.gov

Joshua J. Miller
Kansas City National Security Campus
JMiller6@kcnsc.doe.gov

Keynote Address: NNSA General Counsel

NNSA Overview

- From a GC Perspective

Tim Fischer
General Counsel
National Nuclear Security Administration
October 17, 2024

Established in 2000 by NNSA ACT 50 USC 2401

- SEMI-AUTONOMOUS AGENCY WITHIN THE DOE
- ONLY SECRETARY AND DEP SEC CAN EXERCISE AUTHORITY, DIRECTION OR CONTROL OVER ANYONE IN NNSA
  - **"You're Not The Boss of Me." 50 USC 2410**
- CANNOT HOLD POSITION IN BOTH DOE AND NNSA – Except for Administrator who is also the Undersecretary for Nuclear Security
- CREATED ROLE OF NNSA GENERAL COUNSEL - 50 USC 2407

Established in 2000 by NNSA ACT 50 USC 2401

- HAPPY 25TH BIRTHDAY!

NNSA at 25

- Some of the Top Movies of 1999
  - Star Wars Episode I – The Phantom Menace
  - The Sixth Sense
  - The Matrix
  - The Mummy
  - The Blair Witch Project
  - Patch Adams
  - American Beauty

NNSA at 25

- In October 1999 the World Population reached 6 Billion
  - Today it's 8.2 Billion and Growing

- Computing
  - In 1999 Sandia's ASCI Red was capable of 3.2 Trillion Flops
  - Next Month El Capitan at LLNL will hit 2 Quintillion flops (the equivalent of 1 flop per second every second for 31 Billion Years)

NNSA at 25

- Naval Reactors is 75 this year
  - When it turned 50, it had covered 113 Million Miles and 4900 Reactor Years of Safe Operation
  - Now; 171 Million Miles and 7500 Reactor Years of Safe Operation

NNSA at 25

- Russia
  - In 1999 We Were Implementing MC&A in Russia and across the Former Soviet Union; We had hundreds of Federal and Lab Personnel working Collaboratively in Russia and the START Treaty was in Force
  - Now; We have not been in the Russian Federation for More than Ten Years, Russia invaded The Ukraine, We're Supporting The Ukraine and New START is dead.
    - Had to go to Great Lengths to Convince the World We're NOT Getting Ready to Test

NNSA at 25

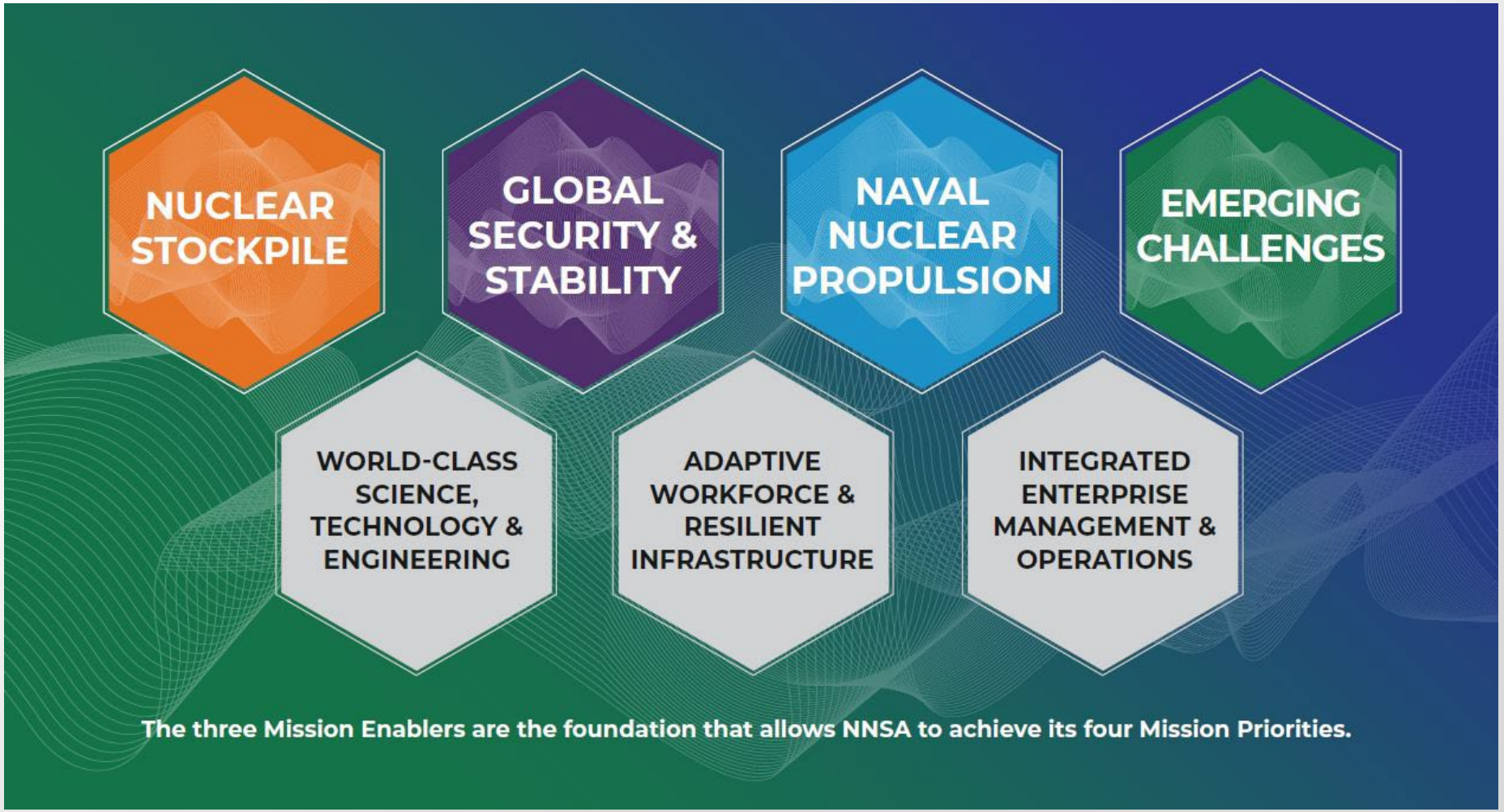
- Weapons
  - In 1999 We had Over 10,680 Nuclear Warheads, the B61-11 was just Completed, the CTBT Ratification was rejected by the Senate.
  - Now; We have less than 3,750 Nuclear Warheads, Seven concurrent Modernization Programs Underway, We've gone 30+ Years Without Underground Nuclear Explosive Testing.

NNSA at 25

- Take Aways
  - We Didn’t know in 1999 all We’d Accomplish by 2024.
  - We Don’t know What the NEXT 25 Years Will Bring.
  - Wo DO know the Nation will Continue to Call on the Department in General and the NNSA in Particular, as it has for the Last 25 Years.
  - I Know We’ll Continue to Need Creative Lawyering to Answer That Call
    - From Both Federal and M&O Lawyers

Our Vision and Mission

Mission Priorities and Enablers



NNSA Strategic Integrated Roadmap FY2021 - FY2046

National Nuclear Security Administration

VISION: A national reputation of excellence that is responsive to the Nation's nuclear security and strategic defense needs.

MISSION: To protect the American people by maintaining a safe, secure, and effective weapons stockpile; reducing global nuclear threats; and providing naval nuclear propulsion.

MISSION ENABLERS

- Workforce
- Acquisitions
- IT & Cybersecurity
- Safety, Security & Emergency Management

MISSION PRIORITIES	GOALS
Nuclear Deterrent	Integrate & implement nuclear security program Improve weapon product realization cycle time/responsiveness
Nuclear Threats	Reduce global nuclear threats & prevent nuclear proliferation Counter nuclear terrorism & respond to incidents
Nuclear Propulsion	Provide nuclear operations to the Fleet Develop new nuclear plants & technology
Science and Technology	Leverage technology solutions with business operations Lead technology & engineering innovations
Infrastructure Modernization	Reduce average age of infrastructure & deferred maintenance Recapitalize infrastructure & dispose of excess assets

2021
- Initiate concept assessment for W93
- Modernize federal unclassified IT infrastructure
- Complete NNSA's first purchase of an existing facility

2022
- Stand-up of non-nuclear parts supplier health assessment capability at KCNSC
- Complete Design Basis Threat policy Risk Management phases
- Finalize conversion of highly enriched uranium Mo-99 targets to low enriched uranium
- Complete execution of the Capability Forward initiative to 14 major US cities
- Assure integration & advancement of USG nuclear forensics capabilities
- Complete NNSA Albuquerque Complex
- Bolster security protocols for highly classified information
- Modernize the Enterprise Secure Network & Cyber infrastructure
- Complete development of Caerus
- Complete Climate Vulnerability Screenings & Assessments at NNSA sites

2023
- Support the commercial establishment of robust domestic Mo-99 production without use of highly enriched uranium
- Complete S8G Prototype Reactor Refueling & Overhaul
- Accept ATS-4/El Capitan exascale computing platform
- Complete construction/modernization of Applied Materials & Engineering Area Plan at LLNL
- Complete light initiated high explosives testing capability

2024
- Restart binary production capability
- Complete restructuring of NEST's radiological public health & safety capability
- Develop Burning Plasma Platform for high fusion yield experiments
- Execute Excalibur Experiment (ECSE reactivity)

2025
- Demonstrate enhanced tritium production capability
- Establish counter nuclear smuggling capability in 80 countries
- Update Lifetime Assessments for the AAR with Pu Aging data computed Age-Aware Models
- Establish centers of excellence to improve cybersecurity operations throughout Nuclear Security Enterprise
- Reduce deferred maintenance by ≥ 30%
- Complete West End Protected Area Reduction Project at Y-12

2026
- Complete W88 Alteration 370
- Achieve 30 pits per year production capability
- Receive Mobile Guardian Transporter First Production Unit
- Complete B61-12 Life Extension Program
- Build capacity to complete forensic analysis of 40 nuclear material samples per year
- Complete Naval Spent Fuel Handling Facility
- Execute Sherman Experiment
- Complete Power Sources Capability Facility
- Complete High Explosives Science & Engineering Facility
- Complete Uranium Processing Facility
- Complete Short-Term Expansion Plan at KCNSC

2027
- Demonstrate enhanced tritium extraction capability
- Replace all cesium blood irradiators domestically
- Complete reactor plant design for COLUMBIA-class submarine

Future-Years Nuclear Security Program

2028
- Begin operations of Surplus Plutonium Disposition Project
- Complete multi year replacement of Pantex Bay & Cell Safety Systems

2029
- Complete excess nuclear material removal
- Complete Chemistry & Metallurgy Research Replacement Project

2030
- Complete High Explosives Synthesis, Formulation, & Production Facility

2031
- Complete W80-4 Life Extension Program
- Deliver last Block IIIF payload for nuclear detonation detection to US Air Force
- Complete Lithium Processing Facility
- Complete Tritium Finishing Facility

2032 (date determined by CD-2)
- Achieve 80 pits per year production capability

2033
- Complete radiological security enhancements

2034
- Complete Naval Examination Acquisition Project

2035
- Complete conversion of research reactors to low enriched uranium fuel
- Complete Combined Radiation Environments for Survivability Testing
- Complete execution of the Security Infrastructure Revitalization Program

2036
- Complete W87-1 Modification Program

2038
- Modernize utilities across all sites

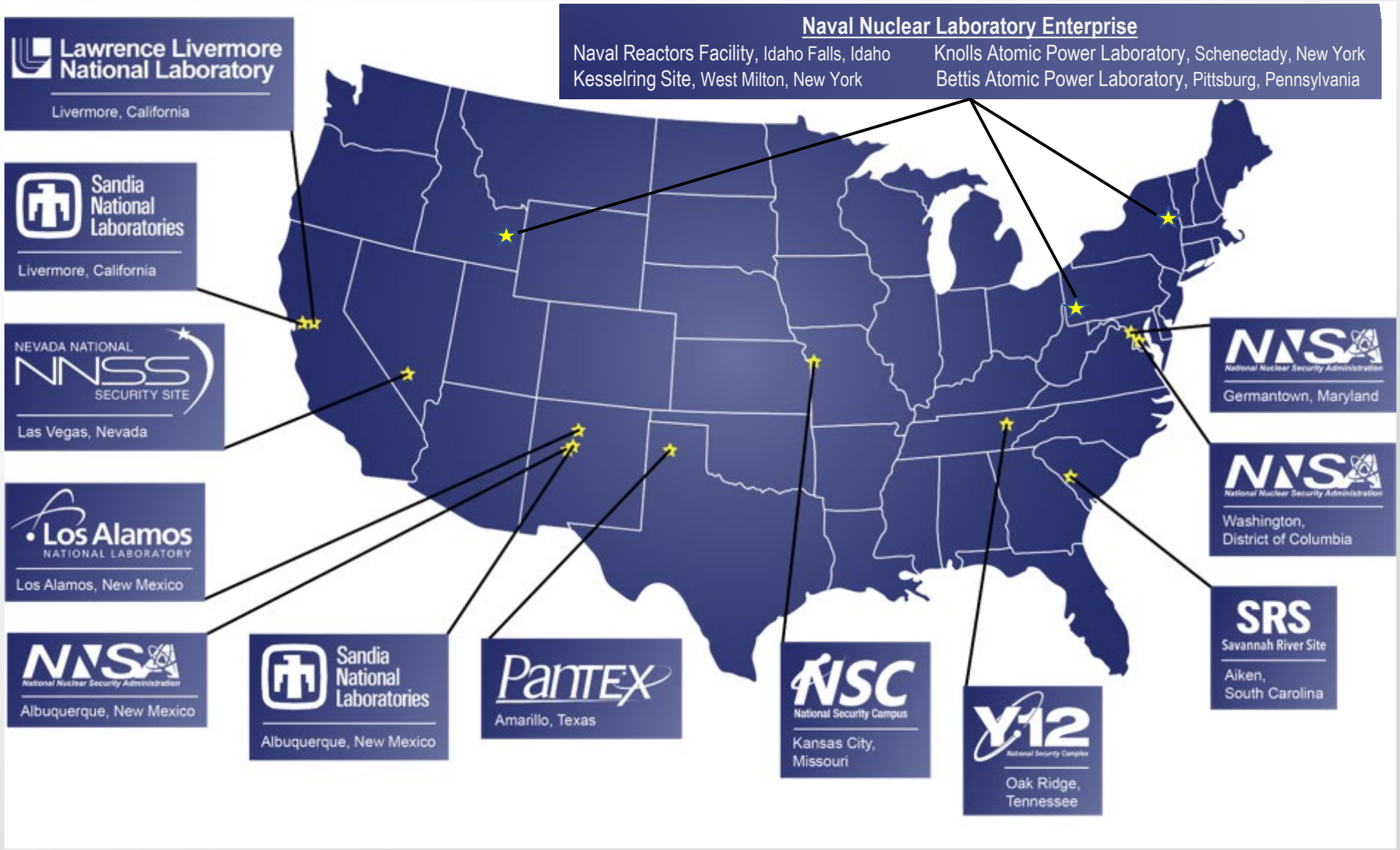
2041
- Establish domestic uranium enrichment capability

2043
- Finalize construction/modernization of 10 million gross square feet office/lab space

"Strengthening our Nation through Nuclear Security"

Revised August 2021

NNSA Labs, Plants, and Sites



QUESTIONS?

T. Fischer Bio

Timothy P. Fischer
General Counsel
Office of the General Counsel
National Nuclear Security Administration

Tim Fischer is a member of the Federal Senior Executive Service (SES) and serves as General Counsel for the National Nuclear Security Administration (NNSA) at NNSA HQ in Washington, District of Columbia. In this capacity he is the chief legal officer for the NNSA, advising the Administrator and senior NNSA leadership on all legal matters, including the implications of proposed legislation and relevant laws, executive orders, court decisions, and the binding decisions of third-party judicial and administrative appellate bodies. He leads an office of forty legal, NEPA and FOIA professionals. Prior to his current assignment he served as NNSA Deputy General Counsel. Before coming to HQ, he was at the NNSA's Savannah River Site Office, serving as Site Counsel and Business Manager. Before joining the NNSA Site Office, he began his DOE career at the Savannah River Site, working in the Office of Environmental Management's Office of Chief Counsel.

Tim is a veteran of the United States Air Force serving as an active duty Judge Advocate, spending three years at Whiteman Air Force Base, Missouri, followed by a second three-year assignment to Aviano Air Base, Italy. Mr. Fischer left active duty after six years to join DOE but continued his military career in the USAF Reserves. He retired as a Lieutenant Colonel after serving as the Staff Judge Advocate at Charleston Air Force Base, South Carolina.

Tim holds a Doctor of Jurisprudence from the University of Denver and a Bachelor of Arts in Philosophy, St John's University, Collegeville, Minnesota. He has been licensed to practice law by the Supreme Court of Colorado since October 1989 and completed DOE's Nuclear Executive Leadership Training. He was born in Minnesota and Raised in Colorado. He and his wife Karen have an adult daughter.

Research Security Guidelines and Best Practices

Research Security Planning and Best Practices

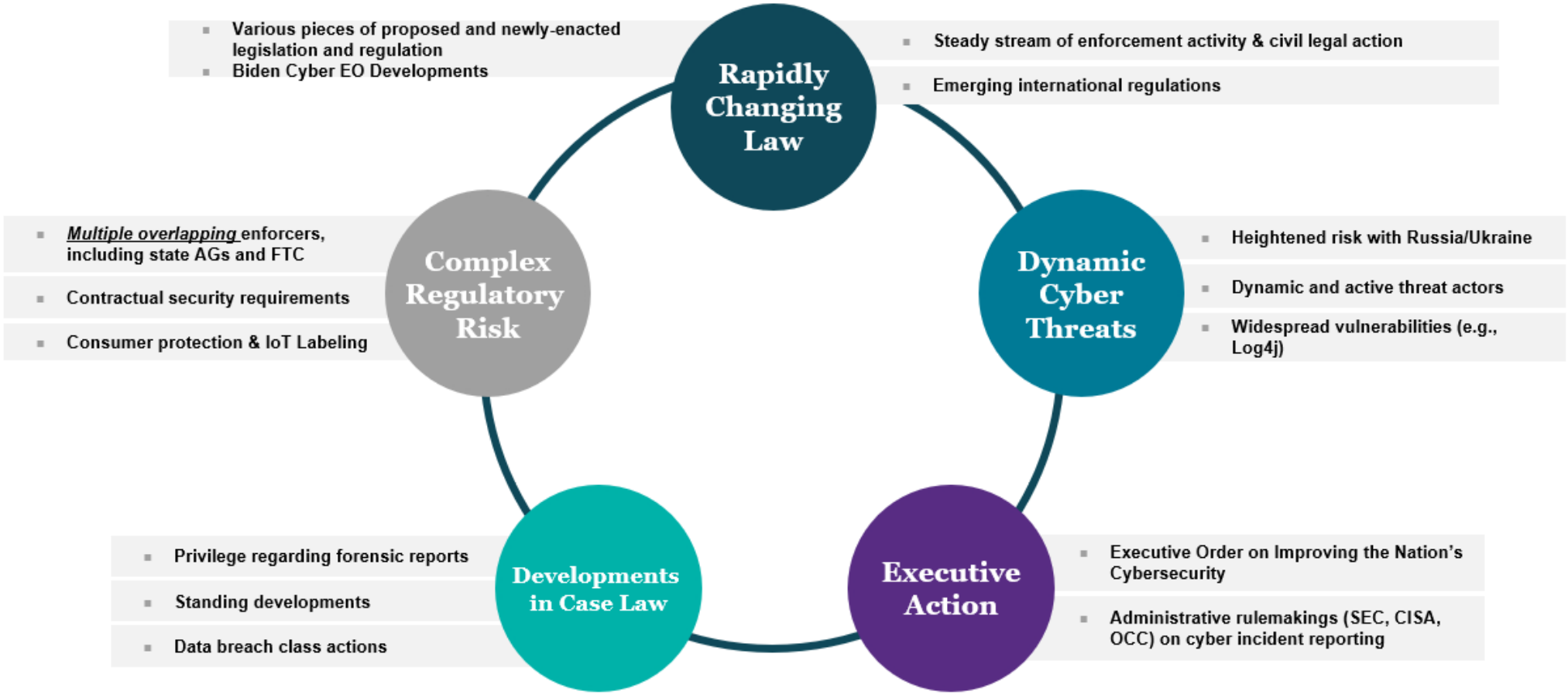
Increased DOJ Enforcement of Cyber Fraud

Susan B. Cassidy
Covington & Burling LLP

2024 DOECAA Fall Conference

October 17, 2024

Overview of U.S. Legal Landscape



DOJ's Civil Cyber-Fraud Initiative

DOECAA

In October 2021, Deputy Attorney General Lisa Monaco announced a DOJ "Civil Cyber-Fraud Initiative" (CFI), which can use the civil FCA to punish contractors who fail to comply with cybersecurity requirements, including mandatory cyber incident reporting.

Enforcement Priorities - Civil

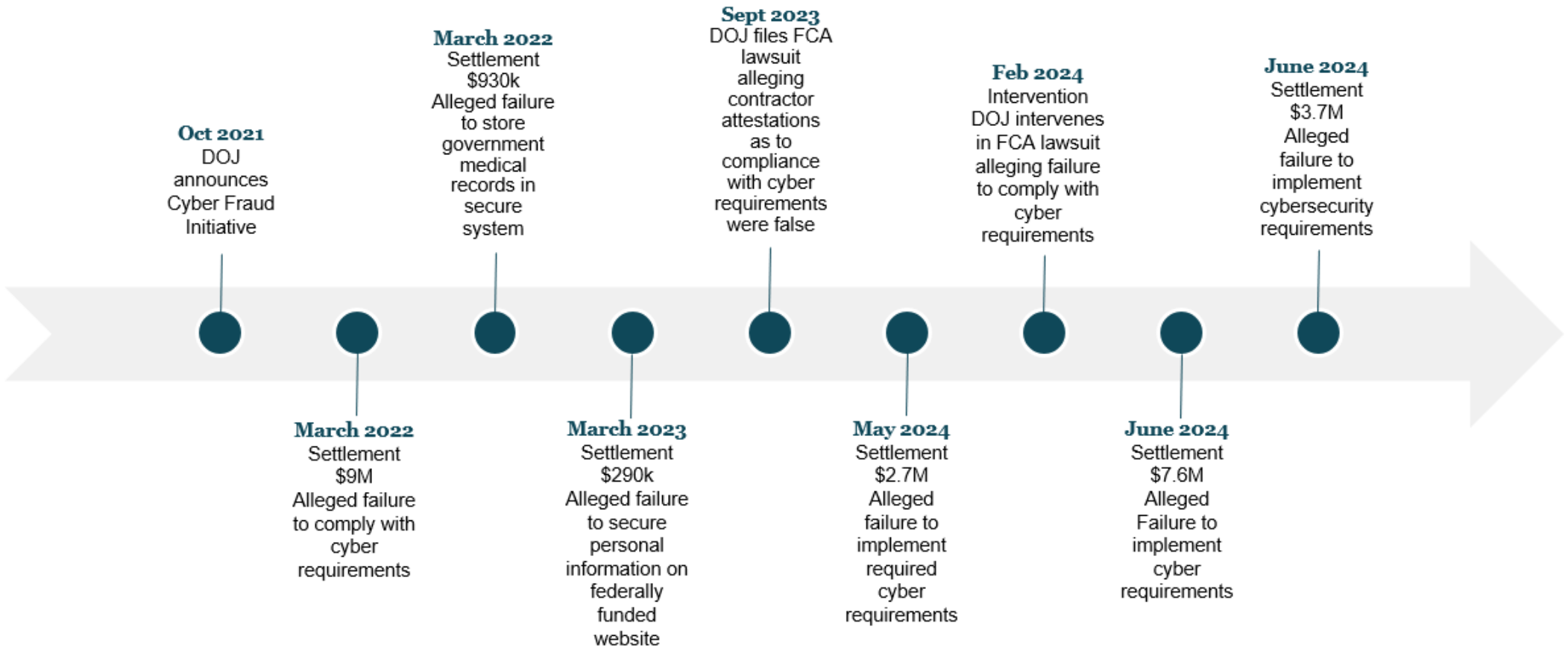
- USG buys IT hardware and software with cyber requirements, and the requirements are not met.
- Contractor implements IT systems for the USG, and does not comply with contract requirements including U.S. citizenship requirements.
- Contractor has an IT system that houses USG data, and cyber requirements are not met.
- Contractor is providing cloud services, i.e., through FedRAMP, and requirements are not met.
- Contractor fails to comply with regulatory/contractual/statutory requirement to monitor incidents and breaches.

DOJ Criminal Division is also engaged

Federal False Claims Act (FCA)

- The FCA (31 U.S.C. §§ 3729) prohibits knowingly presenting a false or fraudulent claim to the federal government
- Prohibits knowingly making a false record or statement to get a false or fraudulent claim paid
- Extends to those who "cause" the submission of a false claim, not just those who submit claims
- "Knowingly" means actual knowledge, reckless disregard, or deliberate ignorance of the falsity of the information; no specific intent to defraud is required
- Burden of proof is preponderance of evidence

Public DOJ Actions – Contractor Cyber Fraud



Materiality Generally

Materiality means a defendant's fraud has "a natural tendency to influence" or was "capable of influencing" the government's payment decision. 31 U.S.C. 3729(b)(4).

- "[M]ateriality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." Universal Health Servs., Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989, 2002 (2016).

- Factors to consider: (1) whether the requirement allegedly violated has expressly been designated a condition of payment, (2) whether the requirement goes to the "essence of the bargain," (3) whether the violation at issue is significant, and (4) whether the government has taken action when it had actual knowledge of the defendant's conduct or of similar violations in similar cases. Id. at 2003 & n.5, 2004.

- Courts treat as a holistic analysis, and no one factor is dispositive. While a "condition of payment" by itself is not sufficient to establish materiality, it is still a sign of materiality that can be considered.

Materiality – *Aerojet* Case

Court rejected contractor SJ argument that relator could not establish materiality (*U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, No. 2:15-cv-02245 (E.D. Cal. Feb 1, 2022).

- DOJ filed Statement of Interest

- Court inferred materiality because contract required compliance with cyber clauses, and thus compliance was "significant" to government "because without complete knowledge about compliance, or noncompliance, with the clauses, the government cannot adequately protect its information."

- Court rejected argument that government's award of contracts to Aerojet and other contactors despite knowledge of noncompliance showed non-materiality, absent evidence as to level of noncompliance by other contractors and genuine dispute as to whether government had "actual knowledge" of Aerojet's violations due to allegedly insufficient disclosures of noncompliance.

Damages

DOECAA

No specific case law to date on damages in cyber noncompliance cases but there is guidance from other FCA cases:

United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 923 (4th Cir. 2003) (awarding no damages where there was no evidence that the defendant "failed to perform the work that it was required to perform," even though defendant submitted false certification that it had no organizational conflicts of interest).

United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1279-80 (D.C. Cir. 2010) (damages calculated based on the difference between what the government paid and "what the services the company actually delivered were worth to the government"; district court should consider whether the value of the defendant's services was "completely compromised by the existence of undisclosed conflicts," and also "evidence to the contrary, such as evidence about the technical quality of [the defendant's] work" and "the fact that the [government] continued to use [the defendant's] work product after the potential conflicts were identified.").

United States ex rel. Hendrix v. J-M Mfg. Co., 76 F.4th 1164, 1174-75 (9th Cir. 2023) (affirming decision awarding zero damages where defendant provided PVC pipe that failed to comply with contractual requirements but the pipe "has not failed to operate as promised" and "remains in use today," and there was no evidence "that an actual failure is imminent or even likely" or that defendant's non-compliant pipe "was in fact inferior in longevity to compliant pipe").

Damages

United States v. Mackby,
339 F.3d 1013, 1018 (9th Cir. 2003)

(upholding damages award where the defendant billed the government for physical therapy services using a false provider identification number, even though medical services were performed).

U.S. ex rel. Fahn v. GardaWorld Fed. Servs. LLC,
2024 WL 1605313 (M.D. Ga. Apr. 12, 2024)

(worthless services damages theory could be argued to jury because the government contracted for "effective" security services at its embassies and by failing to comply with training requirements, defendant's employees were "putting the embassy … at risk").

U.S. ex rel. Compton v. Midwest Specialties, Inc.,
142 F.3d 296, 304-05 (6th Cir. 1998)

(brake shoe kits were "completely valueless" because government was forced to take them out of service, thus warranting award of "the full contract price").

Commercial Contractors, Inc. v. U.S.,
154 F.3d 1357 (Fed. Cir. 1998)

(looking to "cost of repair" as an alternate measure of damages in case of defective flood channel construction: "the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value," per Restatement of Contracts 347)

Penalties

Penalties are mandatory per 31 U.S.C. § 3729(a), and are adjusted for inflation

- 2024 inflation adjustment: $13,946 to $27,894 per violation

United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) ("[A] contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss").

U.S. ex rel. Schwedt v. Plan. Rsch. Corp., 59 F.3d 196, 197 (D.C. Cir. 1995) (penalties apply regardless of whether the false claim causes damages; where contractor allegedly submitted false progress reports about a software system developed for government, each false progress reports subject to a penalty).

U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc., 393 F.3d 1321, 1326 (D.C. Cir. 2005) (statutory penalty attaches to "each claim submitted to the Government under a contract which was procured by fraud, even in the absence of evidence that the claims were fraudulent in themselves").

U.S. ex rel. Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005) (FCA "provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify").

Penalties are subject to Eighth Amendment limits

FCA Risk Mitigation Measures

DOECAA

Develop a process for identifying and cataloguing cyber requirements

Implement a cyber risk program that establishes policies tied to those cyber requirements

Document key risk-informed judgments

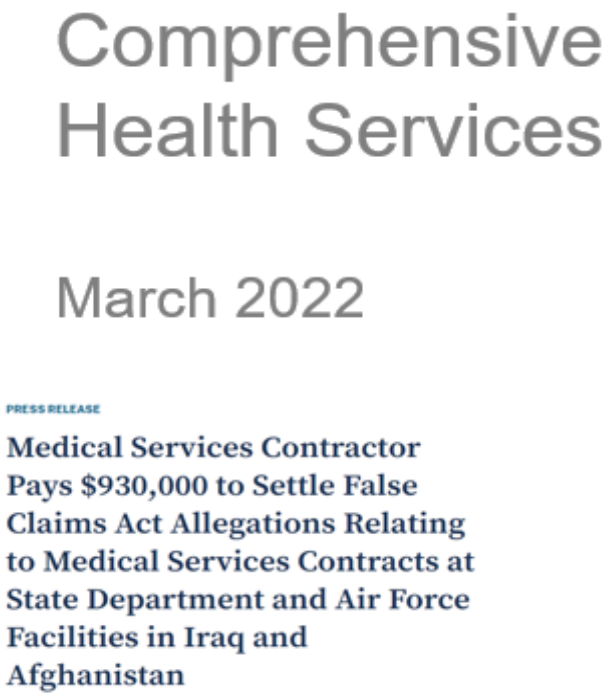
Document reasoning, other than simply cost, for not taking security steps

Maintain a process for receiving and responding to feedback from security professionals

Questions?

Appendix

Comprehensive Health Services



- **Cyber Allegation:** From 2012-2019, CHS failed to disclose that it had not consistently stored patients' (services members, officials, and contractors) medical records on a secure electronic medial records system.
- Non-Cyber allegation: From 2012-2019, CHS failed to properly obtain certain controlled substances that were manufactured in accordance with federal quality standards (FDA/EMA)
- **Relator(s):** 2 qui tam cases – DOJ Intervened
- **Settlement**: CHS paid $930,000 to resolve allegations that it falsely represented to the State Department and Air Force that it complied with contract requirements relating to the provision of medical services at State Department/Air Force facilities in Iraq/Afghanistan

Markus v. Aerojet Rocketdyne Holdings, Inc.

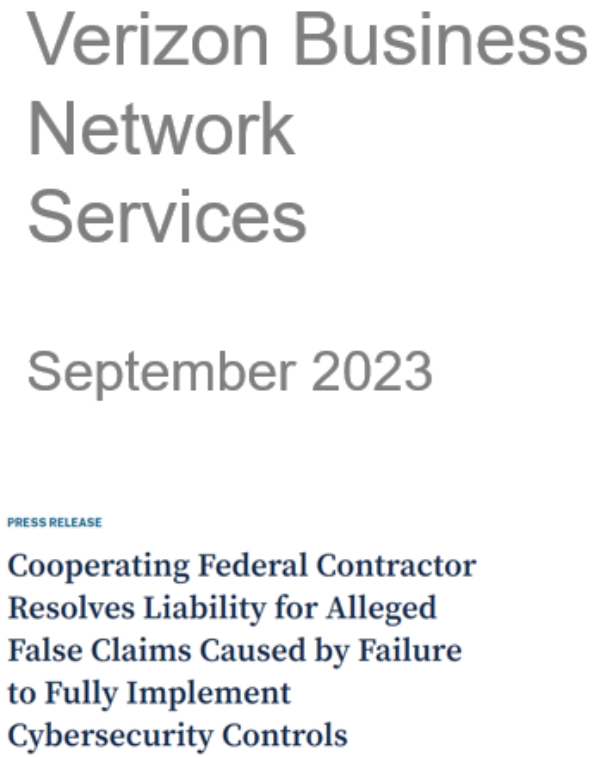
- U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.

PRESS RELEASE

Aerojet Rocketdyne Agrees to Pay $9 Million to Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts

- **Allegation:** Aerojet (missile defense contractor) impliedly falsely certified that it was in compliance with cybersecurity rules
  - Filed in 2015, complaint amended 2017
- **Relator:** Aerojet employee Brian Markus (former senior director of cybersecurity and compliance)
  - DOJ did not intervene, but filed Statement of Interest at summary judgment
  - Court denied summary judgment, finding issues of fact existed regarding whether Aerojet fully disclosed its non-compliance and whether Aerojet knowingly misrepresented its intention to comply
- **Trial/Settlement**: Aerojet settled on the second day of trial for $9 million

Verizon Business Network Services



Allegation: Alleged failure to satisfy three cybersecurity controls in connection with contract to provide IT services to federal agencies.

- Verizon self disclosed that its MTIPS solution did not completely satisfy three required cybersecurity controls for Trusted Internet Connections with respect to General Services Administration (GSA) contracts from 2017 to 2021
- Verizon received cooperation credit for its disclosure and cooperation with the investigation

Settlement: $4 Million

Insight Global LLC

Insight Global LLC

May 2024

Staffing Company to Pay $2.7M for Alleged Failure to Provide Adequate Cybersecurity for COVID-19 Contact Tracing Data

Allegation: Alleged failure to implement adequate cybersecurity measures to protect health information obtained during COVID-19 contact tracing

- Company hired by the Pennsylvania Dept. of Health, but paid using funds from U.S. Centers for Disease Control and Prevention
- Allegations were that personal health information was transmitted and stored in unencrypted files; passwords were inappropriately shared among staff; some information in files that may have been accessible by the public

- **Relator**: Former Insight Global staff member
- **Cooperation**: Insight Global cooperated with the investigation.
- **Settlement**: $2.7M, of which $1.35M is restitution

University Focus

U.S. ex rel. Craig v. Georgia Tech Research Corp.

- **Allegation**: Georgia Institute of Technology and Georgia Tech. Research Corp. allegedly violated federal cybersecurity requirements in connection with DoD contracts.
- **Relators**: Current and former members of the university's cybersecurity team
- Case unsealed in February 2024, when the DOJ intervened

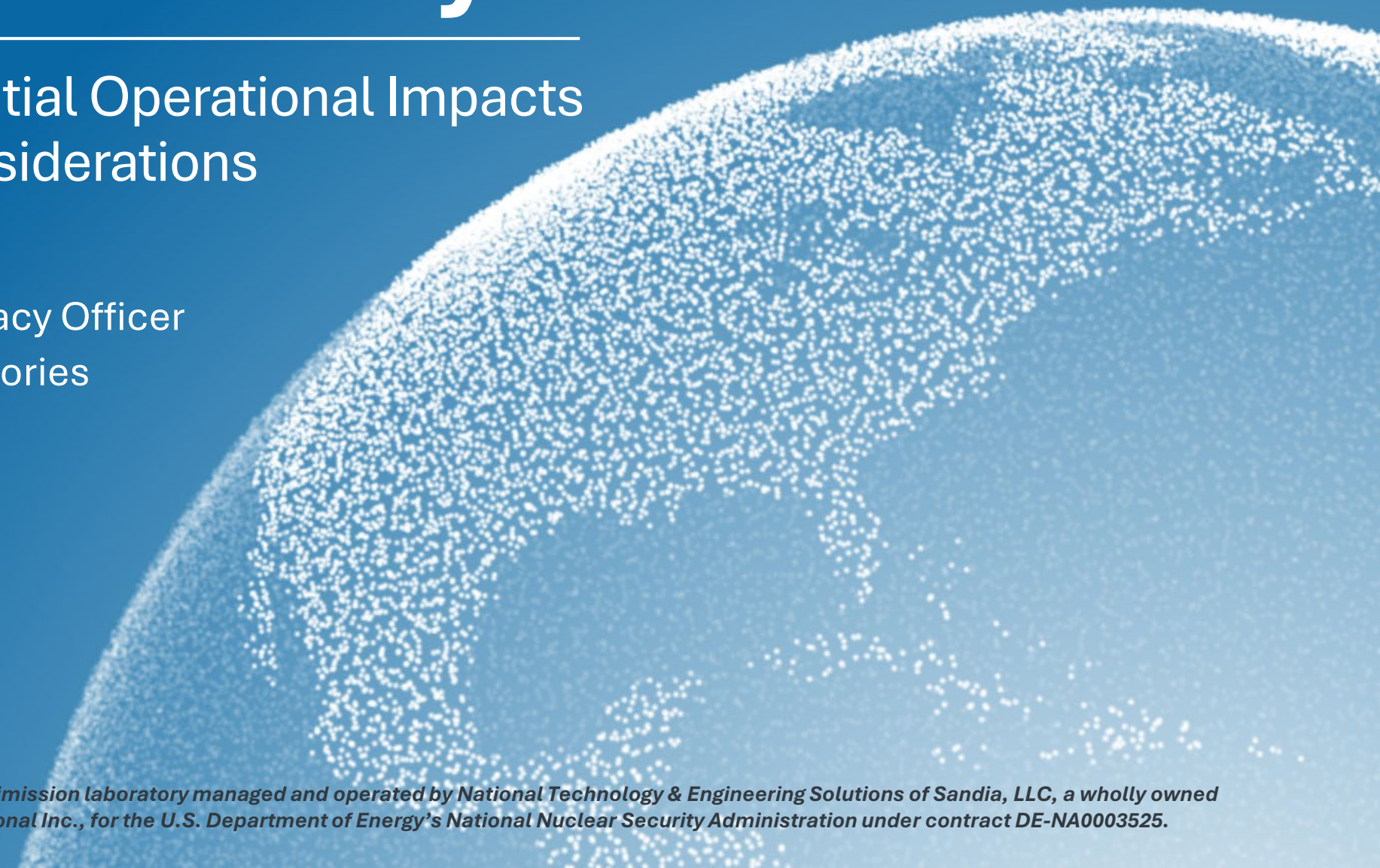
U.S. ex rel. Decker v. Penn. State

- **Allegation**: Penn State University allegedly violated federal cybersecurity requirements in connection with DoD contracts.
- **Relator**: Former Chief Information Officer of the University's applied research lab
- Case unsealed in September 2023, when the DOJ declined to intervene but continuing its investigation

Research Security

Overview of Potential Operational Impacts and Practical Considerations

Rebecca Jackson,
Sr. Counsel & Chief Privacy Officer
Sandia National Laboratories



Sandia National Laboratories is a multimission laboratory managed and operated by National Technology & Engineering Solutions of Sandia, LLC, a wholly owned subsidiary of Honeywell International Inc., for the U.S. Department of Energy's National Nuclear Security Administration under contract DE-NA0003525.

Background

DOECAA

- Latest guidance: White House Memorandum, Office of Science and Technology Policy, July 9, 2024
  - Purpose: *To address risks posed by strategic competitors to the U.S. research and development (R&D) enterprise, the Biden-Harris Administration is implementing several measures to improve research security while preserving the openness that has long enabled U.S. R&D leadership throughout the world and without exacerbating xenophobia, prejudice, or discrimination*.
  - Provides federal research agencies with guidelines for implementing a standardized certification requirement imposed by NSPM-33

Covered institutions

DOECAA

- For purposes of the guidance, participant in the U.S. R&D enterprise is a “covered institution” if it is: (A) institutions of higher education, a FFRDC, nonprofit research institution: and (B) it receives > $50M annual funding

Incorporating requirements into federal agency contracts

DOECAA

- New requirements must be included in a contract modification to be applicable
  - Example process: from CRD of DOE order, FAR clause, or other direction from Contracting Officer
    - E.g., contractor reviews for impacts and develops implementation plan, which requires Contracting Officer approval, to be executed within certain timeline
- For covered institutions with a national security mission, many guidelines may be already implemented, but assessment for compliance still warranted

Standardized requirement

DOECAA

- Requires “covered institutions” to establish and operate a research security program with certain elements
  - Cybersecurity
  - Foreign travel security
  - Research security training
  - Export control training

Cybersecurity

DOECAA

- Guidelines:
  - Universities must certify implementation of a cybersecurity program consistent with NIST IR 8481: Cybersecurity for Research (draft published 8/31/2023)
  - Non-universities must certify implementation of program consistent with relevant NIST or other federal agency guidance
- Considerations:
  - NIST cybersecurity framework highly-regarded as best practice in the U.S.
  - Many covered institutions may have NIST-related requirements in existing contracts, or have adopted NIST framework—but what impact to research partners?

Foreign Travel Security

DOECAA

- Guidelines:
  - Covered institutions must certify they will:
    - Implement periodic training on foreign travel security for individuals engaged in international travel (with 1 year after training resource made available by federal research agency), and ensure training taken every 6 years; and
    - Implement a travel reporting program, to include an organizational record of international travel
- Considerations:
  - Institutions can establish/update an international security operations policy, FCPA training, create a cross-functional team (made up of Security, Legal, Medical) to assess country-specific and other risks
  - Many covered institutions may already have robust foreign travel security training (such as CTAT) required under their contracts, but smaller/private institutions may not

Research Security Training

DOECAA

- Covered entities to certify to:
  - Implementation of a research security training program to address “the unique needs, challenges, and risk profiles of covered individuals”;
  - Completion of the training

- Considerations:
  - Guidelines provide for 2 options to comply: NSF (or successor federal training), or a training program addressing certain elements (e.g., examples of improper/illegal transfer)
  - Covered institutions working in national security may already have this kind of training, but unclear what private/university partners might have

Export Control Training

DOECAA

- Guideline: Covered institutions must certify that covered individuals who perform R&D involving export-controlled technologies to complete compliance training
- Considerations:
  - Guidelines provide for 2 options to comply:
    - 1) seek assistance from government regulatory agencies (e.g., BIS, DDTC)
    - 2) develop a training program addressing certain elements (e.g., compliance requirements, processes for reviewing foreign collaborations/partnerships)
      - In-house training by export control SMEs, tailored to the institution and its processes and risks.
      - Make training part of the institution's internal compliance program which covers all aspects of foreign interactions for purposes of export control, including, but not limited to, foreign national hires, foreign collaborations/partnerships, and foreign suppliers/service providers.
- Covered institutions working in national security likely already have this kind of training, but unclear what private/university partners might have

Information Protection Considerations

DOECAA

- Challenges/opportunities re: recent implementation of CUI across DOE complex
  - Internal culture change to adopt new system for marking sensitive government information
    - Provide workforce with resources (e.g., NARA, DOE, and internally-developed)
    - Training opportunities
  - Engaging with partners to ensure compliance with CUI order
    - Updates to subcontracts and NDAs
      - Understanding what types of information will be exchanged
      - Confer with IP counsel re: when tech transfer information may be third-party proprietary, institution proprietary vs. government-owned
      - Conferring with research partners re: requirements and policies

Bottom line re: impacts

DOECAA

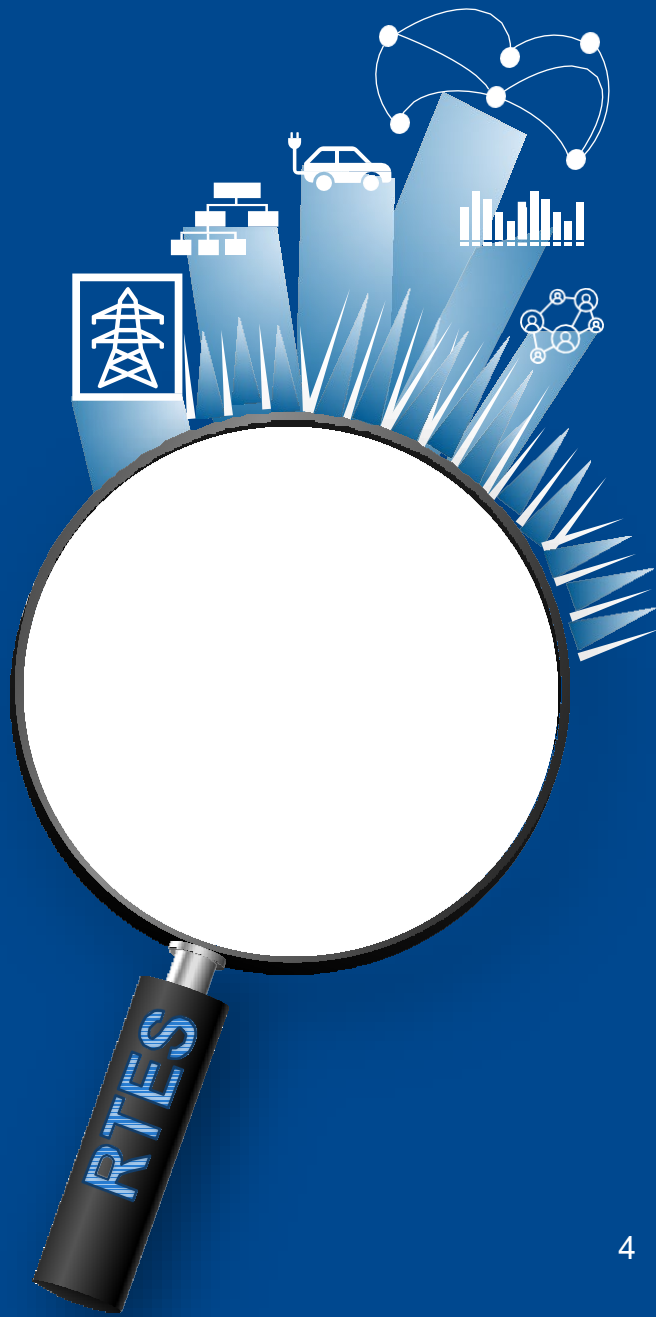
It depends!

- Requirements in a potential DOE order's CRD would need to be analyzed to determine resources needed for compliance
- Unclear what impacts would be to research partners (particularly universities and private subcontractors) re: financial, administrative efforts to comply
- Potential increased costs/activities re: monitoring flow-down requirements to subcontractors
- Potential benefits: enhanced security, compliance, trust, reputation

RTES Office Program Counsel (GC-62) Update for DOECAA

October 17, 2024

Nate Sloan, DOE Patent Counsel

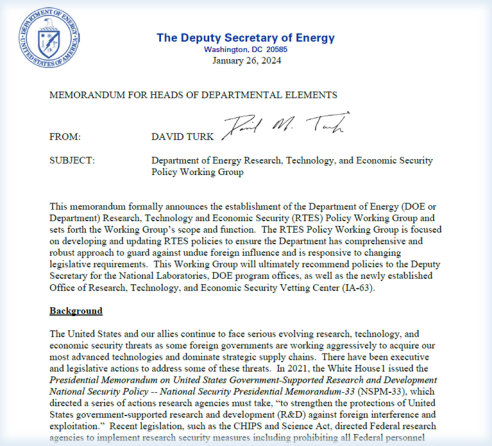


Agenda

- Introduction to the RTES Policy Working Group (PWG)
- Upcoming RTES PWG Initiatives
  - Labs
    - ✓ Updates to DOE O 486.1A, DOE O 142.3B
    - ✓ Research Security Program Guidelines
- Questions?

RTES Policy Working Group ≠ RTES Office

RTES PWG was formalized by S2 in January 2024



The Deputy Secretary of Energy
Washington, DC 20585
January 26, 2024

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: DAVID TURK

SUBJECT: Department of Energy Research, Technology, and Economic Security Policy Working Group

This memorandum formally announces the establishment of the Department of Energy (DOE or Department) Research, Technology and Economic Security (RTES) Policy Working Group and sets forth the Working Group's scope and function. The RTES Policy Working Group is focused on developing and updating RTES policies to ensure the Department has comprehensive and robust approach to guard against undue foreign influence and is responsive to changing legislative requirements. This Working Group will ultimately recommend policies to the Deputy Secretary for the National Laboratories, DOE program offices, as well as the newly established Office of Research, Technology, and Economic Security Vetting Center (IA-63).

Background

The United States and our allies continue to face serious evolving research, technology, and economic security threats as some foreign governments are working aggressively to acquire our most advanced technologies and dominate strategic supply chains. There have been executive and legislative actions to address some of these threats. In 2021, the White House1 issued the *Presidential Memorandum on United States Government-Supported Research and Development National Security Policy -- National Security Presidential Memorandum-33* (NSPM-33), which directed a series of actions research agencies must take, "to strengthen the protections of United States government-supported research and development (R&D) against foreign interference and exploitation." Recent legislation, such as the CHIPS and Science Act, directed Federal research agencies to implement research security measures including prohibiting all Federal personnel

View the memo here

RTES Policy Working Group

Responsible for RTES **policy development** for financial assistance, DOE National Laboratories, acquisition, and Federal and contractor staff.

RTES Office (IA-63)

Responsible for **implementing** DOE's RTES **financial assistance policies** to be informed by the RTES Policy Working Group, building RTES awareness within DOE, and engaging with external stakeholders on RTES matters.

RTES Policy Development & Approval Process

Policy Development:

RTES Policy Working Group with Office Input

Subcommittee Develops Proposal

FAL, Memo, Order, etc.

RTES PWG Review

PWG Rep obtains feedback from the offices they represent and reports back to the PWG

Policy Approval:

Conducted through DOE/NNSA established processes

S2 Memos: Exec Sec (eDOCS) process

DOE Order: Directives Review Board (DRB) process managed by MA + Exec Sec process

FAL: MA's review & approval process

Other Products: DOE S1 Front Office

RTES PWG Structure & Initiatives

Chair:

IA-63 Director

Vice-Chairs:

General Counsel & S4

Working Group includes 10 members (in addition to the 3 Chairs) who represent the following offices:

S3; S4; NNSA; GC; IN/CI; RTES Office; ARPA-E; Office of Science; EERE; LPO

Financial Assistance Policy Subcommittees

- #1: 90-Day OSTP Plan
- #2: Common Forms
- #4: Research security training requirements
- #7: OSTP actions not otherwise covered
- #9: Foreign Nationals Reviews for Financial Assistance
- #16: FOA & Award Requirements

Crosscutting Subcommittees

- #3: Digital Persistent Identifiers
- #5: CHIPS MFTRP Requirements
- #6: Research Security Program Guidance
- #11: COI/COC Rulemaking
- #13: Definitions for FOCI, FEOC, and Foreign
- #18: Determine which policies can be publicly posted

National Lab Policy Subcommittees

- #8: DOE Policy 485.1A Pilot (financial assistance/lab)
- #10: Updates to DOE Order 142.3B
- #19: Updates to DOE Order 486.1A
- #20: FACTS System Improvements

Review Process Subcommittees

- #12: RTES Risk Matrices
- #14: Harmonize DOE approach to EOC Prohibitions
- #15: Disclosures for FOCI and Foreign Collaboration
- #17: Economic Security

Upcoming Policies & Processes

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IA-63 Director
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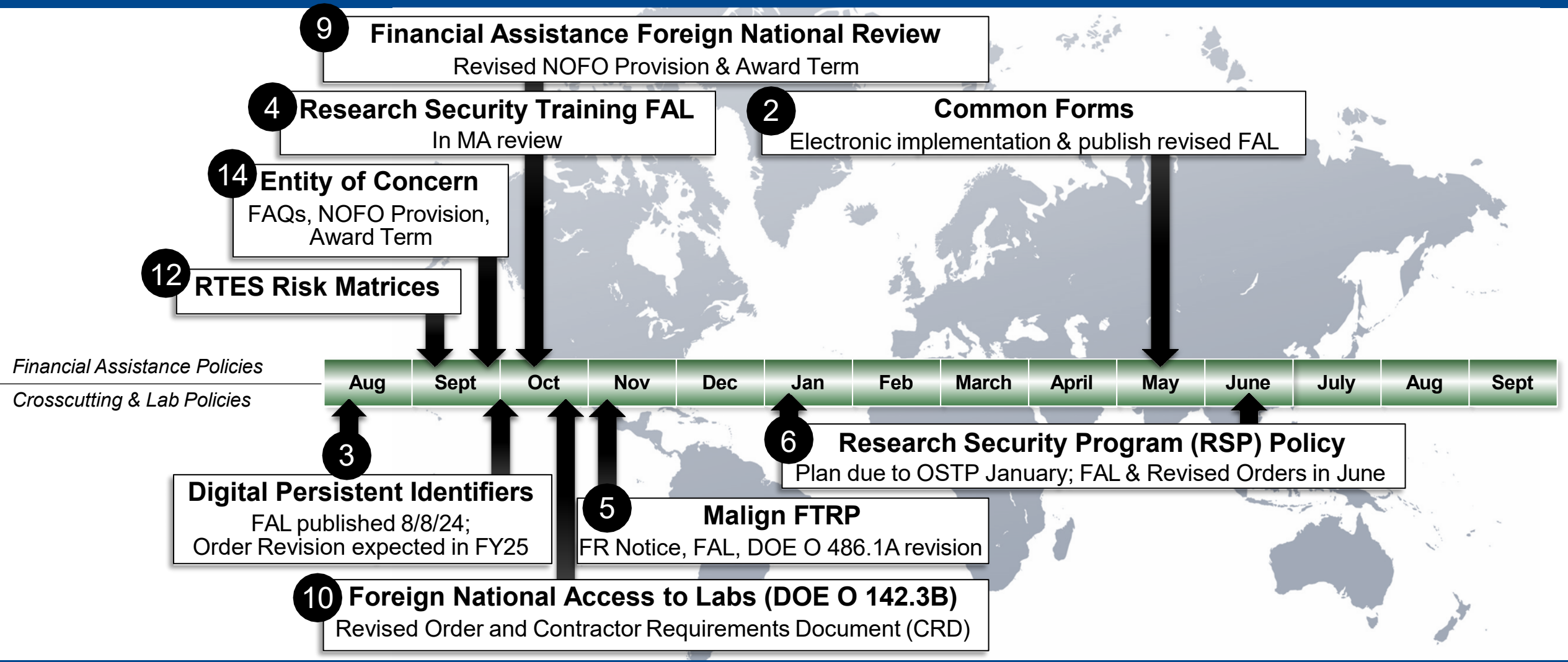
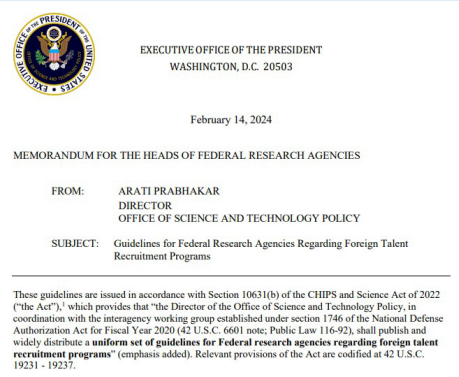
Implementation Timeline



Malign Foreign Talent Recruitment Program

OSTP Guidance Memo published February 2024



EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20503

February 14, 2024

MEMORANDUM FOR THE HEADS OF FEDERAL RESEARCH AGENCIES

FROM: ARATI PRABHAKAR
DIRECTOR
OFFICE OF SCIENCE AND TECHNOLOGY POLICY

SUBJECT: Guidelines for Federal Research Agencies Regarding Foreign Talent Recruitment Programs

These guidelines are issued in accordance with Section 10631(b) of the CHIPS and Science Act of 2022 ("the Act"),[1] which provides that "the Director of the Office of Science and Technology Policy, in coordination with the interagency working group established under section 1746 of the National Defense Authorization Act for Fiscal Year 2020 (42 U.S.C. 6601 note; Public Law 116-92), shall publish and widely distribute a **uniform set of guidelines for Federal research agencies regarding foreign talent recruitment programs**" (emphasis added). Relevant provisions of the Act are codified at 42 U.S.C. 19231 - 19237.

View the memo here

DOE policies will be revised to align with OSTP Guidance on:

- Definition of **malign** programs (prohibited) vs. "foreign talent recruitment programs"
- Exclusion in definition of "foreign talent recruitment programs" to allow agency personnel to engage in certain international collaboration activities
- Annual certification requirements

Financial Assistance

Prohibition Related to Foreign Government-Sponsored Talent Recruitment Programs

Labs

DOE O 486.1A & CRD, Foreign Government Sponsored or Affiliated Activities

Financial Assistance & Labs Required in FY25*

**anticipated, pending approval*

Q&A

Questions?

Feel free to contact me:
nathaniel.sloan@hq.doe.gov

Susan Cassidy
Partner, Washington
+1 202 662 5348
scassidy@cov.com

Susan is co-chair of the firm's Aerospace and Defense Industry Group and is a partner in the firm's Government Contracts and Cybersecurity Practice Groups. She previously served as in-house counsel for two major defense contractors and advises a broad range of government contractors on compliance with FAR and DFARS requirements, with a special expertise in supply chain and cybersecurity requirements. She has an active investigations practice and advises contractors when faced with cyber incidents involving government information.

Susan relies on her expertise and experience with the Department of Defense (DoD) and the Intelligence Community to help her clients navigate the complex regulatory intersection of cybersecurity, national security, and government contracts. She is *Chambers*-rated in both Government Contracts and Government Contracts Cybersecurity. In 2023, *Chambers USA* quoted sources stating that "Susan's in-house experience coupled with her deep understanding of the regulatory requirements is the perfect balance to navigate legal and commercial matters."

Her clients range from new entrants into the federal procurement market to well-established defense contractors, and she provides compliance advice acrosts a broad spectrum of procurement issues. Susan consistently remains at the forefront of legislative and regulatory changes in the procurement area, and in 2018, the *National Law Review* selected her as a "Go-to Thought Leader" on the topic of Cybersecurity for Government Contractors.

In her work with global, national, and start-up contractors, Susan advises companies on all aspects of government supply chain issues including:

- Government cybersecurity requirements, including the Cybersecurity Maturity Model Certification (CMMC), DFARS 7012, and NIST SP 800-171 requirements,
- Evolving sourcing issues such as Section 889, counterfeit part requirements, Section 5949 and limitations on sourcing from China,
- Federal Acquisition Security Council (FASC) regulations and product exclusions,
- Controlled unclassified information (CUI) obligations, and
- M&A government cybersecurity due diligence.

Susan has an active internal investigations practice that assists clients when allegations of non-compliance arise with procurement requirements, such as in the following areas:

- Procurement fraud and FAR mandatory disclosure requirements,
- Cyber incidents and data spills involving sensitive government information,
- Allegations of violations of national security requirements, and
- Compliance with MIL-SPEC requirements, the Qualified Products List, and other sourcing obligations.

In addition to her counseling and investigatory practice, Susan has considerable litigation experience and has represented clients in bid protests, prime-subcontractor disputes, Administrative Procedure Act cases, and product liability litigation before federal courts, state courts, and administrative agencies.

Susan is a former Public Contract Law Procurement Division Co-Chair, former Co-Chair and current Vice-Chair of the ABA PCL Cybersecurity, Privacy and Emerging Technology Committee.

Prior to joining Covington, Susan served as in-house senior counsel at Northrop Grumman Corporation and Motorola Incorporated.

Education

- American University, Washington College of Law, J.D., 1988
  - *cum laude*
  - *American University Law Review*, Note and Comment Editor
  - American University Honor Society
- University of Massachusetts Lowell, B.S., 1985
  - *magna cum laude*

Accolades

- *Chambers USA*, Government Contracts (2019-2024) and Government Contracts – Cybersecurity (2023-2024)
- *National Law Review*, "2018 Go-To Thought Leader," Cybersecurity for Government Contractors (2018)
- *Legal 500 US*, Government Contracts (2016-2017)
- *Washington DC Super Lawyers*, Government Contracts (2015-2024)
- *Who's Who Legal*, Government Contracts (2018-2024)
- *Law360*, Government Contracts Editorial Advisory Board (2014)

Rebecca Jackson is General Law Senior Counsel and Chief Privacy Officer at Sandia National Laboratories in Albuquerque, NM, where she advises management on privacy, information law, and security matters. In this role, she leads initiatives on compliance with regulations such as CCPA, HIPAA, and the Privacy Act, while also serving as the primary legal advisor for policies related to data governance and cyber incident response. Previously, Rebecca she served as General Law Counsel, where she provided counsel on federal and state tax, employment law, and corporate matters. Her extensive experience also includes serving as Acting General Counsel for the New Mexico Department of Finance and Administration, where she managed litigation and advised on procurement and contract law. Rebecca began her legal career as an Associate Attorney at Brownstein Hyatt Farber Schreck, LLP, focusing on public finance and municipal bond transactions. She holds a J.D. from the University of California, Davis School of Law and a B.A. in History from the University of Washington, Seattle.

~

Eric Johnson is the NREL Associate General Counsel for Information Security. Eric came to NREL from the U.S. Department of Energy (DOE) where he counseled national laboratory and power marketing administration senior executives on international engagement, threats, and vulnerabilities to the U.S. energy sector. Eric was the principal author of the DOE Procedures for Intelligence Activities approved by the Secretary of Energy and the U.S. Attorney General. Prior to DOE, Eric served for six years at the Federal Bureau of Investigation (FBI) as an Assistant General Counsel focused on national security and intelligence law. Eric advised FBI executives and special agents on investigations and intelligence operations and appeared before the Foreign Intelligence Surveillance Court and the President's Intelligence Oversight Board. For four years, Eric was an intelligence analyst at the FBI where he managed a team of analysts and completed a two-year joint duty assignment within the U.S. intelligence community. Eric is a (part) NFL team owner. Go Packers!

~

Nate Sloan joined DOE in 2015 and is a senior DOE patent attorney based in the Golden Field Office (GFO) working for GFO and the Office of General Counsel (GC-62) in DOE headquarters. Nate has provided legal support for DOE's research security policies since 2018 and currently serves as GC's representative on the Deputy Secretary's Research, Technology, and Economic Security (RTES) Working Group and as program counsel for the RTES Office.

In addition, Nate co-chairs cross-cutting DOE teams focused on DOE U.S. manufacturing policy for DOE-funded inventions and Laboratory patent licensing. Nate also counsels the Office of Energy Efficiency and Renewable Energy's (EERE) Bioenergy Technologies Office (BETO) and the Advanced Research Projects Agency-Energy (ARPA-E) on intellectual property, data, and U.S. manufacturing issues.

Before joining DOE, Nate practiced law for five years at a large DC law firm specializing in patent and trade secret litigation in federal and state courts and patent preparation and prosecution. Prior to practicing law, Nate worked in federal legislative affairs for eight years focusing on military, homeland security, and labor issues.

New DOE/NNSA Contractor Attorney Program

October 17, 2024

Welcome!

Breakout for “New-ish” DOE/NNSA M&O Contractor Attorneys

JOSH MILLER
ASSOCIATE GENERAL COUNSEL
HONEYWELL FM&T (KCNSC)

IVY GIBSON
ASSOCIATE GENERAL COUNSEL
FERMI RESEARCH ALLIANCE LLC (FERMILAB)

JOHN MYER
SENIOR COUNSEL
HUSCH BLACKWELL

DON THRESS
CHIEF COUNSEL
US DEPARTMENT OF ENERGY, OAK RIDGE OFFICE

KANSAS CITY NSC National Security Campus

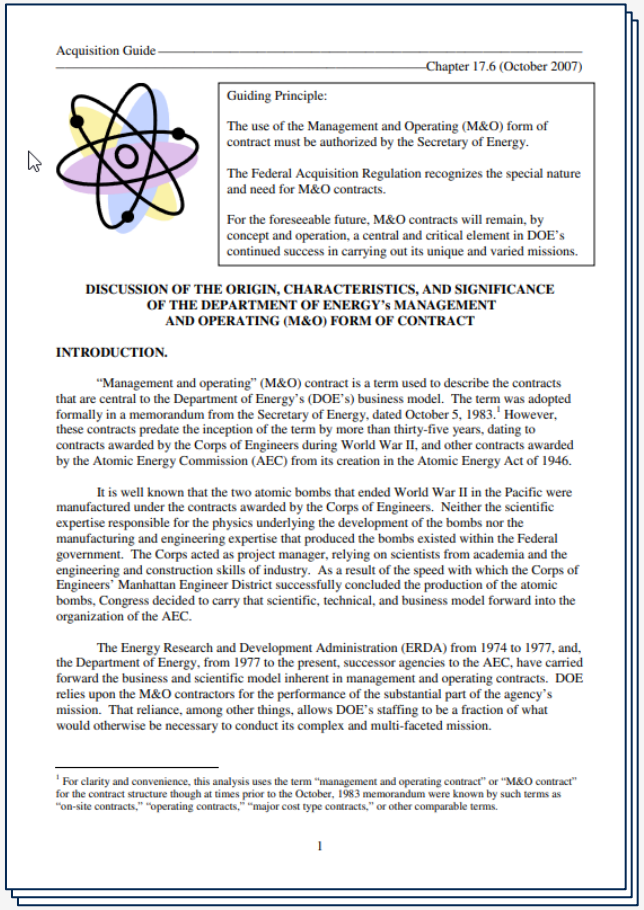
The Department of Energy’s Kansas City National Security Campus is managed and operated by Honeywell Federal Manufacturing & Technologies, LLC under contract number DE-NA0002839

IT’S A BIG COMPLEX

KANSAS CITY NSC National Security Campus

M&O Contractor in History

- **100K+ contractor employees**
- **Management and Operating**



Acquisition Guide — Chapter 17.6 (October 2007)

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The use of the Management and Operating (M&O) form of contract must be authorized by the Secretary of Energy.

The Federal Acquisition Regulation recognizes the special nature and need for M&O contracts.

For the foreseeable future, M&O contracts will remain, by concept and operation, a central and critical element in DOE's continued success in carrying out its unique and varied missions.

DISCUSSION OF THE ORIGIN, CHARACTERISTICS, AND SIGNIFICANCE OF THE DEPARTMENT OF ENERGY's MANAGEMENT AND OPERATING (M&O) FORM OF CONTRACT

INTRODUCTION.

"Management and operating" (M&O) contract is a term used to describe the contracts that are central to the Department of Energy's (DOE's) business model. The term was adopted formally in a memorandum from the Secretary of Energy, dated October 5, 1983.[1] However, these contracts predate the inception of the term by more than thirty-five years, dating to contracts awarded by the Corps of Engineers during World War II, and other contracts awarded by the Atomic Energy Commission (AEC) from its creation in the Atomic Energy Act of 1946.

It is well known that the two atomic bombs that ended World War II in the Pacific were manufactured under the contracts awarded by the Corps of Engineers. Neither the scientific expertise responsible for the physics underlying the development of the bombs nor the manufacturing and engineering expertise that produced the bombs existed within the Federal government. The Corps acted as project manager, relying on scientists from academia and the engineering and construction skills of industry. As a result of the speed with which the Corps of Engineers' Manhattan Engineer District successfully concluded the production of the atomic bombs, Congress decided to carry that scientific, technical, and business model forward into the organization of the AEC.

The Energy Research and Development Administration (ERDA) from 1974 to 1977, and, the Department of Energy, from 1977 to the present, successor agencies to the AEC, have carried forward the business and scientific model inherent in management and operating contracts. DOE relies upon the M&O contractors for the performance of the substantial part of the agency's mission. That reliance, among other things, allows DOE's staffing to be a fraction of what would otherwise be necessary to conduct its complex and multi-faceted mission.

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17.6 - Origin, Characteristics, and Significance of the DOE's Management and Operating (energy.gov)

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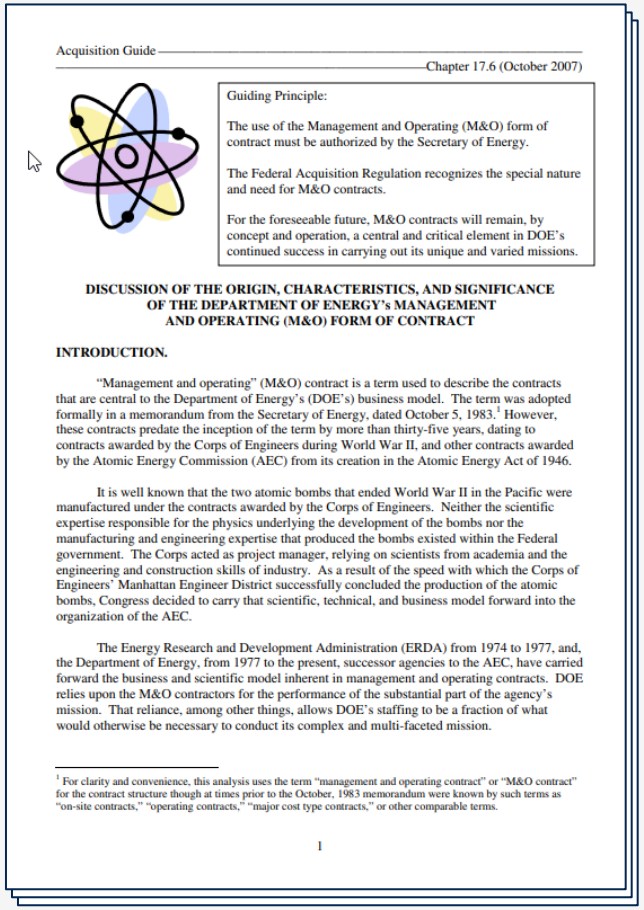

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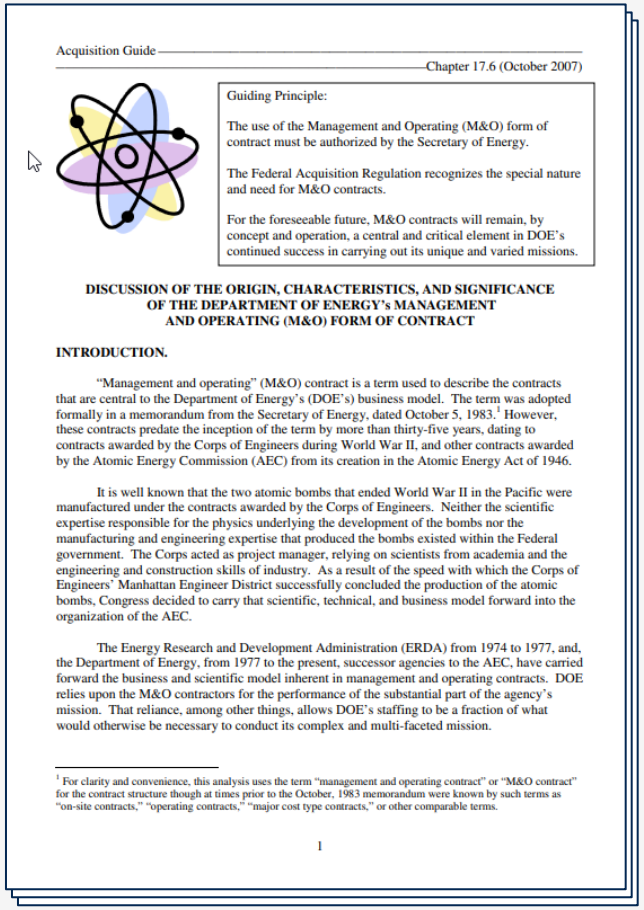

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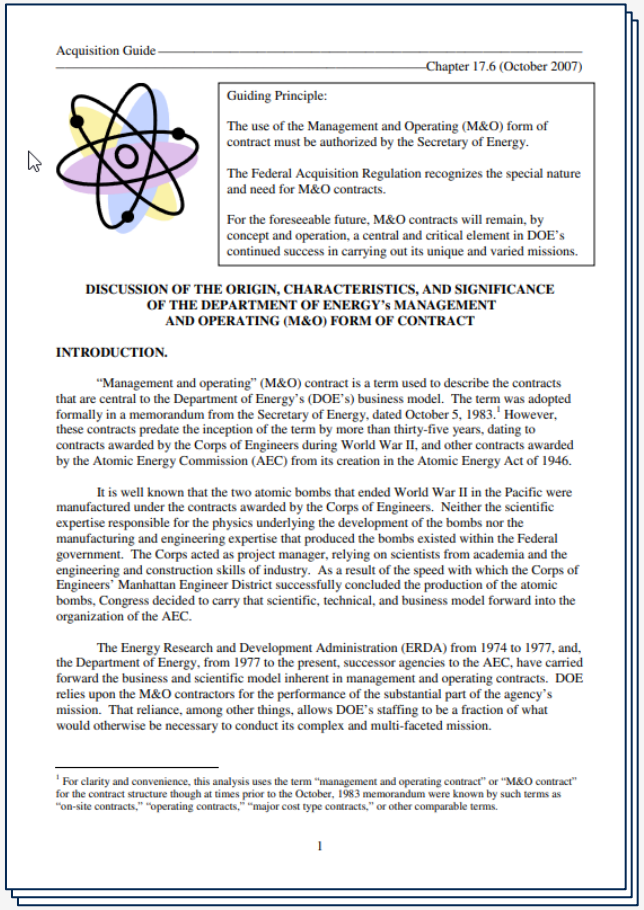

Acquisition Guide — Chapter 17.6 (October 2007)

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The use of the Management and Operating (M&O) form of contract must be authorized by the Secretary of Energy.

The Federal Acquisition Regulation recognizes the special nature and need for M&O contracts.

For the foreseeable future, M&O contracts will remain, by concept and operation, a central and critical element in DOE's continued success in carrying out its unique and varied missions.

DISCUSSION OF THE ORIGIN, CHARACTERISTICS, AND SIGNIFICANCE OF THE DEPARTMENT OF ENERGY's MANAGEMENT AND OPERATING (M&O) FORM OF CONTRACT

INTRODUCTION.

"Management and operating" (M&O) contract is a term used to describe the contracts that are central to the Department of Energy's (DOE's) business model. The term was adopted formally in a memorandum from the Secretary of Energy, dated October 5, 1983.[1] However, these contracts predate the inception of the term by more than thirty-five years, dating to contracts awarded by the Corps of Engineers during World War II, and other contracts awarded by the Atomic Energy Commission (AEC) from its creation in the Atomic Energy Act of 1946.

It is well known that the two atomic bombs that ended World War II in the Pacific were manufactured under the contracts awarded by the Corps of Engineers. Neither the scientific expertise responsible for the physics underlying the development of the bombs nor the manufacturing and engineering expertise that produced the bombs existed within the Federal government. The Corps acted as project manager, relying on scientists from academia and the engineering and construction skills of industry. As a result of the speed with which the Corps of Engineers' Manhattan Engineer District successfully concluded the production of the atomic bombs, Congress decided to carry that scientific, technical, and business model forward into the organization of the AEC.

The Energy Research and Development Administration (ERDA) from 1974 to 1977, and, the Department of Energy, from 1977 to the present, successor agencies to the AEC, have carried forward the business and scientific model inherent in management and operating contracts. DOE relies upon the M&O contractors for the performance of the substantial part of the agency's mission. That reliance, among other things, allows DOE's staffing to be a fraction of what would otherwise be necessary to conduct its complex and multi-faceted mission.

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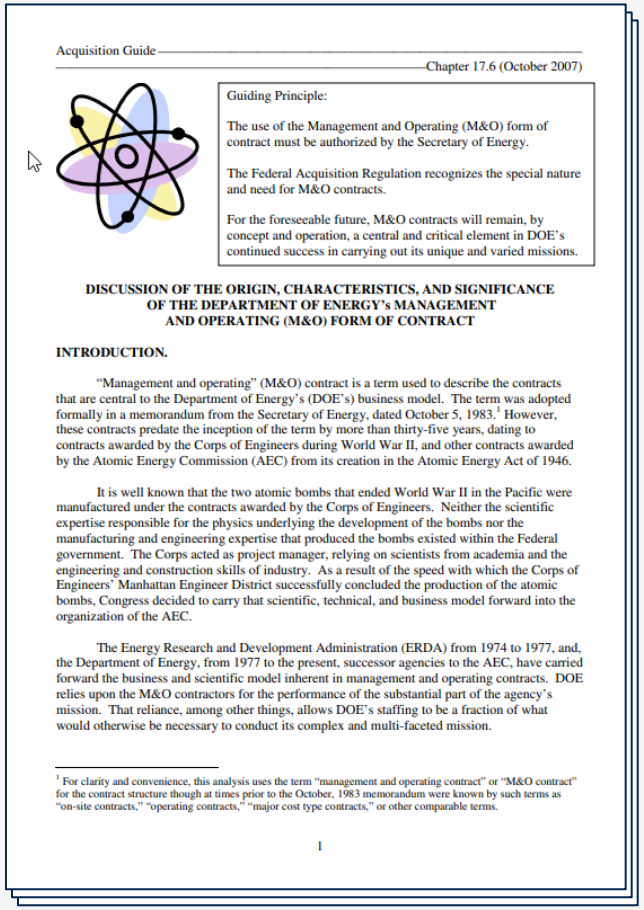
17.6 - Origin, Characteristics, and Significance of the DOE's Management and Operating (energy.gov)

M&O Contractor in History

- **100K+ contractor employees**
- **Management and Operating**
  - Memorandum from the Secretary of Energy, dated October 5, 1983
  - “What today are known as DOE’s Management and Operating contracts began during World War II.”
  - “[P]ermits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry.”
  - **“[I]nitiative and ingenuity carrying out the contract work.”**
  - “[I]n several ways DOE agreements are a unique species of contract.”



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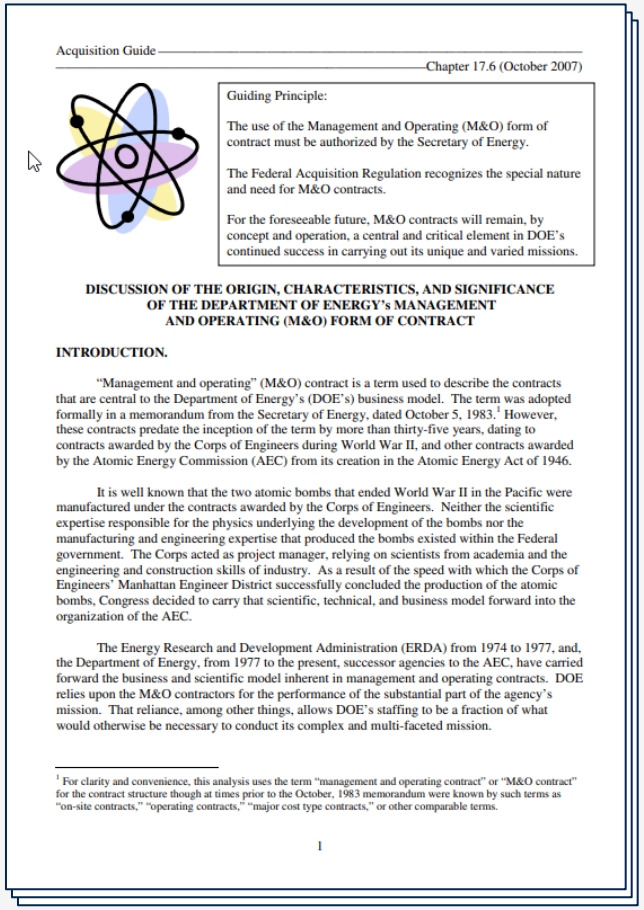
United States v. New Mexico, 455 U.S. 720, 723 (1982).



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DOE/NNSA Labs span the US

17 Laboratories
(sites/facilities on next map)

DOE/NNSA Labs span the US

17 Laboratories
(sites/facilities on next map)

Types of Offices/Agencies for Labs

- **Office of Science**
  - Ames
  - Argonne
  - Brookhaven
  - Fermilab (Single purpose)
  - LBNL
  - ORNL
  - PNNL
  - PPPL
  - SLAC
  - Jefferson
- **Idaho Operations (ID)**
  - INL
- **Fossil Energy and Carbon Management**
  - NETL
- **Energy Efficiency and Renewable Energy**
  - NREL
- **Environmental Management**
  - SRNL
- **National Nuclear Security Administration**
  - LLNL
  - LANL
  - Sandia
  - 5 Sites/Facilities

Types of Offices/Agencies for labs

NNSA (2000)
Semi-autonomous agency

- **Office of Science**
  - Ames
  - Argonne
  - Brookhaven
  - Fermilab (Single purpose)
  - LBNL
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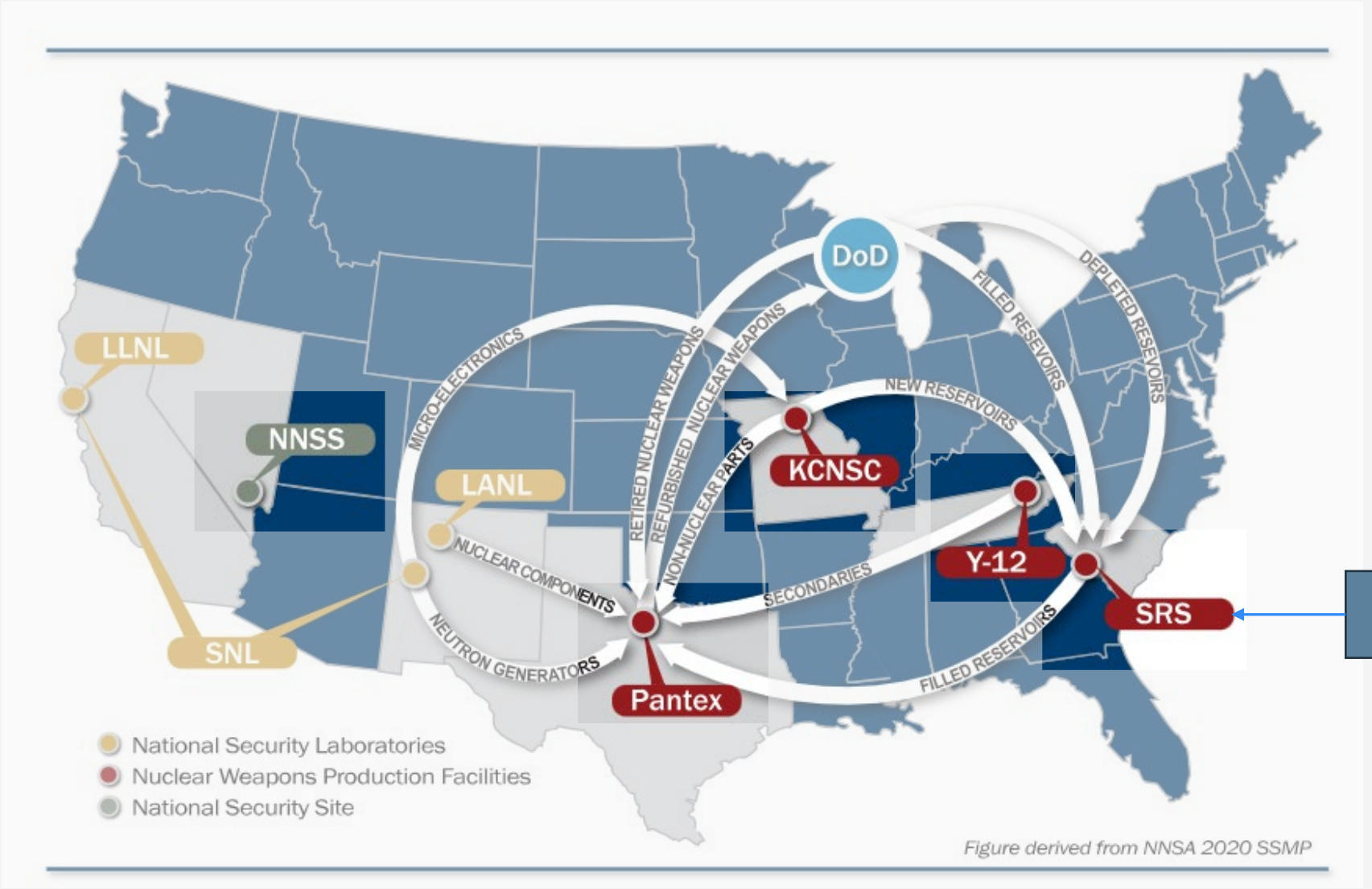
NNSA Labs and Sites/Facilities



Welcome FY 25

21 M&O Contracts

- **Office of Science**
  1. Ames
  2. Argonne
  3. Brookhaven
  4. Fermilab (Single purpose)
  5. LBNL
  6. ORNL
  7. PNNL
  8. PPPL
  9. SLAC
  10. Jefferson
- **Idaho Operations (ID)**
  11. INL
- **Energy Efficiency and Renewable Energy**
  12. NREL
- **Environmental Management**
  13. SRNL
- **National Nuclear Security Administration**
  14. LLNL
  15. LANL
  16. SNL

  Sites/Facilities
  17. KCNSC
  18. NNSS
  19. Pantex
  20. SRS
  21. Y12

21 M&O Contracts

✓ **5.5 years of visits**

- **Office of Science**

✓ 1. Ames
✓ 2. Argonne
3. Brookhaven
4. Fermilab (Single purpose)
5. LBNL
✓ 6. ORNL
✓ 7. PNNL
8. PPPL
9. SLAC
10. Jefferson

- **Idaho Operations (ID)**

11. INL

- **Energy Efficiency and Renewable Energy**

✓ 12. NREL

- **Environmental Management**

✓ 13. SRNL

- **National Nuclear Security Administration**

14. LLNL
✓ 15. LANL
✓ 16. SNL

✓ Sites/Facilities

17. KCNSC
✓ 18. NNSS
✓ 19. Pantex
20. SRS
✓ 21. Y12

IT’S A COMPLEX COMPLEX

KANSAS CITY NSC National Security Campus

M&O Contract

- **Prime Contract**
  - Modifications
  - FAR (which date/version)
  - DEAR (which date/version)
  - DOE Orders (which date/version)
  - NNSA Supplemental Directives (which date/version)
  - Acquisition Letters
  - Acquisition Guide
  - Waivers (general, specific, by office etc.)

Some of the M&O Contractor Lawyer Balance

M&O for whom

- **DOE or NNSA**
  - Which office
- **Different funding mechanisms**
- **Interfacing with government entities and corporate 3rd parties**

Your M&O legal entity

- **Corporate parent(s)**
- **Board**
- **Contractor corporate structure**
  - FFRDC
  - Processes
  - Different reporting structures

Tool Belt Ideas

- **Foster the relationship that is the intent of the M&O contract**
- **Think outside the box but don't reinvent the wheel**
  - How to vet "new" ideas
- **Find counterparts**
- **Learn your organization (both your employer and the government)**
- **Own your development (e.g., find your mentors/colleagues)**

Panel Discussion

Josh Miller joined Honeywell FM&T at the Kansas City National Security Campus in 2019. As the Associate General Counsel over IP, he oversees the progression of intellectual property from reporting through transfer/licensing. Prior to joining FM&T, Josh worked at a Boston-based IP law firm where he focused on patent litigation and developed clients' IP strategies. It's alleged that he's called the DOE/NNSA complex paradisiacal thanks to the unique opportunities for inventors to benefit from their good work.

Formerly general counsel and corporate secretary at the Fermi National Accelerator Laboratory (Fermilab, managed and operated by Fermi Research Alliance, LLC), **John Myer** joined Husch Blackwell in 2024 to help clients develop and execute large-scale, government-funded energy projects. John works closely with companies developing and scaling new technologies, helping them overcome regulatory challenges, address unique government contracting problems, and facilitating the commercial use of innovations developed at research universities and national laboratories. John is especially passionate about working with businesses and investors committed to making commercial fusion energy a reality. Fun Fact: John's Boston Terrier, Stan, has more Instagram followers than John himself.

Don Thress is Chief Counsel for DOE's Oak Ridge Office, also known as GC-South. Don's office serves clients in Site Offices overseeing four Office of Science Laboratories; SC's Office of Scientific and Technical Information; SC's service-based Consolidated Service Center; and, situationally, SC Headquarters officials. He and his office also provide counsel to officials in the Oak Ridge Environmental Management Site Office, which oversees environmental remediation and other environmental-related efforts at present and former Oak Ridge sites. Broadly, Don's Office advises clients about statutory and regulatory issues arising in areas which include, but are not limited to, Appropriations; Contracts; Employment; Environment; Intellectual Property and Technology Transfer; Labor; Procurement; Real Estate; Safety; and Security. Don has a Bachelor of Science in Business Administration and a Juris Doctor from the University of Tennessee. Don is also a former F.B.I. Agent whose hobbies include exercise, mountain hiking, and reading.

Ivy Gibson is Associate General Counsel in the Fermilab OGC. Her practice includes labor and employment matters and a variety of other legal and regulatory issues. Ivy began her legal career in the Office of General Counsel at the Federal Energy Regulatory Commission. She later served as the Associate General Counsel and Chief Compliance Officer at Western Carolina University, a constituent university of the University of North Carolina System. She earned a J.D from the Catholic University of America and a B.A. in International Studies from the University of North Carolina at Chapel Hill.

HUSCH BLACKWELL

John Myer

SENIOR COUNSEL

MADISON, WI
PHONE: 608.234.6147
EMAIL: JOHN.MYER@HUSCHBLACKWELL.COM

OVERVIEW

Formerly general counsel and corporate secretary at the U.S. Department of Energy's Fermi National Accelerator Laboratory (Fermilab), John is uniquely positioned to help clients who are developing large, government-funded energy, science, and engineering projects.

John began his nearly 25-year career in private practice where he focused on construction and government contracts litigation. Following these formative years, he honed his leadership skills at a multinational public company as lead counsel for all aspects of domestic and international government contracting and compliance, including large government energy savings performance contracts.

Powered by his government contracts experience, he was recruited to be general counsel at Fermi Research Alliance, LLC, which manages and operates Fermilab, America's particle physics and accelerator laboratory, for the U.S. Department of Energy's Office of Science. The multibillion-dollar facility drives development of new technologies for scientific research, trains the next generation of scientists, and commercializes innovative technologies developed at the laboratory.

In 2024, John joined Husch Blackwell to help clients address global issues and transform lives through innovation while navigating the dynamic energy regulatory landscape. Organizations within industries such as energy, higher education, construction,

Industry

Energy & Natural Resources

Services

Construction & Design
Energy Regulation
Government Contracts
Higher Education

and government contracting that develop and execute government-funded, large-scale energy projects benefit from his industry insights and relationships within the Department of Energy and the National Laboratories. John is particularly passionate about working with businesses and investors committed to making commercial nuclear fusion a reality.

As a former GC, John brings the client perspective to every matter. Clients value his depth of experience, sensitivity to the pressures facing in-house counsel, experience driving initiatives through boards of directors, ability to marshal limited resources, and talent for finding creative solutions to first-of-its-kind problems.

Experience

- Served as general counsel and corporate secretary to a multibillion-dollar Department of Energy national laboratory.
- Served as lead counsel supporting the development and construction of the multibillion-dollar Long-Baseline Neutrino Facility and Deep Under Neutrino Experiment, a first-of-its kind U.S.-hosted international mega-science experiment.
- Served as lead counsel for all aspects of public contracting and compliance for a $12 billion publicly traded company.
- Served as lead counsel for more than $4 billion in complex construction and fabrication contracts.
- Focused on large science and engineering projects in the energy sector including Energy Savings Performance Contracts (ESPCs).
- Developed and implemented corporate compliance programs for government contractors.
- Developed and led corporate centers of excellence for areas including global government contracts, enterprise insurance and risk management, and export/import control.

Education

- J.D., University of Michigan Law School
- B.A., Oberlin College

Admissions

- Wisconsin
- U.S. District Court, Northern District of Ohio
- U.S. District Court, Eastern District of Wisconsin
- U.S. District Court, Western District of Wisconsin
- U.S. Court of Appeals, Sixth Circuit
- U.S. Court of Appeals, Seventh Circuit

Community Leadership

- Textile Arts Center of Madison, Chair

Workforce Resilience

DOECAA

Workforce Resilience

October 17, 2024

Speakers:

Tania Faransso, Partner, Wilmer Cutler Pickering Hale and Dorr LLP
Therese M. Leone, Chief Counsel, Lawrence Berkeley National Laboratory

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Relevant Non-Discrimination Law

Impact of *SFFA v. Harvard/UNC* on DEI Initiatives

DOECAA

Legal Impact	Law applicable to **employers** following SFFA decision has **not** changed.
Practical Impact	Increased attention on and scrutiny of DEI initiatives.

Primary Federal Laws Applicable to DEI Initiatives

DOECAA

Section 1981 (42 U.S. Code § 1981) of the Civil Rights Act of 1866

Prohibits the consideration of race in making contracting decisions, including with vendors and suppliers.

Title VII of the Civil Rights Act of 1964

Prohibits discrimination on the basis of race, color, religion, sex, and national origin with respect to the "terms, conditions, or privileges" of employment.

Executive Order 11246

Imposes "affirmative action" requirements on federal contractors.

DEI Legal Landscape

DOECAA

01

Cannot use race or protected class status as a *plus* factor

02

Cannot use race or protected class status as a *tiebreaker*

03

Cannot consider race or protected class status when making *contracting* decisions

Increased Focus on DEI Initiatives

Increased Challenges to DEI Initiatives

DOECAA

AMERICAN CIVIL RIGHTS PROJECT™

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH

THE WALL STREET JOURNAL.

The Activist Pushing Companies to Ditch Their Diversity Policies

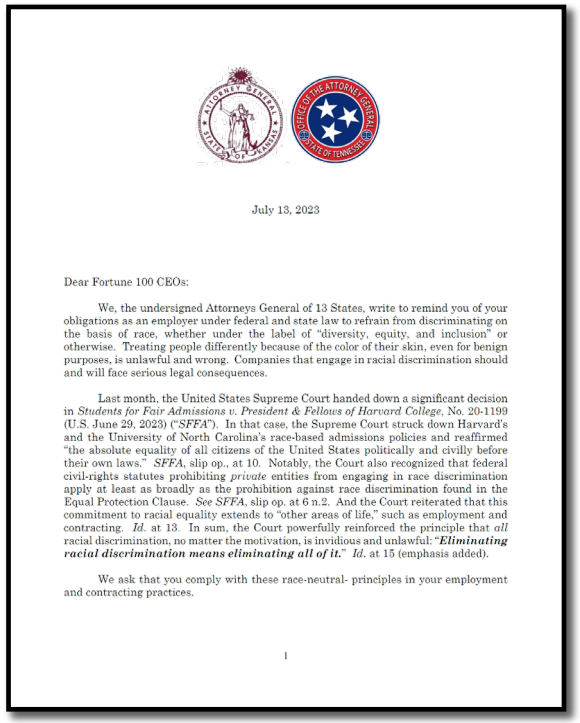
Robby Starbuck has fueled social-media attacks on Tractor Supply, Deere and Harley-Davidson, and his list of targets is getting longer.

AMERICA FIRST LEGAL

Woke Corporations

America First Legal is holding corporate America accountable for illegally engaging in discriminatory employment practices that penalize Americans based on race and sex.

Increased Attention from State AGs and Congress



July 13, 2023

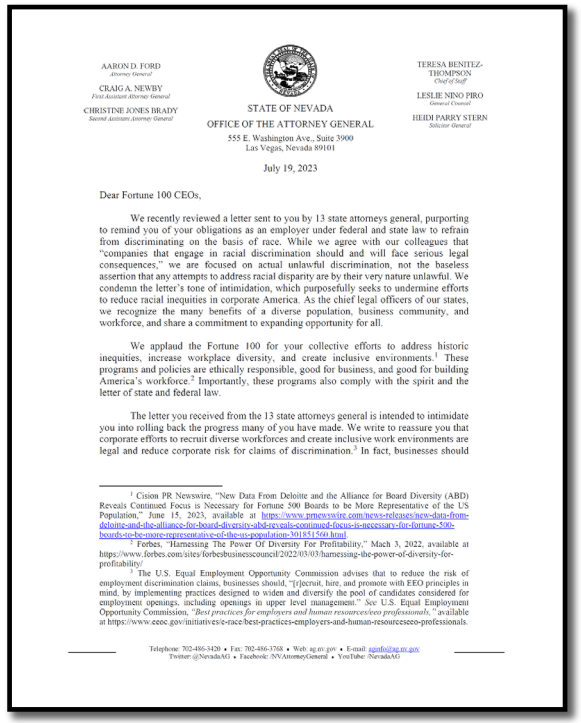
Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) ("*SFFA*"). In that case, the Supreme Court struck down Harvard's and the University of North Carolina's race-based admissions policies and reaffirmed "the absolute equality of all citizens of the United States politically and civilly before their own laws." *SFFA*, slip op., at 10. Notably, the Court also recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *See SFFA*, slip op. at 6 n.2. And the Court reiterated that this commitment to racial equality extends to "other areas of life," such as employment and contracting. *Id.* at 13. In sum, the Court powerfully reinforced the principle that *all* racial discrimination, no matter the motivation, is invidious and unlawful: "***Eliminating racial discrimination means eliminating all of it.***" *Id.* at 15 (emphasis added).

We ask that you comply with these race-neutral- principles in your employment and contracting practices.

1



AARON D. FORD
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TERESA BENITEZ-THOMPSON
Chief of Staff

LESLIE NINO PIRO
General Counsel

HEIDI PARRY STERN
Solicitor General

July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

We applaud the Fortune 100 for your collective efforts to address historic inequities, increase workplace diversity, and create inclusive environments.[1] These programs and policies are ethically responsible, good for business, and good for building America's workforce.[2] Importantly, these programs also comply with the spirit and the letter of state and federal law.

The letter you received from the 13 state attorneys general is intended to intimidate you into rolling back the progress many of you have made. We write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.[3] In fact, businesses should

[1] Cision PR Newswire, "New Data From Deloitte and the Alliance for Board Diversity (ABD) Reveals Continued Focus is Necessary for Fortune 500 Boards to be More Representative of the US Population," June 15, 2023, available at https://www.prnewswire.com/news-releases/new-data-from-deloitte-and-the-alliance-for-board-diversity-abd-reveals-continued-focus-is-necessary-for-fortune-500-boards-to-be-more-representative-of-the-us-population-301851560.html.

[2] Forbes, "Harnessing The Power Of Diversity For Profitability," Mach 3, 2022, available at https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/03/harnessing-the-power-of-diversity-for-profitability/.

[3] The U.S. Equal Employment Opportunity Commission advises that to reduce the risk of employment discrimination claims, businesses should, "[r]ecruit, hire, and promote with EEO principles in mind, by implementing practices designed to widen and diversify the pool of candidates considered for employment openings, including openings in upper level management." *See* U.S. Equal Employment Opportunity Commission, *"Best practices for employers and human resources/eeo professionals,"* available at https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resourceseeo-professionals.

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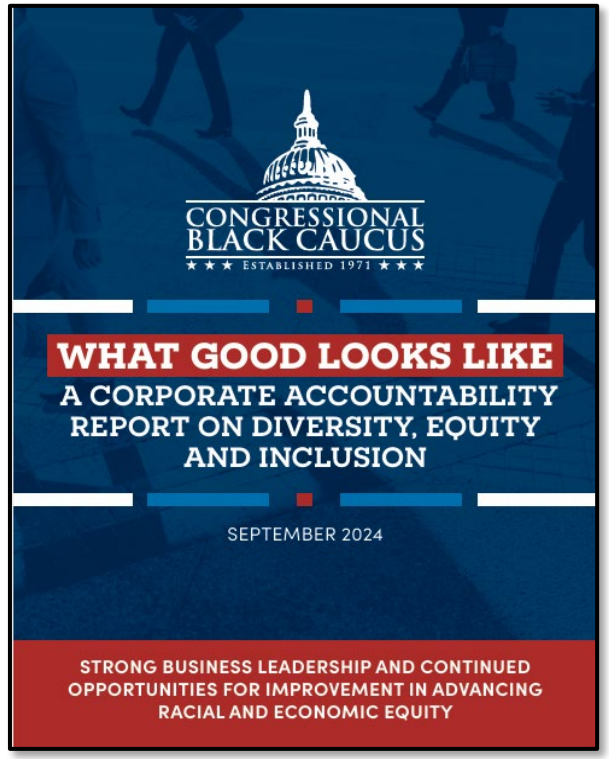
Twitter: @NevadaAG • Facebook: /NVAttorneyGeneral • YouTube: NevadaAG

July 17, 2023

Cotton Warns Top Law Firms About Race-Based Hiring Practices

Washington, D.C.— Senator Tom Cotton today sent letters to 51 law firms detailing the possible federal civil rights laws they and their clients may be violating with Diversity, Equity, and Inclusion (DEI) programs, if those programs treat people differently based on race. The letter advises the law firms to preserve documents relevant to those DEI practices in preparation for congressional oversightand private lawsuits over illegal racial discrimination in DEI programs.



Key Litigation Updates – Workforce

Muldrow v. City of St. Louis, Missouri

Supreme Court Decision in *Muldrow v. St. Louis*

In April 2024, the U.S. Supreme Court held in *Muldrow* that an employee challenging a job transfer under Title VII must show only that the transfer caused "some harm" with respect to an identifiable term or condition of employment, rejecting the idea that the harm must be "significant" or otherwise exceed some heightened threshold of harm.

Challenges to Law Firm Fellowship Programs

The American Alliance for Equal Rights, which seeks to "end[] racial classifications and racial preferences in America," sued three law firms alleging that the firms' paid diversity fellowship programs for law school students violated Section 1981 because the programs were limited to students of certain backgrounds.


Activist Behind Supreme Court Affirmative Action Cases Is Now Suing Law Firms

Aug. 22, 2023 THE WALL STREET JOURNAL.


Law Firms Alter Diversity Programs Amid Legal Challenges

Oct. 9, 2023 THE WALL STREET JOURNAL.

Pending Litigation Challenging Employer Programs

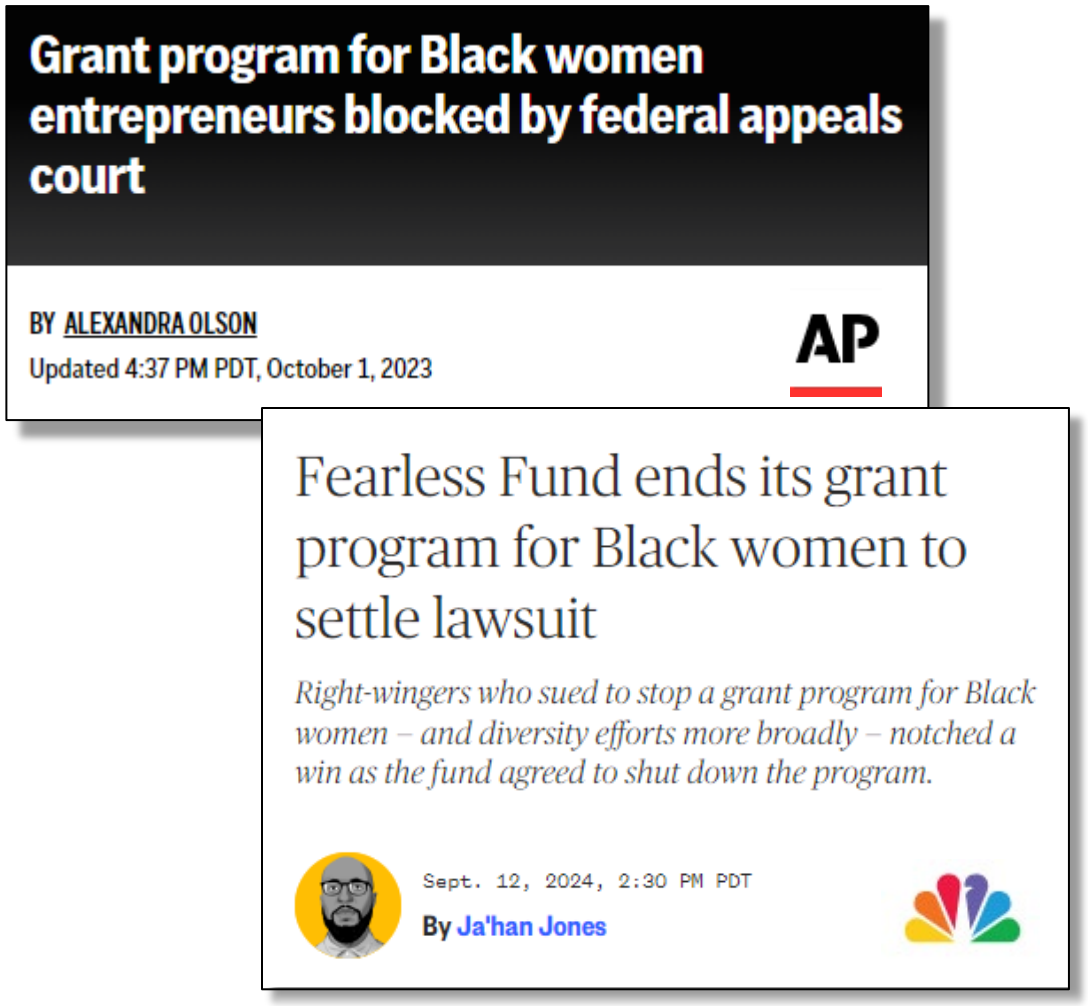
***Beneker v. CBS Studios*; *Vaughn v. CBS Broadcasting*:** Challenges to network's diversity hiring goals, including in writers' rooms

***Harker v. Meta*:** Challenge to race-conscious apprenticeship program in the commercial production industry

***Missouri v. IBM*; *Dill v. IBM*:** Challenges to IBM's diversity hiring goals

Key Litigation Updates – Beyond the Workforce

AAER v. Fearless Fund Management



Grant program for Black women entrepreneurs blocked by federal appeals court

BY ALEXANDRA OLSON
Updated 4:37 PM PDT, October 1, 2023

AP

Fearless Fund ends its grant program for Black women to settle lawsuit

Right-wingers who sued to stop a grant program for Black women – and diversity efforts more broadly – notched a win as the fund agreed to shut down the program.

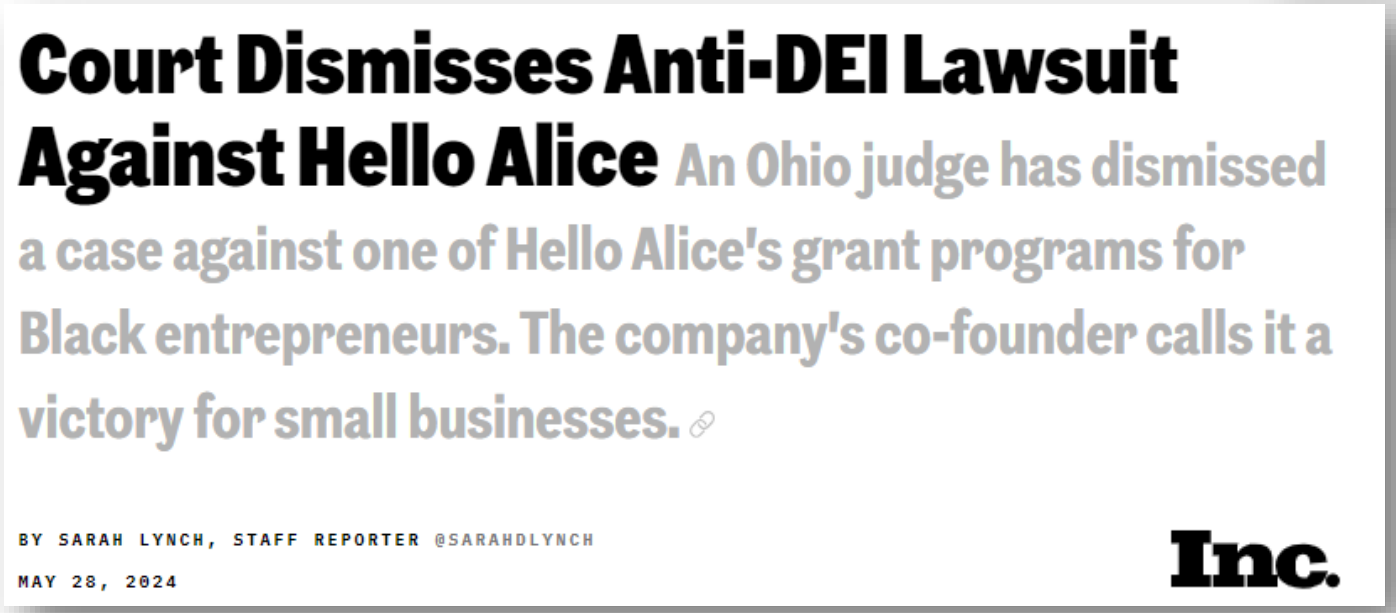
Sept. 12, 2024, 2:30 PM PDT
By Ja'han Jones

ISSUES

1. Whether grants of money constitute a gift or a contract subject to Section 1981
2. Whether remediable purposes are allowed under Section 1981
3. Whether any First Amendment carveouts can be made to cover race-exclusive programming

Roberts v. Progressive Preferred Insurance Co.

DOECAA



Court Dismisses Anti-DEI Lawsuit Against Hello Alice An Ohio judge has dismissed a case against one of Hello Alice's grant programs for Black entrepreneurs. The company's co-founder calls it a victory for small businesses.

BY SARAH LYNCH, STAFF REPORTER @SARAHDLYNCH

MAY 28, 2024

Inc.

Challenges to Federal Programs

- ***Relief programs under The American Rescue Plan Act*** – Multiple challenges to Covid-19 relief programs prioritizing aid to businesses owned by women, veterans, and those who are "socially disadvantaged" and presuming that members of certain racial and ethnic groups qualify as "socially disadvantaged."

- ***Ultima Servs. v. Small Business Agency*** – SBA enjoined from using "socially disadvantaged" presumption when determining access to SBA programming.

- ***Nuziard v. Minority Business Development Agency*** – MBDA enjoined from using "socially disadvantaged" presumption when determining access to capital / government contracts.

Navigating the Landscape

States with Affirmative Action Bans

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Washington: Initiative 200

Michigan: Prop 2

New Hampshire: House Bill 623

Idaho: House Bill 440

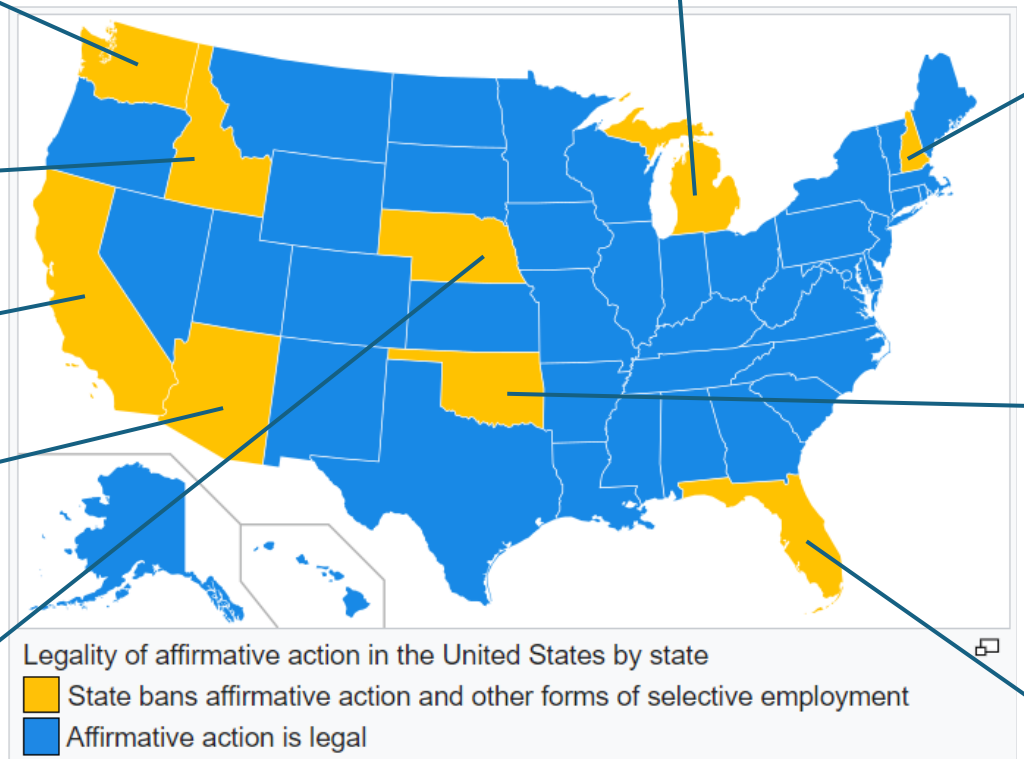
California: Prop 209

Oklahoma: Article II, Section 36, OK State Constitution

Arizona: Prop 107

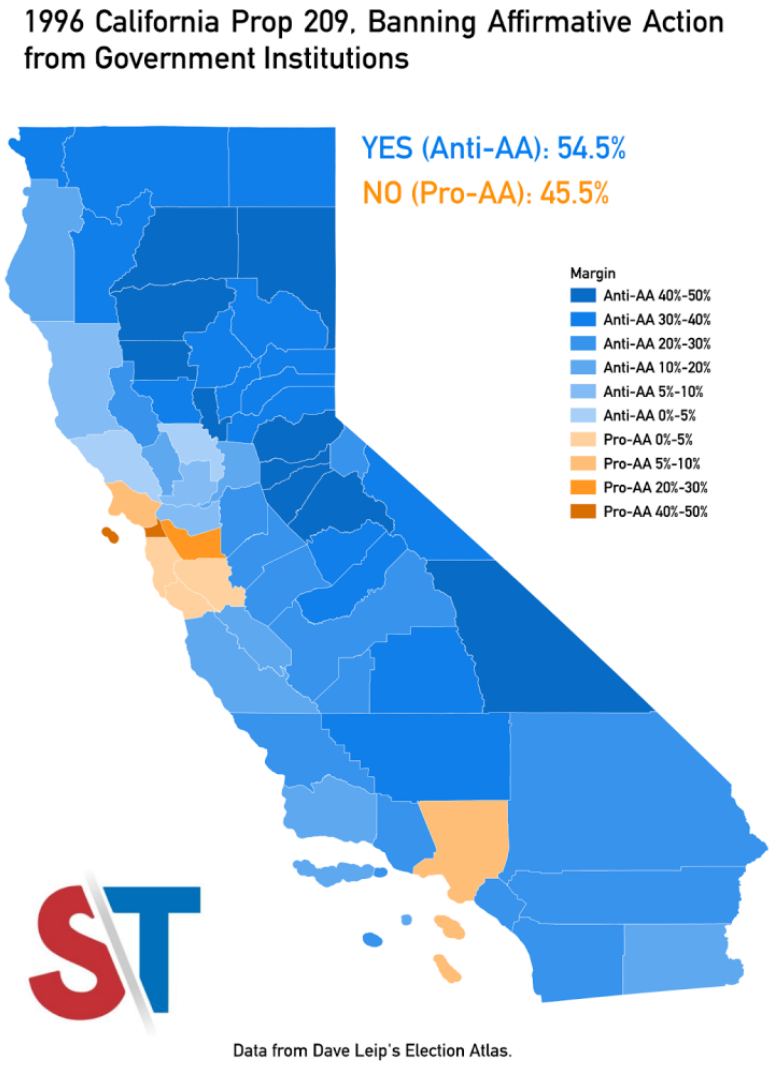
Nebraska: Initiative 424

Florida: Executive Order 99-281



California's Proposition 209

- Passed in 1996, Prop 209 prohibited California state entities from using **race, ethnicity, or sex** as criteria in public employment, public contracting, and public education.



Compliance with Non-Discrimination Laws

DOECAA

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
OFCCP
U.S. DEPARTMENT OF LABOR

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- Federal contractors must comply with OFCCP's written affirmative affirmative action plan requirements.
- Employers must ensure a workplace free from illegal discrimination to promote diversity and equal opportunity.

Areas of Particular Scrutiny

DOECAA

- Programs designed for or targeted to specific groups
- Incentives for achieving representation goals, including executive compensation
- Philanthropic giving and grant-making
- Supplier diversity programs
- Representation goals

Considerations for Effective, Compliant DEI Programs

DOECAA

1

Avoid race-conscious employment decisions

2

Focus initiatives on expanding recruitment and opportunities

3

Ensure thoughtfulness around communications and statements

4

Educate leadership and workforce on effective strategies and importance of compliance

Workforce Resilience Strategies

- Diversity statements (see *Haltigan v. Drake*)
- Climate surveys
- Targeted outreach (see statement from EEOC Chair Burrows)
- Inclusive leadership
- Unconscious bias training (see *Vavra v. Honeywell Int'l Inc.*)
- Stewardship goals

Balancing the Talent Pipeline

- Engage Employee Resource Groups (ERGs)
- Establish educational partnerships
- Partner with multicultural professional local and national organizations, associations and student groups
- Use employee networks/leverage employee referral program
- Attend targeted career fairs

Conclusion

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Tania Faransso focuses her practice on high-stakes internal and government investigations, particularly involving anti-discrimination matters. She has conducted racial equity and civil rights audits for companies across a range of industries and regularly advises clients on issues related to diversity, equity, and inclusion. She also has significant experience conducting sensitive internal investigations and reviews of company culture following reported allegations of sexual misconduct, harassment, and discrimination. She has represented universities in government investigations arising from reported sexual misconduct incidents, and has advised universities on various topics, including policy and regulatory regimes such as Title IX.

Ms. Faransso is an experienced litigator and has represented several major corporations and universities at various stages of litigation, including discovery, dispositive motion practice, trial, and appellate proceedings. She has also assisted clients navigating congressional inquiries, including document requests, informational briefings and investigative reports.

Ms. Faransso shares the firm's commitment to pro bono work. She has represented clients in actions brought under the Voting Rights Act as well as in cases involving complex issues of constitutional law.

Prior to joining the firm, Ms. Faransso served as a judicial clerk to the Honorable Royce C. Lamberth of the Federal District Court for the District of Columbia. While in law school, she held a judicial internship with the Honorable Lee H. Rosenthal of the Federal District Court for the Southern District of Texas.

Professional Activities

Ms. Faransso serves on the Board of Directors of Democracy Forward. She is a member of the National Association of College and University Attorneys and the National Arab American Bar Association.

Solutions

Anti-Discrimination

Congressional Investigations

Crisis Management and Strategic Response

Education

Government and Regulatory Litigation

Litigation

Credentials

EDUCATION

JD, Duke University School of Law, 2010

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Executive Editor, Duke Law Journal, Moot Court Board, Bidlake Memorial Award for Legal Writing, Order of the Coif

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ADMISSIONS

District of Columbia

New York

CLERKSHIPS

The Hon. Royce C. Lamberth, US District Court for the District of Columbia, 2010 - 2011

Therese M. Leone is Chief Laboratory Counsel at Lawrence Berkeley National Lab where she leads the legal team in managing legal risks and providing strategic legal guidance to support the Lab's research mission. In her previous role as Deputy Campus Counsel at UC Berkeley, she advised campus leaders on employment/labor law, academic affairs, complex investigations, Title IX/Clery compliance and student affairs issues. She also served as Vice President and General Counsel at Mills College and was UC Merced's first Chief Campus Counsel. Earlier, she worked as a labor and employment attorney in the UC Office of General Counsel and in private practice as a labor/employment attorney.

Ms. Leone is active in higher education legal circles, currently serving as Secretary to the Board for the National Association of College and University Attorneys (NACUA), where she also has chaired various committees over two decades. She has spoken widely on legal and policy issues in higher education. Therese previously served on the State Bar of California's Council on Access and Fairness and the Alameda County Community Food Bank Board of Directors. Therese earned her J.D. from UC Berkeley and her B.A. from Northwestern University.

Trends and Perspectives from the DOE Inspector General

** Slide deck to be sent as a supplement*

T. Donaldson Bio

Teri L. Donaldson was sworn in as the fifth Inspector General of the United States Department of Energy on January 23, 2019. Ms. Donaldson began her career as an Assistant United States Attorney for the Middle District of Florida, and received numerous commendations from federal investigatory agencies, as well as Special Commendations from the U.S. Attorney General and the Director of the FBI. She then served as General Counsel for the Florida Department of Environmental Protection, representing the State of Florida on a broad range of environmental and energy matters. Ms. Donaldson joined the private sector in 2004, where she assisted clients with complex investigations, litigation and corporate compliance matters. Most recently, Ms. Donaldson was a partner in the Houston office of DLA Piper, LP (US), where her clients included a variety of major American and international corporations. Ms. Donaldson returned to public service in September of 2017 serving as the General Counsel for the Environment and Public Works Committee of the United States Senate before becoming Inspector General. Ms. Donaldson is the first female to the hold the position of Inspector General at the Department of Energy.

2024 Supreme Court Update: Chevron and Beyond

HUSCH BLACKWELL

DOECAA

Chevron & Beyond

DOECCA Fall 2024 Conference

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Setting the Stage

- *Loper Bright Enterprises, et al. v. Raimondo, Secretary of Commerce, et al.*, No. 22-451 (June 28, 2024)
- *Corner Post, Inc. v. Bd. of Governors of the Federal Reserve System*, No. 22-1008 (July 1, 2024)
- A one-two punch on agency rulemaking?

Loper Bright: Chevron is overruled.

- 6-3 decision (C.J. Roberts)
- Challenge to regulation of the National Marine Fisheries Service under the Magnuson-Stevens Fishery Conservation and Management Act
- Regulation required Atlantic herring fisherman to contract and pay for Government-certified third-party observers on fishing trips

- "*Chevron* is overruled. Courts must exercise independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Corner Post: Claim accrues at injury, not final rule.

- 6-3 decision (J. Barrett)
- Facial challenge to Regulation II of Federal Reserve Board regarding allowable amount of "interchange fees."
- Regulation II passed (and unsuccessfully challenged) in 2011.
- Corner Post formed in 2017; brought challenge in 2021.

- "An APA claim does not accrue for purposes of [28 U.S.C.] §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Because Corner Post filed suit within six years of its injury, §2401(a) did not bar its challenge to Regulation II."

- "A claim accrues when the plaintiff has the right to assert it in court – and in the case of the APA, that is when the plaintiff is injured by final agency action."

Practical Implications of *Loper* and *Corner Post*?

- *Corner Post* (J. Jackson, dissenting):
  - "At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government."

Practical Implications of *Loper* and *Corner Post*?

- *Brownlee v. DynCorp.*, 349 F.3d 1343, 1354-55 (Fed. Cir. 2003):
  - "The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference. Not only has Congress specifically authorized the FAR, *see* 41 U.S.C. § 405a (2000), but, in the 1985 Act, it expressly authorized regulations adopting definitions of the statutory terms, such as "contractor." § 911(a), 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)). As the Supreme Court noted in *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), "a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229, 121 S.Ct. 2164. Not surprisingly, we have specifically held that the provisions of FAR are entitled to *Chevron* deference."

Practical Implications of *Loper* and *Corner Post*?

- *Loper Bright:*
  - "[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."

Looking ahead . . .

1. What, if any, practical implications do you anticipate from the *Loper Bright* and *Corner Post* decisions?
2. Are there specific issues, agencies, or areas where you anticipate these cases to have more of an effect?
3. How long will it take for the implications to sort themselves out?

SEC v. Jarkesy: Limits on admin. adjudication?

- No. 22-859 (June 27, 2024)
- 6-3 decision (C.J. Roberts)
- SEC adjudicated securities fraud action & assessed civil penalty of $300,000
- "This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud."

SEC v. Jarkesy: Limits on admin. adjudication?

- "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."
- Distinguished *Atlas Roofing Co.*, 430 U.S. 442 (1977) (OSHA enforcement):
  - "*Atlas Roofing* concluded that Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law.' The case therefore does not control here, where the statutory claim is 'in the nature of' a common law suit."

Ohio v. EPA: Final Rule Explanations

- No. 23A349 (June 27, 2024)
- 5-4 decision (J. Gorsuch)
- Stay granted against EPA final rule for Federal Implementation Plant (FIP) of air quality standards
- EPA announced intent to deny several states' SIPs & then proposed FIP binding those states in the interim

Ohio v. EPA: Final Rule Explanations

- Several states (70% of emissions at issue) obtained stays over FIP; other states sought stay at D.C. Circuit *ostensibly* on theory that FIP was predicated on all states participating
  - *i.e.*, FIP not valid if 70% of emissions are not addressed
- EPA final rule included severability provision for states not subject to FIP

Ohio v. EPA: Final Rule Explanations

- SCOTUS granted stay – likelihood of success on merits
  - Arbitrary & capricious = not "reasonable and *reasonably explained*"
- Given the comments, "EPA needed to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the States it originally intended to cover."

Ohio v. EPA: Final Rule Explanations

- "Perhaps there is some explanation why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvements. *But if there is an explanation, it does not appear in the final rule.*" (emphasis added)
- Severability provision not sufficient b/c "awareness is not itself an explanation"

Ohio v. EPA: Final Rule Explanations

- Clarity of commenters' concerns?
  - "A party need not rehearse the identical argument made before the agency; it need only confirm that the government had notice of the challenge during the public comment period and a chance to consider in substance, if not in form, the same objection now raised in court." (internal quotation marks omitted)

Ohio v. EPA: Final Rule Explanations

- J. Barrett dissenting:
  - "[I]t is not clear that any commenter raised with 'reasonable specificity' the underlying substantive issue: that the exclusion of some States from the FIP would undermine EPA's cost-effectiveness analyses and resulting emissions controls."
- Hundreds of comments with EPA response over 1,100 pages

HUSCH BLACKWELL

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LOPER BRIGHT ENTERPRISES ET AL. *v.* RAIMONDO, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22–451. Argued January 17, 2024—Decided June 28, 2024*

The Court granted certiorari in these cases limited to the question whether *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified. Under the *Chevron* doctrine, courts have sometimes been required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. *Id.*, at 843. In each case below, the reviewing courts applied *Chevron*'s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 *et seq.*, which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq*.

Held: The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled. Pp. 7–35.

(a) Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear, but envisioned

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*Together with No. 22–1219, *Relentless, Inc., et al.* v. *Department of Commerce, et al.*, on certiorari to the United States Court of Appeals for the First Circuit.

that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, p. 525 (A. Hamilton). As Chief Justice Marshall declared in the foundational decision of *Marbury* v. *Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177. In the decades following *Marbury*, when the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur* v. *Paulding*, 14 Pet. 497, 515.

The Court recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who may well have drafted the laws at issue. *United States* v. *Moore*, 95 U. S. 760, 763. "Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. "[I]n cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *United States* v. *Dickson*, 15 Pet. 141, 162.

During the "rapid expansion of the administrative process" that took place during the New Deal era, *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings," *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51. But the Court did not extend similar deference to agency resolutions of questions of *law*. "The interpretation of the meaning of statutes, as applied to justiciable controversies," remained "exclusively a judicial function." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 544. The Court also continued to note that the informed judgment of the Executive Branch could be entitled to "great weight." *Id.*, at 549. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

Occasionally during this period, the Court applied deferential review after concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by

the agency. See *Gray* v. *Powell*, 314 U. S. 402; *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111. But such deferential review, which the Court was far from consistent in applying, was cabined to factbound determinations. And the Court did not purport to refashion the longstanding judicial approach to questions of law. It instead proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." *Id.*, at 130–131. Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes under *Chevron*. Pp. 7–13.

(b) Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U. S., at 644. The APA prescribes procedures for agency action and delineates the basic contours of judicial review of such action. And it codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. As relevant here, the APA specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, 5 U. S. C. §706 (emphasis added)—even those involving ambiguous laws. It prescribes no deferential standard for courts to employ in answering those legal questions, despite mandating deferential judicial review of agency policymaking and factfinding. See §§706(2)(A), (E). And by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, §706, it makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. The APA's history and the contemporaneous views of various respected commentators underscore the plain meaning of its text.

Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. See *Skidmore*, 323 U. S., at 140. And when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in " 'reasoned decisionmaking' " within those boundaries. *Michigan* v. *EPA*, 576 U. S. 743, 750 (quoting *Allentown Mack Sales &*

Syllabus

Service, Inc. v. *NLRB*, 522 U. S. 359, 374). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts. Pp. 13–18.

(c) The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA. Pp. 18–29.

(1) *Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning. The question in the case was whether an Environmental Protection Agency (EPA) regulation was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action. The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." *Id.*, at 842. The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," *ibid.*, and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," *id.*, at 843, n. 9. But in a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand, a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.*, at 843 (footnote omitted). Instead, at *Chevron*'s second step, a court had to defer to the agency if it had offered "a permissible construction of the statute," *ibid.*, even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid.*, n. 11. Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id.*, at 865.

Although the Court did not at first treat *Chevron* as the watershed decision it was fated to become, the Court and the courts of appeals were soon routinely invoking its framework as the governing standard in cases involving statutory questions of agency authority. The Court eventually decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741. Pp. 18–20.

(2) Neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *Chevron* defies the command of the APA that "the reviewing court"—not the agency whose

action it reviews—is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U. S., at 843, n. 11. *Chevron* insists on more than the "respect" historically given to Executive Branch interpretations; it demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time, see *id.*, at 863, and even when a pre-existing judicial precedent holds that an ambiguous statute means something else, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982. That regime is the antithesis of the time honored approach the APA prescribes.

Chevron cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies. That presumption does not approximate reality. A statutory ambiguity does not necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. Many or perhaps most statutory ambiguities may be unintentional. And when courts confront statutory ambiguities in cases that do not involve agency interpretations or delegations of authority, they are not somehow relieved of their obligation to independently interpret the statutes. Instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity. But in an agency case as in any other, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. *Chevron* gravely erred in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate. Pp. 21–23.

(3) The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer;

because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

As the Court recently noted, interpretive issues arising in connection with a regulatory scheme "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor* v. *Wilkie*, 588 U. S. 558, 578. Under *Chevron*'s broad rule of deference, though, ambiguities of all stripes trigger deference, even in cases having little to do with an agency's technical subject matter expertise. And even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions, and courts did so without issue in agency cases before *Chevron*. After all, in an agency case in particular, the reviewing court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. An agency's interpretation of a statute "cannot bind a court," but may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 98, n. 8. Delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.

Nor does a desire for the uniform construction of federal law justify *Chevron*. It is unclear how much the *Chevron* doctrine as a whole actually promotes such uniformity, and in any event, we see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

Finally, the view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken because it rests on a profound misconception of the judicial role. Resolution of statutory ambiguities involves legal interpretation, and that task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U. S., at 575. Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. To stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.

By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* prevents judges from judging. Pp. 23–26.

(4) Because *Chevron*'s justifying presumption is, as Members of the Court have often recognized, a fiction, the Court has spent the better part of four decades imposing one limitation on *Chevron* after another. Confronted with the byzantine set of preconditions and exceptions that has resulted, some courts have simply bypassed *Chevron* or failed to heed its various steps and nuances. The Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. But because *Chevron* remains on the books, litigants must continue to wrestle with it, and lower courts—bound by even the Court's crumbling precedents—understandably continue to apply it. At best, *Chevron* has been a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). Pp. 26–29.

(d) *Stare decisis*, the doctrine governing judicial adherence to precedent, does not require the Court to persist in the *Chevron* project. The *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917)—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. It reshaped judicial review of agency action without grappling with the APA, the statute that lays out how such review works. And its flaws were apparent from the start, prompting the Court to revise its foundations and continually limit its application.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, but the concept of ambiguity has always evaded meaningful definition. Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125. The Court has also been forced to clarify the doctrine again and again, only adding to *Chevron*'s unworkability, and the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. And its continuing import is far from clear, as courts have often declined to engage with the doctrine, saying it makes no difference.

Nor has *Chevron* fostered meaningful reliance. Given the Court's constant tinkering with and eventual turn away from *Chevron*, it is

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hard to see how anyone could reasonably expect a court to rely on *Chevron* in any particular case or expect it to produce readily foreseeable outcomes. And rather than safeguarding reliance interests, *Chevron* affirmatively destroys them by allowing agencies to change course even when Congress has given them no power to do so.

The only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265, is for the Court to leave *Chevron* behind. By overruling *Chevron*, though, the Court does not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443). Pp. 29–35.

No. 22–451, 45 F. 4th 359 & No. 22–1219, 62 F. 4th 621, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and GORSUCH, J., filed concurring opinions. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which JACKSON, J., joined as it applies to No. 22–1219. JACKSON, J., took no part in the consideration or decision of the case in No. 22–451.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL., PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

Our *Chevron* doctrine requires courts to use a two-step

framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." *Id.*, at 842. If, and only if, congressional intent is "clear," that is the end of the inquiry. *Ibid.* But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.*, at 843. The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U. S. coast, which began just 12 nautical miles offshore. See, *e.g.*, S. Rep. No. 94–459, pp. 2–3 (1975). Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). See 90 Stat. 331 (codified as amended at 16 U. S. C. §1801 *et seq*.). The MSA and subsequent amendments extended the jurisdiction of the United States to 200 nautical miles beyond the U. S. territorial sea and claimed "exclusive fishery management authority over all fish" within that area, known as the "exclusive economic zone." §1811(a); see Presidential Proclamation No. 5030, 3 CFR 22 (1983 Comp.); §§101, 102, 90 Stat. 336. The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce.

The MSA established eight regional fishery management councils composed of representatives from the coastal States, fishery stakeholders, and NMFS. See 16 U. S. C.

§§1852(a), (b). The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. See §§1852(h), 1854(a). In service of the statute's fishery conservation and management goals, see §1851(a), the MSA requires that certain provisions—such as "a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur," §1853(a)(15)—be included in these plans, see §1853(a). The plans may also include additional discretionary provisions. See §1853(b). For example, plans may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment," §1853(b)(4); "reserve a portion of the allowable biological catch of the fishery for use in scientific research," §1853(b)(11); and "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery," §1853(b)(14).

Relevant here, a plan may also require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8). The MSA specifies three groups that must cover costs associated with observers: (1) foreign fishing vessels operating within the exclusive economic zone (which *must* carry observers), see §§1821(h)(1)(A), (h)(4), (h)(6); (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch, see §§1802(26), 1853a(c)(1)(H), (e)(2), 1854(d)(2); and (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate, see §1862(a). In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. See §§1854(d)(2)(B), 1862(b)(2)(E). And in general, it author-

izes the Secretary to impose "sanctions" when "any payment required for observer services provided to or contracted by an owner or operator . . . has not been paid." §1858(g)(1)(D).

The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate. And at one point, NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. See 79 Fed. Reg. 8792 (2014). In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment. See 85 Fed. Reg. 7414 (2020).

With respect to the Atlantic herring fishery, the Rule created an industry funded program that aims to ensure observer coverage on 50 percent of trips undertaken by vessels with certain types of permits. Under that program, vessel representatives must "declare into" a fishery before beginning a trip by notifying NMFS of the trip and announcing the species the vessel intends to harvest. If NMFS determines that an observer is required, but declines to assign a Government-paid one, the vessel must contract with and pay for a Government-certified third-party observer. NMFS estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent. See *id.*, at 7417–7418.

B

Petitioners Loper Bright Enterprises, Inc., H&L Axelsson, Inc., Lund Marr Trawlers LLC, and Scombrus One LLC are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, 16 U. S. C. §1855(f), which incorporates

the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq*. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The District Court granted summary judgment to the Government. It concluded that the MSA authorized the Rule, but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron*. 544 F. Supp. 3d 82, 107 (DC 2021); see *id.*, at 103–107.

A divided panel of the D. C. Circuit affirmed. See 45 F. 4th 359 (2022). The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers. *Id.*, at 366. Because there remained "some question" as to Congress's intent, *id.*, at 369, the court proceeded to *Chevron*'s second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA, 45 F. 4th, at 370. In dissent, Judge Walker concluded that Congress's silence on industry funded observers for the Atlantic herring fishery—coupled with the express provision for such observers in other fisheries and on foreign vessels—unambiguously indicated that NMFS lacked the authority to "require [Atlantic herring] fishermen to pay the wages of at-sea monitors." *Id.*, at 375.

C

Petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC own two vessels that operate in the Atlantic herring fishery: the F/V *Relentless* and the F/V *Persistence*.[1] These vessels use small-mesh bottom-trawl gear and can freeze fish at sea, so they can catch more species of fish and take longer trips than other vessels (about 10 to 14 days, as

[1] For any landlubbers, "F/V" is simply the designation for a fishing vessel.

opposed to the more typical 2 to 4). As a result, they generally declare into multiple fisheries per trip so they can catch whatever the ocean offers up. If the vessels declare into the Atlantic herring fishery for a particular trip, they must carry an observer for that trip if NMFS selects the trip for coverage, even if they end up harvesting fewer herring than other vessels—or no herring at all.

This set of petitioners, like those in the D. C. Circuit case, filed a suit challenging the Rule as unauthorized by the MSA. The District Court, like the D. C. Circuit, deferred to NMFS's contrary interpretation under *Chevron* and thus granted summary judgment to the Government. See 561 F. Supp. 3d 226, 234–238 (RI 2021).

The First Circuit affirmed. See 62 F. 4th 621 (2023). It relied on a "default norm" that regulated entities must bear compliance costs, as well as the MSA's sanctions provision, Section 1858(g)(1)(D). See *id.*, at 629–631. And it rejected petitioners' argument that the express statutory authorization of three industry funding programs demonstrated that NMFS lacked the broad implicit authority it asserted to impose such a program for the Atlantic herring fishery. See *id.*, at 631–633. The court ultimately concluded that the "[a]gency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed[] the bounds of the permissible.'" *Id.*, at 633–634 (quoting *Barnhart* v. *Walton*, 535 U. S. 212, 218 (2002); alteration in original). In reaching that conclusion, the First Circuit stated that it was applying *Chevron*'s two-step framework. 62 F. 4th, at 628. But it did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. Similarly, it declined to decide whether the result was "a product of *Chevron* step one or step two." *Id.*, at 634.

We granted certiorari in both cases, limited to the question whether *Chevron* should be overruled or clarified. See

601 U. S. ___ (2023); 598 U. S. ___ (2023).[2]

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.*, at 523. To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*, at 522; see *id.*, at 522–524; *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011).

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury* v. *Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137,

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[2] Both petitions also presented questions regarding the consistency of the Rule with the MSA. See Pet. for Cert. in No. 22–451, p. i; Pet. for Cert. in No. 22–1219, p. ii. We did not grant certiorari with respect to those questions and thus do not reach them.

177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.*, at 210; see also *United States* v. *Vowell*, 5 Cranch 368, 372 (1809) (Marshall, C. J., for the Court).

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. See *Dickson*, 15 Pet., at 161; *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892); *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146 (1920). That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014) (first quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch, at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret." *United*

States v. *Moore*, 95 U. S. 760, 763 (1878); see also *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912).

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." *Decatur*, 14 Pet., at 515; see also *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932). Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

B

The New Deal ushered in a "rapid expansion of the administrative process." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51 (1936). "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." *Ibid.* Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." *Ibid.* (emphasis added).

But the Court did not extend similar deference to agency

resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 544 (1940); see also *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 681–682, n. 1 (1944). The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards*, 298 U. S., at 84 (concurring opinion). It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns.*, 310 U. S., at 549.

Perhaps most notably along those lines, in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.*, at 139–140. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*, at 140.

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray* v. *Powell*, 314 U. S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that

had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. *Id.*, at 411. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." *Id.*, at 412–413. Similarly, in *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" *Id.*, at 130. The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law." *Id.*, at 131.

Such deferential review, though, was cabined to fact-bound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal—encompassed a transaction lacking a transfer of title. See 314 U. S., at 416–417. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." 322 U. S., at 130–131. At least with

respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. See K. Davis, Administrative Law §248, p. 893 (1951) ("The one statement that can be made with confidence about applicability of the doctrine of Gray v. Powell is that sometimes the Supreme Court applies it and sometimes it does not."); B. Schwartz, Gray vs. Powell and the Scope of Review, 54 Mich. L. Rev. 1, 68 (1955) (noting an "embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*"). In one illustrative example, the Court rejected the U. S. Price Administrator's determination that a particular warehouse was a "public utility" entitled to an exemption from the Administrator's General Maximum Price Regulation. Despite the striking resemblance of that administrative determination to those that triggered deference in *Gray* and *Hearst*, the Court declined to "accept the Administrator's view in deference to administrative construction." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944). The Administrator's view, the Court explained, had "hardly seasoned or broadened into a settled administrative practice," and thus did not "overweigh the considerations" the Court had "set forth as to the proper construction of the statute." *Ibid.*

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that *courts* must "decide all relevant questions of

law." 5 U. S. C. §706.[3]

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U. S., at 644. It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–671 (1986).

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o

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[3]The dissent plucks out *Gray*, *Hearst*, and—to "gild the lily," in its telling—three more 1940s decisions, claiming they reflect the relevant historical tradition of judicial review. *Post*, at 21–22, and n. 6 (opinion of KAGAN, J.). But it has no substantial response to the fact that *Gray* and *Hearst* themselves endorsed, implicitly in one case and explicitly in the next, the traditional rule that "questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight"—not outright deference—"to the judgment of those whose special duty is to administer the questioned statute." *Hearst*, 322 U. S., at 130–131. And it fails to recognize the deep roots that this rule has in our Nation's judicial tradition, to the limited extent it engages with that tradition at all. See *post*, at 20–21, n. 5. Instead, like the Government, it strains to equate the "respect" or "weight" traditionally afforded to Executive Branch interpretations with binding deference. See *ibid.*; Brief for Respondents in No. 22–1219, pp. 21–24. That supposed equivalence is a fiction. The dissent's cases establish that a "*contemporaneous* construction" shared by "not *only* . . . the courts" but also "the departments" could be "controlling," *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (emphasis added), and that courts might "lean in favor" of a "contemporaneous" and "continued" construction of the Executive Branch as strong evidence of a statute's meaning, *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892). They do not establish that Executive Branch interpretations of ambiguous statutes—no matter how inconsistent, late breaking, or flawed—always *bound* the courts. In reality, a judge was never "bound to adopt the construction given by the head of a department." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," *Kisor* v. *Wilkie*, 588 U. S. 558, 580 (2019) (plurality opinion) (internal quotation marks omitted), Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns.*, 310 U. S., at 544. But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that

agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109 (2015) (Scalia, J., concurring in judgment).[4]

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. See 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter); P. McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 831 (1946). Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the

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[4]The dissent observes that Section 706 does not say expressly that courts are to decide legal questions using "a *de novo* standard of review." *Post*, at 16. That much is true. But statutes can be sensibly understood only "by reviewing text in context." *Pulsifer* v. *United States*, 601 U. S. 124, 133 (2024). Since the start of our Republic, courts have "decide[d] . . . questions of law" and "interpret[ed] constitutional and statutory provisions" by applying their own legal judgment. §706. Setting aside its misplaced reliance on *Gray* and *Hearst*, the dissent does not and could not deny that tradition. But it nonetheless insists that to codify that tradition, Congress needed to expressly reject a sort of deference the courts had never before applied—and would not apply for several decades to come. It did not. "The notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Bond* v. *United States*, 572 U. S. 844, 857 (2014).

Administrative Procedure Act 108 (1947); see also *Kisor*, 588 U. S., at 582 (plurality opinion) (same). That "present law," as we have described, adhered to the traditional conception of the judicial function. See *supra*, at 9–13.

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. Professor John Dickinson, for example, read the APA to "impose a clear mandate that all [questions of law] shall be decided by the reviewing Court itself, and in the exercise of its own independent judgment." Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). Professor Bernard Schwartz noted that §706 "would seem . . . to be merely a legislative restatement of the familiar review principle that questions of law are for the reviewing court, at the same time leaving to the courts the task of determining in each case what are questions of law." Mixed Questions of Law and Fact and the Administrative Procedure Act, 19 Ford. L. Rev. 73, 84–85 (1950). And Professor Louis Jaffe, who had served in several agencies at the advent of the New Deal, thought that §706 leaves it up to the reviewing "court" to "decide as a 'question of law' whether there is 'discretion' in the premises"—that is, whether the statute at issue delegates particular discretionary authority to an agency. Judicial Control of Administrative Action 570 (1965).

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140. And

interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*; *American Trucking Assns.*, 310 U. S., at 549.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977) (emphasis deleted).[5] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan* v. *EPA*, 576 U. S. 743, 752 (2015), such as "appropriate" or "reasonable."[6]

When the best reading of a statute is that it delegates

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[5] See, *e.g.*, 29 U. S. C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U. S. C. §5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

[6] See, *e.g.*, 33 U. S. C. §1312(a) (requiring establishment of effluent limitations "[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure" various outcomes, such as the "protection of public health" and "public water supplies"); 42 U. S. C. §7412(n)(1)(A) (directing EPA to regulate power plants "if the Administrator finds such regulation is appropriate and necessary").

discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U. S., at 750 (quoting *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

In the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. Cf. T. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 972–975 (1992). As an early proponent (and later critic) of *Chevron* recounted, courts during this period thus identified delegations of discretionary authority to agencies on a "statute-by-statute basis." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516.

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-

emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." *Id.*, at 842. The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," *ibid.*, and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," *id.*, at 843, n. 9. To discern such intent, the Court noted, a reviewing court was to "employ[] traditional tools of statutory construction." *Ibid.*

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." *Id.*, at 843. In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Ibid.* (footnote omitted). A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," *ibid.*, even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid.*, n. 11. That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed

and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. *Id.*, at 843, 844, and n. 14, 865.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id.*, at 865. It did not matter *why* Congress, as the Court saw it, had not squarely addressed the question, see *ibid.*, or that "the agency ha[d] from time to time changed its interpretation," *id.*, at 863. The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

Initially, *Chevron* "seemed destined to obscurity." T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 276 (2014). The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. See *ibid.* But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. See *id.*, at 276–277. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996); see also, *e.g.*, *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 276–277 (2016); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 315 (2014); *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982 (2005).

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U. S., at 109 (Scalia, J., concurring in judgment).

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U. S., at 843, n. 11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, see, *e.g.*, *Edwards' Lessee*, 12 Wheat., at 210; *Skidmore*, 323 U. S., at 140, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. See 467 U. S., at 863. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *ibid.*, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. See

Brief for Respondents in No. 22–1219, pp. 13, 37–38; *post*, at 4–15 (opinion of KAGAN, J.). Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. 467 U. S., at 865. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, . . . the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37, at 236.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." *Post*, at 2 (opinion of KAGAN, J.). Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." *Wisconsin Cen-*

tral Ltd. v. *United States*, 585 U. S. 274, 284 (2018) (emphasis deleted). So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Id.*, at 843, and n. 9. *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

2

The Government responds that Congress must generally

intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. The dissent offers more of the same. See *post*, at 9–14. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578 (opinion of the Court). We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Ibid.* *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise. See Brief for Respondents in No. 22–1219, p. 17; *post*, at 10.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 161 (2001) (Breyer, J., dissenting), and courts did so without issue in agency cases before *Chevron*, see *post*, at 30 (GORSUCH, J., concurring). Courts, after all, do not decide such questions blindly. The parties and

amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 98, n. 8 (1983). Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140; see, *e.g.*, *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. 165, 180 (2020); *Moore*, 95 U. S., at 763.

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, see *infra*, at 30–33, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U. S., at 575 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See The Federalist, No. 78, at 522–525. They were to construe the law with "[c]lear heads . . . and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 Works of James Wilson 363 (J. Andrews ed. 1896).

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. See *Buffington* v. *McDonough*, 598 U. S. ___, ___ (2022) (GORSUCH,

J., dissenting from denial of certiorari) (slip op., at 11); *Cuozzo*, 579 U. S., at 286 (THOMAS, J., concurring); Scalia, 1989 Duke L. J., at 517; see also *post*, at 15 (opinion of KAGAN, J.). So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 230 (2001) (quoting *Christensen* v. *Harris County*, 529 U. S. 576, 597 (2000) (Breyer, J., dissenting)); see also *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649 (1990).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U. S., at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230. But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016) (quoting *Mead*, 533 U. S., at 227).

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.'" *King* v. *Burwell*, 576 U. S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, *ibid.*, for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'"

West Virginia v. *EPA*, 597 U. S. 697, 723 (2022) (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); alteration in original). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, see *Adams Fruit Co.*, 494 U. S., at 649–650, or to statutory schemes not administered by the agency seeking deference, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 519–520 (2018). And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications. Compare *Abramski* v. *United States*, 573 U. S. 169, 191 (2014), with *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 704, n. 18 (1995).

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another.[7] And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," see 62 F. 4th, at 628, and refused to "classify [its] conclusion as a product of *Chevron* step one or step two"—though it ultimately appears to have deferred under step two, *id.*, at 634.

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[7] See, *e.g.*, *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, 45 F. 4th 306, 313–314 (CADC 2022), abrogated by *Garland* v. *Cargill*, 602 U. S. ___ (2024); *County of Amador* v. *United States Dept. of Interior*, 872 F. 3d 1012, 1021–1022 (CA9 2017); *Estrada-Rodriguez* v. *Lynch*, 825 F. 3d 397, 403–404 (CA8 2016); *Nielsen* v. *AECOM Tech. Corp.*, 762 F. 3d 214, 220 (CA2 2014); *Alaska Stock, LLC* v. *Houghton Mifflin Harcourt Publishing Co.*, 747 F. 3d 673, 685, n. 52 (CA9 2014); *Jurado-Delgado* v. *Attorney Gen. of U. S.*, 498 Fed. Appx. 107, 117 (CA3 2009); see also D. Brookins, Confusion in the Circuit Courts: How the Circuit Courts Are Solving the *Mead*-Puzzle by Avoiding It Altogether, 85 Geo. Wash. L. Rev. 1484, 1496–1499 (2017) (documenting *Chevron* avoidance by the lower courts); A. Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1127–1129 (2009) (same); L. Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464–1466 (2005) (same).

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. See *Cuozzo*, 579 U. S., at 280 (most recent occasion). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents, see *Agostini* v. *Felton*, 521 U. S. 203, 238 (1997)—understandably continue to apply it.

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—

the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning. And Members of this Court have long questioned its premises. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan*, 576 U. S., at 760–764 (THOMAS, J., concurring); *Buffington*, 598 U. S. ___ (opinion of GORSUCH, J.); B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–2154 (2016). Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be reconciled with the APA. See *Perez*, 575 U. S., at 109–110 (opinion concurring in judgment). For its entire existence, *Chevron* has been a "rule in search of a justification," *Knick*, 588 U. S., at 204, if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. "'[A]mbiguity' is a term that may have different meanings for different judges." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 572 (2005) (Stevens, J., dissenting). One judge might see ambiguity everywhere; another might never encounter it. Compare L. Silberman, Chevron—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017). A rule of law that is so wholly "in the eye of the

beholder," *Exxon Mobil Corp.*, 545 U. S., at 572 (Stevens, J., dissenting), invites different results in like cases and is therefore "arbitrary in practice," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988). Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125 (1965).

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." *Post*, at 1–2. (The Government offers a similar test. See Brief for Respondents in No. 22–1219, pp. 7, 10, 14; Tr. of Oral Arg. 113–114, 116.) That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent's test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*'s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. See *post*, at 27. That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the

exercise.[8]

Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance. See *Adams Fruit Co.*, 494 U. S., at 649–650; *Mead*, 533 U. S., at 226–227; *King*, 576 U. S., at 486; *Encino Motorcars*, 579 U. S., at 220; *Epic Systems*, 584 U. S., at 519–520; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. See, *e.g.*, *Cargill* v. *Garland*, 57 F. 4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff'd, 602 U. S. ___ (2024).

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." *Marbury*, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference. See n. 7, *supra*. And as noted, we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable. See W. Eskridge & L. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From *Chevron* to *Hamdan*, 96 Geo. L. J. 1083, 1125 (2008). At this point, all

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[8] Citing an empirical study, the dissent adds that *Chevron* "fosters *agreement* among judges." *Post*, at 28. It is hardly surprising that a study might find as much; *Chevron*'s second step is supposed to be hospitable to agency interpretations. So when judges get there, they tend to agree that the agency wins. That proves nothing about the supposed ease or predictability of identifying ambiguity in the first place.

that remains of *Chevron* is a decaying husk with bold pretensions.

Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. *Post*, at 8, n. 1 (opinion of KAGAN, J.) (quoting *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U. S., at 927 (quoting *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." *Brand X*, 545 U. S., at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.

Chevron accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure. *Michigan* v.

Bay Mills Indian Community, 572 U. S. 782, 798 (2014). And it cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions. We would need to once again "revis[e] its theoretical basis . . . in order to cure its practical deficiencies." *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009). *Stare decisis* does not require us to do so, especially because any refinements we might make would only point courts back to their duties under the APA to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706. Nor is there any reason to wait helplessly for Congress to correct our mistake. The Court has jettisoned many precedents that Congress likewise could have legislatively overruled. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*) (collecting cases). And part of "judicial humility," *post*, at 3, 25 (opinion of KAGAN, J.,), is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious, see *post*, at 8–9 (opinion of GORSUCH, J.).

This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457 (2008). Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund,*

Inc., 573 U. S. 258, 266 (2014) (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" *Post*, at 31 (quoting 467 U. S., at 865). That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch, at 177. The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" *Post*, at 31 (quoting *Chevron*, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full because it correctly concludes that *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), must finally be overruled. Under *Chevron*, a judge was required to adopt an agency's interpretation of an ambiguous statute, so long as the agency had a "permissible construction of the statute." See *id.*, at 843. As the Court explains, that deference does not comport with the Administrative Procedure Act, which requires judges to decide "all relevant questions of law" and "interpret constitutional and statutory provisions" when reviewing an agency action. 5 U. S. C. §706; see also *ante,* at 18–23; *Baldwin* v. *United States*, 589 U. S. ___, ___–___ (2020) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 4–5).

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. See *Baldwin*, 589 U. S., at ___–___ (dissenting opinion) (slip op., at 2–4); *Michigan* v. *EPA*, 576 U. S. 743, 761–763 (2015) (concurring opinion); see also *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 115–118 (2015) (opinion concurring in judgment). And, I agree with JUSTICE GORSUCH that we should not overlook *Chevron*'s constitutional defects in overruling it.* *Post*, at 15–20 (concurring opinion). To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Perez*, 575 U. S., at 118 (opinion of THOMAS, J.). *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.

Chevron compels judges to abdicate their Article III "judicial Power." §1. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U. S., at 119 (opinion of THOMAS, J.); accord, *post*, at 17–18 (opinion of GORSUCH, J.). The Framers understood that "legal texts . . . often contain ambiguities," and that the judicial power included "the power to resolve these ambiguities over time." *Perez*, 575 U. S., at 119 (opinion of THOMAS, J.); accord, *ante,* at 7–9. But, under *Chevron*, a judge must accept an agency's interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Ante*, at 19. *Chevron* deference thus prevents judges from

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*There is much to be commended in JUSTICE GORSUCH's careful consideration from first principles of the weight we should afford to our precedent. I agree with the lion's share of his concurrence. See generally *Gamble* v. *United States*, 587 U. S. 678, 710 (2019) (THOMAS, J., concurring).

exercising their independent judgment to resolve ambiguities. *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3); see also *Michigan*, 576 U. S., at 761 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 123 (opinion of THOMAS, J.). By tying a judge's hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive. It allows "the Executive . . . to dictate the outcome of cases through erroneous interpretations." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 763, n. 1 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 124 (opinion of THOMAS, J.). Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate.

Chevron deference also permits the Executive Branch to exercise powers not given to it. "When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 68 (2015) (THOMAS, J., concurring in judgment). Because the Constitution gives the Executive Branch only "[t]he executive Power," executive agencies may constitutionally exercise only that power. Art. II, §1, cl. 1. But, *Chevron* gives agencies license to exercise judicial power. By allowing agencies to definitively interpret laws so long as they are ambiguous, *Chevron* "transfer[s]" the Judiciary's "interpretive judgment to the agency." *Perez*, 575 U. S., at 124 (opinion of THOMAS, J.); see also *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 761–762 (opinion of THOMAS, J.); *post*, at 18 (GORSUCH, J., concurring).

Chevron deference "cannot be salvaged" by recasting it as deference to an agency's "formulation of policy." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (internal quotation marks omitted) (slip op., at 3). If that were true, *Chevron*

would mean that "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3) (quoting Art. I, §1). By "giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent," *Chevron* "permit[s] a body other than Congress to perform a function that requires an exercise of legislative power." *Michigan*, 576 U. S., at 762 (opinion of THOMAS, J.) (internal quotation marks omitted). No matter the gloss put on it, *Chevron* expands agencies' power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government.

Chevron deference was "not a harmless transfer of power." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Ibid.* In particular, the Founders envisioned that "the courts [would] check the Executive by applying the correct interpretation of the law." *Id.*, at ___ (slip op., at 4). *Chevron* was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling *Chevron*, we restore this aspect of our separation of powers. To safeguard individual liberty, "[s]tructure is everything." A. Scalia, Foreword: The Importance of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008). Although the Court finally ends our 40-year misadventure with *Chevron* deference, its more profound problems should not be overlooked. Regardless of what a statute says, the type of deference required by *Chevron* violates the Constitution.

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[June 28, 2024]

JUSTICE GORSUCH, concurring.

In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about "what the law is" without favor to either side. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Beginning in the mid-1980s, however, this Court experimented with a radically different approach. Applying *Chevron* deference, judges began deferring to the views of executive agency officials about the meaning of federal statutes. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). With time, the error of this approach became widely appreciated. So much so that this Court has refused to apply *Chevron* deference since 2016. Today, the Court places a tombstone on *Chevron* no one can miss. In doing

so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding. I write separately to address why the proper application of the doctrine of *stare decisis* supports that course.

I

A

Today, the phrase "common law judge" may call to mind a judicial titan of the past who brilliantly devised new legal rules on his own. The phrase "*stare decisis*" might conjure up a sense that judges who come later in time are strictly bound to follow the work of their predecessors. But neither of those intuitions fairly describes the traditional common-law understanding of the judge's role or the doctrine of *stare decisis*.

At common law, a judge's charge to decide cases was not usually understood as a license to make new law. For much of England's early history, different rulers and different legal systems prevailed in different regions. As England consolidated into a single kingdom governed by a single legal system, the judge's task was to examine those pre-existing legal traditions and apply in the disputes that came to him those legal rules that were "common to the whole land and to all Englishmen." F. Maitland, Equity, Also the Forms of Action at Common Law 2 (1929). That was "common law" judging.

This view of the judge's role had consequences for the authority due judicial decisions. Because a judge's job was to find and apply the law, not make it, the "opinion of the judge" and "the law" were not considered "one and the same thing." 1 W. Blackstone, Commentaries on the Laws of England 71 (1765) (Blackstone) (emphasis deleted). A judge's decision might bind the parties to the case at hand. M. Hale, The History and Analysis of the Common Law of England 68 (1713) (Hale). But none of that meant the judge had the power to "make a Law properly so called" for society

at large, "for that only the King and Parliament can do." *Ibid.*

Other consequences followed for the role precedent played in future judicial proceedings. Because past decisions represented something "less than a Law," they did not bind future judges. *Ibid.* At the same time, as Matthew Hale put it, a future judge could give a past decision "Weight" as "Evidence" of the law. *Ibid.* Expressing the same idea, William Blackstone conceived of judicial precedents as "evidence" of "the common law." 1 Blackstone 69, 71. And much like other forms of evidence, precedents at common law were thought to vary in the weight due them. Some past decisions might supply future courts with considerable guidance. But others might be entitled to lesser weight, not least because judges are no less prone to error than anyone else and they may sometimes "mistake" what the law demands. *Id.*, at 71 (emphasis deleted). In cases like that, both men thought, a future judge should not rotely repeat a past mistake but instead "vindicate" the law "from misrepresentation." *Id.*, at 70.

When examining past decisions as evidence of the law, common law judges did not, broadly speaking, afford overwhelming weight to any "single precedent." J. Baker, An Introduction to English Legal History 209–210 (5th ed. 2019). Instead, a prior decision's persuasive force depended in large measure on its "Consonancy and Congruity with Resolutions and Decisions of former Times." Hale 68. An individual decision might reflect the views of one court at one moment in time, but a consistent line of decisions representing the wisdom of many minds across many generations was generally considered stronger evidence of the law's meaning. *Ibid.*

With this conception of precedent in mind, Lord Mansfield cautioned against elevating "particular cases" above the "general principles" that "run through the cases, and govern the decision of them." *Rust* v. *Cooper*, 2 Cowp. 629,

632, 98 Eng. Rep. 1277, 1279 (K. B. 1777). By discarding aberrational rulings and pursuing instead the mainstream of past decisions, he observed, the common law tended over time to "wor[k] itself pure." *Omychund* v. *Barker*, 1 Atk. 22, 33, 26 Eng. Rep. 15, 23 (Ch. 1744) (emphasis deleted). Reflecting similar thinking, Edmund Burke offered five principles for the evaluation of past judicial decisions: "They ought to be shewn; first, to be numerous and not scattered here and there;—secondly, concurrent and not contradictory and mutually destructive;—thirdly, to be made in good and constitutional times;—fourthly, not to be made to serve an occasion;—and fifthly, to be agreeable to the general tenor of legal principles." Speech of Dec. 23, 1790, in 3 The Speeches of the Right Honourable Edmund Burke 513 (1816).

Not only did different decisions carry different weight, so did different language within a decision. An opinion's holding and the reasoning essential to it (the *ratio decidendi*) merited careful attention. Dicta, stray remarks, and digressions warranted less weight. See N. Duxbury, The Intricacies of Dicta and Dissent 19–24 (2021) (Duxbury). These were no more than "the vapours and fumes of law." F. Bacon, The Lord Keeper's Speech in the Exchequer (1617), in 2 The Works of Francis Bacon 478 (B. Montagu ed. 1887) (Bacon).

That is not to say those "vapours" were worthless. Often dicta might provide the parties to a particular dispute a "fuller understanding of the court's decisional path or related areas of concern." B. Garner et al., The Law of Judicial Precedent 65 (2016) (Precedent). Dicta might also provide future courts with a source of "thoughtful advice." *Ibid.* But future courts had to be careful not to treat every "hasty expression . . . as a serious and deliberate opinion." *Steel* v. *Houghton*, 1 Bl. H. 51, 53, 126 Eng. Rep. 32, 33 (C. P. 1788). To do so would work an "injustice to [the] memory" of their predecessors who could not expect judicial

remarks issued in one context to apply perfectly in others, perhaps especially ones they could not foresee. *Ibid.* Also, the limits of the adversarial process, a distinctive feature of English law, had to be borne in mind. When a single judge or a small panel reached a decision in a case, they did so based on the factual record and legal arguments the parties at hand have chosen to develop. Attuned to those constraints, future judges had to proceed with an open mind to the possibility that different facts and different legal arguments might dictate different outcomes in later disputes. See Duxbury 19–24.

B

Necessarily, this represents just a quick sketch of traditional common-law understandings of the judge's role and the place of precedent in it. It focuses, too, on the horizontal, not vertical, force of judicial precedents. But there are good reasons to think that the common law's understandings of judges and precedent outlined above crossed the Atlantic and informed the nature of the "judicial Power" the Constitution vests in federal courts. Art. III, §1.

Not only was the Constitution adopted against the backdrop of these understandings and, in light of that alone, they may provide evidence of what the framers meant when they spoke of the "judicial Power." Many other, more specific provisions in the Constitution reflect much the same distinction between lawmaking and lawfinding functions the common law did. The Constitution provides that its terms may be amended only through certain prescribed democratic processes. Art. V. It vests the power to enact federal legislation exclusively in the people's elected representatives in Congress. Art. I, §1. Meanwhile, the Constitution describes the judicial power as the power to resolve cases and controversies. Art. III, §2, cl. 1. As well, it delegates that authority to life-tenured judges, see §1, an assignment that would have made little sense if judges could

usurp lawmaking powers vested in periodically elected representatives. But one that makes perfect sense if what is sought is a neutral party "to interpret and apply" the law without fear or favor in a dispute between others. 2 The Works of James Wilson 161 (J. Andrews ed. 1896) (Wilson); see *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824).

The constrained view of the judicial power that runs through our Constitution carries with it familiar implications, ones the framers readily acknowledged. James Madison, for example, proclaimed that it would be a "fallacy" to suggest that judges or their precedents could "repeal or alter" the Constitution or the laws of the United States. Letter to N. Trist (Dec. 1831), in 9 The Writings of James Madison 477 (G. Hunt ed. 1910). A court's opinion, James Wilson added, may be thought of as "effective la[w]" "[a]s to the parties." Wilson 160–161. But as in England, Wilson said, a prior judicial decision could serve in a future dispute only as "evidence" of the law's proper construction. *Id.*, at 160; accord, 1 J. Kent, Commentaries on American Law 442–443 (1826).

The framers also recognized that the judicial power described in our Constitution implies, as the judicial power did in England, a power (and duty) of discrimination when it comes to assessing the "evidence" embodied in past decisions. So, for example, Madison observed that judicial rulings "*repeatedly confirmed*" may supply better evidence of the law's meaning than isolated or aberrant ones. Letter to C. Ingersoll (June 1831), in 4 Letters and Other Writings of James Madison 184 (1867) (emphasis added). Extending the thought, Thomas Jefferson believed it would often take "numerous decisions" for the meaning of new statutes to become truly "settled." Letter to S. Jones (July 1809), in 12 The Writings of Thomas Jefferson 299 (A. Bergh ed. 1907).

From the start, too, American courts recognized that not everything found in a prior decision was entitled to equal

weight. As Chief Justice Marshall warned, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). To the extent a past court offered views "beyond the case," those expressions "may be respected" in a later case "but ought not to control the judgment." *Ibid.* One "obvious" reason for this, Marshall continued, had to do with the limits of the adversarial process we inherited from England: Only "[t]he question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Id.*, at 399–400.

Abraham Lincoln championed these traditional understandings in his debates with Stephen Douglas. Douglas took the view that a single decision of this Court—no matter how flawed—could definitively resolve a contested issue for everyone and all time. Those who thought otherwise, he said, "aim[ed] a deadly blow to our whole Republican system of government." Speech at Springfield, Ill. (June 26, 1857), in 2 The Collected Works of Abraham Lincoln 401 (R. Basler ed. 1953) (Lincoln Speech). But Lincoln knew better. While accepting that judicial decisions "absolutely determine" the rights of the parties to a court's judgment, he refused to accept that any single judicial decision could "fully settl[e]" an issue, particularly when that decision departs from the Constitution. *Id.*, at 400–401. In cases such as these, Lincoln explained, "it is not resistance, it is not factious, it is not even disrespectful, to treat [the decision] as not having yet quite established a settled doctrine for the country." *Id.*, at 401.

After the Civil War, the Court echoed some of these same points. It stressed that every statement in a judicial opin-

ion "must be taken in connection with its immediate context," *In re Ayers*, 123 U. S. 443, 488 (1887), and stray "remarks" must not be elevated above the written law, see *The Belfast*, 7 Wall. 624, 641 (1869); see also, *e.g.*, *Trebilcock* v. *Wilson*, 12 Wall. 687, 692–693 (1872); *Mason* v. *Eldred*, 6 Wall. 231, 236–238 (1868). During Chief Justice Chase's tenure, it seems a Justice writing the Court's majority opinion would generally work alone and present his work orally and in summary form to his colleagues at conference, which meant that other Justices often did not even review the opinion prior to publication. 6 C. Fairman, History of the Supreme Court of the United States 69–70 (1971). The Court could proceed in this way because it understood that a single judicial opinion may resolve a "case or controversy," and in so doing it may make "effective law" for the parties, but it does not legislate for the whole of the country and is not to be confused with laws that do.

C

From all this, I see at least three lessons about the doctrine of *stare decisis* relevant to the decision before us today. Each concerns a form of judicial humility.

First, a past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain. Instead, the Constitution promises, the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation. Unelected judges enjoy no such power. Part I–B, *supra*.

Recognizing as much, this Court has often said that *stare decisis* is not an "'inexorable command.'" *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). And from time to time it has found it necessary to correct its past mistakes. When it comes to correcting errors of constitutional interpretation, the Court has stressed the importance of doing so, for they

can be corrected otherwise only through the amendment process. See, *e.g.*, *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248 (2019). When it comes to fixing errors of statutory interpretation, the Court has proceeded perhaps more circumspectly. But in that field, too, it has overruled even longstanding but "flawed" decisions. See, *e.g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 904, 907 (2007).

Recent history illustrates all this. During the tenures of Chief Justices Warren and Burger, it seems this Court overruled an average of around three cases per Term, including roughly 50 statutory precedents between the 1960s and 1980s alone. See W. Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, 1427–1434 (1988) (collecting cases). Many of these decisions came in settings no less consequential than today's. In recent years, we have not approached the pace set by our predecessors, overruling an average of just one or two prior decisions each Term.[1] But the point remains: Judicial decisions inconsistent with the written law do not inexorably control.

Second, another lesson tempers the first. While judicial decisions may not supersede or revise the Constitution or federal statutory law, they merit our "respect as embodying the considered views of those who have come before." *Ramos* v. *Louisiana*, 590 U. S. 83, 105 (2020). As a matter of professional responsibility, a judge must not only avoid confusing his writings with the law. When a case comes before him, he must also weigh his view of what the law demands against the thoughtful views of his predecessors. After all, "[p]recedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom

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[1] For relevant databases of decisions, see Congressional Research Service, Table of Supreme Court Decisions Overruled by Subsequent Decisions, Constitution Annotated, https://constitution.congress.gov/resources/decisions-overruled/; see also H. Spaeth et al., 2023 Supreme Court Database, http://supremecourtdatabase.org.

richer than what can be found in any single judge or panel of judges." Precedent 9.

Doubtless, past judicial decisions may, as they always have, command "greater or less authority as precedents, according to circumstances." Lincoln Speech 401. But, like English judges before us, we have long turned to familiar considerations to guide our assessment of the weight due a past decision. So, for example, as this Court has put it, the weight due a precedent may depend on the quality of its reasoning, its consistency with related decisions, its workability, and reliance interests that have formed around it. See *Ramos*, 590 U. S., at 106. The first factor recognizes that the primary power of any precedent lies in its power to persuade—and poorly reasoned decisions may not provide reliable evidence of the law's meaning. The second factor reflects the fact that a precedent is more likely to be correct and worthy of respect when it reflects the time-tested wisdom of generations than when it sits "unmoored" from surrounding law. *Ibid.* The remaining factors, like workability and reliance, do not often supply reason enough on their own to abide a flawed decision, for almost any past decision is likely to benefit some group eager to keep things as they are and content with how things work. See, *e.g.*, *id.*, at 108. But these factors can sometimes serve functions similar to the others, by pointing to clues that may suggest a past decision is right in ways not immediately obvious to the individual judge.

When asking whether to follow or depart from a precedent, some judges deploy adverbs. They speak of whether or not a precedent qualifies as "demonstrably erroneous," *Gamble* v. *United States*, 587 U. S. 678, 711 (2019) (THOMAS, J., concurring), or "egregiously wrong," *Ramos*, 590 U. S., at 121 (KAVANAUGH, J., concurring in part). But the emphasis the adverb imparts is not meant for dramatic effect. It seeks to serve instead as a reminder of a more substantive lesson. The lesson that, in assessing the weight

due a past decision, a judge is not to be guided by his own impression alone, but must self-consciously test his views against those who have come before, open to the possibility that a precedent might be correct in ways not initially apparent to him.

Third, it would be a mistake to read judicial opinions like statutes. Adopted through a robust and democratic process, statutes often apply in all their particulars to all persons. By contrast, when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome. They must appreciate, too, that, like anyone else, judges are "innately digressive," and their opinions may sometimes offer stray asides about a wider topic that may sound nearly like legislative commands. Duxbury 4. Often, enterprising counsel seek to exploit such statements to maximum effect. See *id.*, at 25. But while these digressions may sometimes contain valuable counsel, they remain "vapours and fumes of law," Bacon 478, and cannot "control the judgment in a subsequent suit," *Cohens*, 6 Wheat., at 399.

These principles, too, have long guided this Court and others. As Judge Easterbrook has put it, an "opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States* v. *Skoien*, 614 F. 3d 638, 640 (CA7 2010) (en banc); see also *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979) (stressing that an opinion is not "a statute," and its language should not "be parsed" as if it were); *Nevada* v. *Hicks*, 533 U. S. 353, 372 (2001) (same). If *stare decisis* counsels respect for the thinking of those who have come before, it also counsels against doing an "injustice to [their] memory" by

overreliance on their every word. *Steel*, 1 Bl. H., at 53, 126 Eng. Rep., at 33. As judges, "[w]e neither expect nor hope that our successors will comb" through our opinions, searching for delphic answers to matters we never fully explored. *Brown* v. *Davenport*, 596 U. S. 118, 141 (2022). To proceed otherwise risks "turn[ing] *stare decisis* from a tool of judicial humility into one of judicial hubris." *Ibid.*

II

Turning now directly to the question what *stare decisis* effect *Chevron* deference warrants, each of these lessons seem to me to weigh firmly in favor of the course the Court charts today: Lesson 1, because *Chevron* deference contravenes the law Congress prescribed in the Administrative Procedure Act. Lesson 2, because *Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments. And Lesson 3, because to hold otherwise would effectively require us to endow stray statements in *Chevron* with the authority of statutory language, all while ignoring more considered language in that same decision and the teachings of experience.

A

Start with Lesson 1. The Administrative Procedure Act of 1946 (APA) directs a "reviewing court" to "decide all relevant questions of law" and "interpret" relevant "constitutional and statutory provisions." 5 U. S. C. §706. When applying *Chevron* deference, reviewing courts do not interpret all relevant statutory provisions and decide all relevant questions of law. Instead, judges abdicate a large measure of that responsibility in favor of agency officials. Their interpretations of "ambiguous" laws control even when those interpretations are at odds with the fairest reading of the law an independent "reviewing court" can muster. Agency

officials, too, may change their minds about the law's meaning at any time, even when Congress has not amended the relevant statutory language in any way. *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982–983 (2005). And those officials may even disagree with and effectively overrule not only their own past interpretations of a law but a court's past interpretation as well. *Ibid.* None of that is consistent with the APA's clear mandate.

The hard fact is *Chevron* "did not even bother to cite" the APA, let alone seek to apply its terms. *United States* v. *Mead Corp.*, 533 U. S. 218, 241 (2001) (Scalia, J., dissenting). Instead, as even its most ardent defenders have conceded, *Chevron* deference rests upon a "*fictionalized* statement of legislative desire," namely, a judicial supposition that Congress implicitly wishes judges to defer to executive agencies' interpretations of the law even when it has said nothing of the kind. D. Barron & E. Kagan, Chevron's Nondelegation Doctrine, 2001 S. Ct. Rev. 201, 212 (Kagan) (emphasis added). As proponents see it, that fiction represents a "policy judgmen[t] about what . . . make[s] for good government." *Ibid.*[2] But in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives. Some might think the legal directive Congress provided in the APA unwise; some might think a different arrangement preferable. See, *e.g.*, *post*, at 9–11 (KAGAN, J., dissenting). But it is Congress's view of "good government," not ours, that controls.

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[2] See also A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516–517 (1989) (describing *Chevron*'s theory that Congress "delegat[ed]" interpretive authority to agencies as "fictional"); S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) (describing the notion that there exists a "'legislative intent to delegate the law-interpreting function' as a kind of legal fiction").

Much more could be said about *Chevron*'s inconsistency with the APA. But I have said it in the past. See *Buffington* v. *McDonough*, 598 U. S. ___, ___–___ (2022) (opinion dissenting from denial of certiorari) (slip op., at 5–6); *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1151–1153 (CA10 2016) (concurring opinion). And the Court makes many of the same points at length today. See *ante*, at 18–22. For present purposes, the short of it is that continuing to abide *Chevron* deference would require us to transgress the first lesson of *stare decisis*—the humility required of judges to recognize that our decisions must yield to the laws adopted by the people's elected representatives.[3]

B

Lesson 2 cannot rescue *Chevron* deference. If *stare decisis* calls for judicial humility in the face of the written law, it also cautions us to test our present conclusions carefully against the work of our predecessors. At the same time and as we have seen, this second form of humility counsels us to remember that precedents that have won the endorsement of judges across many generations, demonstrated coherence with our broader law, and weathered the tests of time and experience are entitled to greater consideration than those that have not. See Part I, *supra*. Viewed by each of these lights, the case for *Chevron* deference only grows weaker still.

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[3]The dissent suggests that we need not take the APA's directions quite so seriously because the "finest administrative law scholars" from Harvard claim to see in them some wiggle room. *Post*, at 18 (opinion of KAGAN, J.). But nothing in the APA commands deference to the views of professors any more than it does the government. Nor is the dissent's list of Harvard's finest administrative law scholars entirely complete. See S. Breyer et al., Administrative Law and Regulatory Policy 288 (7th ed. 2011) (acknowledging that *Chevron* deference "seems in conflict with . . . the apparently contrary language of 706"); Kagan 212 (likewise acknowledging *Chevron* deference rests upon a "fictionalized statement of legislative desire").

1

Start with a look to how our predecessors traditionally understood the judicial role in disputes over a law's meaning. From the Nation's founding, they considered "[t]he interpretation of the laws" in cases and controversies "the proper and peculiar province of the courts." The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Perhaps the Court's most famous early decision reflected exactly that view. There, Chief Justice Marshall declared it "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch, at 177. For judges "have neither FORCE nor WILL but merely judgment"—and an obligation to exercise that judgment independently. The Federalist No. 78, at 465. No matter how "disagreeable that duty may be," this Court has said, a judge "is not at liberty to surrender, or to waive it." *United States* v. *Dickson*, 15 Pet. 141, 162 (1841) (Story, J.). This duty of independent judgment is perhaps "the defining characteristi[c] of Article III judges." *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011).

To be sure, this Court has also long extended "great respect" to the "contemporaneous" and consistent views of the coordinate branches about the meaning of a statute's terms. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827); see also *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803).[4] But traditionally, that did not mean a court had to "defer" to any "reasonable"

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[4] Accord, *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146 (1920) (affording "great weight" to a "contemporaneous construction" by the executive that had "been long continued"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) ("find[ing] no ambiguity in the act" but also finding "strength" for the Court's interpretation in the executive's "immediate and continued construction of the act"); *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (treating as "controlling" a "contemporaneous construction" of a law endorsed "not only [by] the courts but [also by] the departments").

construction of an "ambiguous" law that an executive agency might offer. It did not mean that the government could propound a "reasonable" view of the law's meaning one day, a different one the next, and bind the judiciary always to its latest word. Nor did it mean the executive could displace a pre-existing judicial construction of a statute's terms, replace it with its own, and effectively overrule a judicial precedent in the process. Put simply, this Court was "not bound" by any and all reasonable "administrative construction[s]" of ambiguous statutes when resolving cases and controversies. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932). While the executive's consistent and contemporaneous views warranted respect, they "by no means control[led] the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them." *Irvine* v. *Marshall*, 20 How. 558, 567 (1858); see also A. Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 987 (2017).

Sensing how jarringly inconsistent *Chevron* is with this Court's many longstanding precedents discussing the nature of the judicial role in disputes over the law's meaning, the government and dissent struggle for a response. The best they can muster is a handful of cases from the early 1940s in which, they say, this Court first "put [deference] principles into action." *Post*, at 21 (KAGAN, J., dissenting). And, admittedly, for a period this Court toyed with a form of deference akin to *Chevron*, at least for so-called mixed questions of law and fact. See, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402, 411–412 (1941); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). But, as the Court details, even that limited experiment did not last. See *ante*, at 10–12. Justice Roberts, in his *Gray* dissent, decried these decisions for "abdicat[ing our] function as a court of review" and "complete[ly] revers[ing] . . . the normal and usual method of construing a statute." 314 U. S., at 420–421. And just a few years later, in *Skidmore* v. *Swift & Co.*, 323

U. S. 134 (1944), the Court returned to its time-worn path.

Echoing themes that had run throughout our law from its start, Justice Robert H. Jackson wrote for the Court in *Skidmore*. There, he said, courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always "depend upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade." *Id.*, at 140. In another case the same year, and again writing for the Court, Justice Jackson expressly rejected a call for a judge-made doctrine of deference much like *Chevron*, offering that, "[i]f Congress had deemed it necessary or even appropriate" for courts to "defe[r] to administrative construction[,] . . . it would not have been at a loss for words to say so." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).

To the extent proper respect for precedent demands, as it always has, special respect for longstanding and mainstream decisions, *Chevron* scores badly. It represented not a continuation of a long line of decisions but a break from them. Worse, it did not merely depart from our precedents. More nearly, *Chevron* defied them.

2

Consider next how uneasily *Chevron* deference sits alongside so many other settled aspects of our law. Having witnessed first-hand King George's efforts to gain influence and control over colonial judges, see Declaration of Independence ¶ 11, the framers made a considered judgment to build judicial independence into the Constitution's design. They vested the judicial power in decisionmakers with life tenure. Art. III, §1. They placed the judicial salary beyond political control during a judge's tenure. *Ibid.* And they rejected any proposal that would subject judicial decisions to review by political actors. The Federalist No. 81, at 482;

United States v. *Hansen*, 599 U. S. 762, 786–791 (2023) (THOMAS, J., concurring). All of this served to ensure the same thing: "A fair trial in a fair tribunal." *In re Murchison*, 349 U. S. 133, 136 (1955). One in which impartial judges, not those currently wielding power in the political branches, would "say what the law is" in cases coming to court. *Marbury*, 1 Cranch, at 177.

Chevron deference undermines all that. It precludes courts from exercising the judicial power vested in them by Article III to say what the law is. It forces judges to abandon the best reading of the law in favor of views of those presently holding the reins of the Executive Branch. It requires judges to change, and change again, their interpretations of the law as and when the government demands. And that transfer of power has exactly the sort of consequences one might expect. Rather than insulate adjudication from power and politics to ensure a fair hearing "without respect to persons" as the federal judicial oath demands, 28 U. S. C. §453, *Chevron* deference requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Buffington*, 598 U. S., at ___ (slip op., at 9). Along the way, *Chevron* deference guarantees "systematic bias" in favor of whichever political party currently holds the levers of executive power. P. Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1212 (2016).

Chevron deference undermines other aspects of our settled law, too. In this country, we often boast that the Constitution's promise of due process of law, see Amdts. 5, 14, means that "'no man can be a judge in his own case.'" *Williams* v. *Pennsylvania*, 579 U. S. 1, 8–9 (2016); *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.). That principle, of course, has even deeper roots, tracing far back into the common law where it was known by the Latin maxim *nemo iudex in causa sua*. See 1 E. Coke, Institutes

of the Laws of England §212, *141a. Yet, under the *Chevron* regime, all that means little, for executive agencies may effectively judge the scope of their own lawful powers. See, *e.g., Arlington* v. *FCC*, 569 U. S. 290, 296–297 (2013).

Traditionally, as well, courts have sought to construe statutes as a reasonable reader would "when the law was made." Blackstone 59; see *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). Today, some call this "textualism." But really it's a very old idea, one that constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction. In that way, textualism serves as an essential guardian of the due process promise of fair notice. If a judge could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them? *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019). Were the rules otherwise, Blackstone warned, the people would be rendered "slaves to their magistrates." 4 Blackstone 371.

Yet, replace "magistrates" with "bureaucrats," and Blackstone's fear becomes reality when courts employ *Chevron* deference. Whenever we confront an ambiguity in the law, judges do not seek to resolve it impartially according to the best evidence of the law's original meaning. Instead, we resort to a far cruder heuristic: "The reasonable bureaucrat always wins." And because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new "interpretations" might be used against them. This "fluid" approach to statutory interpretation is "as much a trap for the innocent as the ancient laws of Caligula," which were posted so high up on the walls and in print so small that ordinary people could never be sure what they required. *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

The ancient rule of lenity is still another of *Chevron*'s victims. Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons. *Wooden* v. *United States*, 595 U. S. 360, 388–390 (2022) (GORSUCH, J., concurring in judgment). That principle upholds due process by safeguarding individual liberty in the face of ambiguous laws. *Ibid.* And it fortifies the separation of powers by keeping the power of punishment firmly "'in the legislative, not in the judicial department.'" *Id.*, at 391 (quoting *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820)). But power begets power. And pressing *Chevron* deference as far as it can go, the government has sometimes managed to leverage "ambiguities" in the written law to penalize conduct Congress never clearly proscribed. Compare *Guedes* v. *ATF*, 920 F. 3d 1, 27–28, 31 (CADC 2019), with *Garland* v. *Cargill*, 602 U. S. 604 (2024).

In all these ways, *Chevron*'s fiction has led us to a strange place. One where authorities long thought reserved for Article III are transferred to Article II, where the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities. So much tension with so many foundational features of our legal order is surely one more sign that we have "taken a wrong turn along the way." *Kisor* v. *Wilkie*, 588 U. S. 558, 607 (2019) (GORSUCH, J., concurring in judgment).[5]

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[5] The dissent suggests that *Chevron* deference bears at least something in common with surrounding law because it resembles a presumption or traditional canon of construction, and both "are common." *Post*, at 8, n. 1, 28–29 (opinion of KAGAN, J.). But even that thin reed wavers at a glance. Many of the presumptions and interpretive canons the dissent cites—including lenity, *contra proferentem*, and others besides—"'embod[y] . . . legal doctrine[s] centuries older than our Republic.'" *Opati* v. *Republic of Sudan*, 590 U. S. 418, 425 (2020). *Chevron* deference can make no such boast. Many of the presumptions and canons the dissent cites also

Finally, consider workability and reliance. If, as I have sought to suggest, these factors may sometimes serve as useful proxies for the question whether a precedent comports with the historic tide of judicial practice or represents an aberrational mistake, see Part I–C, *supra*, they certainly do here.

Take *Chevron*'s "workability." Throughout its short life, this Court has been forced to supplement and revise *Chevron* so many times that no one can agree on how many "steps" it requires, nor even what each of those "steps" entails. Some suggest that the analysis begins with "step zero" (perhaps itself a tell), an innovation that traces to *United States* v. *Mead Corp.*, 533 U. S. 218. *Mead* held that, before even considering whether *Chevron* applies, a court must determine whether Congress meant to delegate to the agency authority to interpret the law in a given field. 533 U. S., at 226–227. But that exercise faces an immediate challenge: Because *Chevron* depends on a judicially implied, rather than a legislatively expressed, delegation of interpretive authority to an executive agency, Part II–A, *supra*, when should the fiction apply and when not? *Mead* fashioned a multifactor test for judges to use. 533 U. S., at

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serve the Constitution, protecting the lines of authority it draws. Take just two examples: The federalism canon tells courts to presume federal statutes do not preempt state laws because of the sovereignty States enjoy under the Constitution. *Bond* v. *United States*, 572 U. S. 844, 858 (2014). The presumption against retroactivity serves as guardian of the Constitution's promise of due process and its ban on *ex post facto* laws, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). Once more, however, *Chevron* deference can make no similar claim. Rather than serve the Constitution's usual rule that litigants are entitled to have an independent judge interpret disputed legal terms, *Chevron* deference works to undermine that promise. As explored above, too, *Chevron* deference sits in tension with many traditional legal presumptions and interpretive principles, representing nearly the *inverse* of the rules of lenity, *nemo iudex*, and *contra proferentem*.

229–231. But that test has proved as indeterminate in application as it was contrived in origin. Perhaps for these reasons, perhaps for others, this Court has sometimes applied *Mead* and often ignored it. See *Brand X*, 545 U. S., at 1014, n. 8 (Scalia, J., dissenting).

Things do not improve as we move up the *Chevron* ladder. At "step one," a judge must defer to an executive official's interpretation when the statute at hand is "ambiguous." But even today, *Chevron*'s principal beneficiary—the federal government—still cannot say when a statute is sufficiently ambiguous to trigger deference. See, *e.g.*, Tr. of Oral Arg. in *American Hospital Assn.* v. *Becerra*, O. T. 2021, No. 20–1114, pp. 71–72. Perhaps thanks to this particular confusion, the search for ambiguity has devolved into a sort of Snark hunt: Some judges claim to spot it almost everywhere, while other equally fine judges claim never to have seen it. Compare L. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 826 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017).

Nor do courts agree when it comes to "step two." There, a judge must assess whether an executive agency's interpretation of an ambiguous statute is "reasonable." But what does that inquiry demand? Some courts engage in a comparatively searching review; others almost reflexively defer to an agency's views. Here again, courts have pursued "wildly different" approaches and reached wildly different conclusions in similar cases. See B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2152 (2016) (Kavanaugh).

Today's cases exemplify some of these problems. We have before us two circuit decisions, three opinions, and at least as many interpretive options on the *Chevron* menu. On the one hand, we have the D. C. Circuit majority, which deemed the Magnuson-Stevens Act "ambiguous" and upheld the

agency's regulation as "'permissible.'" 45 F. 4th 359, 365 (2022). On the other hand, we have the D. C. Circuit dissent, which argues the statute is "unambiguou[s]" and that it plainly forecloses the agency's new rule. *Id.*, at 372 (opinion of Walker, J.). And on yet a third hand, we have the First Circuit, which claimed to have identified "clear textual support" for the regulation, yet refused to say whether it would "classify [its] conclusion as a product of *Chevron* step one or step two." 62 F. 4th 621, 631, 634 (2023). As these cases illustrate, *Chevron* has turned statutory interpretation into a game of bingo under blindfold, with parties guessing at how many boxes there are and which one their case might ultimately fall in.

Turn now from workability to reliance. Far from engendering reliance interests, the whole point of *Chevron* deference is to upset them. Under *Chevron*, executive officials can replace one "reasonable" interpretation with another at any time, all without any change in the law itself. The result: Affected individuals "can never be sure of their legal rights and duties." *Buffington*, 598 U. S., at ___ (slip op., at 12).

How bad is the problem? Take just one example. *Brand X* concerned a law regulating broadband internet services. There, the Court upheld an agency rule adopted by the administration of President George W. Bush because it was premised on a "reasonable" interpretation of the statute. Later, President Barack Obama's administration rescinded the rule and replaced it with another. Later still, during President Donald J. Trump's administration, officials replaced that rule with a different one, all before President Joseph R. Biden, Jr.'s administration declared its intention to reverse course for yet a fourth time. See Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048 (2023); *Brand X*, 545 U. S., at 981–982. Each time, the government claimed its new rule was just as "reasonable" as the last. Rather than promoting reliance by fixing the meaning of

the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged.

Nor are these antireliance harms distributed equally. Sophisticated entities and their lawyers may be able to keep pace with rule changes affecting their rights and responsibilities. They may be able to lobby for new "'reasonable'" agency interpretations and even capture the agencies that issue them. *Buffington*, 598 U. S., at ___, ___ (slip op., at 8, 13). But ordinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites.

Consider a couple of examples. Thomas Buffington, a veteran of the U. S. Air Force, was injured in the line of duty. For a time after he left the Air Force, the Department of Veterans Affairs (VA) paid disability benefits due him by law. But later the government called on Mr. Buffington to reenter active service. During that period, everyone agreed, the VA could (as it did) suspend his disability payments. After he left active service for a second time, however, the VA turned his patriotism against him. By law, Congress permitted the VA to suspend disability pay only "for any period for which [a servicemember] receives active service pay." 38 U. S. C. §5304(c). But the VA had adopted a self-serving regulation requiring veterans to file a form asking for the resumption of their disability pay after a second (or subsequent) stint in active service. 38 CFR §3.654(b)(2) (2021). Unaware of the regulation, Mr. Buffington failed to reapply immediately. When he finally figured out what had happened and reapplied, the VA agreed to resume payments going forward but refused to give Mr. Buffington all of the past disability payments it had withheld. *Buffington*, 598 U. S., at ___–___ (slip op., at 1–4).

Mr. Buffington challenged the agency's action as inconsistent with Congress's direction that the VA may suspend disability payments only for those periods when a veteran

returns to active service. But armed with *Chevron*, the agency defeated Mr. Buffington's claim. Maybe the self-serving regulation the VA cited as justification for its action was not premised on the best reading of the law, courts said, but it represented a "'permissible'" one. 598 U. S., at ___ (slip op., at 7). In that way, the Executive Branch was able to evade Congress's promises to someone who took the field repeatedly in the Nation's defense.

In another case, one which I heard as a court of appeals judge, *De Niz Robles* v. *Lynch*, 803 F. 3d 1165 (CA10 2015), the Board of Immigration Appeals invoked *Chevron* to overrule a judicial precedent on which many immigrants had relied, see *In re Briones*, 24 I. & N. Dec. 355, 370 (BIA 2007) (purporting to overrule *Padilla–Caldera* v. *Gonzales*, 426 F. 3d 1294 (CA10 2005)). The agency then sought to apply its new interpretation retroactively to punish those immigrants—including Alfonzo De Niz Robles, who had relied on that judicial precedent as authority to remain in this country with his U. S. wife and four children. See 803 F. 3d, at 1168–1169. Our court ruled that this retrospective application of the BIA's new interpretation of the law violated Mr. De Niz Robles's due process rights. *Id.*, at 1172. But as a lower court, we could treat only the symptom, not the disease. So *Chevron* permitted the agency going forward to overrule a judicial decision about the best reading of the law with its own different "reasonable" one and in that way deny relief to countless future immigrants.

Those are just two stories among so many that federal judges could tell (and have told) about what *Chevron* deference has meant for ordinary people interacting with the federal government. See, *e.g.*, *Lambert* v. *Saul*, 980 F. 3d 1266, 1268–1276 (CA9 2020); *Valent* v. *Commissioner of Social Security*, 918 F. 3d 516, 525–527 (CA6 2019) (Kethledge, J., dissenting); *Gonzalez* v. *United States Atty. Gen.*, 820 F. 3d 399, 402–405 (CA11 2016) (*per curiam*).

What does the federal government have to say about this?

It acknowledges that *Chevron* sits as a heavy weight on the scale in favor of the government, "oppositional" to many "categories of individuals." Tr. of Oral Arg. in No. 22–1219, p. 133 (Relentless Tr.). But, according to the government, *Chevron* deference is too important an innovation to undo. In its brief reign, the government says, it has become a "fundamenta[l] . . . ground rul[e] for how all three branches of the government are operating together." Relentless Tr. 102. But, in truth, the Constitution, the APA, and our longstanding precedents set those ground rules some time ago. And under them, agencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge.

C

How could a Court, guided for 200 years by Chief Justice Marshall's example, come to embrace a counter-*Marbury* revolution, one at war with the APA, time honored precedents, and so much surrounding law? To answer these questions, turn to Lesson 3 and witness the temptation to endow a stray passage in a judicial decision with extraordinary authority. Call it "power quoting."

Chevron was an unlikely place for a revolution to begin. The case concerned the Clean Air Act's requirement that States regulate "stationary sources" of air pollution in their borders. See 42 U. S. C. §7401 *et seq*. At the time, it was an open question whether entire industrial plants or their constituent polluting parts counted as "stationary sources." The Environmental Protection Agency had defined entire plants as sources, an approach that allowed companies to replace individual plant parts without automatically triggering the permitting requirements that apply to new sources. *Chevron*, 467 U. S., at 840.

This Court upheld the EPA's definition as consistent with the governing statute. *Id.*, at 866. The decision, issued by a bare quorum of the Court, without concurrence or dissent, purported to apply "well-settled principles." *Id.*, at 845. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue," *Chevron* provided, then "that intention is the law and must be given effect." *Id.*, at 843, n. 9. Many of the cases *Chevron* cited to support its judgment stood for the traditional proposition that courts afford respectful consideration, not deference, to executive interpretations of the law. See, *e.g.*, *Burnet*, 285 U. S., at 16; *United States* v. *Moore*, 95 U. S. 760, 763 (1878). And the decision's sole citation to legal scholarship was to Roscoe Pound, who long championed *de novo* judicial review. 467 U. S., at 843, n. 10; see R. Pound, The Place of the Judiciary in a Democratic Polity, 27 A. B. A. J. 133, 136–137 (1941).

At the same time, of course, the opinion contained bits and pieces that spoke differently. The decision also said that, "if [a] statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U. S., at 843. But it seems the government didn't advance this formulation in its brief, so there was no adversarial engagement on it. T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 268 (2014) (Merrill). As we have seen, too, the Court did not pause to consider (or even mention) the APA. See Part II–A, *supra.* It did not discuss contrary precedents issued by the Court since the founding, let alone purport to overrule any of them. See Part II–B–1, *supra.* Nor did the Court seek to address how its novel rule of deference might be squared with so much surrounding law. See Part II–B–2, *supra.* As even its defenders have acknowledged, "*Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate

directions." Kagan 212–213. "[T]he quality of the reasoning," they acknowledge, "was not high," C. Sunstein, *Chevron* as Law, 107 Geo. L. J. 1613, 1669 (2019).

If *Chevron* meant to usher in a revolution in how judges interpret laws, no one appears to have realized it at the time. *Chevron*'s author, Justice Stevens, characterized the decision as a "simpl[e] . . . restatement of existing law, nothing more or less." Merrill 255, 275. In the "19 argued cases" in the following Term "that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law," this Court cited *Chevron* just once. Merrill 276. By some accounts, the decision seemed "destined to obscurity." *Ibid.*

It was only three years later when Justice Scalia wrote a concurrence that a revolution began to take shape. *Buffington*, 598 U. S., at ___ (slip op., at 8). There, he argued for a new rule requiring courts to defer to executive agency interpretations of the law whenever a "'statute is silent or ambiguous.'" *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 133–134 (1987) (opinion of Scalia, J.). Eventually, a majority of the Court followed his lead. *Buffington*, 598 U. S., at ___ (slip op., at 8). But from the start, Justice Scalia made no secret about the scope of his ambitions. See Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 521 (1989) (Scalia). The rule he advocated for represented such a sharp break from prior practice, he explained, that many judges of his day didn't yet "understand" the "old criteria" were "no longer relevant." *Ibid.* Still, he said, overthrowing the past was worth it because a new deferential rule would be "easier to follow." *Ibid.*

Events proved otherwise. As the years wore on and the Court's new and aggressive reading of *Chevron* gradually exposed itself as unworkable, unfair, and at odds with our separation of powers, Justice Scalia could have doubled down on the project. But he didn't. He appreciated that

stare decisis is not a rule of "if I thought it yesterday, I must think it tomorrow." And rather than cling to the pride of personal precedent, the Justice began to express doubts over the very project that he had worked to build. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109–110 (2015) (opinion concurring in judgment); cf. *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 617–618, 621 (2013) (opinion concurring in part and dissenting in part). If *Chevron*'s ascent is a testament to the Justice's ingenuity, its demise is an even greater tribute to his humility.[6]

Justice Scalia was not alone in his reconsideration. After years spent laboring under *Chevron*, trying to make sense of it and make it work, Member after Member of this Court came to question the project. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Kisor*, 588 U. S., at 591 (ROBERTS, C. J., concurring in part); *Gutierrez-Brizuela*, 834 F. 3d, at 1153; *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15); Kavanaugh 2150–2154. Ultimately, the Court gave up. Despite repeated invitations, it has not applied *Chevron* deference since 2016. Relentless Tr. 81; App. to Brief for Respondents in No. 22–1219, p. 68a. So an experiment that began only in the mid-1980s effectively ended eight years ago. Along the way, an unusually large number of federal appellate judges voiced their own thoughtful and extensive

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[6] It should be recalled that, when Justice Scalia launched the *Chevron* revolution, there were many judges who "abhor[red] . . . 'plain meaning'" and preferred instead to elevate "legislative history" and their own curated accounts of a law's "purpose[s]" over enacted statutory text. Scalia 515, 521. *Chevron*, he predicted, would provide a new guardrail against that practice. Scalia 515, 521. As the Justice's later writings show, he had the right diagnosis, just the wrong cure. The answer for judges eliding statutory terms is not deference to agencies that may seek to do the same, but a demand that all return to a more faithful adherence to the written law. That was, of course, another project Justice Scalia championed. And as we like to say, "we're all textualists now."

criticisms of *Chevron*. *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15) (collecting examples). A number of state courts did, too, refusing to import *Chevron* deference into their own administrative law jurisprudence. See 598 U. S., at ___ (slip op., at 15).

Even if all that and everything else laid out above is true, the government suggests we should retain *Chevron* deference because judges simply cannot live without it; some statutes are just too "technical" for courts to interpret "intelligently." *Post*, at 9, 32 (dissenting opinion). But that objection is no answer to *Chevron*'s inconsistency with Congress's directions in the APA, so much surrounding law, or the challenges its multistep regime have posed in practice. Nor does history counsel such defeatism. Surely, it would be a mistake to suggest our predecessors before *Chevron*'s rise in the mid-1980s were unable to make their way intelligently through technical statutory disputes. Following their lead, over the past eight years this Court has managed to resolve even highly complex cases without *Chevron* deference, and done so even when the government sought deference. Nor, as far as I am aware, did any Member of the Court suggest *Chevron* deference was necessary to an intelligent resolution of any of those matters.[7] If anything, by affording *Chevron* deference a period of repose before addressing whether it should be retained, the Court has enabled its Members to test the propriety of that precedent and reflect more deeply on how well it fits into the broader architecture of our law. Others may see things differently, see *post*, at 26–27 (dissenting opinion), but the caution the

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[7] See, *e.g., Becerra* v. *Empire Health Foundation, for Valley Hospital Medical Center*, 597 U. S. 424, 434 (2022) (resolving intricate Medicare dispute by reference solely to "text," "context," and "structure"); see also *Sackett* v. *EPA*, 598 U. S. 651 (2023) (same in a complex Clean Water Act dispute); *Johnson* v. *Guzman Chavez*, 594 U. S. 523 (2021) (same in technical immigration case).

Court has exhibited before overruling *Chevron* may illustrate one of the reasons why the current Court has been slower to overrule precedents than some of its predecessors, see Part I–C, *supra*.

None of this, of course, discharges any Member of this Court from the task of deciding for himself or herself today whether *Chevron* deference itself warrants deference. But when so many past and current judicial colleagues in this Court and across the country tell us our doctrine is misguided, and when we ourselves managed without *Chevron* for centuries and manage to do so today, the humility at the core of *stare decisis* compels us to pause and reflect carefully on the wisdom embodied in that experience. And, in the end, to my mind the lessons of experience counsel wisely against continued reliance on *Chevron*'s stray and unconsidered digression. This Court's opinions fill over 500 volumes, and perhaps "some printed judicial word may be found to support almost any plausible proposition." R. Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). It is not for us to pick and choose passages we happen to like and demand total obedience to them in perpetuity. That would turn *stare decisis* from a doctrine of humility into a tool for judicial opportunism. *Brown*, 596 U. S., at 141.

III

Proper respect for precedent helps "keep the scale of justice even and steady," by reinforcing decisional rules consistent with the law upon which all can rely. 1 Blackstone 69. But that respect does not require, nor does it readily tolerate, a steadfast refusal to correct mistakes. As early as 1810, this Court had already overruled one of its cases. See *Hudson* v. *Guestier*, 6 Cranch 281, 284 (overruling *Rose* v. *Himely*, 4 Cranch 241 (1808)). In recent years, the Court may have overruled precedents less frequently than it did during the Warren and Burger Courts. See Part I–C, *supra*.

But the job of reconsidering past decisions remains one every Member of this Court faces from time to time.[8]

Justice William O. Douglas served longer on this Court than any other person in the Nation's history. During his tenure, he observed how a new colleague might be inclined initially to "revere" every word written in an opinion issued before he arrived. W. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). But, over time, Justice Douglas reflected, his new colleague would "remembe[r] . . . that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." *Ibid.* And "[s]o he [would] com[e] to formulate his own views, rejecting some earlier ones as false and embracing others." *Ibid.* This process of reexamination, Justice Douglas explained, is a "necessary consequence of our system" in which each judge takes an oath—both "personal" and binding—to discern the law's meaning for himself and apply it faithfully in the cases that come before him. *Id.*, at 736–737.

Justice Douglas saw, too, how appeals to precedent could be overstated and sometimes even overwrought. Judges, he reflected, would sometimes first issue "new and startling decision[s]," and then later spin around and "acquire an acute conservatism" in their aggressive defense of "their

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[8] Today's dissenters are no exceptions. They have voted to overrule precedents that they consider "wrong," *Hurst* v. *Florida*, 577 U. S. 92, 101 (2016) (opinion for the Court by SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J.); *Obergefell* v. *Hodges*, 576 U. S. 644, 665, 675 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); that conflict with the Constitution's "original meaning," *Alleyne* v. *United States*, 570 U. S. 99, 118 (2013) (SOTOMAYOR, J., joined by, *inter alias*, KAGAN, J., concurring); and that have proved "unworkable," *Johnson* v. *United States*, 576 U. S. 591, 605 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); see also *Erlinger* v. *United States*, 602 U. S. ___, ___ (2024) (JACKSON, J., dissenting) (slip op., at 1) (arguing *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and the many cases applying it were all "wrongly decided").

new *status quo*." *Id.*, at 737. In that way, even the most novel and unlikely decisions became "coveted anchorage[s]," defended heatedly, if ironically, under the banner of "*stare decisis*." *Ibid.*; see also *Edwards* v. *Vannoy*, 593 U. S. 255, 294, n. 7 (2021) (GORSUCH, J., concurring).

That is *Chevron*'s story: A revolution masquerading as the status quo. And the defense of it follows the same course Justice Douglas described. Though our dissenting colleagues have not hesitated to question other precedents in the past, they today manifest what Justice Douglas called an "acute conservatism" for *Chevron*'s "startling" development, insisting that if this "coveted anchorage" is abandoned the heavens will fall. But the Nation managed to live with busy executive agencies of all sorts long before the *Chevron* revolution began to take shape in the mid-1980s. And all today's decision means is that, going forward, federal courts will do exactly as this Court has since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor.

Proper respect for precedent does not begin to suggest otherwise. Instead, it counsels respect for the written law, adherence to consistent teachings over aberrations, and resistance to the temptation of treating our own stray remarks as if they were statutes. And each of those lessons points toward the same conclusion today: *Chevron* deference is inconsistent with the directions Congress gave us in the APA. It represents a grave anomaly when viewed against the sweep of historic judicial practice. The decision undermines core rule-of-law values ranging from the promise of fair notice to the promise of a fair hearing. Even on its own terms, it has proved unworkable and operated to undermine rather than advance reliance interests, often to the detriment of ordinary Americans. And from the start, the whole project has relied on the overaggressive use of snippets and stray remarks from an opinion that carried

mixed messages. *Stare decisis*'s true lesson today is not that we are bound to respect *Chevron*'s "startling development," but bound to inter it.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

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

For 40 years, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 22–451 and joins this opinion only as it applies to the case in No. 22–1219.

Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or

gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996).

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022); *West Virginia* v. *EPA*, 597 U. S. 697 (2022); *Biden* v. *Nebraska*, 600 U. S. 477 (2023). But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a

way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 388 (2022) (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. In fact, *Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long. Because that is so, the majority needs a "particularly special justification" for its action. *Kisor* v. *Wilkie*, 588 U. S. 558, 588 (2019) (opinion of the Court). But the majority has nothing that would qualify. It barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress "consciously desired" the administering agency to fill in aspects of the legislative scheme, believing that regulatory experts would be "in a better position" than legislators to do so. *Chevron*, 467 U. S., at 865. Or "perhaps Congress was unable to forge a coalition on either side" of a question, and the contending

parties "decided to take their chances with" the agency's resolution. *Ibid.* Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight. Accord, *ante*, at 7, 22. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." *Kisor*, 588 U. S., at 566 (plurality opinion). Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question *is*. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U. S. C. §262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids? See *Teva Pharmaceuticals USA, Inc.* v. *FDA*, 514 F. Supp. 3d 66, 79–80, 93–106 (DC 2020).
- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U. S. C. §1532(16); see §1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct"

because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest? See *Northwest Ecosystem Alliance* v. *United States Fish and Wildlife Serv.*, 475 F. 3d 1136, 1140–1145, 1149 (CA9 2007).

- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U. S. C. §1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area? See *Bellevue Hospital Center* v. *Leavitt*, 443 F. 3d 163, 174–176 (CA2 2006).
- Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." §3(b)(1), 101 Stat. 676; see §3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met? See *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F. 3d 455, 466–467, 474–475 (CADC 1998).
- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U. S. C. §7502(c)(5). Does the term "stationary source[]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another? See 467 U. S., at 857, 859.

In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). *Ante*, at 22. A question thus arises: Who decides which of the possible readings should govern?

This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. For the last 40 years, that doctrine has gone by the name of *Chevron* deference, after the 1984 decision that formalized and canonized it. In *Chevron*, the Court set out a simple two-part framework for reviewing an agency's interpretation of a statute that it administers. First, the reviewing court must determine whether Congress has "directly spoken to the precise question at issue." 467 U. S., at 842. That inquiry is rigorous: A court must exhaust all the "traditional tools of statutory construction" to divine statutory meaning. *Id.*, at 843, n. 9. And when it can find that meaning—a "single right answer"—that is "the end of the matter": The court cannot defer because it "must give effect to the unambiguously expressed intent of Congress." *Kisor*, 588 U. S., at 575 (opinion of the Court); *Chevron*, 467 U. S., at 842–843. But if the court, after using its whole legal toolkit, concludes that "the statute is silent or ambiguous with respect to the specific issue" in dispute—for any of the not-uncommon reasons discussed above—then the court must cede the primary interpretive role. *Ibid.*; see *supra*, at 4–5. At that second step, the court asks only whether the agency construction is within the sphere of "reasonable" readings. *Chevron*, 467 U. S., at 844. If it is, the agency's interpretation of the statute that it every day implements will control.

That rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. See *id.*, at 843–

845; *Smiley*, 517 U. S., at 740–741. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. See *supra*, at 4–5. And every once in a while, Congress provides an explicit instruction for dealing with that contingency—assigning primary responsibility to the courts, or else to an agency. But much more often, Congress does not say. Thus arises the need for a presumption—really, a default rule—for what should happen in that event. Does a statutory silence or ambiguity then go to a court for resolution? Or to an agency? This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. Or said otherwise, Congress would select the agency it has put in control of a regulatory scheme to exercise the "degree of discretion" that the statute's lack of clarity or completeness allows. *Smiley*, 517 U. S., at 741. Of course, Congress can always refute that presumptive choice—can say that, really, it would prefer courts to wield that discretionary power. But until then, the presumption cuts in the agency's favor.[1] The next question is why.

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[1] Note that presumptions of this kind are common in the law. In other contexts, too, the Court responds to a congressional lack of direction by adopting a presumption about what Congress wants, rather than trying to figure that out in every case. And then Congress can legislate, with "predictable effects," against that "stable background" rule. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010). Take the presumption against extraterritoriality: The Court assumes Congress means for its statutes to apply only within the United States, absent a "clear indication" to the contrary. *Id.*, at 255. Or the presumption against retroactivity: The Court assumes Congress wants its laws to apply only prospectively, unless it "unambiguously instruct[s]" something different. *Vartelas* v. *Holder*, 566 U. S. 257, 266 (2012). Or the presumption against repeal of statutes by implication: The Court assumes Congress does not intend a later statute to displace an earlier one unless it makes that intention "clear and manifest." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 510 (2018). Or the (so far unnamed) presumption against treating a procedural requirement as "jurisdictional" unless "Congress

For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." *Kisor*, 588 U. S., at 571 (plurality opinion). Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. *Chevron*, 467 U. S., at 865. Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? See *supra*, at 5. I don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take the perhaps more accessible-sounding second case, involving the Endangered Species Act. See *supra*, at 5–6. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—

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clearly states that it is." *Boechler* v. *Commissioner*, 596 U. S. 199, 203 (2022). I could continue, except that this footnote is long enough. The *Chevron* deference rule is to the same effect: The Court generally assumes that Congress intends to confer discretion on agencies to handle statutory ambiguities or gaps, absent a direction to the contrary. The majority calls that presumption a "fiction," *ante*, at 26, but it is no more so than any of the presumptions listed above. They all are best guesses—and usually quite good guesses—by courts about congressional intent.

the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. Let's stick with squirrels for a moment, except broaden the lens. In construing a term like "distinct" in a case about squirrels, the Service likely would benefit from its "historical familiarity" with how the term has covered the population segments of other species. *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 153 (1991); see, *e.g.*, *Center for Biological Diversity* v. *Zinke*, 900 F. 3d 1053, 1060–1062 (CA9 2018) (arctic grayling); *Center for Biological Diversity* v. *Zinke*, 868 F. 3d 1054, 1056 (CA9 2017) (desert eagle). Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. Or consider, for another way regulatory familiarity matters, the example about adjusting Medicare reimbursement for geographic wage differences. See *supra*, at 6. According to a dictionary, the term "geographic area" could be as large as a multi-state region or as small as a census tract. How to choose? It would make sense to gather hard information about what reimbursement levels each approach will produce, to explore the ease of administering each on a nationwide basis, to survey how regulators have dealt with similar questions in the past, and to confer with the hospitals themselves about what makes sense. See *Kisor*, 588 U. S., at 571 (plurality opinion) (noting that agencies are able to "conduct factual investigations" and "consult with affected parties"). Congress knows the Department of Health and Human Services can do all those things—and that courts cannot.

Still more, *Chevron*'s presumption reflects that resolving

statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696 (1991). The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." See *supra*, at 6. Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. Or consider *Chevron* itself. As the Court there understood, the choice between defining a "stationary source" as a whole plant or as a pollution-emitting device is a choice about how to "reconcile" two "manifestly competing interests." 467 U. S., at 865. The plantwide definition relaxes the permitting requirement in the interest of promoting economic growth; the device-specific definition strengthens that requirement to better reduce air pollution. See *id.*, at 851, 863, 866. Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are "subject to the supervision of the President, who in turn answers to the public." *Kisor*, 588 U. S., at 571–572 (plurality opinion). So when faced with a statutory ambiguity, "an agency to which Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments." *Chevron*, 467 U. S., at 865.

None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, *ante*, at 27, but they are anything but. Consider the rule that an agency gets no deference when construing a statute it is not responsible for administering. See *Epic Systems*

Corp. v. *Lewis*, 584 U. S. 497, 519–520 (2018). Well, of course not—if Congress has not put an agency in charge of implementing a statute, Congress would not have given the agency a special role in its construction. Or take the rule that an agency will not receive deference if it has reached its decision without using—or without using properly—its rulemaking or adjudicatory authority. See *United States* v. *Mead Corp.*, 533 U. S. 218, 226–227 (2001); *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016). Again, that should not be surprising: Congress expects that authoritative pronouncements on a law's meaning will come from the procedures it has enacted to foster "fairness and deliberation" in agency decision-making. *Mead*, 533 U. S., at 230. Or finally, think of the "extraordinary cases" involving questions of vast "economic and political significance" in which the Court has declined to defer. *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015). The theory is that Congress would not have left matters of such import to an agency, but would instead have insisted on maintaining control. So the *Chevron* refinements proceed from the same place as the original doctrine. Taken together, they give interpretive primacy to the agency when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority.

That carefully calibrated framework "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley*, 501 U. S., at 696. Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue. But when courts have decided that Congress has not done so, a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory

experience; and to involve policy choices, including cost-benefit assessments and trade-offs between conflicting values. So a court without relevant expertise or experience, and without warrant to make policy calls, appropriately steps back. The court still has a role to play: It polices the agency to ensure that it acts within the zone of reasonable options. But the court does not insert itself into an agency's expertise-driven, policy-laden functions. That is the arrangement best suited to keep every actor in its proper lane. And it is the one best suited to ensure that Congress's statutes work in the way Congress intended.

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." *Ante*, at 23. Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise,

long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. *Ante*, at 22. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a *presumption*. The decision does not maintain that Congress in every case wants the agency, rather than a court, to fill in gaps. The decision maintains that when Congress does not expressly pick one or the other, we need a default rule; and the best default rule—agency or court?—is the one we think Congress would generally want. As to *why* Congress would generally want the agency: The answer lies in everything said above about Congress's delegation of regulatory power to the agency and the agency's special competencies. See *supra*, at 9–11. The majority appears to think it is a showstopping rejoinder to note that many statutory gaps and ambiguities are "unintentional." *Ante*, at 22. But to begin, many are not; the ratio between the two is uncertain. See *supra*, at 4–5. And to end, why should that matter in any event? Congress may not have deliberately introduced a gap or ambiguity into the statute; but it knows that pretty much everything it drafts will someday be found to contain such a "flaw." Given that knowledge, *Chevron* asks, what would Congress want? The presumed answer is again the same (for the same reasons): The agency. And as with any default rule, if Congress decides otherwise, all it need do is say.

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that *Chevron* chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality," *ante*, at 22). Over the last four decades, Congress has authorized

or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. See A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 928 (fig. 2), 994 (2013). So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. See 12 U. S. C. §25b(b)(5)(A) (exception #1); 15 U. S. C. §8302(c)(3)(A) (exception #2). Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. See S. 909, 116th Cong., 1st Sess., §2 (2019) (still a bill, not a law); H. R. 5, 115th Cong., 1st Sess., §202 (2017) (same). So to the extent the majority is worried that the *Chevron* presumption is "fiction[al]," *ante*, at 26—as all legal presumptions in some sense are—it has gotten less and less so every day for 40 years. The congressional reaction shows as well as anything could that the *Chevron* Court read Congress right.

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are *not* entitled to deference." *Ante*, at 14–15 (emphasis in original). And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. See *ante,* at 9–13, 15–16. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To the extent necessary to decision and when presented, the

reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706.

That text, contra the majority, "does not resolve the *Chevron* question." C. Sunstein, *Chevron* As Law, 107 Geo. L. J. 1613, 1642 (2019) (Sunstein). Or said a bit differently, Section 706 is "generally indeterminate" on the matter of deference. A. Vermeule, Judging Under Uncertainty 207 (2006) (Vermeule). The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. *Ante*, at 14. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. See *Kisor*, 588 U. S., at 581 (plurality opinion). And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[] of law" as when it uses a *de novo* standard. §706. The deferring court then conforms to Section 706 "by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed [the statute it administers] reasonably." J. Manning, *Chevron* and the Reasonable Legislator, 128 Harv. L. Rev. 457, 459 (2014); see *Arlington* v. *FCC*, 569 U. S. 290, 317 (2013) (ROBERTS, C. J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it").[2]

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[2]The majority tries to buttress its argument with a stray sentence or two from the APA's legislative history, but the same response holds. As the majority notes, see *ante*, at 15, the House and Senate Reports each stated that Section 706 "provid[ed] that questions of law are for courts

Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). See *ante*, at 14. Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" from *de novo* review. *Ibid.* Surely? In another part of Section 706, Congress explicitly referred to *de novo* review. §706(2)(F). With all those references to standards of review—both deferential and not—running around Section 706, what is "telling" (*ante*, at 14) is the absence of any standard for reviewing an agency's statutory constructions. That silence left the matter, as noted above, "generally indeterminate": Section 706 neither mandates nor forbids *Chevron*-style deference. Vermeule 207.[3]

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rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). But that statement also does not address the standard of review that courts should then use. When a court defers under *Chevron*, it reviews the agency's construction for reasonableness "in the last analysis." The views of Representative Walter, which the majority also cites, further demonstrate my point. He stated that the APA would require courts to "determine independently all relevant questions of law," but he also stated that courts would be required to "exercise . . . independent judgment" in applying the substantial-evidence standard (a deferential standard if ever there were one). 92 Cong. Rec. 5654 (1946). He therefore did not equate "independent" review with *de novo* review; he thought that a court could conduct independent review of agency action using a deferential standard.

[3] In a footnote responding to the last two paragraphs, the majority raises the white flag on Section 706's text. See *ante*, at 15, n. 4. Yes, it finally concedes, Section 706 does not *say* that *de novo* review is required for an agency's statutory construction. Rather, the majority says, "some things go without saying," and *de novo* review is such a thing. See *ibid.* But why? What extra-textual considerations force us to read Section 706 the majority's way? In its footnote, the majority repairs only to history.

And contra the majority, most "respected commentators" understood Section 706 in that way—as allowing, even if not requiring, deference. *Ante*, at 16. The finest administrative law scholars of the time (call them that generation's Manning, Sunstein, and Vermeule) certainly did. Professor Louis Jaffe described something very like the *Chevron* two-step as the preferred method of reviewing agency interpretations under the APA. A court, he said, first "must decide as a 'question of law' whether there is 'discretion' in the premises." Judicial Control of Administrative Action 570 (1965). That is akin to step 1: Did Congress speak to the issue, or did it leave openness? And if the latter, Jaffe continued, the agency's view "if 'reasonable' is free of control." *Ibid.* That of course looks like step 2: defer if reasonable. And just in case that description was too complicated, Jaffe conveyed his main point this way: The argument that courts "must decide all questions of law"—as if there were no agency in the picture—"is, in my opinion, unsound." *Id.*, at 569. Similarly, Professor Kenneth Culp Davis, author of the then-preeminent treatise on administrative law, noted with approval that "reasonableness" review of agency interpretations—in which courts "refused to substitute judgment"—had "survived the APA." Administrative Law 880, 883, 885 (1951) (Davis). Other contemporaneous scholars and experts agreed. See R. Levin, The APA and the Assault on Deference, 106 Minn. L. Rev. 125, 181–183 (2021) (Levin) (listing many of them). They did not see in their own time what the majority finds there today.[4]

But as I will explain below, the majority also gets wrong the most relevant history, pertaining to how judicial review of agency interpretations operated in the years before the APA was enacted. See *infra*, at 19–23.

[4] I concede one exception (whose view was "almost completely isolated," Levin 181), but his comments on Section 706 refute a different aspect of the majority's argument. Professor John Dickinson, as the majority notes, thought that Section 706 precluded courts from deferring to agency interpretations. See Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947)

Nor, evidently, did the Supreme Court. In the years after the APA was enacted, the Court "never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law." Sunstein 1654. Indeed, not a single Justice so much as floated that view of the APA. To the contrary, the Court issued a number of decisions in those years deferring to an agency's statutory interpretation. See, *e.g.*, *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 153–154 (1946); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403 (1947); *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478–479 (1947). And that continued right up until *Chevron*. See, *e.g.*, *Mitchell* v. *Budd*, 350 U. S. 473, 480 (1956); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). To be clear: Deference in those years was not always given to interpretations that would receive it under *Chevron*. The practice then was more inconsistent and less fully elaborated than it later became. The point here is only that the Court came nowhere close to accepting the majority's view of the APA. Take the language from Section 706 that the majority most relies on: "decide all relevant questions of law." See *ante*, at 14. In the decade after the APA's enactment, those words were used only four times in Supreme Court opinions (all in footnotes)—and never to suggest that courts could not defer to agency interpretations. See Sunstein 1656.

The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[] the present law as to the scope of judicial review."

(Dickinson); *ante*, at 16. But unlike the majority, he viewed that bar as "a change" to, not a restatement of, pre-APA law. Compare Dickinson 516 with *ante*, at 15–16. So if the majority really wants to rely on Professor Dickinson, it will have to give up the claim, which I address below, that the law before the APA forbade deference. See *infra*, at 19–23.

Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); *ante*, at 15–16. The problem for the majority is that in the years preceding the APA, courts became ever more deferential to agencies. New Deal administrative programs had by that point come into their own. And this Court and others, in a fairly short time, had abandoned their initial resistance and gotten on board. Justice Breyer, wearing his administrative-law-scholar hat, characterized the pre-APA period this way: "[J]udicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise." S. Breyer et al., Administrative Law and Regulatory Policy 21 (7th ed. 2011). And that description extends to review of an agency's statutory constructions. An influential study of administrative practice, published five years before the APA's enactment, described the state of play: Judicial "review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one." Final Report of Attorney General's Committee on Administrative Procedure (1941), reprinted in Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., 78 (1941). Or again: "[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body." *Id.*, at 90–91.[5]

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[5] Because the APA was meant to "restate[] the present law," the judicial review practices of the 1940s are more important to understanding the statute than is any earlier tradition (such as the majority dwells on). But before I expand on those APA-contemporaneous practices, I pause to note that they were "not built on sand." *Kisor* v. *Wilkie*, 588 U. S. 558, 568–569 (2019) (plurality opinion). Since the early days of the Republic, this Court has given significant weight to official interpretations of "ambiguous law[s]." *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). With the passage of time—and the growth of the administrative sphere—those "judicial expressions of deference increased." H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 15 (1983). By

Two prominent Supreme Court decisions of the 1940s put those principles into action. *Gray* v. *Powell*, 314 U. S. 402 (1941), was then widely understood as "the leading case" on review of agency interpretations. Davis 882; see *ibid.* (noting that it "establish[ed] what is known as 'the doctrine of Gray v. Powell'"). There, the Court deferred to an agency construction of the term "producer" as used in a statutory exemption from price controls. Congress, the Court explained, had committed the scope of the exemption to the agency because its "experience in [the] field gave promise of a better informed, more equitable, adjustment of the conflicting interests." *Gray*, 314 U. S., at 412. Accordingly, the Court concluded that it was "not the province of a court" to "substitute its judgment" for the agency's. *Ibid.* Three years later, the Court decided *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), another acknowledged "leading case." Davis 882; see *id.*, at 884. The Court again deferred, this time to an agency's construction of the term "employee" in the National Labor Relations Act. The scope of that term, the Court explained, "belong[ed] to" the agency to answer based on its "[e]veryday experience in the administration of the statute." *Hearst*, 322 U. S., at 130. The Court therefore "limited" its review to whether the agency's reading had "warrant in the record and a reasonable basis in

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the early 20th century, the Court stated that it would afford "great weight" to an agency construction in the face of statutory "uncertainty or ambiguity." *National Lead Co.* v. *United States*, 252 U. S. 140, 145 (1920); see *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) ("controlling" weight in "all cases of ambiguity"); *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892) ("decisive" weight "in case of ambiguity"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) (referring to the "rule which gives strength" to official interpretations if "ambiguity exist[s]"). So even before the New Deal, a strand of this Court's cases exemplified deference to executive constructions of ambiguous statutes. And then, as I show in the text, the New Deal arrived and deference surged—creating the "present law" that the APA "restated."

law." *Id.*, at 131.[6] Recall here that even the majority accepts that Section 706 was meant to "restate[] the present law" as to judicial review. See *ante*, at 15–16; *supra*, at 19–20. Well then? It sure would seem that the provision allows a deference regime.

The majority has no way around those two noteworthy decisions. It first appears to distinguish between "pure legal question[s]" and the so-called mixed questions in *Gray* and *Hearst*, involving the application of a legal standard to a set of facts. *Ante*, at 11. If in drawing that distinction, the majority intends to confine its holding to the pure type of legal issue—thus enabling courts to defer when law and facts are entwined—I'd be glad. But I suspect the majority has no such intent, because that approach would preserve *Chevron* in a substantial part of its current domain. Cf. *Wilkinson* v. *Garland*, 601 U. S. 209, 230 (2024) (ALITO, J., dissenting) (noting, in the immigration context, that the universe of mixed questions swamps that of pure legal ones). It is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined. See H. Monaghan, *Marbury* and the

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[6]The majority says that I have "pluck[ed] out" *Gray* and *Hearst*, impliedly from a vast number of not-so-helpful cases. *Ante*, at 13, n. 3. It would make as much sense to say that a judge "plucked out" *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), to discuss substantial-evidence review or "plucked out" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983), to discuss arbitrary-and-capricious review. *Gray* and *Hearst*, as noted above, were the leading cases about agency interpretations in the years before the APA's enactment. But just to gild the lily, here are a number of other Supreme Court decisions from the five years prior to the APA's enactment that were of a piece: *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946); *ICC* v. *Parker*, 326 U. S. 60, 65 (1945); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227–228 (1943). The real "pluck[ing]" offense is the majority's—for taking a stray sentence from *Hearst* (*ante*, at 13, n. 3) to suggest that both *Hearst* and *Gray* stand for the opposite of what they actually do.

Administrative State, 83 Colum. L. Rev. 1, 29 (1983) ("Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm"). How does a statutory interpreter decide, as in *Hearst*, what an "employee" is? In large part through cases asking whether the term covers people performing specific jobs, like (in that case) "newsboys." 322 U. S., at 120. Or consider one of the examples I offered above. How does an interpreter decide when one population segment of a species is "distinct" from another? Often by considering that requirement with respect to particular species, like western gray squirrels. So the distinction the majority offers makes no real-world (or even theoretical) sense. If the *Hearst* Court was deferring to an agency on whether the term "employee" covered newsboys, it was deferring to the agency on the scope and meaning of the term "employee."

The majority's next rejoinder—that "the Court was far from consistent" in deferring—falls equally flat. *Ante*, at 12. I am perfectly ready to acknowledge that in the pre-APA period, a deference regime had not yet taken complete hold. I'll go even further: Let's assume that deference was then an on-again, off-again function (as the majority seems to suggest, see *ante*, at 11–12, and 13, n. 3). Even on that assumption, the majority's main argument—that Section 706 *prohibited* deferential review—collapses. Once again, the majority agrees that Section 706 was not meant to change the then-prevailing law. See *ante*, at 15–16. And even if inconsistent, that law cannot possibly be thought to have *prohibited* deference. Or otherwise said: "If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use." *Kisor*, 588 U. S., at 583 (plurality opinion).

The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous

practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

III

And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. Of course, respecting precedent is not an "inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But overthrowing it requires far more than the majority has offered up here. *Chevron* is entitled to *stare decisis*'s strongest form of protection. The majority thus needs an exceptionally strong reason to overturn the decision, above and beyond thinking it wrong. And it has nothing approaching such a justification, proposing only a bewildering theory about *Chevron*'s "unworkability." *Ante*, at 32. Just five years ago, this Court in *Kisor* rejected a plea to overrule *Auer* v. *Robbins*, 519 U. S. 452 (1997), which requires judicial deference to agencies' interpretations of their own regulations. See 588 U. S., at 586–589 (opinion of the Court). The case against overruling *Chevron* is at least as strong. In particular, the majority's decision today will cause a massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years. 588 U. S., at 587 (opinion of the Court).

Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827. It enables people to order their lives in reliance on judicial decisions. And it "contributes to the actual and perceived integrity of the judicial process," by ensuring that those decisions are founded in the law, and not in the "personal preferences" of judges. *Id.*, at 828; *Dobbs*, 597 U. S., at 388 (dissenting opinion).

Perhaps above all else, *stare decisis* is a "doctrine of judicial modesty." *Id.*, at 363. In that, it shares something important with *Chevron*. Both tell judges that they do not know everything, and would do well to attend to the views of others. So today, the majority rejects what judicial humility counsels not just once but twice over.

And *Chevron* is entitled to a particularly strong form of *stare decisis*, for two separate reasons. First, it matters that "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); see *Kisor*, 588 U. S., at 587 (opinion of the Court) (making the same point for *Auer* deference). In a constitutional case, the Court alone can correct an error. But that is not so here. "Our deference decisions are balls tossed into Congress's court, for acceptance or not as that branch elects." 588 U. S., at 587–588 (opinion of the Court). And for generations now, Congress has chosen acceptance. Throughout those years, Congress could have abolished *Chevron* across the board, most easily by amending the APA. Or it could have eliminated deferential review in discrete areas, by amending old laws or drafting new laws to include an anti-*Chevron* provision. Instead, Congress has "spurned multiple opportunities" to do a comprehensive rejection of *Chevron*, and has hardly ever done a targeted one. *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015); see *supra*, at 14–15. Or to put the point more affirmatively, Congress has kept *Chevron* as is for 40 years. It maintained that position even as Members of this Court began to call *Chevron* into question. See *ante*, at 30. From all it appears, Congress has not agreed with the view of some Justices that they and other judges should have more power.

Second, *Chevron* is by now much more than a single decision. This Court alone, acting as *Chevron* allows, has upheld an agency's reasonable interpretation of a statute at least 70 times. See Brief for United States in No. 22–1219,

p. 27; App. to *id.*, at 68a–72a (collecting cases). Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions. See K. Barnett & C. Walker, *Chevron* and Stare Decisis, 31 Geo. Mason L. Rev. 475, 477, and n. 11 (2024) (noting that at last count, *Chevron* was cited in more than 18,000 federal-court decisions). The *Kisor* Court observed, when upholding *Auer*, that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." 588 U. S., at 587 (opinion of the Court). So too does deference to reasonable agency interpretations of ambiguous statutes—except more so. *Chevron* is as embedded as embedded gets in the law.

The majority says differently, because this Court has ignored *Chevron* lately; all that is left of the decision is a "decaying husk with bold pretensions." *Ante*, at 33. Tell that to the D. C. Circuit, the court that reviews a large share of agency interpretations, where *Chevron* remains alive and well. See, *e.g.*, *Lissack* v. *Commissioner*, 68 F. 4th 1312, 1321–1322 (2023); *Solar Energy Industries Assn.* v. *FERC*, 59 F. 4th 1287, 1291–1294 (2023). But more to the point: The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016" (*ante*, at 32) because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises" (*ante*, at 30); give the whole process a few years . . . and voila!—you have a justification for overruling the decision. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 950 (2018) (KAGAN, J., dissenting) (discussing the overruling of *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977)); see also, *e.g.*, *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 571–572 (2022) (SOTOMAYOR, J., dissenting) (similar

for *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)); *Shelby County* v. *Holder*, 570 U. S. 529, 587–588 (2013) (Ginsburg, J., dissenting) (similar for *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966)). I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." *Janus*, 585 U. S., at 950 (dissenting opinion). I have seen no reason to change my mind.

The majority does no better in its main justification for overruling *Chevron*—that the decision is "unworkable." *Ante*, at 30. The majority's first theory on that score is that there is no single "answer" about what "ambiguity" means: Some judges turn out to see more of it than others do, leading to "different results." *Ante*, at 30–31. But even if so, the legal system has for many years, in many contexts, dealt perfectly well with that variation. Take contract law. It is hornbook stuff that when (but only when) a contract is ambiguous, a court interpreting it can consult extrinsic evidence. See *CNH Industrial N.V.* v. *Reese*, 583 U. S. 133, 139 (2018) (*per curiam*). And when all interpretive tools still leave ambiguity, the contract is construed against the drafter. See *Lamps Plus, Inc.* v. *Varela*, 587 U. S. 176, 186–187 (2019). So I guess the contract rules of the 50 States are unworkable now. Or look closer to home, to doctrines this Court regularly applies. In deciding whether a government has waived sovereign immunity, we construe "[a]ny ambiguities in the statutory language" in "favor of immunity." *FAA* v. *Cooper*, 566 U. S. 284, 290 (2012). Similarly, the rule of lenity tells us to construe ambiguous statutes in favor of criminal defendants. See *United States* v. *Castleman*, 572 U. S. 157, 172–173 (2014). And the canon of constitutional avoidance instructs us to construe ambiguous laws to avoid difficult constitutional questions. See *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001). I could go on, but the point is made. There are ambiguity triggers all over the law. Somehow everyone seems to get by.

And *Chevron* is an especially puzzling decision to criticize on the ground of generating too much judicial divergence. There's good empirical—meaning, non-impressionistic—evidence on exactly that subject. And it shows that, as compared with *de novo* review, use of the *Chevron* two-step framework fosters *agreement* among judges. See K. Barnett, C. Boyd, & C. Walker, Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463, 1502 (2018) (Barnett). More particularly, *Chevron* has a "powerful constraining effect on partisanship in judicial decisionmaking." Barnett 1463 (italics deleted); see Sunstein 1672 ("[A] predictable effect of overruling *Chevron* would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits along ideological lines"). So if consistency among judges is the majority's lodestar, then the Court should not overrule *Chevron*, but return to using it.

The majority's second theory on workability is likewise a makeweight. *Chevron*, the majority complains, has some exceptions, which (so the majority says) are "difficult" and "complicate[d]" to apply. *Ante*, at 32. Recall that courts are not supposed to defer when the agency construing a statute (1) has not been charged with administering that law; (2) has not used deliberative procedures—*i.e.,* notice-and-comment rulemaking or adjudication; or (3) is intervening in a "major question," of great economic and political significance. See *supra*, at 11–12; *ante*, at 27–28. As I've explained, those exceptions—the majority also aptly calls them "refinements"—fit with *Chevron*'s rationale: They define circumstances in which Congress is unlikely to have wanted agency views to govern. *Ante*, at 27; see *supra*, at 11–12. And on the difficulty scale, they are nothing much. Has Congress put the agency in charge of administering the statute? In 99 of 100 cases, everyone will agree on the answer with scarcely a moment's thought. Did the agency use notice-and-comment or an adjudication before rendering an

interpretation? Once again, I could stretch my mind and think up a few edge cases, but for the most part, the answer is an easy yes or no. The major questions exception is, I acknowledge, different: There, many judges have indeed disputed its nature and scope. Compare, *e.g.*, *West Virginia*, 597 U. S., at 721–724, with *id.*, at 764–770 (KAGAN, J., dissenting). But that disagreement concerns, on everyone's view, a tiny subset of all agency interpretations. For the most part, the exceptions that so upset the majority require merely a rote, check-the-box inquiry. If that is the majority's idea of a "dizzying breakdance," *ante*, at 32, the majority needs to get out more.

And anyway, difficult as compared to what? The majority's prescribed way of proceeding is no walk in the park. First, the majority makes clear that what is usually called *Skidmore* deference continues to apply. See *ante*, at 16–17. Under that decision, agency interpretations "constitute a body of experience and informed judgment" that may be "entitled to respect." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). If the majority thinks that the same judges who argue today about where "ambiguity" resides (see *ante*, at 30) are not going to argue tomorrow about what "respect" requires, I fear it will be gravely disappointed. Second, the majority directs courts to comply with the varied ways in which Congress in fact "delegates discretionary authority" to agencies. *Ante*, at 17–18. For example, Congress may authorize an agency to "define[]" or "delimit[]" statutory terms or concepts, or to "fill up the details" of a statutory scheme. *Ante*, at 17, and n. 5. Or Congress may use, in describing an agency's regulatory authority, inherently "flexib[le]" language like "appropriate" or "reasonable." *Ante*, at 17, and n. 6. Attending to every such delegation, as the majority says, is necessary in a world without *Chevron*. But that task involves complexities of its own. Indeed, one reason Justice Scalia supported *Chevron* was that it re-

placed such a "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516. As a lover of the predictability that rules create, Justice Scalia thought the latter "unquestionably better." *Id.*, at 517.

On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*. *Dobbs*, 597 U. S., at 357 (ROBERTS, C. J., concurring in judgment). Congress and agencies alike have relied on *Chevron*—have assumed its existence—in much of their work for the last 40 years. Statutes passed during that time reflect the expectation that *Chevron* would allocate interpretive authority between agencies and courts. Rules issued during the period likewise presuppose that statutory ambiguities were the agencies' to (reasonably) resolve. Those agency interpretations may have benefited regulated entities; or they may have protected members of the broader public. Either way, private parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge. In *Kisor*, this Court refused to overrule *Auer* because doing so would "cast doubt on" many longstanding constructions of rules, and thereby upset settled expectations. 588 U. S., at 587 (opinion of the Court). Overruling *Chevron*, and thus raising new doubts about agency constructions of statutes, will be far more disruptive.

The majority tries to alleviate concerns about a piece of that problem: It states that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone. See *ante*, at 34–35. That is all to the good: There are thousands of such decisions, many settled for decades. See *supra*, at 26. But first,

reasonable reliance need not be predicated on a prior judicial decision. Some agency interpretations never challenged under *Chevron* now will be; expectations formed around those constructions thus could be upset, in a way the majority's assurance does not touch. And anyway, how good is that assurance, really? The majority says that a decision's "[m]ere reliance on *Chevron*" is not enough to counter the force of *stare decisis*; a challenger will need an additional "special justification." *Ante*, at 34. The majority is sanguine; I am not so much. Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a "special justification." Maybe a court will say "the quality of [the precedent's] reasoning" was poor. *Ante*, at 29. Or maybe the court will discover something "unworkable" in the decision—like some exception that has to be applied. *Ante*, at 30. All a court need do is look to today's opinion to see how it is done.

IV

> Judges are not experts in the field, and are not part of either political branch of the Government.
>
> —*Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (See *Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. And given *Chevron*'s pervasiveness, the decision to do so is likely to produce large-scale disruption. All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. In that sense too, today's majority has lost sight of its proper role.

And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary. See *SEC* v. *Jarkesy*, 603 U. S. ___ (2024); see also *supra*, at 3. As to the second, just my own defenses of *stare decisis*—

my own dissents to this Court's reversals of settled law—by now fill a small volume. See *Dobbs*, 597 U. S., at 363–364 (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ.); *Edwards* v. *Vannoy*, 593 U. S. 255, 296–297 (2021); *Knick* v. *Township of Scott*, 588 U. S. 180, 207–208 (2019); *Janus*, 585 U. S., at 931–932. Once again, with respect, I dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CORNER POST, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–1008. Argued February 20, 2024—Decided July 1, 2024

Since it opened for business in 2018, petitioner Corner Post, like most merchants, has accepted debit cards as a form of payment. Debit card transactions require merchants to pay an "interchange fee" to the bank that issued the card. The fee amount is set by the payment networks (such as Visa and MasterCard) that process the transaction. In 2010 Congress tasked the Federal Reserve Board with making sure that interchange fees were "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U. S. C. §1693*o*–2(a)(3)(A). Discharging this duty, in 2011 the Board published Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value.

In 2021, Corner Post joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint challenged Regulation II on the ground that it allows higher interchange fees than the statute permits. The District Court dismissed the suit as time-barred under 28 U. S. C. §2401(a), the default six-year statute of limitations applicable to suits against the United States. The Eighth Circuit affirmed.

Held: An APA claim does not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Pp. 4–23.

(a) The APA grants Corner Post a cause of action subject to certain conditions, see 5 U. S. C. §702 and §704, and 28 U. S. C. §2401(a) delineates the time period in which Corner Post may assert its claim. Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers,

or employees. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141. The Court has explained that §702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 127. A litigant therefore cannot bring an APA claim unless and until she suffers an injury. While §702 equips injured parties with a cause of action, §704 provides that judicial review is available in most cases only for "final agency action." *Bennett* v. *Spear*, 520 U. S. 154, 177–178. Reading §702 and §704 together, a plaintiff may bring an APA claim only after she is injured by final agency action.

To determine whether Corner Post's APA claim is timely, the Court must interpret §2401(a), which provides that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." The Board says an APA claim "accrues" under §2401(a) when agency action is "final" for purposes of §704; the claim can accrue for purposes of the statute of limitations even before the plaintiff suffers an injury. The Court disagrees. A right of action "accrues" when the plaintiff has a "complete and present cause of action," which is when she has the right to "file suit and obtain relief." *Green* v. *Brennan*, 578 U. S. 547, 554. Because an APA plaintiff may not file suit and obtain relief until she suffers an injury from final agency action, the statute of limitations does not begin to run until she is injured. Pp. 4–6.

(b) Congress enacted §2401(a) in 1948, two years after it enacted the APA. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which provided for district court jurisdiction over certain claims against the United States. When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into §2401(a)'s general statute of limitations for all suits against the Government. But Congress continued to start the statute of limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with §2401(a) ("after the right of action first accrues").

"Accrue" had a well-settled meaning in 1948, as it does now: A "right accrues when it comes into existence," *United States* v. *Lindsay*, 346 U. S. 568, 569—*i.e.*, "when the plaintiff has a complete and present cause of action," *Gabelli* v. *SEC*, 568 U. S. 442, 448. This definition has appeared "in dictionaries from the 19th century up until today," which explain that a cause of action accrues when a suit may be maintained thereon. 568 U. S., at 448. Thus, a cause of action does not become complete and present—it does not *accrue*—"until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning*

Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201. Contemporaneous legal dictionaries explained that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

The Court's precedent treats this definition of accrual as the "standard rule for limitations periods," *Green*, 578 U. S., at 554, and the Court has "repeatedly recognized that Congress legislates against" this standard rule, *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418. Conversely, the Court has "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U. S., at 200. The Court will not reach such a conclusion "in the absence of any such indication in the text of the limitations period." *Green*, 578 U. S., at 554. Departing from the traditional rule is particularly inappropriate here because contemporaneous statutes demonstrate that Congress in 1948 knew how to create a limitations period that begins with the defendant's action instead of the plaintiff's injury.

The Board would have this Court interpret §2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. A statute of repose "puts an outer limit on the right to bring a civil action" that is "measured. . . from the date of the last culpable act or omission of the defendant." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8. But §2401(a)'s plaintiff-focused language makes it a "statute of limitations," which—in contradistinction to statutes of repose—are "based on the date when the claim accrued." *Id.*, at 7–8. Pp. 6–10.

(c) The Board's arguments to the contrary lack merit. Pp. 10–23.

(1) The Board points to the many specific statutory review provisions that start the clock at finality, contending that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff" can challenge the final agency action. But unlike the specific review provisions that the Board cites, §2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. The latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in §2401(a). As the Court observed in *Rotkiske* v. *Klemm*, it is "particularly inappropriate" to read language into a statute of limitations "when, as here, Congress has shown that it knows how to adopt the omitted language or provision." 589 U. S. 8, 14. Moreover, most of the finality-focused statutes that the Board cites came *after* §2401(a) was enacted in 1948. These other, textually distinct statutes therefore do

not establish a background presumption that the limitations period for facial challenges to agency rules begins when the rule is final. Given the settled, plaintiff-centric meaning of "right of action first accrues" in 1948—not to mention in the Little Tucker Act before it—the Board cannot "displace" this "standard rule" for limitations periods. *Green*, 578 U. S., at 554.

While the Board argues that §2401(a) should not be interpreted to adopt a "challenger-by-challenger" approach, the standard accrual rule that §2401(a) exemplifies is *plaintiff specific*. The Board reads §2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e.*, *anyone's* right of action] first accrues"—which it does not say. Rather, §2401(a)'s text focuses on when the specific plaintiff had the right to sue: It says "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added). And the Court has explained that the traditional accrual rule looks to when *the* plaintiff—this particular plaintiff—has a complete and present cause of action. See *Green*, 578 U. S., at 554. No precedent supports the Board's hypothetical "when could someone else have sued" sort of inquiry.

Importing the Board's special administrative-law rule into §2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted §2401(a). The Court "will not infer such an odd result in the absence of any such indication in the text of the limitations period." *Green*, 578 U. S., at 554. Pp. 10–16.

(2) The Board maintains that §2401(a)'s tolling provision—which provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"—"reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a)" even when a person is unable to sue. Brief for Respondent 24. While true, the tolling exception applies when the plaintiff *had* a complete and present cause of action after he was injured but his legal disability or absence from the country prevented him from bringing a timely suit. The exception sheds no light on when the clock started for Corner Post. P. 16.

(3) The Court's precedents in *Reading Co.* v. *Koons*, 271 U. S. 58, and *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, do not support the Board's unusual interpretation of "accrual." In *Koons*, the Court held that a statutory wrongful-death claim accrued upon the

death of the employee, not on the appointment of an estate administrator, even though the latter was the "only person authorized by the statute to maintain the action." *Koons*, 271 U. S., at 60. The Board interprets *Koons* to hold that a claim accrued at a time when no plaintiff could sue, just as it says Corner Post's claim "accrued" before it could sue. But in *Koons*, the beneficiaries on whose behalf any administrator would seek relief—the "real parties in interest"—had the right to "procure the action" after the employee died. Given this unique context, *Koons* does not contradict the proposition that a claim generally accrues when the plaintiff has a complete and present cause of action. Next, the Board relies on dicta in *Crown Coat* to support its contention that the word "accrues" can take on different meanings in different contexts. But the Board misreads *Crown Coat*, which did not suggest that the words "right of action first accrues" *in a single statute* should mean different things in different contexts. Instead, the Court interpreted §2401(a)—the very statute at issue here—to embody the traditional rule that a claim accrues when the plaintiff has the right to bring suit in court. Pp. 16–20.

(4) Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff, and that successful facial challenges filed after six years upset the reliance interests of those that have long operated under existing rules. But "pleas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U. S. 155, 169 (quoting *Pereira* v. *Sessions*, 585 U. S. 198, 217). Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies, but it did not. In any event, the Board's policy concerns are overstated because regulated parties may always challenge a regulation as exceeding the agency's statutory authority in enforcement proceedings against them. Moreover, there are significant interests supporting the plaintiff-centric accrual rule, including the APA's "basic presumption" of judicial review, *Abbott Labs.*, 387 U. S., at 140, and our "deep-rooted historic tradition that everyone should have his own day in court," *Richards* v. *Jefferson County*, 517 U. S. 793, 798. Pp. 20–23.

55 F. 4th 634, reversed and remanded.

BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a concurring opinion. JACKSON, J., filed a dissenting opinion, in which SOTOMAYOR, J., and KAGAN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

The default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U. S. C. §2401(a). We must decide when a claim brought under the Administrative Procedure Act "accrues" for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.

I

Corner Post is a truckstop and convenience store located in Watford City, North Dakota. It was incorporated in 2017, and in 2018, it opened for business. Like most merchants, Corner Post accepts debit cards as a form of payment. While convenient for customers, debit cards are costly for merchants: Every transaction requires them to pay an "interchange fee" to the bank that issued the card. The amount of the fee is set by the payment networks, like Visa and Mastercard, that process the transaction between

the banks of merchants and cardholders. The cost quickly adds up. Since it opened, Corner Post has paid hundreds of thousands of dollars in interchange fees—which has meant higher prices for its customers.

Interchange fees have long been a sore point for merchants. For many years, payment networks had free rein over the fee amount—and because they used the promise of per-transaction profit to compete for the banks' business, they had significant incentive to raise the fees. Merchants—who would lose customers if they declined debit cards—had little choice but to pay whatever the networks charged. Left unregulated, interchange fees ballooned.

Congress eventually stepped in. The Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasks the Federal Reserve Board with setting "standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 124 Stat. 2068, 15 U. S. C. §1693*o*–2(a)(3)(A). Discharging this duty, the Board promulgated Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value. See Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43420 (2011). The Board published the rule on July 20, 2011.

Four months later, a group of retail-industry trade associations and individual retailers sued the Board, arguing that Regulation II allows costs that the statute does not. See *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). The District Court agreed, *id.*, at 99–109, but the D. C. Circuit reversed, concluding "that the Board's rules generally rest on reasonable constructions of the statute," *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014).

Corner Post, of course, did not exist when the Board

adopted Regulation II or even during the D. C. Circuit litigation. But after opening its doors, it too became frustrated by interchange fees, and in 2021, joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint alleges that Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits. See 5 U. S. C. §§706(2)(A), (C).

The District Court dismissed the suit as barred by 28 U. S. C. §2401(a), the applicable statute of limitations, 2022 WL 909317, *7–*9 (ND, Mar. 11, 2022), and the Eighth Circuit affirmed, *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634 (2022). Following other Circuits, it distinguished between "facial" challenges to a rule (like Corner Post's challenge to Regulation II) and challenges to a rule "as-applied" to a particular party. *Id.*, at 640–641. The Eighth Circuit held that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *Id.*, at 641. On this view, §2401(a)'s 6-year limitations period began in 2011, when the Board published Regulation II, and expired in 2017, before Corner Post swiped its first debit card. See *id.*, at 643. Corner Post's suit was therefore too late.

The Eighth Circuit's decision deepened a circuit split over when §2401(a)'s statute of limitations begins to run for APA suits challenging agency action. At least six Circuits now hold that the limitations period for "facial" APA challenges begins on the date of final agency action—*e.g.*, when the rule was promulgated—regardless of when the plaintiff was injured. See, *e.g.*, *id.*, at 641; *Wind River Min. Corp.* v. *United States*, 946 F. 2d 710, 715 (CA9 1991); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1287 (CA5 1997); *Harris* v. *FAA*, 353 F. 3d 1006, 1009–1010 (CADC 2004); *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012); *Odyssey Logistics & Tech. Corp.* v. *Iancu*, 959 F. 3d 1104, 1111–1112 (CA Fed.

2020). By contrast, the Sixth Circuit has stated a generally applicable rule that §2401(a)'s limitations period begins when the plaintiff is injured by agency action, even if that injury did not occur until many years after the action became final. *Herr* v. *United States Forest Serv.*, 803 F. 3d 809, 820–822 (2015) ("When a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings" (emphasis deleted)). We granted certiorari to resolve the split. 600 U. S. ___ (2023).

II

Three statutory provisions control our analysis: 5 U. S. C. §702 and §704, the relevant APA provisions, and 28 U. S. C. §2401(a), the relevant statute of limitations. The APA provisions grant Corner Post a cause of action subject to certain conditions, and §2401(a) sets the window within which Corner Post can assert its claim.

Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967). It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. §702. We have explained that §702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 127 (1995). Thus, a litigant cannot bring an APA claim unless and until she suffers an injury.[1]

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[1]The dissent asserts that §702 "restricts *who* may challenge agency

While §702 equips injured parties with a cause of action, §704 limits the agency actions that are subject to judicial review. Unless another statute makes the agency's action reviewable (and none does for Regulation II), judicial review is available only for "final agency action." §704. In most cases, then, a plaintiff can only challenge an action that "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U. S. 154, 177–178 (1997) (internal quotation marks omitted). Note that §702's injury requirement and §704's finality requirement work hand in hand: Each is a "necessary, but not by itself . . . sufficient, ground for stating a claim under the APA." *Herr*, 803 F. 3d, at 819.

The applicable statute of limitations, 28 U. S. C. §2401(a), contains the language we must interpret: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*." (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it. See, *e.g.*, 33 U. S. C. §1369(b) (deadline to challenge certain agency actions under the Clean Water Act).

The Board contends that an APA claim "accrues" when agency action is "final" for purposes of §704—injury, it says,

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action," yet its injury requirement "says nothing about" the cause of action or elements of the claim. *Post*, at 16. But surely the dissent does not mean to suggest that an *uninjured* person may bring an APA claim. Whether one calls injury a restriction on who may sue or an element of the cause of action, the relevant, undisputed point is that a plaintiff cannot sue under the APA unless she is "injured in fact by agency action." *Newport News*, 514 U. S., at 127.

is necessary for the suit but irrelevant to the statute of limitations.[2] We disagree. A right of action "accrues" when the plaintiff has a "complete and present cause of action"—*i.e.*, when she has the right to "file suit and obtain relief." *Green* v. *Brennan*, 578 U. S. 547, 554 (2016) (internal quotation marks omitted). An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.

III

Congress enacted §2401(a) in 1948, two years after it enacted the APA. See 62 Stat. 971. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which gave district courts jurisdiction over non-tort monetary claims not exceeding $10,000 against the United States. See §24, 36 Stat. 1093 ("That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made"); Brief for Professor Aditya Bamzai et al. as *Amici Curiae* 5–6. When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into a general statute of limitations for all

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[2] The Board leaves open the possibility that someone could bring an as-applied challenge to a rule when the agency relies on that rule in enforcement proceedings against that person, even if more than six years have passed since the rule's promulgation. But Corner Post, as a merchant rather than a payment network, is not regulated by Regulation II—so it will never be the target of an enforcement action in which it could challenge that rule. JUSTICE KAVANAUGH asserts that "Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules." *Post*, at 1 (concurring opinion). Whether the APA authorizes vacatur has been subject to thoughtful debate by Members of this Court. See, *e.g.*, *United States* v. *Texas*, 599 U. S. 670, 693–702 (2023) (GORSUCH, J., concurring in judgment). We took this case only to decide how §2401(a)'s statute of limitations applies to APA claims. We therefore assume without deciding that vacatur is available under the APA.

suits against the Government—replacing "under this paragraph" with "every civil action against the United States." But Congress continued to start the 6-year limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with §2401(a) ("after the right of action first accrues").

In 1948, as now, "accrue" had a well-settled meaning: A "right accrues when it comes into existence," *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954)—*i.e.*, "'when the plaintiff has a complete and present cause of action,'" *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (quoting *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007)). This definition has appeared "in dictionaries from the 19th century up until today." *Gabelli*, 568 U. S., at 448. Legal dictionaries in the 1940s and 1950s uniformly explained that a cause of action "'accrues' when a suit may be maintained thereon." Black's Law Dictionary 37 (4th ed. 1951) (Black's); see also, *e.g.*, Ballentine's Law Dictionary 15–16 (2d ed. 1948) (Ballentine's) ("[A]ccrual of cause of action" defined as the "coming or springing into existence of a right to sue" (boldface deleted)). Thus, we have explained that a cause of action "does not become 'complete and present' for limitations purposes"—it does not *accrue*—"until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997).

Importantly, contemporaneous dictionaries also explained that a cause of action accrues "on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury." Black's 37. "[I]f an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and *in such case no cause of action accrues until the loss or damage occurs*." Ballentine's 16 (emphasis added). Thus, when Congress used the phrase "right of action first accrues" in

§2401(a), it was well understood that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

Our precedent treats this definition of accrual as the "standard rule for limitations periods." *Green*, 578 U. S., at 554. "We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005) (quoting *Bay Area Laundry*, 522 U. S., at 201). It is "unquestionably the traditional rule" that "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief.'" *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (Scalia, J., concurring in judgment) (quoting 1 H. Wood, Limitation of Actions §122a, p. 684 (rev. 4th ed. 1916) (Wood)). Conversely, we have "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U. S., at 200.

This traditional rule constitutes a strong background presumption. While the "standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit," we "'will not infer such an odd result in the absence of any such indication' in the text of the limitations period." *Green*, 578 U. S., at 554 (quoting *Reiter* v. *Cooper*, 507 U. S. 258, 267 (1993)). "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U. S., at 201.

There is good reason to conclude that Congress codified the traditional accrual rule in §2401(a). Nothing "in the text of [§2401(a)'s] limitations period" gives any indication that it begins to run before the plaintiff has a complete and

present cause of action. *Green*, 578 U. S., at 554. Rather, §2401(a) uses standard language that had a well-settled meaning in 1948: "right of action first accrues." Moreover, Congress knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action instead of the plaintiff's injury: Just six years before it enacted §2401(a), Congress passed the Emergency Price Control Act of 1942, which required challenges to Office of Price Administration actions to be filed "[w]ithin a period of sixty days *after the issuance of any regulation or order*." §203(a), 56 Stat. 31 (emphasis added); see also Administrative Orders Review Act (Hobbs Act), §4, 64 Stat. 1130 (1950) (allowing petitions for review "within sixty days after entry of" a "final order reviewable under this Act"). Section 2401(a), by contrast, stuck with the standard accrual language.

Section 2401(a) thus operates as a statute of limitations rather than a statute of repose. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 7–8 (2014) (quoting Black's 1546 (9th ed. 2009)). That describes §2401(a), with its reference to when the right of action "accrues," to a tee. "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action" that is "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." 573 U. S., at 8. Such statutes bar "'any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.'" *Ibid.* (quoting Black's 1546). That describes statutes like the Hobbs Act, which sets a filing deadline of 60 days from the "entry" of the agency order. 64 Stat. 1130. Statutes of limitations "require plaintiffs to pursue diligent prosecution of known claims"; statutes of repose reflect a "legislative judgment that a defendant should be free from liability after the

legislatively determined period of time." *CTS Corp.*, 573 U. S., at 8–9 (internal quotation marks omitted).[3] The Board asks us to interpret §2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. But §2401(a)'s plaintiff-focused language makes it an accrual-based statute of limitations.

* * *

Section 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action. Because injury, not just finality, is required to sue under the APA, Corner Post's cause of action was not complete and present until it was injured by Regulation II. Therefore, its suit is not barred by the statute of limitations.

IV

The Board concedes that some claims accrue for purposes of §2401(a) when the plaintiff has a complete and present cause of action—in other words, it admits that "accrue" carries its usual meaning for some claims. But it argues that facial challenges to agency rules are different, accruing when agency action is final rather than when the plaintiff can assert her claim. See also *post*, at 5–6 (JACKSON, J., dissenting). The Board raises several arguments to support its position, but none work.

A

The Board puts the most weight on the many specific statutory review provisions that start the clock at finality. See also *post*, at 12–15 (JACKSON, J., dissenting). The

[3] Perplexingly, the dissent rejects this distinction, *post*, at 10–11, even though our precedent clearly recognizes it: *CTS Corp.* acknowledged the "substantial overlap between the policies of the two types of statute" but concluded nonetheless that "each has a distinct purpose and each is targeted at a different actor." 573 U. S., at 8.

Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations of the Federal Communications Commission, Secretary of Agriculture, and Secretary of Transportation, among others, to petition for review "within 60 days after [the] entry" of the final agency action. 28 U. S. C. §§2342, 2344; see also, *e.g.*, 29 U. S. C. §655(f) (suits challenging Occupational Safety and Health Administration standards must be filed "prior to the sixtieth day after such standard is promulgated"). The Board contends that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff" can challenge the final agency action. Brief for Respondent 9. There is "no sound basis," it insists, "for instead applying a challenger-by-challenger approach to calculate the limitations period on APA claims." *Ibid.*; see also *post*, at 9–10 (JACKSON, J., dissenting).

1

This argument hits the immutable obstacle of §2401(a)'s text. Unlike the specific review provisions that the Board cites, §2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. To begin, the latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions actually undercut the Board's argument, because they illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in §2401(a). As we observed in *Rotkiske* v. *Klemm*, it is "particularly inappropriate" to read language into a statute of limitations "when, as here, Congress has shown that it knows how to adopt the omitted language or provision." 589 U. S. 8, 14 (2019).

In arguing to the contrary, *post*, at 12–16, the dissent ignores the textual differences between §2401(a) and finality-

focused specific review provisions—flouting *Rotkiske*'s admonition to heed such distinctions. According to the dissent, we cannot expect "Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision" that applies generally. *Post*, at 15. But §2401(a)'s text reflects a choice: Congress took the Little Tucker Act's plaintiff-focused limitations period—which began when "the right accrued for which the claim is made," 36 Stat. 1093—and made it generally applicable to "every" suit against the United States, §2401(a); see Part III, *supra*. Congress could have created a separate residual provision for suits challenging agency action and pegged its limitations period to the moment of finality, using statutes like the Emergency Price Control Act as a model. It chose a different path.

Undeterred, the dissent insists that by the time §2401(a) was enacted, Congress had "uniformly expressed [a] judgment" that the limitations period for agency suits should be defendant-centric and start with finality. *Post*, at 14. Again, this argument disregards §2401(a)'s text in favor of alleged congressional intent divined from *other* statutes with very different language. "As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text"; the Court "may not 'replace the actual text with speculation as to Congress' intent.'" *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629, 642 (2022) (quoting *Magwood* v. *Patterson*, 561 U. S. 320, 334 (2010)).

In any event, the dissent misunderstands the history. See *post*, at 14, and n. 6. (Notably, the Board itself does not make this argument.) While the Emergency Price Control Act of 1942 preceded the APA (1946) and §2401(a) (1948), most finality-focused limitations provisions, like the Hobbs Act (1950), came later. See *post*, at 12–13, and n. 5; *e.g.*, 5 U. S. C. §7703(b)(1) (added by 92 Stat. 1143 (1978)). To conjure its supposed backdrop, the dissent cites a hodgepodge

of other pre-1948 statutes that started the clock at finality. *Post*, at 14, n. 6. But these statutes generally governed challenges to orders adjudicating a party's own rights—what we today might call "as-applied" challenges. For example, 7 U. S. C. §194(a) provided a 30-day limitations period for a meatpacker to appeal an order finding that the packer "has violated or is violating any provision" of the statute regulating business practices in the meatpacking industry. 42 Stat. 161–162; see also, *e.g.*, 15 U. S. C. §45(c) (persons required by a Federal Trade Commission order to cease a business practice may obtain review of that order within 60 days). Statutes like these do not contradict the plaintiff-centric standard accrual rule, because a party subject to such an order suffers legally cognizable injury at the same time that the order becomes final.[4]

Thus, even if the "intention" Congress "expressed" in textually distinct statutes could overcome §2401(a)'s language, *post*, at 14, the dissent's history would not support its supposed background presumption—that the limitations period for facial challenges to regulations begins when the rule becomes final even if the plaintiff does not yet have a complete and present cause of action. Instead, the best course, as always, is to stick with the ordinary meaning of the text that actually applies, §2401(a). Given the settled, plaintiff-centric meaning of "right of action first accrues" in

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[4]There is another reason to doubt the dissent's supposed background limitations principle for facial challenges to agency rules: In the 1940s, "most administrative activity was adjudicative in nature"; agencies "rarely, if ever, adopted sweeping regulations." K. Hickman & R. Pierce, 1 Administrative Law §1.3, p. 26 (7th ed. 2024). The dissent errs by extrapolating a general congressional intent that all agency suits be subject to a finality-based limitations rule based on pre-1948 statutes that governed a subset of agency actions—adjudicative orders—and were enacted before facial challenges to regulations became common. It is hard to see how provisions governing when a party may challenge an order adjudicating her own rights could set any kind of background rule for facial APA challenges to generally applicable regulations.

1948—not to mention in the Little Tucker Act—the dissent cannot "displace" this "standard rule" with scattered citations to different, inapposite statutes. *Green*, 578 U. S., at 554.

2

The standard accrual rule that §2401(a)'s limitations period exemplifies is *plaintiff specific*—even if repose provisions like the Hobbs Act eschew a "challenger-by-challenger" approach. Brief for Respondent 9. The Board's rule would start the limitations period applicable to the plaintiff not when *she* had a complete and present cause of action but when the agency action was final and, theoretically, some *other* plaintiff was injured and could have sued. But §2401(a)'s text focuses on a specific plaintiff: "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added.)

The dissent disputes §2401(a)'s plaintiff specificity by pointing out that it does not say "*the plaintiff's* right of action first accrues." *Post*, at 9. True, but it does use the definite article "the" to link "*the* complaint" with "*the* right of action." So the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint*—the plaintiff's cause of action—is complete. And while the dissent cites dictionary definitions of "accrue" that mention "'*a* right to sue,'" *ibid.*, the statute's use of the definite article "the" takes precedence. The Board and the dissent read §2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e.*, *anyone's* right of action] first accrues"—which, of course, it does not.

In fact, we have explained that the traditional accrual rule looks to when "*the* plaintiff"—this particular plaintiff—"has a complete and present cause of action." *Green*, 578 U. S., at 554 (internal quotation marks omitted; emphasis added). No precedent suggests that the traditional rule contemplates the Board's hypothetical "when could

someone else have sued" sort of inquiry.[5] Rather, the "statute of limitations begins to run at the time *the plaintiff* has the right to apply to the court for relief." *TRW Inc.*, 534 U. S., at 37 (opinion of Scalia, J.) (internal quotation marks omitted; emphasis added).[6]

Importing the Board's special administrative-law rule into §2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted §2401(a). See Part III, *supra*. The Board's interpretation would thereby decouple the statute of limitations from any injury "such that the limitations period begins to run before a plaintiff can file a suit"—for *some*, *but not all*, suits governed by §2401(a). *Green*, 578 U. S., at 554. We "will not infer such an odd result in the

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[5] While the dissent attempts to cabin our precedent describing the plaintiff-specific standard accrual rule, nothing in those cases suggests that the rule is only plaintiff-specific for "plaintiff-specific causes of action." *Post*, at 10; see, *e.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (The "'standard rule'" that a "claim accrues 'when the plaintiff has a complete and present cause of action'" has "governed since the 1830s" and "appears in dictionaries from the 19th century up until today"). And regardless, the dissent's assertion that "administrative-law claims" are *not* "plaintiff specific," *post*, at 6, is mystifying given that an APA plaintiff cannot sue until *she* suffers an injury, see 5 U. S. C. §702; n. 1, *supra*. By emphasizing the plaintiff-agnostic aspects of facial challenges to agency action, *post*, at 10, 16–18, the dissent conflates the defendant-focused *substance* of an APA claim with its plaintiff-specific *cause of action*.

[6] Moreover, there may be cases where *no one* is injured and able to sue at the time of final agency action—*e.g.*, if the agency delays a rule's enforcement—but the Board would still start the clock then. Cf. *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 162–166 (1967) (agency rule was final but challenge was not yet ripe). So the Board's position cannot be reconciled even with a challenger-agnostic form of the traditional accrual rule, which at least would require that *someone* have a complete and present cause of action before the limitations period begins.

absence of any such indication in the text of the limitations period." *Ibid.* (internal quotation marks omitted).

B

Turning to §2401(a)'s text, the Board draws significance from this sentence: "The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." This language, the Board stresses, "necessarily reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a)" even when a person is unable to sue. Brief for Respondent 24. True enough. It is a mystery, however, why the Board finds this helpful. The tolling exception applies when the plaintiff *had* a complete and present cause of action after he was injured but his legal disability or absence from the country "prevent[ed] him from bringing a timely suit." *Goewey* v. *United States*, 222 Ct. Cl. 104, 113, 612 F. 2d 539, 544 (1979) (*per curiam*). What matters for accrual is when the plaintiff had "the *right* to apply to the court for relief," not whether some external impediment prevented her from doing so. Wood §122a, at 684 (emphasis added). The exception, therefore, sheds no light on when the clock started ticking for Corner Post—but it does show Congress's concern for plaintiffs who might lose a cause of action through no fault of their own.

C

The Board also leans on our precedent—namely, *Reading Co.* v. *Koons*, 271 U. S. 58 (1926), and *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967)—to support its unusual interpretation of "accrual." See also *post*, at 6–9 (JACKSON, J., dissenting). Again, the Board comes up empty.

In *Koons*, we interpreted the statute of limitations under the Federal Employers' Liability Act, which barred actions

brought more than two years after "'the cause of action accrued.'" 271 U. S., at 60 (quoting ch. 149, §6, 35 Stat. 66). We held that the plaintiff's wrongful-death claim accrued when the employee died, even though the estate's administrator was not appointed until later and the administrator was "the only person authorized by the statute to maintain the action." 271 U. S., at 60. The Board interprets *Koons* to hold that a claim accrued at a time when no plaintiff could sue. Thus, the Board reasons, it is consistent with the meaning of "accrue" to say that Corner Post's claim "accrued" before it could sue.

The Board's characterization of *Koons* is incomplete. *Koons* explained that the administrator "acts only for the benefit of persons specifically designated in the statute," and at the "time of death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator." *Id.*, at 62. If a beneficiary sued in her individual capacity immediately after the employee's death, she could amend her suit to describe herself as "executor or administrator of the decedent." *Ibid.* So "at the death of decedent, there are real parties in interest who may procure the action to be brought." *Id.*, at 62–63. While it is true that the claim accrued before any particular administrator was appointed, the beneficiaries on whose behalf any administrator would seek relief—the "real parties in interest"—had the right to "procure the action" after the employee died. Given this unique context, *Koons* does not contradict the proposition that a claim generally accrues when the plaintiff has a complete and present cause of action.

Nor does *Crown Coat*. That case concerned a contract dispute in which a Government contractor sought an equitable adjustment to the payment it received. 386 U. S., at 507. The contract required the contractor to present its claim to the contracting officer and Armed Services Board

of Contract Appeals; its claim was "not subject to adjudication in the courts" until it was denied by the Board. *Id.*, at 511. The question presented was whether §2401(a)'s statute of limitations began to run when the Board issued its final determination or at an earlier date. *Id.*, at 507.

We held that the right of action first accrued when the Board denied the contractor's claim, because the contractor had "the right to resort to the courts only upon the making of that administrative determination." *Id.*, at 512. We explained that §2401(a)'s phrase "right of action" refers to "the right to file a civil action in the courts against the United States." *Id.*, at 511. Given the contract's administrative-exhaustion requirement, "the contractor's claim was subject only to administrative, not judicial, determination in the first instance"; the plaintiff was "not legally entitled to ask the courts to adjudicate [its] claim as an original matter." *Id.*, at 511–512, 515. So its "claim or right to bring a civil action against the United States" did not "matur[e]" until the Board made its final decision. *Id.*, at 514. *Crown Coat* thus supports Corner Post: The Court interpreted §2401(a) to embody the traditional rule that a claim accrues when the plaintiff has the right to bring suit in court.

Notwithstanding *Crown Coat*'s holding, the Board and the dissent try to marshal support from its dicta. The Court noted that it is hazardous "to define for all purposes when a 'cause of action' first 'accrues'"; it cautioned that those words should be "'interpreted in the light of the general purposes of the statute and of its other provisions'" and the "'practical ends'" served by time limitations. *Id.*, at 517 (quoting *Koons*, 271 U. S., at 62). Seizing on this language, the Board insists that the word "accrues" is a chameleon, taking on different meanings in different contexts—and in the administrative-law context, a right of action "accrues" when a regulation is final, full stop. See also *post*, at 6 (JACKSON, J., dissenting) (citing *Crown Coat* for the proposition that "the word 'accrues' lacks any fixed meaning").

The Board and the dissent vastly overread—in fact, they misread—*Crown Coat*. The Court did not suggest that the same words "right of action first accrues" *in a single statute* should mean different things in different contexts—which is how the Board and the dissent would have us interpret §2401(a). Rather, the Court made its observation in the course of distinguishing §2401(a) from a statutory scheme that departed from the traditional accrual rule.[7] 386 U. S., at 516–517. Moreover, as we have already explained, the Court interpreted §2401(a)—the very statute at issue in this case—to start the clock when the plaintiff is "legally entitled" to file suit. *Id.*, at 515. It also specifically rejected the Government's position that the time can run even before a plaintiff's "civil action against the United States matures." *Id.*, at 514; see also *ibid.* (noting that the Government's position "would have unfortunate impact"). We therefore do not read *Crown Coat*'s "general purposes" language to contradict either its holding or the "'standard rule' for limitations periods." *Green*, 578 U. S., at 554.

Even if *Crown Coat*'s dicta supported sapping "accrues" of any "fixed meaning," *post*, at 6 (JACKSON, J., dissenting), this approach has been contravened by the weight of subse-

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[7]The Court distinguished the limitations scheme at issue in *McMahon* v. *United States*, 342 U. S. 25 (1951). That scheme involved two statutes: one requiring "actions to be brought within two years after 'the cause of action arises'" and another "permit[ting] court action only if the claim ha[d] been administratively disallowed, but set[ting] no time within which a claim must be presented to the administrative body." *Crown Coat*, 386 U. S., at 516–517. The *McMahon* Court held that the claim accrued not after the administrative disallowance that would enable the plaintiff to sue in court, but at the time of the plaintiff's earlier injury. 342 U. S., at 27. *Crown Coat* attributed this holding to the unique two-statute context: "[P]ostpon[ing] the usual time of accrual of the cause of action [*i.e.*, the time of injury] until the date of disallowance" would have "permit[ted] the claimant to postpone indefinitely the commencement of the running of the statutory period." 386 U. S., at 517; see *McMahon*, 342 U. S., at 27.

quent precedent. Our limitations cases from the last several decades have instead emphasized the strength of the traditional, plaintiff-centric accrual rule and demanded that departures be justified by the statutory "text of the limitations period." *Green*, 578 U. S., at 554; see also, *e.g.*, *Graham County*, 545 U. S., at 418–419 (explaining that in *Reiter* v. *Cooper*, 507 U. S., at 267, the Court "declin[ed] to countenance the 'odd result' that a federal cause of action and statute of limitations arise at different times 'absen[t] . . . any such indication in the statute'"); *Bay Area Laundry*, 522 U. S., at 201.

D

Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff. After that point, facial challenges impose significant burdens on agencies and courts. Moreover, if they are successful, such challenges upset the reliance interests of the agencies and regulated parties that have long operated under existing rules. See also *post*, at 18–24 (JACKSON, J., dissenting).

"[P]leas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U. S. 155, 169 (2021) (quoting *Pereira* v. *Sessions*, 585 U. S 198, 217 (2018)). Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies. It did not.

That is enough to dispatch the Board's policy arguments, but we add that its concerns are overstated. Put aside facial challenges like Corner Post's. Regulated parties "may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them" or "petition an agency to reconsider a longstanding rule and then appeal the denial of that petition." *Herr*, 803 F. 3d, at 821–822. So even on the Board's preferred interpretation, "[a] federal regulation that makes it six years without being

contested does not enter a promised land free from legal challenge." *Id.*, at 821. Likewise, the dissent imagines an alternative reality of total finality that simply does not exist. See *post*, at 21–23.

Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.[8]

Turning to the other side of the policy ledger, the Board slights the arguments supporting the plaintiff-centric accrual rule. In addition to being compelled by §2401(a)'s text, this rule vindicates the APA's "basic presumption" that anyone injured by agency action should have access to judicial review. *Abbott Labs.*, 387 U. S., at 140. It also respects our "deep-rooted historic tradition that everyone

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[8] It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. Reply Brief 18–19. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case *are* procedural," *post*, at 18, is confused. Even if some of Corner Post's claims might be procedural, its central claim—that the regulation violates the statute—is a prototypical substantive challenge.

should have his own day in court." *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (1996) (internal quotation marks omitted). Under the Board's finality rule, only those fortunate enough to suffer an injury within six years of a rule's promulgation may bring an APA suit. Everyone else—no matter how serious the injury or how illegal the rule—has no recourse.[9]

The dissent also raises a host of policy arguments masquerading as "matter[s] of congressional intent." *Post*, at 18–24. And it warns that today's opinion will "devastate the functioning of the Federal Government." *Post*, at 23. This claim is baffling—indeed, bizarre—in a case about a statute of limitations. The Solicitor General, whose mandate is to protect the interests of the Federal Government, comes nowhere close to suggesting that a plaintiff-centric interpretation of §2401(a) spells the end of the United States as we know it. Perhaps the dissent believes that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges; or perhaps it believes that meritless challenges will flood federal courts that are too incompetent to reject them. We have more confidence in both the Executive Branch and the Judiciary. But we do agree with the dissent on one point: "'[T]he ball is in Congress' court.'" *Post*, at 24 (quoting *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting)). Section 2401(a) is 75 years old. If it is a poor fit for modern APA litigation, the

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[9] Corner Post has no other way to obtain meaningful review of Regulation II. Because Regulation II does not directly regulate it, it will never be subject to enforcement actions in which it may challenge the rule's legality. See n. 2, *supra.* Nor is the ability to petition the Board for rulemaking to change Regulation II a sufficient substitute for *de novo* judicial review of its lawfulness: The agency's "discretionary decision to decline to take new action" would be subject only to "deferential judicial review." *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 588 U. S. 1, 25 (2019) (KAVANAUGH, J., concurring in judgment).

solution is for Congress to enact a distinct statute of limitations for the APA.

* * *

An APA claim does not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Because Corner Post filed suit within six years of its injury, §2401(a) did not bar its challenge to Regulation II. We reverse the Eighth Circuit's judgment to the contrary and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE KAVANAUGH, concurring.

I agree with the Court that a claim under the Administrative Procedure Act accrues when the plaintiff is injured by the challenged agency rule. I also agree with the Court that today's decision vindicates the APA's "'basic presumption' that anyone injured by agency action should have access to judicial review." *Ante*, at 21 (quoting *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967)).

I write separately to explain a crucial additional point: Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules.

Corner Post challenged an agency rule that regulates the fees that banks may charge. But Corner Post is not a bank regulated by the rule. Rather, it is a business that must pay the fees charged by the banks who are regulated by the rule. Corner Post complains that the agency rule allows banks to charge fees that are unreasonably high.

Corner Post's suit is a typical APA suit. An unregulated plaintiff such as Corner Post often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff. In those cases, an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff, because the plaintiff is not regulated

by the rule in the first place. Instead, the unregulated plaintiff can obtain meaningful relief only if the APA authorizes vacatur of the agency rule, thereby remedying the adverse downstream effects of the rule on the unregulated plaintiff.

The APA empowers federal courts to "hold unlawful and set aside agency action" that, as relevant here, is arbitrary and capricious or is contrary to law. 5 U. S. C. §706(2). The Federal Government and the federal courts have long understood §706(2) to authorize vacatur of unlawful agency rules, including in suits by unregulated plaintiffs who are adversely affected by an agency's regulation of others.

Recently, the Government has advanced a far-reaching argument that the APA does not allow vacatur. See Brief for Respondent 42; Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. Invoking a few law review articles, the Government contends that the APA's authorization to "set aside" agency action does not allow vacatur, but instead permits a court only to enjoin an agency from enforcing a rule against the plaintiff.

If the Government were correct on that point, Corner Post could not obtain any relief in this suit because, to reiterate, Corner Post is not regulated by the rule to begin with. And the APA would supply no remedy for most other *unregulated* but adversely affected parties who traditionally have brought, and regularly still bring, APA suits challenging agency rules.

The Government's position would revolutionize long-settled administrative law—shutting the door on entire classes of everyday administrative law cases. The Government's newly minted position is both novel and wrong. It "disregards a lot of history and a lot of law." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2311 (2024).

The APA authorizes vacatur of agency rules; therefore, Corner Post can obtain relief in this case.

I

Corner Post owns a truck stop and convenience store in rural North Dakota. When a customer uses a debit card at its business, Corner Post must pay a fee (known as an interchange fee) to the bank that processes the customer's transaction.

As the Court explains, the Dodd-Frank Act requires the Federal Reserve Board to "prescribe regulations" for assessing whether interchange fees are "reasonable and proportional to the cost incurred" in processing a debit-card transaction. 15 U. S. C. §1693*o*–2(a)(3)(A); see *ante*, at 2. Pursuant to the Act, the Board has issued a rule that sets a maximum fee of about 21 cents per transaction. 76 Fed. Reg. 43394, 43420 (2011). For convenience, I will refer to that rule as the fee rule.

Corner Post is not subject to the fee rule. Corner Post does not charge interchange fees to its customers, and Corner Post lacks any authority to set those fees. But because Corner Post must *pay* the fees to banks, it is affected by the agency's rule setting the maximum fees that banks may charge. In particular, Corner Post would be harmed by a fee rule that allows unreasonably high fees and would benefit from a fee rule that more strictly limits the fees that banks may charge.

The APA authorizes any person who has been "adversely affected or aggrieved" by a "final agency action" to obtain judicial review in federal district court. 5 U. S. C. §§702, 704. In an APA suit, the district court "shall" "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §706(2)(A).

Corner Post filed this APA suit because it believes that the fee rule allows banks to charge unreasonably high fees. In particular, Corner Post argues that the Board's 21-cent fee cap is unreasonably high and therefore arbitrary and capricious under the APA. Corner Post asked the Federal

District Court to vacate the fee rule on the ground that the Board must more strictly regulate bank fees (in other words, that the Board must set a lower cap on the fees that banks may charge).

Corner Post would not be able to obtain relief in its lawsuit through any remedy other than vacatur. Corner Post could not obtain relief through an injunction forbidding the Board from enforcing the rule against it. That is because the rule does not regulate Corner Post and therefore is not and cannot be enforced against Corner Post in the first place. Nor could Corner Post secure relief through an injunction against banks; the APA does not authorize suits against private parties.

Corner Post instead needs a remedy that acts directly on the fee rule—specifically, by vacating it. Indeed, without vacatur, it is hard to imagine what kind of lawsuit Corner Post could file. At oral argument, the Government ultimately seemed to acknowledge that reality and the necessity of the vacatur remedy if Corner Post is to obtain any relief in this case. See Tr. of Oral Arg. 76 ("it's possible that the only way to provide this party relief would be vacatur").[1]

II

For Corner Post to obtain relief, an important question therefore is whether the APA authorizes vacatur of unlawful agency actions, including agency rules.

The answer is yes—in light of the text and history of the

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[1] A plaintiff could not challenge the fee rule by suing to "compel agency action" that is "unlawfully withheld or unreasonably delayed." 5 U. S. C. §706(1). The remedy of compelling agency action applies if an agency fails to issue a required rule. But here, the Board issued a rule, and the question is whether the rule set a reasonable fee cap. It would therefore make little sense to say that the fee rule has been "withheld" or "delayed." Indeed, it seems that §706(1) has almost never been used to challenge extant agency rules, as opposed to challenging the absence of required rules.

APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available.

The text and history of the APA authorize vacatur. The text directs courts to "set aside" unlawful agency actions. 5 U. S. C. §706(2)(A). When Congress enacted the APA in 1946, the phrase "set aside" meant "cancel, annul, or revoke." Black's Law Dictionary 1612 (3d ed. 1933); see also Black's Law Dictionary 1537 (4th ed. 1951) (same); Bouvier's Law Dictionary 1103 (W. Baldwin ed. 1926) ("To annul; to make void; as, to set aside an award"). At that time, it was common for an appellate court that reversed the decision of a lower court to direct that the lower court's "judgment" be "set aside," meaning vacated. *E.g.*, *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 322 U. S. 271, 274 (1944). Likewise, Congress used the phrase "set aside" in many pre-APA statutes that plainly contemplated the vacatur of agency actions.[2]

The APA incorporated that common and contemporaneous meaning of "set aside." When a federal court sets aside an agency action, the federal court vacates that order—in much the same way that an appellate court vacates the judgment of a trial court.

The APA prescribes the same "set aside" remedy for all categories of "agency action," including agency adjudicative orders and agency rules. §§551(13), 706(2). When a federal court concludes that an agency adjudicative order is

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[2] See, *e.g.*, Hepburn Act of 1906, ch. 3591, §5, 34 Stat. 584, 592 (courts could "enjoin, set aside, annul, or suspend any order or requirement of" the Interstate Commerce Commission); Securities Exchange Act of 1934, ch. 404, §25(a), 48 Stat. 881, 902 (authorizing courts "to affirm, modify, and enforce or set aside [an] order" of the SEC); Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, §701(f)(3), 52 Stat. 1040, 1055–1056 (authorizing a court to "affirm the order" of the FDA, "or to set it aside in whole or in part, temporarily or permanently").

unlawful, the court must vacate that order. Around the time when Congress enacted the APA, the phrase "set aside" the agency order meant vacate that order. See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952). And because federal courts must "set aside" agency rules in the same way that they set aside agency orders, successful challenges to agency rules must award the same remedy. See M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). In short, to "set aside" a rule is to vacate it.

Longstanding precedent reinforces the text. Over the decades, this Court has affirmed countless decisions that vacated agency actions, including agency rules. See, *e.g.*, *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. 1, 36, and n. 7 (2020); *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 486 (2001); *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 364–365 (1986). Those decisions vacated the challenged agency rules rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs. See, *e.g.*, *Regents of Univ. of Cal.*, 591 U. S., at 9 (holding that the rescission of a major federal program "must be vacated"). And the D. C. Circuit—which handles the lion's share of the country's administrative law cases—has likewise long recognized vacatur as the usual relief when a court holds that agency rules are unlawful. See, *e.g.*, *National Mining Assn.* v. *United States Army Corps of Engineers*, 145 F. 3d 1399, 1409 (CADC 1998). In the words of the D. C. Circuit: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon* v. *Thornburgh*, 878 F. 2d 484, 495, n. 21 (CADC 1989).

Importantly, as Corner Post's lawsuit shows, the availability of vacatur determines not only the extent of the

relief that courts may award in APA suits by *regulated* parties, but also whether *unregulated* parties can obtain relief under the APA at all. In most APA litigation brought by unregulated but adversely affected parties, a plaintiff can obtain relief only through vacatur of the adverse agency action. Prohibiting courts from vacating agency actions would essentially close the courthouse doors on those unregulated plaintiffs—a radical change to administrative law that would insulate a broad swath of agency actions from any judicial review.[3]

Vacatur is therefore essential to fulfill the "basic presumption of judicial review" for parties who have been "adversely affected or aggrieved" by federal agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quotation marks omitted). The Court has long applied that "strong presumption" unless there is a "persuasive reason to believe" that Congress intended to bar review of certain actions. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986) (quotation marks omitted); see also, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22–23 (2018); *Sackett* v. *EPA*, 566 U. S. 120, 128–131 (2012). Eliminating the vacatur remedy would contravene the strong *Abbott Laboratories* presumption by insulating many agency rules from meaningful judicial review (which perhaps is the Government's motivation for its recent campaign).

The absence of vacatur would also create an asymmetry. For example, without the vacatur remedy, a *bank* could still challenge the Board's regulation of interchange fees in a suit for injunctive relief. The bank might argue that the fee cap is too low and that the Board should be enjoined from enforcing the cap against the bank—a result that would

[3]Most of the recent academic and judicial discussion of this issue has addressed suits by regulated parties. That discussion has largely missed a major piece of the issue—suits by unregulated but adversely affected parties.

allow the bank to charge higher fees. But because Corner Post is not subject to the Board's regulation, it could not contend that the fee cap is too high and that the Board should be enjoined from keeping the cap so high. So Corner Post would be precluded from suing even though the allegedly unlawful regulation is causing it monetary injury.[4]

III

Eliminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties.[5]

One example is the wide range of administrative law suits in which businesses target the allegedly unlawful under-regulation of other businesses, such as their

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[4] Absent vacatur, the remedy for a *regulated* plaintiff would not automatically extend to other regulated parties. For example, if a district court issued an injunction that prevents the Board from enforcing the fee rule against one bank, the Board would still be able to enforce the fee rule against other banks. For those other banks to obtain the same relief, they would need to either (i) file similar APA suits and request similar injunctions or (ii) wait and see if the fee rule is temporarily enjoined or held unlawful by either the relevant court of appeals or this Court. In that respect, eliminating the vacatur remedy would delay relief for many regulated parties. That said, in light of vertical *stare decisis*, the consequences for regulated parties of eliminating vacatur would not be as severe as the consequences for unregulated parties. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 8–9); cf. W. Baude & S. Bray, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 183 (2023) (when the Supreme Court "holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as* vacated").

[5] This opinion focuses primarily on administrative litigation that arises under the APA. But Congress has also enacted special statutory review provisions that similarly authorize federal courts to "set aside" specific agency actions. See, *e.g.*, 15 U. S. C. §78y(a) (orders of the SEC); 16 U. S. C. §825*l*(b) (FERC); 28 U. S. C. §2342 (the FCC, the Atomic Energy Commission, and other agencies). By arguing that the APA's use of "set aside" does not authorize vacatur, the Government implies that vacatur is also unavailable under those similar review provisions.

competitors. For example, in *National Credit Union Administration* v. *First National Bank & Trust Co.*, several banks challenged the decision of a federal agency to approve a series of amendments to the charter of a federal credit union, a competitor of the banks. 522 U. S. 479, 484–485 (1998). The amendments were controversial because they expanded the markets in which the credit union could operate, thereby increasing competition against the banks. The Court held that the banks could sue under the APA to challenge the agency's approval of those charter amendments, and also that the agency's approval of the amendments was unlawful. Of course, the District Court could remedy the banks' harm only by vacating the approval of the amendments. In short, for the plaintiff in *First National Bank* to have a remedy, the APA must have authorized vacatur.

Those competitor suits are ubiquitous in administrative law. Some plaintiffs have challenged the favorable classification of a competitor's drugs or medical products, see, *e.g.*, *American Bioscience, Inc.* v. *Thompson*, 269 F. 3d 1077 (CADC 2001); a research guideline that increased competition for federal grants, see, *e.g.*, *Sherley* v. *Sebelius*, 610 F. 3d 69 (CADC 2010); and a competitor's exemption from a generally applicable rule, see, *e.g.*, *Regular Common Carrier Conference* v. *United States*, 793 F. 2d 376 (CADC 1986) (arose under the review provision in 28 U. S. C. §2342). The Court has consistently held that the plaintiffs incurring those injuries are "adversely affected or aggrieved by agency action" within the meaning of the APA. 5 U. S. C. §702; see *First Nat. Bank*, 522 U. S., at 488, 499; *Investment Company Institute* v. *Camp*, 401 U. S. 617, 618–621 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 157 (1970). But such competitor suits would be largely if not entirely eradicated if the APA and similar statutory review provisions did not authorize vacatur.

Suits where one business challenges the under-regulation of another go well beyond competitor suits. One example is the Court's landmark decision in *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29 (1983). That case arose when several insurance companies challenged a federal agency's rescission of safety standards for new motor vehicles. The Court held that the agency's decision to rescind those safety standards was subject to the same degree of judicial review as the decision to issue the standards in the first place. See *id.*, at 40–44. The Court also concluded that the rescission of the safety standards was arbitrary and capricious. See *id.*, at 44–57.

At no point in that landmark opinion on the judicial review of agency actions did the Court state (or need to state) the obvious: Because the agency did not regulate the insurers themselves, the insurers could obtain relief from the downstream effects of the agency's rescission of the safety standards only if the insurers could obtain vacatur of that rescission. The Court did not dwell on that remedial point because the availability of vacatur was presumably obvious to all involved. Only now—some 40 years later—does the Government imply that the premise of *State Farm* was mistaken.

The Government's new position would also largely eliminate the common form of environmental litigation where private citizens sue a federal agency based on the externalities that an agency action is likely to produce. Litigation often arises when a federal agency approves a development project with potential effects on the environment or on other property owners. Examples include the construction of a new pipeline, see *Delaware Riverkeeper Network* v. *FERC*, 753 F. 3d 1304 (CADC 2014), or the mining of federal land, see *WildEarth Guardians* v. *Jewell*, 738 F. 3d 298 (CADC 2013). In those cases, the plaintiff generally cannot bring an APA suit

against the developer, who is usually a private party. See §704 (authorizing review of "agency action"). Instead, the plaintiff typically sues the federal agency that approved the development and asks a federal court to vacate that approval.

Some of those suits proceed under the APA; others proceed under federal statutory review provisions that similarly authorize courts to "set aside" agency action. See, *e.g.*, 15 U. S. C. §717r(b) (Natural Gas Act); 16 U. S. C. §825*l*(b) (Federal Power Act). Regardless, all of those suits depend on the availability of vacatur.

Many APA suits similarly challenge federal emissions limits or efficiency standards for cars, trucks, and other sources of pollution. See, *e.g.*, *American Public Gas Assn.* v. *Department of Energy*, 72 F. 4th 1324 (CADC 2023). When a plaintiff alleges that an emissions limit does too little to stop third parties from polluting the environment, the plaintiff cannot bring an APA suit against the third party. Rather, the plaintiff must sue the agency that enacted the emissions limit. If the vacatur remedy were unavailable, the agency that enacted the emissions limit would never face litigation from unregulated parties seeking stricter limits; the agency could face litigation only from regulated parties seeking looser limits.

Workers and their unions also regularly challenge agency rules that rescind or loosen federal workplace safety standards. See, *e.g.*, *Transportation Div. of Int'l Assn. of Sheet Metal, Air, Rail, and Transp. Workers* v. *Federal Railroad Admin.*, 988 F. 3d 1170 (CA9 2021) (railroad industry); *United Steel* v. *Mine Safety and Health Admin.*, 925 F. 3d 1279 (CADC 2019) (mining industry). Those suits often arise under statutory review provisions that, like the APA, authorize courts to "set aside" agency actions. See, *e.g.*, 28 U. S. C. §2342(7) (railroad industry); 30 U. S. C. §816(a)(1) (mining industry). And the suits all depend on the availability of vacatur as a remedy. In particular, the

workers may prevail in those suits only through vacatur of the agency rules. So if "set aside" did not mean vacate, workplace safety rules could be challenged from only one direction—by employers who want less regulation, not by workers who want more regulation.

The examples of standard agency litigation that depend on the availability of vacatur are seemingly endless. Vacatur was essential when American workers challenged a Department of Labor rule that unlawfully allowed employers to access inexpensive foreign labor, with the effect of lowering American workers' wages. See *Mendoza* v. *Perez*, 754 F. 3d 1002 (CADC 2014). Vacatur was essential when a county challenged the Department of the Interior's allowance for Indian gaming on nearby land. See *Butte Cty.* v. *Hogen*, 613 F. 3d 190 (CADC 2010). Vacatur is often essential when a State challenges an agency action that does not regulate the State directly but has adverse downstream effects on the State. See, *e.g.*, *Department of Commerce* v. *New York*, 588 U. S. 752 (2019).[6]

I will stop there. But to be clear, I could go on all day (and then some) listing cases where vacatur was necessary for an unregulated but adversely affected plaintiff in an

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[6] In some circumstances, usually when a court rules that an agency must provide additional explanation for the challenged agency action or must regulate some entity or activity *more* extensively, some courts have remanded to the agency without vacatur. Remand without vacatur is essentially a shorthand way of vacating a rule and staying the vacatur pending the agency's completion of an additional required action, such as providing additional explanation or issuing a new, more stringent rule. I do not address that practice here, which has been the subject of some debate. See *Checkosky* v. *SEC*, 23 F. 3d 452, 462–465 (CADC 1994) (Silberman, J.) (explaining the practice); see also *id.*, at 493, n. 37 (Randolph, J.) (noting that courts and parties alternatively may avoid any "difficulties" associated with vacatur by "a stay of the mandate"). Importantly for present purposes, the view that vacatur is "*authorized* by the APA is a basic proposition shared by *both* sides of the debate over remand without vacatur." M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1178 (2020).

APA suit to obtain relief.

IV

Against all of that text, history, precedent, and common sense, the Government has recently rejected the straightforward and long-accepted conclusion that the phrase "set aside" in the APA authorizes vacatur. Instead, the Government contends that plaintiffs harmed by agency rules must seek injunctions against enforcement of those rules. See Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. One effect of the Government's new position would be to insulate many agency rules from meaningful judicial review in suits by unregulated but adversely affected parties.

To support its new position, the Government has offered an array of arguments.

First, the Government says that vacatur of a federal rule is akin to a nationwide injunction—in other words, an injunction that prohibits the Government from enforcing a law against *anyone*, not just the parties in a specific case. The Government has contended that equitable relief is ordinarily limited to the parties in a specific case. Therefore, nationwide injunctions would be permissible only if Congress authorized them.

But in the APA, Congress did in fact depart from that baseline and authorize vacatur. As noted above, the text of the APA expressly authorizes federal courts to "set aside" agency action. 5 U. S. C. §706(2). "Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA" and related statutory review provisions "go further by empowering the judiciary to act directly against the challenged agency action." J. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 1012 (2018). The text of §706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts. See M. Sohoni, The

Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). The text of the APA therefore authorizes vacatur of agency rules. By contrast, Congress has rarely authorized courts to act directly on federal statutes or to prohibit their enforcement against nonparties. As a result, background equitable principles may control in those non-APA cases.

Second, the Government argues that the remedies available in APA suits are not governed by §706(2), which directs courts to "set aside" agency action, but instead are governed by §703. That argument is weak. Section 703 determines the "form of proceeding" for suits under the APA and identifies the federal actors against whom an "action for judicial review may be brought."[7] But "no court has ever held that Section 703 implicitly delimits the kinds of remedies available in an APA suit." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2337 (2024). For good reason: As explained above, the ordinary meaning of "set aside" in §706(2) has long been understood to refer to the remedy of vacatur. The conclusion that §706 governs remedies is also supported by §706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"—unmistakably a remedy. By contrast, the text of §703 "speaks to venue and forms of proceedings, not to remedies, and regardless, its

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[7] Section 703 states: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

listing of the available forms of proceedings is nonexhaustive." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2337.

To support its novel reliance on §703, the Government suggests that the phrase "set aside" in §706(2) may refer to a "rule of decision directing the reviewing court to disregard unlawful" agency actions in "resolving the case before it," rather than the remedy of vacatur. Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 40. But the leading cases and legal dictionaries at the time of the APA's enactment did not use "set aside" in that manner. They instead referred to setting aside (that is, vacating) judgments—a meaning entirely consistent with the APA's authorization to vacate agency actions. See *supra*, at 5. The Government's position instead relies on some colloquial uses of the phrase "set aside" in federal constitutional challenges to state statutes. See, *e.g.*, Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 41 (citing *Mallinckrodt Chemical Works* v. *Missouri ex rel. Jones*, 238 U. S. 41, 54 (1915)); see also *Mallinckrodt*, 238 U. S., at 54 (referring to "one who seeks to set aside a state statute as repugnant to the Federal Constitution"). That is a thin basis for suddenly prohibiting entire categories of long-common administrative litigation.

Third, the Government seizes on legislative history to argue that Congress did not expect the APA to create new remedies against unlawful agency actions. But vacatur was not a new remedy. On the contrary, several pre-APA statutes authorized courts to "set aside" specific kinds of agency actions, such as orders by the Interstate Commerce Commission. See n. 2, *supra*. This Court correctly understood those statutes to authorize vacatur. For example, in litigation regarding the regulation of railroads, this Court held that an unlawful ICC order was "void." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464 (1935). Similar examples abound. See, *e.g.*, Sohoni, The

Past and Future of Universal Vacatur, 133 Yale L. J., at 2329–2335 (collecting cases). By similarly authorizing courts to "set aside" agency actions, the APA likewise authorized vacatur. §706(2).

Moreover, although vacatur was not as common in the years surrounding the APA's enactment, there is a simple explanation for that: Courts had few occasions to set aside agency rules before this Court's 1967 decision in *Abbott Laboratories* v. *Gardner*, which significantly expanded the opportunities for facial, pre-enforcement review of agency rules. 387 U. S. 136, 139–141. Indeed, it was not until *Abbott Laboratories* that "preenforcement review of agency rules" became "the norm, not the exception." S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1137 (2d ed. 1985).

The Government's current position on vacatur would *de facto* overrule *Abbott Laboratories* as to suits by unregulated parties. Not surprisingly, the Government's current position on vacatur sounds very similar to Justice Fortas' dissent in a companion case to *Abbott Laboratories*, where he lamented that in the wake of those decisions, a court would be able to "suspend the operation of regulations in their entirety." *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 175 (1967). In any event, to the extent that the Government worries that vacatur of rules (as opposed to orders) is more common today than it was in the 1950s, the Government's true grievance is with *Abbott Laboratories*.

Fourth, the Government objects to the real-world consequences that occur when a federal district court wrongly vacates a lawful rule. I appreciate that concern. But federal law already gives the Government tools to mitigate those consequences—if not avoid them altogether. When the Government believes that a district court has erroneously vacated a rule (or erroneously issued a preliminary injunction against a rule), the Government may promptly seek a stay in the relevant federal court of

appeals. To determine whether to grant a stay, the court of appeals may then promptly review the Government's likelihood of success on the merits, among other factors. If the court of appeals denies a stay, the Government may seek further review in this Court. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2). The Government's frustration with the occasional incorrect district court vacatur of an agency rule is understandable. But especially given the readily accessible and regularly utilized procedures for staying a district court's vacatur,[8] we should not overreact by entirely gutting vacatur as a remedy and thereby barring unregulated but adversely affected parties from bringing APA suits.

Not surprisingly, when asked at oral argument in this case about the extraordinary consequences of its new no-vacatur position, the Government seemed to backpedal and hedge a bit. The Government suggested that vacatur may actually still be appropriate if it is "the only way to give the party before the court relief." Tr. of Oral Arg. 76. The Government also said that "it's possible that the only way to provide" Corner Post "relief would be vacatur." *Ibid.*

I appreciate the Government's apparent attempt to back away from its extreme stance. But in doing so, the Government also revealed the weakness of its position. The meaning of "set aside" in the APA cannot reasonably depend on the specific party before the court. Either the APA authorizes vacatur, or it does not.

More to the point, the Government's answer at oral argument is a solution in search of a problem. The federal courts have long interpreted the APA to authorize vacatur of agency actions. Both the text and the history of the APA support that interpretation, and courts have had no real

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[8] If the problem became sufficiently severe, the Executive Branch could always ask Congress to limit the remedies available under the APA.

difficulty applying the remedy in practice. Some 78 years after the APA and 57 years after *Abbott Laboratories*, I would not suddenly throw out that sound and settled interpretation of the APA and eliminate entire classes of historically common and vitally important litigation against federal agencies.

* * *

The Government's crusade against vacatur would create "strange and even absurd consequences." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2340. In this opinion, I have described one such consequence: It would leave unregulated plaintiffs like Corner Post without a remedy in APA challenges to agency rules. The Government's position therefore would fundamentally reshape administrative law, leaving administrative agencies with extraordinary new power to issue rules free from potential suits by unregulated but adversely affected parties—businesses, environmental plaintiffs, workers, the list goes on.

I agree with the longstanding consensus—a consensus based on text, history, precedent, and common sense—that vacatur is an appropriate remedy when a federal court holds that an agency rule is unlawful. Because vacatur remains an available remedy under the APA, Corner Post can obtain meaningful relief if it prevails in this lawsuit.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

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

More than half a century ago, this Court highlighted the long-recognized "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, 517 (1967). Today, the majority throws that caution to the wind and engages in the same kind of misguided reasoning about statutory limitations periods that we have previously admonished.

The flawed reasoning and far-reaching results of the Court's ruling in this case are staggering. First, the reasoning. The text and context of the relevant statutory provisions plainly reveal that, for facial challenges to agency regulations, the 6-year limitations period in 28 U. S. C. §2401(a) starts running when the rule is published. The Court says otherwise today, holding that the broad statutory term "accrues" requires us to conclude that the limitations period for Administrative Procedure Act (APA) claims runs from the time of a plaintiff's injury. Never mind that this Court's precedents tell us that the meaning of "accrues" is context specific. Never mind that, in the administrative-law context, limitations statutes uniformly run from the

moment of agency action. Never mind that a plaintiff's injury is utterly irrelevant to a facial APA claim. According to the Court, we must ignore all of this because, for other kinds of claims, accrual begins at the time of a plaintiff's injury.

Next, the results. The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.

The majority refuses to accept the straightforward, commonsense, and singularly plausible reading of the limitations statute that Congress wrote. In doing so, the Court wreaks havoc on Government agencies, businesses, and society at large. I respectfully dissent.

I

When a claim accrues depends on the nature of the claim. See *Crown Coat*, 386 U. S., at 517. So, understanding the context in which *these* claims arose is essential to determining when Congress meant for them to accrue. The facts of this very case illustrate the absurdity of the majority's one-size-fits-all approach. The procedural history is also a prime example of the gamesmanship that statutory limitations periods are enacted to prevent.

A

Start with the relevant agency regulation. In 2010, Congress required the Federal Reserve Board to issue rules for debit-card transaction fees. See 15 U. S. C. §1693*o*–2(a)(1). The Board did as Congress instructed. As relevant here, in

2011, the Board issued Regulation II, capping debit-card interchange fees at 21 cents per transaction plus 0.05 percent of the transaction. 76 Fed. Reg. 43420 (2011) (codified at 12 CFR §253.3(b) (2022)).

As often happens, affected parties challenged Regulation II almost immediately after the Board issued it Several large trade groups sued under the APA, alleging that Regulation II was, in several respects, arbitrary, capricious, and not in accordance with law. *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). Ultimately, the D. C. Circuit rejected that challenge in relevant part. *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014). And, a few months after that, we denied certiorari. See 574 U. S. 1121 (2015).

B

Now consider the facts of this challenge. In the majority's telling, this is about a single "truckstop and convenience store located in Watford City, North Dakota." *Ante,* at 1.

Not quite. Rather, two large trade groups initially filed this action in 2021—a full decade after the Federal Reserve Board finalized the debit-card-fee regulations at issue. Those groups were the North Dakota Petroleum Marketers Association, a "trade association that has existed since the mid-1950s," and the North Dakota Retail Association, another trade group. App. to Pet. for Cert. 53. Corner Post, which had only opened its doors in 2018, was not a party to the trade groups' initial complaint. The Government moved to dismiss the pleading, invoking §2401(a)'s 6-year statute of limitations. In response, the trade groups sought leave to amend.

It was only then that Corner Post was added as a plaintiff. And, importantly, other than the addition of Corner Post, the trade groups' complaint remained practically identical to the untimely one they had filed before. Other than a few changes of phrasing and some newly available

2019 data, the amended complaint alleged the same facts and sought the same relief as the original pleading. It also included the exact same legal claims—verbatim. The only material change to the amended complaint was the addition of Corner Post.

Thus, even before I analyze the statute of limitations arguments, one can see that this case is the poster child for the type of manipulation that the majority now invites—new groups being brought in (or created) just to do an end run around the statute of limitations.[1] To repeat: The claims in Corner Post's lawsuit were not new or in any way distinct (even in wording) from the pre-existing and untimely claims of the trade organizations that had been around for decades.

This time, however, when the Government renewed its motion to dismiss, the plaintiffs made the case all about Corner Post. The plaintiffs argued that, because Corner Post had not yet formed as a company when the Board issued Regulation II, it simply could not be subjected to a 6-year limitations period that ran from when the challenged regulation issued back in 2011. (One wonders how a company that formed against the backdrop of a long-settled rule could possibly be entitled to complain, or claim injury, related to the regulatory environment in which it willingly entered—but I digress.) Rather than accepting that the untimely challenge remained so, Corner Post demanded a personalized, plaintiff-specific limitations rule, giving an entity six years from when *it* was first affected by a

[1] If this case illustrates one type of gamesmanship, one does not need to think hard to imagine other examples. A cash-only business that announces its intent to accept debit cards and thereby claiming injury from the debit-card rule. New owners that buy out a shop, insisting that they too are entitled to challenge the debit-card rule based on their status as new entrants into the marketplace. It is telling that, even as the majority says that the moment of the plaintiff's injury marks the start of the limitations period for facial APA challenges, the majority fails to describe precisely when that injury occurs in this context.

Government action to file a facial challenge.

The District Court rejected Corner Post's argument, following the lead of every court of appeals that had ever addressed accrual of an APA facial challenge.[2] It held that the addition of Corner Post as a plaintiff did not make a difference to the timeliness of the business groups' claims. The Eighth Circuit affirmed, holding that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634, 641 (2022).

II

But here we are. Three-quarters of a century after Congress enacted the APA, a majority of this Court rejects the consensus view that, for facial challenges to agency rules, the statutory 6-year limitations period runs from the publication of the rule. Instead, it holds that an APA claim accrues "when the plaintiff is injured by final agency action." *Ante,* at 1. The majority maintains that the text of §2401(a) demands this result. But if that answer is so obvious, one wonders why no court proclaimed it until more than 75 years after all the statutory pieces were in place.

To explain how the majority got this ruling wrong, I find it necessary to provide the right answer. Here, the relevant

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[2] The majority's opinion says we took this case to resolve a circuit split, suggesting that the Sixth Circuit had reached the contrary conclusion. See *ante,* at 3–4. It had not. In *Herr* v. *United States Forest Serv.*, 803 F. 3d 809 (2015), the Sixth Circuit addressed accrual in the context of an *as-applied* challenge after the Government had threatened enforcement. There, the Circuit pegged accrual to the moment of the injury allegedly caused by application of the rule to the plaintiff, see *id.*, at 820, and did not discuss whether that same accrual rule would apply to facial challenges. Since *Herr*, neither the Sixth Circuit nor any district court within it has extended *Herr*'s rule to facial challenges to final agency actions, and at least one District Court has expressly rejected such an extension. See *Linney's Pizza, LLC* v. *Board of Governors of FRS*, 2023 WL 6050569, *2–*4 (ED Ky., Sept. 15, 2023).

statutory text is the catchall limitations provision for suits brought against the United States: §2401(a) of Title 28 of the United States Code. All agree that there are two key terms in that provision—"accrues" and "the right of action." *Ibid.* The majority misreads both. Contrary to the Court's rigid reading, the word "accrues" lacks any fixed meaning. See *Crown Coat*, 386 U. S., at 517. Instead, the meaning of accrue for the purpose of a statute of limitations is determined by the particular "right of action" at issue. For many kinds of legal claims, accrual is plaintiff specific because the claims themselves are plaintiff specific. But facial administrative-law claims are not. This means that, in the administrative-law context, the limitations period begins not when a plaintiff is injured, but when a rule is finalized.

A

When sovereign immunity has been waived, the Federal Government is often sued, and Congress has enacted statutes of limitations to ensure that those lawsuits are brought in a timely fashion. Because such suits arise in different contexts, Congress has enacted different statutes of limitations for different types of suits.

Most statutes of limitations are context specific. For example, a tort claim against the United States typically must be brought "within two years after such claim accrues." 28 U. S. C. §2401(b). By contrast, a party challenging certain administrative orders must seek review "within 60 days after [the order's] entry." §2344. Many more examples of context-specific limitations periods in the U. S. Code abound. See, *e.g.*, §2501 (claims over which the United States Court of Federal Claims has jurisdiction must be brought within six years); 33 U. S. C. §1369(b)(1) (challenges to certain standards adopted by the Environmental Protection Agency under the Clean Water Act must commence "within 120 days from the date of . . . promulgation").

The statute at issue here—28 U. S. C. §2401(a)—supplements those specific provisions. In doing so, §2401(a) serves a special purpose: to act as a catchall that imposes an outer time limit on claims brought against the United States when no other statute of limitations applies. Under §2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This catchall limitations statute has been applied in a range of contexts, including APA claims (like this one), contract claims, see *Crown Coat*, 386 U. S., at 510–511, and more, see, *e.g.*, *Natural Resources Defense Council* v. *Haaland*, 102 F. 4th 1045, 1074 (CA9 2024) (claims under the Endangered Species Act).

Consistent with the broad scope of its potential application, §2401(a) uses broad language. It starts the 6-year clock when "the right of action first accrues." §2401(a). No more elaboration or specificity is given. So, what *does* the sparse text of §2401(a) tell us?

To start, the statute tells us to look at when "the right of action *first* accrues." (Emphasis added.) The word "first" directs us to start the clock at the earliest possible opportunity once the claim accrues. From the text alone, then, we know that this moment in time should happen sooner rather than later. But *when* that moment occurs depends on the meaning of both "the right of action" and "accrues."

Next, the provision uses the unadorned phrase "the right of action." Because this statute is applicable to a broad range of causes of action against the Government, the underlying statute (here the APA) provides "the right of action," not §2401(a) itself. Put another way, the §2401(a) catchall applies to different causes of action, and those causes of action establish different legal claims. Though the right of action is not the same for an APA claim as it is for an Endangered Species Act claim, §2401(a)'s broad "right of action" language applies to both of these claims, and more.

B

A proper understanding of the word "accrues" makes clear that this term is far more flexible and context dependent than the majority appreciates. Crucially, the Court has said this very thing before—more than once, in fact. We have long understood that it is simply not "possible to assign the word 'accrued' any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other." *Reading Co.* v. *Koons*, 271 U. S. 58, 61–62 (1926); see also *Crown Coat*, 386 U. S., at 517 (recognizing "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues'").

But, for some reason, that does not stop the majority from trying here. Its opinion repeatedly asserts that the ordinary meaning of accrual is that claims accrue only when a plaintiff can sue. See *ante,* at 6–10.[3] But even the majority acknowledges that its preferred definition of accrual is not universal; it is, at most, "the '*standard* rule'" that "can be displaced." *Ante,* at 8 (quoting *Green* v. *Brennan*, 578 U. S. 547, 554 (2016); emphasis added).

Far from imposing a one-size-fits-all definition of the word "accrue," this Court has traditionally taken a claim-specific view: "[A] right accrues when it comes into existence." *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954). For example, in *McMahon* v. *United States*, 342 U. S. 25 (1951), we held that, under the Suits in Admiralty Act, a claim accrued when a seaman was injured, even though he could not yet sue at that time. See *id.*, at 27–28. In *Crown*

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[3] The majority insists on a single definition of "accrued," but it cannot keep its story straight as to what that definition is. Its opinion offers multiple formulations, stating that a claim accrues "when it comes into existence," "when the plaintiff has a complete and present cause of action," "when a suit may be maintained thereon," and, also, "after the plaintiff suffers the injury." *Ante,* at 7–8 (internal quotation marks omitted). These distinctions can make a difference.

Coat, we held the opposite—a claim brought under 28 U. S. C. §1346 did not accrue at the time of injury, but rather at the moment of final administrative action, because a plaintiff could not sue until the agency action was final. See 386 U. S., at 513–514, 517–518. The point is *not* that these cases all point in one direction or the other with respect to the meaning of accrue. Instead, our cases illustrate what this Court has expressly stated: The term "accrued" lacks "any definite technical meaning," *Reading*, 271 U. S., at 61.

The majority nevertheless decrees today that accrual must always be plaintiff specific—*i.e.,* that a claim cannot accrue until "this particular plaintiff" can bring suit. *Ante,* at 14. But that is not what §2401(a) says. It does not say that the clock starts when *the plaintiff's* right of action first accrues; rather, §2401(a) starts the clock when "*the* right of action first accrues." (Emphasis added.) In other words, the limitations provision here focuses on the claim being brought without regard for who brings it.

The dictionary definitions on which the majority relies further highlight this important observation. A claim accrues, according to those definitions, "'when *a* suit may be maintained thereon'" or upon the "'coming or springing into existence of *a* right to sue.'" *Ante,* at 7 (emphasis added) (first quoting Black's Law Dictionary 37 (4th ed. 1951), then quoting Ballentine's Law Dictionary 15–16 (2d ed. 1948)). Again, and notably, these dictionaries speak of *a* right to sue, not *the plaintiff's* right to sue. Like §2401(a) itself, these definitions do not support the majority's assertion that accrual is necessarily plaintiff specific.

Of course, many of our cases *do* say that a claim accrues when "'the plaintiff has a complete and present cause of action.'" *E.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013); *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005); *Bay Area Laundry and Dry*

Cleaning Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997). But those statements were made in the context of particular cases, each of which dealt with plaintiff-specific causes of action. See, *e.g.*, *Gabelli*, 568 U. S., at 446 (civil enforcement claim by the Securities and Exchange Commission); *Wallace*, 549 U. S., at 388 (false imprisonment and arrest claims); *Graham County*, 545 U. S., at 412 (retaliation claim against an employer); *Bay Area Laundry*, 522 U. S., at 195 (claim alleging failure to make required payments to employee pension funds).

Here is what I mean by this. When a complaint brought against a defendant asserts, "You falsely imprisoned me," or "You retaliated against me," it is making a legal claim that is specific to the particular plaintiff. But, as discussed below, it is not similarly plaintiff specific to bring a claim saying, for example, that a particular regulation is invalid because it "exceeds the Board's statutory authority," or because the Government "failed to consider important aspects of the problem," as the complaint here alleges. App. to Pet. for Cert. 80, 82. So, while accrual may sometimes—even usually—be plaintiff specific, that is just because underlying legal claims are often plaintiff specific. The precedents the majority cites never say otherwise; *i.e.*, they do not tell us that accrual must *always* be plaintiff specific.

The majority's other hard-and-fast distinction—between statutes of limitations and statutes of repose—fares no better. See *ante,* at 9–10. The majority sets up a dichotomy: Statutes of limitations are plaintiff-centric rules that "'require plaintiffs to pursue diligent prosecution of known claims,'" while statutes of repose emphasize finality and are tied to "'the last culpable act or omission of the defendant.'" *Ante,* at 9 (quoting *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8 (2014)). The problem is that statutes of limitations and statutes of repose, while different, are not nearly as different as the majority imagines. It is true that statutes of repose are considered to be "defendant-protective."

Ante, at 10. But the same is true of statutes of limitations. "The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation." *Reading*, 271 U. S., at 65; see also *Gabelli*, 568 U. S., at 448 (repose is a "'basic polic[y] of all limitations provisions'"). In fact, according to one of the dictionaries the majority cites, "[s]tatutes of limitation *are* statutes of repose." Black's Law Dictionary, at 1077 (emphasis added). The difference is that unlike statutes of repose, statutes of limitations have more than one purpose: they bring finality for defendants *and* prevent plaintiffs from sleeping on their rights. Understanding these dual functions sheds no light whatsoever on what to do when those competing purposes point in different directions.[4]

III

Because different claims accrue at different times, we must look to the specific types of claims that the plaintiffs have brought and consider the context in which the limitations period operates. "Cases under [one statute] do not necessarily rule . . . claims" brought under another. *Crown Coat*, 386 U. S., at 517. And our understanding of accrual for limitations purposes has always been context specific. See, *e.g.*, *Wallace*, 549 U. S., at 389 (relying on torts treatises to explain the "distinctive rule" for commencement of limitations period for false imprisonment suits); *Franconia Associates* v. *United States*, 536 U. S. 129, 142–144 (2002) (citing contracts treatises to explain that contract claims accrue at the moment of breach); *Merck & Co.* v. *Reynolds*,

[4] Here, these purposes are at odds because repose favors starting the clock at the moment of final agency action, whereas a plaintiff-specific limitations rule would be targeted at a plaintiff's injury to ensure plaintiffs don't sleep on their rights. In the administrative-law context, one has to choose between those objectives; no one rule can equally achieve both of these ends.

559 U. S. 633, 644–646 (2010) (applying fraud-specific discovery rule to determine accrual). In other words, to understand when "the right of action" accrues under §2401(a), we must understand what the right of action is.

A

The right of action that is invoked in many administrative-law cases, including this one, is a statutory claim that an agency has violated certain legal requirements when it took a certain action, such that the agency's action itself is invalid. See, *e.g.,* 5 U. S. C. §706(2). And Congress has repeatedly made clear, through various statutory enactments, that in the administrative-law context, the statute of limitations for filing a claim that seeks to invalidate the agency action runs from the moment of final agency action.

Take the Administrative Orders Review Act (also known as the Hobbs Act), for example. See 28 U. S. C. §2342. That statute is the exclusive mechanism for reviewing certain orders issued by over a half-dozen federal agencies. The Act requires suits to be brought "within 60 days after [the] entry" of any final agency order. §2344. There are many other similar statutes. In its brief, the Government provided us with more than two dozen statutory provisions where the limitations period starts running at the moment of final agency action—whether that action is the publication of a rule, or the issuance of an order, or something else. See Brief for Respondent 15–17, and n. 4. And, as the Government itself acknowledges, even that list is not comprehensive. See Tr. of Oral Arg. 51 ("Candidly, we got to a page-long footnote and stopped").[5]

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[5] No kidding. On top of the dozens of examples that the Government provided, there are many, many others. See, *e.g.*, 5 U. S. C. §7703(b)(1)(A) ("[A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed . . . within 60 days after the Board issues notice of the final order or decision of the Board"); 15 U. S. C. §80b–13(a) ("Any person or party aggrieved by an order issued by the [Securities and Exchange] Commission under this subchapter

Despite the dozens of statutes that start the limitations period at the moment of final agency action, neither Corner Post nor the majority identifies a single statute in the administrative-law context—either now or before 1948—that takes any other approach. This tells us exactly the message that Congress might have expected courts to infer when interpreting §2401(a): For administrative-law actions, a claim accrues at the moment of final agency action.

The Court says we must ignore these other statutes because they post-date Congress's 1948 enactment of §2401(a). See *ante,* at 12–14. The majority's reasoning is doubly wrong. First, it is wrong on the facts. Even before 1948, Congress consistently started limitations periods in the administrative-law context at the moment of the last

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may obtain a review of such order . . . by filing . . . within sixty days after the entry of such order, a written petition"); 30 U. S. C. §1276(a)(2) ("Any [covered] order or decision . . . shall be subject to judicial review on or before 30 days from the date of such order or decision"); 38 U. S. C. §7266(a) ("[T]o obtain review . . . of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is issued"); 42 U. S. C. §405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision"); §1395*oo*(f)(1) ("Providers shall have the right to obtain judicial review of any final decision of the [Provider Reimbursement Review] Board . . . by a civil action commenced within 60 days of the date on which notice of any final decision by the Board . . . is received"); §7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise"); 49 U. S. C. §1153(b)(1) (petitions seeking review of National Transportation Safety Board orders that relate to aviation matters "must be filed not later than 60 days after the order is issued").

agency action.[6] Then, as now, Congress decided that the deadline for reviewing agency actions should be pegged to the action under review. Second, the majority misses the broader point: Whenever Congress imposes a deadline to challenge an agency decision, the limitations period always starts at the moment of the last agency action. We should pay attention to the uniformly expressed judgment of Congress, and read §2401(a) accordingly.

Somehow, the majority draws the opposite conclusion. In its view, either Congress's consistently expressed intention is irrelevant to what §2401(a) means, or Congress's failure to explicitly express that intention in the text of §2401(a) indicates that Congress decided otherwise in this particular statute (after all, Congress could have expressly pegged accrual to final agency action in §2401(a) but did not do so). See *ante,* at 8–10.[7] But mechanically drawing these sorts

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[6] See, *e.g.*, 42 Stat. 162 (1921) (codified at 7 U. S. C. §194(a)) (meatpackers must appeal agency orders within 30 days after service of order); 48 Stat. 1093 (1934) (codified as amended at 47 U. S. C. §402(c)) (Federal Communications Commission orders must be challenged in court "within twenty days after the decision complained of is effective"); 49 Stat. 860 (1935) (codified at 16 U. S. C. §825*l*(b)) (orders issued by the Federal Power Commission pursuant to the Public Utility Act of 1935 must be challenged in court "within sixty days after the order of the Commission"); 49 Stat. 980 (1935) (codified at 27 U. S. C. §204(h)) (orders related to alcohol permits must be challenged "within sixty days after the entry of such order"); 52 Stat. 112 (1938) (codified at 15 U. S. C. §45) (Federal Trade Commission cease-and-desist orders must be challenged "within sixty days from the date of the service of such order"); 52 Stat. 831 (1938) (codified at 15 U. S. C. §717r(b)) (orders issued by the Federal Power Commission pursuant to the Natural Gas Act must be challenged in court "within sixty days after the order of the Commission"); 52 Stat. 1053 (1938) (codified at 21 U. S. C. §355(h)) (orders related to new drug applications must be challenged in court "within sixty days after the entry of such order"); 54 Stat. 501 (1940) (orders apportioning costs for certain bridge projects must be challenged in court "within three months after the date such order is issued").

[7] The majority criticizes my review of congressional action in this area, but fails to adequately explore the record itself. *Ante,* at 12–14. The

of negative inferences when interpreting statutes can be risky. "Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute." *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 78 (2023).

The majority's approach overlooks relevant context in all sorts of ways, including the fact that §2401(a) is a catchall provision that applies to a variety of actions—that is, the language we are interpreting here does not apply *only* in the administrative-law context. It applies to *every* suit against the United States not covered by another statute of limitations. One cannot expect for Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision that also applies to claims that do not involve agency action at all.[8]

Frankly, it was also entirely unnecessary for Congress to be explicit regarding its intentions. Again, in the administrative-law context, the consistent rule is *not* the plaintiff-specific accrual rule that exists in other contexts (*e.g.,* torts), but the rule that applies every time Congress has ever mentioned a limitations period with respect to a suit against an agency: The claim accrues at the moment of final agency action. So it is no wonder that Congress did not expressly mention this in the text of §2401(a)—it did not have to, for those who have a basic understanding of its statutes.

What is more, the standard accrual rule for the administrative-law context makes perfect sense. The APA itself focuses on the agency's action, not on the plaintiff. Section 704 subjects certain "agency action[s]" to judicial review.

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majority's conclusion that the accrual rule is plaintiff specific for APA claims is no more than *ipse dixit*.

[8] Contra the majority, see *ante,* at 12, the fact that Congress *could* have opted to enact a specific statutory review provision for APA claims says nothing about how we should apply the catchall review provision here.

Section 706 lays out the scope of judicial review. As relevant here, courts shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). Other subsections of §706 likewise focus exclusively on what the *agency* did. Did the *agency* act "in excess of statutory jurisdiction"? §706(2)(C). Did the *agency* act "without observance of procedure required by law"? §706(2)(D).

Section 702 is not to the contrary. The majority suggests otherwise, characterizing §702 as "equip[ping] injured parties with a cause of action." *Ante,* at 5. This is a misleading characterization. Section 702 restricts *who* may challenge agency action: only those "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." It is simply a limitation on who can sue. As such, it says nothing about the cause of action that such a person might bring, nor does it establish that an injury is an element of the claim, as the majority mistakenly suggests.[9] And that is for good reason, since, in administrative

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[9]The majority puts too much stock in the fact that §702 references an injury: That reference actually does no more than highlight the distinction between what constitutes a claim and who can bring that claim. See *ante,* at 4–5, and n. 1. This type of distinction is commonplace in many areas of our jurisprudence. Take, for example, the constitutional standing doctrine, which limits eligible plaintiffs to those who have suffered an injury in fact that is both traceable to the defendant's conduct and redressable in court. See *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 380–385 (2024). Whether a particular plaintiff has standing to sue says nothing about the elements of the claim itself. See *Haaland* v. *Brackeen*, 599 U. S. 255, 291 (2023) ("We do not reach the merits of these claims because no party before the Court has standing to raise them"). The distinction between what a claim is and who can bring it applies with full force here. Section 702 codifies an injury requirement for bringing APA claims. Whether a particular plaintiff was "adversely affected or aggrieved by agency action within the meaning of a relevant statute" under §702 is a threshold inquiry about whether she is an appropriate plaintiff; it has no bearing on whether the agency did, in fact,

actions, the claim itself remains focused on the agency. See *Crown Coat*, 386 U. S., at 513 ("The focus of the court action is the validity of the administrative decision").

The way that courts review agency actions also reinforces this basic observation. Courts do not look at what happened to the plaintiff or what happened after the rulemaking—they look only at the rule and the rulemaking process itself. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U. S. 138, 142 (1973) (*per curiam*). Anything that happened after the rule's publication (including, perhaps, some injury to a regulated party) does not matter to an APA claim. So, the available claims, causes of action, and evidence are the same regardless of who brings the challenge or when they bring it.

Again, the complaint in this case proves the point. Before Corner Post was added as a plaintiff, the complaint alleged that (1) Regulation II is contrary to law and exceeds the Board's statutory authority, and (2) Regulation II is arbitrary and capricious. See Complaint in *North Dakota Retail Assn.* v. *Board of Governors of FRS*, No. 1:21–cv–00095 (D ND), ECF Doc. 1, pp. 32–36. After Corner Post was added as a plaintiff, the complaint made exactly those same two legal claims. See App. to Pet. for Cert. 79–84. Before Corner Post was added, the contrary-to-law claim said that the Board considered impermissible costs and capped interchange fees in a way that was not proportional to the specific costs of each transaction. See ECF Doc. 1, at 32–34. After Corner Post was added, the contrary-to-law claim said the exact same thing. See App. to Pet. for Cert. 79–81. Be-

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act in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," §706(2).

fore the addition of Corner Post, the arbitrary-and-capricious claim said that the Board failed to consider certain congressional instructions, relied on factors that Congress did not intend for it to consider, and ran counter to evidence before the Board. See ECF Doc. 1, at 34–36. Those claims, too, were unchanged after the addition of Corner Post. See App. to Pet. for Cert. 82–84.

From the pleadings filed in this case, three observations stand out. First, these APA claims, like all APA claims, are about what the agency itself did, so the logical point to start the clock is the moment the agency acted. Second, the claims that Corner Post brings are not specific to it—they are identical to the untimely claims the coplaintiff trade groups brought before. And, finally, although the majority puts procedural challenges to the side—asserting that its holding does not extend to those, see *ante,* at 21, n. 8—the claims in this case *are* procedural, so the majority's line-drawing exercise is meaningless.

B

On the matter of congressional intent, the consistent accrual rule in the administrative-law context (the limitations period starts running at the time of the final agency action) is patently superior to the majority's reading of §2401(a). Congress enacts statutes of limitations to achieve basic policy goals: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U. S. 549, 555 (2000); see also *Gabelli*, 568 U. S., at 448. For APA claims, where rulemakings apply to the public writ large, repose and certainty would *never* exist if any and every newly formed entity can challenge every agency regulation in existence. Stated simply, the majority has adopted an implausible reading of §2401(a), because, as I explain below, a plaintiff-specific accrual rule operating in this context undermines each of the central goals of all limitations

provisions.

First, repose. This principle means that, at some point, litigation must end. Under the majority's reading of the statute, it never will. Instead of putting a stop to things after six years, §2401(a) now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities (or, as this case illustrates, by old entities that can find or create new entities to graft onto their complaint).[10]

Second, elimination of stale claims. The majority forces courts and agencies to parse cold administrative records. Long after the action in question, courts may be ill equipped to review decades-old administrative explanations.

Last, certainty. As I explain in Part IV, *infra*, the majority's approach creates uncertainty for the Government and every entity that relies on the Government to function. Agency rulemaking serves important "notice and predictability purposes." *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (Scalia, J., concurring). When an administrative agency changes its own rules, it follows specific, established processes, so parties have some predictability about how the rules of the road might change. But when every rule on the books can perpetually be challenged by any new plaintiff, and is thus subject to limitless ad hoc amendment, no policy determination can ever be put to rest, and certainty about the rules that govern will forever remain elusive.

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[10] The fact that "courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent," *ante,* at 21, is irrelevant. What we are deciding now is how the statute of limitations should be interpreted, and more specifically, whether it makes sense to interpret it in a way that is inconsistent with the purpose of such statutes.

IV

Today's ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress's unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.

The majority's ruling makes legal challenges to decades-old agency decisions fair game, even though courts of appeals had previously applied §2401(a) to find untimely a range of belated APA challenges. For example, a lower court rejected an APA challenge to the Food and Drug Administration's approval of the abortion medication mifepristone that was brought more than two decades after the relevant agency action. See *Alliance for Hippocratic Medicine* v. *FDA*, 78 F. 4th 210, 242 (CA5 2023). A 2008 APA challenge to a 1969 ruling by the Bureau of Alcohol, Tobacco, Firearms and Explosives implementing the Gun Control Act was also bounced on statute of limitations grounds. See *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012). Other unquestionably tardy APA suits have been dismissed on similar grounds too.[11]

No more. After today, even the most well-settled agency

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[11] See, *e.g.*, *Alabama* v. *PCI Gaming Auth.*, 801 F. 3d 1278, 1292 (CA11 2015) (2013 challenge to Secretary of Interior's 1984, 1992, and 1995 decisions to take certain land into trust for tribes); *Wong* v. *Doar*, 571 F. 3d 247, 263 (CA2 2009) (2007 challenge to 1980 Medicaid regulation); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1286–1287 (CA5 1997) (1994 challenge to 1979 National Park Service regulations); *Shiny Rock Mining Corp.* v. *United States*, 906 F. 2d 1362, 1365–1366 (CA9 1990) (1984 challenges to 1964 and 1965 land management orders).

regulations can be placed on the chopping block. And please take note: The fallout will not stop with new challenges to old rules involving the most contentious issues of today. *Any* established government regulation about *any* issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by *any* new regulated entity within six years of the entity's formation. A brand new entity could pop up and challenge a regulation that is *decades* old; perhaps even one that is as old as the APA itself. No matter how entrenched, heavily relied upon, or central to the functioning of our society a rule is, the majority has announced open season.

Still, in issuing its ruling in this case, the Court seems oddly oblivious to the most foreseeable consequence of the accrual rule it is adopting: Giving every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations affects our Nation's economy. Why? Because administrative agencies establish the baseline rules around which businesses and individuals order their lives. When an agency publishes a final rule, and the period for challenging that rule passes, people in that industry understand that the agency's policy choice is the law and act accordingly. They make investments because of it. They change their practices because of it. They enter contracts in light of it. They may not like the rule, but they live and work with it, because that is what the Rule of Law requires. It is profoundly destabilizing—and also acutely unfair—to permit newcomers to bring legal challenges that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment.

Moreover, as I have explained, the Court's ruling in this case allows for every new entity to challenge any and every rule that an agency has ever adopted. It is extraordinarily presumptuous that an entity formed in full view of an

agency's rules, by founders who can choose to enter the industry or not, can demand that well-established rules of engagement be revisited. But even setting aside those commonsense fairness concerns, the constant churn of potential attacks on an agency's rules by new entrants can harm *all* entities in a regulated industry. At any time, anyone can come along and potentially cause every entity to have to adjust its whole operations manual, since any rule (no matter how well settled) might be subject to alteration. Indeed, the obvious need for stability in the rules that govern an industry is precisely why a defined period for challenging the rules was needed at all.

Knowledgeable *amici* have explained that the majority's approach to accrual of the statute of limitations for APA claims undermines the "[s]tability, predictability, and consistency [that] enable[s] small businesses to survive and thrive." Brief for Small Business Associations as *Amici Curiae* 5. And there is no question that long-term uncertainty "hinders the ability of businesses to plan effectively." *Id.,* at 9. The majority's accrual rule unnecessarily creates "frequent, inconsistent, judicially-driven policy changes that do not involve the sort of careful balancing envisioned in the normal process of regulatory change." *Id.,* at 12. And, again, one might think that preventing such chaos is precisely why Congress enacted a statute of limitations in the first place.

Seeking to minimize the fully foreseeable and potentially devastating impact of its ruling, the majority maintains that there is nothing to see here, because not every lawsuit brought by a new industry upstart will win, and, at any rate, many agency regulations are already subject to challenge. See *ante,* at 21. But this myopic rationalization overlooks other significant changes that this Court has wrought this Term with respect to the longstanding rules governing review of agency actions. The discerning reader will know that the Court has handed down other decisions this Term

that likewise invite and enable a wave of regulatory challenges—decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs.

In *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024), for example, the Court has reneged on a blackletter rule of administrative law that had been foundational for the last four decades. *Id.*, at ___ (slip op., at 30). Under that prior interpretive doctrine, courts deferred to agency interpretations of ambiguous statutes that Congress authorized the agency to administer. Now, every legal claim conceived of in those last four decades—and before—can possibly be brought before courts newly unleashed from the constraints of any such deference. See Tr. of Oral Arg. 74 (Assistant to the Solicitor General explaining that this result "would magnify the effect of" overruling *Chevron*).

Put differently, a fixed statute of limitations, running from the agency's action, was one barrier to the chaotic upending of settled agency rules; the requirement that deference be given to an agency's reasonable interpretations concerning its statutory authority to issue rules was another. The Court has now eliminated both. Any new objection to any old rule must be entertained and determined *de novo* by judges who can now apply their own unfettered judgment as to whether the rule should be voided.

* * *

At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government. Even more to the present point, that result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and

vested them with authority to set the ground rules for the individuals and entities that participate in our economy and our society. It is utterly inconceivable that §2401(a)'s statute of limitations was meant to permit fresh attacks on settled regulations from all new comers forever. Yet, that is what the majority holds today.

But Congress still has a chance to address this absurdity and forestall the coming chaos. It can opt to correct this Court's mistake by clarifying that the statutes it enacts are designed to facilitate the functioning of agencies, not to hobble them. In particular, Congress can amend §2401(a), or enact a specific review provision for APA claims, to state explicitly what any such rule *must* mean if it is to operate as a limitations period in this context: Regulated entities have six years from the date of the agency action to bring a lawsuit seeking to have it changed or invalidated; after that, facial challenges must end. By doing this, Congress can make clear that lawsuits bringing facial claims against agencies are not personal attack vehicles for new entities created just for that purpose. So, while the Court has made a mess of this pivotal statute, and the consequences are profound, "the ball is in Congress' court." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting).

349 F.3d 1343
United States Court of Appeals,
Federal Circuit.

Les BROWNLEE, Acting
Secretary of the Army, Appellant,
v.
DYNCORP, Appellee.

No. 02–1601.
|
Nov. 13, 2003.

Synopsis

Secretary of Army appealed final decision of the Armed Services Board of Contract Appeals, 2002 WL 1009833, awarding, as allowable costs, a part of a government contractor's legal fees incurred in defending against criminal fraud charges brought by the United States against contractor's employee. The Court of Appeals, Dyk, Circuit Judge, held that: (1) addressing an issue of apparent first impression, the government's appeal was not time-barred, even though, instead of appealing from the Board's earlier "entitlement" decision, the government waited to appeal from the Board's "quantum" decision; (2) the Federal Acquisition Regulation (FAR) at issue disallows a government contractor's recovery of all costs incurred in the unsuccessful defense of criminal proceedings where an employee of the contractor was convicted, even if the contractor itself was not convicted; and (3) when so construed, the FAR constituted a reasonable interpretation of the applicable statute and, thus, was valid.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Public Contracts** Jurisdiction of reviewing court
United States Jurisdiction of reviewing court

Relevant inquiry in determining finality in appeals from a decision of an agency board of contract appeals is the scope of the contracting officer's decision, for this determines the extent of the contractor's right of appeal and the board's jurisdiction. 28 U.S.C.A. § 1295(a)(10).

4 Cases that cite this headnote

[2] **Public Contracts** Jurisdiction of reviewing court
United States Jurisdiction of reviewing court

Armed Services Board of Contract Appeals' reversal of contracting officer's entitlement determination was a "final" judgment, for purposes of review by the Court of Appeals, where the only issue resolved by the contracting officer was the issue of entitlement, and so that was the only issue before the Board. 28 U.S.C.A. § 1295(a)(10).

2 Cases that cite this headnote

[3] **Public Contracts** Jurisdiction of reviewing court
United States Jurisdiction of reviewing court

Federal government's appeal from a decision of the Armed Services Board of Contract Appeals awarding, as allowable costs, part of government contractor's legal fees, was not time-barred, even though, instead of appealing from the Board's earlier decision as to contractor's entitlement, the government waited to appeal from the Board's decision resolving the question of quantum; although the earlier entitlement decision was, pursuant to the flexible concept of finality applicable in this context, a "final" decision, allowing the government, as aggrieved party, to wait for a truly final judgment before appealing furthered the purposes of both the Contract Disputes Act (CDA) and the doctrine of finality. Contract Disputes Act of 1978, § 2 et seq., 41 U.S.C.A. § 601 et seq.; 28 U.S.C.A. § 1295(a)(10).

6 Cases that cite this headnote

[4] **Public Contracts** Scope of review

United States Scope of review

Court of Appeals reviews the Armed Services Board of Contract Appeals' decisions interpreting statutes and regulations without deference.

6 Cases that cite this headnote

[5] **Public Contracts** Cost-plus contracts

United States Cost-plus contracts

Federal Acquisition Regulation (FAR) governing the recovery of legal fees incurred by a government contractor disallows a contractor's recovery of all costs incurred in the unsuccessful defense of criminal proceedings where an employee of the contractor was convicted, even if the contractor itself was not convicted. 48 C.F.R. § 31.205-47(b).

1 Case that cites this headnote

[6] **Administrative Law and Procedure** Plain, literal, or clear meaning; ambiguity or silence

Administrative Law and Procedure Permissible or reasonable construction

Pursuant to the Supreme Court's *Chevron* decision, courts reviewing agency interpretations of statutes must answer two questions: (1) whether Congress has directly spoken to the precise question at issue, and if not, (2) whether the agency's answer is based on a permissible construction of the statute.

2 Cases that cite this headnote

[7] **Administrative Law and Procedure** Plain, literal, or clear meaning; ambiguity or silence

In determining whether an agency's interpretation of a statute is entitled to *Chevron* deference, the correct inquiry is whether Congress has left an explicit or implicit gap for the agency to fill, not whether Congress explicitly provided that the agency should resolve conflicting policies.

[8] **Public Contracts** Cost-plus contracts

United States Cost-plus contracts

Federal Acquisition Regulation (FAR) governing the recovery of legal fees incurred by a government contractor in defense of criminal proceedings was entitled to *Chevron* deference; not only did Congress specifically authorize the FAR, but it expressly authorized regulations adopting definitions of the subject statutory terms, such as "contractor." 10 U.S.C.A. § 2324(e)(2); 48 C.F.R. § 31.205-47(b).

1 Case that cites this headnote

[9] **Administrative Law and Procedure** Deference to Agency in General

One very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.

[10] **Public Contracts** Cost-plus contracts

United States Cost-plus contracts

Federal Acquisition Regulation (FAR) governing the recovery of legal fees incurred by a government contractor, as construed so as to disallow a contractor's recovery of all costs incurred in the unsuccessful defense of criminal proceedings where an employee of the contractor was convicted, even if the contractor itself was not convicted, constituted a reasonable interpretation of the relevant statute, as amended by the Defense Procurement Improvement Act of 1985 and the Major Fraud Act of 1988, and so was valid. 10 U.S.C.A. § 2324; 48 C.F.R. § 31.205-47(b).

2 Cases that cite this headnote

[11] **Public Contracts** Cost-plus contracts
United States Cost-plus contracts

In enacting the Federal Acquisition Regulation (FAR) governing the recovery of legal fees incurred by a government contractor in defense of criminal proceedings, Congress intended to confer broad authority on the agencies to adopt cost disallowance principles. 41 U.S.C.A. § 405a; 48 C.F.R. § 31.205-47(b).

2 Cases that cite this headnote

Attorneys and Law Firms

***1345** Domenique Kirchner, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for appellant. With her on the brief were David M. Cohen, Director; and Bryant G. Snee, Assistant Director. Of counsel on the brief was Craig S. Clarke, Deputy Chief Trial Attorney, Contract Appeals Division, United States Army Legal Services Agency, of Arlington, Virginia.

Craig A. Holman, Holland & Knight, LLP, of Washington, DC, argued for appellee. With him on the brief was Richard O. Duvall, Holland & Knight, LLP, of McLean, Virginia.

Before MICHEL, LOURIE, and DYK, Circuit Judges.

Opinion

DYK, Circuit Judge.

This case presents two significant issues. The first is whether the appeal by Les Brownlee, Acting Secretary of the Army, ("Army") to this court concerning the Board's June 21, 2000, entitlement decision is timely. We hold that it is. The mere fact that the government could have appealed the Board's June 21, 2000, entitlement decision does not prohibit the government from raising entitlement issues in an appeal from the Board's subsequent quantum decision.

On the merits, the question is whether the Armed Services Board of Contract Appeals ("Board") correctly awarded as allowable contract costs a part of the contractor's legal fees incurred in defending against criminal charges brought by the United States. The Board assumed that Federal Acquisition Regulation ("FAR") 31.205–47(b), 48 C.F.R. § 31.205–47(b) (1991), made unallowable criminal defense costs incurred by a government contractor in a proceeding in which one of its employees was convicted of criminal conduct. However, the Board held the regulation invalid on the ground that it was contrary to the statute (10 U.S.C. § 2324 (2000)) and that the statute allowed partial cost recovery. We conclude that the regulation disallows recovery of the contractor's costs incurred in a proceeding in which an employee is convicted; that the regulation is valid because the statute does not mandate a contrary result; and that such defense costs are accordingly not allowable.

BACKGROUND

In 1991, the Army awarded DynCorp a cost-plus-award-fee contract for base support services at Fort Irwin, California. The contract included FAR 52.216–7, pursuant to which the government was required to pay the contractor's costs "in amounts determined to be allowable by the ***1346** Contracting Officer in accordance with Subpart 31.2 of the [FAR] in effect on the date of this contract." [1] (App. at 47.) Subpart 31.2 deals with the allowability of costs accrued under contracts between the government and commercial organizations. Among other things, the subpart includes FAR 31.205–47, which disallows the recovery by a contractor of costs related to certain legal proceedings. The government contends that the regulation disallows legal defense costs in a proceeding in which one of the contractor's employees is convicted of a criminal offense. The contractor disputes the government's interpretation of the regulation and urges that, if it is so construed, the regulation is invalid because it is contrary to the statute. The background of the present controversy is as follows.

In 1992, the Army Criminal Investigation Division began investigating allegations of criminal activity by DynCorp and its employees relating to DynCorp's performance of the contract. The allegations included fraud involving documentation related to vehicle maintenance; fraudulent use of government gasoline credit cards; and recording of false data by Larry Marcum, the Branch Manager for DynCorp's Bio–Medical Maintenance Branch. In accordance with the law of Delaware—DynCorp's state of incorporation—and DynCorp's bylaws, DynCorp paid the costs of its defense and the defense of its employees. The United States declined to prosecute the contractor, but it charged Mr. Marcum in a single-count information. The information alleged that Mr. Marcum input into a government accounting system

"estimated hours, which represented the average time among all work centers using [the government accounting system] for performing a particular scheduled service," rather than the actual work hours his employees had expended. (App. at 94.) Mr. Marcum subsequently entered into a plea agreement with the government in which he pled guilty to a charge of unauthorized access to a government computer in violation of 18 U.S.C. § 1030(a)(3). No criminal or civil actions were filed against DynCorp as a result of the investigations.

On January 23, 1996, DynCorp submitted a certified claim to the Army seeking reimbursement of the costs it incurred in connection with the criminal investigation. DynCorp excluded from its claim the fees charged by the lawyers who conducted Mr. Marcum's defense. The Army contracting officer denied the claim on March 29, 1996, and DynCorp appealed the decision to the Board on April 2, 1996. On June 21, 2000, the Board rendered a decision on entitlement, holding that DynCorp could recover a portion of its defense costs. *DynCorp,* ASBCA No. 49714, 00–2 B.C.A. (CCH) ¶ 30,986 ("*Entitlement Decision* "), at 152,930 (2000). The Board accepted, *arguendo,* the government's argument that FAR 31.205–47(b) barred recovery of defense costs for a proceeding in which only the contractor's agent or employee, not the contractor itself, was convicted. However, the Board found that, so construed, the regulation was "inconsistent" with 10 U.S.C. § 2324, as amended by the Major Fraud Act of 1988. *Id.* The Board found that the regulation was thus an unenforceable "mere nullity." *Id.* (quoting *Manhattan Gen. Equip. Co. v. Comm'r,* 297 U.S. 129, 134, 56 S.Ct. 397, 80 L.Ed. 528 (1936)). The Board remanded the case for negotiation of quantum. *Id.* at 152,932. The Army did not appeal that decision to this court. On May 6, 2002, the Army stipulated ***1347** to the amount of DynCorp's fees, and the Board entered final judgment in DynCorp's favor on May 15, 2002. *DynCorp,* ASBCA No. 53098, *available at* 2002 WL 1009833. The Army then filed a notice of appeal in this court on September 11, 2002.

DISCUSSION

I

At the outset, we must resolve a challenge to our jurisdiction. The contractor contends that the government's appeal challenging the Board's June 21, 2000, decision as to entitlement is untimely because (1) the government could have appealed earlier from the Board's June 21, 2000, decision, and (2) having failed to appeal earlier, the government's present appeal on the issue of entitlement is time barred. We agree with the first proposition, but disagree with the second. We conclude that we have jurisdiction to consider the issue of entitlement.

A

[1] **[2]** This court has exclusive jurisdiction "of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978." 28 U.S.C. § 1295(a)(10) (2000). Although the statute requires that the Board's decision be "final," we have held that the concept of finality in this context is more flexible than, for example, the "rigid district court concept of finality" required by 28 U.S.C. § 1291. *Dewey Elecs. Corp. v. United States,* 803 F.2d 650, 655 (Fed.Cir.1986) ("*Dewey* "); *see also Rumsfeld v. Applied Cos.,* 325 F.3d 1328, 1333 n. 3 (Fed.Cir.); *cert. denied* 540 U.S. 981, 124 S.Ct. 462, 157L. Ed.2d 370, 72 U.S.L.W. 3007 (2003). The relevant inquiry in determining finality in appeals pursuant to section 1295(a)(10) is "the scope of the contracting officer's decision, for this determines the extent of the contractor's right of appeal and the board's jurisdiction." *Dewey,* 803 F.2d at 655; *see also Applied Cos.,* 325 F.3d at 1333 n. 3. In *Dewey* and *Applied Cos.,* the Board had only entitlement issues before it because the contracting officer had not considered quantum issues. *Dewey,* 803 F.2d at 655; *Applied Cos.,* 325 F.3d at 1333 n. 3. Similarly, the only issue resolved by the contracting officer in this case at the time of the Board's June 21, 2000, decision was the issue of entitlement. The Board's reversal of that determination by the contracting officer was therefore a final judgment for purposes of this court's review. *Applied Cos.,* 325 F.3d at 1333 n. 3 ("[S]ince the contracting officer did not decide quantum, but decided only entitlement, the Board's decision on entitlement is final and appealable to this court."); *Dewey,* 803 F.2d at 658. Thus, the government could have appealed from the June 21, 2000, Board decision at the time it was rendered.

B

[3] The government argues, however, that its decision not to appeal the earlier Board decision does not render the present appeal as to entitlement time barred. We agree. The statutory language authorizing an appeal from a "final" judgment does not address the consequences of a failure to appeal from that

"final" judgment. As DynCorp admitted at oral argument, we have not previously decided this question. Cases such as *Dewey* and *Applied Cos.,* while permitting appeals from entitlement decisions, neither hold nor suggest that appeals are *required* before the question of quantum is resolved. Allowing the aggrieved party to wait for a truly final judgment before appealing furthers the purposes of both the Contract Disputes Act of 1978 ("CDA"), Pub.L. No. 95–563, 92 Stat. 2383, and the doctrine of finality. A contrary rule would force the government or the contractor to appeal ***1348** each and every Board entitlement decision that was appealable under our flexible final judgment approach or lose the right to appeal those issues when the case was truly final in the section 1291 sense. Requiring appeals under such circumstances would compel premature appeals that might in fact be mooted if the parties awaited a judgment concerning quantum, thus wasting the parties' and this court's resources.

A similar issue arises in connection with the final judgment rule appearing in section 1257 of the Judicial Code, 28 U.S.C. § 1257 (2000), which governs review of state-court judgments by writ of certiorari to the Supreme Court. In that context, the Supreme Court has adopted a flexible final judgment rule, just as we have in Board of Contract Appeals decisions under the CDA. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Supreme Court set out four categories of "cases in which the Court has treated [a] decision on [a] federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 476–87, 95 S.Ct. 1029. In subsequent cases under section 1257, the Supreme Court has repeatedly assumed that awaiting the conclusion of such additional proceedings does not render the request for review untimely. *See, e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (deciding the case on the merits despite the petitioner's failure to appeal from an earlier, final state court judgment). [2]

So too, our sister circuits have permitted parties to wait for a final judgment, rather than requiring the parties to take an interlocutory appeal where interlocutory appeals are permitted by 28 U.S.C. § 1292. [3] For example, *Victor Talking Machine Co. v. George,* 105 F.2d 697 (3d Cir.), *cert. denied* 308 U.S. 611, 60 S.Ct. 176, 84 L.Ed. 511 (1939), held:

> A party, feeling himself aggrieved by an interlocutory decree ..., is given the right to appeal without awaiting a final decree [pursuant to 28 U.S.C. § 227 (now 28 U.S.C. § 1292(a)(1))], upon condition that he take his appeal within thirty days. *The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the* ***1349** *previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree.* The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case.... We conclude that upon this appeal from the final decree we have jurisdiction to review the question of the defendant's liability as well as the questions raised by the accounting.
>
> *Id.* at 699 (emphasis added); *see also* 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3921, at 20 n. 27 (2d ed.1996) (collecting cases from other circuits). Other courts have applied the same rule in the context of 28 U.S.C. § 227a, which is the predecessor statute of 28 U.S.C. § 1291(c)(2), pursuant to which this court has exclusive jurisdiction "of an appeal from a judgment in a civil action for patent infringement which ... is final except for an accounting." *See, e.g., Bingham Pump Co. v. Edwards,* 118 F.2d 338, 339 (9th Cir.), *cert. denied* 314 U.S. 656, 62 S.Ct. 107, 86 L.Ed. 525 (1941) (applying the rule of *Victor Talking Machine* in this context); *see also* 16 Wright, *supra,* § 3928, at 361 ("Failure to take an interlocutory appeal permitted by the statute does not foreclose review on appeal from a final judgment of the questions that might have been raised by earlier appeal.").

Accordingly, we conclude that the government's appeal is not time barred and that we have jurisdiction. We proceed to the merits.

II

[4] We review the Board's decisions interpreting statutes and regulations without deference. *E.g., General Elec. Co. v. Delaney,* 251 F.3d 976, 978 (Fed.Cir.2001). In this case, we conclude that the Board has seriously misread the governing statutory provisions.

A

At least since 1983, the FAR has barred the recovery of legal fees as a cost under government contracts if those fees were incurred in defense of a fraud proceeding that resulted

in a conviction. *See* Establishing the Federal Acquisition Regulation, 41 Fed.Reg. 42,301, 42,327 (Sept. 19, 1983) (codified as amended at 48 C.F.R. § 31.205–47(b)). [4] The following regulation remained in place until 1986:

> Costs incurred in connection with defense of any ... criminal ... investigation, grand jury proceeding or prosecution ... *brought by the Government against a contractor, its agent or employee,* are unallowable *when the charges,* which are the subject of the investigation, proceedings, or prosecution, *involve fraud on the part of the contractor, its agent or employee,* as defined below, *and result in conviction* (including conviction entered on a plea of nolo contendere), judgment against the contractor, its agent or employees, or decision to debar or suspend, or are resolved by consent or compromise.

48 C.F.R. § 31.205–47(b) (1985) (emphases added).

Congress subsequently passed the Defense Procurement Improvement Act of 1985 ("1985 Act"), Pub.L. No. 99–145, 99 Stat. 583, 682–704, which limited certain costs that could be recovered against the government. The scope of the 1985 Act proved controversial. Congress was "strongly in favor of stating as a matter of public policy that certain costs would not be allowable on government contracts," ***1350** but it was concerned that "an absolute statutory prohibition on certain categories of costs might be unworkable." H.R. Conf. Rep. No. 99–235, at 449 (1985), *reprinted in* 1985 U.S.C.C.A.N. 571, 603. Therefore, Congress did not deal broadly with cost allowability, but it specifically barred the recovery of ten classes of costs under covered contracts, including:

> [c]osts incurred in *defense of any civil or criminal fraud proceeding* or similar proceeding (including filing of any false certification) brought by the United States *where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding* (including filing of a false certification).

1985 Act § 911(a), 99 Stat. at 683 (codified at 10 U.S.C. § 2324(e)(1)(C)) (emphases added). Congress further directed: "The Secretary [of Defense] shall prescribe regulations to implement this section. Such regulations may establish appropriate definitions, exclusions, limitations, and qualifications." *Id.,* 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)). Congress also directed the Secretary of Defense to prescribe regulations to "define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts." *Id.,* 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(f)(1)). Pursuant to the 1985 Act, the earlier regulation was continued in the following modified, but substantially similar, form covering proceedings leading to the conviction of either the contractor or its employees:

> Costs incurred in connection with defense of any ... Criminal ... investigation, grand jury proceeding, or prosecution ... *brought by the Government against a contractor, its agents or employees,* are unallowable *when the charges,* which are the subject of the investigation, proceedings, or prosecution, *involve fraud or similar offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction* (including conviction entered on a plea of nolo contendere), judgment against the contractor, its agents or employees, or decision to debar or suspend, or are resolved by consent or compromise.

Federal Acquisition Circular 84–15, 51 Fed.Reg. 12,296, 12,302 (Apr. 9, 1986) (emphases added) (codified as amended at 48 C.F.R. § 31.205–47(b)). [5]

The next notable development was the enactment of the Major Fraud Act of 1988 ("1988 Act"), Pub.L. No. 100–700, 102 Stat. 4631. Among other things, the 1988 Act broadened the statutory grounds for cost disallowance in two respects: (1) by disallowing criminal defense costs in all types of proceedings not just those involving fraud where there was a conviction and (2) by limiting (but not completely barring) cost recovery where there was no conviction. These changes are reflected in the language of the 1988 Act.

First, the Act amended section 2324, disallowing "[c]osts incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United

States or a State, to the extent provided in subsection (k)." 1988 Act § 8(b)(1)(A), 102 Stat. at 4636 (adding subsection 2324(e)(1)(N)) (codified as amended at 10 U.S.C. § 2324(e)(1)(O)). Subsection (k) provides in pertinent part:

> (k) (1) Except as otherwise provided in this subsection [allowing, *inter alia,* otherwise disallowable costs to the extent provided by an agreement between the contractor and the United States], costs incurred by a contractor in connection ***1351** with *any criminal, civil, or administrative proceeding* commenced by the United States or a State are not allowable as reimbursable costs under a covered contract *if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation,* and (B) results in a disposition described in paragraph (2).
>
> (2) A disposition referred to in paragraph (1)(B) is any of the following:
>
> > (A) *In the case of a criminal proceeding, a conviction* (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

Id. § 8(b)(2), 102 Stat. at 4636–37 (codified as amended at 10 U.S.C. § 2324(k)) (emphases added).

Second, when costs were not disallowed by subsection (k)(1), the 1988 Act allowed the contractor to recover criminal defense costs equal to eighty percent of the costs it incurred, but only if the costs were "otherwise allowable" under the regulations:

> (5) (A) Except as provided in subparagraph (C), *costs incurred by a contractor in connection with a criminal,* civil, or administrative *proceeding* commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), *but only to the extent provided in subparagraph (B).*
>
> > (B) (i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount *equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation* issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) [*i.e.,* FAR].
> >
> > ....
> >
> > (C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

Id., 102 Stat. at 4637–38 (codified as amended at 10 U.S.C. § 2324(k)) (emphases added).

As a result of the 1988 Act, the regulations were amended in 1989, Federal Acquisition Circular 84–44, 54 Fed.Reg. 13,022, 13,022 (Mar. 29, 1989), and minor cosmetic changes were made to subsection (b) in 1990, Federal Acquisition Circular 90–3, 55 Fed.Reg. 52, 782, 52,794 (Dec. 21, 1990). Thus, the regulation incorporated into the contract provided:

> Costs incurred in connection with any proceeding brought by a Federal, State, local or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (*including its agents or employees) are unallowable if the result is ... [i]n a criminal proceeding, a conviction.*

48 C.F.R. § 31.205–47(b) (1991) (emphasis added). [6]

***1352** B

[5] The contractor here admits that its employee was convicted of a criminal offense, but it asserts that the legal fees incurred by the contractor are allowable. It makes two arguments: (1) that FAR 31.205–47(b) should be construed to be inapplicable when only the employee, but not the contractor, was convicted and (2) that if the regulation is construed to cover defense costs involving proceedings resulting in employee convictions, the regulation is invalid in view of the 1988 Act, which makes the costs allowable in part.

The Board did not adopt the contractor's proposed interpretation of the regulation, and we conclude that the interpretation is incorrect. The regulation disallows "[c]osts incurred in connection with any [criminal] proceeding brought by [the federal] government for violation of, or a failure to comply with, law or regulation by the contractor (*including its agents or employees*)" if a conviction results. 48 C.F.R. § 31.205–47(b) (1991) (emphasis added). In essence, the regulation defines the term "contractor" to include both the contractor and its employees. Indeed, the predecessor regulations clearly applied to employee proceedings. [7] The original regulation disallowed criminal defense costs where charges brought by the government "against a contractor, its agent or employee, ... involve fraud on the part of the contractor, its agent or employee, ... and result in conviction." 41 Fed.Reg. at 42,327. The regulation remained largely the same after the 1985 Act, disallowing criminal defense costs where charges brought by the government "against a contractor, its agents or employees, ... involve fraud or similar offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction." 51 Fed.Reg. at 12,302. Nothing in the history of the regulation subsequent to the 1988 Act indicates any intent to narrow the regulation's scope. *See* 54 Fed.Reg. at 13,022; 55 Fed.Reg. at 52,784.

Thus, we conclude that the regulation disallows costs incurred in the unsuccessful defense of criminal proceedings where an employee is convicted, even if the contractor is not. Furthermore, contrary to the contractor's contention, the regulation does not simply disallow the costs of defending the employee (which the contractor excluded from its claim); it disallows all costs of the proceeding, including the costs of defending the contractor, even though the contractor itself was not convicted.

This then requires us to reach the contractor's alternate claim that the regulation is invalid when so construed. The Board agreed with the contractor, concluding that the regulation was invalid in light of the 1988 Act because the plain language of the 1988 Act compels the allowance of the contractor's costs. The Board's theory was that the statute disallows criminal defense costs only if the contractor itself is convicted and that subsection (k)(5) provides that other criminal defense costs "may be allowed," but only to the extent of "80 percent of the amount of the costs incurred." 10 U.S.C. § 2324(k)(5)(A)-(B). The Board is incorrect for each of two reasons.

First, the statute is ambiguous. Indeed, although the contractor notes that subsection (k)(2)(A) does not include the word ***1353** "employees," it does not include the word "contractor," either. Instead, it merely requires "a conviction." 10 U.S.C. § 2324(k)(2)(A). The contractor concedes that the subsection "does not expressly provide who must be convicted for purposes of cost disallowance." (Cont. Br. at 44.) So too, the Board agreed that these provisions "are not explicit regarding whether contractor wrongdoing is necessary for costs to be unallowable, or whether conviction of an employee will also bar recovery of proceeding costs." *Entitlement Decision* at 152,929. On its face, the statutory language is ambiguous. Contrary to the contractor's contention, nothing in the remainder of the 1988 Act or its legislative history resolves that ambiguity in favor of the contractor's limited interpretation.

The reference in subsection (k)(5)(C) to "contractor misconduct" does not suggest that only contractor convictions are covered by subsection (k)(2)(A) or that the subsection cannot be construed to include employees within the term "contractor." So too, nothing in the legislative history is particularly informative. The 1988 Act included criminal provisions which penalized fraud by "contractors." § 2(a), 102 Stat. at 4631–32 (codified as amended at 18 U.S.C. § 1031 (2000)). The contractor points to Senate Report 100–503, which states:

> The committee *did not attempt to modify or establish new principles regarding respondeat superior and other forms of vicarious liability in criminal prosecutions.* ... In order for the corporation to be liable for a crime involving a mental element, it is necessary to prove that the agent acted within the scope of his or her actual or apparent authority and with the intent to benefit the corporation.

S.Rep. No. 100–503, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 5977 (emphasis added). As best we can understand this argument, the contractor contends that, by disallowing the contractor's costs in proceedings in which only the employee is convicted, the regulation is somehow imposing respondeat superior liability on the contractor for

acts of the employee. But that premise is not sustainable. There is nothing in the regulation that imposes liability on the contractor for the acts of its agents. Rather, the regulation merely disallows certain contractor costs. *See* 48 C.F.R. § 31.205–47(b).

In addition, the contractor relies on the following statement by Senator Grassley in support of his amendment adding what became subsection (k) to the 1988 Act:

> In summary, the amendment provides that legal proceeding costs are unallowable in any criminal, civil or administrative proceeding brought by the Federal or State Government that results in a conviction, civil liability, the imposition of a fine or other monetary penalty, a suspension or debarment, or other similar result *evidencing a violation or failure to comply on the part of the contractor.*

134 Cong. Rec. 31,528 (1988) (emphasis added). The contractor argues that this statement referring to "contractor" violations manifests an intent to limit the disallowance provisions to situations in which the contractor itself was convicted. However, Sen. Grassley never defined what he meant by "contractor" and never used the word "employee" in his remarks, *see id.* at 31,527–29, so there is no reason to believe that he intended to draw such a distinction between the contractor and its employees. Furthermore, Sen. Grassley's amendment was crafted to *expand* contractor cost disallowance, not to limit it. *See, e.g., id.* at 31,528 ("Under current practices, there's no incentive for contractors to keep an eye on costs or keep a careful eye on what lawyers bill them in Government fraud cases. After this amendment, there will ***1354** be."); *id.* at 31,527 (explaining that the amendment was designed to avoid "[t]he anomalous result ... that the same Government that prosecutes the fraud case pays the cost of the defense" by the contractor's "high-priced lawyers"). Thus, Sen. Grassley's statement does not support the contractor's reasoning.

Indeed, if the legislative history shows anything, it shows knowledge and approval of the existing regulatory approach of not covering legal fees in proceedings involving employee convictions for fraud. The regulation was cited specifically in the Senate Report. S.Rep. No. 100–503, at 4, *reprinted in* 1988 U.S.C.C.A.N. at 5972. Under such circumstances, Congress is often deemed to have approved the existing regulatory approach. *See Young v. Cmty. Nutrition Inst.,* 476 U.S. 974, 983, 106 S.Ct. 2360, 90 L.Ed.2d 959 (1986) ("[A] 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " (quoting *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974))); *San Huan New Materials High Tech, Inc. v. Int'l Trade Comm'n,* 161 F.3d 1347, 1355 (Fed.Cir.1998) ("The legislative history shows that Congress was fully aware of the agency regulations and practices at the time of legislating in their area, and absent some special circumstance the failure to change or refer to existing practices is reasonably viewed as ratification thereof.").

[6] **[7]** Having concluded that the statute is ambiguous, we turn to the analysis mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Board suggested that the FAR regulations were not entitled to *Chevron* deference because it found "no indication that Congress entrusted the accommodation of conflicting policies on the issue before us to the agencies through the FAR." *Entitlement Decision* at 152,930. We disagree. In *Chevron,* the Court held that courts reviewing agency interpretations of statutes must answer two questions: (1) "whether Congress has directly spoken to the precise question at issue," and if not, (2) "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842–43, 104 S.Ct. 2778. Thus, the correct inquiry is whether Congress has left an explicit or implicit gap for the agency to fill, *id.* at 843, 104 S.Ct. 2778, not whether Congress explicitly provided that the agency should resolve conflicting policies.

[8] **[9]** The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference. Not only has Congress specifically authorized the FAR, *see* 41 U.S.C. § 405a (2000), but, in the 1985 Act, it expressly authorized regulations adopting definitions of the statutory terms, such as "contractor." § 911(a), 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)). As the Supreme Court noted in *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), "a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or

rulings for which deference is claimed." *Id.* at 229, 121 S.Ct. 2164. Not surprisingly, we have specifically held that the provisions of FAR are entitled to *Chevron* deference. *See, e.g., Info. Tech. & Applications Corp. v. United States,* 316 F.3d 1312, 1321–22 (Fed.Cir.2003); *Newport News Shipbuilding and Dry Dock Co. v. Garrett,* 6 F.3d 1547, 1552 (Fed.Cir.1993); *United States v. Grumman Aerospace Corp.,* 927 F.2d 575, 578 (Fed.Cir.1991).

***1355** **[10]** **[11]** It remains only to determine whether the regulations constitute a reasonable interpretation of the statute. As we have discussed above, FAR 31.205–47(b) effectively defines the statutory term "contractor" to include the employees of the contractor. That is plainly a reasonable interpretation of the statute, and similar agency interpretations appearing in other regulations have been held to be entitled to *Chevron* deference. For example, in *Meyer v. Holley,* 537 U.S. 280, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003), a regulation promulgated by the Department of Housing and Urban Development ("HUD") interpreted the word "person" in 42 U.S.C. § 3605(a) to include:

> any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale ... of dwellings ... if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person ... has engaged ... in a discriminatory housing practice.

24 C.F.R. § 103.20(b) (1999) (repealed). The Supreme Court deferred to this "reasonable interpretation" of the statute by HUD, citing *Chevron. Meyer,* 537 U.S. at 287–88, 123 S.Ct. 824; *see also, e.g., N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 520, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (upholding a regulation by the Department of Health, Education, and Welfare that interpreted the word "person" in 20 U.S.C. § 1681(a) to encompass employees, as well as students, of educational institutions). We conclude that FAR 31–205.47(b), which defines "contractor" to include the contractor's employees, is entitled to *Chevron* deference, and it is, accordingly, binding.

Second, even if the statutory term "contractor" were construed to exclude employees, the 1985 and 1988 Acts authorized the Secretary of Defense to adopt supplemental cost disallowance rules going beyond the statute. In enacting the FAR, Congress intended to confer broad authority on the agencies to adopt cost disallowance principles. *See, e.g.,* 41 U.S.C. § 405(a) (2000). Nothing in the 1985 or 1988 Acts was designed to limit this authority. Rather, those statutes confirmed it. As noted in the 1985 Act, Congress adopted section 2324(e), which provided: "The Secretary shall prescribe regulations to implement this section. Such regulations may establish appropriate definitions, exclusions, limitations, and qualifications." § 911(a), 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)). We have previously characterized this provision as having "directed the Secretary of Defense to promulgate regulations prescribing specific categories of unallowable costs." *Bill Strong Enters., Inc. v. Shannon,* 49 F.3d 1541, 1548 (Fed.Cir.1995), *overruled in part on other grounds by Reflectone, Inc. v. Dalton,* 60 F.3d 1572, 1579 & n. 10 (Fed.Cir.1995) (*en banc*). Further confirmation of the breadth of the regulatory authority was the inclusion of subsection (f)(1), which, while not specifically directed to FAR itself, confirmed the authority of the Secretary of Defense in supplemental regulations "to clarify the FARs concerning the allowability and unallowability of a different set of categories of costs." *Id.* Nothing in the 1988 Act changed that approach. The 1988 Act recognized that defense costs (where there was no conviction) were to be allowed in part only if not disallowed by regulation. Furthermore, the 1988 Act expressly provided that allowable costs under subsection (k)(5) are allowed only "to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A))," *i.e.,* under FAR itself. § 8(b)(2), 102 Stat. at 4637 (codified ***1356** as amended at 10 U.S.C. § 2324(k)(5)(B)(i)).

The extension in FAR 31–205.47 of the subsection (k)(1) cost disallowance to employees of contractors, rather than contractors alone, falls squarely within the Secretary's authority under the 1985 and 1988 Acts. In short, contrary to the contractor's argument, the Secretary had authority to expand the disallowance in subsection (k)(1) to proceedings in which an employee of a contractor was convicted even though the contractor itself was not.

Thus, the FAR regulation in question is not inconsistent with the statute, and it is not invalid. The contractor's defense costs in that proceeding were therefore not allowable.

III

A remaining question is whether this case needs to be remanded for a determination of whether the costs sought by the contractor resulted from the same proceeding as that in which Mr. Marcum pled guilty. The contractor argues that the proceedings in which the claimed costs were incurred and in which Mr. Marcum pled guilty were separate and that it is still entitled to recovery of its costs. The Board did not reach the issue of whether there was more than one proceeding in this case, *see Entitlement Decision* at 152,932 n. 1, nor did it address the operation of subsection (k)(5)(C) [8] or its implementing regulation, 48 C.F.R. § 31.205–47(b)(5), in this context. Therefore, we remand to the Board for an initial determination whether the proceedings were separate, and, if they were, whether they involved the same contractor misconduct.

CONCLUSION

For the foregoing reasons, we reverse the Board's decision and remand to it for further proceedings in accordance with this decision.

REVERSED AND REMANDED

COSTS

No costs.

All Citations

349 F.3d 1343

Footnotes

1 The applicable regulations are therefore those in effect on the contract's effective date of September 25, 1991. *See, e.g., Johnson v. All–State Constr., Inc.,* 329 F.3d 848, 851 n. 2 (Fed.Cir.2003). The present regulations are not materially different. *See* 48 C.F.R. § 31.205–47 (2002).

2 *See also* Robert L. Stern et al., *Supreme Court Practice* § 3.7, at 156 (8th ed. 2002) ("It is one thing to hold that a litigant may seek early review of a state court decision because otherwise the federal constitutional issue might disappear or be eroded. But it is quite a different matter to hold that a litigant is precluded from review if, having carefully conserved his constitutional claims on the remand, he waits for the end of the state court litigation before bringing his federal claims to the Supreme Court. Finality is too practical a doctrine to be turned into such a trap for litigants...."); *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 517, 70 S.Ct. 322, 94 L.Ed. 299 (1950) (Black, J., dissenting) ("Where, as here, arguments as to which of two decrees is 'final' may be considered relatively even, an appellate court should be free to find 'finality' in either decree appealed from."). *But see Cox Broad. Corp.,* 420 U.S. at 511–12, 95 S.Ct. 1029 (Rehnquist, J., dissenting) (advocating the contrary approach).

3 Section 1292 permits interlocutory appeals, *inter alia,* to a court of appeals when a district court enters an interlocutory order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court," § 1292(a)(1), and to this court "from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting," § 1292(c)(2).

4 Even before 1983, a similar regulation was included in the Defense Acquisition Regulations. *See* Defense Acquisition Circular 76–39 (Oct. 20, 1982) (codified as amended at 32 C.F.R. § 15–205.52 (1983)).

5 The coverage of the regulation was expressly revised "to comply with the provisions of Pub.L. 99–145, which ... authorized amendments to regulations to provide appropriate definitions, exclusions, limitations, and qualifications." 51 Fed.Reg. at 12,298.

6 The regulation currently provides:

> Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is ... [i]n a criminal proceeding, a conviction....

48 C.F.R. § 31.205–47(b) (2002).

7 Even the contractor admits that the predecessor regulations "might have prevented a contractor from recovering the legal defense costs of an employee based on the subsequent conviction of the employee." (Cont. Br. at 50.)

8 That subsection provides:

> In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

10 U.S.C. § 2324(k)(5)(C).

Brent Allen is the Department of Energy's Deputy General Counsel for Environment and Litigation. Prior to joining the Department, Mr. Allen was a Senior Trial Attorney in the Environment and Natural Resources Division at the Department of Justice. Mr. Allen also represented private clients for over 20 years as a litigation partner at two different law firms in Washington, DC. Mr. Allen graduated from Vanderbilt University Law School and the University of Pennsylvania.

Cindy Lovato-Farmer, Executive Director and General Counsel, Office of General Counsel

Biography

Cindy Lovato-Farmer is the Executive Director and General Counsel at Pacific Northwest National Laboratory (PNNL). In this role, Cindy leads a talented team of legal professionals who are strategic partners providing legal guidance on a broad range of issues and proactively mitigating risk while supporting mission objectives. In addition, Cindy provides leadership and direction on legal and litigation strategies in support of PNNL's overall mission.

Prior to joining PNNL, Cindy spent a combined total of 19 years in legal and leadership positions at DOE NNSA National Laboratories. Cindy was Senior Managing General Law and Litigation Counsel at Sandia National Laboratories where she led Sandia's General Law Center, recognized in 2020 for their strategic partnership with management, strategic approach to litigation and proactive risk mitigation strategy. Prior to joining Sandia, she led the Employment Law & Litigation Group at Los Alamos National Laboratory. In these roles, Cindy has managed and directly handled a range of complex legal matters and litigation, participated in employee resource groups and supported mission strategies and objectives. Cindy previously was a partner at a law firm in Albuquerque, New Mexico where she handled employment law and civil rights defense litigation and appeals, following a federal judicial clerkship. She is recognized as a specialist in employment law and has been a speaker and instructor at numerous legal seminars and trainings.

Cindy has earned an AV Preeminent peer review rating from Martindale Hubbell which denotes the highest level of professional excellence for legal expertise, communication skills and ethical standards and is in the Martindale Hubbell Bar Register of Preeminent Women Lawyers. Cindy has obtained In-house Counsel Certification from the Association of Corporate Counsel. She has been active in legal and community organizations and served on numerous boards.

A native of New Mexico, Cindy earned a bachelor's degree in journalism from New Mexico State University and a law degree from the University of New Mexico School of Law.

Angela B. Styles is currently a partner at Akin Gump Strauss Hauer & Feld LLP. With a practice spanning more than 25 years, Angela is among the most prominent government contracts and grants lawyers in the United States.

She is recognized for her deep experience in government procurement policy, cost and pricing issues, commercial item contracting, Other Transaction Authority agreements and compliance.

She brings to bear her experience as an administrator for federal procurement policy within the OMB, a position that required confirmation by the U.S. Senate. For eight years, Angela also served in the role of executive director of the Defense Industry Initiative on Business Ethics and Conduct. Angela is also a member of the Board of Governors for Argonne National Laboratory, which was established by the University of Chicago, and chairs the audit committee of the laboratory.

Angela's previous private practice experience includes chairing the government contracts practice at an international law firm and serving as that firm's chair. She also worked as legislative aide for Congressman Joe Barton and the Governor of the State of Texas. Angela was also recently elected as a member of the University of Texas Chancellor's Council Executive Committee and is a board member of the Texas Historical Foundation.

HUSCH BLACKWELL

Steven A. Neeley

PARTNER

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OVERVIEW

Steve provides practical solutions to complex commercial disputes. He digests complicated issues quickly and guides the dispute resolution process to achieve clients' business objectives.

Steve focuses his litigation and arbitration practice on government contracts, renewable energy, and construction projects. He began his career litigating construction disputes on federal government projects, but clients quickly began looking to Steve for guidance on all of their government contracting needs.

He now assists clients across the industry spectrum who contract with, or accept grants from, the federal government. Steve has represented clients in bid protests and claims litigation at both the state and federal level in numerous jurisdictions across the country. He also has guided clients through numerous audits, internal investigations, and due diligence matters, as well as other contract compliance and administration issues.

In the renewable energy arena, Steve represents owners and developers of wind, solar, and hydroelectric projects with all of their project construction and operation issues. He has extensive experience in the preparation and pursuit of warranty claims, and has successfully litigated or settled disputes against several of the world's top original equipment manufacturers and EPC contractors. He also counsels owners and developers on corporate matters that affect day-to-day operations. Steve enjoys the challenge of viewing an issue from all vantage points to create a coherent case for clients.

Industry

Energy & Natural Resources

Services

Aviation
Bid Protests
Construction & Design
Construction Litigation
COVID-19 Research and Laboratory Testing
eDiscovery Solutions
Energy Storage
Government Contracts
Government Solutions
Labor & Employment
Litigation & Alternative Dispute Resolution
Solar Energy
Wind Energy

Experience

RENEWABLE ENERGY

- Represented solar developers in various claims against EPC contractors and panel manufacturer for defective construction and low power production.
- Advised solar developer on various compliance issues arising under power purchase agreement with government agency for soon-to-be-constructed solar project.
- Represented global renewable energy developer in multimillion-dollar arbitration in New York on alleged breaches of warranties in long-term service and maintenance agreement.
- Advised wind energy developers in warranty disputes involving alleged blade and gearbox defects in wind turbines at facilities in California, Colorado, Illinois, New Mexico, Oregon, Pennsylvania and Texas.
- Represented renewable energy developer in litigation of $140 million warranty coverage dispute involving wind turbines at wind farms in California, Illinois and Pennsylvania.
- Successfully obtained dismissal in breach of contract action against hydroelectric developer and investor-owned utility brought by former owner of plant.
- Represented wind energy developer in litigation against major balance of plant contractor and engineering firm.

GOVERNMENT CONTRACTS

- Assisted one of largest U.S. commercial and civil contractors with numerous emergency design-build contracts for new hospital construction intended for COVID-19 patients.
- Represented technical, professional and scientific services company in multiple GAO bid protests challenging award of Air Force contract for technical support services. Actively participated in drafting and presentation of expert testimony supporting challenge to agency's technical evaluation and corrective action.

Experience

- Successfully defended awardee in GAO bid protests seeking to overturn award of $480 million contract for interoperability testing and certification services with Defense Logistics Agency.
- Represented successful offeror in defending three GAO bid protests challenging award of $350 million Corps of Engineers contract for remediation of nuclear waste.
- Represented construction contractor in protests involving contracts for (i) construction of Army Reserve Center in New York; (ii) renovation of Army barracks in New Jersey; and (iii) relocation of maintenance facility at national park in New Jersey.
- Represented health IT contractor in connection with task order protest before GAO and then U.S. Court of Federal Claims under government-wide acquisition contract for markup and quality assurance of public access journal manuscripts for National Institutes of Health.
- Successfully mediated and converted default termination of X-ray inspection solutions company in contract with Defense Logistics Agency-Aviation to construct and install radiographic shielded enclosure to be used by Navy's Fleet Readiness Center Southwest in San Diego, California.
- Advised small aerospace company in connection with convenience termination of four subcontract purchase orders issued for modification of aircraft to perform flight testing for Navy's Multi-Stage Supersonic Target Project.
- Advised private liberal arts university on several grant administration issues, including time and effort reporting, institutional base salary compliance, procurement standards and conflicts of interest policies.
- Represented independent K-12 school district in connection with performance and closeout of JobLink contract funded by federal grant.

Recognition

- *The Legal 500 United States*
  - E-discovery, Recommended attorney, 2023 and 2024
  - Government contracts, Recommended attorney, 2024
- Capital Pro Bono Honor Roll, High Honors, 2019-2020

Education

- J.D., American University Washington College of Law
  - *cum laude*
  - Moot Court Honor Society
  - *Administrative Law Review*
- B.A., College of William and Mary

Admissions

- U.S. Bankruptcy Court, District of Columbia
- U.S. Bankruptcy Court, Eastern District of Virginia
- U.S. Court of Appeals, Federal Circuit
- District of Columbia
- U.S. Court of Federal Claims
- Virginia
- U.S. District Court, District of Columbia
- U.S. District Court, District of Maryland
- U.S. District Court, Eastern District of Virginia

Community Leadership

From 2010-2013 and again in 2016-2017, Steve was a volunteer teacher at the Central American Resource Center. He taught U.S. history and civics to permanent residents preparing to take the U.S. citizenship exam.

The Legal 500 United States.

NNSA Contractor Morale, Recreation, and Welfare Programs: Perspectives on Cost Allowability Requirements and Compliance Best Practices

The Most Complex Legal Issue of Them All

NNSA Contractor Morale, Recreation, and Welfare Programs: Perspectives on Cost Allowability Requirements and Compliance Best Practices

William Mayers, Attorney, OGC, NNSA
Irvin Gray, Associate General Counsel, FM&T

NSC-614-6683 dated 15 Oct 2024 Unclassified Unlimited Release

How many FAR citations clearly state the federal government's position on costs for morale and recreation programs?

Zero!

The allowability of costs for morale and recreation programs depend on a complex web of FAR citations, prime contract language, and caselaw. In general, these fall into three categories:

1. Food
2. Swag/gifts/awards
3. Events/Conferences

Assumption

"The government shall reimburse the contractor for the following costs: ....."

Reality

Web of FAR citations, standard contract language, advance agreements, caselaw.

Meet Olivia

She has been tasked with organizing an event to recognize a program milestone.

She was told that 10 VIPs from the Department of Energy will be attending.

She asks you the following questions:

1. Can she provide for meals and refreshments for employees, attendees, and the VIPs?

2. Can she purchase a golden shovel and 100 commemorative coins as requested and funded by the federal program manager?

3. Can she rent an off-site conference room for a conference center for visitors and site management to work on strategic planning?

Before using morale and welfare funding, Olivia requests an answer from the M&O attorney and confirmation from Site Counsel...

Approach 1

Pay for the event using off-contract dollars

Pros:
Local decision
Clear rules
No audit traps

Cons:
Expensive over time
No budget constraint on agency

Approach 2

Pay for the event using federal dollars.

Pros:
Use funding from agency

Cons
Obtaining common understanding of rules
Unclear rules
~~Aud~~it traps

In 2021, NNSA announced an effort to expand morale and welfare programs to $50/employee at M&O Contractors

Problem: Contract language and advance agreements vary across sites.

Path forward: Common framework for morale and recreation costs

Example...

Enclosed is a signed bilateral modification to clarify the complex web of FAR citations and caselaw, and to align prime contract language and advance agreements across the complex.

2. Modifies the language in Section J, Appendix G (Personnel Appendix), § 11.1 Recreation and Morale Building Benefits with the language as follows (Enclosure A).

ENCLOSURE A

to

Settlement Agreement between Honeywell Federal Manufacturing & Technologies and NNSA

The language in Section J, Appendix G (Personnel Appendix), § 11.1 Recreation and Morale Building Benefits, is deleted in its entirety and replaced with:

11.1 Recreation and Morale Building Benefits

(A) General Parameters. The Contractor may institute a recreation and morale building program (the "Culture Club"), with parameters approved by the Contracting Officer. In order to be considered allowable costs, expenditures in furtherance of the Culture Club must be consistent with Federal Acquisition Regulations (FAR) Subpart 31.2, as supplemented by Department of Energy Regulations (DEAR) Subpart 931.2, and other provisions of the Contract.

(B) Scope of Activities that May be Allowable. Contractor activities administered within the Culture Club may include, but are not necessarily limited to:

(1) Employee participation in company-sponsored sports teams;

(2) Employee participation in organizations designed to improve company loyalty, teamwork, or physical fitness;

(3) The support and planning of meetings, conventions, conferences, symposia, or seminars, if the principal purpose is trade, business, technical or professional information or the stimulation of production or improved productivity.

(C) Scope of Activities that are Expressly Unallowable. In addition to other unallowable costs, to avoid confusion, the following are expressly prohibited under the Culture Club:

(1) Gifts (*see* FAR 31.205-13(b);

(2) Entertainment costs (*e.g.*, costs of amusement, diversions, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation and gratuities) (*see* FAR 31.205-14);

(3) Costs of alcoholic beverages (*see* FAR 31.205-51); and

(4) Awards or other recognition programs (as these are carried out under the authority of § 11.6).

(D) Culture Club Funding. The amount to be expended annually by the Contractor per fiscal year shall not exceed $50 multiplied by the annual average number of employees under the Contract. The annual average number of employees for purposes of determining the annual maximum allowable expenditure related to the Culture Club, shall be calculated by totaling the number of employees on the payroll register at the end of each calendar month and dividing such total by 12.

(E) Annual Submissions. Contractor shall submit an annual report of expenditures in furtherance of the Culture Club, including support for its calculation of annual average number of employees within 30 days of the end of each fiscal year. Contractor should, if appropriate, seek advanced agreement, for planned expenditures in furtherance of the Culture Club.

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Bill Mayers serves as a procurement and general law attorney with the National Nuclear Security Administration's (NNSA) Office of the General Counsel. Bill joined the team in 2010 after serving fourteen years with the Department of Defense.

Bill received his undergraduate degree from Campbell University, where he earned a Bachelor of Business Administration and completed the Army ROTC program. After serving in the Army, he attended American University and earned a Master of Science degree. Over the next several years he worked for several corporations and Federal agencies as a real estate financial analyst and consultant. Also, during this time, he attended George Mason University School of Law.

Upon graduation from law school, Bill began practice as a Criminal Justice Act attorney in the District of Columbia and the Commonwealth of Virginia. In 1996, he joined the staff of the Defense Information Systems Agency (DISA), Office of General Counsel. In 2001, he transferred to Scott Air Force Base and in 2002 became Chief Legal Counsel for DISA's Defense Information Technology Contracting Office (DITCO) Legal Office. During his tenure with DISA, Bill received the DISA Exceptional Civilian Service Medal from LTG Carroll Pollet. In 2010, he joined the Office of the General Counsel for NNSA. Bill's first assignment with NNSA was to serve as the Acting Site Counsel for the Los Alamos National Laboratory. Since 2011, he has worked with the NNSA Procurement Law Team in Albuquerque, NM.

Irvin Gray
JD (2009), MBA (2013), LLM (2022), NCMA Fellow, CPCM, CFCM, CCCM
Associate General Counsel - Contracts and Special Projects
Honeywell Federal Manufacturing & Technologies, LLC (FM&T)
Kansas City, MO

Irvin Gray is Associate General Counsel - Contracts and Special Projects for the Kansas City National Security Campus (KCNSC) managed by Honeywell FM&T. Irvin has worked in the legal office at FM&T since 2018. Before joining FM&T, Irvin served as a civilian attorney for the U.S. Army Corps of Engineers, as the Director of Administration for a U.S. Presidential Commission, as a Northrop Grumman contractor at the US State Department, and as an active-duty Navy Officer for 8 years.

Irvin helps senior leaders to accomplish their goals and to manage risks through contracts. Approaches include prime contract compliance, organizational conflicts of interest, subcontract formation and administration, and innovative initiatives such as Workforce Pipeline Development and Multi-Site Development and Production Agreements.

Irvin earned his BS in English from the US Naval Academy, a JD from The George Washington Law School, an MBA from Washington University in St. Louis, and an LLM from The George Washington Law School. He is a Fellow of the National Contract Management Association (NCMA), has earned three NCMA certifications in contract management, and earned a Certificate in Public Leadership from The Brookings Institution.

Irvin teaches contract management for the University of Dayton School of Law (Introduction Course on Business Law, Capstone Course on Government Procurement). He has trained over 1,000 contract management professionals through the NCMA and the Department of Energy's Contractor Acquisition University. He has published over 50 articles on government contracts in the NCMA's Contract Management magazine.

Trends and Perspectives from DOE Worker Safety & Health Enforcement

Trends & Perspectives from Worker Safety & Health Enforcement

Shannon Holman

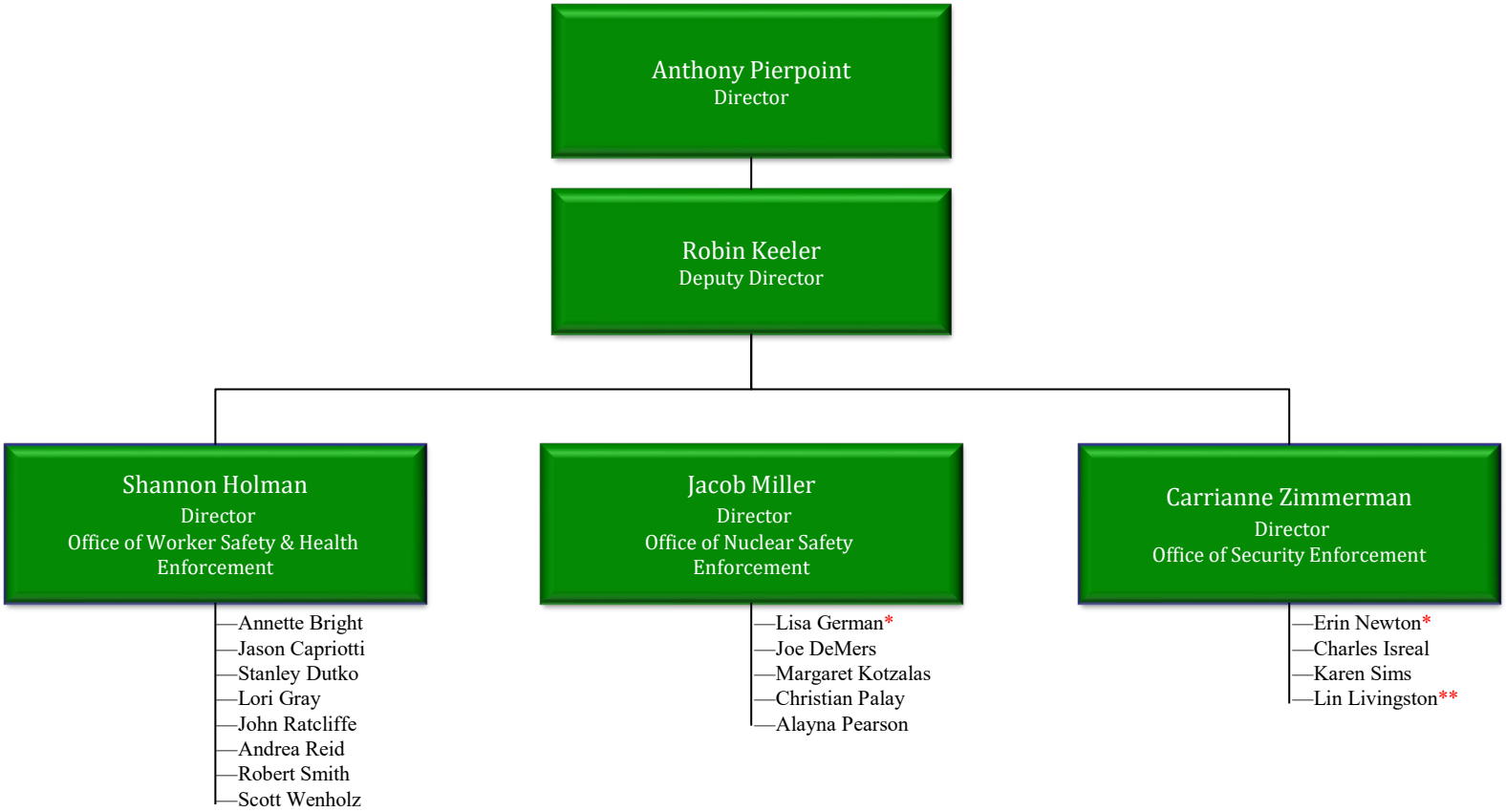
Director

Office of Worker Safety & Health Enforcement

The Office of Enforcement (EA-10)

- Promotes overall improvement in the Department's safety and security programs through management and implementation of the DOE enforcement programs for safety and information security that are authorized by the Atomic Energy Act.
- Conducts enforcement investigations using systematic enforcement practices to thoroughly evaluate operational events and conditions that represent potentially serious violations of the Department’s nuclear safety, worker safety and health, classified information, and unclassified controlled nuclear information regulations. These investigations can result in civil penalties against DOE contractors that violate the regulations.

EA-10 Organization



** Denotes Contractor Administrative Support* *** Denotes Contractor Support Part-Time*

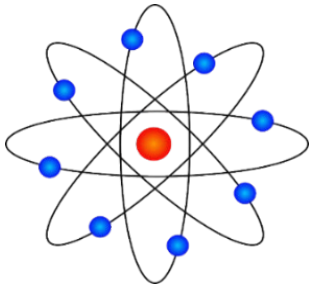
Enforcement Authorities

The Atomic Energy Act (AEA) authorizes the Secretary of Energy to issue civil penalties for violations related to:

Section 234A→ **Nuclear Safety**

Section 234B→ **Information Security**

Section 234C→ **Worker Safety and Health**



Enforcement Program Authorities and Procedural Rules

- 10 C.F.R. Part 820, Procedural Rules for DOE Nuclear Activities [Parts 830 and 835] [AEA Section 234A]
- 10 C.F.R. Part 824, Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations [AEA Section 234B]
- 10 C.F.R. Part 1017, Identification and Protection of Unclassified Controlled Nuclear Information [AEA Section 234B]
- 10 C.F.R. Part 851, Worker Safety and Health Program (contains procedural rules and program requirements) [Part 850] [AEA Section 234C]

Why Enforce?

- The Federal Government provides almost $16.6 billion in financial protection to DOE contractors who may be liable for a nuclear incident (nuclear indemnification)
- Helps ensure contractors meet their obligations to provide a safe and healthful workplace
- Demonstrates DOE and its contractors are trustworthy guardians of classified matter and UCNI information
- Promotes compliance with safety and security requirements
- Demonstrates to Congress and the public that DOE is capable of effective self-regulation

Additional Program Information

- *Enforcement Process Overview*: Provides more detailed information on program approach and implementation process.

- *Enforcement Coordinator Handbook*: Provides guidance and expectations on coordinator roles, noncompliance screening and reporting, discipline-specific information, and assessment and corrective action observations.

- *Enforcement Program Overview Training*: Provides an overview of the Enforcement program and process.

This information is located at: http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information

Enforcement Philosophy

- DOE contractors are viewed as being in the best position to identify and promptly correct noncompliances

- Provide **incentives to promote contractor identification, evaluation, reporting, and resolution of noncompliances** before events occur

- Incentivize proactive self-identification through contractor assessment processes

Enforcement Process

- Enforcement staff are assigned sites to monitor
- Review and evaluate performance and compliance information from numerous sources
- Pursue cases of significance
- Use incentives for issues that are self-identified and effectively resolved

Information Sources

Events	Self-Assessments, Corporate Assessments
ORPS and Injury Reports (CAIRS, OSHA logs)	External Assessments (site/program office, EA, IG, GAO, DNFSB)
Accident Investigations	Local Security Surveys
Nonconformance Reports	Security Inquiries
Radiological Deficiency Reports	Security Incident Trending and Snalysis
Employee Concerns	Media Reports

Case Selection Considerations

- Actual/potential safety or security significance
- Contractor performance history/trends
- Isolated event or systemic problem
- Level of management involvement
- Prompt identification/reporting
- Comprehensive corrective actions
- Willfulness or record falsification
- DOE line management input

Enforcement Options

- Exercise discretion; track to closure
- Advisory Note
- Consider issuance of an Enforcement Letter
- Conduct a fact-finding visit
- Recommend formal investigation

Common Enforcement Outcomes

- Enforcement Letter
- Consent Order/Settlement Agreement
- Notice of Violation (PNOV, FNOV)

- *The NNSA Administrator issues PNOVs and FNOVs for NNSA contractors after considering the recommendation of the Director of Enforcement.*

Severity Levels and Civil Penalties: 2024

			Worker Safety & Health	Nuclear Safety	Classified Information Security
Severity	Level I		$118,000 (100%)	$255,000 (100%)	$182,000 (100%)
	Level II		$59,000 (50%)	$127,500 (50%)	$91,000 (50%)
	Level III		Does not apply	$25,500 (10%)	$18,200 (10%)

- **See appendices to the Procedural Rules for descriptions of Severity Levels**
- **Penalties can be assessed on a per violation, per day basis.**
- **Base civil penalty amounts are adjusted annually for inflation**

Additional information on civil penalties can be found at: https://www.energy.gov/ea/enforcement-program-information-and-training

Website Posting and Docket

- Outcome documents such as Enforcement Letters, Consent Orders, Settlement Agreements, and Notices of Violation (NOVs) are posted to the Office of Enforcement's webpages, unless any portion is CUI or classified

- NOVs are added to the Enforcement Docket by the Docketing Clerk who also coordinates with the contractor company for payment of monetary remedies or civil penalties

Issued Enforcement Documents can be found at:
https://www.energy.gov/ea/enforcement-infocenter

Safety and Security Regulatory Program Assistance Review – Purpose and Value

- Establish and strengthen communication flow between contractor safety/security/enforcement program personnel and the Office of Enforcement
- Increase senior management awareness of safety and security regulatory program process strengths and challenges
- Offer contractors the opportunity to validate its resource investment in the regulatory program

Safety and Security Regulatory Program Assistance Review – Purpose and Value (cont'd)

- Build confidence in the contractor's ability to effectively identify and correct noncompliance
- Familiarize Office of Enforcement personnel with site operations
- Provide constructive feedback to enhance the safety and security regulatory program processes
- Increase engagement with Federal safety/security/enforcement partners

TRENDS

EA-11 Notice of Violations Review

- 10 CFR 851 Regulation FRN – 2006
- Safety Significant Targets Investigation
- Focused Investigations
- First PNOV Outcome Issued - 2008
- 47 PNOV WSH Cases Issued
- Average 3 PNOV Per Year
- Max PNOV Issued - 7 in 2015
- 378 Total Violations Cited
- Average 8 Violations Per PNOV

Most Frequently Cited Standards

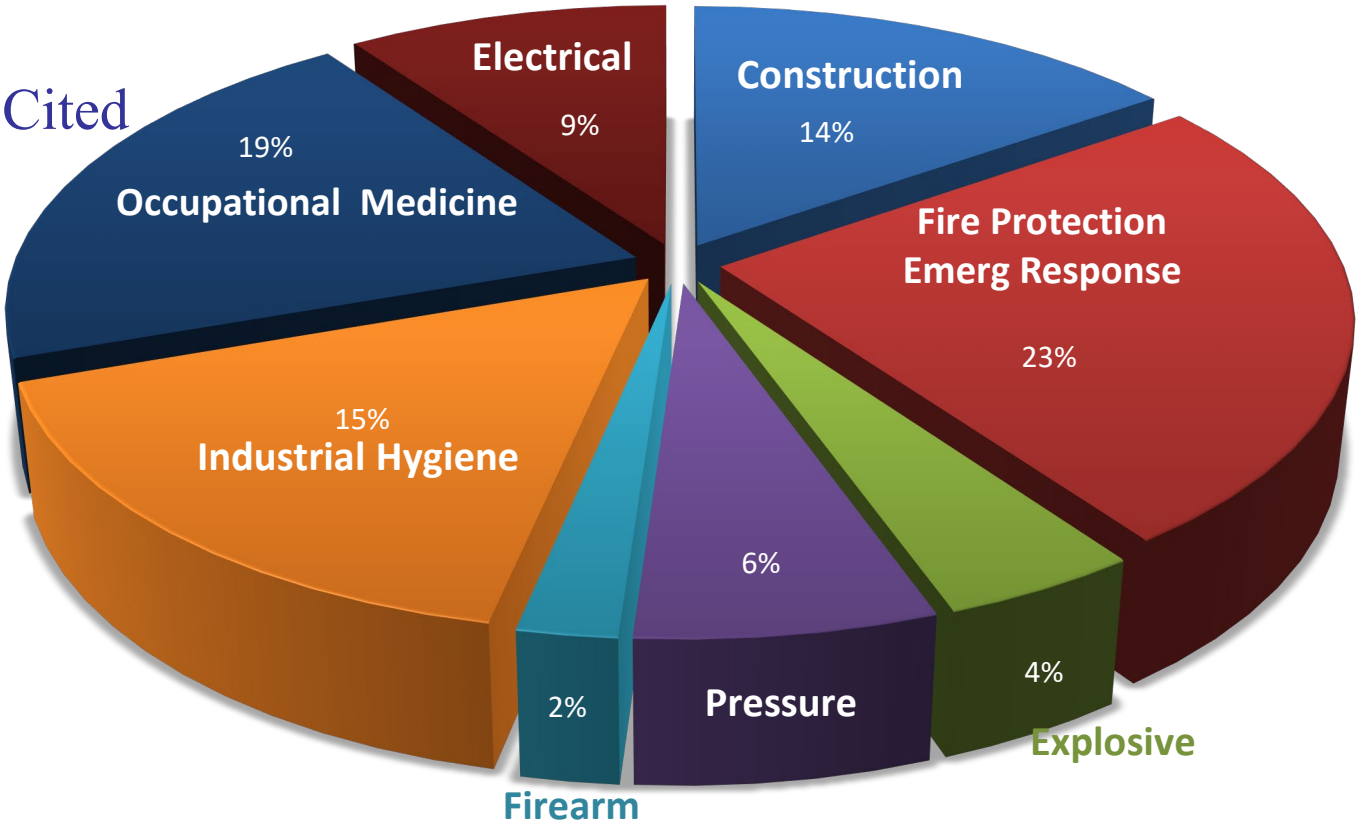
General Requirements 851.10	94%
Safety & Health Standards 851.23	81%
Functional Areas 851.24 and/or Appendix A	79%
Hazard ID and Assessment 851.21	79%
Hazard Prevention & Abatement 851.22	77%
Training & Information 10 CFR 851.25	70%
Mgt Responsibilities & Workers' Rights 851.20	45%
Personal Protective Equipment (All types)	43%
Electrical Standards (OSHA, NFPA 70, 70E, NEC)	36%
Medical Services & First Aid 29 CFR 1910.151/1926.50	19%

Functional Areas Breakout

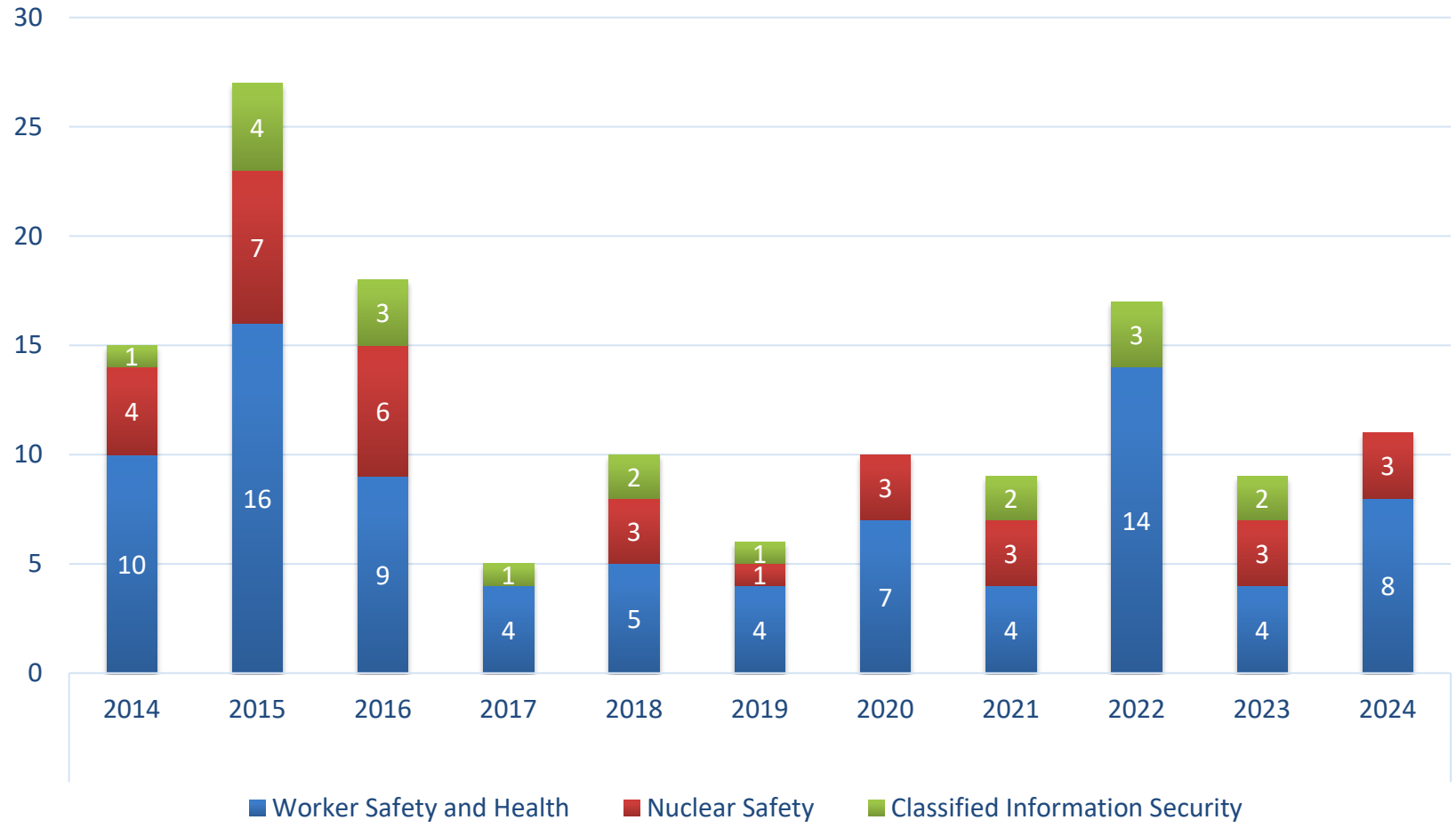
Functional Area	Times Cited	Frequency (%)
Construction Safety	5	14%
Fire Protection/Emergency Response	11	23%
Explosive Safety	2	4%
Pressure Safety	3	6%
Firearms Safety	1	2%
Industrial Hygiene	7	15%
Biological Safety	0	-
Occupational Medicine	9	19%
Motor Vehicle Safety	0	-
Electrical Safety	4	9%
Nanotech Safety	0	-
Workplace Violence	0	-

Functional Area Breakout

Frequency Cited



Enforcement Outcomes (Calendar Year)



Notable Observations

- Subcontractor safety
- Inadequate work planning and control
- Job/process hazard analysis ineffective/absent
- Non-routine and skill of the craft tasks
- Worker training & qualifications
- Amputations
- Emergency Response

Recent Worker Safety & Health Cases

LANL
Heat Stress Event

- **A worker at LANL Technical Area 54, Area G/Pit 29, experienced heat exhaustion while supporting the Corrugated Metal Pipes (CMP) retrieval operations.**

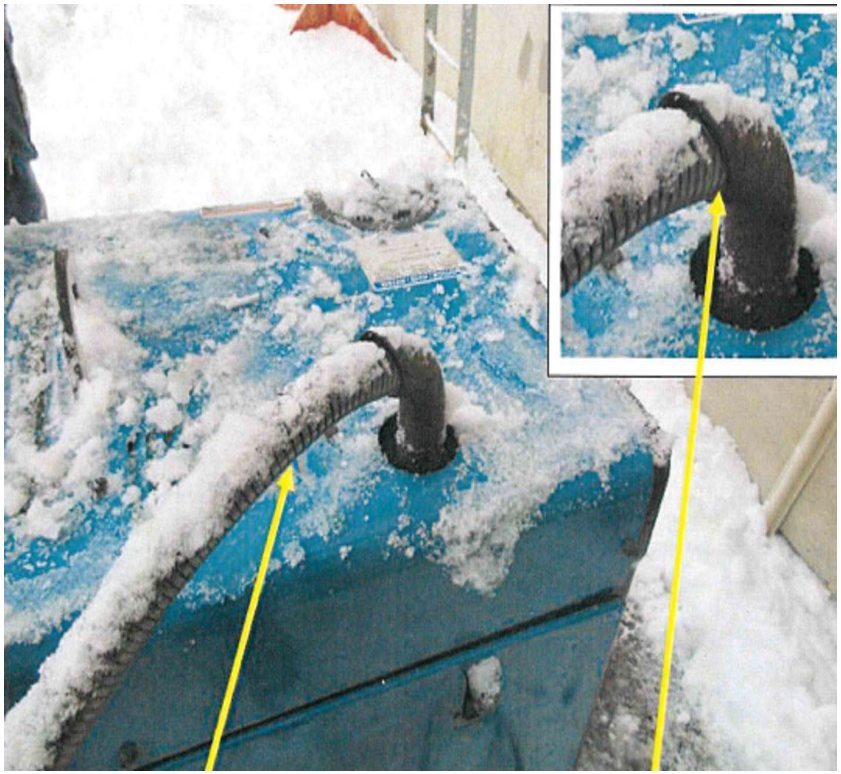
- **The worker experienced heat stress symptoms while working in a contained cab with no air conditioning and fully dressed in anti-contamination clothing.**

- **PNOV issued December 21, 2023**

SLAC
Electrical Shock Event

- Worker received a high voltage electrical shock resulting in severe injuries to their hands and face while preparing an electrical substation for preventative maintenance work.
- Severe injuries to their hands and face
- **PNOV issued January 9, 2024**

Idaho Cleanup Project
Uncontrolled Exposure to Potentially Dangerous Levels of Carbon Monoxide



- 2 workers were potentially exposed to an uncontrolled immediately dangerous to life and health (IDLH) level of carbon monoxide (CO).
- Testing an exhaust extension setup on a gasoline-powered welder generator machine located inside the high bay.
- Worker diagnosed with CO exposure.
- **Enforcement Letter: Feb 2, 2024**

Sandia
Worker Hand Injury (Finger Amputation) Event

- 4 workers were manually aligning a large 750-pound chamber cover after it had been lowered using a hoist.
- One worker was using their right middle finger to check if the cover was horizontally aligned with the chamber when the cover fell into place, pinching their finger.
- **Consent Order: April 19, 2024**

FERMI
Serious Fall Injury

- Worker fall from height (approx. 23 feet)
- Ironworker was preparing to secure a rebar template bar to a concrete formwork wall and fell backwards, striking a diagonal brace before landing on the concrete slab below.
- Air lifted to a local trauma center and sustained serious injuries, including head trauma.
- **2 PNOVs and an EL: July 10, 2024**

Paducah
Potential Overexposure to Toluene Event

- Remove and replace the chlorobutyl rubber liner inside five **hydrofluoric acid storage** tanks
- Entrant was applying an adhesive for approx. 15 min when and then began experiencing symptoms (dizzy, staggering, confused)
- Entrant had to be retrieved from the tank
- **Case ongoing**

Oak Ridge
Tree Care Fatality

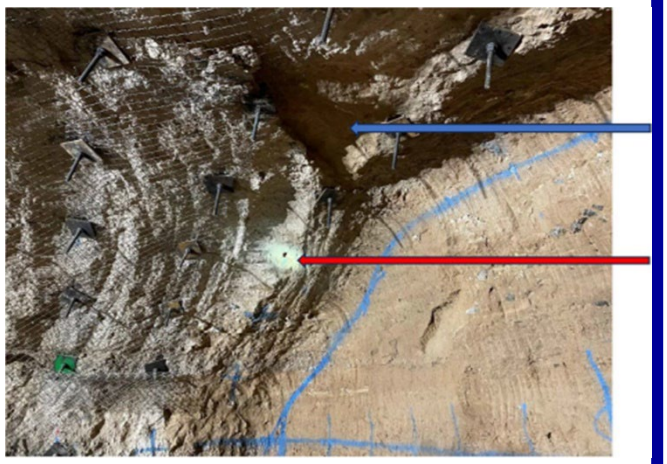
- Performing tree clearing operations
- Final cut to the trunk of a tree (approximately forty feet tall and one foot in diameter). Worker was struck in the head
- **Case ongoing**

Oak Ridge
Telehandler Event

- Lifting materials to an exterior roof access point
- Unsecured 585-lb extendable truss boom (jib) attachment came loose from the telehandler and slid off the forks, striking and pinning a pipefitter on the roof by their pant leg.
- Multiple traumatic fracture injuries to bones (ankle and pelvis).
- **Case ongoing**

NNSS
Two Ground Fall Events

- Loose and unsecured soil and rocks fell onto and significantly injured multiple miners
- Case ongoing



Questions ?

Shannon Holman is the Director of the Office of Worker Safety and Health Enforcement within the Department of Energy's (DOE) Office of Enterprise Assessments (EA). Ms. Holman is responsible for implementing the Department's worker safety and health enforcement program. The primary goal of the worker safety and health enforcement program is to enhance and protect the safety and health of workers at DOE facilities by fostering a culture among its operating contractors that seeks to attain and sustain compliance with DOE's worker safety and health program requirements identified in 10 C.F.R. Part 851. Before being selected as Director, Ms. Holman served as an enforcement officer within the Office of Worker Safety and Health Enforcement, where she led and participated on teams investigating potential noncompliances with DOE worker safety and health regulations.

Prior to joining EA, Ms. Holman was a Safety and Occupational Health Specialist in the National Office of the Occupational Safety and Health Administration (OSHA), where she participated in various rulemaking activities. Prior to joining OSHA, Ms. Holman served as a Safety and Occupational Health Specialist for the United States Military Academy, where she was responsible for the day-to-day safety of approximately 4,500 cadets, civilians, and military personnel. Before joining civilian federal service, Ms. Holman was a risk management associate for an insurance agency.

Ms. Holman has been a professor at Columbia Southern University's College of Safety and Emergency Services since 2015, teaching a variety of occupational safety and health courses. She holds a Master of Science in Safety, Security and Emergency Management from Eastern Kentucky University and a Bachelor of Science degree in Safety and Environmental Management from Slippery Rock University of Pennsylvania.

Maintaining Confidentiality in Internal Investigations

Maintaining Confidentiality in Internal Investigations

Andrea Reagan
General Counsel
Savannah River Nuclear Solutions

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Thomas Watson
General Counsel
Fluor Federal Petroleum Operations, LLC
Strategic Petroleum Reserve

Agenda

- History and application of the Mandatory Disclosure Rule, FAR § 52.203-13
  - The "Credible Evidence" and "Timely" disclosure standards
  - Contractor right to investigate *before* making a disclosure
- Attorney-client privilege and MDR investigations
- DEAR 970.5204-3 "Access to and Ownership of Records"
  - Legal precedent re "Ownership" clause and privilege
- Case Study: *US v. Guillory*
- Summary of best practices to maintain privilege of internal investigations

2

Mandatory Disclosure Rule, FAR § 52.203-13

MDR requires the following:

> (3)(i) The Contractor shall **timely disclose**, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has **credible evidence** that a principal, employee, agent, or subcontractor of the Contractor has committed—
>
> (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
>
> (B) A violation of the civil False Claims Act (31 U.S.C. 3729–3733).

3

Credible Evidence Standard

- Whether evidence is "credible" is subjective
  - requires thoughtful evaluation
  - rarely can be established quickly
  - a *single* report from *one* individual of a *possible* violation may not raise to "credible evidence"
- Evidence is credible when it is worthy of belief, trustworthy. *Black's Law Dictionary*
- Plain language of regulation, and regulatory history, reveals contractors must possess more than a "minimal foundation" before making a disclosure
- Contractors are *authorized* to investigate *before* making a disclosure
- The term "credible evidence" was used *intentionally*.

> *Response:* The Councils have replaced "reasonable grounds to believe" with "credible evidence." DoJ Criminal Division recommended use of this standard after discussions with industry representatives. This term indicates a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government. See also the following discussion of "timely disclosure."

73 Fed. Reg. 67064

4

Timely Disclosure Standard

- A contractor must have a "determination of credible evidence" ***before*** making a disclosure.
- Until contractor has determined the evidence to be "credible" there can be no "knowing failure to disclose"
- US Supreme Court recognizes corporate right to counsel and corporate attorney-client privilege. *See Upjohn v. United States*, 449 U.S. 383 (1981)

> Further, the Councils believe that using the standard of ''credible evidence'' rather than ''reasonable grounds to believe'' will help clarify ''timely'' because it implies that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government. Until the contractor has determined the evidence to be credible, there can be no ''knowing failure to timely disclose.'' This does not impose upon the contractor an obligation to carry out a complex investigation, but only to take reasonable steps that the contractor considers sufficient to determine that the evidence is credible.

73 Fed. Reg. 67074

> With regard to the contractual disclosure requirement, the timely disclosure would be measured from the date of determination of credible evidence or the date of contract award, whichever event occurs later.

73 Fed. Reg. 67075

- Simply commencing an investigation or engaging counsel to assist an investigation are not, themselves, indicative that "credible evidence" exists

5

Legal Interpretation of MDR

- *Anderson v. Fluor Intercontinental, Inc.*, No: 1:19-CV-0289, 2021 WL 837335 (E.D. Va. Jan 4, 2021)
  - "Fluor had to evaluate whether 'credible evidence' of wrongful conduct existed *prior to* sending its 'Notification of Potential Violation'"
  - Fluor undertook "reasonable steps" to ascertain existence of credible evidence
    - an extensive review of company email
    - interviews of numerous witnesses,
    - analysis of third-party marketing materials,
    - conversations with entities affiliated with Anderson,
    - inspections of public-source financial information
    - careful inspection of internal compliance and training documents.
  - Upon completion of these "reasonable steps," Fluor determined that "credible evidence" of wrongful conduct did, in fact, exist

6

MDR and Privilege

- MDR specifically *protects* attorney-client privilege:

Contractor Code of Business Ethics and Conduct (NOV 2021)

(a) Definitions. As used in this clause—

Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

Full cooperation—(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

7

MDR and Privilege

- *In re Fluor Intercontinental, Inc.*, 803 F. App'x 697, 700 (4th Cir. 2020)
  - 4th Circuit found that Fluor did not waive privilege
  - Court found that requiring disclosure of protected material would be "particularly injurious" because Fluor's investigation was necessary to comply with the MDR
  - Government contractors should not fear waiving privilege in these circumstances

> We conclude that such circumstances are present in this case. First, for the reasons discussed below, the district court's ruling that Fluor's disclosure waived attorney-client privilege is clearly and indisputably incorrect. Second, the ruling implicates "the important legal principles that protect attorney-client relationships," which we recently "elucidate[d]" in *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 172–74 (4th Cir. 2019). Third, requiring Fluor to produce privileged materials is particularly injurious here, where Fluor acted pursuant to a regulatory scheme mandating disclosure of potential wrongdoing. Government contractors should not fear waiving attorney-client privilege in these circumstances. We think that together, these circumstances work a manifest injustice.

8

MDR and Privilege

- *In re Kellogg Brown & Root, Inc., 756 F.3d 754, 756 (D.C. Cir. 2014)*
  - Qui Tam action
  - District Court asserted KBR performed MDR investigation under regulatory law and corporate policy rather than for legal advice
  - District Court ordered production of privileged records
  - DC Circuit overruled

> In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred.

9

DEAR 970.5204-3
"Access to and Ownership of Records"

- Establishes:
  - Government Owned Records
  - Contractor Owned Records
    - Employment Records
    - Confidential financial information, internal governance records, etc.
    - Records relating to procurement
    - *Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges*

(d) Inspection, copying, and audit of records. All records acquired or generated by the Contractor under this contract in the possession of the Contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times . . . .

10

Legal Interpretation of Ownership Clause

- *Every* case reviewing DEAR 970.5204-3 found DOE does *not* have right to review contractor's privileged information

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998) (Douglas 1)
Douglas v. Dyn McDermott Petroleum Operations Co., 163 F.3d 223 (5th Cir. 1998) (Douglas 2)

- Former in-house counsel for DOE contractor asserted wrongful termination after she was terminated for releasing contractor's privileged information to DOE
- Employee asserted that DOE was entitled to receive all legal records and therefore, no waiver existed
- M&O contract contact exact language as DEAR 970.5204-3
- Fifth Circuit reviewed the contract and found that

"*DynMcDermott neither implicitly nor explicitly waived any of its rights of confidentiality or privilege with respect to its in-house counsel*."

Legal Interpretation of Ownership Clause

"[a]ll records acquired or generated by the contractor [DPO] under this contract in the possession of the contractor, including [performance appraisals, reviews, and associated documents, equal employment opportunity and affirmative action claims and records, files and records concerning ethics and security investigations, ***and attorney-client privilege or attorney work product***] shall be subject to inspection, copying and audit by the government at all reasonable times[.]"

DPO Contract Terms

The relationship between DynMcDermott and the DOE was purely contractual and at arm's length. Under the contract, DynMcDermott simply agreed to perform certain managerial and administrative services for the DOE. The contract required that DynMcDermott operate free from discriminatory practices, but DynMcDermott neither implicitly nor explicitly waived any of its rights of confidentiality or privilege with respect to its in-house counsel. In connection with the antidiscrimination provision, DOE officials met with DynMcDermott employees at various times to assure that DynMcDermott was complying with this aspect of the contract ("EEO audits"). Just such a meeting occurred on June 6, 1994, between John Poindexter —DynMcDermott's general counsel and Douglas's supervisor —and three DOE employees.

Fifth Circuit Douglas I Decision

12

Legal Interpretation of Ownership Clause

- *CB&I AREVA MOX Services, LLC v. United States,* No. 1:16-cv-00950-TCW (Fed. Cl. filed Apr. 16, 2019) (ECF 192)
  - Clause H.39 of Contract contained Access to and Ownership of Records Clause
  - DOJ sought full control of MOX Service's technology systems
  - DOJ argued H.39 transferred *all* records upon termination, even privileged records
  - Contractor objected asserting that system contained privileged information

> Regarding the potential presence of privileged information on MOXNet, MOX Services explicitly waived any privilege in H.39(c), which specifically addresses the disposition of contractor-owned privileged information upon termination. *See* H.39(b)(4) and (c). Privileges have been contractually waived, and cannot be used as basis to prevent the transfer of ownership of MOXNet to NNSA.

DOJ Argument to MOX Services

13

Legal Interpretation of Ownership Clause

- *CB&I AREVA MOX Services, LLC v. United States,* No. 1:16-cv-00950-TCW (Fed. Cl. filed Apr. 16, 2019) (ECF 192)
  - Court issued protective order

> The Court has issued this Protective Order **to ensure that Plaintiff may protect privileged and proprietary information**, and to facilitate Plaintiff's unfettered access to documents and information that it generated during contract performance, which may be relevant to the consolidated cases.

MOX Services, No. 1:16-cv-00950-TCW, Court Protective Order (Fed. Cl. filed Apr. 16, 2019) (ECF 192) (emphasis added).

14

United States v. Guillory

- Feb 2015 - FFPO received information of possible financial conflict by employee
- FFPO commenced investigation *under direction of counsel* in writing and identified investigating personnel
- May 2015 - FFPO made initial disclosure to DOE OIG under MDR
- DOJ pursued criminal action against Guillory, E.D.L.A. Case No. 21-008
- FFPO produced thousands of non-privileged records
- DOJ then demanded FFPO produce privileged records *including* FFPO's MDR investigation
- Triggered interplay between MDR and DEAR 970.5204-3

United States v. Guillory

- During counsel discussion with DOJ, DOJ focused on *criminal* aspect of its litigation
- First call with DOJ:
  - DOJ: *Do you understand criminal law?*
  - Counsel: *I understand privilege*.
- Second call with DOJ:
  - Counsel: *Do you understand the DEAR, MOX Services, and Douglas? Have you spoken with DOJ Civil Division?*
  - DOJ: *None of that is relevant.*

United States v. Guillory

- DOJ subpoenas FFPO's privileged MDR investigation records
- Jan 2022 - DOJ requested Rule 17 subpoena for FFPO's MDR Investigation
- DOJ asserts waiver under DEAR 970.5204-3

Under the M&O Contract and its modifications, FFPO is required to comply with DOE Acquisition Regulations ("DEAR"), specifically including 48 C.F.R. § 970.5204-3 ("Access to and ownership of records.")

This right of access, as described in paragraph (b) of that clause, includes legal records "covered by the attorney-client and attorney work product privileges." Id. at § 970.5204- 3(b)(4).

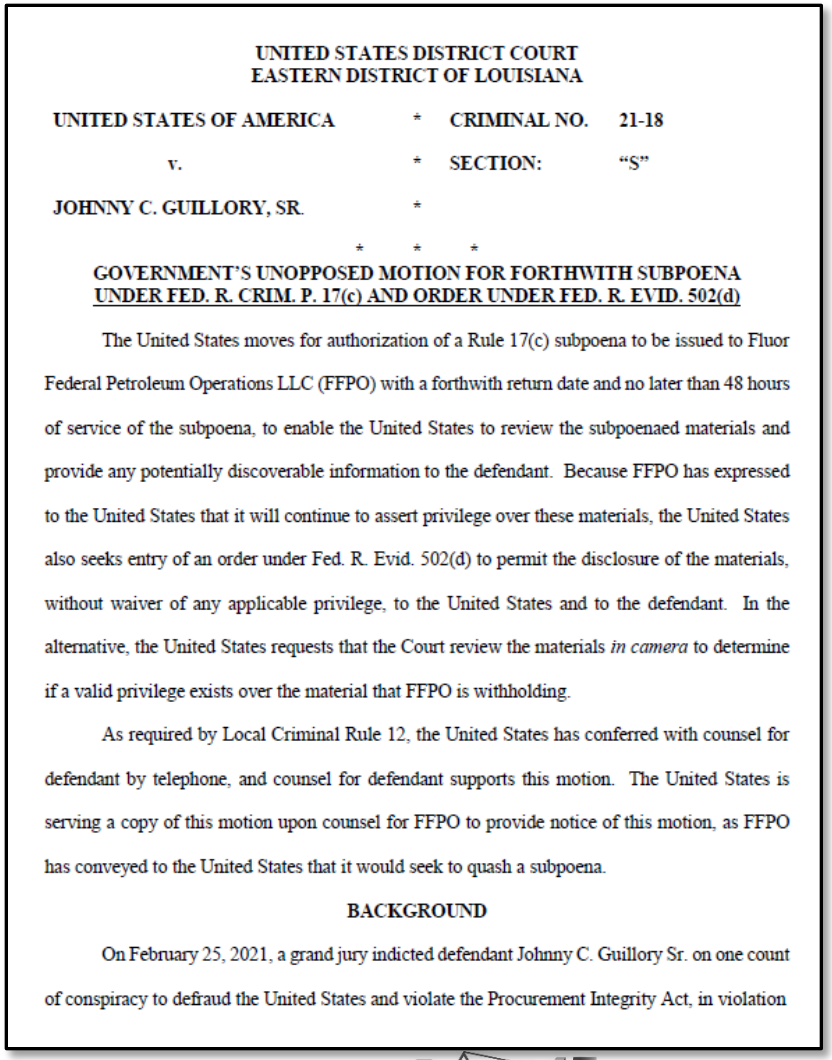
In light of FFPO's refusal to provide the materials to the United States under these contractual and regulatory provisions, the United States is seeking their production through the issuance of a Rule 17(c) trial subpoena.

> The plain text of the contractual and regulatory provision under which the FFPO operates the SPR provides the government with the right of access to FFPO's material, explicitly including records covered by attorney-client privilege and work product protection. 48 C.F.R. § 970.5204-3(d); (b)(4). On this basis alone, the United States is entitled to the materials in question.

DOJ Argument for Subpoena

United States v. Guillory

- Additional DOJ arguments in support of subpoena for privileged files:
- DOJ attempts to distinguish *Douglas* because it was not a criminal case
- DOJ asserts that a *criminal* matter provides additional support for access to privileged records
  - But MDR specifically addresses *criminal* actions
- FFPO should produce the records under FRE 502(d) or submit a privilege log



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL NO.	21-18
v.	*	SECTION:	"S"
JOHNNY C. GUILLORY, SR.	*		

* * *

GOVERNMENT'S UNOPPOSED MOTION FOR FORTHWITH SUBPOENA UNDER FED. R. CRIM. P. 17(c) AND ORDER UNDER FED. R. EVID. 502(d)

The United States moves for authorization of a Rule 17(c) subpoena to be issued to Fluor Federal Petroleum Operations LLC (FFPO) with a forthwith return date and no later than 48 hours of service of the subpoena, to enable the United States to review the subpoenaed materials and provide any potentially discoverable information to the defendant. Because FFPO has expressed to the United States that it will continue to assert privilege over these materials, the United States also seeks entry of an order under Fed. R. Evid. 502(d) to permit the disclosure of the materials, without waiver of any applicable privilege, to the United States and to the defendant. In the alternative, the United States requests that the Court review the materials *in camera* to determine if a valid privilege exists over the material that FFPO is withholding.

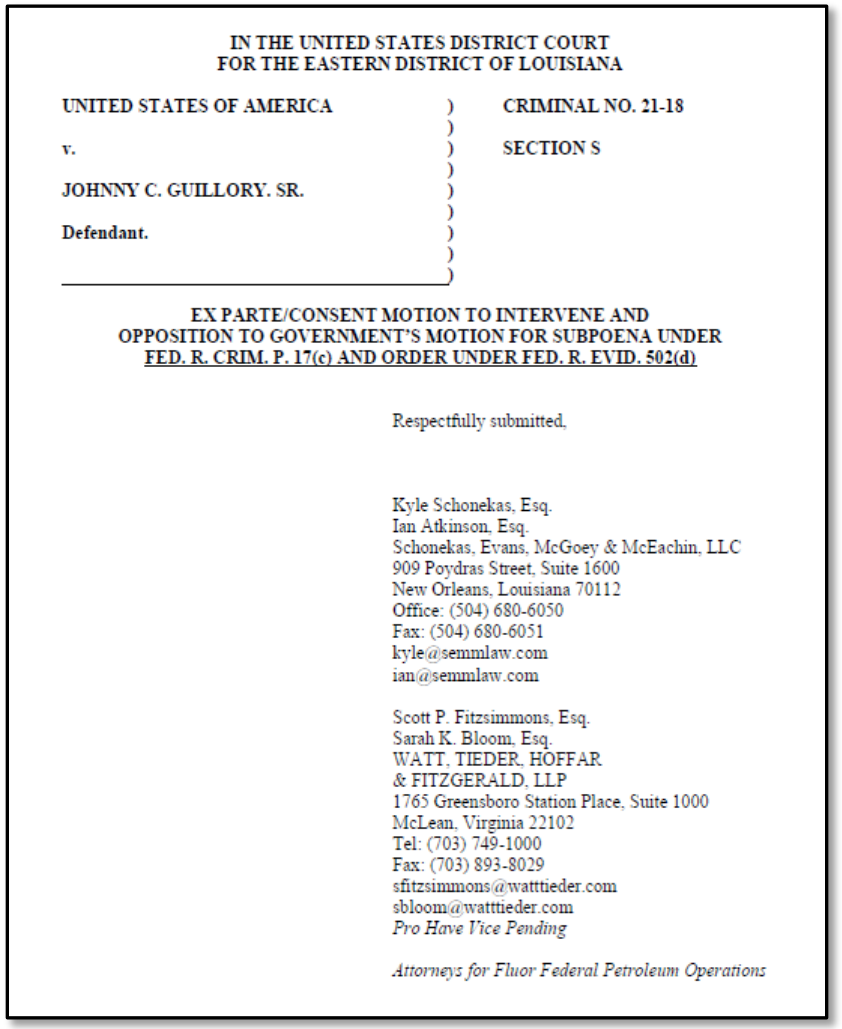
As required by Local Criminal Rule 12, the United States has conferred with counsel for defendant by telephone, and counsel for defendant supports this motion. The United States is serving a copy of this motion upon counsel for FFPO to provide notice of this motion, as FFPO has conveyed to the United States that it would seek to quash a subpoena.

BACKGROUND

On February 25, 2021, a grand jury indicted defendant Johnny C. Guillory Sr. on one count of conspiracy to defraud the United States and violate the Procurement Integrity Act, in violation

United States v. Guillory

- FFPO Opposition to DOJ Subpoena:
- Internal investigations under MDR are subject to attorney-client privilege
- MDR does not require contractors to waive attorney client privilege. FAR 52.203-13(b)(3), *Anderson, KBR, Upjohn*
- Releasing documents, even to DOE, would make such documents subject to FOIA. *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 61 (D.D.C. 2018) (privileged e-mails provided to DOE OIG were subject to release under FOIA)
- DEAR 970.5204-3 does not waive FFPO's privileges or grant DOE/DOJ access to privileged information. *Douglas, MOX Services*



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	CRIMINAL NO. 21-18
v.	)	SECTION S
JOHNNY C. GUILLORY. SR.	)	
Defendant.	)	

EX PARTE/CONSENT MOTION TO INTERVENE AND OPPOSITION TO GOVERNMENT'S MOTION FOR SUBPOENA UNDER FED. R. CRIM. P. 17(c) AND ORDER UNDER FED. R. EVID. 502(d)

Respectfully submitted,

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Attorneys for Fluor Federal Petroleum Operations

United States v. Guillory

- FFPO Opposition to DOJ Subpoena:

- DEAR 970.5204-3 provides access only when DOE and the Contractor share a common interest:

> *As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.*

10 C.F.R. § 719.8.

- Since inception of DOE's legal management regulations, contractors have raised "concern about the potential waiver of attorney-client confidentiality privileges." *Contractor Legal Management Requirements; Department of Energy Acquisition Regulation*, 66 Fed. Reg. 4617, 2001 WL 39895 (Jan 18, 2001).

- DOJ is attempting to administer a contract by alleging breach of contract

- Opposition was supported by Affidavit from General Counsel regarding MDR investigation

United States v. Guillory

- DOJ arguments in Reply Brief:
  - DOJ reduced MDR arguments to a single footnote:

> [4] FFPO also misreads 48 C.F.R. § 52.203-13, commonly referred to as the Mandatory Disclosure Rule (MDR). The MDR does not relieve FFPO from its obligation to comply with the Access to Records provision that FFPO agreed to in its contract with the Department of Energy. The MDR was intended to increase contractor transparency, and it should not be read to nullify the Access to Records Provision in a way that results in less contractor transparency. Moreover, the provision of these records to the United States in these circumstances would not be a waiver of privilege, nor is the United States requiring FFPO to waive any privilege it may hold against any third parties. Consequently, under the United States' position, the two provisions do not conflict.

  - *Douglas* was not a *criminal* case - DOJ did not address *MOX Services;* FFPO "fails to appreciate the context and obligations that arise in a *criminal case*"
  - FFPO "*agreed to the terms of . . . 970.5204-3, which explicitly provide government access to its privileged and work product records*"

United States v. Guillory

- DOJ arguments in Reply Brief:
  - FFPO is a third party - but "it is not an ordinary third-party government contractor here"
    - FFPO solely exists to manage and operate the SPR for DOE
    - Its employees conduct business under a doe.gov email address
    - Those employees perform work identified and approved by the government at government facilities
    - FFPO can seek reimbursement of its legal costs from federal funds
    - Records that DOE pays for are Gov't owned records.

> [3] FFPO has not informed the United States whether it sought reimbursement of the costs associated with this investigation, but such reimbursement would not be dispositive to the question here. "Records that the Department [of Energy] pays for, directly or indirectly, under the contract are considered the property of the government." Acquisition Regulations; Department of Energy Management and Operating Contracts, 62 Fed. Reg. 34,852, 34,857 (June 27, 1997). Moreover, as noted in the United States' initial filing, the DEAR Access to Records provision "applies to all records created, received and maintained by the contractor without regard to the date or origination of such records…." 48 C.F.R. § 970.5204-3(e).

- Court ordered submission of records for *in camera* review

United States v. Guillory

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NUMBER: 21-18**
JOHNNY C. GUILLORY, SR.	**SECTION: "S" (5)**

ORDER

On February 1, 2022, this Court ordered Fluor Federal Petroleum Operation, L.L.C. ("Fluor") to produce a privilege log and documents withheld by it for *in camera* review in connection with the Government's Motion for Forthwith Subpoena Under Fed. R. Crim. P.17(c) and Order Under Fed. R. Evid. 502(d). (Rec. doc. 37). Fluor produced the materials shortly thereafter. The Court has now reviewed the withheld documents *in camera* and finds as follows. Documents identified on Fluor's privilege log as 001, 002, and 003 do not facially bear any indicia of confidentiality or privilege and should be produced. All of the remaining documents (004-0017) are clearly privileged and need not be produced. The Government has not established that it is entitled – even in this criminal case – to receive what are obviously privileged documents from its contract partner, Fluor.

New Orleans, Louisiana, this 7th day of February, 2022.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

Best Practices for Maintaining Privilege in Internal Investigations

- Establish attorney oversight early
- Put in writing that MDR investigation is being performed at direction of counsel

  > "This investigation is being conducted at the direction and under the control of myself, as General Counsel for ABC Corp. Accordingly, this investigation shall remain confidential and subject to attorney-client privilege as authorized by *Upjohn*. "

- Identify investigators in writing, put in writing that their investigation efforts are under the direction of counsel
- Mark all investigation documents with "Attorney Client Privilege"

Best Practices for Maintaining Privilege in Internal Investigations

- Do not bill internal investigations to DOE
- Use a separate email/IT account for communications related to the investigation
- Provide *Upjohn* warnings to employees
- Minimize verbiage when providing mandatory disclosure to DOE OIG to avoid assertion of waiver
- Deny requests for privileged information from Government
- Cite *Douglas, MOX Services*, and *Guillory* for precedent that DEAR 970.5204-3 does *not* provide Gov't access to privileged records

DOECAA

Questions

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45 YEARS OF LEGAL EXCELLENCE
WATT TIEDER
WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

Scott P. Fitzsimmons Biography

For more than 20 years, Scott has focused his practice on government contracts and construction. He has represented contractors in numerous trials and hearings before state and federal tribunals, including federal courts and the U.S. Boards of Contract Appeals. Scott's experience includes high-stake matters with values exceeding $300 Million. He also represents contractors in high-value bid protests before the United States Government Accountability Office (GAO).

Before joining Watt Tieder, Scott served for two years as a law clerk to a federal judge on the United States Court of Federal Claims where he focused on federal government contract matters including bid protest and Contract Disputes Act (CDA) claims. Scott's experience in federal government contracts offers clients incredible insight into the federal arena and helps shepherd contractors through the administrative and regulatory requirements of public contracting.

In addition to being an attorney with Watt Tieder, Scott serves as an Officer in the United States Navy Reserve, where he holds the rank of Captain (O-6) and has commanded six units. His most recent assignment was with the Office of the Secretary of Defense in the Pentagon. Scott spends his spare time on his farm in Purcellville, Virginia, where he and his wife own several amazing horses including the 2015 Theodora A. Randolph National Fieldhunter Champion.

Andrea L. Reagan

Senior Vice President and General Counsel
Savannah River Nuclear Solutions, LLC

EDUCATION

Ashland University
Bachelor of Arts, Political Science and Philosophy

New England School of Law
Juris Doctor

EXPERIENCE

Andrea L. Reagan is Senior Vice President and General Counsel for Savannah River Nuclear Solutions (SRNS). In this capacity, she is responsible for all legal activities and issues for the company,
in its execution of its Savannah River Site management and operations contract.

Reagan has more than 20 years of legal experience. She is currently Senior Counsel, Litigation and Claims for Fluor Mission Solutions. Her past roles include serving as General Counsel to Fluor Federal Petroleum Operations (FFPO), the management and operations contractor for the U.S. Strategic Petroleum Reserve; Associate General Counsel at Oak Ridge National Laboratory; Senior Attorney for Battelle Memorial Institute; and a Judge Advocate General's Corps (JAG) Attorney with the U.S. Air Force.

Thomas L. Watson Biography

Thomas currently serves as General Counsel and Compliance Manager for Fluor Federal Petroleum Operations, LLC, the Management & Operating Contractor for the Strategic Petroleum Reserve, the nation's emergency oil supply. In his role as General Counsel, Thomas has provided legal and business advice on a wide variety of matters including the ongoing Life Extension 2 project, a $1.4 billion construction effort to modernize the SPR.

Before joining Fluor, Thomas worked for CenturyLink, a telecommunications company, in its Risk/Litigation and Employment Law Groups and at various large law firms as a commercial-litigation, government-contracts and labor-and-employment attorney.

Thomas lives in New Orleans, where he enjoys running and spending time with his wife and nine kids.

Keynote Address: Perspectives from DOE General Counsel

** Slide deck to be sent as a supplement*

S. Walsh Bio

Samuel T. Walsh was sworn in as the General Counsel of the Department of Energy on August 11, 2021. Immediately prior to re-joining DOE, Mr. Walsh was a partner at the law firm Harris, Wiltshire & Grannis LLP in Washington, DC. Mr. Walsh previously served at the Department from 2010 to 2016, as Deputy General Counsel for Energy Policy, Associate General Counsel, and Senior Legal Advisor to the General Counsel. Before his former service at DOE, Mr. Walsh was an attorney in the energy group at Hogan Lovells LLP and a law clerk to the Hon. Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Walsh holds a B.A. from Yale College, an M.P.A. from the Harvard Kennedy School, and a J.D. from Harvard Law School.

Originally from New York, Walsh now lives in Washington D.C. with his wife and two children.

Legal Ethics: A Look Inside the Office of Disciplinary Counsel and Perspectives on Investigation and Technology Issues from the Standpoint of a Lawyer's Professional Responsibility

LEGAL ETHICS:

A LOOK INSIDE THE OFFICE OF DISCIPLINARY COUNSEL

PERSPECTIVES ON INVESTIGATION AND TECHNOLOGY ISSUES FROM THE STANDPOINT OF A LAWYER'S PROFESSIONAL RESPONSIBILITY

Mark J. Meagher, Founder, Meagher GC Law, LLC
Hamilton P. ("Phil") Fox, Disciplinary Counsel, DC Bar ODC
Phillip R. Seckman, Partner, Dentons US LLP

AGENDA

A Look Inside the D.C. Bar Office of Disciplinary Counsel with Hamilton P. ("Phil") Fox

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Investigations and Ethics: A review of recent legal ethics opinions and decisions

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- Continuing Developments in the Legal Ethics of Technology

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- Other Legal Ethics Issues to Consider

D.C. BAR OFFICE OF DISCIPLINARY COUNSEL

- A Look Inside the D.C. Bar Office of Disciplinary Counsel with Hamilton P. ("Phil") Fox

  - How does the office decide which matters to pursue?
  - What procedures are followed when prosecuting ethics or professional responsibility issues?
  - What trends does the ODC see in its matters that may not be reflected in formal ethics opinions or rules?
  - Discuss a few of the key recent ODC proceedings
    - How raised with the ODC?
    - How did ODC weigh the decision to pursue the actions?
    - What specific ethics rules at play?

Investigations and Ethics

- Preparing Witnesses – ABA Ethics Opinion 508 (August 5, 2023)
  - What is, and what is not, permitted in the preparation of a witness?
  - What is, and what is not, permitted when a witness is testifying?
  - How has technology and testimony from remote settings impacted these topics?

Investigations and Ethics

- DC Ethics Opinion 380 (Jan 2021) – Conflicts of Interest Issues Related to Witnesses
  - Subpoenaing current or former clients who do not want to testify
  - Potential conflicts in connection with advising current or former clients about Fifth Amendment rights
  - Cross-examining current or former clients
  - Thrust-upon conflicts
  - Confidences or secrets regarding a witness

Investigations and Ethics

- Duty of Candor with Third Parties – Using private investigators and deception in the investigation context – *Impossible Foods, Inc. v Motif Foodworks, Inc.*, Civil Action 22-311-WCB (D. Del. May. 31, 2023)
  - Model Rule 5.3 and Model Rule 8.4 – If conduct of investigators would amount to violation of Rules of Professional Conduct if engaged in by attorney, then attorney directing the investigators' conduct also would be in violation
  - Model Rule 4.1 – Prohibits making a false statement of material fact or law to a third person
  - Model Rule 4.2 – Prohibits communications with persons represented by counsel as to the represented matter and without opposing counsel's consent

Investigations and Ethics

- DC Bar Legal Ethics Committee Opinion 385 – Advising Clients About Communications with Represented Opponents
    - Attorney cannot advise client to communicate with represented party specifically for the purpose of evading Model Rule 4.2

Investigations and Ethics

- Handling the privilege in the review of electronic document productions – Example case: *Hur v. Lloyd & Williams LLC* , 523 P.3d 861 (Wash. Ct. App. 2023)
  - Inadvertent disclosure of privileged material
  - Wash. RPC 4.4(b): A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender
  - Also in the ABA Model Rule 4.4(b)

CONTINUING DEVELOPMENTS IN THE ETHICS OF TECHNOLOGY

- ABA Ethics Opinion 512 (July 29, 2024) – A lawyer's use of generative AI tools

  - Competence – Model Rule 1.1
  - Confidentiality – Model Rule 1.6 (Current Clients)
  - Confidentiality – Model Rules 1.9(c) and 1.18(c) (former and prospective clients)
  - Communication – Model Rule 1.4
  - Generally avoiding misrepresentations -- Model Rules 3.1, 3.3 and 8.4(c)
  - Supervisory Responsibilities – Model Rules 5.1 and 5.3
  - Fees for Generative AI Tools – Model Rule 1.5(b)

CONTINUING DEVELOPMENTS IN THE ETHICS OF TECHNOLOGY

- ABA Ethics Opinion 503 (November 2, 2022) – Hitting "Reply All" on email when the client(s) are copied
    - Avoid placing clients in direct line of communication with opposing counsel which may cause issues under Model Rule 4.2 (communicating with represented parties)

CONTINUING DEVELOPMENTS IN THE ETHICS OF TECHNOLOGY

- ABA Ethics Opinion 511 (May 8, 2024) – Attorneys' use of and posting to Listservs – Duty of confidentiality
  - Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved

CONTINUING DEVELOPMENTS IN THE ETHICS OF TECHNOLOGY

- ABA Ethics Opinion 483 (October 17, 2018) – Lawyers' obligations after an electronic data breach or cyberattack

  - Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

OTHER DEVELOPMENTS IN LEGAL ETHICS

- ABA Ethics Opinion 509 (Feb. 28, 2024) – re Disqualification of Current and Former Government attorneys possessing confidential information

  - The Rule provides that a lawyer who acquired confidential government information about a person while serving as a government officer or employee is disqualified from representing a "private client" whose interests are adverse to that person. The purpose is to prevent the confidential government information from being used to the material disadvantage of that person.

OTHER DEVELOPMENTS IN LEGAL ETHICS

- Advance waivers of conflicts of interest
  - *Supercooler Technologies, Inc. v. The Coca Cola Co., et al.*, Case No. 6:23-cv-187-CEM-RMN (M.D. Fla. 2023)
  - Of interest to inhouse counsel when outside counsel is seeking an advance waiver
  - Court reviews the requirements under ABA Model Rules and Florida Rules for Professional Conduct
  - Finds law firm representing Supercooler had a conflict due to existing representation of Coca Cola on unrelated matters – but advance waiver was enforceable meaning law firm could not be disqualified

QUESTIONS?

Phillip R. Seckman

Phil Seckman is a partner at Dentons US LLP. Phil represents clients concerning government and commercial contract matters spanning a broad range of subjects related to federal procurement law, state and local procurement law, and complex federal regulatory issues. He concentrates his practice in the areas of contract cost allowability, cost and pricing, audit response, commercial product and service acquisitions, compliance and internal investigations. He regularly represents clients in claims and litigation at the Boards of Contract Appeals, Court of Federal Claims and the Federal Circuit. Phil has worked numerous issues for clients in the DOE/NNSA complex. He is a frequent lecturer on government contracts related topics, as well as on legal ethics. In his free time, Phil enjoys attending his daughters' swim meets, baking whole grain sourdough bread, and cycling.

Mark J. Meagher

Mark Meagher is the founder of Meagher GC Law, LLC, a federal government contracts law practice in Boulder, Colorado. Mark has over 35 years' experience representing federal contractors on a range of issues, with substantial prior and current work for contractors working under DOE and NNSA contracts. He is a frequent lecturer on federal contracting topics and lawyers' ethical and professional responsibilities. When he is not on MS Teams speaking with clients or doing other work, he plays in a weekly co-ed ice hockey league as well as hikes, skis and cycles with his fiancée in the Colorado mountains.

Hamilton P. ("Phil") Fox

Hamilton P. "Phil" Fox, III serves as Disciplinary Counsel for the Office of Disciplinary Counsel in Washington, DC. Phil joined the Office of Disciplinary Counsel in 2011 as an Assistant Disciplinary Counsel after retiring from Sutherland, Asbill & Brennan, where he had practiced since 1990.

After graduating from Yale Law School, Phil was a law clerk to Judge Frank M. Coffin of the First Circuit and then to Supreme Court Justice Lewis F. Powell, Jr. He served as a federal prosecutor for more than seven years, including serving in the Watergate Special Prosecution Force. He then entered private practice as a solo/small firm practitioner and a partner in international law firms. While in private practice, he served as Associate Special Counsel to the House Ethics Committee. He has also taught as an adjunct professor at the University of Virginia and Georgetown law schools.

Phil served many years with the D.C. attorney discipline system, as a Hearing Committee Member and then as a Member, Vice Chair and Chair of the Board on Professional Responsibility. Phil has also represented respondents in disciplinary proceedings.

Phil was also a Member and Chair of the Committee on Admissions and Grievances, District of Columbia Circuit; a Member, Vice Chair, and Chair of the D.C. Bar Legal Ethics Committee; a Member of the D.C. Bar Rules of Professional Conduct Review Committee; and a Member of the Committee on Unauthorized Practice of Law, D.C. Court of Appeals.

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