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Foreign Ownership of Agricultural Land: A Legislative Roadmap

Reviewing State Law Provisions Restricting Foreign Landholdings
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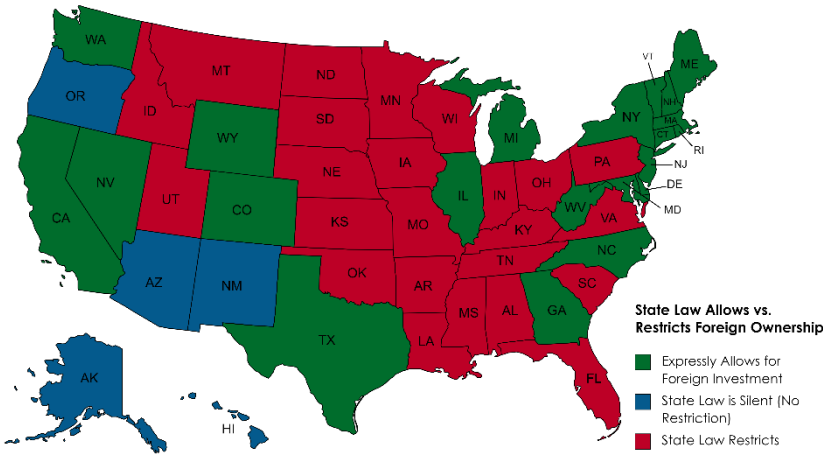
I. Introduction

Ownership of U.S. land, specifically agricultural lands, by foreign persons or entities has been an issue that traces to the origins of the United States.[1] In most states, foreign persons and entities have the same property rights as the citizens of those states. Other states restrict or significantly limit foreign ownership of agricultural land while allowing for at least some level of ownership of non-agricultural land. Some states restrict foreign ownership and investments in all real estate. Today, approximately twenty-four states[2] specifically



[1] The Colonies addressed British policies concerning land ownership through the Declaration of Independence where Representatives alleged that the Crown had "endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." *See* U.S. National Archives and Records Administration, "Declaration of Independence: A Transcription."

[2] States that restrict certain foreign investors from acquiring or holding an interest in private agricultural land include Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin.

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forbid or limit nonresident aliens, foreign businesses and corporations, and/or foreign governments from acquiring or holding an interest in private agricultural land within the boundaries of their state.

Each state with a restriction has taken its own approach. In other words, a uniform approach to restricting foreign ownership has not been established because state laws vary widely. Because there is no uniformity among the states that have restrictions, any legislative proposal will likely have components that make it unique from other states' proposals, reflecting the type of provisions that various interests may want included or excluded. This fact sheet discusses various provisions often included in states' foreign ownership laws and is a resource for legislators or others who may consider drafting or reviewing a foreign ownership proposal.

This resource does not advocate for or against the enactment of laws that restrict foreign ownership of agricultural land. The information provided in this fact sheet is for educational purposes only. This resource is meant to provide general information only, and does not constitute any legal advice offered by the National Agricultural Law Center, nor act as a substitute for legal advice and counsel.

II. Background

In the past three years or so, the issue of restricting foreign investments and ownership of private land emerged or remerged in the majority of states in the U.S. A recording of a NALC webinar discussing these state proposals can be viewed here. NALC's *Foreign Investments in Agricultural Land: FAQs & Resource Library* also discusses some of these state proposals, which is available here. This reemerging interest in restricting foreign investments in U.S. land, especially agricultural land, is partly due to a Chinese-owned company purchasing over 130,000 acres near a U.S. Air Force base in Texas. Another transaction that raised concerns among some lawmakers is the purchase of 300 acres near an Air Force base in North Dakota by the Chinese company Fufeng Group.

Each of these states proposed legislation that would restrict foreign ownership or investment of agricultural land to some degree. Like the states that had enacted a foreign ownership law before 2021, many states' proposals took their own approach to restricting foreign acquisitions of agricultural land within their state. In 2021, Senate Bill 312 ("SB 312") was introduced in the Arkansas legislature that, under the original version of the bill, included many identical provisions contained in Missouri's foreign ownership law. The Arkansas legislature enacted SB 312, but this law is entirely different from the original version that was proposed. In fact, the law does not restrict foreign ownership of agricultural land. Rather, the new law simply requires certain "foreign persons" to report their ownership interest in agricultural land within the state to the Secretary of the Arkansas Department of Agriculture.

In 2022, Indiana was the only state to enact a law restricting certain foreign investments in the state's agricultural land. To read the statutory language of

Indiana's restriction law, click here. In the same year, Mississippi amended its foreign ownership law to protect domestic entities from losing their interest in land through forfeiture or escheat because of the alienage of a former owner of the land. *See* Miss. Code Ann. § 89-1-23. Also in 2022, both chambers of California's state legislature unanimously passed a bill (SB 1084) that would restricting foreign governments from owning agricultural land within the state, but Governor Newsom vetoed the bill. To learn more on California's SB 1084, read NALC's "California's Attempt to Restrict Foreign Agricultural Land Investments" article here.

States that enacted a foreign ownership law during the 2023 legislative session include Alabama, Arkansas, Florida, Idaho, Louisiana, Montana, North Dakota, Ohio, Tennessee, Utah, and Virginia. Further, North Dakota amended a portion of their previously enacted foreign ownership law to extend the restriction to foreign governments and foreign government-controlled entities. Oklahoma also amended their state's foreign ownership law in 2023; however, the legislation narrowed their restriction to specifically prohibit foreign acquisitions of land through business entities or trusts that engage in activities or ventures that are illegal under federal law (*i.e.*, the production of marijuana). A recording of a NALC webinar discussing these state laws is available here.

Historically, almost all of the land ownership restrictions placed on foreign investors have been established under state law. Accordingly, no federal law currently exists that restricts foreign investors from acquiring or holding U.S. agricultural land. However, over the past few years, federal policymakers have become increasingly concerned about foreign investments in land, especially agricultural land. As a result, there has been several bills introduced in Congress that seek to control or restrict certain foreign investments in agricultural land. A discussion of these proposals are outlined in more detail in a NALC publication titled *Congressional Considerations on Restricting Foreign Investments in U.S. Agriculture* which is available here. Two NALC webinars discuss these federal proposals in great detail, which are available here and here.

III. Discussion

A. Legislative Drafting Considerations

There are several different elements to drafting a bill that seeks to restrict certain foreign investors from acquiring and holding agricultural land. Although there is no uniform or model foreign ownership law among the states, there are areas these laws commonly address that legislators may want to consider. However, different state legislators may have different goals when proposing a bill that aims at restricting foreign acquisitions. For example, some states may want to prohibit all foreign ownership while other states may seek to restrict only certain foreign parties from investing or participating in certain types of agricultural production within their state. Further, some states seek to restrict foreign investments from specific countries while other states seek to restrict all foreign acquisitions.

1. State Constitution and Statutes

Some states' constitutions[3] and codes provide foreign parties the right to hold and acquire real property. Consequently, a law that restricts foreign persons from investing in farmland will likely violate their state constitution. For example, some states have laws that permit foreign persons to inherit real estate, specifically farmland.[4] Other states' constitutions[5] or codes allow or specifically direct their legislature to enact laws that restrict or prohibit foreign persons from investing in land within their state. Alternatively, a few states are silent on the issue of restricting foreign ownership of private farmland within its state.[6]

2. Definitions

The definitions contained in any piece of legislation are important because they provide context to how the words or phrases are to be understood throughout the legislative text. This is especially true for legislation that seeks to restrict certain foreign investors from purchasing specific types of real estate within the state, such as agricultural land. However, there is not a uniform definition of "agricultural land" among the states that have a foreign ownership law. Nevertheless, a definition of "agricultural land" or similar terminology is almost always included or referenced in a foreign ownership law.

a. "Agricultural Land" and "Farming"

Some states' foreign ownership laws define the phrase more broadly while other states have adopted a narrower definition. For example, Indiana's law defines "agricultural land" as "land for use in crop farming or timber production."[7] Indiana's law does not specify what qualifies as "timber production," but it does define "crop farming" as the "cultivation of land for the production of agricultural crops, consisting of plants or plant products that can be grown and harvested exclusively for profit or subsistence."[8] On the other hand, Missouri's law defines "agricultural land" as:

> "[A]ny tract of land in this state consisting of more than five acres, whether inside or outside corporate limits of any municipality, which is

[3] For example, Cal. Const. art. I, § 20 ("Noncitizens have the same property rights as citizens."); Mass. Gen. Laws Ann. ch. 184, § 1 ("Aliens may take, hold, transmit and convey real property…."); N.Y. Real Prop. Law § 10(2) ("Aliens are empowered to take, hold, transmit, and dispose of real property within this state in the same manner as native-born citizens…."); Tenn. Code Ann. § 66-2-101 ("An alien, resident or nonresident…, may take and hold property, real or personal, in this state….").
[3] *See* K.S.A. § 17-5903.
[4] For example, see Ky. Rev. Stat. § 381.330.
[5] *See* Kan. Const. Bill of Rts. § 17; Miss. Const. Art. 4, § 84; Okla. Const. art. XXII, § 1; S.C. Const. art. III, § 35.
[6] Alaska, Arizona, Hawaii, Montana, New Mexico, Oregon, and Utah.
[7] Ind. Code Ann. § 32-22-3-1.
[8] *Id.* at § 32-22-3-2.

> capable, without substantial modification to the character of the land, of supporting an agricultural enterprise, including but not limited to land used for the production of agricultural crops or fruit or other horticultural products, or for the raising or feeding of animals for the production of livestock or livestock products, poultry or poultry products, or milk or dairy products. Adjacent parcels of land under the same ownership shall be deemed to be a single tract...."[9]

A few states include separate definitions for "agricultural land" and "farming" within their law. For example, Iowa's law defines "agricultural land" as "land suitable for use in farming" and defines "farming" as "the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock."[10]

Some states specifically or implicitly exclude certain agricultural practices and products from their definitions of "agricultural land" and "farming." Iowa's law expressly excludes "production of timber, forest products, nursery products, or sod" and contracts for "spraying, harvesting or other farm services" as "farming."[11] Indiana's law explicitly excludes agricultural land used for confined feeding operations and raising and producing poultry and poultry products.[12]

Overall, the definition of "agricultural land" within each state's foreign ownership law typically determines the types of agricultural practices or commodities foreign investors are prohibited from participating or producing. As a result, one state's definition of "agricultural land" may not be practical for another state. For example, Indiana's definition of "agricultural land" may be objectionable in states that produce large quantities of beef or dairy products, such as Texas and California, because the definition does not restrict foreign purchasers from acquiring or holding property for these production purposes.

b. Carbon, Solar, and Wind Energy Markets

Agriculture has become a centerpiece of the climate discussion because agricultural producers are capable of delivering natural climate solutions by undertaking certain "carbon-smart" farming practices that sequester carbon. As a result, several carbon market-operating companies are currently offering market programs to producers who implement sustainable farming practices to boost market participation. As the carbon market industry continues develop into a money-making venture, foreign persons and entities may seek to invest in the industry. Consequently, this would most likely require the foreign party to invest in agricultural land. Similarly, solar, wind,

[9] Mo. Rev. Stat. § 442.566(1).
[10] Iowa Code Ann. § 9I.1(1)–(2).
[11] Iowa Code Ann. § 9I.1(2).
[12] Ind. Code Ann. § 32-22-3-0.5(a)(3)–(4).

and other renewable energy markets also typically rely on agricultural land in order to convert a natural resource into energy.

Because carbon markets in the agricultural sector have created a new industry just recently, states have not specifically considered whether participation in carbon markets constitutes "farming" on "agricultural land" within the scope of a foreign ownership law. States also have not considered whether solar, wind, or other renewable energy market participation constitutes "farming" or whether land encumbered with solar or windmills panels constitutes "agricultural land." Further, businesses and other entities generally lease agricultural land in order to participate in carbon and renewable energy markets. However, states have not considered whether leasing farmland to participate in these markets is considered "ownership" or a "leasehold interest" in land subject to a state's foreign ownership restriction.

Minnesota is the only state to expressly mention wind within its foreign ownership law. While Minnesota's law does not specifically reference wind energy markets, it does exempt foreign individuals and entities from its foreign ownership restriction when taking an easement upon agricultural land "for the installation and repaid of transmission lines and for wind rights."[13] This type of exemption is similar to other states' laws that exempt foreign participation in oil and gas leases on agricultural land.

c. Restricted Foreign Parties

Almost every state that has a foreign ownership law specifies which foreign investors are prohibited or restricted from purchasing, acquiring, owning, or otherwise holding agricultural land within its state. In general, the three different classifications of foreign investors that states restrict include foreign individuals, foreign business entities, and foreign governments. Some states only restrict one classification of foreign investor while other states restrict more than one type of foreign investor.

Multiple states restrict foreign individuals from investing in its state's farmland, but there is no uniform approach to restricting this classification of foreign investor. Typically, states use the terms such as "aliens", "non-resident aliens", or "non-resident individuals", or similar terminology to indicate its restriction applies to individual persons (i.e., not business entities or governments). However, these terms sometimes do not represent the same type of individual.

Specifically, the term "alien" can be interpreted to include all resident *and* non-resident aliens or individuals. These are two distinct groups of aliens, however, and each possess different legal rights within the United States. Permanent legal aliens are protected under the U.S. Constitution, meaning these individuals usually enjoy the same privileges granted to natural-born citizens of the U.S.

[13] Minn. Stat. § 500.221, subd. 2(9).

The Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution prohibits federal and state governments from denying individuals equal protection under the law. In other words, the government cannot draw distinctions between individuals based on differences that are irrelevant to the overall objective of the law. Because natural-born U.S. citizens have the right to hold and acquire real property, a state's foreign ownership law that possibly restricts permanent resident aliens from holding and acquiring agricultural land may be subject to an argument that the law violates their equal protection rights because the government likely has no compelling interest in restricting these types of investments.

Nebraska and Oklahoma are two states that prohibit "aliens" from acquiring or holding land located within its state.[14] Because the term "alien" is broad, it is unclear who is subject to the restriction without further defining the term within the law. Most states' laws specify which type of foreign individuals they restrict. For example, North Dakota restricts "[a]n individual who is not a citizen of the United States, a citizen of Canada, or a permanent resident alien of the United States...."[15]

Of the approximate twenty-four states that currently have laws, nineteen of these states—Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, and Wisconsin—impose restrictions on foreign business entities from investing in private agricultural land. These restrictions overlap with corporate farming laws, which are laws that restrict the power of certain businesses to engage in agriculture within a state. The states restricting foreign business investments in agricultural land define or indicate the types of entities subject to the restrictions. For example, Indiana's law restricts "foreign business entities" which is defined as "a corporation, professional corporation, nonprofit corporation, limited liability company, partnership, or limited partnership that is organized under the laws of another country" or any other type of entity that is equivalent to these business structures.[16]

A few states[17] offer agriculture-specific business structures to certain groups participating in the agricultural industry. Some of these business structures include "family farm corporations", "authorized farm corporations", "limited agricultural partnerships", "family farm limited liability companies", and "family farm unincorporated nonprofit associations". Each of these structures are tailored for entities that are established for the purpose of farming and owning agricultural land.

[14] Neb. Rev. Stat. § 76-402; Okla. Const. art. XXII, § 1; Okla. Stat. tit. 60, §121.
[15] N.D. Cent. Code Ann. § 47-10.1-02(1).
[16] Ind. Code Ann. § 32-22-3-3(a).
[17] States including Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota offer some form of agriculture-specific business structure.

These types of agriculture-specific entities are primarily exempt from restrictions imposed on businesses under states' laws.[18]

In addition to restrictions on individuals and business entities, Alabama, Arkansas, Florida, Idaho, Iowa, Louisiana, Montana, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, and Wisconsin restrict foreign governments from holding or acquiring farmland within its state. Some states define the term "foreign government." For example, Iowa's law defines "foreign government" as "a government other than the government of the United States, its states, territories or possessions."[19] This definition clarifies that U.S. territories, such as Puerto Rico, Guam, and the U.S. Virgin Islands are excluded from the restriction, and also exempts Tribal Nations within the U.S. from the restriction.

Some states have sought to restrict certain foreign investments from specific countries, a trend that primarily emerged during the 2023 legislative session.[20] For example, Virginia's newly enacted foreign ownership law[21] restricts a "foreign adversary" from obtaining an interest in agricultural land within the state.[22] The law defines "foreign adversary" as "any foreign government or nongovernment person determined by the U.S. Secretary of Commerce to have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons, as set forth in 15 C.F.R. § 7.4 or such successor regulation, declaration, or statute as may exist from time to time."[23] In other words, the type of foreign investor subject to Virginia's restriction relies on the list of countries or governmental regimes determined to be a "foreign adversary" by the U.S. Secretary of Commerce.

Some states use other federal definitions or lists to define which countries' investors are prohibited from acquiring land within their state. Arkansas' foreign ownership law[24] restricts acquisitions of land by investors of countries that are subject to the U.S. Secretary of State's International Traffic in Arms Regulations[25] and entities

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[18] For example, see S.D. Codified Laws § 47-9A-13, which states "[t]he restrictions…do not apply to a family farm corporation or an authorized farm corporation."
[19] Iowa Code Ann. § 9I.1(4).
[20] The fourteen states that had a foreign ownership before 2023 did not specifically restrict foreign acquisitions of land by investors from specific countries; Rather, these "traditional" foreign ownership laws restrict "any nonresident" or "any foreign business entity", whereas almost all the states that enacted a foreign ownership law in 2023 restrict investments from individuals, entities, and/or governments from specific countries (namely China, Iran, North Korea, and Russia).
[21] *See* Va. Code Ann. §§ 55.1-507–509.
[22] Note that other state statutes use the U.S. Secretary of Commerce's "foreign adversary" definition under 15 C.F.R. § 7.4, including La. Stat. Ann. § 9:2717.1, Montana 2023 Sess. Law Ch. No. 434, N.D. Cent. Code Ann. § 47-01-09, and Ohio Rev. Code Ann. § 5301.256 (Ohio Secretary of State is required to consult the "foreign adversary" list as well as other federal definitions and lists when compiling a registry of the types of foreign investments are prohibited within the state).
[23] Va. Code Ann. § 55.1-507.
[24] *See* Ark. Code Ann. §§ 18-11-110; 18-11-701–705.
[25] 22 C.F.R. § 126.1.

designated by the Secretary "Entities of Particular Concern" list[26]. Tennessee's law[27] restricts nonresident individuals, foreign businesses, and foreign governments of countries subject to the U.S. Treasury Department's "sanctions program list."[28] Alabama's law[29] also uses the "sanctions program list" to restrict the governments and government-controlled entities subject to this list from purchasing the state's farmland, but also restricts governments and their entities of a "foreign country of concern." Under the law, a "foreign country of concern" includes China, Iran, North Korea, and Russia. The state of Utah restricts land investments by companies—and any entity or country associated or affiliated with these companies—identified as Chinese military companies operating in the U.S.[30]

Florida's law[31] restricts certain foreign land acquisitions from investors of specific countries, but the state's law does not reference a federal definition or list. Rather, Florida restricts purchases and leases of agricultural land from investors of a "foreign country of concern," which the law defines as China, Russia, Iran, North Korea, Cuba, Syria, and the Venezuelan regime of Nicolás Maduro.[32] Further, the Florida law specifically restricts the Chinese government, entities organized under the laws of China, and individuals "domiciled" in China from acquiring any real property located within the state.

d. Property Interests

Several states' foreign ownership laws define the type of ownership interests that are restricted or prohibited. In general, there are several different types of ownership interests someone may hold in land, such as fee simple (outright ownership), joint ownership, a life estate, or a leasehold interest. Each type of ownership interest provides different rights and protections in property to individuals and entities. Accordingly, some states restrict foreign investors from acquiring "by grant, purchase, devise, descent, or otherwise" any farmland located within its state.[33] This type of statutory language would likely restrict foreign investors from acquiring any type of ownership or leasehold interest in agricultural land. Also, some states

[26] "Entities of Particular Concern" designations are available on the U.S. Secretary of State's website at: https://www.state.gov/countries-of-particular-concern-special-watch-list-countries-entities-of-particular-concern/ (last updated Nov. 30, 2022).
[27] *See* Tenn. Code Ann. §§ 66-2-301–306.
[28] The U.S. Treasury Department's list of sanctioned countries and entities is available on the agency's website at https://ofac.treasury.gov/sanctions-programs-and-country-information.
[29] *See* Ala. Code § 35-1-1.1.
[30] *See* Utah Code Ann. §§ 63L-13-101–202. *See also* the U.S. Defense Department's list of Chinese military companies operating directly or indirectly in the U.S. at: https://media.defense.gov/2022/Oct/05/2003091659/-1/-1/0/1260H%20COMPANIES.PDF.
[31] *See* Fla. Stat. Ann. §§ 692.201–205.
[32] *Id*. at § 692.201(3).
[33] Ind. Code Ann. § 32-22-3-4(a).

explicitly define leases on agricultural land are considered "ownership interests" in that land.[34]

3. Restriction Provision

Generally, the actual provision that establishes a restriction against foreign purchases and acquisitions of farmland does not have to be lengthy. In fact, many states' laws contain a one- or two-sentence provision that declares a restriction or prohibition on foreign ownership of agricultural land located within their state. The most common components of a restriction provision include:

- The types of foreign persons or entities subject to the restriction (individuals, business entities, and/or foreign governments);
- The types of investments or acquisitions that are prohibited (grant, purchase, own, hold, transfer, devise, descent, lease, alienate, or otherwise acquire);
- A commencement date of the restriction;
- Whether direct and indirect acquisition is restricted; and
- Status changes of individuals and entities.

By compiling this into one provision, the legislative text of a restriction may resemble the following example provision:

> "Nonresident aliens, foreign businesses, and foreign governments, or an agent, trustee or fiduciary thereof, shall not, directly or indirectly, grant, purchase, devise, descent, transfer, or otherwise acquire or hold any interest in agricultural land located within the borders of this state after January 1, 2023. This restriction applies to persons and entities that purchase or hold agricultural land whose status changes so that it becomes a nonresident alien or foreign business, and it must divest itself of all right, title and interest in the agricultural land within one year from the date of its status change."[35]

Some states' foreign ownership laws do not specifically restrict ownership or investments in farmland; rather, their restrictions apply to all real property located within the state.[36] Some of these states specify that this restriction applies to public and private real property located within the state.

[34] *See* N.D. Cent. Code Ann. § 47-10.1-01(2), which specifies that an "interest in agricultural land" also includes a lease in agricultural land under the restriction law. *See also* Mo. Rev. Stat. § 442.581, which states "a lease on agricultural land for a term of ten years or longer…has acquired agricultural land…."
[35] Language in example based on Iowa Code Ann. § 9I.3(1).
[36] *See* Miss. Code Ann. § 29-1-75; Miss. Code Ann. § 89-1-23; Okla. Const. art XXII, § 1; Okla. Stat. tit. 60, § 121.

4. Exceptions

Every foreign ownership law contains exceptions to a restriction on foreign agricultural landholdings. In other words, every state's law contains provisions that permit foreign investors to acquire or hold agricultural land in certain situations. Most often, these provisions exempt certain foreign parties, agricultural practices, and land-use activities from a state's restriction. While some states have only a few exceptions, many states have multiple exceptions to its restriction on foreign investment in agricultural land.

a. Acreage Limits

A few of the states that have a foreign ownership law include an acreage limit or cap to its restriction. Essentially, these types of exceptions restrict foreign investments in farmland only if the acquisition exceeds a specified number of acres. For example, Pennsylvania caps foreign ownership to 100 acres before the restriction applies, while Missouri limits a foreign investor from owning more than one percent of the "total agricultural land acreage" within the state.[37] Indiana's acreage limit exception relies on the type of production which limits foreign business acquisitions to 320 acres of crop farming land and 10 acres for land used for timber production.[38] Therefore, under these exceptions, foreign investors do not violate a restriction if their overall interest in farmland does not exceed the acreage limit provided under the law.

b. Conversion

Some states' laws provide exceptions for conversions of agricultural land or the use of agricultural land for nonfarming enterprises. In general, this type of exception arises when a restricted foreign party acquires agricultural land, but converts the land into some use other than farming. This type of exception can be complex and difficult to draft, and there are a few things legislators should assess when considering this type of exception for a restriction bill.

First, some states' foreign ownership law that contain this type of exception is typically tailored towards manufacturing and industrial purposes.[39] Second, these types of exceptions generally include a specific period of time for a conversion. For example, North Dakota requires foreign business entities to enter into contracts within 150 days of acquiring the agricultural land for the construction of an industrial development.[40] If the foreign business fails to enter into these contracts within this time period, they must dispose of the land within 1 year from the date of acquiring the

[37] 68 Pa. Stat. Ann. § 41; Mo. Rev. Stat. § 442.571(1).
[38] Ind. Code Ann. § 32-22-3-0.5(a)(2).
[39] For an example, see Neb. Rev. Stat. § 76-413.
[40] N.D. Cent. Code Ann. § 47-10.1-02(6).

land.[41] Other states, such as Iowa, require foreign parties to convert the agricultural land into other purposes within 5 years.[42]

Third, states that provide for this type of exception in its foreign ownership law usually permit the land to continue being used for farming purposes during the conversion or development of the nonfarming purpose. Some states, such as Missouri, allow the foreign-owned land to be used for farming purposes pending the development of the land for nonfarming purposes, but only if the land is leased to certain persons or entities engaged in farming.[43] Generally, these types of exceptions require foreign investors to lease the land to individuals or businesses not subject to a state's restriction.[44]

Fourth, a few states with foreign ownership laws limit the amount of agricultural land a foreign party may convert for nonfarming purposes. North Dakota, for example, exempts foreign parties to convert farmland into an industrial purpose, but only the amount of land "reasonably necessary for industrial purposes."[45] South Dakota's does not limit conversion to industrial purposes; rather, the state's law permits restricted foreign owners to hold agricultural land "in such acreage as may be necessary to its *nonfarm business operations*."[46]

Fifth, a few states' foreign ownership laws govern situations where a foreign party ceases to use the land for the converted purpose. States most likely include this "exception to the exception" provision to ensure foreign investors do not use a conversion exemption as a loophole to own agricultural land. For example, in Missouri foreign-held agricultural land is in violation of the state's restriction if the land "ceases to be used for nonagricultural purposes."[47] Mississippi's foreign ownership law permits nonresident aliens to acquire agricultural land for industrial development purposes, but if the land ceases to be used for this purpose, "it shall escheat to the state." This type of exemption likely safeguards against foreign investors using a conversion exemption as a loophole to own agricultural land.

c. Agricultural Production, Research, and Experimentation

Several states that have a foreign ownership law typically exempt certain types of agricultural production from its restriction. Some states[48] exempt foreign parties from restrictions when foreign-owned agricultural land is used for certain purposes,

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[41] *Id*.
[42] Iowa Code Ann. § 9I.3(2).
[43] Mo. Rev. Stat. § 442.591.
[44] For instance, see Wis. State. § 710.02(3).
[45] N.D. Cent. Code Ann. § 47-10.1-02(6).
[46] S.D. Codified Laws § 43-2A-8 (emphasis added).
[47] Mo. Rev. Stat. § 442.576(1).
[48] *See* Ind. Code Ann. § 32-22-3-0.5(a)(3)-(4); Iowa Code Ann. § 9I.3(3)(d)(3); Kan. Stat. Ann. § 17-5904(a)(8)-(9), (11); Mo. Rev. Stat. § 350.015(5); Okla. Stat. tit. 18, § 954; S.D. Codified Laws §§ 47-9A-1.1, 3.1-3.3, 10, 11.

such as raising breeding stock, livestock feeding operations, cultivating nursery plants, vegetables, grain, fruits or sod, producing poultry or poultry products, producing timber and forest products, and dairy or swine operations. Other states[49] exempt certain types of research and experimental testing, development, or production of agricultural commodities and practices from its restriction.

d. Estates

Another exception found in many states' foreign ownership law or statutory code is taking agricultural land through someone's estate. Situations may arise where a restricted foreign party obtains ownership of agricultural land by inheritance ("by descent") or through the terms of a person's will ("by devise"). Many states have a public policy interest in allowing beneficiaries and descendants to receive and hold the property granted to them by devise or descent. However, some states that have this exception also limit the period of time a foreign person may hold the farmland granted to them. For instance, Kentucky's law[50] state that nonresident aliens may only hold inherited farmland for eight years from the time they acquired the land. If the nonresident alien does not become a U.S. citizen within that eight-year period, the land escheats to the state.

e. Oil, Gas, and Mineral Leases

Foreign ownership laws generally include an exception for certain leases of farmland that involve nonfarming operations, such as mineral leases. Oil, gas, and other mineral drilling, mining, or production may supplement a state's economy and restricting foreign parties involved in this industry may not serve a state's interest. Some states, such as Wisconsin, exempt "leases for exploration or production of oil, gas, coal, shale and related hydrocarbons..."[51] from their foreign ownership restriction. Other states limit this type of exception to a specific number of years for leases on agricultural land or circumstances in which a lease may end, such as instances where oil, gas, or other minerals can no longer be produced in commercial quantities.[52] Further, as carbon, solar, and wind energy markets continue to develop within the agricultural industry, some foreign ownership proposals may include exceptions for foreign investors leasing farmland in order to participate in these markets.

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[49] *See* Ind. Code Ann. § 32-22-3-0.5(a)(1); Iowa Code Ann. §§ 9H.4(1), 9I.3(3)(d); Kan. Stat. Ann. § 17-7504(a)(10); Minn. Stat. Ann. § 500.221, subdivision 2(5); Mo. Rev. Stat. § 350.015(4); Okla. Stat. tit. 18, § 954(1); S.D. Codified Laws § 47-9A-9; Wis. Stat. § 182.001(2)(d).

[50] Ky. Rev. Stat. Ann. § 381.300.

[51] Wis. Stat. § 710.02(2)(g).

[52] Neb. Rev. Stat. § 76-404 limits leases for oil, gas, or other hydrocarbon substances to 10 years and "as long thereafter…shall or can be produced in commercial quantities."

f. Interstate Commerce Exception

Some states' foreign ownership laws exclude certain types of business operations from its restriction so that the law does not violate federal law. Certain business operations, such as railroads, public utilities, common carriers, and pipeline companies[53] conduct business and provide services across large portions of land in sometimes several different states. Accordingly, restricting foreign parties that operates these types of businesses from purchasing certain land within a state can burden commercial activity, which could likely violate the Dormant Commerce Clause.

Essentially, the Dormant Commerce Clause, which derives from the Commerce Clause under Article I of the U.S. Constitution, prohibits a state legislature from enacting laws that place an excessive burden on interstate or international commerce. In other words, states violate the Dormant Commerce Clause when they regulate commercial activity that occurs outside its borders. Therefore, some states exempt these types of business activities from its foreign ownership law to avoid violating federal law.

g. Federal Treaties

Under the U.S. Constitution, the President has the power to enter into treaties with other nations.[54] In certain instances, the federal government may grant citizens or entities from another country the right to acquire or hold land within the U.S. under an international treaty. Because these treaties have the force of federal legislation, these treaties preempt or supersede state law. This is why the U.S. Supreme Court has previously ruled that states have the authority to regulate foreign ownership of real property "where there [is] no treaty...."[55] Accordingly, some states[56] exclude certain "foreign governments" from its foreign ownership law. For instance, Wisconsin does not prohibit "foreign governments or subjects of a foreign government whose rights to hold...land are secured by treaty."[57]

h. Securing Debt with Agricultural Land

Most states with a foreign ownership law exempt lenders from a restriction when agricultural land is collateral for a loan. Generally, lenders require borrowers to give them a security interest or lien in some type of property before supplying the funds so that they may enforce this interest against a borrower if they do not satisfy the unpaid

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[53] Some states provide an exception to one or more of these types of businesses or service providers (Minn. Stat. Ann. § 500.221, subdivision 2(3); Neb. Rev. Stat. § 76-412; N.D. Cent. Code Ann. § 47-10.1-02(7); Wis. Stat. § 710.02(2)(c).

[54] *See* U.S. Const. art. II, § 2.

[55] Blythe v. Hinckley, 180 U.S. 333, 340-41 (1901).

[56] Fla. Stat. Ann. § 692.205; N.D. Cent. Code Ann. §§ 47-10.1-02(1)(a), (7); N.D. Cent. Code Ann. § 47-01-09(4)(c) (exempting certain foreign governments from the state's foreign ownership law restriction for foreign governments that maintain "an active national security agreement with the [U.S.] federal government."); 68 Pa. Stat. Ann. § 41; Va. Code Ann. § 55.1-505(E); Wis. Stat. § 710.02(2)(b).

[57] Wis. Stat. § 710.02(2)(b).

debt. In cases where the lender is a foreign person or entity, most states' laws exempt the foreign lender from enforcing their interest in collateralized agricultural land.

A few states that permit foreign lenders to enforce its security interest in agricultural land also limit the period of time in which a foreign lender may hold title to the land after foreclosure. Some of these states limit the types of persons or entities eligible to purchase or acquire the land from the foreign lender (*i.e.*, U.S. citizens and resident aliens and/or U.S. business entities). Further, states with this type of exemption often attach penalties to foreign lenders if they do not sell or otherwise dispose of the property to an eligible party before the specified time period expires, such as escheat or forfeiture of the land.

i. "Grandfather" Clause

States with a foreign ownership law usually include a "grandfather clause." Essentially, a grandfather clause exempts certain persons from the requirements of a law by allowing these persons to continue with the activities that were permissible before the implementation of the new law. For example, Iowa's law excludes nonresident aliens from its restriction if they owned or held agricultural land located within the state on January 1, 1980.[58] Although this exemption is provided under states' foreign ownership law, foreign persons are generally not exempt from additional investments in farmland. Further, some states' grandfather clauses forbid foreign persons from selling or transferring exempt farmland to other restricted parties.

5. Enforcement and Penalty Provision

Many states' restriction laws contain enforcement and penalty provisions while some states are silent on enforcement of their restriction law. Some states have assigned enforcement authority upon the state's attorney general or a district attorney of the county where the foreign-owned land is located. Under this approach, the attorney general or district attorney, when notified or suspecting a foreign party is in violation of a foreign ownership law, will file an escheat or forfeiture action against the foreign person or entity. Thus, if a judge determines that the foreign party is in violation of the restriction law, the land escheats or forfeits to the state which means the state takes title to the land.

Other states permit private enforcement.[59] In other words, residents of the state have the ability to bring a divestment action against a foreign party suspected of violating a foreign owner law. If a judge rules in favor of the resident in this type of lawsuit, they can require the foreign party to sell or transfer their interest in the agricultural land they held in violation of the restriction law.

[58] Iowa Code Ann. § 9-I.3(1).
[59] Okla. Stat. tit. 18, § 956.

Aside from losing an ownership interest in agricultural land, some states require foreign persons that violate its law to pay a civil penalty. Sometimes, the amount of the penalty is ordered by a judge. Other times, the penalty is assessed on a certain percentage amount of the firm market value of the foreign-held land in violation or the number of violations committed by a foreign person.

6. Reporting Provision

While certain foreign persons are required to disclose their interests in U.S. agricultural land to USDA under the federal Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA"), some states have their own reporting requirements. Specifically, approximately _ states—Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Wisconsin—require certain nonresident aliens and/or foreign entities to report their agricultural landholdings within the state. These states require foreign investors to report their farmland holding interest to the state's attorney general, secretary of state, or agricultural department. In some states, its reporting statute requires foreign parties to submit a copy of their AFIDA report to a state agency to satisfy their reporting requirement. State-level reporting statutes are compiled on the NALC's website here.

Pennsylvania does not have reporting requirements separate from AFIDA; rather, the state has enacted a law that requires the Pennsylvania Department of Agriculture to review AFIDA data to ensure compliance with the state's restriction on foreign ownership of agricultural land.[60] In Virginia, foreign persons and entities are not required to report their agricultural landholdings, but state law requires the Virginia Department of Agriculture and Consumer Services to compile an annual report that contains certain information concerning foreign ownership and investments in the state's agricultural land.[61] In 2023, the Mississippi state legislature enacted a law[62] which established a committee to study and monitor foreign interests in agricultural land, water rights, and energy production within the state, but no reporting requirement was established under the legislation.

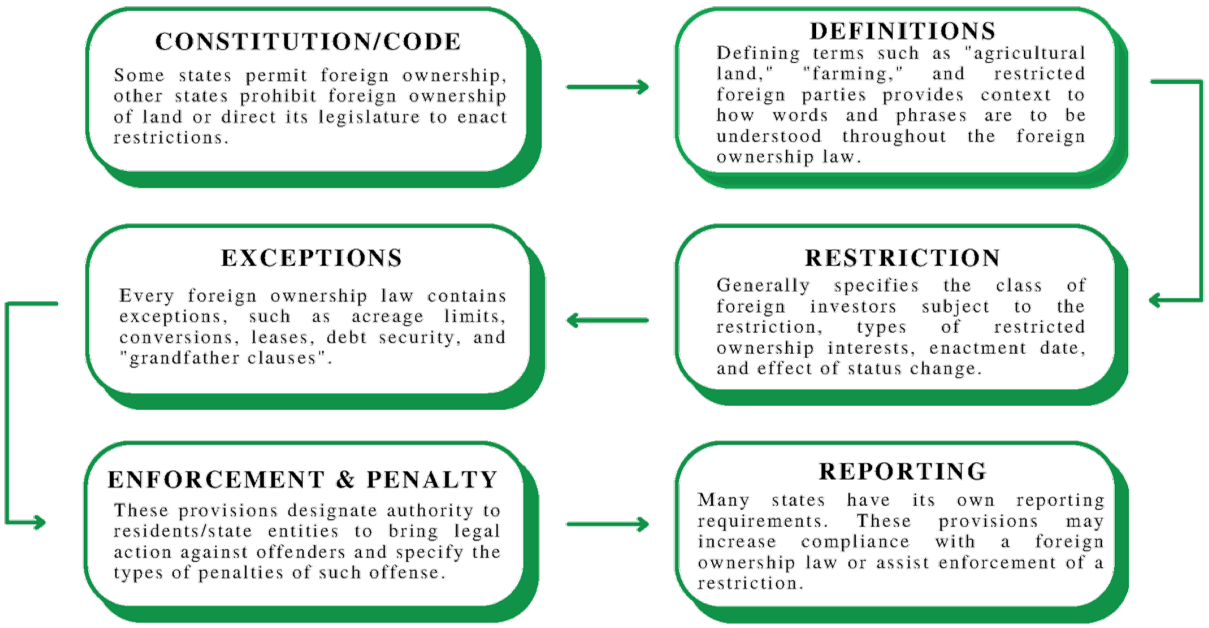
IV. Conclusion

In recent years, there has been an increasing number of states considering legislation aimed at restricting foreign ownership and investments in land, specifically agricultural land, within their state. Because of the interest in restricting foreign ownership in U.S. agricultural land, more states may choose to introduce legislation seeking to limit foreign ownership interests. These states that seek to propose a foreign ownership law will likely include some if not most of the type of provisions discussed in this fact sheet.

[60] 68 Pa. Stat. Ann. § 45.
[61] Va. Code Ann. § 55.1-509.
[62] Miss. Laws 2023, H.B. 280, § 1 (effective July 1, 2023).

A “roadmap” of the most common foreign ownership law provisions

The provisions discussed in this fact sheet have been condensed into a flowchart to summarize the most common components included in most foreign ownership laws. Importantly, this chart does not represent a complete list of every type of provision contained in a foreign ownership law.



Balancing Wildlife Protection and Responsible Pesticide Use: How EPA's Pesticide Program Will Meet its Endangered Species Act Obligations

2022

www.epa.gov/endangered-species

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Images from the U.S. Fish and Wildlife Services National Digital Library and the U.S. Department of Agriculture Official Photostream

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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

Background

EPA has both an opportunity and a responsibility to address the decades-old challenge of how its Pesticide Program meets its obligations under the Endangered Species Act (ESA). In past decades, the Agency has met those obligations for less than 5% of the thousands of pesticide actions it completes annually under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The reasons for this failure are multifold, including the unusual complexity of ESA pesticide reviews. The entire process, including consulting with federal wildlife agencies to adopt protections, can take at least 4 years for a single pesticide and up to 15 years in rare cases. FIFRA requires that EPA reevaluate every pesticide every 15 years, including the hundreds that affect species listed under the ESA. ESA obligations also exist for many registrations of new pesticides, new uses of existing pesticides, and amendments to pesticide labels. In total, thousands of FIFRA actions will require an ESA review over the next decade alone.

EPA's Pesticide Program has been unable to keep pace with its ESA workload, resulting not only in inadequate protections for listed species but also litigation against the Agency that has increased in frequency in recent years. EPA has faced over 20 lawsuits, covering over 1,000 pesticide products, challenging its failure to meet ESA obligations. As a result, EPA's current ESA priorities are driven almost entirely by litigation settlements and other court-enforceable deadlines. Over the next six years, existing court-enforceable deadlines will require EPA to complete ESA reviews for 18 pesticides—the most the Agency estimates it can handle during this period based on its current capacity and processes. And ongoing litigation and settlement discussions for other lawsuits cover dozens of additional pesticides and will likely fill the Agency's ESA workload beyond 2030. Even though these litigation deadlines have determined most of the ESA workload for the next decade, that workload is estimated to cover less than 5% of EPA's future pesticide actions that trigger ESA obligations. Because the Pesticide Program currently lacks the capacity and efficient processes to fully meet its ESA obligations on those remaining pesticide actions, it remains vulnerable to additional lawsuits.

This situation creates significant uncertainty for farmers, other pesticide users, and pesticide registrants. For example, if a court vacates a pesticide action, users may lose access to the pesticide for the several years likely needed for EPA to meet its ESA obligations for that action. Without certain pesticide products, farmers could have trouble growing crops that feed Americans and public health agencies could lack the tools needed to combat insect-borne diseases.

EPA's Pesticide Program is at a critical juncture and needs a new vision. This is why the Agency has embarked on an unprecedented effort to improve the current ESA-FIFRA process in collaboration with the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), U.S. Department of Agriculture (USDA), Council on Environmental Quality (CEQ), and stakeholders especially environmental and agricultural ones. In the last year alone, EPA has taken several important steps. This includes deciding to meet ESA obligations when registering new conventional pesticides, incorporating mitigation for ESA species much earlier in the FIFRA process for certain pesticide decisions, and revitalizing the ESA-FIFRA Interagency Working Group. This workplan is another important step, reflecting the Agency's most comprehensive thinking to date on how to improve its ESA-FIFRA work to meet its mission of protecting human health and the environment while supporting responsible use of pesticides for agriculture, public health, and other important purposes.

A Vision of Success and Challenges to the Vision

To guide its ESA-FIFRA work, EPA has developed a vision of a successful process. Success means that EPA is protecting ESA species and their habitats from pesticide effects to an extent that fulfills its obligations under all federal laws. EPA would be achieving this goal while minimizing impacts to pesticide users, supporting the development of safer technologies to control important public health and agronomic pests, and completing timely pesticide registration decisions. EPA would also become a trusted expert in protecting listed species through its pesticide decisions, using real-world, up-to-date information.

To achieve this vision, EPA has identified at least six key challenges that must be overcome.

- First is the large and growing number of FIFRA actions that trigger ESA review, at a time when the Pesticide Program's staffing is roughly at the FY 2013 level.
- Second is that the current ESA-FIFRA process generally does not result in protections for listed species that is both practical for pesticide users to implement and timely to protect species.
- Third is that FIFRA registrations are often geographically broad, cover many pesticide uses, and affect many types of listed species. All of this creates unique scientific and other challenges for EPA's ability to meet its ESA obligations.
- Fourth is the need to better harmonize the FIFRA process with the ESA process. For example, the current FIFRA process assesses each pesticide on a chemical-by-chemical basis, but this approach is unsustainable across hundreds of pesticides, many of which affect hundreds of listed species. This is one reason that the entire ESA-FIFRA process currently spans at least 4 years for one pesticide.
- Fifth is a series of challenges related to data and scientific methods. For example, better and more refined data on where species occur and how best to protect them from pesticide exposure would result in more effective and cost-efficient protections. But gathering and analyzing these data would likely extend the ESA-FIFRA process even longer and require additional agency capacity. Thus, EPA needs to balance the benefits of more or better data, with the goal of expediting the ESA-FIFRA process.
- Finally, an effective ESA-FIFRA process requires strong working relationships among EPA, FWS, NMFS, and USDA. All four agencies are working toward this goal but still have room for improvement.

Strategies and Actions to Achieve Vision

To address these challenges and advance EPA's vision, the workplan establishes four overlapping strategies and multiple actions to implement each strategy. The first strategy is for EPA to meet its ESA obligations for all FIFRA actions. Because EPA cannot meet all these obligations immediately while also complying with statutory deadlines for FIFRA actions, the Agency will generally prioritize those actions as follows:

- The top tier includes actions with existing and future court-enforceable deadlines and the registrations of new conventional pesticide active ingredients.
- The second tier includes the large number of remaining conventional pesticides, without court-enforceable deadlines, that EPA reevaluates every 15 years (*i.e.*, FIFRA registration review).
- The third tier includes all other FIFRA actions for conventional pesticides (*e.g.,* new uses of existing pesticides) and FIFRA actions for non-conventional pesticides (*e.g.*, biopesticides).

The workplan provides EPA's rationale for these priority categories and the estimated number of actions in each category that may require an ESA review.

The second strategy is for EPA to improve its approaches to identifying and requiring ESA protections to address pesticide effects. These improvements will include the following:

- Identify and incorporate protections for ESA species earlier in the FIFRA process, with a focus on species that EPA considers vulnerable to pesticides.
- Proactively adopt protections for ESA species facing the greatest risk to their survival from pesticides, such that if EPA did not adopt those protections, the Agency may be in violation of the ESA's substantive obligations.
- Identify flexible options for pesticide users to decide how best to protect ESA species affected by pesticides, including through a federal pilot project being launched in 2022 to identify and implement practical conservation practices across approximately two-dozen listed species.
- Where multiple pesticides are used for the same crops and affect the same species, begin coordinating species protection measures across those pesticides to ensure the measures are consistent. In 2022, for example, EPA will begin coordinating opportunities between newly registered pesticides and existing pesticides undergoing their periodic 15-year reevaluation.
- Where pesticide effects on ESA species cannot be practically avoided or minimized, create opportunities to offset the residual effects through habitat restoration and other conservation actions. Doing so can provide greater flexibility for pesticide users and directly further species recovery, especially in response to climate change.
- Adopt other policy and program improvements to support the above actions.

The third strategy is to improve the efficiency and timeliness of the ESA-FIFRA process, in collaboration with FWS, NMFS, and USDA. This strategy includes developing different approaches for EPA to meet its ESA obligations, which may include assessing all pesticides intended for a particular use at the same time, and consulting with FWS or NMFS regional staff to efficiently incorporate more localized data on species, protection measures, and pest control practices.

The final strategy is to improve EPA's stakeholder engagement. This will include seeking help on more or better data for ESA assessments and expanding dialogues with growers and non-agricultural pesticide users.

Closing and Future Steps

The workplan is a living document that will evolve based on lessons learned through implementation. Within the next two years, EPA will reevaluate its progress under the workplan and decide whether and how to update it. EPA cannot achieve most of the actions in the workplan on its own. The Agency welcomes stakeholder feedback on the workplan, especially on opportunities to help implement species protection measures and provide better data to expedite ESA-FIFRA analyses.

INTRODUCTION

INTRODUCTION

EPA's mission is to protect human health and the environment. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Endangered Species Act (ESA) are important laws that allow EPA to meet its mission of protecting the environment. Through these and other laws, EPA decides how best to regulate pesticide uses to ensure they achieve society's pest control goals without unduly harming human health or the environment, including ESA-listed endangered and threatened species. This is a formidable task, considering the tens of thousands of pesticide products and amendments that will require ESA review in the coming decade, combined with the over 1,600 listed species in the United States. Moreover, information on the vulnerability, biology, and location of many of these species is limited, especially information on how pesticides may impact their survival. These and other challenges are partly why EPA's Pesticide Program has struggled for decades with meeting its ESA obligations. Even though EPA has approved over 1,000 pesticide ingredients and thousands of pesticide uses over the past decades, it has met its ESA obligations for less than 5 percent of those actions.

This low rate has resulted in over 20 lawsuits against the Agency challenging its failure to meet its ESA obligations. The lawsuits have compelled EPA to meet these obligations by assessing the effects of pesticide actions on listed species and, in most cases, consulting with one or both of the federal wildlife agencies on those effects. Indeed, nearly every consultation on pesticides is in response to lawsuits, which now largely set EPA's pesticide consultation workload and schedule. To date, most of these consultations have covered commonly used pesticides that affect many listed species. The consultations are typically very complex, lengthy, and resource-intensive for all involved, with many spanning no fewer than 4 years and some extending to 15 years. EPA's pesticide program has already agreed, through court-enforceable settlements, to completing 18 ESA assessments within the next six years, which is the most assessments it can accommodate based on its current process and staffing, while also meeting its other near-term ESA obligations. EPA is also in settlement discussions that could result in similar agreements for dozens of additional pesticides. Yet all of these assessments reflect less than 5% of the total ESA assessments that EPA would need to complete as part of past, current, and future FIFRA actions. If EPA does not complete this work, it will continue to face legal challenges to its pesticide actions. This creates uncertainty for farmers and other pesticide users, who could lose access to pesticides if a court vacates a FIFRA action.

EPA must focus on how to achieve the goals of ESA and FIFRA differently than in the past—to break the decades-old cycle where ESA goals were not met, and the resulting litigation became the main driver and priority setter of how EPA fulfills its ESA obligations. The old approach has been expensive for EPA, expensive for the parties to the lawsuits, and frustrating for all stakeholders—all while listed species remain inadequately protected. These reasons are why EPA's Pesticide Program is at a critical juncture, and why the Agency has issued this workplan.

In 2021, prompted by the escalating challenges of fulfilling its ESA obligations for pesticide decisions, EPA began developing a comprehensive, long-term approach to meeting those obligations. This effort was not the Agency's first attempt to address this complex issue. Over the decades, EPA has pursued various approaches to this issue and has stated several times that it would develop a plan to meet its ESA obligations. Although EPA has made some progress on improving its ESA-FIFRA program, much more work remains.

Informed by EPA's past efforts and by its recent discussions with stakeholders and lawmakers, EPA in 2021 began holding a series of internal and external meetings on how the Agency could fully address its ESA obligations. These include quarterly ESA-FIFRA meetings with stakeholders and a widely attended January 2022 public listening session on improving the ESA-FIFRA process.[1] The outcome of all those dialogues is this workplan, which reflects EPA's experiences, assesses its future ESA workload, and describes administrative and other improvements that EPA will pursue or consider pursuing. The workplan thus reflects the Agency's most comprehensive thinking to date on how to create a sustainable ESA-FIFRA program.

The Magnitude of EPA's Pesticide Program

Safe pesticide use offers important contributions to society, particularly in the production of U.S. food and fiber and the protection of public health from insect and rodent pests. Generally, there are more than 17,000 registered pesticide products containing more than 1,200 active ingredients, with uses including insect repellents, household cleaners, lawn and garden chemicals, hospital disinfectants, biotech products, and a wide range of agricultural chemicals.

In arriving at policy decisions that are informed by sound science, EPA seeks to balance the interests of many stakeholders. These include more than 88 million households; more than two million farms; 23,000 commercial pest control firms; a dozen major pesticide producers; another 100 small producers; 1,700 pesticide formulators; 25,000 distributors; several industry, grower, farmworker, and environmental associations and non-government organizations; and state, local, and tribal entities.

Although this workplan focuses on ESA and FIFRA obligations, EPA also has obligations under the Federal Food Drug and Cosmetic Act (FFDCA). Further, several amendments to FIFRA, through successive versions of the Pesticide Registration Improvement Act (PRIA), set timeframes for EPA to complete pesticide actions. EPA must meet these obligations alongside those of the ESA.

The workplan is structured as follows. The next section, *A Vision of Success*, describes EPA's long-term vision for its ESA-FIFRA work. This vision statement acts as the Agency's north star to navigate the complexities of this issue, and informs the strategies and actions described later in this document. The following section, *Background and Challenges to Vision*, provides a detailed discussion on the background of key ESA-FIFRA issues and the major challenges to achieving this vision. EPA provides this extended explanation so the public can understand why meeting ESA obligations in full is difficult and how stakeholders can help EPA solve those challenges more effectively. The following section, *Strategies and Actions to Advance Vision*, is the core of the workplan, describing the strategies and actions that EPA has developed to advance its vision. This section also describes how EPA will prioritize certain types of FIFRA actions over others for ESA determinations, given that the Agency cannot immediately meet its ESA obligations for all backlogged and future FIFRA actions that trigger ESA obligations. The workplan concludes by discussing opportunities for the public to engage with EPA on implementing the approaches described in the document.

1 Visit EPA's Interagency Working Group: Public Meeting on Endangered Species Pesticide Issues webpage.

Primer on ESA Concepts and Process

Under FIFRA, EPA decides whether to register pesticide products containing **new active ingredients** and **new uses** of currently registered pesticides, and reevaluates all existing registered pesticides every 15 years as part of **registration review**. Those are the major actions that may trigger an ESA assessment for potential effects on ESA listed species and their designated critical habitats.

An ESA assessment begins with EPA determining whether a FIFRA action may have any effect on a species or critical habitat. If EPA finds "**no effect**," no further ESA analysis is needed. If EPA finds "**may affect**," the agency further assesses whether the pesticide's use is either "not likely to adversely affect" (**NLAA**) or "likely to adversely affect" (**LAA**) the species or designated critical habitat. In general, likely harm to even one individual of a species triggers an LAA. EPA describes its findings in a **biological evaluation** that it provides to the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), or both agencies (the Services). For brevity, this workplan refers to all these findings as "**ESA determinations**."

FWS (Department of the Interior) and NMFS (Department of Commerce) are charged with administering the ESA. FWS is responsible for most listed species, while NMFS is responsible for listed marine species and anadromous fish. Most nationwide pesticide consultations involve both Services.

For an NLAA finding, EPA seeks the concurrence of the Services in that finding. If the Services concur, no further ESA process is needed. For an LAA finding, EPA formally consults with the Services. During formal consultation, the Services determine whether the EPA action is likely to **jeopardize** any listed species or **destroy or adversely modify** any critical habitat—both of which the ESA prohibits. Unlike the LAA/NLAA findings, the jeopardy/adverse modification findings assess effects on the entire species, including its ability to recover under the ESA. If the Services *propose* jeopardy/adverse modification, they work with EPA and the registrant to negotiate mitigation measures to avoid these findings. If the measures are adequate, the Services conclude no jeopardy/adverse modification. If the measures are inadequate, the Services conclude jeopardy/adverse modification and recommend mitigation that, if adopted, will avoid these prohibitions. Those measures are called reasonable and prudent alternatives (**RPAs**) and are in addition to label restrictions adopted under FIFRA or in a biological evaluation. Even for animal species not at risk of jeopardy/adverse modification, the ESA requires the Services to develop mitigation—called reasonable and prudent measures (**RPMs**)—to minimize the effects of any **incidental take** on the species. Incidental take includes unintended injury to or death of an individual of any listed animal species. In practice, the potential for take of an individual animal triggers an LAA finding.

At the end of formal consultation, each of the Services issues a **biological opinion** that describes its findings and mitigation recommendations. The biological opinion also includes an **incidental take statement** that exempts the pesticide action from the ESA's take prohibition, if the terms and conditions of the statement are followed. If EPA implements the biological opinion through changes to a pesticide registration or label, any person who follows those requirements faces no ESA liability when applying the pesticide.

To implement the mitigations resulting from formal consultation, EPA may require changes to a pesticide's registration, label, or use instructions. When those changes are needed only in specific regions rather than nationwide, EPA may implement the changes through geographically specific Endangered Species Protection Bulletins. *Bulletins Live! Two* is EPA's current online endangered species bulletins system.

Primer on FIFRA Registration Review Process

*After publication EPA generally holds a 60-day public comment period.

Under registration review, EPA reviews each registered pesticide at least every 15 years to ensure that each pesticide can carry out its intended function(s) without creating unreasonable adverse effects to human health and the environment. Each pesticide review is unique but all undergo the same basic registration review process.

EPA initiates a registration review by establishing a public docket for a pesticide registration review case and opens the docket for public comment. The docket contains a **Preliminary Work Plan (PWP)** summarizing information EPA has on the pesticide and the anticipated path forward. The PWP includes facts about the pesticide and its current use and usage, anticipated risk assessment and data needs, and an overall estimate of the time needed for the reviews. Once comments are received during the 60-day comment period for the PWP, the information received will be used to update the **Final Work Plan (FWP)**, which is also included in the docket. If data are needed to update the risk assessments, EPA will issue a **Data-Call In (DCI)** notice to the registrant under FIFRA section 3(c)(2)(B).

Once all the required data are received, the Agency will review and incorporate all information into **Draft Risk Assessments (DRA),** which always strive to include the best available science. The DRAs are placed in the public docket for a 60-day comment period.

If ecological or human health risks are identified in the DRA, then the **Proposed Interim Decision (PID)** will present the Agency's proposed findings on the FIFRA standard, including the results of formal ESA consultation, if needed, and the bases for these proposed findings; proposed modifications to the use of the pesticide to address risks of concern; state whether additional data are needed; specify any proposed labeling changes; and identify deadlines for completing any required actions. The PID is published in the public docket for a 60-day comment period.

After considering comments on the PID, EPA will issue an **Interim Decision (ID),** including an explanation of any changes from the PID and response to significant comments received on the PID. The Agency then publishes a Federal Register notice announcing the availability of the ID. The ID may require new or impose interim risk mitigation measures; identify data or information needed to complete the review (DCI); and require within 60-days of the ID publication the submission of updated pesticide labels.

EPA will issue a **Final Decision (FD)** after it completes a listed species assessment and any necessary ESA section 7 consultation with the Services. The decision will also account for the Endocrine Disruptor Screening Program.

At the outset of the workplan, readers should note two limitations in the document's ability to provide a complete, detailed path for EPA to fully meet its ESA obligations. First, the workplan does not provide a schedule for completing ESA determinations for all the pesticides in registration review. One reason is that EPA has already agreed to completing 18 ESA determinations over the next six years as part of litigation-driven agreements, which is the most the Agency can accommodate based on current processes and staffing (see Appendix A for current schedule and *Background and Challenges to Vision* section for more information). A schedule for ESA determinations for registration review beyond that timeframe is unlikely to reflect the most efficient approach for completing those assessments, given the major process improvements EPA expects to implement during this time. EPA hopes that these improvements will allow the Agency to complete more ESA determinations in the future. Further, EPA is currently addressing approximately 18 additional ESA lawsuits on FIFRA actions covering over 1,700 pesticide products, with some of those lawsuits likely to result in EPA agreeing to complete additional ESA determinations, under court-enforceable deadlines, that extend beyond the next six years.

A second reason for the lack of a schedule is that at the current pace at which EPA and the Services are completing pesticide consultations, this process would span decades for all pesticides that have their first cycle of FIFRA registration review ending in October 2022. To address this challenge, the Agency needs to prioritize certain FIFRA actions over others as part of fulfilling its ESA obligations and to work with the Services to develop and adopt program improvements that drastically reduce the complexity and duration of pesticide consultations. Because EPA does not yet know how much those improvements will expedite the ESA-FIFRA process, it sees limited value at this time to developing an ESA schedule that is likely to change considerably in several years. EPA plans to begin adopting the near-term improvements in this workplan and assess how much those actions improve the ESA-FIFRA process. That experience will give EPA a far better foundation for developing an overall schedule within the next three years for conducting ESA determinations for registration review decisions.

A second limitation of this workplan is that although some strategies and actions are well developed, others are only in their initial stages of discussion. Thus, this document may read more like a "plan to develop a plan" for certain actions. This is the inevitable outcome of a document that covers near-, medium-, and long-term actions, with the latter two influenced by factors largely outside of EPA's control such as its funding levels in annual appropriations and litigation. Even though those actions are described with less specificity, they remain crucial for readers to understand EPA's path to achieving its vision. Based on EPA's implementation of the workplan, other administrative improvement actions will become evident over the coming years. Thus, readers should consider this workplan as a living document that will evolve based on lessons learned through implementation. Within the next two years, EPA will reevaluate its progress under the workplan and decide whether and how to update it. EPA's hope is that within two years, the process improvements described in this workplan will allow the Agency to begin increasing the number of ESA assessments it can complete annually.

A VISION OF SUCCESS

A VISION OF SUCCESS

Before beginning this significant and challenging process, EPA developed a vision of success. EPA has adopted the following vision to guide this workplan and the Agency's ESA-FIFRA work generally.

> ***EPA's Office of Pesticide Programs is protecting federally listed threatened and endangered species and their designated critical habitats from pesticide effects to an extent that fulfills our obligations under all federal pesticide use and species protection laws. Our program is achieving this goal while minimizing impacts to pesticide users, supporting the development of safer technologies to control important public health and agronomic pests, and completing timely pesticide registration decisions. Our program is also working with stakeholders and our federal partners so that we are trusted experts in protecting endangered species through pesticide registration and registration review decisions. In making these decisions, we are performing credible analyses that answer the scientific questions needed to protect species using real-world, up-to-date information.***

EPA developed this vision mindful of the goals of stakeholders and other federal agencies. EPA thus hopes that all its partners and stakeholders see aspects of the vision that resonates with their goals. After all, meaningful, enduring improvements to the ESA-FIFRA process cannot occur without broad consensus about what the process is striving to achieve.

EPA wrote this workplan on its own because the ESA imposes duties on all federal agencies, including EPA, to meet its legal obligations. The workplan describes how EPA will achieve this with the help of other federal agencies and stakeholders.

Several specific parts of the vision deserve further explanation. First, as evident from the first line of the vision, EPA will meet its ESA obligations. This objective, however, cannot exist in a vacuum. EPA also strives to minimize the regulatory impacts of protections because doing so promotes its other legal and public policy goals of providing pesticides for agriculture, public health protections, and natural resource management. Further, EPA has FIFRA deadlines for pesticide actions that it strives to meet independent of ESA obligations. Those deadlines provide certainty to growers and other pesticide users about the availability of pesticides.

Second, EPA cannot address the ESA-FIFRA challenge on its own. Even though EPA developed this workplan independently to help meet its ESA duties, it seeks the help of stakeholders, the Services, USDA, and lawmakers to implement the workplan. Further, the workplan explains the many ways that EPA needs to change how it approaches its ESA obligations for FIFRA decisions. EPA, however, will also need to work with other organizations to change how they approach these issues. For example, in the short term, as EPA strives to build a workable process, EPA will encourage stakeholders to allow EPA to focus more of its time and resources to implement conservation measures needed to meet its ESA obligations, and less on certain data, methodology, or modeling issues that have limited bearing on the outcome of ESA consultations. EPA will also work with stakeholders to support greater flexibility for EPA to test new policies tailored to the complexities of pesticide consultations. EPA will continue to work with stakeholders to give EPA the ability to meet its ESA obligations at a pace that is realistic given the existing workload and EPA's commitment to follow this workplan. In short, EPA needs all organizations and stakeholders to work toward a common goal, such as the one in EPA's vision of success.

Finally, EPA seeks to work closely with its partners and earn their trust in viewing the Agency as an expert in ensuring that FIFRA decisions are adequately protecting listed species. EPA realizes that it has much work to do before it reaches this goal. The Agency is working hard to develop the expertise and capacity to protect listed species by implementing flexible mitigations that reflect real-world pesticide usage, exposure, and effects.

One Workplan, Multiple Audiences

Given the long and complicated history of pesticide consultations, EPA expects a range of interest in this workplan. EPA has written the workplan for many audiences, recognizing that no single document can convey the ideal amount and level of information to any single audience. Below is information to help the primary audiences understand how they can use this workplan.

- For all audiences, the workplan describes EPA's plans to significantly improve its process to meet its ESA obligations as part of FIFRA decisions.
- For the Services and USDA, the workplan describes opportunities for interagency coordination on ESA-FIFRA improvements, including actions that require the input and leadership of all four agencies.
- For Congress, the workplan describes EPA's progress under the 2018 Farm Bill, Section 10115 (FIFRA Interagency Working Group) and informs general oversight of the Agency's ESA and FIFRA work.
- For pesticide registrants and users, the workplan describes EPA actions to improve predictability about the ESA-FIFRA process and opportunities to work with EPA on those improvements.
- For environmental organizations, the workplan describes EPA actions to adopt protections for listed species, better meet its ESA obligations, and provide opportunities to work with EPA on those improvements.

BACKGROUND AND CHALLENGES TO VISION

BACKGROUND AND CHALLENGES TO VISION

To meaningfully improve the ESA-FIFRA process, EPA first needs to articulate for the public its understanding of the current process and the main challenges to developing a more effective one. Given the unusual complexity of this issue, it is understandable that some aspects of the process and challenges are not well understood outside of EPA, making it difficult to appreciate the barriers the Agency faces to meeting its ESA obligations. The goal of this section is to fill that knowledge gap and help the public and other agencies to engage with EPA more constructively on ESA-FIFRA issues. As a result, this section is lengthy and detailed. Readers who are more interested in understanding EPA's plans to improve the ESA-FIFRA process may want to skim or skip this section. At the same time, this section does not describe every challenge, only those that EPA views as the most significant in the coming years to EPA meeting its ESA obligations.

Overview of Different Types of Pesticides

Throughout this workplan, EPA will reference the three types of pesticides it regulates.

Conventional pesticides are all active ingredients other than biological pesticides and antimicrobial pesticides. Conventional active ingredients are generally produced synthetically (*i.e.*, synthetic chemicals that prevent, mitigate, destroy, or repel a pest or that act as a plant growth regulator, desiccant, defoliant, or nitrogen stabilizer).

Antimicrobial pesticides are intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms or protect inanimate objects, industrial processes or systems, surfaces, water, or other chemical substances from contamination, fouling, or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime.

Biopesticides are certain types of pesticides derived from such natural materials as animals, plants, bacteria, and certain minerals. For example, canola oil and baking soda have pesticidal applications and are considered biopesticides. Biopesticides fall into three major classifications: Biochemical, Microbial, and Plant-Incorporated Protectants (PIPs).

Large and growing workload

Most EPA actions under FIFRA require an ESA determination and possibly formal consultation. These decisions fall into three broad categories: (1) registration of new pesticides, (2) registration review of existing pesticides, and (3) other FIFRA decisions on existing pesticides, including registration of new uses of existing pesticides and FIFRA section 18 emergency use exemptions. To date, EPA has completed ESA determinations and, if necessary, consultations for less than 5% of these actions, leading to a large backlog of actions that continues to grow (Appendix A).

In addition to this backlog, the Agency will also have many future actions that trigger ESA obligations. In particular, the registration of new active ingredients, the ongoing 15-year cycle of registration review for each registered active ingredient, and the approval of new uses and pesticide label amendments of registered pesticides will amount to tens of thousands of FIFRA actions over the next decade alone that require an ESA review.

To better describe the level of effort required of EPA to meet its ESA obligations for each category of FIFRA action, **Table 1** shows the estimated required full-time equivalents (FTEs) for actions in each category. These estimates are based on EPA's current processes, which need optimization to meet the large and growing ESA workload. The process improvements described in this workplan are expected to reduce the FTEs for most or all actions, but the extent of the reductions is unknown at this early stage.

Apart from the growing workload and backlog challenges, the Pesticide Program's staffing levels have declined from a high of 808 (2005) to 603 (2021). Changes in PRIA IV enabled EPA to more fully use FIFRA maintenance fees to support the Pesticide Program's activities since 2018, which helped support more FTEs during this time (**see Figure 1**). Current decreases in the FIFRA maintenance fee account may result in EPA being unable to maintain the same FTE level using funds from this account.

Meeting ESA obligations for registration and registration review decisions alone will require a multifaceted approach, including capacity, resources, improved processes, updated technology, workload analysis, and increased stakeholder collaboration. For example, assessing effects on listed species and their critical habitats involves spatially explicit effects determinations that identify where a pesticide can be used and where species are likely to be found, and an evaluation of species' habitats and biological characteristics. Likewise, to implement early ESA mitigation as part of a FIFRA action, EPA must identify effective and feasible mitigation options, which may depend on acquiring information about species characteristics and habitats, evaluating that information, evaluating how pesticides may enter those habitats, and mitigating those effects. The increased complexity and specificity of ESA determinations, and the increased variety of mitigation options, require additional communication with the regulated community and other stakeholders. Further, even if EPA were to incorporate early species mitigation as part of a FIFRA action, it is likely that consultation with the Services would still be needed in many cases.

Table 1. Level of effort required of EPA to complete both FIFRA and ESA obligations for each category of FIFRA action, based on current EPA processes.

EPA's Required Effort Per FIFRA Action, Including Meeting ESA Obligations	
FIFRA Action	**FTEs for Action**
New Active Ingredients Registration	
Conventional Pesticides	5.5
Antimicrobials	5.5
Biopesticides	1.0
Registration Review	
Conventional Pesticides	8.5
Antimicrobials	8.5
Biopesticides	1.0
New Uses for Existing Pesticides	
Conventional Pesticides	2.5
Antimicrobials	3.0
Biopesticides	0.5
Other Expansions of Existing Use Patterns	
Conventional Pesticides	1.5
Biopesticides	0.5
Geographically Limited Registrations	
Section 18 emergency exemptions (conventional pesticides)	0.5
Experimental Use Permits	1.0
Commitments Prioritized Due to Litigation	
Conventional pesticides	34 (OPP alone)
ESA Pilots and Method/Process Development	
Conventional Pesticides	6.0
Antimicrobials	18

This table estimates the required effort (FTE) for EPA to complete ESA assessments for all FIFRA actions requiring those assessments. The estimated effort is based on EPA's current ESA-FIFRA process and methods, and accounts for preparing risk assessments, identifying appropriate mitigations, implementing risk management decisions, and consulting with the Services when appropriate. Based on the actions in this workplan, EPA expects efficiency gains to its process over time but is currently unable to quantify those gains.

These risk assessment, risk management, and consultation processes substantially increase the time and effort for making pesticide registration decisions. The following are the main types of FIFRA actions for which EPA expects to increase its ESA workload in the coming years, based on the Agency's goal of meeting its ESA obligations.

Historically for some actions in registration review, the Pesticide Program has completed ESA determinations as part of litigation settlements. OPP must continue to meet its court-enforceable deadlines across various settlement agreements under registration review (Appendix A). Conducting these biological evaluations currently requires 3 to 4 FTEs for each evaluation, compared with about half that level of effort for non-ESA registration review ecological risk assessments. The Agency has agreed to court-enforceable deadlines to complete draft or final biological evaluations for 18 registration review pesticides over the next six years. In addition, EPA has agreed to or is in discussions that could result in completing biological evaluations on dozens of additional pesticide registration or registration review actions under court-enforceable deadlines that would extend beyond six years.

In January 2022, EPA announced that it will incorporate ESA determinations and protections into its registration process for new conventional active ingredients. The ESA component is expected to more than double EPA's workload for these actions, including to conduct the ecological assessment and mitigate for effects to species. EPA conducts approximately 10 new conventional active ingredient risk assessments per year and may have 15 or more applications for conventional registrations that are in different stages within the regulatory process. New active ingredients, however, represent a very small fraction of the total number of registration actions. Each year, EPA receives hundreds of applications for new uses for existing conventional pesticides, other amendments, and emergency exemptions.

Similarly, under registration review, EPA comprehensively reevaluates hundreds of conventional pesticide active ingredients on a 15-year cycle. Incorporating ESA assessment and risk management into registration review, as described above for new active ingredients, similarly requires more effort and resources. When EPA reevaluates a pesticide through registration review, it considers all registered uses of the pesticide. Thus, the reevaluation and accompanying ESA determinations are often complicated by the regulatory history of the pesticide and the availability of additional information on the pesticide.

EPA is currently unable to incorporate ESA assessment and risk management across all the types of pesticide registration and registration review decisions, while also complying with statutory deadlines for FIFRA actions. Although some FIFRA actions will not require formal consultation or extensive ESA analyses, most others likely will. This challenge is heightened by EPA's recent commitment to incorporate ESA determinations into its new conventional active ingredient decisions and by its need to address other regulatory and statutory deadlines.

PESTICIDE PROGRAM FTEs AND COMPLETED PRIA ACTIONS: FY2004-FY2021

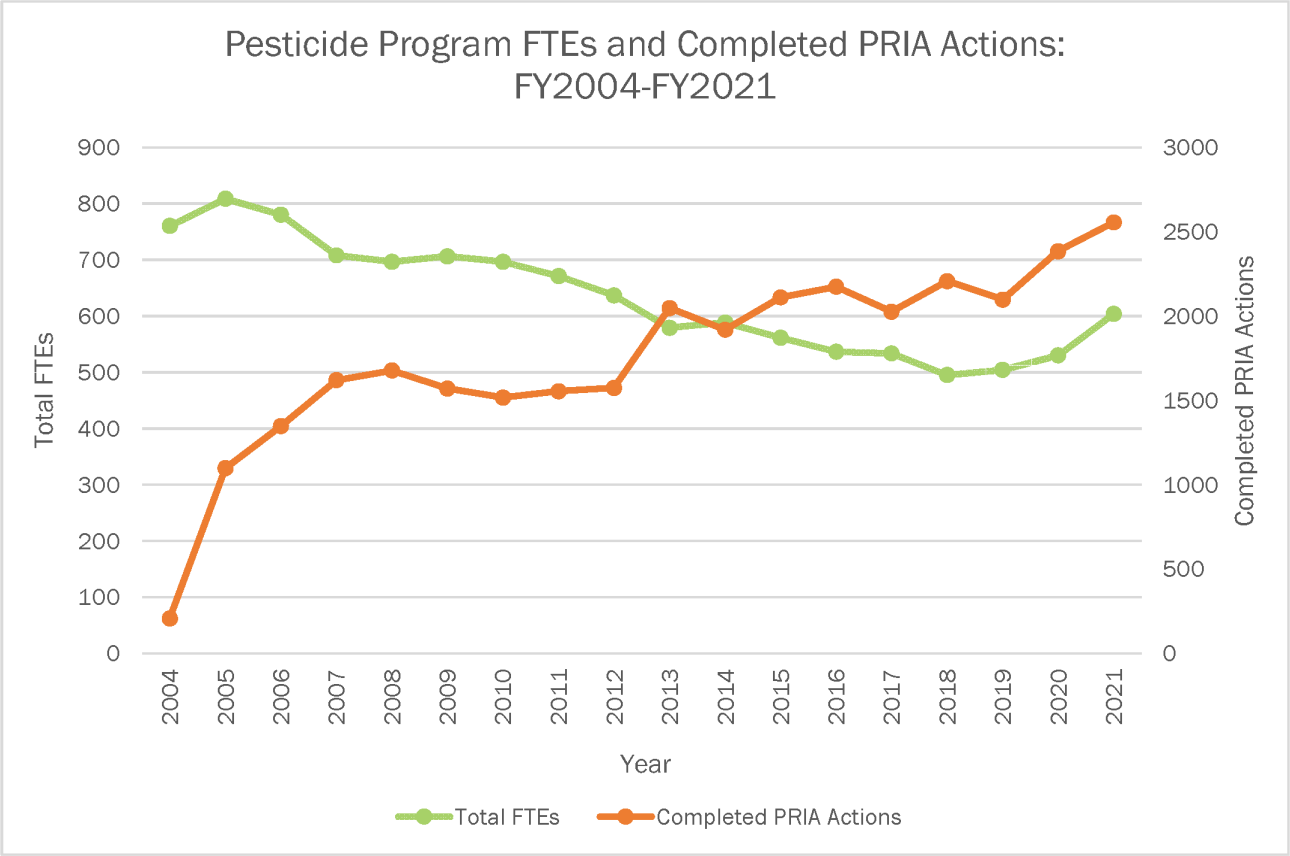


Figure 1. The graph above shows the Pesticide Program's total FTEs and the number of completed PRIA actions from 2004 to 2021. Increasing FTEs since 2018 reflect changes in PRIA IV that has enabled EPA to more fully use FIFRA fees to support OPP activities.

These estimates are based on EPA's current approaches to meeting its ESA obligations, including the 2020 Revised Method for ESA determinations for registration review.[1] Although EPA developed the approaches to increase efficiencies, some aspects of the approaches remain resource intensive and must be made more efficient. Further, ESA assessments require a high level of specialized education, training, expertise, and judgment that comes from years of experience. Thus, EPA cannot simply assign unexperienced staff to cover the resource gap. EPA would need to hire scientists with specialized education and train and mentor them for several years before they could independently conduct ecological risk and ESA pesticide assessments.

EPA's capacity to fully meet its ESA obligations at this time is limited and continues to place listed species at risk and the Agency at considerable risk of ESA lawsuits. Further, because the Agency's ESA workload is already at capacity for conducting ESA determinations for conventional pesticides in registration review for at least the next six years, any future court decision or legal settlement to complete an ESA determination during that time will stretch the Agency's already very thin program capacity and may undermine EPA's ability to meet its other ESA commitments. EPA is striving to increase the number of ESA determinations it can complete annually, partly through process improvements described in this workplan and the FY2023 President's proposed budget that includes an additional $4.9 million and 10 FTE to integrate ESA requirements in conducting risk assessments and making risk management decisions.[2] How these improvements would translate to increased number of ESA determinations is unclear at this early stage.

A final challenge related to workload is that EPA's ability to fully meet its ESA obligations also depends on the ability of the Services to provide timely review of EPA's "not likely to adversely affect" findings and, where necessary, complete formal consultation and issue final biological opinions. Because FWS is the lead agency for most listed species, EPA will work with the agency's national consultation program to ensure our joint priorities are aligned, which is especially important to a workable pesticide consultation process.

Lack of process for identifying and requiring practical and timely mitigation

The most important conservation outcome of pesticide consultations is to mitigate adverse pesticide effects to ESA species and critical habitat. The current consultation process, however, does not always produce mitigation that is both practical for pesticide users to implement and timely to protect species. There are several aspects of this challenge, some related to developing mitigation and others related to implementing mitigation.

1 EPA. Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides (March 2020).
2 EPA. FY 2023 Budget In Brief (March 2022).

First is the geographic scope of ESA mitigation. In a variety of situations, mitigation should be location-specific and tailored to the needs of a specific population, ecosystem, and pest control practice. For example, if a narrow-range endemic beetle may be exposed to pesticides from only two sources, ideal mitigation for the species should address those sources without regulating other pesticide users. This outcome, however, requires local knowledge about the sources and the species. National-level pesticide consultations lack a consistent process of coordinating with local species experts and pesticide users to identify mitigation options tailored to local conditions. This type of coordination would require considerable time and resources. Under EPA's system of developing mitigation, some landowners and pesticide users have regarded those requirements as overly broad or inapplicable to their situation. This is partly because they may not recognize that national-level consultations must rely on more precautionary mitigation measures when geographically refined data are unavailable or prohibitively difficult to obtain. Conversely, other mitigation requirements may sometimes not be refined enough to address all effects to a species. For example, a uniform 100' spray buffer might not address exposure in situations where individuals of a species periodically wander beyond the buffer zone. EPA has no way of knowing the precise location of suitable habitat for all species, so mitigation measures may not always cover all suitable habitat or areas where individuals of a species occur, especially for migratory species. To address this uncertainty, EPA will need to work with the Services and others on monitoring of mitigation measures and updating future mitigation techniques to reflect the results (*i.e.*, adaptive management).

A second aspect of the challenge is timing. Historically, ESA-specific mitigation for pesticide consultations has often been developed as part of formal consultation (often with each of the Services separately, under different timelines), after EPA spends considerable time and resources developing a biological evaluation. Because that mitigation occurs years later in the ESA process and typically after FIFRA registration review label mitigations, the opportunity to streamline assessments and consultations based on early mitigation is lost. EPA does not currently have a specific process for identifying early ESA mitigation across all its FIFRA decisions, especially an established process that allows registrants to propose early mitigation.

Third, the current process for developing biological evaluations focuses on effects to individual organisms, whereas EPA's ultimate obligation is to avoid jeopardy and adverse modification based on species-level effects on survival and recovery and to minimize the effects of incidental take. Following longstanding ESA regulations, EPA has historically focused on individual-level effects in determining whether a pesticide "may affect" and is "likely to adversely affect" individuals of a listed species or critical habitat. This determination, however, generally does not consider mitigation to protect survival and recovery for the entire species, which occurs only during formal consultation to evaluate jeopardy and adverse modification. But when mitigation is identified during formal consultation (*e.g.*, NMFS salmonid biological opinions), considerable work has already gone into developing a biological evaluation, creating a lost opportunity to identify and adopt the mitigation earlier. Recently, however, EPA has begun to address this issue by also assessing the likelihood that the effects may rise to the level of jeopardy for the species or adverse modification for their critical habitat, and implementing mitigation designed to prevent such effects (*e.g.*, January 2022 registration of the herbicide Enlist). The Agency expects to expand this approach to other pesticides, as discussed in the next section.

Fourth, during registration review, the process of implementing mitigations in a final biological opinion is time consuming and cumbersome. One reason is that EPA's current process of reviewing and approving amended labels in the registration review program requires manual updates, which is resource intensive and time consuming for long or complex labels. Although shifting to electronic labeling would address most of the problem, the Agency has not yet adopted this approach.

Fifth, in situations where EPA cannot identify mitigation that adequately avoids and minimizes effects to listed species, the Agency currently lacks a specific approach to incorporate compensatory mitigation, also known as offsets, into nationwide pesticide consultations. FWS defines offsets as measures to "compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments…through the restoration, establishment, enhancement, or preservation of resources…."[1] Habitat restoration and preservation are among the most common types of offsets. Because EPA lacks a process for incorporating offsets into FIFRA actions, the Agency is unable to take advantage of all mitigation options to address pesticide effects on species. The Agency also has less flexibility to offer registrants and growers to mitigate effects, because avoidance and minimization in the form of label restrictions are the only available tools. The flexibility of including offsets as an option is crucial because EPA must also consider impacts to growers when the Agency decides whether and how to regulate pesticides. Even if EPA were to adopt significant label restrictions, unavoidable effects to certain species are likely to remain for many widely used pesticides. For example, it is difficult to conceive that aerial spraying of adult mosquitocides could be performed in a manner that avoids exposure to all populations of listed species in all counties where they occur, partly because the presence and location of many populations of these species are poorly known, especially for highly mobile species (*e.g.*, butterflies) or species without well-defined habitats (*e.g.*, habitat generalists). Although monitoring or other approaches for evaluating the effectiveness of mitigation would resolve some of these uncertainties, unavoidable effects will still occur in many situations. Another example is the sizable number of pesticides that lack reasonable options to fully avoid effects to pollinators in indeterminately blooming crops. Some of those pollinators, however, do have existing conservation programs (*e.g.*, wildflower plantings) that could be augmented through offsets for the species, thus potentially reducing the likelihood of jeopardy/adverse modification.

The absence of offsets as an available mitigation option also limits EPA's ability to direct mitigation in ways that contribute the most to species recovery, especially because many recovery actions qualify only as offsets. That is, those actions cannot be implemented through site-specific avoidance and minimization of pesticide exposure. For example, species that require conservation measures to adapt to climate change may benefit disproportionately from offsets that focus on improving future habitat needed for recovery, even if the species does not yet occupy the habitat. The same may be true for species threatened primarily by invasive species or disease, which could be alleviated through conservation measures that directly address those threats.

4 FWS. Endangered Species Act Compensatory Mitigation Policy (Dec. 2016).

The sixth barrier to effective mitigation is that the current ESA-FIFRA process does not always result in comparable mitigation for pesticides with similar risks to the same ESA species. For example, if a species is affected by five pesticides, one of which comes up for registration review five years earlier than the other four, the ESA mitigation required for that pesticide would take effect before EPA has determined mitigation for the other pesticides. Thus, the first pesticide has more ESA restrictions than the others, until they complete registration review. Even if EPA were able to assess multiple pesticides within a similar timeframe, the most expeditious process to achieve mitigation is generally through negotiations with pesticide registrants, which vary across pesticides. In addition, EPA currently lacks an agreed-upon set of mitigation measures for listed species, which makes standardization of ESA mitigation across pesticides difficult.

FIFRA actions create unique challenges for ESA consultations

Pesticide consultations are truly unusual in terms of their complexity and geographic scope. In particular, pesticides are applied by millions of people in response to specific pest problems that may differ widely across time and place. National-level pesticide consultations—a process that includes developing biological evaluations and opinions—must address all species effects that are reasonably certain to occur, as there are no subsequent regional- or site-specific consultations through which EPA can work with the Services' regional or field offices to address site-specific effects.

Another reason these consultations are challenging is that a pesticide may or may not be used to the full extent allowed by its label (it is extremely unlikely that a pesticide would be applied at the maximum rate to all treatable acres simultaneously). Pesticide labels are intentionally flexible to allow users to apply pesticides at different times and rates best suited to a user's particular pest issue, as it is impossible for EPA to prescribe specific use conditions for every possible application scenario. In addition, growers typically only use pesticides when needed because of the costs of using pesticides (with some exceptions such as pesticide seed treatments) consistent with integrated pest management principles. Thus, EPA's registration action authorizes a variety of application scenarios involving an unknown but often large number of pesticide users. This variation and uncertainty make pesticide consultation fundamentally different from consultations on most other federal projects, which have a well-defined geographic scope (*e.g.*, a bridge either is or is not built in a specific location). Another difference is that the indirect effects of pesticides on listed species (*e.g.*, effects on prey or habitat) are often far more difficult to evaluate than for ESA consultations on infrastructure or construction projects. Because of these differences, the adverse effects of pesticide actions and the estimation of incidental take is considerably more difficult than for the average federal action undergoing consultation.

At various times since the 1980s, EPA and the Services have tried to develop workable ESA consultation approaches for FIFRA decisions, with mixed success. Examples include the 2004 Overview Document, 2013 National Academies of Sciences report on this topic, and the 2015 interagency Interim Approaches for Nationwide Pesticide Consultations to implement some of the report recommendations.

EPA then developed its Revised Method for conducting its biological evaluations for registration review chemicals in 2020, but a complementary document for conducting formal consultation and developing Services biological opinions does not currently exist. In March 2022, EPA finished consulting with FWS on its first national-level pesticide biological opinion, based on a biological evaluation that used the 2015 Interim Approaches and supplemented with elements of the 2020 Revised Method. Although NMFS has completed consultation on over 30 pesticides, three of which were national-level consultations, EPA will continue discussing with NMFS some of those biological opinions with the intention of implementing the opinions under EPA's FIFRA authorities and processes. Thus, the three agencies are still improving the process for formal nationwide pesticide consultation and have not yet developed standalone interagency guidance for the entire process (*i.e.*, aside from recent biological opinions serving as examples of a process).

Another challenge associated with the existing consultation process is that most nationwide consultations involve both Services, with each Service completing its own biological opinion after EPA consults with each agency. Because FWS has approximately 16 times as many domestic listed species as NMFS, it is not surprising that FWS will likely take longer to complete a consultation than will NMFS (although the ranges of NMFS anadromous fish can be considerably larger than those of many FWS terrestrial species that are habitat specialists). This approach creates several inefficiencies.

First, EPA and the registrants must participate in two separate consultations conducted over different time periods using different approaches and assumptions, and must implement two different sets of labels and *Bulletins Live Two!* changes. Second, this approach generally increases EPA's workload as the Agency often has to provide updated information for the consultation with each of the Services, particularly when the consultation spans several years (*e.g.*, update section 7 "action" to reflect agreed upon mitigations).

Incorporating ESA requirements into the current FIFRA process presents unique challenges

Similar to how the pesticide consultation process is not adapted to the complexity and volume of FIFRA decisions, the current FIFRA process poses challenges to pesticide consultation needs.

First, EPA's current chemical-by-chemical approach for addressing ESA creates unequal mitigation requirements among pesticides and may not result in optimal species protection. Further, this approach does not scale well to addressing the over 1,000 pesticide ingredients and over 18,000 registrations that EPA must evaluate every 15 years as part of registration review. Another reason the current approach is problematic is that growers can often choose among multiple pesticides to address their pest issues. Thus, listed species may not benefit from mitigation for a particular pesticide if a grower switches to another comparable pesticide for which EPA has not yet required ESA mitigation.

Second, as part of final registration review decisions, EPA needs to consider the outcomes of any biological opinion and implement any mitigation the Agency determines is needed. This process will likely include working with the registrants to incorporate the measures onto product labels. If the registrants are not amenable to making these changes, EPA may need to initiate cancellation of uses or products, which is protracted and resource intensive, involving public comment and interagency review. Even when a registrant voluntarily agrees to incorporate ESA mitigation on the label, the current FIFRA process includes spending additional resources to review labels, particularly if the ESA consultation is not completed until several years after the registration review interim decision and if the labels require additional revisions because of the consultation and any public comments. All these processes apply regardless of the number of measures needed to meet ESA obligations.

Finally, the registration review schedule is based on the date of the initial registration of a pesticide or, if a pesticide has completed registration review, the date of the most recent final registration review decision. EPA's schedule for conducting ESA analyses, however, has been largely driven by litigation and court-ordered deadlines. These two schedules are often different, creating misalignments between when EPA evaluates a pesticide in registration review and when the Agency performs the ESA analyses on the pesticide. This misalignment is inefficient for EPA, because the Agency is not conducting all of its analyses for a pesticide at the same time.

Challenges related to data and risk assessment tools

In recent years, EPA and the Services (all of whom have focused their efforts mostly on conventional pesticides) have seen a welcome shift to using more refined data, models, and other risk assessment tools for ESA determinations. This includes better information on species ranges, pesticide use and usage (*e.g.*, typical application rates and number of applications, geographic area treated), and toxicological effects of pesticides on species. The shift in data and tools to increase efficiency, however, has also resulted in biological evaluations that are considerably more detailed, complex, and longer. This trend toward more and better information has generally improved the foundation of both FIFRA and ESA findings but can result in a very lengthy ESA-FIFRA process. Below, EPA discusses several aspects of this tradeoff and other challenges related to data for pesticide consultations.

First, better species data would benefit several aspects of pesticide consultations. For example, spatially refined, subcounty range maps are not available from the Services for all species. Without this refinement, EPA must assume a species occurs in an entire county or multiple counties, even when it likely does not. As a result, mitigation measures will apply even in areas where the species may not occur, creating unnecessary restrictions on pesticide users. In addition, more refined data could also increase the number of EPA's "no effect" or "not likely to adversely affect" determinations, increase stakeholder confidence in EPA's effect determinations, and avoid formal consultation on species or habitat that are unlikely to experience pesticide exposure.

Beyond range species data, pesticide consultations would also benefit from better information on individual species biological responses to pesticides and effective mitigation techniques, especially for species facing the greatest risks from pesticides (those species are still being identified). For instance, information on the effectiveness of offset measures would inform how much EPA must rely on avoidance and minimization.

Despite the value of better data, incorporating the data into biological evaluations can be very resource intensive for EPA and thus extend consultations by several months or longer. For example, incorporating county-specific information for a wide ranging species (*e.g.*, found in many states, such as the Indiana bat) can be much more difficult than for a species with a small range (*e.g.*, may only be found in several counties, such as the Barton Springs salamander). Another example comes from EPA's ESA methods, which have led to increasingly refined analyses to guide its "may affect" and "likely to adversely affect" findings for currently registered pesticides in registration review where usage data are available.[1] Although this trend has generally increased the scientific rigor of the findings, EPA's experience applying the Revised Method is that the process is very resource-intensive when addressing the over 1,600 U.S. listed species and over 800 critical habitat designations. This level of work—which requires adequate staff, subject-matter expertise, and computer resources and which typically spans two years—far exceeds what EPA can handle across the hundreds of pesticides for which it must issue ESA determinations in the coming years. Moving forward, EPA must better distinguish between refined data and methods that generate a good return on investment for the Agency, and those that do not. Stakeholders can help with this tradeoff by focusing their interactions with EPA on the types of data and analyses that are likely to improve ESA effects determination or mitigation. To support this approach, EPA will need to clarify the types of data useful for refinements and the timing to submit the data, as sometimes data submitted in response to a draft biological evaluation are not used in a meaningful way.

EPA is mindful of the limits to which more or better toxicological effects data will increase the number of "no effect" findings or add value to the consultation process. By their nature, pesticides are designed to affect organisms. At the same time, the "may affect" threshold is inherently sensitive, currently defined as covering situations "when a proposed action may pose any effects on listed species or designated critical habitat."[2] Particularly for wide ranging species or species that frequently occur in or near lands or items treated with pesticides, "no effect" findings may be very difficult, if not impossible, to reach without significant mitigation. Thus, better data need to be augmented with more efficient regulatory approaches to handling "may affect" and "likely to adversely affect" situations, especially those accompanied by mitigation that reduces the effects. EPA will thus need to develop approaches that are consistent with the principles of the Revised Method for conventional registration review pesticides but far more efficient to apply.

5 EPA. Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides (March 2020).
6 *See* the definition for "may affect" in U.S. Fish and Wildlife Service and National Marine Fisheries Service Endangered Species Consultation Handbook at page xvi.

Second, another drawback of EPA's historical approach for conducting ESA analyses (focusing on effects determinations) is that it does not direct identify or implement ESA mitigation. As such, EPA has not yet developed a process for registrants to offer mitigation for listed species or critical habitats as part of the FIFRA process. As explained earlier, the Revised Method focuses on assessing exposure and effects at the level of individual organisms, rather than on developing mitigation at the level of the entire species. The former is necessary under the regulations for section 7 consultations, but the latter is more relevant to the ESA's goal of species recovery and the prohibitions on jeopardy and adverse modification. Because pesticide consultations are unique and would benefit from early mitigation, EPA seeks to expand the scope of its ESA assessment to assess and focus on species-level impacts and associated mitigation needs while minimizing resources needed to make effects determinations at the level of the individual.

Third, EPA's current processes and infrastructure limit the Agency's ability to expeditiously or consistently incorporate all updated species or pesticide data it receives from the Services or stakeholders into its biological evaluations and ESA determinations. For example, the current process of developing a biological evaluation for a registration review pesticide takes over two years. Refined data that become available 18 months into the process cannot be incorporated into a draft or final evaluation, without delaying release of the document and without further increasing the resources needed to produce a biological evaluation. In almost all situations, EPA has no ability to delay because it is under a legal deadline to produce a draft or final evaluation. Thus, the Agency has cutoff dates by which it can no longer incorporate additional data into its ESA analyses. Similarly, biological opinions can take several years to produce, and the current timeline in which the Services can complete consultations exacerbates this challenge to updating data. Incorporating additional data during consultation would similarly require EPA resources that have transitioned to working on the next court-ordered biological evaluation, to return to the prior assessment and update information that would not have been needed had the consultation been completed more quickly. EPA's current information management systems for species maps and other key data, combined with the current consultation process, impede the Agency's ability to incorporate all updated data into its ESA determinations.

Fourth, data on pesticide usage for currently registered pesticides are important for accurate risk assessments and meaningful mitigation but must be used in the proper context. Given the strong public interest in usage data, EPA first needs to explain why it uses usage data in ESA assessments. EPA registers pesticide products that include labels with use patterns that are intentionally flexible to allow users to apply pesticides at different intervals and rates depending on a particular pest issue. Although an individual may apply a pesticide at the maximum labeled use, it is highly unlikely that a pesticide would be applied at this maximum rate in all areas by all users simultaneously (or even within a single year).[1] Thus, EPA uses pesticide usage data to better understand where and how the pesticide has been used historically, and to inform where and how it is likely to be used in the future. This prediction allows EPA to refine its assessments to focus resources and mitigation in areas where uses are most likely to occur and thus affect ESA species.

7 Some pesticides require exact application rates, but most do not.

When usage data are unavailable or inadequate—which is especially a challenge for new pesticides with no usage data, and for biopesticides and antimicrobial pesticides for which these data are rarely if ever available—EPA typically makes conservative assumptions (*e.g.*, that 100% of treatable use sites will actually be treated at the maximum label rate). These assumptions overestimate exposure and the potential for incidental take and could result in EPA imposing unnecessary mitigation. Unnecessary mitigation can also complicate pesticide labels, thus stretching limited EPA resources. Certain mitigations can also reduce access to pest management tools or exacerbate pest resistance problems. Thus, high-quality usage data are key to prioritizing limited EPA resources and supporting better risk assessment and management decisions for currently registered pesticides. For new pesticides, other information is necessary to characterize how the pesticide will likely be used.

Despite the importance of usage data for assessing currently registered pesticides, EPA acknowledges several important limits to the use of these data when they are highly spatially refined (*e.g.*, county level). Although high resolution data provide more precise information about how a pesticide was used in a particular location in the past, those data may incorrectly predict future pesticide usage in that area because the actions of a single user can strongly bias historical usage estimates. By contrast, geographically coarser usage data in areas experiencing similar pest pressure (*e.g.*, state level) can offer better insights into the potential for future usage by averaging usage across multiple users, thus accounting for variability in use (*e.g.*, crop rotations) and usage. For conventional pesticides, EPA uses state-level usage averages in its ESA assessments because this approach is unlikely to underestimate future exposure to ESA species.

Further, current usage data for registered pesticides vary considerably in quality. For example, California's Department of Pesticide Regulation usage data are unmatched in their spatial and temporal resolution. Usage in California, however, cannot readily extrapolate to other states. Currently, the only annually collected nationwide data on agricultural pesticide usage come from a pesticide usage survey conducted by Kynetec USA, Inc., that covers approximately 70 of the largest agricultural use sites. The data are provided only through a license and cannot be redistributed to or explored by unlicensed groups in their raw format. As a result, EPA's ability to provide full transparency of usage data is contractually limited. EPA does, however, provide in its biological evaluations the summarized usage data averaged by crop over five years. Besides the Kynetec dataset, EPA also uses other nationwide datasets including USDA National Agricultural Statistics Service (NASS) Chemical Use Program. Although the NASS dataset is publicly available, it does not survey most agricultural use sites annually. EPA uses this dataset to inform and validate usage data from Kynetec, but the publicly available NASS data cannot currently replace the usage data from Kynetec for most crops. EPA generally has high confidence in the usage data from these various sources. Certain use sites, however, are rarely or never surveyed (*e.g.*, small acreage crops and non-agricultural use sites), and usage data sources for biopesticide and antimicrobial active ingredients are generally unavailable.

State-level usage estimates strike a balance between national-level usage, which can mask regional or local differences in usage, and substate usage, which can vary in quality because of the potential low number of individuals used to derive the estimate. State-level estimates can be readily applied in a manner that adequately protects ESA species (*e.g.*, allocate all projected acres treated in the state onto the species range).

In certain cases, EPA could benefit from more spatially refined usage data than those generally available today. One solution may be for pesticide applicators, working with USDA and other organizations, to provide those substate data. If available, the data could also allow EPA to incorporate species mitigation at the substate level, which could avoid unnecessary restrictions in areas where a species and its critical habitat does not occur.

There are additional challenges for conducting ESA assessments for antimicrobial pesticides. For antimicrobial use patterns that could result in outdoor exposures, the highest environmental exposures are expected to occur in aquatic habitats. Out of the many potential use sites that could result in aquatic exposures, EPA currently only has screening level exposure models for a very limited set of uses that are believed to result in the highest potential exposures (*i.e.*, anti-fouling paints, cooling towers, paper mills and other industrial settings, down-the-drain uses, wood treatments for docks, and material preservation for outdoor paints). All the available exposure models are conservative, FIFRA screening-level models intended to inform whether there is the expected potential for risks from a registered antimicrobial use. None of the available screening-level models allows EPA to quantify potential effects to listed species.

Additionally, because of the focus on aquatic exposures, there are generally no existing methods that allow EPA to conduct an exposure assessment for any terrestrial species. Further, ecotoxicity data for terrestrial species are often more limited for antimicrobial pesticides than for conventional pesticides because of differences in data requirements, and EPA receives frequent FIFRA requests to waive these data. This situation may limit EPA's ability to fully address direct and indirect effects without calling in additional data for antimicrobial pesticides. Additionally, data that identify the locations of potential use sites are not currently available for any antimicrobial use patterns. Usage data are generally lacking for antimicrobial uses and are limited to production volumes per year at the national level, if available at all. The lack of available spatial data for antimicrobial use patterns limits the ability to conduct an overlap analysis to identify the species and critical habitats that may need to be assessed. For these reasons, the risk assessment methods and processes developed for conventional pesticides do not apply to assessing antimicrobial uses. Further, the ability to complete ESA determinations for antimicrobial pesticides would require significant model development, data collection, and coordination across stakeholders and the Services.

Need to continue improving the working relationship among agencies

A major aspect of an effective consultation process is trust and mutual respect between EPA and the Services. As many close observers of the ESA-FIFRA process know, there is room for improvement in this area. Particularly as EPA embarks on major improvements to the ESA-FIFRA process, the Agency will need strong working relationships with headquarters and regional or field staff in the Services. For example, identifying and overseeing species mitigation will sometimes require EPA to work with regional staff that are the lead in conserving a species and that have relationships with landowners. Only through mutual trust can the interagency relationships lead to more efficient consultations and conservation. One reason that EPA has written this workplan is to show its federal agency partners and stakeholders how the Agency intends to work in good faith toward the goals of ESA consultation.

STRATEGIES AND ACTIONS TO ADVANCE VISION

STRATEGIES AND ACTIONS TO ADVANCE VISION

To achieve EPA's vision, the workplan establishes four overlapping strategies and multiple actions to implement each strategy. The first strategy is for EPA to meet its ESA obligations for all FIFRA actions that require ESA determinations and consultations. These actions include those with pending court-enforceable deadlines to complete ESA assessments, and the considerably larger number of actions without court-enforceable deadlines. The second strategy is for EPA to improve its approaches to identifying and requiring ESA mitigation earlier in the FIFRA process. These improvements will include prioritizing mitigation for species most vulnerable to pesticides, offering pesticide users greater flexibility in adopting mitigation, and developing internal policy and program changes to support EPA's mitigation goals. The third strategy is to improve the efficiency and timeliness of the consultation process. Unlike the first two strategies, this strategy relies heavily on collaboration with the Services and USDA.

Similarly, the fourth strategy of improving EPA's stakeholder engagement is external facing. The Agency is especially interested in working with stakeholders on data and analyses to support more timely and efficient ESA determinations and consultations.

For each action, EPA has also identified the timeframe for implementation relative to the date of this workplan. In general, actions that are expected to be developed farther in the future are described with less specificity than those in the near term. Many of those details will depend on how EPA implements the latter and on other factors such as its future litigation, workload, backlogs, and resources.

Throughout this section, EPA has been deliberate in conveying whether it is committing to pursue an action. For actions that the Agency will definitively pursue, the workplan uses "will" or other affirmative language. For actions that the Agency cannot yet commit to or is still evaluating, the workplan uses "may," "could," "will consider," or other equivocating words. The workplan thus contains a mix of definitive and aspirational actions.

Divisions of EPA's Pesticide Office

EPA has identified the divisions within its Office of Pesticide Program that will lead each of the actions described in this section. The main responsibilities of each division are as follows.

Antimicrobials Division (AD). AD is responsible for all registration and registration review activities for antimicrobial pesticides including the review of scientific data, development of human health and ecological risk assessments, and regulatory decision making for new registrations, registration review, and reregistration.

Biological and Economic Analysis Division (BEAD). BEAD evaluates use information for identifying the action area, usage information for refining the extent of exposure, and the potential impacts of mitigation on pesticide users in support of biological evaluations and biological opinions through analyses provided to OPP and the Services, respectively.

Biopesticides and Pollution Prevention Division (BPPD). BPPD is responsible for all registration and registration review activities for biopesticides (microbials, biochemicals, and emerging technologies) including the review of scientific data, development of human health and ecological risk assessments, and regulatory decision making for new registrations and registration review.

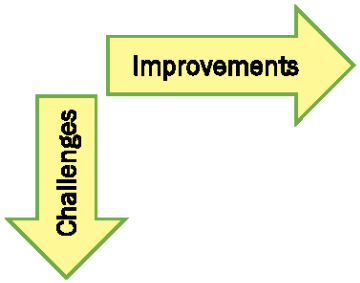
Environmental Fate and Effects Division (EFED). EFED is responsible for conducting ecological, drinking water, and endangered species assessments to evaluate potential risks posed by conventional pesticides for registration and registration review and effects to listed species. EFED also houses *Bulletins Live! Two*.

Health Effects Division (HED). HED is responsible for conducting human health risk assessments to evaluate potential risks posed by conventional pesticides for registration and registration review.

Pesticide Re-Evaluation Division (PRD). PRD is responsible for the re-evaluation of currently registered conventional pesticides and for the development of risk mitigation measures to ensure that they continue to meet the FIFRA registration standard.

Registration Division (RD). RD is responsible for developing regulatory decisions for conventional pesticides. This involves risk management and regulatory determinations for all conventional new chemicals, new uses, new products, and product amendments. RD is the office lead for emergency exemption requests submitted under section 18 of FIFRA. RD completes product specific science review for acute toxicity, chemistry, and efficacy for public health products. RD also develops risk assessments and regulatory decisions for inert ingredients contained in pesticides.

Overview of improvements to address challenges to ESA-FIFRA process



	Meet ESA obligations for FIFRA actions					Improve ESA mitigation approaches							Improve stakeholder engagement		
Challenges / **Improvements**	Court-ordered deadlines	New pesticide reg. (conventionals)	Reg. review (conventionals)	All other FIFRA actions (conventionals)	Non-conventional reg.	Mitigate for vulnerable species	Mitigate for high risk species	Flexible mitigation	Coordinate mitigation	Use offsets	Other policy improvements	**Improve consultation process**	Obtain better data	Engage growers	Engage others
Large and growing workload											✓✓	✓✓	✓		✓
Process for mitigation															
Broad geographic scope						✓✓	✓			✓	✓	✓	✓✓		
Mitigation too late						✓✓	✓✓			✓	✓				
Not species level						✓	✓✓			✓✓			✓		
Reg. review timing					✓			✓	✓		✓				
Lack of offsets										✓✓			✓	✓	
Mitigation not comparable									✓✓		✓			✓	
FIFRA challenges for ESA															
FIFRA actions complex							✓	✓			✓	✓	✓		
Inefficient consultation process												✓✓			
Incorporating ESA into FIFRA															
FIFRA actions rarely addressed ESA	✓✓	✓✓	✓✓	✓✓	✓✓	✓	✓	✓	✓	✓	✓				
Inefficient chemical-by-chemical approach						✓	✓	✓		✓	✓✓	✓			
Limited ability to require mitigation through reg. review	✓		✓		✓			✓		✓	✓✓		✓	✓	✓
Reg. review and ESA analyses on different schedules			✓		✓	✓	✓	✓		✓	✓				
Data and risk assessment tools															
Tradeoff between better data and faster consultation											✓	✓	✓		
Past ESA methods silent on species-level mitigation						✓	✓✓	✓		✓✓	✓	✓		✓	✓
Difficult to update ESA analyses with new data											✓	✓	✓		
Usage data challenges											✓	✓	✓	✓	✓
Antimicrobials challenges					✓						✓				✓
Improve interagency relationships					✓	✓	✓	✓				✓✓			

Figure 2: Table summarizing how each category of ESA-FIFRA improvement discussed in this workplan addresses each challenge identified in the document. Descriptions are abridged; see table of contents for full descriptions. One checkmark represents a low to moderate connection between the improvement and challenge, and two checkmarks represent a high connection between the two.

✓✓	Indicates strong connection
✓	Indicates low to moderate connection

STRATEGY 1: MEET ESA OBLIGATIONS FOR FIFRA ACTIONS

The overarching purpose of this workplan is for EPA to meet its ESA obligations for all FIFRA actions that require ESA review. Given the hundreds of FIFRA actions annually that trigger these obligations, the Agency cannot simultaneously and immediately meet these obligations for all these actions. Rather, EPA will increase the number of its ESA determinations and consultations as efficiencies and resources allow. As part of this phased approach and as outlined in this workplan, the Agency has identified at this time which types of actions are the highest priorities for addressing ESA obligations and which are lower priorities.

The top priority is for EPA to meet its existing and future court-enforceable deadlines, most of which cover existing pesticides in registration review, newly registered active ingredients, and new uses of existing pesticides. The next priority covers registrations of new conventional active ingredients, which EPA has committed to assessing through its January 2022 announcement on these actions. This means that EPA will not register a new conventional pesticide without ensuring that EPA meets its ESA obligations before granting the registration. EPA has prioritized these actions for several reasons, including to help ensure the legal defensibility of new chemistries, which are often safer than existing chemistries, and because EPA can negotiate mitigation more expeditiously for new registrations than during registration review.

The next tier of priority is for the remaining conventional pesticides in registration review. Given the hundreds of registration review cases that still require an ESA determination, EPA currently needs many years to complete these determinations and, if needed, consult with the Services on each pesticide. The time and resources to complete this work on the part of all three agencies is the main reason EPA has not assigned a higher priority to these actions. With that said, certain actions for pesticides in registration review that are not already subject to litigation-related deadlines are especially urgent and are among EPA's highest priorities for its ESA-FIFRA program within its portfolio of registration review chemicals. In particular, implementing existing NMFS biological opinions with jeopardy findings is crucial to minimizing extinction risks. In addition, EPA is developing early mitigation for a subset of species predicted to be at risk of jeopardy/adverse modification for several registration review pilot chemicals, as outlined in this workplan, and then plans to expand these measures to certain other high priority registration review chemicals. EPA's vulnerable species initiative and the federal interagency mitigation pilot project, both discussed in the mitigation strategy section below, will also inform the Agency's early ESA mitigation efforts.

The final tier of priorities consists of all other FIFRA actions for conventional pesticides (*e.g.*, new uses) and FIFRA actions for non-conventional pesticides. In general, EPA's work to address its ESA obligations for this final tier of actions is the least developed. For example, EPA does not have ESA methods specific to antimicrobials, and ESA methods for biopesticides are not as developed as those for conventional pesticides. Nonetheless, EPA will develop efficient approaches for these actions and will continue to determine, on a case-by-case basis, how best to address its ESA obligations for the actions. For example, certain mitigation actions in this workplan may allow EPA to make ESA determinations and, where necessary, consult on some new uses. In those cases, EPA may be able to prioritize the determinations/consultations by conducting them concurrent with consultations for new active ingredient registrations or for chemicals in registration review. Similarly, through this workplan, EPA expects to adopt systemwide process efficiencies that will allow the Agency to complete more ESA assessments and consultations over time. In that scenario, EPA expects to meet its ESA obligations for this final tier of FIFRA actions sooner.

To help readers better understand the number of FIFRA actions associated with each of the three tiers, **Table 2** shows the approximate number of actions that EPA completes annually that may require an ESA analysis and, where the information is available, the approximate number of ESA "no effect" findings for each category of action. As readers can see, the number of actions for new uses, expansion of existing uses, and geographically limited registrations far exceed the number of actions for new active ingredient registrations and registration review. As discussed above, this is one reason that EPA has prioritized the latter for ESA review.

Table 2. Estimated number of FIFRA actions completed annually that may require ESA review. As explained throughout this workplan, EPA does not currently complete an ESA review for most of these actions.

FIFRA Action	No. of Actions	Comments
New Active Ingredients (AIs) Registration		
Conventional Pesticides	10	EPA may have 15 in-house submissions at any time.
Antimicrobials	5	EPA may have 5 antimicrobial in-house submissions at any time in different stages of registration. EPA estimates that 1/5th of these will have "no effect" on ESA species.
Biopesticides	30	EPA may have 40-50 new AIs in-house at any given time in different stages of registration. While many biopesticides result in "no effect" (approx. 2/3), some will require additional ESA work.
Registration Review		
Conventional Pesticides	40	There is a wide range of the number of registration review risk assessments depending on where EPA stands in its registration review cycle. EPA averaged approximately 40 conventional pesticide DRAs per year over the past 10 years and typically ranges from approximately 20 to 60 annually.
Antimicrobials	15	There is a wide range in the number of registration review risk assessments depending on where EPA stands in its registration review cycle. AD averaged approximately 15 antimicrobial pesticide DRAs per year over the past several years. AD expects that approximately 30 percent of DRAs will be "no effect."
Biopesticides	30 cases	There is a wide range of the number of registration review risk assessments depending on where EPA stands in its registration review cycle. BPPD works on about 30 biopesticide "cases" (some cases have multiple AIs) per year over the past 10 years, on average. While many biopesticides result in "no effect" (approx. 2/3), these calls will need to be reconfirmed, and other cases will require additional work.
New Uses for Existing Pesticides		
Conventional Pesticides	80	Approximately 60 to 100 new use applications are received each year that could require ESA analysis. Many additional new use applications are submitted that may not require new ecological risk assessments to make a FIFRA determination. The amount of risk assessment effort for new use registrations has historically been lower compared to the effort required for new chemical registrations. For example, ecological risk assessments may simply refer to existing assessments if sufficient to inform the FIFRA determination.

Table 2 (cont.). Estimated number of FIFRA actions completed annually that may require ESA review. As explained throughout this workplan, EPA does not currently complete an ESA review for most of these actions.

New Uses for Existing Pesticides		
Biopesticides	20	Approximately 20 new use applications are received each year for BPPD with about 1/3rd of them having the potential to require ESA analysis. Some measure of efficiency would be expected in future years as more BPPD chemicals undergo ESA analyses.
Other Expansions of Existing Use Patterns		
Conventional Pesticides	140	Other actions that may increase ecological exposure and, therefore, require science support may include requests to change existing product application methods for a registered use site (*e.g.,* increase application rate, number of applications, etc.) or applications for products in a new physical form. The number of applications received each year varies and may range from approximately 120 to 160.
Biopesticides	50	Other actions that may increase ecological exposure and, therefore, require science support may include requests to change existing product application methods for a registered use site (*e.g.,* increase application rate, number of applications, etc.) or applications for products in a new physical form. The number of applications received each year varies but only about 1/3rd would be expected to require ESA work.
Geographically Limited Registrations		
Section 18 emergency exemptions (conventional pesticides)	100	Science support is historically more limited for these types of actions and focuses on a review of information submitted by the state applicant. The number of applications received each year varies and may range from approximately 80 to 120. ESA analysis for antimicrobial and biopesticides is expected to be minimal.
Experimental Use Permits (EUPs)	5	EUPs for emerging technologies are basically treated as new AI assessments for BPPD. In recent years, many of these EUPs already receive some type of an ESA analysis. Some of these may result in "no effect," but others will require additional work. ESA analysis for antimicrobial and conventional pesticides is expected to be minimal.
Commitments Prioritized Due to Litigation		
Conventional pesticides	5	This represents resource commitments from various litigations. Litigation discussions are ongoing for dozens of pesticides related to ESA.

Having described the relative priorities of these different types of FIFRA actions, the section below summarizes the steps that EPA will or plans to pursue for each type of action.

Meet court-enforceable ESA deadlines

EPA's highest priority for the pesticide program is to meet its court-enforceable ESA deadlines and other commitments to courts. The deadlines cover dates for issuing draft biological evaluations, final biological evaluations, and implementing biological opinions for a variety of pesticide active ingredients and pesticide decisions (see Appendix A). Although EPA's current ESA workload is largely driven by these settlement deadlines, with this workplan the Agency expects to reduce the number of deadlines established through litigation and be able to set its own priorities using far more efficient approaches to meeting its ESA obligations. Fewer litigation-driven deadlines allow EPA more opportunities to complete the other actions in this workplan and to accommodate ESA assessments for all FIFRA actions that trigger ESA requirements. This is why in the long term, EPA seeks to set deadlines for its ESA obligations based on priorities the Agency establishes on its own.

> Lead division(s): EFED, PRD, RD
> Timing: In progress. As Appendix A shows, EPA has 18 chemicals with court-enforceable deadlines or other court commitments through 2028, with additional chemicals in current litigation where litigants are likely to request EPA add more chemicals to this schedule.

Meet ESA obligations for new registrations for conventional pesticide ingredients

As announced in January 2022, EPA will meet its ESA obligations for all new registrations for conventional pesticide active ingredients.[1] To further this objective, EPA will not issue new registrations for these ingredients without first making ESA assessments (effects determinations and predicting the likelihood of jeopardy and adverse modification), implementing needed mitigation, and initiating consultation with the Service(s) if necessary (consultation is unnecessary if EPA makes "no effect" findings for all covered species and critical habitats). In phasing in the policy, consistent with its ESA obligations, EPA may need to issue a final registration for a pesticide even if the Agency has initiated but not completed consultation for the pesticide. The policy allows the Agency to meet its ESA obligations and to provide regulatory certainty to pesticide registrants and users, and to strive to meet the applicable PRIA deadlines for new pesticide ingredient registrations.

Where EPA initiates consultation and then registers a new pesticide before completing formal consultation, the Agency will include a determination that issuing the registration will not violate the ESA's section 7(d) prohibition on making "any irreversible or irretrievable commitment of resources" that prevent the Agency from formulating or implementing any reasonable and prudent alternatives identified through formal consultation. If EPA deems that a new pesticide submission is unable to adequately mitigate for effects that are likely to trigger a jeopardy or adverse modification finding during formal consultation, the Agency will notify the applicant that its registration cannot be granted until consultation can be completed. At that point the applicant could wait for consultation to be completed, withdraw their application, or request a denial of the registration.

8 EPA. EPA Announces Endangered Species Act Protection Policy for New Pesticides (Jan. 2022).

The ability to complete consultation before a final registration decision will depend on various factors, some of which are outside of EPA's control. These include EPA's and the Services' capacity to complete pesticide consultations, devising a more efficient consultation process, registrant willingness to change labels prior to EPA approval, and existing court-enforceable deadlines for completing biological evaluations. Where EPA has initiated consultation and issues a final registration before completing that consultation, it will have, at a minimum, completed its ESA analysis and made its effects determinations, required early mitigation for ESA species as part of the registration, and required terms of the registration that allow EPA to amend the registration to reflect the outcome of consultation. In particular, for geographically specific mitigation requirements, EPA may implement them through pesticide labels that refer users to EPA's *Bulletins Live! Two* or through updating existing bulletins. Where applicable, EPA will update bulletins shortly after registration to ensure prompt protections for species and to ensure that pesticide users regard bulletins as a reliable source of information.

In the future, EPA expects that any necessary consultation would be completed before registering a new conventional pesticide. Exactly when this will begin depends on the factors identified above.

To implement the January 2022 policy, EPA will:

- **Consult on new conventional registration submissions.** As of January 2022, EPA began implementing this requirement and will continue doing so for new pesticide active ingredient submissions. EPA is currently phasing in this action, starting with new conventional registration submissions that it had already received as of January 2022.

  Lead division(s): RD, EFED, and BEAD

  Timing: Started January 2022

- **Adopt mitigation for species.** EPA plans to predict whether the new AI registration could jeopardize listed species or adversely modify its critical habitat. If jeopardy or adverse modification is predicted to occur, EPA will adopt mitigation intended to avoid both. EPA may also adopt additional mitigation to reduce exposure to listed species even when effects are not predicted to result in jeopardy/adverse modification.
- **Adopt flexible mitigation.** EPA will identify and offer pesticide users more flexible approaches to mitigating for effects to listed species (see mitigation strategy below for more information).
- **Coordinate mitigation between new registrations and registration review.** EPA will begin coordinating mitigation between new registrations of pesticide ingredients and related registration review conventional pesticides, to help ensure consistent mitigation among pesticides that cover similar uses (see mitigation strategy below for more information).

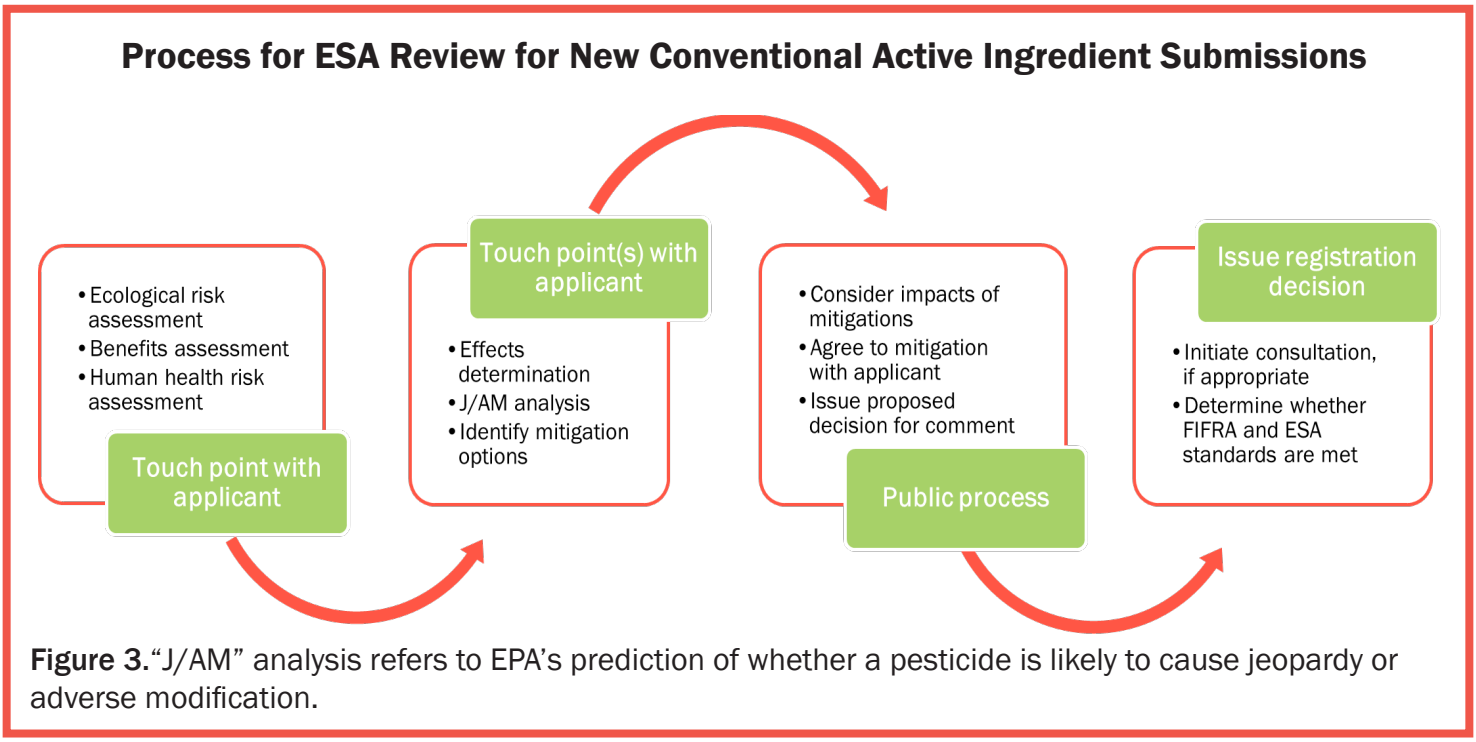


Figure 3."J/AM" analysis refers to EPA's prediction of whether a pesticide is likely to cause jeopardy or adverse modification.

Meet ESA obligations for new registrations for conventional pesticide ingredients already registered or undergoing registration review

Meeting ESA obligations for registration review will continue to represent the bulk of the Agency's ESA workload, as there are far more pesticide cases in registration review than new pesticide ingredient submissions. EPA's current and future ESA workload for registration review consists of (1) pesticides for which the Agency has committed to court-enforceable deadlines, as described earlier, and (2) pesticides not covered by any court-enforceable deadlines, which are the focus of this section.

Under court settlements, EPA has already been consulting on several conventional pesticide registration review pesticides, creating a foundation for the Agency to increase the number and speed of consultations it can complete as part of future registration review decisions for pesticides not covered by a court-enforceable deadline. Although EPA and the Services are improving the consultation process, far more efficiencies are still needed as the current situation creates an unsustainable workload for EPA and the Services and does not result in timely mitigation. The lack of greater efficiencies has resulted in EPA completing biological evaluations for only a small fraction of the pesticides in registration review. Moving forward, EPA, working with the Services, will strive to fulfill its ESA obligations far more efficiently, with priority on early mitigation for vulnerable species (*i.e.*, species at greatest risk of pesticide exposure, as defined later in the mitigation strategy).

The Agency will do so through a multistep process that includes working with the Services to develop general guidance on using offsets for pesticide consultations including ecosystem-scale and advance mitigation opportunities, working with registrants to identify and adopt offsets for specific pesticides and species, ensuring that adopted offsets are legally binding as a condition of a FIFRA registration, and working with the Services to oversee implementation of offsets.

To implement EPA's obligations for registered pesticides, the Agency will:

- **Implement the terms of existing pesticide biological opinions.** Besides the biological opinions for which EPA has court-enforceable deadlines to implement, EPA has other NMFS biological opinions that it is implementing with NMFS. See Appendix A.

  Lead division(s): PRD, EFED

  Timing: In process

- **For select conventional pesticides, mitigate for certain species.** Given EPA's large ESA workload for registration review, the Agency needs to identify a set of pesticides and species as a starting point to focus its early ESA mitigation measures, before the start of formal consultation. To further this objective, EPA has identified the following pesticides with court-enforceable deadlines (some of which have been fulfilled) as pilots to incorporate early mitigation under registration review: methomyl, carbaryl, certain neonicotinoids, and rodenticides. Each of these pesticides or pesticide classes are at different stages in the FIFRA process (*e.g.*, risk assessments conducted, proposed interim decision, interim decision) and in the ESA process (*e.g.*, biological evaluation not yet conducted, biological evaluation in process, formal consultation initiated). This variety will allow EPA to determine how best to incorporate early mitigation at each of those stages. Each of the pilot chemicals will focus on a subset of species that EPA determines has a high likelihood of jeopardy or adverse modification for that chemical. EPA plans to incorporate early mitigation to address likely effects to those selected species as part of the FIFRA process or through EPA's biological evaluations (more details in the mitigation strategy section).

  For these registration review pilots, EPA plans to provide information on the species and associated mitigations in the preliminary interim decision (PID) or an amended PID. In addition to providing a formal opportunity for our stakeholders to provide feedback, EPA hopes this information will help registrants and growers to better understand how EPA identified species for these actions and how EPA selected the proposed mitigations. Although this effort starts with the pesticides/pesticide classes listed above, it will expand to other pesticides in registration review based on staff capacity. As this effort expands, it will benefit from EPA's vulnerable species initiative and the federal interagency mitigation pilot project, both discussed in the mitigation strategy section below.

  Lead division(s): EFED, PRD, BEAD

  Timing: In process

Meet ESA obligations for new registrations for conventional pesticide ingredients already registered or undergoing registration review

- **Meet ESA obligations for all other registration review cases.** EPA is also required to complete ESA determinations for the large number of registration review cases not covered by existing court deadlines or currently in litigation. The first cycle of registration review covers over 450 conventional pesticide cases, but EPA is unable to complete most of the remaining ESA determinations before the end of this cycle. Under this workplan, however, EPA will begin developing a plan on when and how to make those determinations.

  As explained in the earlier *Background and Challenges* section, the optimal order for making those determinations will depend on the interplay between multiple factors. Those factors may include:

  - How a pesticide affects listed species and critical habitat.
  - The amount of use for a pesticide that overlaps with listed species and critical habitat, especially EPA-identified vulnerable species.
  - Early mitigations EPA incorporates that benefits species affected by a pesticide, even before EPA has completed consultation, following public comment and notification procedures under FIFRA.
  - Coordination of mitigation on newly registered pesticides and the existing pesticides they are intended to replace, including through any discussions with USDA and pesticide users.
  - Process efficiencies that allow EPA to group multiple pesticides or classes of pesticides for concurrent ESA determinations and formal consultation.
  - EPA capacity and infrastructure to make ESA effects determinations.

  Developing an efficient ESA schedule that balances these and other factors presents a major challenge for EPA. For this reason, the Agency cannot currently set a timeline for when it can conduct ESA assessments for all the pesticides currently in registration review. The Agency, however, does appreciate the importance of providing a timeline and clear commitments about when these assessments will occur. During the next year, the Agency will continue working toward a timeline. As part of this process, the Agency may determine the order in which it will complete ESA assessments for each conventional chemical, even if it cannot yet identify the dates for the assessments.

  Lead division(s): EFED, PRD, BEAD

  Timing: In process

- **Adopt mitigation for vulnerable species.** Through EPA's vulnerable species effort (see mitigation strategy below for more information) EPA will identify and incorporate early ESA mitigation for those species as part of registration review. This effort is also designed to benefit other ESA species not covered by the vulnerable species effort.

- **Adopt flexible mitigation.** EPA will identify and offer pesticide users more flexible approaches to mitigating for effects to listed species (see mitigation strategy below for more information).
- **Coordinate mitigation between new registrations and registration review.** EPA will coordinate mitigation measures on new conventional pesticide active ingredient registrations and related registration review conventional pesticides, to help ensure consistent mitigation among pesticides that cover similar uses (see mitigation strategy below for more information).

Meet ESA obligations for new use registrations, section 18 emergency use registrations, and other actions on existing conventional pesticides

EPA will develop a strategy to meet its ESA obligations, as needed, for the large number of actions that its registration program receives under PRIA and FIFRA. These include new uses for an existing pesticide, requests for label amendments to an existing pesticide, new product combinations or physical form, temporary permission for an unregistered use in response to a pest emergency under FIFRA section 18, and other FIFRA actions, all of which may invoke ESA obligations. Collectively, these actions far exceed the number of registration review decisions. New food use requests for existing chemicals are especially important to agriculture and have averaged approximately 140 decisions per year. New products and amendments also have a high volume (about 700) of decisions annually.

With the current approaches to ESA determinations and existing agency capacity, EPA is currently unable to meet its ESA obligations for all the large number of new uses, section 18s, and other registration actions. A major reason is that over the next six or more years, EPA has prioritized its workload on ESA assessments for registration and registration review cases needed to meet settlement agreements. New uses, section 18s, and other FIFRA actions will generally be lower priority during this period. Thus, EPA will need to develop considerably more efficient ESA approaches for those FIFRA actions, as its approach for new active ingredients is not designed to apply to the actions. EPA will develop the approaches after it makes progress on the three types of FIFRA actions described earlier. As EPA develops more experience incorporating ESA mitigation through registration of new active ingredients and registration review, it will use this experience to inform mitigation for the FIFRA actions described in this section. Over the long-term, EPA envisions that it can complete enough consultations for commonly used pesticides, so that the Agency can update those consultations to include the other FIFRA actions.

In the meantime, EPA will continue to determine, on a case-by-case basis, how best to address its ESA obligations for these other FIFRA actions. The one exception is new uses for herbicides used on crops genetically engineered for tolerance to those herbicides. For those uses, EPA will continue to meet its ESA obligations by making ESA determinations, initiating consultation as appropriate, and requiring any necessary mitigation before a registration is granted.

Lead division(s): RD, EFED, BEAD

Timing: Case-by-case decision for all FIFRA actions, with development of comprehensive strategy no sooner than 3 years.

Meet ESA obligations for antimicrobial and biopesticide registration and registration review decisions

The ESA-FIFRA assessment methods that EPA has developed were designed for conventional pesticides, rather than antimicrobials or biopesticides. Nonetheless, EPA has completed ESA determinations for some antimicrobials and has often concluded "no effect" because many antimicrobials are used indoors and thus have no direct or indirect exposure to listed species or critical habitats. Similarly, EPA has been able to find "no effect" for some biopesticides based on lack of exposure or lack of toxicity to listed species or critical habitats.

To further meet its ESA obligations in these areas, the Agency will develop ESA assessment methods for antimicrobials and biopesticides that allow it to go beyond the may effect/no effect analysis. EPA does not expect that all future antimicrobial and biopesticide assessments will result in "no effect," so the Agency will need to consider how to assess any potential "likely to adversely affect" determinations for those pesticides and to require early and flexible mitigation. As part of this process, EPA will work with stakeholders to determine when higher tier toxicological data may be needed to support any needed biopesticide or antimicrobial biological evaluations.

EPA will learn important information through the process for addressing ESA obligations in the new conventional pesticide actions. This will inform EPA's development of the process for non-conventional pesticide actions.

To implement these obligations, EPA will:

- **Develop ESA approaches for biopesticides.** Many biopesticides are used similarly to conventional pesticides, so EPA expects to adapt some of the approaches for conventionals to biopesticides, although EPA may also need to develop ESA approaches specific to biopesticides. EPA will describe in any new approaches how the Agency will determine whether a biopesticide "may affect" and is "likely to adversely affect" ESA species and critical habitats.

  Lead division(s): BPPD, EFED

  Timing: Within 18 months

- **Meet ESA obligations for biopesticides.** EPA will adopt policy and program improvements, similar to those for conventional pesticides, to help meet its ESA obligations for biopesticides. These include early and flexible mitigation, and coordination between registration and registration review of biopesticides. EPA plans to use pilot chemical(s) to demonstrate these approaches. EPA will also start reaching out to biopesticide stakeholders who are likely unfamiliar with the ESA process and EPA's obligations.

  Lead division(s): BPPD

  Timing: Pilots ongoing; significant progress on overall action within 18 months

- **Develop ESA approaches for antimicrobials.** EPA will develop ESA approaches specific to antimicrobials. This will describe how the Agency will determine whether an antimicrobial "may affect" and is "likely to adversely affect" listed species and critical habitats. The EPA will try to use data from available sources to help identify the location of potential use sites (*e.g.*, NPDES permits for industrial uses; marina locations for anti-fouling paint uses) and work towards refining available exposure models that will allow EPA to quantify risk to species. EPA will also develop a list of antimicrobial use sites that are not expected to result in any outdoor exposures (*e.g.*, indoor uses that do not go down the drain) for which the EPA can make "no effect" determinations.

  Lead division(s): AD, EFED

  Timing: 3 years

- **Meet ESA obligations for antimicrobials.** EPA will adopt policy and program improvements, similar to those for conventional pesticides, to help meet its ESA obligations for antimicrobials. These include early and flexible mitigation, and coordination between registration and registration review of antimicrobials. EPA plans to use pilot chemical(s) to demonstrate these approaches. EPA will also start reaching out to antimicrobial pesticide stakeholders who are likely unfamiliar with the ESA process and EPA's obligations.

  Lead division(s): AD

  Timing: Within 5 years

STRATEGY 2: IMPROVE APPROACHES TO ESA MITIGATION

This section describes actions that support the mitigation measures that EPA will incorporate into its registration and registration review decisions, including those resulting from litigation-related deadlines. The implementation and rollout of these actions will vary, depending on the nature of each action. Some actions will be announced through an EPA press release or OPP Update, while other actions do not warrant a standalone announcement and will simply be incorporated into future EPA decisions.

Identify and incorporate early mitigation for vulnerable ESA species

EPA will identify and implement early mitigation for vulnerable ESA species, so that the Agency can incorporate the mitigation into its registration and registration review decisions that require ESA mitigation. The goal of this effort is to ensure that EPA is beginning to adopt meaningful protections for species most affected by pesticide use, without the Agency waiting until consultation with the Services is completed. Early mitigation for vulnerable species will also expedite any future pesticide consultation that covers those species, because much of the mitigation needed for those consultations may have already been identified through the vulnerable species effort discussed in step 1 below. Early mitigation for vulnerable species entails three related but distinct steps: (1) identify vulnerable species, (2) identify mitigation for those species, and (3) incorporate mitigation into FIFRA decisions.

The three steps are described below.

- **Step 1: Identify vulnerable species.** Throughout this workplan, "vulnerable species" refers to the subset of ESA species that EPA is currently identifying based on characteristics of the species or its habitat that predisposes it to experiencing pesticide effects. Those characteristics include extent of range in proximity to pesticide use sites, sensitivity of species to pesticidal effects (*e.g.*, insecticide's effects on insects), ability of species to recover from effects, and identification of pesticides as a contributor to a species' declines in ESA recovery documents. EPA expects to publish its working list of vulnerable species in the near future.

  When EPA predicts the likelihood of a future jeopardy or adverse modification finding, that analysis is specific to the pesticide at issue. This is a major difference between those predictions and the identification of vulnerable species, which are not pesticide specific. EPA may predict a high likelihood of jeopardy/adverse modification even for ESA species not on the vulnerable species list. The reason is that the specific interaction between a particular pesticide use and a species may reveal a high likelihood of jeopardy, which was not evident without the pesticide-specific analysis. Conversely, EPA may not predict a species on the vulnerable species list as having a high likelihood of jeopardy/adverse modification for a particular pesticide because, for example, the species range may not overlap with the pesticide's registered uses.

- **Step 2: Identify mitigation for vulnerable species.** EPA intends to identify early mitigation for vulnerable species through two approaches. First is through EPA's internal efforts to determine suitable mitigation for each vulnerable species, based on ESA documents for the species, ecological principles, coordination with Services biologists, and other ESA-FIFRA efforts. These mitigation measures are not specific to a particular FIFRA action but instead designed to address effects from most pesticides to which the species may be exposed.

  Second is through a federal mitigation pilot project with the Services and USDA. Through this pilot, the agencies will develop approaches for identifying and implementing mitigation earlier in the ESA-FIFRA process for select species particularly vulnerable to pesticides. The Services have selected approximately 20 species for the pilot, and EPA has selected an herbicide, an insecticide, and a fungicide with uses that overlap with these species. For each species, the agencies will develop an initial list of suitable mitigation measures to reduce the likelihood of a future jeopardy or adverse modification finding and to minimize the effects of incidental take. The initial list may be based on existing mitigation measures the Service(s) have developed and conservation actions in recovery plans and other ESA documents (*e.g.*, recovery outline, 5-year status review, species status assessment), and will reflect input from species experts. Based on additional input from USDA, registrants, pesticide users, conservation organizations, and others, the agencies will identify the most feasible and effective mitigation measures from the initial list to create a refined list of mitigation measures to incorporate into FIFRA and ESA decisions. The agencies will also assess the success of the refined mitigation measures and expand the approach to include other pesticides and species. The agencies will provide more details on the pilot project later in 2022.

Relationship Among the Three Categories of Species for Targeted Mitigation

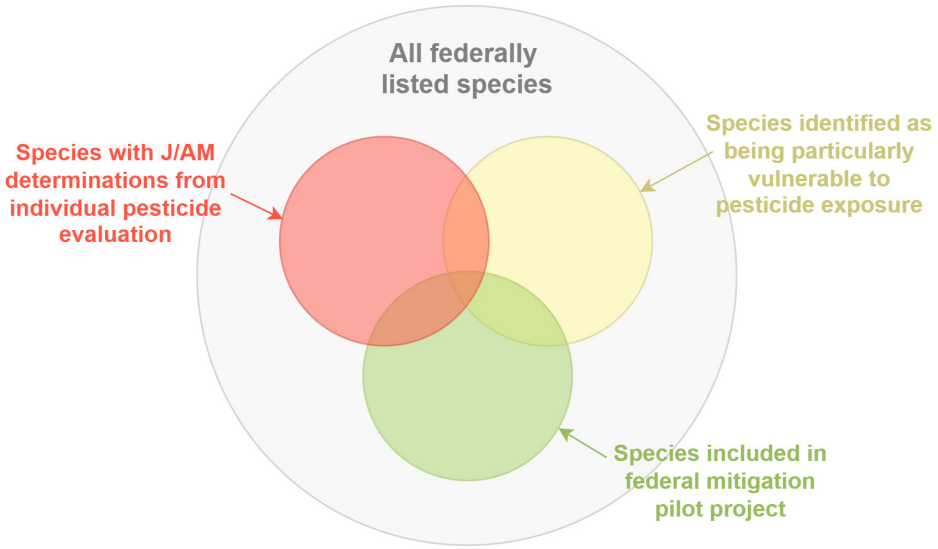


Figure 4. Currently, EPA is compiling a list of vulnerable species based on characteristics of the species or their habitat that predisposes them to pesticide effects. Some of those species are also likely to be at risk of a future jeopardy finding for certain pesticides. But not all species facing a future jeopardy risk have been identified as vulnerable species. All species selected for the federal mitigation pilot project are vulnerable species and some may be at risk of a future jeopardy finding, absent adequate early mitigation. Because the number of species represented by each of the circles has not yet been determined, the size of the circles are not proportionally accurate. Further, the extent of overlap among the inner circles will depend on various factors that EPA is still assessing.

- **Step 3: Incorporate any necessary ESA mitigation into FIFRA actions.** EPA expects to incorporate the identified necessary mitigation measures for vulnerable species into any relevant FIFRA action that invokes ESA obligations. This may include registration of new pesticide active ingredients, registration review, and other registration actions. Further, the measures can be incorporated in any of the following stages of the FIFRA process, before the completion of consultation:
    - Mitigation required to meet the FIFRA standard, before EPA completes a biological evaluation or before the Services complete their biological opinions.
    - Mitigation as part of a FIFRA action where EPA has made a "may affect" finding.
    - Mitigation as part of a FIFRA action where the Agency has made an ESA likely to adversely affect finding. This includes when EPA finds likely to adversely affect but is unable to complete formal consultation with the Service(s) prior to registering a new active ingredient.

  As EPA continues identifying vulnerable species and any necessary mitigation for them, it will explore how to apply those measures. In general, EPA intends to apply the mitigation measures for vulnerable species as broadly as feasible. For example, effective, practical mitigation measures that protect a listed insect species from an insecticide may apply across all insecticides. Depending on the type of mitigation, EPA may first need to complete public notice and comment (*e.g.*, voluntary use deletions).

  Lead division(s): EFED, RD, PRD, BEAD

  Timing: In process for some FIFRA actions

Focus pesticide consultation process on adopting mitigation for species likely to receive a jeopardy or adverse modification determination

To streamline the pesticide consultation process and to address species most affected by pesticides, EPA will prioritize mitigation for species most likely to receive a jeopardy or adverse modification finding during formal consultation. Because both findings focus on effects to species survival and recovery (rather than effects only to individuals of a species, as is the case with "may affect" and "likely to adversely affect" findings), EPA must perform some analysis of those species-level effects before initiating formal consultation with the Services.

This approach will entail two shifts in how the Agency conducts its ESA-FIFRA analyses. First, as part of EPA's effects determinations for certain pesticides, the Agency will assess population-level effects to inform (1) the likelihood of a jeopardy or adverse modification finding during formal consultation and (2) mitigation to address those effects. This approach will help ensure that EPA's assessments are relevant to the ESA's goal of recovering species. It should also reduce the overall length and complexity of consultations.

Thus, although EPA needs to make trade-offs in the type of analyses it performs, the Agency expects those tradeoffs to improve its ability to meet its ESA obligations more expeditiously and to adopt more meaningful mitigation. Nothing about this new approach is intended to lessen the Services' role under the ESA or to abrogate EPA's duty to issue effects findings or consult with the Services.

The second shift is that EPA seeks to work with the Services to expedite formal consultation for species that benefit from early mitigation such that the likelihood of jeopardy or adverse modification becomes negligible or nonexistent, but that still trigger a "likely to adversely affect" finding. In practice, "likely to adversely affect" is triggered if even one individual of a species is likely to experience incidental take. This is the case regardless of the species' recovery status or the overall effects of the proposed action on a species. As a result, for certain species that are wide ranging or that occur near agricultural lands, a likely to adversely affect may be unavoidable even with early mitigation and even if the probability of jeopardy or adverse modification is very low or none. In those situations, EPA seeks to work with the Services to expedite formal consultation for those species, thus creating a tangible incentive for registrants to offer early mitigation to minimize the probability of future jeopardy and adverse modification findings. This approach will require the agreement of both Services.

Lead division(s): EFED, RD, PRD, BEAD

Timing: In process

Identify flexible mitigation for all ESA species

When EPA gives registrants and pesticide users more flexibility in identifying ESA mitigation, those measures are more likely to be implemented. EPA can offer more flexibility in at least two ways. One is by engaging users and registrants earlier in the FIFRA process to identify and adopt suitable ESA mitigation, based on input from those stakeholders about effective mitigation techniques that work best for them. Another is by creating a menu of mitigation that users or registrants can select from, similar to the approach taken by NMFS in recent pesticide biological opinions. A more comprehensive approach for developing mitigation options is to gather information from species experts about effective mitigation techniques and from pesticide registrants and users about techniques that are practical to implement.

For both options, EPA anticipates working with the Services on how best to determine the amount of mitigation necessary to meet ESA obligations, and with USDA and other groups (*e.g.*, American Mosquito Control Association, National Agricultural Aviation Association, and university and extension researchers) on how best to engage with pesticide users to identify and implement mitigation, including existing conservations practices. To promote flexible mitigation, EPA will pursue the following two actions.

- **Start with federal mitigation pilot project.** As described above, EPA is developing menus of mitigation options with the Services and USDA through a pilot project for select species and pesticides. EPA plans to incorporate lessons learned from this pilot to registration review chemicals that overlap with other species that face the likelihood of a future jeopardy or adverse modification finding. EPA hopes the federal pilot will provide additional insight on opportunities to engage pesticide users and registrants on mitigation earlier in the FIFRA registration review process, thereby improving EPA's ability to meet its ESA obligations.

- **Start with federal mitigation pilot project (cont.).** Additionally, as EPA incorporates early mitigation for new conventional pesticide registrations and for the pilot pesticides in registration review (discussed earlier) and completes consultations, it anticipates the resulting mitigations will likely apply to other pesticides and will form the basis of mitigation menus for those pesticides. For example, EPA recently developed a menu of mitigation to address run-off from the herbicide Enlist that may also serve as a starting point to address the effects of run-off to listed species and their critical habitat from other mobile herbicides.

  Lead division(s): EFED, RD, PRD, BEAD

  Timing: In process

- **Expand to other pesticides and species.** EPA will work with the Services and USDA to expand the actions in the efforts described above to other conventional pesticides and other species.

  Lead division(s): RD, PRD, EFED, BEAD, BPPD

  Timing: Within 2-3 years

Coordinate mitigation between registration and registration review decisions

EPA supports the registration of newer chemistries that likely have lower environmental and human health risks. This is one reason that EPA is prioritizing resources to meet its ESA obligations for registration of new active ingredients, especially those designed to replace older chemistries that have greater effects on ESA species. This approach, however, can impose ESA mitigation for those pesticides before mitigation is imposed on a corresponding older pesticide used for the same purposes (*e.g.*, where ESA consultation on the older pesticide has not yet occurred), and in some cases, the older pesticide may have a more harmful health or environmental profile. This disparity in mitigation may be seen as incentivizing use of the older pesticides, because the older pesticide may not have as many use restrictions. The disparity may also be seen as discouraging the development of new pesticides if they are restricted more than older pesticides, thus possibly reducing their market share. To address these problems, EPA will begin coordinating ESA mitigation between new pesticides and corresponding older pesticides.

To identify these pairings, EPA will need to match new and older pesticides based on crop use, target pests, timing of FIFRA and ESA reviews, registrants, and other factors. EPA does not yet have a framework for this type of assessment, so will begin piloting an approach in 2022 through a new pesticide registration decision that the Agency will link to a corresponding conventional pesticide in registration review. This could include new biopesticide registrations that lead to reduced use of existing conventional pesticides with more significant effects on ESA species. EPA will then evaluate how to coordinate its ESA mitigation more broadly between its registration and registration review decisions.

Lead division(s): RD, PRD, EFED, BEAD, BPPD

Timing: Begin within 12 months

Use compensatory mitigation (offsets) to supplement avoidance and minimization

To meet ESA obligations, federal agencies often use compensatory mitigation (also known as offsets) to address the effects of their actions that cannot be avoided or minimized. Offsets can include actions such as habitat preservation or restoration, invasive species control, and species reintroductions. These actions directly further species recovery (sometimes more than on-site avoidance and minimization) and should provide registrants with greater flexibility by creating more options for EPA to meet its ESA obligations. EPA will thus identify opportunities for offsets to complement traditional FIFRA avoidance and minimization measures for ESA species. The Agency will do so through a multistep process that includes working with the Services to develop general guidance on using offsets for pesticide consultations, working with registrants to identify and adopt offsets for specific pesticides and species, ensuring that adopted offsets are legally binding as a condition of a FIFRA registration, and working with the Services to oversee implementation of offsets. In 2022, EPA will be working to pilot the use of offsets for certain chemicals and species, in cooperation with registrants who are seeking to include offsets in their registration. Based on these pilots, EPA seeks to work with the Services to clarify the process for incorporating offsets into pesticide consultations and scaling up that process to handle large numbers of species and pesticide actions.

Lead division(s): EFED, PRD, RD, BEAD

Timing: Pilot projects in 2022

Pursue other policy and program improvements that support mitigation

- **Require *Bulletins Live! Two* language on certain pesticide labels.** *Bulletins Live! Two* is EPA's web-based system for incorporating geographically specific restrictions for ESA species and critical habitats. To help meet ESA obligations, especially for conventional pesticides that EPA registers before completing formal consultation, EPA expects to require that certain labels for new conventional registration actions, certain non-conventional registration actions, and many registration review actions include language directing users to check *Bulletins Live! Two* for restrictions that the user must follow before applying a pesticide. For example, when EPA expects that a pesticide in registration review may require mitigation implemented through *Bulletins*, the Agency will seek *Bulletins* language as part of the label it approves through an Interim Decision. Because EPA will not be able to immediately populate *Bulletins* with mitigation for all listed species affected by approved pesticide uses, the Agency will prioritize developing mitigation for EPA vulnerable species and species covered by the interagency mitigation pilot project, both discussed earlier. To facilitate EPA's efforts to adopt mitigation for these species, the Agency is considering the option to retract or revise the antiquated 2005 Federal Register Notice on its Endangered Species Protection Program (OPP-2002-0311). The reason is that much has changed since 2005 about how EPA addresses its ESA obligations, and the Agency seeks to update and modernize its guidance.

- **Require *Bulletins Live! Two* language on certain pesticide labels (cont.).** The Agency is also considering rulemaking in the future to require the *Bulletins* language on all or a subset of all labels, where that language is necessary, thus standardizing the use of the language across labels that require spatially explicit mitigation. Incorporating the language where necessary also helps with the legal defensibility of EPA's registration and registration review decisions and reduces agency resources to update labels after formal consultation has concluded and a biological opinion is finalized. This approach will also facilitate adopting timely mitigation because the pesticide labels in commerce will already contain the requirement to follow *Bulletins* when EPA issues the *Bulletin* language, thus bypassing the lengthy process from EPA approval of a label to field implementation of that label, which typically takes 18 months or longer.

  Lead division(s): RD, PRD, BPPD

  Timing: In process

- **Update *Bulletins Live! Two*.** Given that *Bulletins Live! Two* will be the main interface for conveying most future geographically specific ESA label restrictions, EPA will upgrade the interface to be more user friendly. In February 2022, EPA completed initial updates to *Bulletins*. The Agency will continue identifying additional updates to implement over the coming years.

  Lead division(s): EFED

  Timing: Ongoing

- **Adopt electronic labeling system.** In the longer term, EPA will focus on shifting to an electronic labeling process that supports quicker label revisions during registration and registration review, in implementing non-geographic mitigations in biological opinions, and that may replace *Bulletins Live! Two* with a more comprehensive system for conveying ESA label restrictions. EPA has been working for several years to set up an electronic labeling program, but implementing the program may require rulemaking, transitioning labels to the electronic system, and other major administrative actions that will span 3-5 years. In the meantime, EPA is considering whether pilot projects with willing registrants can demonstrate how electronic labeling can streamline label amendments that incorporate ESA mitigation.

  Lead division(s): PRD, RD, EFED, BPPD, other OCSPP divisions

  Timing: No earlier than 2 years

- **Develop policies or processes to integrate meeting ESA obligations into FIFRA decisions.** To streamline the ESA-FIFRA program, EPA will consider policies that integrate meeting its ESA obligations into the FIFRA process. EPA will be considering issues such as the situation where the Agency determines that a registration may present a high likelihood of jeopardy or adverse modification, EPA may find that the application does not meet the FIFRA approval standard without adequate mitigation because of ESA concerns.

  Lead division(s): OCSPP, OPP

  Timing: Within 2 years

- **Use existing conservation practices to inform ESA mitigation.** Many landowners are likely implementing stewardship and best management practices to reduce pesticide drift and runoff, but those practices are not often identified and incorporated into EPA's risk assessments nor consistently used to inform ESA mitigation. By addressing this gap, EPA can develop mitigation that landowners are more likely to be familiar with and effectively implement. EPA will work with the Services, USDA, and stakeholders to develop a plan to identify pesticide stewardship practices that EPA and the Services are not currently considering in pesticide consultations, and then determine how best to incorporate that information into the consultation process.

  Lead division(s): BEAD, EFED

  Timing: Within 3 years

- **Evaluate ESA section 7(a)(1) conservation program for pesticides.** Section 7(a)(1) of the ESA requires all federal agencies to use their authorities to help conserve ESA species and complements the section 7(a)(2) requirement for agencies to consult with the Services to avoid jeopardy and adverse modification. How agencies fulfill their section 7(a)(1) duty, however, is flexible and open-ended (*e.g.*, the Services have no regulations on section 7(a)(1)). EPA will consider developing a section 7(a)(1) approach for its pesticide program that can help with meeting its section 7(a)(2) obligations. For example, EPA could work with registrants, pesticide users, and the Services to adopt proactive conservation that, if implemented and shown to be effective, can be incorporated into future pesticide consultations. In this case, USDA could help identify these conservation practices and then EPA could work with the Services and USDA to determine how future pesticide consultations should account for the practices. This approach should also help expand the use of offsets in pesticide consultations. A section 7(a)(1) program could also help address species research needs to inform future pesticide consultations (*e.g.*, effectiveness of specific mitigation techniques). EPA proposes to work with the Services to identify the various opportunities for a section 7(a)(1) program to benefit EPA's ESA-FIFRA work and determine whether and how to pursue those opportunities.

  Lead division(s): EFED, PRD, RD, OCSPP IO

  Timing: Within 3 years

- **Coordinate on research.** OPP will continue coordinating with EPA's Office of Research and Development to help ensure that its research can inform the ESA-FIFRA process. Current coordination already covers important questions on species risk assessments. The two offices may consider expanding this work to cover ESA mitigation and other emerging topics important to ESA pesticide consultations. EPA also envisions coordinating on research with other federal agencies and with academic institutions. In particular, EPA will explore work with the NMFS Northwest Fisheries Science Center on pesticides research, given the Center's long history of pesticide research and their science support for NMFS biological opinions. All these efforts will increase the resources for improving the scientific foundation of pesticide consultations.

  Lead division(s): EFED

  Timing: In progress

STRATEGY 3: IMPROVE INTERAGENCY CONSULTATION PROCESS

Although progress has been made over the last decade, over the next decade far more improvements to the pesticide consultation process are needed to keep pace with EPA's ability to meet its ESA obligations, including for the large backlog of conventional pesticides in registration review. The current consultation process does not optimize use of EPA resources or optimally engage stakeholders, irrespective of resource levels. Improving the consultation process, however, requires considerable interagency coordination; EPA cannot accomplish any of the actions on its own. This section describes how EPA seeks to work with the Services to improve the efficiency of the consultation process.

EPA has determined that the current approach to consulting on individual pesticide ingredients cannot efficiently scale to the hundreds of pesticides that EPA must assess under the ESA within the next decade. This inefficiency applies not only to the individual ESA determinations that EPA must make, but to the process of developing and implementing mitigation. Based on its experience with current and upcoming pesticide consultations, EPA will coordinate with the Services to develop more efficient approaches to consulting on pesticides. For example, programmatic consultations for groups of pesticides (*e.g.*, herbicides) or for all pesticides that share similar use patterns in a region would enable mitigations to be identified together and would be far more efficient than the current pesticide-by-pesticide approach. This approach also avoids the problem of imposing disparate mitigation requirements across pesticides with similar use patterns.

Another example is for EPA to consider consulting with certain regional or field offices of the Services for a pesticide used only in a region, in coordination with the agency's headquarters staff. Although there are barriers to this approach, which would first require Services agreement, there are also benefits such as working directly with the Services biologists who may have connections to the landowners who implement mitigations. In the past, EPA has successfully consulted with FWS headquarters and a regional office on two rodenticides (Rozol and Kaput).

Developing alternatives to the current approach to pesticide consultations will require EPA and the Services to address various logistical and legal issues, all of which take time. EPA, however, sees no choice but to identify more efficient approaches that enable each consultation to cover far more pesticides or that the agencies can complete in far less time than under the current approach.

Lead division(s): EFED, RD, PRD, BEAD

Timing: In process

STRATEGY 4: IMPROVE STAKEHOLDER ENGAGEMENT

Stakeholder engagement is crucial not only to providing transparency about EPA's work, but also for stakeholders to help with ESA-FIFRA improvements. Registrants and pesticide users will especially benefit from many of these improvements that increase the predictability and speed of pesticide consultations.

Obtain data for ESA assessments

In some cases, EPA may lack sufficient data to begin an ESA assessment or complete one efficiently. In these situations, EPA will work with registrants and others to obtain the necessary data before the start of the assessments. This will likely include use and usage data, where applicable, and recommendations on when and how to incorporate those data into ESA determinations. For example, state agricultural extension agencies and USDA may be able to inform EPA about anticipated uses of a new active ingredient for which no usage data exist. EPA may also issue new Data Call-In notices, especially for antimicrobial and biopesticides, to seek data needed for its ESA determinations. In those situations, EPA will also update its Information Collection Request that describes the type of information EPA seeks, the reasons for seeking the information, and the time and cost for the public to provide the information. EPA is also considering issuing a Pesticide Registration Notice to help registrants draft labels that consider ESA mitigation and to discuss other approaches to facilitate the adoption of mitigation. Further, through EPA's quarterly registration review schedule, the Agency may notify stakeholders of upcoming data needs for pesticides in registration review.

Lead division(s): PRD, RD, EFED, BEAD, BPPD, AD

Timing: No earlier than 12 months

Expand engagement with growers through USDA

Growers have an important stake in the outcome of many FIFRA actions and an important role in growing our nation's food and protecting its natural resources. EPA already works with growers on a variety of pesticide matters and envisions a larger role for growers to offer information to support FIFRA actions and ESA determinations and mitigation decisions. EPA views USDA as an important conduit for growers to provide this information and will work with the agency to identify process improvements for grower engagement, including through the federal pilot project described earlier.

Lead division(s): PRD, RD, EFED, BEAD, BPPD

Timing: In process

Expand engagement with non-agricultural organizations

EPA already works with non-agricultural organizations that have an interest in ESA-FIFRA issues. This includes environmental, tribal, and public interest organizations, as well as organizations that represent pesticide users (*e.g.*, American Mosquito Control Association, National Pest Management Association). EPA will expand its engagement with non-agricultural organizations on specific ESA-FIFRA issues and improvements to the ESA-FIFRA process.

Lead division(s): PRD, RD, EFED, BEAD, BPPD

Timing: Beginning within the next 12 months

CLOSING AND FUTURE STEPS

CLOSING AND FUTURE STEPS

Through this workplan, EPA's Pesticide Program hopes that readers appreciate its strong commitment to addressing its historic lapses in fulfilling its ESA obligations. The Program's vision statement will guide the workplan as the Agency works through the monumental backlog of FIFRA actions that require ESA review, compounded by ongoing and future FIFRA actions. The Program understands the limitations of its current capacity and expertise and has taken steps to start addressing this challenge. These steps include major process improvements, many of which depend on collaboration with the Services, USDA, and stakeholders. This workplan is EPA's most comprehensive effort to date that describes the improvements it will pursue and the external partnerships it is seeking.

EPA welcomes feedback from stakeholders about the workplan and particularly about opportunities to partner with EPA on implementing the highest priority actions in the document. Through those partnerships, EPA expects that it can increase the number of ESA assessments it completes on its own without the need for litigation to compel this work, deliver more meaningful conservation for listed species, and offer pesticide registrants and users more practical and flexible mitigation to protect those species.

APPENDIX A

CURRENT SCHEDULE FOR ESA DETERMINATIONS AND IMPLEMENTATION OF NMFS SALMONID BIOLOGICAL OPINIONS

APPENDIX A

CURRENT SCHEDULE FOR ESA DETERMINATIONS AND IMPLEMENTATION OF NMFS SALMONID BIOLOGICAL OPINIONS

EPA has the following court-enforceable deadlines and other agreements (not yet court-enforceable) for ESA determinations and biological evaluations (BE). Pending litigation may add other deadlines to this schedule. The table includes EPA's expected/known timing to complete its biological evaluations as well as work to implement some recent biological opinions from U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS). "TBD" indicates that timing has not yet been determined for the specified step in the process.

Each date (or TBD) in the table is either green, yellow, or red, where: green = completed; red = expected/planned future work; and yellow = expected/planned future work for pesticides without ESA litigation.

Chemical	EPA Draft BE	EPA Final BE
Court Enforceable or Court Committed Dates		
Methomyl	2020	2021
Carbaryl	2020	2021
Atrazine	2020	2021
Simazine	2020	2021
Glyphosate	2020	2021
Propazine[1]	2020	NA
Enlist One	NA	2022
Enlist Duo	NA	2022
Imidacloprid	2021	June 2022
Clothianidin	2021	June 2022
Thiamethoxam	2021	June 2022
Sulfoxaflor	NA	Spring 2022
Inpyrfluxam	NA	2023
Cyantraniliprole	2023	2023
Dinotefuran	2023	2024
Acetamiprid	2023	2024
Brodifacoum	2023	2024
Warfarin	2023	2024
Bromadiolone	2023	2024
Zinc phosphide	2023	2024
Chlorophacinone	2023	2024
Diphacinone	2023	2024
Difenacoum	2023	2024
Bromethalin	2023	2024
Difethialone	2023	2024
Cholecalciferol	2023	2024
Flupyradifurone	2024	2025
Bicyclopyrone	2024	2025
Streptomycin	2025	2026[2]
Benzovindiflupyr	2026	2027
Halauxifen-methyl	2026	2027

APPENDIX A

CURRENT SCHEDULE FOR ESA DETERMINATIONS AND IMPLEMENTATION OF NMFS SALMONID BIOLOGICAL OPINIONS

Chemical	EPA Draft BE	EPA Final BE
Expected BE Completion Dates		
Approximately 10 new active ingredients	2022	2022/2023
Acephate	2026	2026
Dimethoate	2026	2026
Naled	2026	2026
Tribufos	2026	2026
Bensulide	2027	2027
Ethoprop	2027	2027
Phorate	2027	2027
Phosmet	2027	2027
Active Ingredients in Pending Litigation Without Current Commitments		
1,3-D (Telone)	TBD	TBD
2,4-D	TBD	TBD
Captan	TBD	TBD
Chlorothalonil	TBD	TBD
Dicamba	TBD	TBD
Diuron	TBD	TBD
MCPA	TBD	TBD
Mancozeb	TBD	TBD
Metolachlor	TBD	TBD
Metribuzin	TBD	TBD
Oxyfluorfen	TBD	TBD
Paraquat	TBD	TBD
Pendimethalin	TBD	TBD
Propanil	TBD	TBD
Propargite	TBD	TBD
Phosphorotrithioate	TBD	TBD
Thiobencarb	TBD	TBD
Trifludimoxazin[3]	TBD	TBD
Trifluralin	TBD	TBD

APPENDIX A - continued

Recent Biological Opinions from the Services that EPA is Working to Implement		
Chemical	**FWS/NMFS**	**Final BiOp**
1080	FWS	2021[4]
M-44	FWS	2021[4]
Metolachlor[5]	NMFS	2021
Telone[5]	NMFS	2021
Prometryn[5]	NMFS	2021
Bromoxynil[5]	NMFS	2021
Malathion	FWS	2022
Diazinon[6]	NMFS	2022
Chlorpyrifos[6]	NMFS	2022
Malathion[6]	NMFS	2022

[1] Propazine registrations were voluntarily cancelled; therefore, consultation was no longer necessary.

[2] No sooner than Fall 2026

[3] Trifludimoxazin registrations are going through a voluntary cancellation process.

[4] EPA re-initiated consultation on these two predacides in 2011; a biological opinion was not necessary because the action was changed during the consultation process to avoid jeopardy. Consultation was completed in December 2021.

[5] Consultation was limited to salmonid species in the Pacific Northwest; EPA is working to implement additional salmonid BiOps through the registration review process.

[6] NMFS's 2022 BiOps are the result of a re-initiation process.

Many of the dates in this table are part of various settlement agreements and subject to change depending on the terms of those agreements.
Some dates are not associated with settlement agreements and are subject to change pending resources and prioritization.

APPENDIX A - continued

Implementation of NMFS Salmonid Biological Opinions

EPA is currently working to implement the NMFS salmonid biological opinions #2, 4, and 7 in 2022 as part of registration review proposed interim decisions (PID) or interim decisions (ID) for these pesticides. EPA anticipates focusing on the next set of NMFS salmonid biological opinions once these three biological opinions are implemented.

NMFS Biological Opinion No. and Year Issued	**Chemicals** (strikeout = cancelled product)	**Action/Status**
2 (2009)	Carbaryl, Methomyl ~~Carbofuran~~,	In process, with initial steps in 2022
3 (2010)	Bensulide, Dimethoate, Ethoprop, Naled, Phorate, Phosmet ~~Azinphos-methyl~~, ~~Disulfoton~~, ~~Fenamiphos~~, ~~Methamidophos~~, ~~Methidathion~~, ~~Methyl parathion~~,	Implement through ID
4 (2011)	2,4-D, Captan, Chlorothalonil, Diuron, Linuron, Triclopyr BEE	In process, with initial steps in 2022
5 (2012)	Oryzalin, Pendimethalin, Trifluralin	Implement through amended IDs
6 (2012)	Thiobencarb	Implemented through *Bulletins Two! Live* (2014)
7 (2014)	Diflubenzuron, Fenbutatin-oxide, Propargite	In process, with initial steps in 2022
9 (2021)	Bromoxynil, Prometryn	Label amendments scheduled for December 2022
10 (2021)	1, 3-dichloropropene (1,3-D), Metolachlor	Label amendments scheduled for December 2022

APPENDIX B

PENDING ESA LITIGATION ALLEGING FAILURE TO MAKE EFFECTS DETERMINATIONS ON FIFRA ACTIONS

APPENDIX B

PENDING ESA LITIGATION ALLEGING FAILURE TO MAKE EFFECTS DETERMINATIONS ON FIFRA ACTIONS

Litigation involving new actions to older chemicals for failure to consult:

- Center for Biological Diversity (CBD) v. EPA, No. 11-cv-00293-JCS (N.D. Cal.): "megasuit" challenging 2200 products re 35 active ingredients
- National Research Defense Council (NRDC) v. EPA, No. 20-70787, (9th Cir,), registration review of glyphosate. EPA is awaiting decision from the court.

Litigation involving new uses of existing pesticides

- Migrant Clinicians Network (MCN) v. EPA, No. 21-70719 (9th Cir.). Challenge to select streptomycin registrations. Litigation is currently at briefing stage.
- Center for Food Safety (CFS) v. EPA, No. 19-72109 (9th Cir.). Challenge to registrations of new uses of sulfoxaflor. Parties are awaiting decision from the court.

Litigation involving new AI registrations

- Center for Biological Diversity (CBD) v. EPA, No. 15-1054, (DC Cir.). Challenge to registrations of new AIs flupyradifurone, bicyclopyrone, and benzovindiflupyr, and halauxifen-methyl. Parties are awaiting decision from the court.
- Center for Biological Diversity (CBD) v. EPA, No. 20-73146 (9th Cir.). Challenge to inpyrfluxam registrations. Litigation is currently at briefing stage.
- Center for Food Safety (CFS) v. EPA, No. 21-71180, (9th Cir.). Challenge to trifludymoxazin registrations, for which the registrant has requested voluntary cancellation.

EPA
www.epa.gov/endangered-species

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

NATIONAL PORK PRODUCERS COUNCIL ET AL. *v.* ROSS, SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

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

No. 21–468. Argued October 11, 2022—Decided May 11, 2023

This case involves a challenge to a California law known as Proposition 12, which as relevant here forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are "confined in a cruel manner." Cal. Health & Safety Code Ann. §25990(b)(2). Confinement is "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely." §25991(e)(1). Prior to the vote on Proposition 12, proponents suggested the law would benefit animal welfare and consumer health, and opponents claimed that existing farming practices did better than Proposition 12 protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination). Shortly after Proposition 12's adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation (petitioners)—filed this lawsuit on behalf of their members who raise and process pigs alleging that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce. Petitioners estimated that the cost of compliance with Proposition 12 will increase production costs and will fall on both California and out-of-state producers. But because California imports almost all the pork it consumes, most of Proposition 12's compliance costs will be borne by out-of-state firms. The district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. The Ninth Circuit affirmed.

Held: The judgment of the Ninth Circuit is affirmed.

6 4th 1021, affirmed.

Syllabus

JUSTICE GORSUCH delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D, rejecting petitioners' theories that would place Proposition 12 in violation of the dormant Commerce Clause even though petitioners do not allege the law purposefully discriminates against out-of-state economic interests. Pp 5–17, 27–29.

(a) The Constitution vests Congress with the power to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. Although Congress may seek to exercise this power to regulate the interstate trade of pork, and many pork producers have urged Congress to do so, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States. Petitioners' litigation theory thus rests on the *dormant* Commerce Clause theory, pursuant to which the Commerce Clause not only vests Congress with the power to regulate interstate trade, but also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines*, *Inc.*, 514 U. S. 175, 179. This Court has held that state laws offend this dormant aspect of the Commerce Clause when they seek to "build up . . . domestic commerce" through "burdens upon the industry and business of other States." *Guy* v. *Baltimore*, 100 U. S. 434, 443. At the same time, though, the Court has reiterated that, absent purposeful discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid.*

The antidiscrimination principle lies at the "very core" of the Court's dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna*, *Inc.* v. *Town of Harrison*, 520 U. S. 564, 581. This Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by . . . 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 337–338 (quoting *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274). Petitioners here disavow any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state pork producers. Pp 5–8.

(b) Given petitioners' concession that Proposition 12 does not implicate the antidiscrimination principle, petitioners first invoke what they call the "extraterritoriality doctrine." They contend that the Court's dormant Commerce Clause cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state interests.

Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will impose substantial new costs on out-of-state pork producers who wish to sell their products in California. Petitioners contend the rule they propose follows ineluctably from three cases: *Healy* v. *Beer Institute*, 491 U. S. 324; *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573; and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. But a close look at those cases reveals that each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests. In *Baldwin*, a New York law that barred out-of-state dairy farmers from selling their milk in the State for less than the minimum price New York law guaranteed in-state producers "plainly discriminate[d]" against out-of-staters by "erecting an economic barrier protecting a major local industry against competition from without the State." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (discussing *Baldwin*). In *Brown-Forman*, a New York law that required liquor distillers to affirm that their in-state prices were no higher than their out-of-state prices impermissibly sought to force out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals, which amounted to economic protectionism. 476 U. S., at 580.

The Court reached a similar conclusion in *Healy*, which involved a Connecticut law that required out-of-state beer merchants to affirm that their in-state prices were no higher than those they charged in neighboring States. 491 U. S., at 328–330. As the Court later explained, "[t]he essential vice in laws" like Connecticut's is that they "hoard" commerce "for the benefit of" in-state merchants and discourage consumers from crossing state lines to make their purchases from nearby out-of-state vendors. *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391–392.

Petitioners insist that *Baldwin*, *Brown-Forman*, and *Healy* taken together suggest an "almost *per se*" rule against state laws with "extraterritorial effects." While petitioners point to language in these cases pertaining to the "practical effect" of the challenged laws on out-of-state commerce and prices, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341. The language highlighted by petitioners in *Baldwin*, *Brown-Forman*, and *Healy* appeared in a particular context and did particular work. A close look at those cases reveals nothing like the "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce that petitioners posit, and indeed petitioners' reading would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. *Baldwin*, *Brown-Forman*, and *Healy* did not mean to do so much. In rejecting petitioners' "almost *per se*" theory

the Court does not mean to trivialize the role territory and sovereign boundaries play in the federal system; the Constitution takes great care to provide rules for fixing and changing state borders. Art. IV, §3, cl. 1. Courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context. Indeed, the antidiscrimination principle found in the Court's dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 346–347. Pp 8–14.

(c) Petitioners next point to *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, which they assert requires a court to at least assess "'the burden imposed on interstate commerce'" by a state law and prevent its enforcement if the law's burdens are "'clearly excessive in relation to the putative local benefits.'" Brief for Petitioners 44. Petitioners provide a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests.

Petitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of the Court's dormant Commerce Clause jurisprudence. As this Court has previously explained, "no clear line" separates the *Pike* line of cases from core antidiscrimination precedents. *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298, n. 12. If some cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose. *Pike* itself concerned an Arizona order requiring cantaloupes grown in state to be processed and packed in state. 397 U. S., at 138–140. The Court held that Arizona's order violated the dormant Commerce Clause, stressing that even if that order could be fairly characterized as facially neutral, it "requir[ed] business operations to be performed in [state] that could more efficiently be performed elsewhere." *Id.*, at 145. The "practical effect[s]" of the order in operation thus revealed a discriminatory purpose—an effort to insulate in-state processing and packaging businesses from out-of-state competition. *Id.*, at 140. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," *Davis*, 553 U. S., at 353, and while "a small number of our cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory,"

Tracy, 519 U. S., at 298, n. 12, petitioners' claim about Proposition 12 falls well outside *Pike*'s heartland. Pp 15–18.

(d) The Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. See U. S. Const., Art. I, §8, cl. 3; Art. IV, §2. While this Court has inferred an additional judicially enforceable rule against certain state laws adopted even against the backdrop of congressional silence, the Court's cases also suggest extreme caution is warranted in its exercise. Disavowing reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation, petitioners invite the Court to endorse new theories of implied judicial power. They would have the Court recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though it has long recognized that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have the Court prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case below, this Court declines both incautious invitations. Pp 27–29.

JUSTICE GORSUCH, joined by JUSTICE THOMAS and JUSTICE BARRETT, concluded in Part IV–B that, accepting petitioners' allegations, the *Pike* balancing task that they propose in this case is one no court is equipped to undertake. Some out-of-state producers who choose to comply with Proposition 12 may incur new costs, while the law serves moral and health interests of some magnitude for in-state residents. In a functioning democracy, those sorts of policy choices—balancing competing, incommensurable goods—belong to the people and their elected representatives. Pp 18–21.

JUSTICE GORSUCH, joined by JUSTICE THOMAS, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, concluded in Part IV–C that the allegations in the complaint were insufficient as a matter of law to demonstrate a substantial burden on interstate commerce, a showing *Pike* requires *before* a court may assess the law's competing benefits or weigh the two sides against each other, and that the facts pleaded merely allege harm to some producers' favored "methods of operation" which the Court found insufficient to state a claim in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 127. Pp 21–25.

JUSTICE GORSUCH, joined by JUSTICE THOMAS and JUSTICE BARRETT, concluded in Part IV–D that petitioners have not asked the Court to treat putative harms to out-of-state animal welfare or other noneconomic interests as freestanding harms cognizable under the dormant Commerce Clause, and in any event that the Court's decisions authorizing claims alleging "burdens on commerce," *Davis*, 553 U. S., at 353,

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do not provide judges "a roving license" to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise. *United Haulers*, 550 U. S., at 343. Pp 25–27.

JUSTICE SOTOMAYOR, joined by JUSTICE KAGAN, concluded that the judgment should be affirmed, not because courts are incapable of balancing economic burdens against noneconomic benefits as *Pike* requires or because of any other fundamental reworking of that doctrine, but because petitioners fail to plausibly allege a substantial burden on interstate commerce as required by *Pike*. Pp 1–3.

JUSTICE BARRETT concluded that the judgment should be affirmed because *Pike* balancing requires both the benefits and burdens of a State law to be judicially cognizable and comparable, see *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 354–355, but the benefits and burdens of Proposition 12 are incommensurable; that said, the complaint plausibly alleges a substantial burden on interstate commerce because Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. Pp 1–2.

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which THOMAS, SOTOMAYOR, KAGAN, and BARRETT, JJ., joined, an opinion with respect to Parts IV–B and IV–D, in which THOMAS and BARRETT, JJ., joined, and an opinion with respect to Part IV–C, in which THOMAS, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part, in which KAGAN, J., joined. BARRETT, J., filed an opinion concurring in part. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which ALITO, KAVANAUGH, and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 21–468

NATIONAL PORK PRODUCERS COUNCIL, ET AL., PETITIONERS *v.* KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.

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

[May 11, 2023]

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D.

What goods belong in our stores? Usually, consumer demand and local laws supply some of the answer. Recently, California adopted just such a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around. In response, two groups of out-of-state pork producers filed this lawsuit, arguing that the law unconstitutionally interferes with their preferred way of doing business in violation of this Court's dormant Commerce Clause precedents. Both the district court and court of appeals dismissed the producers' complaint for failing to state a claim.

We affirm. Companies that choose to sell products in various States must normally comply with the laws of those various States. Assuredly, under this Court's dormant Commerce Clause decisions, no State may use its laws to

discriminate purposefully against out-of-state economic interests. But the pork producers do not suggest that California's law offends this principle. Instead, they invite us to fashion two new and more aggressive constitutional restrictions on the ability of States to regulate goods sold within their borders. We decline that invitation. While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list.

I

Modern American grocery stores offer a dizzying array of choice. Often, consumers may choose among eggs that are large, medium, or small; eggs that are white, brown, or some other color; eggs from cage-free chickens or ones raised consistent with organic farming standards. When it comes to meat and fish, the options are no less plentiful. Products may be marketed as free range, wild caught, or graded by quality (prime, choice, select, and beyond). The pork products at issue here, too, sometimes come with "antibiotic-free" and "crate-free" labels. USDA, Report to Congress: Livestock Mandatory Reporting 18 (2018), https://www.ams.usda.gov/sites/default/files/media/LMR2018ReporttoCongress.pdf. Much of this product differentiation reflects consumer demand, informed by individual taste, health, or moral considerations.

Informed by similar concerns, States (and their predecessors) have long enacted laws aimed at protecting animal welfare. As far back as 1641, the Massachusetts Bay Colony prohibited "Tirranny or Crueltie towards any bruite Creature." Body of Liberties §92, in A Bibliographical Sketch of the Laws of the Massachusetts Colony 52–53 (1890). Today, Massachusetts prohibits the sale of pork products from breeding pigs (or their offspring) if the breeding pig has been confined "in a manner that prevents [it] from lying down, standing up, fully extending [its] limbs or turning around freely." Mass. Gen. Laws Ann., ch. 129,

App. §§1–3, 1–5 (Cum. Supp. 2023). Nor is that State alone. Florida's Constitution prohibits "any person [from] confin[ing] a pig during pregnancy . . . in such a way that she is prevented from turning around freely." Art. X, §21(a). Arizona, Maine, Michigan, Oregon, and Rhode Island, too, have laws regulating animal confinement practices within their borders. See Ariz. Rev. Stat. Ann. §13–2910.07(A) (2018); Me. Rev. Stat. Ann., Tit. 7, §§4020(1)–(2) (2018); Mich. Comp. Laws §287.746(2) (West Cum. Supp. 2022); Ore. Rev. Stat. §§600.150(1)–(2) (2021); R. I. Gen. Laws §4–1.1–3 (Supp. 2022).

This case involves a challenge to a California law known as Proposition 12. In November 2018 and with the support of about 63% of participating voters, California adopted a ballot initiative that revised the State's existing standards for the in-state sale of eggs and announced new standards for the in-state sale of pork and veal products. App. to Pet. for Cert. 37a–46a. As relevant here, Proposition 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are "confined in a cruel manner." Cal. Health & Safety Code Ann. §25990(b)(2) (West Cum. Supp. 2023). Subject to certain exceptions, the law deems confinement "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely." §25991(e)(1). Since Proposition 12's adoption, the State has begun developing "proposed regulations" that would permit compliance "certification[s]" to be issued "by non-governmental third parties, many used for myriad programs (*e.g.*, 'organic') already." Brief for Intervenor Respondents 30, n. 8.

A spirited debate preceded the vote on Proposition 12. Proponents observed that, in some farming operations, pregnant pigs remain "[e]ncased" for 16 weeks in "fit-to-size" metal crates. M. Scully, A Brief for the Pigs: The Case of *National Pork Producers Council* v. *Ross*, National Review, July 11, 2022, https://www.nationalreview.com/2022/

07/a-brief-for-the-pigs-the-case-of-national-pork-producers-council-v-ross/. These animals may receive their only opportunity for exercise when they are moved to a separate barn to give birth and later returned for another 16 weeks of pregnancy confinement—with the cycle repeating until the pigs are slaughtered. *Ibid.* Proponents hoped that Proposition 12 would go a long way toward eliminating pork sourced in this manner "from the California marketplace." A. Padilla, Cal. Secretary of State, California General Election—Official Voter Information Guide 70 (Nov. 6, 2018) (Voter Guide), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf. Proponents also suggested that the law would have health benefits for consumers because "packing animals in tiny, filthy cages increases the risk of food poisoning." *Ibid.*; see App. to Pet. for Cert. 201a–202a.

Opponents pressed their case in strong terms too. They argued that existing farming practices did a better job of protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination) than Proposition 12 would. *Id.*, at 185a–187a; see also Voter Guide 70–71. They also warned voters that Proposition 12 would require some farmers and processors to incur new costs. *Id.*, at 69. Ones that might be "passed through" to California consumers. *Ibid.*

Shortly after Proposition 12's adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation (collectively, petitioners)—filed this lawsuit on behalf of their members who raise and process pigs. App. to Pet. for Cert. 154a–155a. Petitioners alleged that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce. *Id.*, at 230a–232a.

In support of that legal claim, petitioners pleaded a number of facts. They acknowledged that, in response to consumer demand and the laws of other States, 28% of their

industry has already converted to some form of group housing for pregnant pigs. *Id.*, at 186a. But, petitioners cautioned, even some farmers who already raise group-housed pigs will have to modify their practices if they wish to comply with Proposition 12. *Id.*, at 208a–209a. Much of pork production today is vertically integrated, too, with farmers selling pigs to large processing firms that turn them into different "cuts of meat" and distribute the "different parts . . . all over to completely different end users." *Id.*, at 334a–335a. Revising this system to segregate and trace Proposition 12-compliant pork, petitioners alleged, will require certain processing firms to make substantial new capital investments. *Id.*, at 205a–206a. Ultimately, petitioners estimated that "compliance with Proposition 12 will increase production costs" by "9.2% . . . at the farm level." *Id.*, at 214a. These compliance costs will fall on California and out-of-state producers alike. *Ibid.* But because California imports almost all the pork it consumes, petitioners emphasized, "the majority" of Proposition 12's compliance costs will be initially borne by out-of-state firms. *Ibid.*

After considerable motions practice, the district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. 456 F. Supp. 3d 1201 (SD Cal. 2020). With Judge Ikuta writing for a unanimous panel, the Ninth Circuit affirmed. 6 F. 4th 1021 (2021). Following that ruling, petitioners sought certiorari and we agreed to consider the complaint's legal sufficiency for ourselves. 596 U. S. ___ (2022).

II

The Constitution vests Congress with the power to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting

state laws. See Art. VI, cl. 2. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States. See, *e.g.*, H. R. 272, 116th Cong., 1st Sess., §2 (2019); H. R. 4879, 115th Cong., 2d Sess., §2(a) (2018); H. R. 3599, 115th Cong., 1st Sess., §2(a) (2017); H. R. 687, 114th Cong., 1st Sess., §2(a) (2015).

That has led petitioners to resort to litigation, pinning their hopes on what has come to be called the *dormant* Commerce Clause. Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines*, *Inc.*, 514 U. S. 175, 179 (1995).

This view of the Commerce Clause developed gradually. In *Gibbons* v. *Ogden*, Chief Justice Marshall recognized that the States' constitutionally reserved powers enable them to regulate commerce in their own jurisdictions in ways sure to have "a remote and considerable influence on commerce" in other States. 9 Wheat. 1, 203 (1824). By way of example, he cited "[i]nspection laws, quarantine laws, [and] health laws of every description." *Ibid.* At the same time, however, Chief Justice Marshall saw "great force in th[e] argument" that the Commerce Clause might impliedly bar certain types of state economic regulation. *Id.*, at 209. Decades later, in *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, this Court again recognized that the power vested in Congress to regulate interstate commerce leaves the States substantial leeway to adopt their own commercial codes. 12 How. 299, 317–321 (1852). But once more, the Court hinted that the Constitution may come with some restrictions on what

"may be regulated by the States" even "in the absence of all congressional legislation." *Id.*, at 320.

Eventually, the Court cashed out these warnings, holding that state laws offend the Commerce Clause when they seek to "build up . . . domestic commerce" through "burdens upon the industry and business of other States," regardless of whether Congress has spoken. *Guy* v. *Baltimore*, 100 U. S. 434, 443 (1880). At the same time, though, the Court reiterated that, absent discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens. *Ibid.*

Today, this antidiscrimination principle lies at the "very core" of our dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 581 (1997). In its "modern" cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by . . . 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 337–338 (2008) (quoting *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274 (1988)); see also *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 588 U. S. ___, ___ (2019) (slip op., at 9) (observing that this Court's cases operate principally to "safeguard against state protectionism"); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 373, n. 18 (1994) (describing "a violation of the dormant Commerce Clause" as "discrimination against interstate commerce").

Admittedly, some "Members of the Court have authored vigorous and thoughtful critiques of this interpretation" of the Commerce Clause. *Tennessee Wine*, 588 U. S., at ___ (slip op., at 7) (citing cases). They have not necessarily quarreled with the antidiscrimination principle. But they have suggested that it may be more appropriately housed

elsewhere in the Constitution. Perhaps in the Import–Export Clause, which prohibits States from "lay[ing] any Imposts or Duties on Imports or Exports" without permission from Congress. Art. I, §10, cl. 2; see *Camps Newfound/Owatonna*, 520 U. S., at 621–637 (THOMAS, J., dissenting). Perhaps in the Privileges and Immunities Clause, which entitles "[t]he Citizens of each State" to "all Privileges and Immunities of Citizens in the several States." Art. IV, §2; see *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part). Or perhaps the principle inheres in the very structure of the Constitution, which "was framed upon the theory that the peoples of the several [S]tates must sink or swim together." *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429, 433 (2005) (internal quotation marks omitted).

Whatever one thinks about these critiques, we have no need to engage with any of them to resolve this case. Even under our received dormant Commerce Clause case law, petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners *disavow* any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones. As petitioners put it, "the dormant Commerce Clause . . . bar on protectionist state statutes that discriminate against interstate commerce . . . is not in issue here." Brief for Petitioners 2, n. 2.

III

Having conceded that California's law does not implicate the antidiscrimination principle at the core of this Court's dormant Commerce Clause cases, petitioners are left to pursue two more ambitious theories. In the first, petitioners invoke what they call "extraterritoriality doctrine." *Id.*, at 19. They contend that our dormant Commerce Clause

cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state economic interests. *Ibid.* Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will impose substantial new costs on out-of-state pork producers who wish to sell their products in California.

A

This argument falters out of the gate. Put aside what problems may attend the minor (factual) premise of this argument. Focus just on the major (legal) premise. Petitioners say the "almost *per se*" rule they propose follows ineluctably from three cases—*Healy* v. *Beer Institute*, 491 U. S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986); and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). A close look at those cases, however, reveals nothing like the rule petitioners posit. Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.

Start with *Baldwin*. There, this Court refused to enforce New York laws that barred out-of-state dairy farmers from selling their milk in the State "unless the price paid to" them matched the minimum price New York law guaranteed in-state producers. *Id.*, at 519. In that way, the challenged laws deliberately robbed out-of-state dairy farmers of the opportunity to charge lower prices in New York thanks to whatever "natural competitive advantage" they might have enjoyed over in-state dairy farmers—for example, lower cost structures, more productive farming practices, or "lusher pasturage." D. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1248 (1986). The problem with New York's laws was thus a simple one:

They "plainly discriminate[d]" against out-of-staters by "erecting an economic barrier protecting a major local industry against competition from without the State." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (discussing *Baldwin*). Really, the laws operated like "a tariff or customs duty." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 194 (1994); see *Baldwin*, 294 U. S., at 523 (condemning the challenged laws for seeking to "protec[t]" New York dairy farmers "against competition from without").

Brown-Forman and *Healy* differed from *Baldwin* only in that they involved price-affirmation, rather than price-fixing, statutes. In *Brown-Forman*, New York required liquor distillers to affirm (on a monthly basis) that their in-state prices were no higher than their out-of-state prices. 476 U. S., at 576. Once more, the goal was plain: New York sought to force out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals. *Id.*, at 580. Once more, the law amounted to "simple economic protectionism." *Ibid.* (internal quotation marks omitted).

In *Healy*, a Connecticut law required out-of-state beer merchants to affirm that their in-state prices were no higher than those they charged in neighboring States. 491 U. S., at 328–330. Here, too, protectionism took center stage. As the Court later noted, "[t]he essential vice in laws" like Connecticut's is that they "hoard" commerce "for the benefit of" in-state merchants and discourage consumers from crossing state lines to make their purchases from nearby out-of-state vendors. *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391–392 (1994). Nor did the law in *Healy* even try to cloak its discriminatory purpose: "By its plain terms, the Connecticut affirmation statute applie[d] solely to interstate" firms, and in that way "clearly discriminate[d] against interstate commerce." 491 U. S., at 340–341. The Court also worried that, if the Connecticut law

stood, "each of the border States" could "enac[t] statutes essentially identical to Connecticut's" in retaliation—a result often associated with avowedly protectionist economic policies. *Id.*, at 339–340.

B

Petitioners insist that our reading of these cases misses the forest for the trees. On their account, *Baldwin*, *Brown-Forman*, and *Healy* didn't just find an impermissible discriminatory purpose in the challenged laws; they also suggested an "almost *per se*" rule against state laws with "extraterritorial effects." Brief for Petitioners 19, 23. In *Healy*, petitioners stress, the Court included language criticizing New York's laws for having the "'practical effect'" of "control[ling] commerce 'occurring wholly outside the boundaries of [the] State.'" Brief for Petitioners 21, 25 (quoting 491 U. S., at 336). In *Brown-Forman*, petitioners observe, the Court suggested that whether a state law "'is addressed only to [in-state] sales is irrelevant if the "practical effect" of the law is to control'" out-of-state prices. Brief for Petitioners 21 (quoting 476 U. S., at 583). Petitioners point to similar language in *Baldwin* as well. Brief for Petitioners 37 (quoting 294 U. S., at 523–524).

In our view, however, petitioners read too much into too little. "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979). Instead, we emphasize, our opinions dispose of discrete cases and controversies and they must be read with a careful eye to context. See *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400 (1821) (Marshall, C. J.). And when it comes to *Baldwin*, *Brown-Forman*, and *Healy*, the language petitioners highlight appeared in a particular context and did particular work. Throughout, the Court explained that the challenged statutes had a *specific* impermissible "extraterritorial effect"—they deliberately "prevent[ed out-of-state

firms] from undertaking competitive pricing" or "deprive[d] businesses and consumers in other States of 'whatever competitive advantages they may possess.'" *Healy*, 491 U. S., at 338–339 (quoting *Brown-Forman*, 476 U. S., at 580).

In recognizing this much, we say nothing new. This Court has already described "[t]he rule that was applied in *Baldwin* and *Healy*" as addressing "price control or price affirmation statutes" that tied "the price of . . . in-state products to out-of-state prices." *Pharmaceutical Research and Mfrs. of America* v. *Walsh*, 538 U. S. 644, 669 (2003) (internal quotation marks omitted). Many lower courts have read these decisions in exactly the same way. See, *e.g.*, 6 F. 4th, at 1028–1029; *Association for Accessible Medicines* v. *Frosh*, 887 F. 3d 664, 669 (CA4 2018); *Energy and Environment Legal Inst.* v. *Epel*, 793 F. 3d 1169, 1174 (CA10 2015); *American Beverage Assn.* v. *Snyder*, 735 F. 3d 362, 373 (CA6 2013).

Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. See, *e.g.*, *Banner* v. *United States*, 428 F. 3d 303, 310 (CADC 2005) (*per curiam*). Environmental laws often prove decisive when businesses choose where to manufacture their goods. See *American Beverage Assn.*, 735 F. 3d, at 379 (Sutton, J., concurring). Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides. J. Goldsmith & A. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L. J. 785, 804 (2001). Nor, as we have seen, is this a recent development. Since the founding, States have enacted an "immense mass" of "[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on

commerce outside their borders. *Gibbons*, 9 Wheat., at 203; see also *Cooley*, 12 How., at 317–321. Petitioners' "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results. Can anyone really suppose *Baldwin*, *Brown-Forman*, and *Healy* meant to do so much?

In rejecting petitioners' "almost *per se*" theory we do not mean to trivialize the role territory and sovereign boundaries play in our federal system. Certainly, the Constitution takes great care to provide rules for fixing and changing state borders. Art. IV, §3, cl. 1. Doubtless, too, courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context. In carrying out that task, this Court has recognized the usual "legislative power of a State to act upon persons and property within the limits of its own territory," *Hoyt* v. *Sprague*, 103 U. S. 613, 630 (1881), a feature of our constitutional order that allows "different communities" to live "with different local standards," *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). But, by way of example, no one should think that one State may adopt a law exempting securities held by the residents of a second State from taxation in that second State. *Bonaparte* v. *Tax Court*, 104 U. S. 592, 592–594 (1882). Nor, we have held, should anyone think one State may prosecute the citizen of another State for acts committed "outside [the first State's] jurisdiction" that are not "intended to produce [or that do not] produc[e] detrimental effects within it." *Strassheim* v. *Daily*, 221 U. S. 280, 285 (1911).

To resolve disputes about the reach of one State's power,

this Court has long consulted original and historical understandings of the Constitution's structure and the principles of "sovereignty and comity" it embraces. *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 572 (1996). This Court has invoked as well a number of the Constitution's express provisions—including "the Due Process Clause and the Full Faith and Credit Clause." *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 818 (1985). The antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 347 (2007). We see no reason to change course now.[1]

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[1] Beyond *Baldwin*, *Brown-Forman*, and *Healy*, petitioners point to *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), as authority for the "almost *per se*" rule they propose. Invoking the dormant Commerce Clause, a plurality in that case declined to enforce an Illinois securities law that "*directly* regulate[d] transactions which [took] place . . . wholly outside the State" and involved individuals "having no connection with Illinois." *Id.*, at 641–643 (emphasis added). Some have questioned whether the state law at issue in *Edgar* posed a dormant Commerce Clause question as much as one testing the territorial limits of state authority under the Constitution's horizontal separation of powers. See, *e.g.,* D. Regan, Siamese Essays: (I) *CTS Corp. v. Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1875–1880, 1897–1902 (1987); cf. *Shelby County* v. *Holder*, 570 U. S. 529, 535 (2013) ("[A]ll States enjoy equal sovereignty"). But either way, the *Edgar* plurality opinion does not support the rule petitioners propose. That decision spoke to a law that *directly* regulated out-

IV

Failing in their first theory, petitioners retreat to a second they associate with *Pike* v. *Bruce Church*, *Inc.*, 397 U. S. 137 (1970). Under *Pike*, they say, a court must at least assess "'the burden imposed on interstate commerce'" by a state law and prevent its enforcement if the law's burdens are "'clearly excessive in relation to the putative local benefits.'" Brief for Petitioners 44. Petitioners then rattle off a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests. We see problems with this theory too.

A

In the first place, petitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence. As this Court has previously explained, "no clear line" separates the *Pike* line of cases from our core antidiscrimination precedents. *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298, n. 12 (1997). While many of our dormant Commerce Clause cases have asked whether a law exhibits "'facial discrimination,'" "several cases that have purported to apply [*Pike,*] including *Pike* itself," have "turned in whole or in part on the discriminatory character of the challenged state regulations." *Ibid.* In other words, if some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose.

Pike itself illustrates the point. That case concerned an

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of-state transactions by those with *no* connection to the State. Petitioners do not allege those conditions exist here. To the contrary, they acknowledge that Proposition 12 regulates only products that companies choose to sell "within" California. Cal. Health & Safety Code Ann. §25990(b).

Arizona order requiring cantaloupes grown in state to be processed and packed in state. 397 U. S., at 138–140. The Court held that Arizona's order violated the dormant Commerce Clause. *Id.,* at 146. Even if that order could be fairly characterized as facially neutral, the Court stressed that it "requir[ed] business operations to be performed in [state] that could more efficiently be performed elsewhere." *Id.*, at 145. The "practical effect[s]" of the order in operation thus revealed a discriminatory purpose—an effort to insulate in-state processing and packaging businesses from out-of-state competition. *Id.*, at 140, 145.

Other cases in the *Pike* line underscore the same message. In *Minnesota* v. *Clover Leaf Creamery Co.*, the Court found no impermissible burden on interstate commerce because, looking to the law's effects, "there [was] no reason to suspect that the gainers" would be in-state firms or that "the losers [would be] out-of-state firms." 449 U. S. 456, 473 (1981); see also *id.*, at 474–477, and n. 2 (Powell, J., concurring in part and dissenting in part) (asking whether the "actual purpose," if not the "'avowed purpose,'" of the law was discrimination). Similarly, in *Exxon Corp.* v. *Governor of Maryland*, the Court keyed to the fact that the effect of the challenged law was only to shift business from one set of out-of-state suppliers to another. 437 U. S. 117, 127 (1978). And in *United Haulers*, a plurality upheld the challenged law because it could not "detect" any discrimination in favor of in-state businesses or against out-of-state competitors. 550 U. S., at 346. In each of these cases and many more, the presence or absence of discrimination in practice proved decisive.

Once again, we say nothing new here. Some time ago, *Tracy* identified the congruity between our core dormant Commerce Clause precedents and the *Pike* line. 519 U. S., at 298, n. 12. Many lower courts have done the same. See, *e.g.*, *Rosenblatt* v. *Santa Monica*, 940 F. 3d 439, 452 (CA9 2019); *Park Pet Shop, Inc.* v. *Chicago*, 872 F. 3d 495, 501

(CA7 2017); *Amanda Acquisition Corp.* v. *Universal Foods Corp.*, 877 F. 2d 496, 505 (CA7 1989). So have many scholars. See, *e.g.*, R. Fallon, The Dynamic Constitution 311 (2d ed. 2013) (observing that *Pike* serves to "'smoke out' a hidden" protectionism); B. Friedman & D. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1927 (2011); Regan, 84 Mich. L. Rev., at 1286.

Nor does any of this help petitioners in this case. They not only disavow any claim that Proposition 12 discriminates on its face. They nowhere suggest that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," *Davis*, 553 U. S., at 353, and while "a small number of our cases have invalidated state laws . . . that appear to have been genuinely nondiscriminatory," *Tracy*, 519 U. S., at 298, n. 12,[2] petitioners' claim falls well outside

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[2]Most notably, *Tracy* referred to, and petitioners briefly allude to, a line of cases that originated before *Pike* in which this Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like. See, *e.g.*, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 523–530 (1959) (concerning a state law specifying certain mud flaps for trucks and trailers); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 763–782 (1945) (addressing a state law regarding the length of trains). Petitioners claim these cases support something like the extraterritoriality or balancing rules they propose. But at least some decisions in this line might be viewed as condemning state laws that "although neutral on their face . . . were enacted at the instance of, and primarily benefit," in-state interests. *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 447 (1978); see also B. Friedman & D. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1927 (2011). In any event, this Court "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods."

Pike's heartland. That is not an auspicious start.

B

Matters do not improve from there. While *Pike* has traditionally served as another way to test for purposeful discrimination against out-of-state economic interests, and while some of our cases associated with that line have expressed special concern with certain state regulation of the instrumentalities of interstate transportation, see n. 2, *supra*, petitioners would have us retool *Pike* for a much more ambitious project. They urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits."

That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of free-wheeling power is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." *United Haulers*, 550 U. S., at 343. While "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause," we have long refused pleas like petitioners' "to reclaim that ground" in the name of the dormant Commerce Clause. *Id.*, at 347.

Not only is the task petitioners propose one the Commerce Clause does not authorize judges to undertake. This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind

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Exxon Corp. v. *Governor of Maryland*, 437 U. S. 117, 128 (1978) (emphasis added). Nothing like that exists here. We do not face a law that impedes the flow of commerce. Pigs are not trucks or trains.

that would be necessary . . . to satisfy [the] *Pike*" test as petitioners conceive it. *Davis*, 553 U. S., at 353.

Our case illustrates the problem. On the "cost" side of the ledger, petitioners allege they will face increased production expenses because of Proposition 12. On the "benefits" side, petitioners acknowledge that Californians voted for Proposition 12 to vindicate a variety of interests, many noneconomic. See App. to Pet. for Cert. 192a (alleging in their complaint that "Proposition 12's requirements were driven by [a] conception of what qualifies as 'cruel' animal housing" and by the State's concern for the "'health and safety of California consumers'"). How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.* v. *Midwesco Enterprises*, *Inc.*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment).

Faced with this problem, petitioners reply that we should heavily discount the benefits of Proposition 12. They say that California has little interest in protecting the welfare of animals raised elsewhere and the law's health benefits are overblown. But along the way, petitioners offer notable concessions too. They acknowledge that States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor). See Tr. of Oral Arg. 51 ("[A] state is perfectly entitled to enforce its morals in state"); see also *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 653 (1896) (holding that States may enact laws to "promote . . . public morals"). And, at least arguably, Proposition 12 works in just this way—banning from the State all whole pork products derived from practices its voters consider "cruel." Petitioners

also concede that States may often adopt laws addressing even "imperfectly understood" health risks associated with goods sold within their borders. Reply Brief 13. And, again, no one disputes that some who voted for Proposition 12 may have done so with just that sort of goal in mind. See, *e.g.*, USDA Proposed Rule To Amend Organic Livestock and Poultry Production Requirements, 87 Fed. Reg. 48565 (2022) (affording animals more space "may result in healthier livestock products for human consumption").

So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.

More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 279 (1978), and "try novel social and economic experiments" if they wish, *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in "Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting)—or, for that matter, Mr. Wilson Pond's Pork Production Systems, see W. Pond, J. Maner, & D. Harris, Pork Production Systems: Efficient Use of Swine and Feed Resources (1991).

If, as petitioners insist, California's law really does

threaten a "massive" disruption of the pork industry, see Brief for Petitioners 2, 4, 19—if pig husbandry really does "'imperatively demand'" a single uniform nationwide rule, *id.*, at 27—they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make. But so far, Congress has declined the producers' sustained entreaties for new legislation. See Part I, *supra* (citing failed efforts). And with that history in mind, it is hard not to wonder whether petitioners have ventured here only because winning a majority of a handful of judges may seem easier than marshaling a majority of elected representatives across the street.

C

Even as petitioners conceive *Pike*, they face a problem. As they read it, *Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes "substantial burdens" on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other. Brief for Petitioners 44. And, tellingly, the complaint before us fails to clear even that bar.

To appreciate petitioners' problem, compare our case to *Exxon*. That case involved a Maryland law prohibiting petroleum producers from operating retail gas stations in the State. 437 U. S., at 119–121, and n. 1. Because Maryland had no in-state petroleum producers, Exxon argued, the law's "divestiture requirements" fell "solely on interstate companies" and threatened to force some to "withdraw entirely from the Maryland market" or incur new costs to serve that market. *Id.*, at 125–127. All this, the company said, amounted to a violation of the dormant Commerce

Clause.

This Court found the allegations in Exxon's complaint insufficient as a matter of law to demonstrate a substantial burden on interstate commerce. Without question, Maryland's law favored one business structure (independent gas station retailers) over another (vertically integrated production and retail firms). *Ibid.* The law also promised to increase retail gas prices for Maryland consumers, allowing some to question its "wisdom." *Id.*, at 124, 128. But, the Court found, Exxon failed to plead facts leading, "either logically or as a practical matter, to [the] conclusion that the State [was] discriminating against interstate commerce." *Id.*, at 125. The company failed to do so because, on its face, Maryland's law welcomed competition from interstate retail gas station chains that did not produce petroleum. *Id.*, at 125–126. And as far as anyone could tell, the law's "practical effect" wasn't to protect in-state producers; it was to shift market share from one set of out-of-state firms (vertically integrated businesses) to another (retail gas station firms). *Id.*, at 125, 127. This Court squarely rejected the view that this predicted "'change [in] the market structure'" would "impermissibly burde[n] interstate commerce." *Id.,* at 127. If the dormant Commerce Clause protects the "interstate market . . . from prohibitive or burdensome regulations," the Court held, it does not protect "particular . . . firms" or "particular structure[s] or methods of operation." *Id.,* at 127–128.

If Maryland's law did not impose a sufficient burden on interstate commerce to warrant further scrutiny, the same must be said for Proposition 12. In *Exxon*, vertically integrated businesses faced a choice: They could divest their production capacities or withdraw from the local retail market. Here, farmers and vertically integrated processors have at least as much choice: They may provide all their pigs the space the law requires; they may segregate their operations to ensure pork products entering California

meet its standards; or they may withdraw from that State's market. In *Exxon*, the law posed a choice *only* for out-of-state firms. Here, the law presents a choice primarily—but not exclusively—for out-of-state businesses; California does have some pork producers affected by Proposition 12. See App. to Pet. for Cert. 205a. In *Exxon*, as far as anyone could tell, the law threatened only to shift market share from one set of out-of-state firms to another. Here, the pleadings allow for the same possibility—that California market share previously enjoyed by one group of profit-seeking, out-of-state businesses (farmers who stringently confine pigs and processors who decline to segregate their products) will be replaced by another (those who raise and trace Proposition 12-compliant pork). In both cases, some may question the "wisdom" of a law that threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices. 437 U. S., at 128. But the dormant Commerce Clause does not protect a "particular structure or metho[d] of operation." *Id.*, at 127. That goes for pigs no less than gas stations.

Think of it another way. Petitioners must plead facts "plausibly" suggesting a substantial harm to interstate commerce; facts that render that outcome a "speculative" possibility are not enough. *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 555, 557 (2007). In an effort to meet this standard, petitioners allege facts suggesting that certain out-of-state farmers and processing firms will find it difficult to comply with Proposition 12 and may choose not to do so. See App. to Pet. for Cert. 198a, 208a, 313a. But the complaint also acknowledges that many producers have already converted to some form of group housing, even if they have not all yet met Proposition 12's standards. *Id.*, at 186a. From these facts, the complaint plausibly alleges that *some* out-of-state firms may face difficulty complying (or may choose not to comply) with Proposition 12. But from all anyone can tell, *other* out-of-state competitors seeking to

enhance their own profits may choose to modify their existing operations or create new ones to fill the void.[3]

Of course, as the complaint alleges, a shift from one set of production methods to another promises some costs. *Id.*, at 214a. But the complaint concedes that complying producers will be able to "pas[s] along" at least "some" of their increased costs to consumers. *Id.,* at 178a. And no one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause precedents. See *United Haulers*, 550 U. S., at 345 (holding that the dormant Commerce Clause is not offended by higher prices "likely to fall upon the very people who voted for the [challenged] la[w]"). Nor does the complaint allege facts plausibly suggesting that out-of-state consumers indifferent to pork production methods will have to pick up the tab (let alone explain how petitioners might sue to vindicate their interests). Instead, at least one declaration incorporated by reference into the complaint avers that some out-of-state consumers will "not value these changes and will not pay an increased price."

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[3]Though it is unnecessary to adorn the point, we note that a number of smaller out-of-state pork producers have filed an *amicus* brief in this Court hailing the "opportunities" Proposition 12 affords them to compete with vertically integrated firms with "'concentrated market power'" that are wedded to their existing processing practices. Brief for Small and Independent Farming Businesses et al. as *Amici Curiae* 1, 12, 19–20. Other *amici* have noted that even some large vertically integrated processing firms have already begun to modify (or else have indicated their intention to modify) their operations to comply with Proposition 12. See Brief for Perdue Premium Meat Co., Inc., as *Amicus Curiae* 3–7; see also Brief for Economic Research Organizations as *Amici Curiae* 16–17 (reciting public statements from Hormel, Smithfield, and Tyson). Another large processing firm, Cargill, has boasted that, "'[b]efore we sold our pork business in 2015, we led the industry in removing gestation stalls to house pregnant sows.'" *Id.*, at 16. Petitioner National Pork Producers Council lists Cargill as an "allied industry compan[y]." National Pork Producers Council, Pork Alliance Program, https://nppc.org/get-involved/join-the-pork-alliance/.

App. to Pet. for Cert. 335a; see also Brief for Agricultural and Resource Economics Professors as *Amici Curiae* 15, 23 (suggesting negligible effect on out-of-state prices for consumers not interested in Proposition 12-compliant pork). Further experience may yield further facts. But the facts pleaded in this complaint merely allege harm to some producers' favored "methods of operation." *Exxon*, 437 U. S., at 127. A substantial harm to interstate commerce remains nothing more than a speculative possibility. *Ibid.*

D

THE CHIEF JUSTICE's concurrence in part and dissent in part (call it "the lead dissent") offers a contrasting view. Correctly, it begins by rejecting petitioners' "almost *per se*" rule against laws with extraterritorial effects. *Post*, at 1. And correctly, it disapproves reading *Pike* to endorse a "freewheeling judicial weighing of benefits and burdens." *Post*, at 2. But for all it gets right, in other respects it goes astray. In places, the lead dissent seems to advance a reading of *Pike* that would permit judges to enjoin the enforcement of any state law restricting the sale of an ordinary consumer good if the law threatens an "'excessive'" "har[m] to the interstate market" for that good. *Post*, at 4–9. It is an approach that would go much further than our precedents permit. So much further, in fact, that it isn't clear what separates the lead dissent's approach from others it purports to reject.

Consider an example. Today, many States prohibit the sale of horsemeat for human consumption. See *Cavel Int'l, Inc.* v. *Madigan*, 500 F. 3d 551, 552–555 (CA7 2007). But these prohibitions "har[m] the interstate market" for horsemeat by denying outlets for its sale. Not only that, they distort the market for animal products more generally by pressuring horsemeat manufacturers to transition to different products, ones they can lawfully sell nationwide. Under the lead dissent's test, all it would take is one complaint

from an unhappy out-of-state producer and—presto—the Constitution would protect the sale of horsemeat. Just find a judge anywhere in the country who considers the burden to producers "excessive." *Post*, at 9. The same would go for all manner of consumer products currently banned by some States but not by others—goods ranging from fireworks, see, *e.g.,* Mass. Gen. Laws Ann., ch. 148, §39 (2020), to single-use plastic grocery bags, see, *e.g.,* Me. Rev. Stat. Ann., Tit. 38, §§1611(2)(A), (4) (2022). Rather than respecting federalism, a rule like that would require any consumer good available for sale in one State to be made available in every State. In the process, it would essentially replicate under *Pike's* banner petitioners' "almost *per se*" rule against state laws with extraterritorial effects.

Seeking a way around that problem, the lead dissent stumbles into another. It suggests that the burdens of Proposition 12 are particularly "substantial" because California's law "carr[ies] implications for producers as far flung as Indiana and North Carolina." *Post*, at 7–10. Why is that so? JUSTICE KAVANAUGH's solo concurrence in part and dissent in part says the quiet part aloud: California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate. *Post,* at 4–5. But if that makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets. So much for the Constitution's "fundamental principle of *equal* sovereignty among the States." *Shelby County* v. *Holder*, 570 U. S. 529, 544 (2013) (internal quotation marks omitted).

The most striking feature of both dissents, however, may be another one. They suggest that, in assessing a state law's burdens under *Pike*, courts should take into account not just economic harms but also all manner of "derivative harms" to out-of-state interests. *Post*, at 5–6 (opinion of

ROBERTS, C. J.). These include social costs that are "difficult to quantify" such as (in this case) costs to the "national pig population," "animal husbandry" traditions, and (again) "industry practice." *Post,* at 6–9; see also *post,* at 3–5 (opinion of KAVANAUGH, J.). But not even petitioners read *Pike* so boldly. While petitioners argue that Proposition 12 does not benefit pigs (as California has asserted), they have not asked this Court (or any court) to treat putative harms to out-of-state animal welfare or other noneconomic interests as freestanding harms cognizable under the dormant Commerce Clause. Nor could they have proceeded otherwise. Our decisions have authorized claims alleging "burdens on commerce." *Davis*, 553 U. S., at 353. They do not provide judges "a roving license" to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise. *United Haulers*, 550 U. S., at 343.[4]

V

Before the Constitution's passage, Rhode Island imposed special taxes on imported "*New-England* Rum"; Connecticut levied duties on goods "brought into th[e] State, by Land

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[4] Both dissents seek to characterize today's decision as "fractured" in an effort to advance their own overbroad readings of *Pike* and layer their own gloss on opinions they do not join. *Post*, at 1, 8 (opinion of KAVANAUGH, J.); see also *post* at 2–4, 8–10 (opinion of ROBERTS, C. J.). But the dissents are just that—dissents. Their glosses do not speak for the Court. Today, the Court unanimously disavows petitioners' "almost *per se*" rule against laws with extraterritorial effects. See Parts II and III, *supra*. When it comes to *Pike*, a majority agrees that heartland *Pike* cases seek to smoke out purposeful discrimination in state laws (as illuminated by those laws' practical effects) or seek to protect the instrumentalities of interstate transportation. See Part IV–A, *supra.* A majority also rejects any effort to expand *Pike*'s domain to cover cases like this one, some of us for reasons found in Part IV–B, others of us for reasons discussed in Part IV–C. Today's decision depends equally on the analysis found in both of these sections; without either, there is no explaining the Court's judgment affirming the decision below. A majority also subscribes to what follows in Part V.

or Water, from any of the United States of *America*"; and Virginia taxed "vessels coming within th[e S]tate from any of the United States." An Act Laying Certain Duties of Excise Upon Certain Articles, Feb. 24, 1783 R. I. Acts and Resolves 45; An Act for Levying and Collecting a Duty on Certain Articles of Goods, Wares and Merchandize Imported into this State, by Land or Water, 1784 Conn. Acts and Laws 271; An Act to Amend the Act for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue (May 6, 1782), in 11 Statues at Large, Laws of Virginia 70 (W. Hening ed. 1823).

Whether moved by this experience or merely worried that more States might join the bandwagon, the Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. See U. S. Const., Art. I, §8, cl. 3; Art. IV, §2; see also Regan, 84 Mich. L. Rev., at 1114, n. 55; A. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 448–449 (1941). In the years since, this Court has inferred an additional judicially enforceable rule against certain, especially discriminatory, state laws adopted even against the backdrop of congressional silence. But "'extreme caution'" is warranted before a court deploys this implied authority. *Tracy*, 519 U. S., at 310 (quoting *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 302 (1944) (Black, J., concurring)). Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of "extreme delicacy," something courts should do only "where the infraction is clear." *Conway* v. *Taylor's Executor*, 1 Black 603, 634 (1862).

Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production. And they disavow any reliance on

this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation. Instead, petitioners invite us to endorse two new theories of implied judicial power. They would have us recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though this Court has recognized since *Gibbons* that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case before us, we decline both of petitioners' incautious invitations.

The judgment of the Ninth Circuit is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 21–468

NATIONAL PORK PRODUCERS COUNCIL, ET AL., PETITIONERS *v.* KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.

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

[May 11, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, concurring in part.

I join all but Parts IV–B and IV–D of JUSTICE GORSUCH's opinion. Given the fractured nature of Part IV, I write separately to clarify my understanding of why petitioners' *Pike* claim fails. In short, I vote to affirm the judgment because petitioners fail to allege a substantial burden on interstate commerce as required by *Pike*, not because of any fundamental reworking of that doctrine.

* * *

In *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the Court distilled a general principle from its prior cases. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*, at 142. Further, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.*

As the Court's opinion here explains, *Pike*'s balancing and tailoring principles are most frequently deployed to detect the presence or absence of latent economic protectionism. See *ante*, at 15–18. That is no surprise. Warding off state discrimination against interstate commerce is at the heart of our dormant Commerce Clause jurisprudence. See *ante*, at 7, 9–11, 15–16.

As the Court's opinion also acknowledges, however, the Court has "generally le[ft] the courtroom door open" to claims premised on "even nondiscriminatory burdens." *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 353 (2008); see *ante*, at 17. Indeed, "a small number" of this Court's cases in the *Pike* line "have invalidated state laws . . . that appear to have been genuinely nondiscriminatory" in nature. *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298, n. 12 (1997); see *ante*, at 17. Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on "trucks, trains, and the like." *Ibid.*, n. 2. Yet, there is at least one exception to that tradition. See *Edgar* v. *MITE Corp.*, 457 U. S. 624, 643–646 (1982) (invalidating a nondiscriminatory state law that regulated tender offers to shareholders).

Pike claims that do not allege discrimination or a burden on an artery of commerce are further from *Pike*'s core. As THE CHIEF JUSTICE recognizes, however, the Court today does not shut the door on all such *Pike* claims. See *ante*, at 17–18, and n. 2; *post*, at 2–3. Thus, petitioners' failure to allege discrimination or an impact on the instrumentalities of commerce does not doom their *Pike* claim.

Nor does a majority of the Court endorse the view that judges are not up to the task that *Pike* prescribes. JUSTICE GORSUCH, for a plurality, concludes that petitioners' *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits. See *ante*, at 18–21. I do not join that portion of JUSTICE GORSUCH's

opinion. I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution. See *ante*, at 28. Yet, I agree with THE CHIEF JUSTICE that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency. See *post*, at 3–4. The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble JUSTICE GORSUCH.

In my view, and as JUSTICE GORSUCH concludes for a separate plurality of the Court, petitioners' *Pike* claim fails for a much narrower reason. Reading petitioners' allegations in light of the Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), the complaint fails to allege a substantial burden on interstate commerce. See *ante*, at 21–25. Alleging a substantial burden on interstate commerce is a threshold requirement that plaintiffs must satisfy before courts need even engage in *Pike*'s balancing and tailoring analyses. Because petitioners have not done so, they fail to state a *Pike* claim.

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

[May 11, 2023]

JUSTICE BARRETT, concurring in part.

A state law that burdens interstate commerce in clear excess of its putative local benefits flunks *Pike* balancing. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). In most cases, *Pike*'s "general rule" reflects a commonsense principle: Where there's smoke, there's fire. *Ibid.* Under our dormant Commerce Clause jurisprudence, one State may not discriminate against another's producers or consumers. A law whose burdens fall incommensurately and inexplicably on out-of-state interests may be doing just that.

But to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable. See *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 354–355 (2008). I agree with JUSTICE GORSUCH that the benefits and burdens of Proposition 12 are incommensurable. California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians. *Ante*, at 18–21; *Davis*, 553 U. S., at 360 (Scalia, J., concurring in part). None

of our *Pike* precedents requires us to attempt such a feat.

That said, I disagree with my colleagues who would hold that petitioners have failed to allege a substantial burden on interstate commerce. *Ante*, at 21–25; *ante*, at 3 (SOTOMAYOR, J., concurring in part). The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. See *post*, at 6–7 (ROBERTS, C. J., concurring in part and dissenting in part). For this reason, I do not join Part IV–C of JUSTICE GORSUCH's opinion. If the burdens and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim.

SUPREME COURT OF THE UNITED STATES

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

[May 11, 2023]

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO, JUSTICE KAVANAUGH, and JUSTICE JACKSON join, concurring in part and dissenting in part.

I agree with the Court's view in its thoughtful opinion that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism. See *ante*, at 8–11. I also agree with the Court's conclusion that our precedent does not support a *per se* rule against state laws with "extraterritorial" effects. See *ante*, at 11–14. But I cannot agree with the approach adopted by some of my colleagues to analyzing petitioners' claim based on *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). See *ante*, at 15–27 (opinion of GORSUCH, J.); *ante*, at 3 (SOTOMAYOR, J. concurring in part); *ante*, at 1–2 (BARRETT, J., concurring in part).

Pike provides that nondiscriminatory state regulations are valid under the Commerce Clause "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U. S., at 142. A majority of the Court thinks that petitioners' complaint does not make for "an auspicious start" on that claim. *Ante*, at 18. In my view, that is through no fault of their own.

The Ninth Circuit misapplied our existing *Pike* jurisprudence in evaluating petitioners' allegations. I would find that petitioners' have plausibly alleged a substantial burden against interstate commerce, and would therefore vacate the judgment and remand the case for the court below to decide whether petitioners have stated a claim under *Pike*.

I

The Ninth Circuit stated that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction." 6 F. 4th 1021, 1033 (2021). Today's majority does not pull the plug. For good reason: Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be "free private trade in the national marketplace." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 287 (1997) (quoting *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 437 (1980)); see also *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977) (*Pike* protects "a national 'common market'"). "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949).

The majority's discussion of our *Pike* jurisprudence highlights two types of cases: those involving discriminatory state laws and those implicating the "instrumentalities of interstate transportation." *Ante*, at 17, n. 2. But *Pike* has not been so narrowly typecast. As a majority of the Court acknowledges, "we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a

showing that those burdens clearly outweigh the benefits of a state or local practice." *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 353 (2008); see also *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 346 (2007) (plurality opinion) (*Pike* applies to "a nondiscriminatory statute like this one"). Nor have our cases applied *Pike* only where a State regulates the instrumentalities of transportation. *Pike* itself addressed an Arizona law regulating cantaloupe packaging. See 397 U. S., at 138. And we have since applied *Pike* to invalidate nondiscriminatory state laws that do not concern transportation. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 643–646 (1982). As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation. See *ante*, at 2 (opinion of SOTOMAYOR, J.); *post*, at 1–2 (KAVANAUGH, J., concurring in part and dissenting in part).

Speaking for three Members of the Court, JUSTICE GORSUCH objects that balancing competing interests under *Pike* is simply an impossible judicial task. See *ante*, at 18–21. I certainly appreciate the concern, see *United Haulers*, 550 U. S., at 343, 347, but sometimes there is no avoiding the need to weigh seemingly incommensurable values. See, *e.g.*, *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 162 (1939) (weighing "the purpose to keep the streets clean and of good appearance" against the "the constitutional protection of the freedom of speech and press"); *Winston* v. *Lee*, 470 U. S. 753, 760 (1985) ("The reasonableness" under the Fourth Amendment "of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure."); *Addington* v. *Texas*, 441 U. S. 418, 425 (1979) ("In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the

state's interest in committing the emotionally disturbed under a particular standard of proof."). Here too, a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*. See *ante*, at 2–3 (opinion of SOTOMAYOR, J.); *post*, at 1–2 (opinion of KAVANAUGH, J.).

II

This case comes before us on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, and in my view the court below erred in how it analyzed petitioners' allegations under *Pike*. The Ninth Circuit reasoned that "[f]or dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." 6 F. 4th, at 1032. The panel then dismissed petitioners' claim under *Pike* by concluding that the complaint alleged only an increase in compliance costs due to Proposition 12. 6 F. 4th, at 1033. But, as I read it, the complaint alleges more than simply an increase in "compliance costs," unless such costs are defined to include all the fallout from a challenged regulatory regime. Petitioners identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce. I would therefore find that petitioners have stated a substantial burden against interstate commerce, vacate the judgment below, and remand this case for the Ninth Circuit to consider whether petitioners have plausibly claimed that the burden alleged outweighs any "putative local interests" under *Pike*. 397 U. S., at 142.

A

Our precedents have long distinguished the costs of complying with a given state regulation from other economic harms to the interstate market. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959), illustrates the point. In

that case, we considered an Illinois law requiring that trucks and trailers use a particular kind of mudguard. The "cost of installing" the mudguards was "$30 or more per vehicle," amounting to "$4,500 to $45,840" for the trucking companies at issue. *Id.*, at 525. But beyond documenting those direct costs of complying with the Illinois law, we also noted other derivative harms flowing from the regulation. The mudguard rule threatened "significant delay in an operation where prompt movement may be of the essence." *Id.*, at 527. Also, changing mudguard types when crossing into Illinois from a State with a different standard would require "two to four hours of labor" and could prove "exceedingly dangerous." *Ibid.* We concluded that "[c]ost taken into consideration" together with those "*other* factors" could constitute a burden on interstate commerce. *Id.*, at 526 (emphasis added). Subsequent cases followed *Bibb*'s logic by analyzing economic impact to the interstate market separately from immediate costs of compliance. See *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662, 674 (1981) (plurality opinion) (separating "increas[ed] . . . costs" from the fact that the challenged "law may aggravate . . . the problem of highway accidents" in describing the burden on interstate commerce); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 445, and n. 21 (1978) (analyzing an increase in "cost" independently of other consequential effects, such as "slow[ing] the movement of goods").

Pike itself did not conflate harms to the interstate market with compliance costs. In *Pike*, we analyzed an Arizona law requiring that cantaloupes grown in the State be packed prior to shipment across state lines. 397 U. S., at 138. We noted repeatedly that the regulation would require the appellee to construct an unneeded packing facility in Arizona at a cost of $200,000. *Id.*, at 140, 144, 145. But we considered that cost together with the "nature" of a regulation "requiring business operations to be performed in the home

State." *Id.*, at 145. The Court in *Pike* found both compliance costs and consequential market harms cognizable in determining whether the law at issue impermissibly burdened interstate commerce.

The derivative harms we have long considered in this context are in no sense "noneconomic." *Ante*, at 27 (opinion of GORSUCH, J.). Regulations that "aggravate . . . the problem of highway accidents," *Kassel*, 450 U. S., at 674, or "slow the movement of goods," *Rice*, 434 U. S., at 445, impose economic burdens, even if those burdens may be difficult to quantify and may not arise immediately. Our cases provide no license to chalk up *every* economic harm—no matter how derivative—to a mere cost of compliance.

Nor can the foregoing cases be dismissed because they either involved the instrumentalities of transportation or a state law born of discriminatory purpose. As discussed above, we have applied *Pike* to state laws that neither concerned transportation nor discriminated against commerce. See *Edgar*, 457 U. S., at 643–646. The *Pike* balance may well come out differently when it comes to interstate transportation, an area presenting a strong interest in "national uniformity." *Tracy*, 519 U. S., at 298, n. 12. But the error below does not concern a particular balancing of interests under *Pike*; it concerns how to analyze the burden on interstate commerce in the first place.

B

As in our prior cases, petitioners here allege both compliance costs and consequential harms to the interstate market. With respect to compliance costs, petitioners allege that Proposition 12 demands significant capital expenditures for farmers who wish to sell into California. "Producers . . . will need to spend" between $290 and $348 million "of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes." App. to Pet. for Cert. 214a. All told, compliance

will "increase production costs per pig by over $13 dollars per head, a 9.2% cost increase at the farm level." *Ibid.*

Separate and apart from those costs, petitioners assert harms to the interstate market itself. The complaint alleges that the interstate pork market is so interconnected that producers will be "forced to comply" with Proposition 12, "even though some or even most of the cuts from a hog are sold in other States." *Id.*, at 213a; *id.*, at 239a. Proposition 12 may not expressly regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California. The panel below acknowledged petitioners' allegation that, "[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements." 6 F. 4th, at 1028.

We have found such sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*. In *Edgar*, we assessed the constitutionality of an Illinois corporate takeover statute that authorized the secretary of state to scrutinize tender offers, even for transactions occurring wholly beyond the State's borders. As the majority explains, only a plurality of the Court in *Edgar* concluded that the Illinois statute constituted a *per se* violation of the dormant Commerce Clause. See *ante*, at 14, n. 1. But a majority in *Edgar* analyzed those same extraterritorial effects under our approach in *Pike*, concluding that the "nationwide reach" of Illinois's law constituted an "obvious burden . . . on interstate commerce." 457 U. S., at 643. The Ninth Circuit did not consider whether, by effectively requiring compliance by farmers who do not even wish to ship their product into California, Proposition 12 has a "nationwide reach" similar to the regulation at issue in *Edgar*.

The complaint further alleges other harms that cannot

fairly be characterized as mere costs of compliance but that the panel below seems to have treated as such. Because of Proposition 12's square footage requirements, farms will be compelled to adopt group housing, which is likely to produce "worse health outcome[s]" and "sprea[d] pathogens and disease." App. to Pet. for Cert. 229a. Such housing changes will also "upen[d] generations of animal husbandry, training, and knowledge." *Id.*, at 211a. And "[b]y preventing the use of breeding stalls during the 30 to 40 day period between weaning and confirmation of pregnancy, Proposition 12 puts sows at greater risk of injury and stress during the vulnerable stages of breeding and gestation." *Id.*, at 223a. These consequential threats to animal welfare and industry practice are difficult to quantify and are not susceptible to categorization as mere costs of compliance.

Writing for a plurality of the Court, JUSTICE GORSUCH relies on this Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), to conclude that petitioners' complaint does not plead a substantial burden against interstate commerce. See *ante*, at 21–25; see also *ante*, at 3 (opinion of SOTOMAYOR, J.) (also relying on *Exxon*). In *Exxon*, petroleum producers sued after Maryland prohibited their sale of retail gas within the State. 437 U. S., at 119. The Court concluded that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business[es] to shift from one interstate supplier to another." *Id.*, at 127. Fair enough. But the complaint before us pleads facts going far beyond the allegations in *Exxon*. The producers in *Exxon* operated within Maryland and wished to continue doing so. By contrast, petitioners here allege that Proposition 12 will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices. In my view, these allegations amount to economic harms against "the interstate market"—not just "particular

interstate firms," *ibid.*—such that they constitute a substantial burden under *Pike*. At the very least, the harms alleged by petitioners are categorically different from the cost of installing $30 mudguards, *Bibb*, 359 U. S., at 525, or of constructing a $200,000 cantaloupe packing facility, *Pike*, 397 U. S., at 140.

JUSTICE GORSUCH asks what separates my approach from the *per se* extraterritoriality rule I reject. *Ante*, at 25. It is the difference between mere cross-border effects and broad impact requiring, in this case, compliance even by producers who do not wish to sell in the regulated market. And even then, we only invalidate a regulation if that burden proves "clearly excessive in relation to the putative local benefits." *Pike*, 397 U. S., at 142. Adhering to that established approach in this case would not convert the inquiry into a *per se* rule against extraterritorial regulation.

Rather than analyze petitioners' alleged harms to the interstate market on their own terms, the Ninth Circuit reasoned that the "crux" of the complaint is "the cost of compliance with Proposition 12." 6 F. 4th, at 1033. Such "cost increases," the panel below concluded, "do not qualify as a substantial burden to interstate commerce." *Ibid.* Those statements ignore the industry-wide harms discussed above.

The panel below itself recognized that petitioners "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide." *Ibid.* Yet it nevertheless reduced the myriad harms detailed by petitioners in their complaint to so-called "compliance costs" and wrote them off as independently insufficient to state a claim under *Pike*. Our precedents do not support such an approach. A majority of the Court agrees that—were it possible to balance benefits and burdens in this context—petitioners have plausibly stated a substantial burden against interstate

commerce. See *ante*, at 2 (opinion of BARRETT, J.) ("The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California.").

* * *

In my view, petitioners plausibly allege a substantial burden against interstate commerce. I would therefore remand the case for the Ninth Circuit to decide whether it is plausible that the "burden . . . is clearly excessive in relation to the putative local benefits." *Pike*, 397 U. S., at 142.

SUPREME COURT OF THE UNITED STATES

No. 21–468

NATIONAL PORK PRODUCERS COUNCIL, ET AL., PETITIONERS *v.* KAREN ROSS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE, ET AL.

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

[May 11, 2023]

JUSTICE KAVANAUGH, concurring in part and dissenting in part.

In today's fractured decision, six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations. *Ante,* at 1 (SOTOMAYOR, J., joined by KAGAN, J., concurring in part); *ante,* at 2–3 (ROBERTS, C. J., joined by ALITO, KAVANAUGH, and JACKSON, JJ., concurring in part and dissenting in part); see *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). Although Parts IV–B and IV–D of JUSTICE GORSUCH's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent, as I understand it.

But Part IV–C of JUSTICE GORSUCH's opinion is controlling precedent for purposes of the Court's judgment as to the plaintiffs' *Pike* claim. There, a four-Justice plurality of the Court applies *Pike* and rejects the plaintiffs' dormant Commerce Clause challenge under *Pike*. The plurality reasons that the plaintiffs' complaint did not sufficiently allege that the California law at issue here imposed a substantial burden on interstate commerce

under *Pike*. I respectfully disagree with that conclusion for the reasons well stated in THE CHIEF JUSTICE's separate opinion.[1]

I add this opinion to point out that state economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

I

In the 1780s, the Framers in Philadelphia and the people of the United States discarded the Articles of Confederation and adopted a new Constitution. They did so in order to, among other things, create a national economic market and overcome state restrictions on free trade—and thereby promote the general welfare. By the summer of 1787, when the delegates met in Philadelphia, state interference with interstate commerce was cutting off the lifeblood of the Nation. See *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 588 U. S. ___, ___ (2019) (slip op., at 7). For the delegates, therefore, "removing state trade barriers was a principal reason for the adoption of the Constitution." *Ibid.* In the state ratifying conventions, moreover, "fostering free trade among the States was prominently cited as a reason for ratification." *Id.,* at ___ (slip op., at 8).

The Constitution crafted by the Framers contains several provisions protecting free trade among the States. The Constitution's protection of free trade among the States has resulted in an extraordinary 234-year record of progress: It has facilitated robust economic activity within the United States and has helped generate remarkable (albeit at times uneven) economic prosperity and growth in America relative to the other nations of the world.

This case involves the American pork industry, which

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[1]The Court also unanimously rejects plaintiffs' separate claim under *Healy* v. *Beer Institute*, 491 U. S. 324 (1989).

today is a $20 billion-plus industry that generates hundreds of thousands of American jobs and serves millions of American consumers. Importantly for this case, the vast majority of pig farms are located in States other than California—such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. And the vast majority of pork is likewise produced in States other than California.

In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production *throughout the United States*. Under Proposition 12, all pork sold to consumers in California must be derived from pigs raised in compliance with California's strict standards for pig farming, including California's minimum square footage of space required for housing individual pigs. By its terms, Proposition 12 applies to pigs raised and pork produced *outside California.*

California's requirements for pig farms and pork production depart significantly from common agricultural practices that are lawful in major pig-farming and pork-producing States such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. See Brief for Indiana et al. as *Amici Curiae* 24–32. Moreover, according to various *amici*, some of the scientific literature suggests that California's requirements could worsen animal health and welfare. See, *e.g.,* Brief for American Association of Swine Veterinarians as *Amicus Curiae* 4–19; Brief for State Pork Producers Association of Iowa et al. as *Amici Curiae* 25–34. Regardless of whether the *amici* are correct on that point, it is evident that absent California's Proposition 12, relatively few pig farmers and pork producers in the United States would follow the practices that California now demands. Yet American pig farmers and pork producers have little choice but to comply with California's regulatory dictates. It would be prohibitively expensive and

practically all but impossible for pig farmers and pork producers to segregate individual pigs based on their ultimate marketplace destination in California or elsewhere. And California's 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market.

California's required changes to pig-farming and pork-production practices throughout the United States will cost American farmers and pork producers hundreds of millions (if not billions) of dollars. And those costs for pig farmers and pork producers will be passed on, in many cases, to American consumers of pork via higher pork prices nationwide. The increased costs may also result in lower wages and reduced benefits (or layoffs) for the American workers who work on pig farms and in meatpacking plants. See generally Brief for Indiana et al. as *Amici Curiae* 29–32; Brief for North Carolina Chamber Legal Institute et al. as *Amici Curiae* 9–13.[2]

In short, through Proposition 12, California is forcing massive changes to pig-farming and pork-production practices throughout the United States. Proposition 12 therefore substantially burdens the interstate pork market. See *ante,* at 6–10 (opinion of ROBERTS, C. J.).

Under the Constitution, Congress could enact a national law imposing minimum space requirements or other regulations on pig farms involved in the interstate pork market. In the absence of action by Congress, each State may of course adopt health and safety regulations for products sold *in that State*. And each State may regulate

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[2]The majority opinion dismisses this case as not presenting a "weighty" issue. *Ante,* at 2. That phrasing is misplaced. This case presents a weighty constitutional question, as the Framers surely would have recognized. And it is important for the American workers, farmers, and consumers who will be significantly affected by the outcome of today's decision.

as it sees fit with respect to farming, manufacturing, and production practices *in that State*. Through Proposition 12, however, California has tried something quite different and unusual. It has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation. It has sought to deny market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates. The State has aggressively propounded a "California knows best" economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a *different* State.

Notably, future state laws of this kind might not be confined to the pork industry. As the *amici* brief of 26 States points out, what if a state law prohibits the sale of fruit picked by noncitizens who are unlawfully in the country? Brief for Indiana et al. as *Amici Curiae* 33. What if a state law prohibits the sale of goods produced by workers paid less than $20 per hour? Or as those States suggest, what if a state law prohibits "the retail sale of goods from producers that do not pay for employees' birth control or abortions" (or alternatively, that do pay for employees' birth control or abortions)? *Ibid.*

If upheld against all constitutional challenges, California's novel and far-reaching regulation could provide a blueprint for other States. California's law thus may foreshadow a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands. That is not the Constitution the Framers

adopted in Philadelphia in 1787.[3]

II

Thus far, legal challenges to California's Proposition 12 have focused on the Commerce Clause and this Court's dormant Commerce Clause precedents.

Although the Court today rejects the plaintiffs' dormant Commerce Clause challenge as insufficiently pled, state laws like Proposition 12 implicate not only the Commerce Clause, but also potentially several other constitutional provisions, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

First, the Import-Export Clause prohibits any State, absent "the Consent of the Congress," from imposing "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing" its "inspection Laws." Art. I, §10, cl. 2. This Court has limited that Clause to imports from *foreign countries*. See *Woodruff* v. *Parham*, 8 Wall. 123, 133–136 (1869). As Justice Scalia and JUSTICE THOMAS have explained, that limitation may be mistaken as a matter of constitutional text and history: Properly interpreted, the Import-Export Clause may also prevent States "from imposing certain especially burdensome" taxes and duties on imports from other States—not just on imports from foreign countries. *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 573 (2015) (Scalia, J., dissenting); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 621–637 (1997) (THOMAS,

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[3] The portions of JUSTICE GORSUCH's opinion that speak for only three Justices (Parts IV–B and IV–D) refer to THE CHIEF JUSTICE's opinion as a "dissent." *Ante,* at 18–21, 25–27. But on the question of whether to retain the *Pike* balancing test in cases like this one, THE CHIEF JUSTICE's opinion reflects the majority view because six Justices agree to retain the *Pike* balancing test: THE CHIEF JUSTICE and JUSTICES ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and JACKSON. On that legal issue, JUSTICE GORSUCH's opinion advances a minority view.

J., dissenting); *Brown* v. *Maryland*, 12 Wheat. 419, 438–439, 449 (1827).

In other words, if one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause. I do not take a position here on whether such an argument ultimately would prevail. I note only that the question warrants additional consideration in a future case.

Second, the Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1; see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ___, ___–___ (2018) (GORSUCH, J., concurring) (slip op., at 1–2); see also *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part); J. Eule, Laying the Dormant Commerce Clause To Rest, 91 Yale L. J. 425, 446–448 (1982). Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant questions under that Clause. Again, I express no view on whether such an argument ultimately would prevail. But the issue warrants further analysis in a future case.

Third, the Full Faith and Credit Clause requires each State to afford "Full Faith and Credit" to the "public Acts" of "every other State." Art. IV, §1. That Clause prevents States from "adopting any policy of hostility to the public Acts" of another State. *Carroll* v. *Lanza*, 349 U. S. 408, 413 (1955). A State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices) could in some circumstances raise questions under that Clause. See, *e.g.,* M. Rosen, State Extraterritorial Powers Reconsidered, 85 Notre Dame

L. Rev. 1133, 1153 (2010) ("[T]he Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality"); see also D. Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 290, 296–301 (1992).

For example, the plaintiffs in this case say that Ohio law expressly authorizes pig farmers in Ohio to do precisely what California's Proposition 12 forbids. Brief for Petitioners 30–31; see Ohio Admin. Code §§901:12–8–02(G)(4), (5) (2011). If so, the Full Faith and Credit Clause might preclude California from enacting conflicting regulations on Ohio pig farmers.

Once again, I express no view on whether such an argument ultimately would succeed. But the question deserves further examination in a future case.

* * *

As I understand it, the controlling plurality of the Court (reflected in Part IV–C of JUSTICE GORSUCH's opinion) today rejects the plaintiffs' dormant Commerce Clause challenge on the ground that the plaintiffs' complaint does not sufficiently allege that the California law at issue here imposes a substantial burden on interstate commerce under *Pike*. See *ante,* at 21–25 (plurality opinion); *ante,* at 1–3 (opinion of SOTOMAYOR, J.). It appears, therefore, that properly pled dormant Commerce Clause challenges under *Pike* to laws like California's Proposition 12 (or even to Proposition 12 itself) could succeed in the future—or at least survive past the motion-to-dismiss stage. Regardless, it will be important in future cases to consider that state laws like Proposition 12 also may raise substantial constitutional questions under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

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 &*

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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.

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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.

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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

[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

[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.

CASE NOTES

***Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)**

- Decided under the Administrative Procedure Act, 5 U.S.C. § 551 et seq.
- Overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984)
- The APA 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.
- 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.
- 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").
- Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference.
- Courts understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. 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 the business of statutory interpretation, if it is not the best, it is not permissible.
- We do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.
- The most relevant *stare decisis* considerations are the quality of the precedent's reasoning, the workability of the rule it established, and reliance on the decision.

***Skidmore v. Swift & Co*., 323 U.S. 134 (1944)**

- Predated the Administrative Procedure Act
- Referred to as "*Skidmore* deference"
- Survived *Loper Bright*
- We consider that the rulings, interpretations and opinions of the Administrator made pursuant to official duty under this [Fair Labor Standards] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
- [Insert Scalia's view]

***Kisor v. Wilkie*, 588 U.S. 558 (2019)**

- Upheld *Auer* deference (sometimes known as *Seminole Rock* deference) as modified
- *Auer* deference is a general rule – it does not apply in all cases
- A court should not afford *Auer* deference unless the regulation is genuinely ambiguous.
- Before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction.
- When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision.
- If genuine ambiguity remains, the agency's reading must still be "reasonable."
- Not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.
- The regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers.
- The agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency."
- The agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack."

- A court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties.
- The Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text.
- If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Auer* does not, and indeed could not, go that far.

***West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022)**

- Since passage of the Clean Air Act in 1970, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly.
- In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.
- EPA relied on 42 U.S.C. § 7411(d) (Clean Air Act § 111(d)) to justify the new rule. Under a second new rule adopted in 2015, EPA established federal carbon emissions limits for new power plants. Because EPA was now regulating carbon dioxide from new coal and gas plants, Section 111(d) required EPA to also address carbon emissions from existing coal and gas plants.
- Controls for existing plants included among its 'building blocks" one requiring a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. Another required a shift from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar.
- Coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.
- The Supreme Court stayed the new rule and it never became effective.
- The new administration repealed and replaced the rule, declaring that the interpretative question it raised fell under the "major question doctrine."
- The Supreme Court explained that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.
- Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a

statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."

- The Court held that this is a major question doctrine case.
- The Court found it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself.
- The only interpretive question before us, and the only one we answer, is whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.
- Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

***Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023)**

- Action brought under the Administrative Procedure Act
- The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and to "waters of the contiguous zone of the ocean." 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" "means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).
- EPA and the Corps of Engineers promulgated a rule that classified traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands, as waters of the United States. So are any "[i]ntrastate lakes and ponds, streams, or wetlands" that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters.
- The actual term the Court was asked to interpret was "waters of the United States."
- The Court ruled that the Act's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"
- The Act extends to more than traditional navigable waters.
- The Clean Water Act extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] ... 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

***Lewis v. United States*, 764 F. Supp. 3d 362 (M.D. La. 2025)**

- Suit under the Administrative Procedure Act
- Plaintiffs assert that Defendant United States Army Corps of Engineers ("Corps") has failed to show Clean Water Act jurisdiction over the property in dispute under the governing law as clarified in Sackett v. EPA, 598 U.S. 651, 143 S.Ct. 1322, 215 L.Ed.2d 579 (2023). Plaintiffs further argue that summary judgment rather than remand is appropriate on this point since, they claim, the Corps cannot show Clean Water Act jurisdiction under the facts in evidence.
- The Court finds that the Corps' actions are not in accordance with law as clarified in Sackett and are therefore not consistent with the APA standard of review. Furthermore, Defendants have repeatedly been instructed to file the full administrative record with the Court. However, only portions have thus far been submitted to the Court. Based on the facts as contained in the portions of the administrative record currently in evidence, the Court finds that no application of Sackett and guiding regulations can lead to a finding of Clean Water Act jurisdiction over the property at issue.
- Neither party in the instant case has argued that the agency decision here is arbitrary and capricious. The Court will therefore limit its analysis to whether or not the agency's action is consistent with the statutory text and therefore in accordance with the law, as required by the APA.
- Although the Court employs a deferential standard of review of agency policymaking and factfinding, it does not do so with respect to agency interpretations of statute. In reviewing the Corps' determination, the Court will use the legal standard set forth by Sackett, guided by the Rapanos plurality: a tributary must be "relatively permanent, standing or continuously flowing" rather than intermittent or ephemeral.
- At no point in the Approved Jurisdictional Determination, or in Defs. Opposition, do Defendants allege that Switch Cane Bayou flows either year-round or continuously during a three-month period. Instead, in the Approved Jurisdictional Determination, the Corps identifies Switch Cane Bayou as an intermittent tributary, with "intermittent flow in a typical year." The Corps stated that "Switchcane [sic] Bayou was observed on multiple site visits to have intermittent flow."
- The Court treats the Corps' factfinding and its determinations with deference. Here, the Corps found Switch Cane Bayou to have intermittent flow and to be subject to Clean Water Act jurisdiction. These cannot both hold true under Sackett. The Corps argues that it might be able to find facts to support a more-than-intermittent flow. However, those facts are not in the record before the Court at present. The Corps has not provided the Court with the data sources upon which it relied in reaching the conclusions of the Approved Jurisdictional Determination. As part of the Approved Jurisdictional Determination, the Corps lists "all resources that were used to aid in this determination" and is instructed to "attach data/maps to this document and/or references/citations in the administrative record, as appropriate." It lists information submitted by Plaintiffs, "[d]ata sheets prepared by the Corps", "[a]erials and other site photos", site visits, previous Approved and Preliminary Jurisdictional Determinations, a precipitation tool, a soil survey, a "NWI Mapper", "USGS topographic maps" dating back to 1934, as well as multiple other USGS maps and precipitation data

sources during site visits. Defendants have filed only small portions of this material with the Court. The Court is therefore unable to rely on any of the unsubmitted factfinding from the Corps in its review of the Approved Jurisdictional Determination.

- The Approved Jurisdictional Determination also states that the "observed and documented flow in both Switchcane [sic] Bayou and the Unnamed tributary were flowing within a typical year, and not because of extreme precipitation." At no point does the Approved Jurisdictional Determination indicate that Switch Cane Bayou has continuous flow, even seasonally.
- The Court is deferential in its review of agency factfinding. At issue here, though, is not the agency's factfinding but whether the agency's determination, based on its interpretation of the facts, is in accordance with the law. Upon the facts before it, only some of which the Court possesses, the Corps found that Switch Cane Bayou had an intermittent flow. In accordance with the regulations in effect at the time, the Corps could assert jurisdiction not only over those tributaries that were "relatively permanent, standing or continuously flowing bodies of water" but also over "not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water." It did so, without needing to find that Switch Cane Bayou had a continuous flow.
- Now that Sackett has overturned the "significant nexus" test, a tributary must be relatively permanent to be a water of the United States. Sackett, 598 U.S. at 678–79, 143 S.Ct. 1322; 328 CFR 328(a)(3). Defendants have had multiple opportunities to provide the Court with additional factual findings—from the 70,000 pages of discovery materials provided to Plaintiffs, for example—to support their assertion that Switch Cane Bayou may in fact have continuous flow. But the Corps does not argue that its previous factfinding supports such a conclusion. Instead, it implies that if it were permitted to go back and redo its factfinding with this new test in mind, it could feasibly come to a conclusion tailored to the new test rather than the old one. Despite its own repeated pattern of failing to file the Administrative Record with the Court, Defendants argue that they should be allowed another bite at the apple due to the current "insufficient record support to allow the Court to make a de novo finding of no jurisdiction."
- While the Court continues to treat an agency's factfinding with deference, an agency may not simply change its findings of fact to meet the agency's preferred outcome in a case. The Corps found that Switch Cane Bayou is an intermittent tributary. At the time, the agency's interpretation of the statute may have allowed for a finding of Clean Water Act jurisdiction based on these facts. Today, post-Sackett, the agency's facts do not support a finding of Clean Water Act jurisdiction. The Approved Jurisdictional Determination is inconsistent with 33 CFR § 328.3(a)(3) and with Sackett. Its determination is unsupported by the evidence presented by the Approved Jurisdictional Determination and the record taken as a whole. As such, the Approved Jurisdictional Determination is not in accordance with the law and is in violation of the APA.
- The Corps' attempted interpretation, that an intermittent flow—even one that is both seasonal and intermittent—suffices for Clean Water Act jurisdiction, is not consistent with

the statute. While the Court defers to the Corps with respect to factfinding and policymaking, it does not defer with respect to statutory questions.

***Michigan v. Environmental Protection Agency*, 576 U.S. 743 (2015)**

- Reviewed under *Chevron*. *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, "agencies must operate within the bounds of reasonable interpretation." EPA strayed far beyond those bounds when it read 42 U.S.C. § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.
- *Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.
- When it deemed regulation of power plants appropriate, EPA said that cost was irrelevant to that determination—not that cost-benefit analysis would be deferred until later. Much less did it say (what the dissent now concludes) that the consideration of cost at subsequent stages will ensure that the costs are not disproportionate to the benefits. What it said is that cost is irrelevant to the decision to regulate.
- It was unreasonable for EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.

***Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007)**

- Applies *Chevron*
- On October 20, 1999, a group of private organizations filed a rulemaking petition asking EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act."
- On September 8, 2003, EPA entered an order denying the rulemaking petition. The Agency gave two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change; and (2) that even if the Agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.
- In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.
- The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.
- On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a "judgment" that such emissions contribute to climate change. We have little trouble concluding that it does.

- Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.
- The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air ... ." § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical ... substance [s] which [are] emitted into ... the ambient air." The statute is unambiguous.
- While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.

***City & County of San Francisco v. Environmental Protection Agency*, 145 S. Ct. 704 (2025)**.

- This case involves provisions that do not spell out what a Clean Water Act permittee must do or refrain from doing; rather, they make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants. When a permit contains such requirements, a permittee that punctiliously follows every specific requirement in its permit may nevertheless face crushing penalties if the quality of the water in its receiving waters falls below the applicable standards. For convenience, we will call such provisions "end-result" requirements.
- The permittee in this case is a wastewater treatment facility owned by San Francisco. For the past five years, the facility's permit has included two end-result requirements, and if those provisions are upheld, the City could be heavily penalized even though it was never put on notice that it was obligated to take any specific step other than those it undertook. San Francisco argues that the end-result provisions in its permit are not authorized by the CWA.
- The EPA contends that Congress authorized the use of end-result requirements when it codified the Agency's Combined Sewer Overflow (CSO) Policy in 1994. And in support of that argument, it cites language in the policy that pertains to phase I permits. But the permit in question here is a phase II permit, and the EPA does not claim that its interpretation is supported by any CSO Policy provision relating to such permits.
- In any event, the phase I language to which the EPA points does not authorize the imposition of end-result requirements. The policy states that a phase I permit should require a permittee to "[c]omply with applicable [water quality standards] ... expressed in the form of a narrative limitation." Our decision does not rule out "narrative limitations."

"Limitations," as we understand the term, are permitted under § 1311(b)(1)(C), and limitations may be expressed in both numerical and non-numerical (i.e., "narrative") form.

- Attempting to read more into the phase I language, the EPA cites guidance it issued in 1995, but Congress did not codify that guidance, and we are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement, citing *Loper Bright*.
- We hold that 33 U.S.C. § 1311(b)(1)(C) does not authorize the EPA to include "end-result" provisions in NPDES permits. Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.

***Seven County Infrastructure Coalition v. Eagle County*, 2025 WL 1520964 (U.S. May 29, 2025)**

- Suit under the Administrative Procedure Act
- The U. S. Surface Transportation Board considered a proposal by a group of seven Utah counties for the construction and operation of an approximately 88-mile railroad line in northeastern Utah.
- The new railroad line would facilitate the transportation of crude oil from Utah to refineries in Louisiana, Texas, and elsewhere.
- In December 2021, a few months after issuing the final EIS, the Board approved the construction and operation of the Uinta Basin Railway.
- We think it important to reiterate and clarify the fundamental principles of judicial review applicable in those cases. As we will explain, the central principle of judicial review in NEPA cases is deference.
- As a general matter, when an agency interprets a statute, judicial review of the agency's interpretation is de novo. See Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 391–392, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024). But when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard. Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained.
- NEPA imposes no substantive constraints on the agency's ultimate decision to build, fund, or approve a proposed project. So when reviewing an agency's EIS, "the only role for a court" is to confirm that the agency has addressed environmental consequences and feasible alternatives as to the relevant project. Because an EIS is only one input into an agency's decision and does not itself require any particular substantive outcome, the adequacy of an EIS is relevant only to the question of whether an agency's final decision (here, to approve the railroad) was reasonably explained.
- In short, when determining whether an agency's EIS complied with NEPA, a court should afford substantial deference to the agency.
- In practice, judicial deference in NEPA cases can take several forms. For example, NEPA says that the EIS should be "detailed." 42 U.S.C. § 4332(2)(C). Of course, the meaning of "detailed" is a question of law to be decided by a court. Loper Bright, 603 U.S. at 391–

392, 144 S.Ct. 2244. But what details need to be included in any given EIS? For the most part, that question does not turn on the meaning of "detailed"—instead, it "involves primarily issues of fact." The agency is better equipped to assess what facts are relevant to the agency's own decision than a court is. As a result, "agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." So the question of whether a particular report is detailed enough in a particular case itself requires the exercise of agency discretion—which should not be excessively second-guessed by a court. Brevity should not be mistaken for lack of detail. A relatively brief agency explanation can be reasoned and detailed; an EIS need not meander on for hundreds or thousands of pages. So courts should not insist on length as a prerequisite for finding an EIS to be detailed.

- The EIS also must identify significant environmental impacts and feasible alternatives. But there too, an agency exercises substantial discretion. An agency must make predictive and scientific judgments in assessing the relevant impacts (what are the likely impacts; do they rise to the level of "significant"?) and alternatives (what are the potential alternatives; are they really "feasible"?). As this Court has said, "the term 'alternatives' is not self-defining," and "[c]ommon sense" should be brought to bear. Black-letter administrative law instructs that when an agency makes those kinds of speculative assessments or predictive or scientific judgments, and decides what qualifies as significant or feasible or the like, a reviewing court must be at its "most deferential."
- In preparing an EIS, an agency also must determine the scope of the environmental effects that it will address. The textual focus of NEPA is the "proposed action"—that is, the project at hand. 42 U.S.C. § 4332(2)(C) (2018). The agency therefore will obviously seek to assess significant effects from the project at issue. But how far will the agency go in considering the indirect effects that might occur outside the area of the immediate project—for example, due to emissions or run off from the project carried elsewhere by air or water? And will the agency evaluate the environmental effects from other future or geographically separate projects that may be initiated (or expanded) as a result of or in the wake of the current project? And what if another agency also possesses regulatory authority over a related project?
- In analyzing those scope questions, it is critical to disaggregate the agency's role from the court's role. So long as the EIS addresses environmental effects from the project at issue, courts should defer to agencies' decisions about where to draw the line—including (i) how far to go in considering indirect environmental effects from the project at hand and (ii) whether to analyze environmental effects from other projects separate in time or place from the project at hand. On those kinds of questions, as this Court has often said, agencies possess discretion and must have broad latitude to draw a "manageable line."
- When assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting EIS. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness. As the Court has emphasized on several occasions, and we doubly

underscore again today, "inherent in NEPA ... is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." A reviewing court may not "substitute its judgment for that of the agency as to the environmental consequences of its actions."

- The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference.

Parker v. Tenneco Inc., 2024 WL 5004326 (E.D. Mich. Dec. 6, 2024)

- Defendants suggest that Loper Bright "indicates that judge-made rules are being scaled back," so the Supreme Court is likely to jettison the "effective vindication" doctrine now that Chevron deference has been eliminated. Loper Bright, however, rejected Chevron deference as requiring the judiciary to be overly deferential to the executive branch in violation of its "statutory duties" under the Administrative Procedure Act. It is not about whether "judge-made rules" are, in general, too pervasive.

***Art & Antique Dealers League of America, Inc. v. Seggos*, 121 F.4th 423 (2d Cir. 2024)**

- Plaintiffs seek relief from the State's enforcement against them of the State Ivory Law and a licensing restriction thereunder, which prohibits licensees from "physically display[ing] for sale within New York State any [ivory] item that is not authorized for Intrastate sale" (the "Display Restriction").
- Plaintiffs contend that they are entitled to this relief on two grounds: First, because pertinent portions of the State Ivory Law are preempted by the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and its implementing regulations, and, second, because the Display Restriction violates their free speech rights under the First Amendment.
- An administrative agency does not have authority to pass regulations that are inconsistent with the meaning of a statute. The fact that the implementing regulations at times fail to observe the distinction drawn by the Act between "exception" and "exemption" does not mean that the statute uses these words interchangeably.
- In the post-Chevron era, regardless of whether a statute is deemed to be ambiguous or unambiguous, interpretation of the statute is a question of law, and accordingly, it is the court, and not the administrative agency, that determines its meaning. While the court may of course be persuaded by the correctness of the agency's interpretation, see Skidmore v. Swift & Co., 323 U.S. 134, 139–40, 65 S.Ct. 161, 89 L.Ed. 124 (1944), the court is not required to defer to the agency's interpretation. The court makes its own determination of the meaning of ambiguous provisions.
- "[F]ederal law does not preempt state law under [conflict] preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." It is possible, even likely, that a restriction on intrastate sales could make it much less profitable to be an interstate ivory dealer in New York. However, there is not an irreconcilable conflict between allowing the out-of-State sale of some items and prohibiting the sale of those same items within the State. The DEC will not deny permits for interstate or foreign sales of ivory. Because Plaintiffs are free to sell these items

across state lines in accordance with the ESA, there is no basis to conclude that the State Ivory Law undermines the regulatory scheme established in federal law.

- We accordingly conclude that, by virtue of their adversaries' concessions that the Display Restriction affects speech that is protected by the First Amendment, Plaintiffs are relieved of the responsibility of demonstrating that point. We can therefore assume for the resolution of this case that the restriction affects speech and implicates the First Amendment without establishing a precedent to that effect.
- We find, on this record, assuming as the State concedes that the Display Restriction impinges on speech, that the restriction is more extensive than necessary to serve the State's interest.

***Kansas Natural Resource Coalition v. U.S. Fish & Wildlife Service*, 2025 WL 1367834 (W.D. Tex. March 29, 2025)**

- Section 4(d) of the Endangered Species Act provides that when a species is listed as threatened under the Act, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species.
- On November 25, 2022, Fish and Wildlife listed the lesser prairie-chicken's Northern Distinct Population as threatened under the Endangered Species Act and simultaneously issued a 4(d) Rule regulating its take.
- Plaintiffs challenge the 4(d) Rule.
- With Chevron overturned, the Court can now conduct straight ahead statutory interpretation. And Plaintiffs offer the correct reading. Sentence One and Two depend on one another. The first sentence requires a necessary and advisable determination for each prohibition. The second provides a list of regulations made available by Congress, suggestions of the outer bounds of the authority granted in the first sentence. Under this reading, both sentences require a necessary and advisable determination before issuing a 4(d) Rule.
- That leaves one final question—does "necessary and advisable" require consideration of economic costs? Plaintiffs believe it does. Fish and Wildlife see no distinction between a listing decision, which cannot consider costs, and its 4(d) Rule, largely because they issued here at the same time.
- Plaintiffs offer other theories as backstops. They range from major questions and non-delegation doctrines to whether the Regulatory Flexibility Act should have triggered cost benefit analysis. For the most part, the Court does not reach these additional theories. The record is too spare and the briefing does not reveal the kind of impact one expects to find in a successful major questions challenge. The non-delegation doctrine is an argument dead on arrival until further notice from the higher courts that its test has returned to its original formulation.
- Section 4 of the ESA directs the Secretary of the Interior, acting through Fish and Wildlife,37 to determine whether any species should be listed as endangered or threatened. Whether a listing decision is prohibited from taking in economic considerations is not at issue. On the one hand, both parties seem to agree that the Secretary cannot account for

such costs in a listing decision. On the other, Plaintiffs challenge only the 4(d) Rule, not its underlying listing.

- Once a species is determined threatened, the Secretary must issue a 4(d) Rule.42 This means, other than to locate a 4(d) Rule in the greater statutory context, the listing mechanism's only relevance here comes from Fish and Wildlife's dragging it in.
- Fish and Wildlife issued its final 4(d) Rule concurrent to its listing decision. It now seems to believe (1) its choice to do so permissibly collapses the two agency actions into one, and (2) the 4(d) Rule therefore suffers the same constraints against considering economic costs that the listing decision does. This first point may well be efficiency of the proverbial sort. But the second creates a foundational disagreement between the parties. The first hurdle is therefore whether a 4(d) Rule suffers the same constraints. It does not.
- Congress intended that a threatened species may be given the same prohibitions as an endangered species provided an extra step occurs. The Secretary first deems the regulation necessary and advisable under sentence one. He may then select from Section 9's prohibition menu or develop a prohibition off-menu. Sentence two then serves as (1) a reminder that a threatened species can enjoy the same protections as an endangered one after such a determination, and (2) suggests that a threatened species cannot enjoy protections greater than those automatically afforded to an endangered species, though in perhaps near infinite permutations.
- Despite Fish and Wildlife's protest that each sentence provides separate grants of power, the 4(d) Rule here did not issue through sentence two. Rather, it declares on its face that the Secretary made a necessary and advisable determination.
- Because Fish and Wildlife failed to account for costs, to include cost of compliance, it failed to consider the "all relevant factors" and ignored "important aspect[s] of the problem" before it. For these reasons, the Court VACATES the 4(d) Rule.
- Fish and Wildlife argues that a 4(d) Rule cannot consider costs because listing decisions cannot consider costs; therefore, the Regulatory Flexibility Act is inapplicable. As Plaintiffs correctly highlight, because Fish and Wildlife is required to consider costs, it must also comply with the RFA. Because the Court vacates the 4(d) Rule for the reasons stated in the first section, remand or deferring enforcement of the rule is unnecessary.

***CTM Holdings, LLC v. U.S. Dep't of Agriculture*, 2025 WL 1532146 (N.D. Iowa May 29, 2025)**

- When plaintiff was under contract to purchase the land, Conlan began emailing with USDA representatives regarding wetland determinations. Initially, in July 2022, Conlan asked for the employee's "help with the process of seeking" a redetermination of the nine acres previously denoted as wetlands, among other things. Conlan noted that one of his plans for the property was to remove trees from several areas of the property.
- In August 2022, a USDA employee emailed Conlan regarding several things. The employee noted, in part, that "any logging or widespread tree removal could potentially create a wetland violation situation" and a wetland violation "would jeopardize all financial benefits associated to the farm, including those of any tenants associated to the farm, and possibly their other farming interests." The employee's point, it seems, was to explain that

plaintiff would be wise to request a wetland determination for the land which previously had not had a wetland determination.

- On October 7, 2022, Conlan signaled in an email that he wanted to remove the trees (but not the stumps) from the existing wetland, and remove the trees and stumps from the rest of the forested land (upon which no wetland determination had been made) to make that land ready for farming.
- On October 11 and 12, 2022, several USDA representatives told Conlan in emails that, because plaintiff planned on removing trees and stumps in the undetermined land (i.e., the land upon which no wetland determination had been made), plaintiff would need to submit a form AD-1026 to get a wetland determination completed on the then-undetermined land.
- On January 23, 2023, the Natural Resources Conservation Service (NRCS) field office—specifically, wetland specialist Russ Wolf—sent plaintiff a letter which included a "Wetland Preliminary Technical Determination." This wetland determination was in regard to the forested area on the land which previously did not have any wetland determination. The NRCS determined that all of the previously non-certified land was not wetland. That is, all of the forested land, other than the nine acres which were determined to be wetland in 2010, was determined not wetland.
- Here, plaintiff brings its action under the general review provisions of the APA, and therefore the "agency action" in question must be "final agency action." Plaintiff contends defendants' letter notifying plaintiff how to request review of the 2010 wetlands determination was a final agency action. It is not. Plaintiff did not ask defendants to review the previous determination that the nine acres were wetlands. In fact, plaintiff had signaled that it would cut the trees down in the wetlands area but leave the stumps. In this, plaintiff showed its compliance with Swampbuster and with defendants' prior determination, not a desire to challenge the prior determination. Plaintiff argues that it requested review of the 2010 determination by submitting the form AD-1026. Nothing in the filled out form AD-1026 backs this argument up. So, plaintiff's emails signal that plaintiff was not requesting review of the 2010 wetlands determination, and the form AD-1026 says nothing about reviewing the 2010 wetlands determination. If plaintiff's intention was to request a review of the 2010 wetlands determination, nobody else in the world could possibly have known it. Most importantly, plaintiff did not request review of the 2010 wetlands determination in any communication to defendants. Defendants, therefore, did not deny plaintiff's request for review, as there was no request for review. The letter is not final agency action.
- The Swampbuster Act, 16 U.S.C. §§ 3801, 3821–3824, refers to the wetland conservation provisions of the Food Security Act of 1985. The purpose of the Swampbuster Act is "to combat the disappearance of wetlands through their conversion into crop lands." As an enforcement mechanism, the Swampbuster Act sets forth that persons who convert certified wetlands to crop lands are disqualified from receiving federal farm benefits.
- The issue is whether Swampbuster is an unconstitutional exercise of Congress's authority under the Commerce Clause. The problem with this framing of the issue, however, is that it misses the point. The Food Security Act, of which Swampbuster is a part, is an exercise of Congress's spending power.

- Under Article I, Section 8, clause 1 of the Constitution, Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]" (emphasis added). The Supreme Court has held that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds," and the Court has noted that Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." The Dole Court further explained that "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." Swampbuster fits squarely into this category.
- In sum, plaintiff's argument is that because Congress could not regulate intrastate wetlands directly under the Commerce Clause, Congress cannot attempt to effectuate the regulation through conditional spending. But, in Dole, the Supreme Court specifically rejected this type of argument, holding instead that Congress's spending power is not as narrow as its other enumerated powers, and Congress can therefore condition spending in areas that it could not regulate directly. Congress did just that in Swampbuster. Thus, plaintiff's argument that Swampbuster effectuates an unconstitutional condition in requiring farmers to give up their interests protected by the Commerce Clause fails.
- But the Loper Bright Court did not instruct courts to "decide such questions blindly." Instead, courts should take into account the agency's perspective, which "may be especially informative to the extent it rests on factual premises within the agency's expertise." Courts must analyze the issue independently, but "with due respect for the views of the Executive Branch." Finally, the Loper Bright opinion specifically noted that holdings which relied upon Chevron "are still subject to statutory stare decisis" despite the Court's "change in interpretive methodology."

***Kansas v. U.S. Dep't of Labor*, 749 F. Supp. 3d 1363 (S.D. Ga. 2024)**

- Seventeen states sued claiming that a recently adopted DOL regulation illegally provided collective bargaining rights to agricultural migrant workers employed in the United States under the H-2A visa program.
- The states argue that, if the Final Rule were enacted, alien agricultural workers would receive rights that American citizens working agricultural jobs do not enjoy.
- The National Labor Relations Act (NLRA) defines the term "employee" to include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." § 152(a)(3). This definition is ostensibly broad, but Congress explicitly excludes certain laborers from its definition of "employee," including agricultural workers. Id. ("The term 'employee' ... shall not include any individual employed as an agricultural laborer."). Put plainly, the NLRA establishes the right to collectively bargain for

employees, but specifically excludes agricultural laborers from the group of employees entitled to such rights.

- The Court finds that the Final Rule falls within the DOL's rulemaking authority under § 1188.
- The issue before the Court is whether the Final Rule creates a right not previously bestowed by Congress. The Court finds it does so. Regardless of the terminology used in the Final Rule—be it collective bargaining or otherwise—the Final Rule provides for agricultural workers' right to participate in concerted activity to further their interests. That is a right that Congress has not created by statute. And Defendants have not provided any source indicating that Congress intended to create such a right.
- The Court does not hold, nor could it, that the DOL is barred from issuing any labor regulations governing agricultural workers. Indeed, the IRCA delegates rulemaking authority to the DOL to issue labor regulations governing H-2A workers, which are, by definition, agricultural workers. But rulemaking authority alone, absent Congressional intent otherwise, does not allow the DOL to create law or protect newly-created rights of agricultural workers. And the DOL aims to do just that through the Final Rule.
- The Court finds no evidence of federal Congressional intent to create a right to collective bargaining for agricultural workers. The Final Rule does just that. The Court therefore finds that the Final Rule exceeds the DOL's constitutional authority because it creates a right. This is not in "accordance with law" as required by the APA. "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power." Administrative agencies, including the DOL, cannot create law, and the DOL cannot create rights that Congress has not. The DOL cannot make both executive rules and congressional laws. The Court finds that the Final Rule violates federal law and that Plaintiffs are likely to succeed on the merits of their claim.
- A party-specific preliminary injunction offers complete relief to Plaintiffs. A tailored preliminary injunction would be no broader than necessary to address the harms that have been demonstrated by Plaintiffs. A preliminary injunction would also be a more workable form of relief than a stay, which both parties agree could have the same effect as a nationwide injunction. The Court, therefore, finds that Plaintiffs are entitled to a narrowly tailored, party-specific preliminary injunction.
- The court explained at some length why it declined to enter the requested nationwide injunction.

***Barton v. U.S. Dep't of Labor*, 757 F. Supp. 3d 766 (E.D. Ky. 2024)**

- Farmers across the country rely on H-2A visa workers to perform temporary or seasonal agricultural work. And while the program is vital to the success of American farmers, it can be complicated and expensive for employers to meet its requirements.
- On April 29, 2024, the DOL issued a Final Rule that substantially altered the requirements for employers seeking to hire workers under the H-2A temporary agricultural visa program.

It includes provisions such as worker protections and employer-mandated seatbelt requirements, which raised numerous objections from states and private parties.

- The *Kansas* Court found that, although the DOL had the requisite authority to promulgate the Final Rule under the Immigration and Nationality Act ("INA"), it violated the National Labor Relations Act ("NLRA"). The DOL chose not to seek review through an interlocutory appeal.
- The DOL's decision to continue enforcing the Final Rule in other states not subject to the *Kansas* Court's injunction has led to other lawsuits across the country. The plaintiffs before this Court include seven Kentucky farmers who employ workers through the H-2A visa program and five association entities that, on behalf of their members and shareholders, file H-2A applications and offer support through a variety of educational and advocacy efforts related to the program. Thereafter, West Virginia, Alabama, Ohio, and Kentucky were granted permission to intervene as plaintiffs.
- Under the facts presented in this case, the Court finds multiple portions of the Final Rule being challenged unlawful under the Administrative Procedure Act. More specifically, the Final Rule contains provisions that contravene the National Labor Relations Act and the Takings Clause of the Fifth Amendment. Further, the Final Rule includes other provisions that are arbitrary and capricious. As a result, the undersigned will issue injunctive relief preventing the DOL from enforcing the provisions discussed herein.
- In perhaps its most blatant arrogation of authority, the Final Rule seeks to extend numerous rights to H-2A workers which they did not previously enjoy through its worker voice and empowerment provisions. The DOL justifies this attempted regulatory expansion as an effort to prevent the alleged "unfair treatment" of H-2A workers by employers and to protect similarly situated American workers.
- To achieve these ends, the Final Rule requires employers to provide assurances that they will not intimidate, threaten, or otherwise discriminate against certain workers or others for engaging in "activities related to self-organization," including "concerted activities for the purpose of mutual aid or protection relating to wages or working conditions," or refusing to engage in such activities. Under the NLRA, H-2A workers had not previously enjoyed these protections, and the DOL has not cited any statutory authority for the change in policy extending these protections to workers. The petitioners in this suit have claimed these new protections amount to "collective bargaining rights," which contravene the NLRA because agricultural workers are excluded from the Act.
- To enforce these provisions, the Final Rule mandates that State Workforce Agencies (SWAs) "initiate procedures for discontinuation of [employment] services to employers" who do not comply with the new provisions of the Final Rule. Those challenging this Final Rule oppose these requirements, not only because of the burden they impose on them in their efforts to comply, but also because they did not agree to them when they applied for H-2A employees under the regulatory framework established before the Final Rule.
- Despite the *Kansas* Court's thoughtful and well-reasoned opinion, the DOL reissued the Final Rule on September 10, 2024. As a result, the current regulatory landscape has become increasingly complex and now encapsulates different schemes for applicants to navigate, depending on where the applicant is located. If an employer operates in a state covered by

the injunction, the party is bound by the requirements of the H-2A regulatory provisions and application processes that were in effect before the Final Rule was promulgated. However, at the same time, if a party is located in a state not covered by the injunction, the party is bound by the new obligations and application processes set forth in the Final Rule. And if the party operates in a state covered by the injunction but also in a state not covered, the party must fill out multiple H-2A applications and will be simultaneously bound by both the "old" H-2A rules as well as the Final Rule. This new regulatory scheme has created obvious and understandable confusion among participating employers, farmers advocacy groups, and SWAs as different employees are subject to different rules depending on where they work. Additionally, different employers may be bound by different rules in the same state depending on whether they were party to the litigation in the Southern District of Georgia. As a result, employers and SWAs are struggling to adhere to the Final Rule and are incurring significant and additional compliance costs, while also remaining unsure if they are fully in compliance.

- The DOL cites 8 U.S.C. § 1188, of the Immigration and Nationality Act, (as amended by the IRCA) ("§ 1188") as its authority to promulgate the Final Rule.
- "Section 1188(a)(1) establishes the INA's general mission; Congress left it to the Department of Labor to implement that mission through the creation of specific substantive provisions." Ultimately, the DOL's mission under § 1188 is to ensure that the H-2A program's use of migrant workers "does not adversely affect the wages and working conditions of American workers similarly employed." Based on both the plain text of the statute and the broad authority recognized by other courts, this Court agrees that "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers."
- Given this understanding of the DOL's statutory authority, the next question becomes whether the DOL exceeded that authority in the Final Rule. "[W]hen 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." Loper Bright, 144 S. Ct. at 2273. This is an inquiry separate and distinct from whether the DOL adequately explains the need for certain provisions, or whether specific portions are arbitrary and capricious. As such, agency action can be unlawful if arbitrary, capricious, an abuse of discretion, or in excess of statutory jurisdiction.
- In sum, "§ 1188 affords the DOL considerable latitude to promulgate regulations that protect American workers from being adversely affected by the issuance of H-2A visas." Kansas, 749 F.Supp.3d at 1374. This Court sees no reason to depart from the statute's text and longstanding interpretation governing the DOL's jurisdiction. But even if the Final Rule's measures are conceivably authorized under the IRCA, this Court finds many of the provisions contrary to other law and are arbitrary and capricious.
- The undersigned does not deny the DOL's authority under § 1188. Rather, the Court refuses to extend it to labor regulations traditionally limited to Congress and the states. The defendants' contention that Congress' decision to unambiguously exclude agricultural workers from the NLRA means the field was "left alone" for agencies to regulate is

misguided. However, the DOL fails to provide any examples where an agency was permitted to alter or expand the scope of 29 U.S.C. § 152(3). It instead proffers cases where states did so, and two cases where labor-adjacent executive orders unrelated to § 152(3) were upheld. The APA requires courts to set aside agency action that is not in accordance with law. And the Court's "task is to give effect to the will of Congress[.]"Therefore, if the Final Rule grants collective bargaining protections on a group outside of the NLRA's purview, those provisions cannot stand.

- The DOL argues that these provisions "do not purport to bring any workers within the ambit of the NLRA and do not extend the enforcement powers of the National Labor Relations Board to agricultural workers." It adds that the Final Rule "does not provide for collective bargaining rights nor does the rule compel a worker to join a union. As finalized, the rule does not grant any rights to labor organizations" and "does not require collective bargaining, employer recognition, or any other action by the employer in response to worker organizing."
- However, the DOL cannot confer substantive rights on parties simply by saying it is not doing so. The Final Rule effectively prevents employers from taking action against an employee who attempts to "form, join, or assist a labor organization; or has engaged in other concerted activities for the purpose of mutual aid or protection." The NLRA allows employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The DOL appears to have found significant inspiration for the Final Rule's worker voice and empowerment provisions in the NLRA's text, but it made sure to remove the words "collective bargaining" from the regulation wherever possible.
- he words are different, but the meaning is the same. The worker voice and empowerment provisions, unlike the NLRA, do not specifically self-reference their protections, but they substantively prohibit action taken in response to violations of federal law, which would include the Final Rule.
- The Final Rule not so sneakily creates substantive collective bargaining rights for H-2A agricultural workers through the "prohibitions" it places on their employers. Framing these provisions as mere expansions of anti-retaliation policies, the DOL attempts to grant H-2A workers substantive rights without Congressional authorization. The worker voice and empowerment provisions thus illegally contravene the NLRA.
- Before the Final Rule, employers could choose whether to compensate their employees on a piece rate or hourly basis. But under the Final Rule, employers are required, at the end of every pay period, to recalculate and pay employees by whichever method the Department claims would have resulted in higher pay to the workers during that period.
- The DOL has failed to provide sufficient justification for their change in the Final Rule. The change to the Final Rule deviates from the DOL's longstanding practice recognizing employers may choose to pay their employees in the manner that best serves their business interest. Because the DOL has neither provided sufficient justification nor displayed awareness that its position is different, this change is arbitrary and capricious.
- The DOL fails to adequately explain the requirements for additional employer information, including birth dates, and they are therefore arbitrary and capricious. On July 31, 2024, the

DOL issued new H-2A application forms which mandate the disclosure of personal information, including the birth dates of any owner, operator, manager or supervisor of H-2A workers and workers in corresponding employment.

- The DOL does not adequately connect the need for birth dates to its goals of ascertaining an employer's hiring needs or sanctioning individual employers. It mentions that certain bad actors exploit the current process by changing roles from employer to manager, thereby evading enforcement measures. But this does not justify the vast breadth and sensitivity of the information demanded. While information collection can be warranted, the personal information here far exceeds what the DOL may need to address the limited instances of misfeasance it cites. The DOL's justification for the additional is thus arbitrary and capricious because it lacks "a rational connection between the facts found and the choice made."
- The requirement that all H-2A workers wear seatbelts in employer owned vehicles is a significant deviation from longstanding DOL policy. Further, the rule imposes a strict liability penalty for employers if an employee is found to be non-compliant with the rule. Historically, the DOL only required employers to provide seatbelts to employees, and its stated rationale for the change is to "avoid degrading worker safety conditions." Yet, the DOL does not explain how holding employers liable for the failure of the employee to wear a seatbelt addresses the issue of avoiding degrading worker safety conditions. In fact, it fails to rationally connect the two. The DOL's failure to explain this departure from long-standing rules regarding the use of seatbelts and lack of an obvious connection between the rule and its stated objective means the department has engaged in arbitrary and capricious rulemaking in violation of the APA. The provision of the Final Rule that holds employers liable for the failure of an employee to use a seatbelt also has no rational relation to the authority of the secretary to issue regulations under the IRCA.
- Moreover, there is no federal law that requires all drivers and passengers in a vehicle to wear a seatbelt, and state laws vary as to who must wear one. Requiring an individual to use a seatbelt, that is already provided, does not alter the safety conditions for the worker, it simply mandates an employee use a tool that is already provided. In fact, requiring and actively monitoring the use of seatbelts by adults does nothing more than make the employee's working conditions degrading because they will now find themselves under greater levels of scrutiny and supervision.
- Under the Final Rule, an employer can be held liable for the decisions of employees whether to wear a seatbelt despite having little control over whether the employee does so. As such, the Court finds this part of the Final Rule to be arbitrary and capricious.
- The Final Rule's mandate that H-2A employers allow their employees to invite guests onto employer property, without the employer's consent, and without compensation constitutes an unconstitutional taking.
- The Final Rule amounts to a taking of the employer's property. An employer, like any other property owner, has a right to exclude individuals from his or her property and the Final Rule seeks to deprive the owner of that right. The Final Rule's creation of a public right of access to employer-provided housing deprives employers of their right to exclude individuals from their property, and as such, they are entitled to compensation, which is

not provided under the Final Rule. Therefore, the provision of the Final Rule which grants the public access to the employers' property is unconstitutional.

- While the plaintiffs (including members of the associations and non-profit corporate entities who are plaintiffs to the proceeding) will be granted preliminary injunctive relief to prevent enforcement of portions of the Final Rule which are discussed herein, the undersigned declines to award relief to any entities, States or Commonwealths that are not party to this suit.

***International Fresh Produce Ass'n v. U.S. Dep't of Labor*, 758 F. Supp. 3d 575 (S.D. Miss. 2024)**

- Plaintiffs ask the Court to stay the effective date of 89 Federal Regulation 33,898's amendments to 20 C.F.R. § 655.135(h)(2), (m), which strengthen the protections for agricultural migrant workers employed in the United States under the H-2A visa program.
- Plaintiffs argue that the Rule's amendments to 20 C.F.R. § 655.135(h)(2), (m) should be vacated because DOL exceeded its statutory authority in adopting them, and because they conflict with the National Labor Relation Act, 29 U.S.C. § 151, et seq.), by creating collective bargaining rights for agricultural workers. Plaintiffs further assert that the amendments violate the First Amendment by imposing content-based restrictions on employers' speech. Defendants respond that the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. ("INA"), specifically § 1188(a)(1), (c)(3)(A), affords DOL the authority to promulgate the Rule, that the amendments do not provide collective bargaining rights, and that they regulate conduct, not speech.
- Plaintiffs filed their Complaint [1] on October 8, 2024, arguing that the amendments to 20 C.F.R. § 655.135(h)(2), (m) exceed DOL's statutory authority, that they are not in accord with the NLRA (Count One), and that they violate the First Amendment to the United States Constitution (Count Two). The Complaint [1] seeks a declaratory judgment that the amendments are unlawful (Count Three). Id. at 23. On October 10, 2024, Plaintiffs filed the present Motion [17] for Preliminary Injunction and Section 705 Stay, asking the Court to issue a temporary vacatur of the amendments to 20 C.F.R. § 655.135(h)(2), (m) under 5 U.S.C. § 705, or alternatively that it enjoin their enforcement against Plaintiffs. Defendants and Amici oppose the Motion [17].
- Plaintiffs contend that the INA delegates limited authority to DOL which does not "have anything to do with workers' rights to 'engage[ ] in activities related to self-organization' or to 'refuse[ ] to attend' mandatory meetings." For this reason, Plaintiffs argue that DOL exceeded its authority by creating collective bargaining rights for migrant workers. Plaintiffs further maintain that DOL exceeded its authority because the NLRA exempts agricultural laborers from receiving collective bargaining rights, and by including language in the amendments that is "nearly identical" to that of the NLRA, "Defendants have attempted to bypass express congressional intent." As for the prohibition on employers threatening employees who refuse to attend meetings whose primary purpose is for the employer to express anti-union views, Plaintiffs take the position that 20 C.F.R. § 655.135(h)(2)(ii) violates the First Amendment by restricting speech based on the employer's viewpoint.

- The plain text of these phrases cannot be read as such a broad grant of authority as to allow DOL to effectively provide collective action rights to H-2A workers in the name of reducing the adverse effect of the H-2A program on domestic workers; the language does not support the conclusion that DOL can prescribe these kinds of rights as part of the "criteria for certification[.]"Following § 1188(c)(3)(A)(i)'s use of "criteria for certification[,]" the section includes a parenthetical, where the words "as prescribed by the Secretary" follow "including the criteria for the recruitment of eligible individuals[.]"If Congress intended DOL to have the broad authority to determine certification requirements beyond what is explicitly stated in the statute, it could have instead placed or added "as prescribed by the Secretary" after "criteria for certification[,]" but that would render use of the phrase in the parenthetical surplusage.
- As written, the phrase "as prescribed by the Secretary" modifies only the language in the parenthetical, indicating it was not meant to apply to the phrase "criteria for certification."
- Reading § 1188(c)(3)(A) in the context of other provisions of the INA also reflects an intent that DOL play a limited role in effectuating the H-2A program.
- And § 1188(c)(3)(A) also appears to limit DOL's authority, stating that "[i]n considering the question of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops." In other words, when reviewing the terms of H-2A employers' job offers, DOL's authority is limited to looking at what non-H-2A employers usually offer. But here, DOL seeks to confer upon H-2A agricultural workers NLRA-style rights that Congress specifically chose to not confer upon domestic agricultural workers. Considering this context, the Court does not see how the text of § 1188 affords DOL the broad delegation of authority it claims such as to allow it to provide collective rights to H-2A workers which would not otherwise be available to domestic agricultural workers. And the Court may not read such authority into the statute at Defendants' behest.
- The best reading of the statute is that it does not delegate to DOL the authority to create the challenged amendments to the regulations.
- The court stayed the challenged portions of the rule until the conclusion of the suit, and did not restrict that remedy to the benefit of plaintiffs.

***North Carolina Farm Bureau Federation, Inc. v. U.S. Dep't of Labor*, 2025 WL 1296245 (E.D.N.C. May 5, 2025)**

- Plaintiffs sought to enjoin implementation of a final rule that would affect agricultural workers temporarily employed through the H-2A visa program, agricultural employees engaged in corresponding employment, and their employers.
- Although plaintiffs' complaint challenges the entirety of the Final Rule, they raise arguments only against the amendments to 20 C.F.R. § 655.135(h) (and the parallel provision at 29 C.F.R. § 501.4(a)) and 20 C.F.R. § 655.135(m) and (n), related to "Protections for Worker Voice and Empowerment."
- According to the court in *Int'l Fresh Produce*, Labor currently has no authority to enforce the Final Rule's amendments to 20 C.F.R. § 655.135(h)(2), (m), related to "Protections for

Worker Voice and Empowerment" against anyone, including plaintiffs here. All other portions of the Final Rule remain in effect against plaintiffs.

- Plaintiffs argue the Final Rule must be set aside because it violates the major questions doctrine, exceeds Labor's authority under the IRCA, is the result of arbitrary and capricious agency action, and conflicts with the National Labor Relations Act of 1935, 29 U.S.C. § 151 et seq. ("NLRA").
- Plaintiffs assert this case poses a major question "because it involves a matter of significant economic and political significance," pointing to the large impact of agriculture on the national and state economies. There is no doubt that agriculture is an economically and politically significant industry. However, the court cannot conclude that a regulation raises a major question simply because it relates to an important industry. Rather, it is "the history and breadth and economic and political significance of the action at issue" that requires application of the major questions doctrine.
- Here, the agency action in question, promulgation of the Final Rule, and in particular the challenged portions related to "Protections for Worker Voice and Empowerment," is not a sweeping overhaul of the entire agriculture industry. Instead, the Final Rule reforms a single government program through which some agricultural employers are permitted to employ some foreign workers on a temporary or seasonal basis. Although the parties agree the number of such workers is growing, plaintiffs have not demonstrated it is large enough to require classifying this issue as a major question.
- Because Congress explicitly excluded agricultural laborers from its definition of employees subject to regulation by the National Labor Relations Board (the "NLRB"), that agency's regulations do not and cannot govern the relationships at issue here: those between employers, foreign temporary agricultural workers, and workers in corresponding employment. Therefore, Labor's issuance of the Final Rule does not arrogate authority left by Congress to the NLRB.
- This court finds persuasive the determination in Kansas and Barton that Labor acted within its § 1188 authority in issuing the Final Rule.
- The court concludes that the Final Rule falls within Labor's authority "to prescribe rules to fill up the details of [the] statutory scheme," and to "regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility.
- Issuance of the final rule was not arbitrary or capricious.
- Because nothing in the Final Rule requires such "mutual obligation" or "negotiation," it does not convey a right to collectively bargain. The court therefore departs from the reasoning of the Kansas and Barton courts on the issue of NLRA conflict.
- Defendants were entitled to judgment in their favor on all claims.

***Taylor v. JBS Foods USA*, 2025 WL 102450 (D.S.D. Jan. 15, 2025)**

- Plaintiffs are ranchers who domestically sell cattle born, raised, and slaughtered in the United States.
- Defendants are meat packers who manufacture, market, distribute, and sell meat throughout the United States, including South Dakota. According to the Complaint, Defendants have imported live cattle from foreign countries, slaughtered and processed the

cattle in the United States, and labeled the resulting beef products as "Products of the USA."

- Plaintiffs allege Defendants have misled the public by selling foreign raised beef under a "Product of USA" label because the meat was processed in the United States. The Federal Meat Inspection Act ("FMIA"), which governs meat inspection and label requirements, prohibits false and misleading labels. The twist before the Court is the Food Safety Inspection Service ("FSIS")—the agency that administers the FMIA—has issued guidance allowing Defendants' use of their "Product of USA" label. Defendants contend the FSIS's approval conclusively establishes their compliance with the FMIA's labeling requirements.
- The FMIA gives States concurrent authority with the FSIS to enforce the FMIA's misbranding provisions (i.e., that meat labels cannot be false or misleading). Defendants contend the FSIS's guidance approving Defendants' labels preempts any state law or action used to assert such labels are false or misleading. But because the FMIA also delegates its misbranding enforcement to the States, and the FMIA's purpose was to prevent misbranded meat, Plaintiffs' state-law claims for restraint of trade and unjust enrichment survive. The FSIS's approval does not conclusively establish that a label is not false or misleading.
- Plaintiffs' civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim, however, is prohibited by the Noerr-Pennington doctrine. As a result, it must be dismissed.
- Defendants point to the FSIS's Food Standards and Labeling Policy Book ("Policy Book"), which allows Defendants' practice of labeling meat processed in the United States as a "Product of the USA." In short, Defendants contend the FSIS's approval conclusively determines that Defendants' labels are neither false nor misleading.
- Plaintiffs argue the Policy Book Defendants rely on cannot be a basis for preemption because it lacks the force of law. Plaintiffs also maintain the FMIA expressly allows States to enforce its misbranding prohibitions even if the FSIS has already approved the labels in question.
- Given the FSIS's approval of the "Product of USA" label and their regulations prohibiting false or misleading labels, this Court must consider what weight to give the agency's interpretation of the statute and their view on whether the labels at issue are false or misleading.
- The Court must determine whether the FMIA gives authority to States to enforce its misbranding prohibition when the FSIS has already approved the label, which only occurs—per their own regulations—if the label is not "false or misleading." In answering this question, the Court must give the statute " 'the reading [it] would have reached' if no agency were involved."
- Although the States may not impose additional or different requirements than those under the FMIA, States may exercise concurrent jurisdiction with the Secretary of Agriculture to protect consumers from receiving "misbranded" meat. Relevant here, the term "misbranded" means "meat or meat food product ... labeling [that] is false or misleading in any particular." Thus, Congress did not make the Secretary the sole arbiter of whether a label is false or misleading.
- Despite the FSIS's past and present takes on the "Product of USA" label and whether they believe it was misleading or not to consumers, courts "no longer treat [an agency's] views

as controlling or even 'especially informative.' " Thus, the FSIS's guidance in their Policy Book does not conclusively determine whether the label at issue is false or misleading.

***Hallman v, Flagship Restaurant Group, LLC*, 762 F. Supp. 3d 830 (D. Neb. 2025)**

- Hallman alleges she was required to spend more than twenty percent of her time on non-tipped "side work." Specifically, Flagship required Hallman "to engage in non-tip-producing activities, such as rolling silverware, cleaning tables, and a variety of other side work for more than 20% of her time."
- Hallman alleges she was required to pool her tips with non-tipped employees.
- Flagship did not argue the sufficiency of the allegations on Hallman's federal claim or argue the law was unsettled by *Kisor* or *Loper Bright* in their first motion to dismiss.
- The 20% cutoff for related work is a longstanding feature of the Department of Labor's interpretation of the Dual Jobs Regulation. In Fast, the Eighth Circuit adopted the Department of Labor's interpretation of the Dual Jobs Regulation, including the 20% cutoff for related work. The Department of Labor codified this interpretation in the 80/20 Rule. The 80/20 Rule amending the Dual Jobs Regulation was vacated by the Fifth Circuit, returning the law to the status quo under the 1967 Dual Jobs Regulation. Therefore, the controlling law for this case is the 1967 Dual Jobs Regulation as interpreted by the Eighth Circuit in Fast.
- The Court notes its determination on the pleadings is narrow. It does not resolve what duties the 20% cutoff applies. Fast, 638 F.3d at 881. It may be, on a full record, that some duties are properly categorized as part of Hallman' core occupation. These questions are better answered at summary judgment or class certification on a record showing the nature, timing, and duration of the "side work" alleged in the Amended Complaint. The Court does not express any opinion on this issue and only determines that, construing all inferences in Hallman's favor, there are enough facts alleged to go forward.
- The Fifth Circuit's national vacatur of the 80/20 Rule has consequences for this litigation. Specifically, the 80/20 Rule is no longer a controlling source of authority from the agency. However, the practical impact of vacatur is to return the law to the pre-rulemaking status quo. Here, the Eighth Circuit interpreted the Dual Jobs Regulation to encompass the principles of the 80/20 Rule articulated in earlier sub-regulatory guidance, meaning Hallman's allegations are cognizable under the FLSA. Therefore, the Fifth Circuit's vacatur alone is not a basis for dismissal.
- Flagship argues because Restaurant Law Center found the legal interpretation underlying the 80/20 Rule unlawful and the decision had national impact, surely the interpretation is not lawful here. Not so. Decisions of other circuit courts, even ones with national impact, are not binding on this Court. Moreover, even if the Court were to find the Fifth Circuit's analysis in Restaurant Law Center more persuasive, Fast "is controlling until overruled by our court en banc, by the Supreme Court, or by Congress." The Court has no authority to leapfrog the Court of Appeals, even if it believes a decision was wrong or that the circuit en banc would consider the issue differently under the current law. At best, Restaurant Law Center creates a split in authority Flagship can point to in their en banc petition or petition for certiorari but does not get them to a dismissal on 12(b)(6).

- Certainly, the Court could revisit the issues settled by Fast if it was called into question by a subsequent decision of the Supreme Court. Flagship contends *Loper Bright* and *Kisor* meet that standard. The Court disagrees. Specifically, *Loper Bright* addressed a rule related to the payment of fishing monitors not the standard for tipped employees under the FLSA. Moreover, the Supreme Court indicated it did "not call into question prior cases that relied on the Chevron framework" because those decisions "are still subject to statutory stare decisis despite our change in interpretive methodology." "Mere reliance on Chevron cannot constitute a special justification for overruling such a holding, because to say a precedent relied on Chevron is, at best, just an argument that the precedent was wrongly decided." Likewise, the Supreme Court in *Kisor* did not destroy the foundations of Fast when it upheld Auer deference, the doctrine relied on by the Eighth Circuit.
- . Flagship argues that these decisions represent "seismic changes in administrative law." While true, the mere fact that the prevailing judicial mood is more hostile to agency interpretations does not give the Court the ability to ignore binding precedent. In sum, the Court cannot treat Fast as a nullity because it relied in part on Chevron or Auer because, a matter of vertical stare decisis, the Court must apply Fast's interpretation of the Dual Jobs Regulation, "even [if] the interpretive methods that led to those constructions f[e]ll out of favor."
- Hallman plausibly alleges Flagship operated an illegal tip pool. Specifically, the complaint alleges that Flagship took the tip credit rather than paying its tipped employees minimum wage and Hallman was a tipped employee. Hallman's tips were pooled through the Point of Sale System and distributed to other employees along a set formula. The tips were distributed to non-tipped employees including "Sushi Chefs, support staff, server assistants, and food runners." Finally, Hallman's allegations that she was told by management that she was required to tip share raises the inference that the tip sharing was not "mutually agreed upon" by employees but rather required by management. Therefore, Hallman alleges sufficient facts to plausibly allege a violation of the FLSA provisions and Department of Labor Regulations regarding tip pools.

***Texas v. U.S. Environmental Protection Agency*, 137 F.4th 353 (5th Cir. 2025)**

- This action was filed under the Administrative Procedure Act.
- This case concerns the standards that the United States Environmental Protection Agency ("EPA") must follow when reviewing attainment recommendations by the States in relation to the National Ambient Air Quality Standards ("NAAQS"). Relying exclusively on data submitted by Intervenor Sierra Club, EPA, in late 2016, designated two counties in Texas as nonattainment for purposes of the 2010 sulfur dioxide NAAQS. Afterwards, EPA twice changed course, perhaps reflecting how quadrennial elections have consequences.
- Section 109 of the Clean Air Act ("CAA") directs EPA to establish the NAAQS, which set maximum permissible concentrations of harmful air pollutants deemed to pose a risk to public health and safety. Congress delegated authority to EPA to establish the particular limits for these "criteria pollutants." Among the criteria pollutants is sulfur dioxide ("SO_2"), exposure to which can cause respiratory and cardiovascular illnesses.

- Affected here are two lightly populated counties in east Texas: Rusk and Panola. Luminant Generation Company, L.L.C., owns and operates the Martin Lake power plant in Rusk County. That power plant is relevant because SO_2 is a natural byproduct of burning coal to generate electricity. The State of Texas must consider that source of SO_2 emissions in assessing whether Rusk and Panola Counties were in attainment for the new NAAQS.
- The State set out to make its initial attainment recommendations. One difficulty was that infrastructure had not yet developed to allow reliable monitoring or modeling of SO_2 emissions. EPA issued a guidance document explaining its expectation that most areas would be designated as unclassifiable for lack of clear data, explaining: "Given the current limited network of SO_2 monitors, and our expectation that states will not yet have completed appropriate modeling of all significant SO_2 sources, we anticipate that most areas of the country will be designated 'unclassifiable.'"
- Consistent with this expectation, in June 2011, the State recommended that most counties be designated as unclassifiable, including Rusk and Panola Counties. EPA was required by statute to make final designations within two years after the revision of the NAAQS. In July 2012, however, EPA extended this deadline to June 3, 2013, because there was "insufficient information to promulgate the designations" of the Counties. It further responded to the State's February 2013 recommendations and explained that its review "of the most recent monitored air quality data from 2009–2011 shows no violations of the 2010 SO_2 standard in any areas in Texas."
- EPA did not meet the June 3 deadline. In August 2013, EPA issued "Round 1" designations under the 2010 NAAQS, designating regions in 16 states. The Round 1 designations relied only on the available air quality monitoring data. EPA stated it would continue to make designations "in separate future actions."
- Sierra Club and the National Resources Defense Council sued EPA in the Northern District of California to compel EPA to complete designations for the rest of the country. They argued EPA failed to fulfill a nondiscretionary duty under the CAA. Texas and other States intervened to represent their interests in disputing any nonattainment designations, given that such a designation would create an obligation to develop a SIP. EPA did not contest liability. The district court granted summary judgment in favor of the plaintiffs and ordered the parties to confer on the proper remedy. Sierra Club and EPA entered into, and the district court approved, a consent decree that required EPA to issue final designations for regions with the largest sources of SO_2 by July 2, 2016. The States appealed, presenting essentially the same arguments raised in the district court. The Ninth Circuit affirmed the entry of the consent decree, holding that the settlement was consistent with the CAA.
- Texas submitted recommendations for area designations. Texas recommended that Rusk and Panola County be designated as either unclassifiable or in attainment and that data gathered from air quality monitors be used. EPA subsequently issued a draft Technical Support Document that rejected Texas's recommendations and stated it would instead rely upon Sierra Club's modeling.
- EPA proposed that 68 areas in 24 states would be included in the "Round 2" designations. In this proposal, EPA designated Rusk and Panola Counties as nonattainment. Interested parties had 30 days to provide additional information before EPA made its final decision.

During the comment period, Luminant submitted its own modeling that purportedly showed Sierra Club's modeling overstated the impact of emissions for the three Texas areas due to errors and shortcomings.

- In July 2016, EPA delivered its final-rulemaking designations for 61 areas. Pursuant to an agreed modification to the consent decree, EPA delayed issuing the Round 2 designations for the four remaining areas in Texas.
- In December 2016, EPA issued a "Supplement to Round 2 for Four Areas in Texas" making designations for the areas surrounding the Big Brown, Martin Lake, Monticello, and Sandow power plants. Contrary to Texas's recommendations and after providing the required notice to Texas, EPA designated three of the areas as "nonattainment." Those areas included portions of: (1) Freestone and Anderson Counties; (2) Rusk and Panola Counties; and (3) Titus County. EPA acknowledged Petitioners' objections, but it explained that it relied upon the modeling submitted by Sierra Club in making these determinations, despite recognizing its "potential defects."
- The CAA identifies an "unclassifiable" area as "any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant." In 2015, EPA issued guidance as part of a consent decree in California litigation that was to be applied nationwide. Petitioners rely on that guidance to insist that this provision requires designation of an area as unclassifiable when "the information at the time of designation does not clearly demonstrate that the area is in attainment or nonattainment." "Clearly demonstrate" was part of the 2015 guidance, and no replacement guidance was entered relevant to the suit before us. Petitioners argue that due to the existence of conflicting data in the record, the information could not have clearly demonstrated nonattainment. They therefore contend EPA's nonattainment designation for portions of Panola and Rusk counties violated the statute.
- We examine the statute that needs interpreting — Section 7407(d)(1)(A)(iii). We "exercise independent judgment in construing statutes administered by agencies" and "in deciding whether an agency has acted within its statutory authority." Loper Bright Enters. v. Raimondo, 603 U.S. 369, 406, 412, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024). This requires the use of " 'all relevant interpretive tools' to determine the 'best' reading of a statute; a merely 'permissible' reading is not enough."
- To be clear, discarding Chevron deference does not mean ignoring agency interpretations. The Supreme Court discussed in considerable detail its 1944 precedent that to a large but not complete extent Chevron displaced in 1984. Loper Bright, 603 U.S. at 388, 144 S.Ct. 2244 (discussing Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). The Loper Bright Court agreed with Skidmore that an agency's "expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.' " It is not necessary to give Chevron deference in order "to ensure that the resolution of statutory ambiguities is well informed by [an agency's] subject matter expertise.... Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch." The degree of respect, i.e., the weight to be given an agency's interpretation, will "depend upon the thoroughness evident in its consideration, the validity of its reasoning,

its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

- If "the best reading of a statute is that it delegates discretionary authority to an agency," then our role under the APA is "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."
- We conclude that the best reading of this language is that Congress insisted on a finding of "we don't know" when the "available information" does not reliably support a finding of attainment or nonattainment. A finding is not to be forced. The mere presence of competing evidence does not bar factfinding, of course. Among the ways for EPA to know that an area should be unclassifiable is when there is not much evidence, when the competing evidence is too closely balanced, or when the evidence is dubious. To put it more generally, EPA is obligated to designate an area as "unclassifiable" if the available evidence does not allow for a meaningfully reliable determination of attainment or nonattainment. Does that mean that the evidence must "clearly demonstrate" attainment or nonattainment, a descriptive phrase EPA no longer endorses? We do not see much daylight between our interpretation and that phrase. Consequently, we need not explore questions about whether the guidance was improperly abandoned without notice to affected parties or other issues related to an agency's changing its position.
- EPA has an obligation to "examine the relevant data and articulate a satisfactory explanation for its action." It must weigh evidence and determine if some evidence is reliable while other evidence is not. It is not possible to interpret Loper Bright as discarding deferential review of agency factfinding. The Supreme Court relied extensively on the provisions of the APA in its Loper Bright opinion. The Court distinguished a court's deferential standard for reviewing findings of fact under the APA from the absence of deference for legal conclusions.
- EPA explained the distance from the monitor to the power plant was too great to rule out the possibility that Rusk and Panola Counties were in nonattainment. Even so, that does not explain why the model and the monitor showed vastly different results for the same location — the area around the Longview airport. If the model could not accurately predict SO2 concentrations in that location, we have no basis to believe it could accurately predict SO2 concentrations at the Martin Lake power plant. EPA needed to account for this limitation, but it failed to do so. EPA's failure to reconcile the inconsistencies between Sierra Club's modeling and the monitoring data created an unexplained inconsistency. See Sierra Club, 939 F.3d at 668.
- EPA's argument that it relied on the 2016 instead of the 2015 modeling does not change the result. Sierra Club's 2016 model used actual emissions instead of allowable emissions and predicted a concentration at the Longview airport monitor less than the value predicted by the 2015 model. As previously stated, however, EPA did not investigate or explain the reason for the disparity between the 2015 model and the monitoring data. We therefore cannot assess whether a switch to actual emissions resolved the problem that originally caused the deviation. Because we "cannot excuse the EPA's reliance upon a methodology

that generates apparently arbitrary results," we remand for EPA to "fulfill its obligation to engage in reasoned decisionmaking."

- We interpret Section 7407(d)(1)(A)(iii) as requiring EPA to designate an area as "unclassifiable" if the available evidence does not allow for a meaningfully reliable determination of attainment or nonattainment. We also explained that EPA can know an area should be designated "unclassifiable" when there is not much evidence, the competing evidence is too closely balanced, or the evidence is dubious. Here, the evidence before EPA implicated all three categories — EPA relied solely on Sierra Club's modeling that had conceded limitations and that was further called into question by conflicting monitoring data. Given this, EPA should have designated the areas as unclassifiable or rationally explained why an alternative designation was clear and not debatable. EPA did neither. Instead, EPA seems to have forced a result on sparse and suspect evidence. That violates the APA and cannot withstand our searching review. We remand for EPA to engage in reasoned decision-making in accordance with our interpretation of "unclassifiable" under 42 U.S.C. § 7407(d)(1)(A)(iii).

***Schaffner v. Monsanto Corp*., 113 F.4th 364 (3d Cir. 2024)**

- This appeal presents the question of whether, once the Environmental Protection Agency ("EPA") registers and approves a pesticide label that omits a particular health warning, a state-law duty to include that warning is preempted by a federal statute expressly preempting any state-law pesticide labeling requirement that differs from or adds to the requirements imposed under federal law.
- Plaintiffs allege that defendant Monsanto Company ("Monsanto") violated Pennsylvania law by omitting a cancer warning from the label of its weed-killer, Roundup (the "Cancer Warning"). But the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the federal statute that regulates pesticides such as Roundup, mandates nationwide uniformity in pesticide labeling by prohibiting states from imposing labeling requirements that are in addition to or different from the requirements imposed under FIFRA itself. This provision, Monsanto argues, preempts the Pennsylvania duty to warn that it allegedly breached.
- Because regulations promulgated to implement FIFRA require the health warnings on a pesticide's label to conform to the proposed label approved by the EPA during the registration process (the "Preapproved Label"), and because during Roundup's registration process the EPA approved proposed labels omitting a cancer warning following an extensive review of scientific evidence concerning Roundup's possible carcinogenicity, we conclude that the alleged state-law duty to include the Cancer Warning on Roundup's label (the "Pa. Duty to Warn") imposes requirements that are different from those imposed under FIFRA, and that it is therefore preempted by FIFRA.
- Prior to Loper Bright, courts might have owed deference to the EPA's interpretation of the statutory term "misbranding," but no more. Nonetheless, while Loper Bright requires courts, not agencies, to determine the meaning of statutory terms such as "misbranding," we do not read the decision to undermine the EPA's authority to promulgate the regulations that implement FIFRA. As the Court explained in Loper Bright, while courts alone must ascertain a statute's meaning, "the statute's meaning may well be that the agency is

authorized to exercise a degree of discretion." And one way for statutes to express that meaning is when they "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme." FIFRA is such a statute: it expressly authorizes the EPA Administrator "to prescribe regulations to carry out the provisions" of the statute. We therefore conclude that Loper Bright does not undermine the validity of the EPA regulations that govern pesticide labeling and that we consider in analyzing preemption under FIFRA in this opinion.

- Section 152.46 does not itself directly permit the modification by notification of a registered pesticide in any manner that has "no potential to cause unreasonable adverse effects to the environment." Rather, it merely authorizes the EPA, at its discretion, to permit registrants to modify pesticides by notification in some such circumstance.
- Section 152.46(a) does not of its own force permit Monsanto to add the Cancer Warning to the Roundup label by notification. At most, it could authorize the EPA to permit that modification to be made by notification. Whether Monsanto in fact could have added the Cancer Warning by notification depends on how the EPA has exercised the authority conferred upon it by section 152.46(a).
- We do not believe that courts may avoid the task of interpreting sources of law such as section 152.46 and PRN 98-10 based on the reasoning that actions must be permissible if the agency that administers that law has permitted them. As the Supreme Court has recently reminded us, "[i]t is emphatically the province and duty of the judicial department to say what the law is." And while courts may sometimes defer to an agency's interpretation of its own regulations, the Court has "cabined" the scope of that deference "in varied and critical ways." Kisor v. Wilkie, 588 U.S. 558, 580, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019). Agency interpretations are not entitled to deference unless they emanate "from those actors, using those vehicles, understood to make authoritative policy in the relevant context." Similarly, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive ... deference" from courts.
- The EPA letter cited in Hardeman II satisfies neither condition. Rather than being a statement of "authoritative policy," it merely condones a single registrant's modification by notification of the label of a single pesticide. See Letter from Jennifer Gaines. And rather than reflecting the EPA's "fair and considered judgment," it consists entirely of a single, boilerplate, three-sentence paragraph that omits any substantive analysis of PRN 98-10 or the relevant regulations. Such a letter is not entitled to deference in the face of our conclusion, based on our own substantive legal analysis, that the Cancer Warning could not have been added to the Roundup label via modification by notification.
- Because the EPA does not approve label contents added through modification by notification, that procedure cannot be used to add contents, such as the Cancer Warning, that "must be approved by the Agency." Section 156.70 therefore provides an additional basis, besides the express terms of PRN 98-10 itself, for our conclusion that the Cancer Warning could not have been added to the Roundup label through modification by notification.
- Because the addition of the Cancer Warning to Roundup's label would involve a change in the precautionary statements on its Preapproved Label, modification by notification was

unavailable under section 152.46 and PRN 98-10. The Preapproval Regulation therefore prohibited the addition of the Cancer Warning to the Roundup label without further EPA approval.

- We hold that under both Bates and section 136v(b) itself federal requirements must be articulated at the more specific level when identifying the Federal Comparator in applying the parallel-requirements test. If EPA regulations specifically identify the contents required to be included on a pesticide label, a state-law requirement is preempted unless it is equivalent to that specific regulatory requirement. The state-law duty cannot survive preemption simply because its standard of liability is equivalent to the broad statutory definition of misbranding. We therefore apply the parallel-requirements test in this case by comparing the Pa. Duty to Warn with a Federal Comparator that incorporates the Preapproval Regulation.
- We do not hold that FIFRA necessarily preempts any state-law duty requiring modification to a pesticide's Preapproved Label. Rather, we hold only that such duties may sometimes be preempted, including in the circumstances of this case.
- We hold that the Preapproval Regulation prohibits modifying the health warnings on a pesticide's Preapproved Label, including by adding the Cancer Warning; that this prohibition constitutes a "requirement" for the purposes of section 136v(b); and that when we apply the parallel-requirements test the Federal Comparator must incorporate this regulatory requirement rather than incorporating only the statutory definition of misbranding. This approach best achieves Congress's stated aim of uniformity in pesticide labeling. And the parallel-requirements test is not satisfied when the Pa. Duty to Warn and the Federal Comparator are compared under this approach: they are not equivalent because Monsanto's alleged violation of the Pa. Duty to Warn does not constitute a violation of the Preapproval Regulation. We thus conclude that the Schaffners' failure-to-warn claim is preempted under section 136v(b).

***Restaurant Law Center v. U.S. Dep't of Labor*, 120 F.4th 163 (5th Cir. 2024)**

- Suit filed under Administrative Procedure Act
- The Restaurant Law Center and the Texas Restaurant Association challenge a final rule promulgated by the Department of Labor that restricts when employers may claim a "tip credit" for "tipped employees" under the Fair Labor Standards Act.
- The Final Rule fails under the Administrative Procedure Act twice over. Because the Final Rule is contrary to the Fair Labor Standards Act's clear statutory text, it is not in accordance with law. And because it imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious.
- The 80/20 guidance provided that a maximum of 20 percent of an employee's time could be spent on non-tipped activities related to the tipped occupation—for example, a waitress setting tables or making coffee—for the employer to claim the full tip credit.
- DOL's 80/20 guidance persisted uninterrupted until 2009, when DOL's interpretation of the dual-jobs regulation began to oscillate with every change in presidential administration.
- In December 2021, DOL issued a different final rule after notice and comment that effectively codified its longstanding 80/20 guidance. The Final Rule added a new

subsection (f) to 29 C.F.R. § 531.56, explaining what it means to be "engaged in a tipped occupation" under 29 U.S.C. § 203(t). Notably, "tipped occupation" is not a term used in § 203(t) of the FLSA. According to the Final Rule, an employee is "engaged in a tipped occupation when the employee performs work that is part of the tipped occupation." Therefore, "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation."

- The Final Rule then proceeds to define three categories of work: (1) directly tip-producing work (e.g., a server "providing table service"); (2) directly supporting work (e.g., a server "setting and bussing tables"); and (3) work not part of the tipped occupation (e.g., a server "preparing food"). An employer may take the tip credit for tip-producing work. But if more than 20 percent of an employee's workweek is spent on directly supporting work, the employer cannot claim the tip credit for that excess. Nor can directly supporting work be performed for more than 30 minutes at any given time. An employer may not take the tip credit for any time spent on work not part of the tipped occupation. In addition, the Final Rule amended the 1967 dual-jobs regulation to omit the counterexample of a waitress engaging in duties related to her occupation.
- "Chevron is overruled." In its place, the Court has instructed that we are to return to the APA's basic textual command: "independently interpret[ing] the statute and effectuat[ing] the will of Congress." Courts are constantly faced with statutory ambiguities and genuinely hard cases. But "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."
- Following the Supreme Court's instructions, and without the guidance of Chevron, we turn now to our task. While the district court was of course correct to apply the Chevron framework at the time of its decision, the Supreme Court's intervening opinion in Loper Bright requires us to depart from the district court's analysis at the very start. We must parse the text of the FLSA using the traditional tools of statutory interpretation. As the district court correctly put it, "[t]he dispute in this case turns on the meaning of the statutory phrase 'engaged in an occupation' and the term 'occupation,' both of which are used in the definition of 'tipped employee' but are undefined in the FLSA."
- DOL's interpretation sits uncomfortably with the operative statutory term: "tipped employee." Under the Final Rule, if an employee is not engaged in her occupation at a given moment, then she is not a "tipped employee" at that moment. The Final Rule necessarily means, therefore, that when an employee is not engaged in her "tipped occupation," as the regulatory language puts it, she is engaged in some other occupation. Because the Final Rule is so granular in divvying up component tasks, a single occupation could quickly break apart, implausibly, into many.
- The Final Rule is attempting to answer a question that DOL itself, not the FLSA, has posed. The FLSA is clear: an employer may claim the tip credit for any employee who, when "engaged in" her given "occupation ... customarily and regularly receives more than $30 a month in tips." The FLSA does not ask whether duties composing that given occupation are themselves each individually tip-producing.

- It is DOL's interpretation that threatens to turn the $30-threshold requirement into a nullity by focusing instead on individual tasks. DOL's interpretation functionally turns § 203(t) into: " 'tipped employee' means any employee who, in a given moment, is engaged in tip-producing work." We conclude that our interpretation of the statutory language is the best one because it gives full effect to the entirety of the provision.
- We pause to note that, even in the absence of Chevron, courts are well-advised to consider agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time." As DOL points out, the 80/20 standard (but not the 30-minute requirement) is indeed of some vintage, having been applied with brief interregna since at least 1988. But while longstanding agency practice might have the "power to persuade," it has never had the "power to control." See Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). Nor can we permit agency practice to "defeat a statute's text by 'adverse possession.' " We are not persuaded that the 80/20 standard, however longstanding, can defeat the FLSA's plain text.
- In no way does our holding bear on the validity of the dual-jobs regulation, which is not challenged here. The dual-jobs regulation, unlike the Final Rule, does not countenance a percentage-based—much less a 30-minute-increment-cutoff-based—approach to identifying how much untipped work is too much. Indeed, it focusses on "whether the employee performs tasks unrelated to his or her tipped occupation," not the "amount of time" spent on untipped tasks. It therefore suffers from none of the infirmities that we have identified with the Final Rule.
- "Dual" really means dual. The 1967 regulation envisioned two unrelated and separate occupations: maintenance work and waitressing. By contrast, the Final Rule applies the dual-jobs framework to disaggregate the component tasks of a single occupation.
- Even without Chevron, we understand that courts are still to conduct a similar arbitrary-and-capricious analysis in "fix[ing] the boundaries of ... delegated authority and ensuring the agency has engaged in reasoned decisionmaking within those boundaries."
- DOL's basic premise is that § 203(t) presents a line-drawing problem. Assuming that the provision's use of "engaged in an occupation" refers to engaging in some identifiable set of duties that compose that occupation, there is admittedly the potential for ambiguity. If the dual-jobs regulation is permissible under the FLSA, as the parties in large part agree, then there is at least some line drawing that must occur in identifying which duties make up any given occupation qualifying for the tip credit. DOL argues that the Final Rule's focus on those duties' tip-producing nexus, and on the time an employee spends on supporting duties, is a permissible line to draw.
- The "line" that DOL has drawn discounts many core duties of an occupation when those duties do not themselves produce tips. This is not what § 203(t) directs DOL to consider. If a core duty of a server is bussing and setting up tables, the server is undoubtedly engaged in his occupation. It does not matter whether he is tipped or not for those duties. DOL must introduce the independent concept of a "tipped occupation." But that term appears nowhere in the statute.
- Another fundamental problem with the Final Rule is its inconsistent treatment of supporting work based only on the work's duration. We cannot think of any occupation for

which every duty is directly tip-producing, as the Final Rule demands. The Final Rule ties the tip credit not to the character of these various duties as integral to their respective occupations, but to the amount of time that these duties take. Like the tipping nexus, this temporality requirement can be found nowhere in the statute.

- In short, as to supporting work, the Final Rule replaces the Congressionally chosen touchstone of the tip-credit analysis—the occupation—with one of DOL's making—the timesheet. And as to untipped work, the Final Rule again ignores such work's clear connection to the occupation itself and instead elevates its lack of connection to tipping.
- We hold that the Final Rule is arbitrary and capricious because it draws a line for application of the tip credit based on impermissible considerations and contrary to the statutory scheme enacted by Congress.

***Green v. Perry's Restaurants Ltd*., 758 F. Supp. 3d 1312 (D. Colo. 2024)**

- Plaintiffs are current and former servers asserting claims under the Fair Labor Standards Act.
- Plaintiffs allege that Defendants compensated them at a subminimum hourly wage and claimed an improper "tip credit" to offset their obligation to pay Plaintiffs the full minimum wage required under state and federal law. Among other reasons, Plaintiffs assert Defendants were not entitled to claim a tip credit because Plaintiffs were regularly required to perform "non-tipped work that, although related to [their] tipped occupation, exceeded twenty percent (20%) of their time worked during each workweek." This "related" "non-tipped work" included "wiping down tables, stocking and setting tables, running food, rolling silverware, and other 'side-work.'"
- Plaintiffs assert that their minimum wage claims in this regard are based on the United States Department of Labor's ("DOL") long-standing subregulatory guidance setting forth a 20% threshold for tipped employee time spent performing "related" non-tipped duties, beyond which the employer becomes ineligible to claim a tip credit (the "80/20 Rule"), as well as relevant case law applying that guidance.
- In response to Congress's amendment of the FLSA to include the tip-credit provision, the DOL promulgated a regulation to clarify when a tipped employee is "engaged in an occupation in which he customarily and regularly receives ... tips."
- The 2021 Final Rule permitted an employer to take a tip credit, not only for an employee's tip-producing work, but also for other "[w]ork that directly supports the tip-producing work, if the directly supporting work is not performed for a substantial amount of time." It further defined a "substantial amount of time" as "directly supporting work exceed[ing] a 20 percent workweek tolerance" and, as newly incorporated, "directly supporting work for a continuous period of time that exceeds 30 minutes." The 2021 Final Rule went into effect in December 2021.
- Two special interest groups—the Restaurant Law Center and the Texas Restaurant Association (collectively, the "Associations")—sued the DOL in the Western District of Texas seeking to enjoin its enforcement. Addressing the parties' cross summary judgment motions, the district court granted the DOL's motion, concluding that the 2021 Final Rule

was a permissible interpretation of the ambiguous statutory term, "engaged in an occupation," and was thus entitled to deference under Chevron.

- While the Associations' appeal of the district court's order was pending, the United States Supreme Court overruled Chevron. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L.Ed.2d 832 (2024). Thus, rather than affording Chevron deference to the DOL's 2021 Final Rule, the Fifth Circuit opined that it must "return to the [Administrative Procedures Act's ("APA")] basic textual command: 'independently interpret[ing] the statute and effectuat[ing] the will of Congress.' " Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 404 (5th Cir. 2024) (quoting Loper Bright, 144 S. Ct. at 2263). In so doing, the Circuit rejected the DOL's interpretation of when a tipped employee is "engaged in [their] occupation," reasoning instead that the FLSA's definition of "[t]ipped employee" is clear on its face and "does not ask whether duties composing that given occupation are themselves each individually tip-producing."
- The Fifth Circuit continued: "Having concluded the [2021] Final Rule is contrary to the FLSA's text, we could stop here." It did not. Instead, it went on to find "the [2021] Final Rule is arbitrary and capricious [under the APA] because it draws a line for application of the tip credit based on impermissible considerations and contrary to the statutory scheme enacted by Congress." As for the remedy, the Fifth Circuit concluded that vacatur without remand was appropriate, because in its view the 2021 Final Rule "suffer[ed] from a fundamental substantive defect that the DOL could not rectify on remand." Nonetheless, the Circuit's opinion made clear that its holding "in no way ... bear[s] on the validity of the dual-jobs regulation, which is not challenged here."
- The central issue presented by the Motion is whether the Restaurant Law Center decision invalidated the entire concept of "related side work" and the corresponding 80/20 Rule, such that Defendants are entitled to summary judgment on Plaintiffs' claims predicated on the same. Here, the Court must specifically determine (1) the effect, if any, of Restaurant Law Center's vacatur of the 2021 Final Rule on Plaintiffs' claims in this case, and (2) the effect, if any, of Restaurant Law Center's vacatur of the 2021 Final Rule on earlier subregulatory guidance (i.e., the 1988 FOH Guidance) embodying the 80/20 Rule, and upon which Plaintiffs rely in this case.
- As to the former inquiry, the Court acknowledges that precedent in other circuits—including the D.C. Circuit—supports the proposition that vacatur of an agency action pursuant to the APA renders the action void as to any regulated person or entity, whether a party to the immediate case or not.
- Still, based on the Court's review, the Tenth Circuit has not expressly addressed the scope of the vacatur remedy. Furthermore, some justices of the Supreme Court have recently expressed disagreement over whether the APA is properly interpreted as authorizing such a global remedy. See United States v. Texas, 599 U.S. 670, 695-702, 143 S.Ct. 1964, 216 L.Ed.2d 624 (2023) (Gorsuch, J., concurring) (expressing doubt that "set aside" in the APA authorizes vacatur: "Why bother jumping through [ordinary joinder and class-action procedures] when a single plaintiff can secure a remedy that rules the world?"). The Court is similarly skeptical that it is necessarily obliged to extend the Fifth Circuit's vacatur of the 2021 Final Rule to the claims and defenses of the parties in this case.

- Ultimately, however, the Court concludes that it need not decide whether the Fifth Circuit's vacatur of the 2021 Final Rule extends to the parties in this case. Plaintiffs' Amended Complaint was filed in February 2021, ten months before the 2021 Final Rule became effective in December 2021. See Sections II.A, I.B supra. "As a general rule, ... [n]ewly promulgated agency rules, ... are ... given only prospective effect." Munoz v. Lynch, 631 F. App'x 510, 512 (10th Cir. 2015). Plaintiffs do not cite the 2021 Final Rule as the basis for their related side work claims, let alone argue the 2021 Final Rule should be given retroactive effect. Thus, setting aside the question of what legally preclusive effect the vacatur decision in Restaurant Law Center should be given in this Circuit, the Court declines to apply the 2021 Final Rule's amendments to the Dual Jobs Regulation to Plaintiffs' claims.
- The Court thus turns to the second inquiry: whether the Fifth Circuit's vacatur of the 2021 Final Rule uprooted the earlier sources for the 80/20 Rule that Plaintiffs rely upon in this case—that is, the Dual Jobs Regulation, the 1988 FOH Guidance, and case law applying the same.
- The parties agree that Restaurant Law Center had no effect on the validity of the Dual Jobs Regulation. But, Defendants argue that after Restaurant Law Center, only the Dual Jobs Regulation's concept of unrelated side work remains intact. Defendants' argument ignores that the 80/20 Rule has, apart from two brief interludes discussed in Section II.A supra, continuously been included in subregulatory guidance interpreting the Dual Jobs Regulation since at least 1988. And they otherwise fail to convince the Court that it must reject the 1988 FOH Guidance for the same reasons that Restaurant Law Center rejected the 2021 Final Rule's codification of the 80/20 Rule.
- For one, the precise legal issue in Restaurant Law Center was "the validity of the [2021] Final Rule as an interpretation of the FLSA"—not, as here, the validity of the DOL's subregulatory guidance as an interpretation of the Dual Jobs Regulation. Thus, while the demise of Chevron featured heavily in Restaurant Law Center, it does not bear on the Court's application of the 1988 FOH Guidance. That is because agency interpretations of their own regulations, like the 1988 FOH Guidance, have never received the benefit of Chevron deference. Rather, "[w]hen an agency reasonably interprets a genuinely ambiguous regulation that it has promulgated, federal courts generally defer to that interpretation" under Auer—not Chevron.
- Auer was not discussed, let alone analyzed, in Loper Bright, and federal courts in this Circuit have continued to apply it.
- Moreover, even if Auer deference were no longer warranted, agency interpretations may still be considered persuasive under Skidmore.
- Just as the Fifth Circuit was free to find persuasiveness—or not—in earlier opinions applying Auer and/or Skidmore to the 1988 FOH Guidance, this Court is free to do the same as to Restaurant Law Center's independent statutory interpretation of the FLSA.
- As the law currently stands, Plaintiffs are free to base their claims on the 80/20 Rule, as embodied by the DOL's subregulatory guidance interpreting the Dual Jobs Regulation.
- Faced with this ambiguity [in the Dual Jobs Regulation's failure to address certain issues], the Court will defer to the DOL's interpretation of its own Dual Jobs Regulation so long

as it is not "plainly erroneous or inconsistent with the regulation." Here again, the Court agrees with Fast that the DOL's interpretation of the Dual Jobs Regulation—"which concludes that employees who spend 'substantial time' (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit"—is a reasonable one.

- Alternatively, the Court finds the 1988 FOH Guidance has the "power to persuade" and as a consequence is entitled to Skidmore deference. Under Skidmore, "a reviewing court 'accord[s] the [agency's] interpretation a measure of deference proportional to 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.'"
- Because the 1988 FOH Guidance is entitled to both Auer and Skidmore deference, the Court holds that the 80/20 Rule applies to Plaintiffs' FLSA claims.

***Mayfield v. U.S. Dep't of Labor*, 117 F.4th 611 (5th Cir. 2024)**

- Although the Fair Labor Standards Act defines the workers to whom the statute applies broadly, it also contains a series of exemptions that exclude certain types of employees from that definition. Relevant here, the FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity." That exemption is known as the "EAP Exemption" or the "White Collar Exemption,'' and it gives the Secretary of the Department of Labor the power to "define[ ] and delimit[ ]" the "terms" of the exemption.
- n 2019, DOL issued a new version of what is known as the "Minimum Salary Rule," raising the minimum salary required to qualify for the Exemption from $455 per week to $684 per week, an increase of 50.3%. DOL is currently considering a proposed rule that would raise the minimum salary to $1,059 per week, a roughly 55% increase from the 2019 Rule.
- Robert Mayfield challenges the latest rule, which updates the minimum salary necessary to fall within the Exemption, on the ground that promulgating any rule imposing a salary requirement exceeds the Department's statutorily conferred authority or else violates the nondelegation doctrine.
- Mayfield is a small-business owner who runs thirteen fast-food restaurants in Austin, Texas. According to Mayfield, his businesses succeed by offering high bonus payments to the best performing store managers. He asserts that the Rule forces him to pay a higher salary to all managers regardless of performance, leaving him with insufficient funds to reward the best performers.
- There are three indicators that each independently trigger the major questions doctrine: (1) when the agency "claims the power to resolve a matter of great political significance"; (2) when the agency "seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities"; and (3) when an agency "seeks to intrude into an area that is the particular domain of state law."
- This case neither is one of vast political or economic significance under Supreme Court or Fifth Circuit precedent nor intrudes into an area that is the particular domain of state law.
- Where, as here, Congress has clearly delegated discretionary authority to an agency, we discharge our duty by "independently interpret[ing] the statute and effectuat[ing] the will of Congress subject to constitutional limits." This means that we must "independently

identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." Doing so requires using "all relevant interpretive tools" to determine the "best" reading of a statute; a merely "permissible" reading is not enough.

- Here, because there is an uncontroverted, explicit delegation of authority, the question is whether the Rule is within the outer boundaries of that delegation.
- Promulgating the Minimum Salary Rule can be construed in two ways, both of which are consistent with DOL's statutorily conferred authority. By promulgating the Rule, DOL defines, in part, what it means to work in an executive, administrative, or professional capacity (namely, to earn at least a particular amount of money). This tracks the simple fact that a definition can rely on multiple types of characteristics. The Minimum Salary Rule can also be construed as an exercise of the power to delimit the scope of the Exemption. By promulgating the Rule, DOL sets a limit on what is otherwise defined by the text of the Exemption. On either construal of what DOL is doing when it promulgates the Rule, its action is within the scope of its authority.
- Using salary as a proxy for EAP status is a permissible choice because, as we have explained, the link between the job duties identified and salary is strong. That does not mean, however, that use of a proxy characteristic will always be a permissible exercise of the power to define and delimit. If the proxy characteristic frequently yields different results than the characteristic Congress initially chose, then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them. That is not the case here.
- One might ask what work Skidmore deference can do given the Supreme Court's statements that (1) statutes have a "best reading ... the reading the court would have reached if no agency were involved," and (2) "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." Taking these statements together, it seems that either the agency's interpretation is the best interpretation (in which case no deference is needed) or the agency's interpretation is not best (in which case it lacks persuasive force and is not owed deference). We need not address that issue here because DOL's interpretation of the statute is "best" based on traditional tools of statutory interpretation and without reliance on deference of any kind. We note, however, that if Skidmore deference does any work, it applies here. DOL has consistently issued minimum salary rules for over eighty years. Though the specific dollar value required has varied, DOL's position that it has the authority to promulgate such a rule has been consistent. Furthermore, it began doing so immediately after the FLSA was passed. And for those who subscribe to legislative acquiescence, Congress has amended the FLSA numerous times without modifying, foreclosing, or otherwise questioning the Minimum Salary Rule.
- We join two of our sister circuits in finding that, under the existing test, DOL's authority to define and delimit the terms of the EAP Exemption is guided by an intelligible principle.

***Pickens v. Hamilton-Ryker IT Solutions, LLC*, 133 F.4th 575 (6th Cir. 2025)**

- Pickens sued his former employer for classifying him as a salaried worker rather than an hourly worker under the Fair Labor Standards Act.

- An employer need not pay overtime to "any employee employed in a bona fide executive, administrative, or professional capacity," as those "terms are defined and delimited from time to time by regulations of the Secretary [of Labor]."
- An employee works in a bona fide executive, administrative, or professional capacity if (among other things) he is paid on a "salary basis."
- An employee receives a "salary" if he is paid "a predetermined amount" "on a weekly[ ] or less frequent basis." An employee must receive that amount—his "full salary"—"for any week in which [he] performs any work." His pay may not be docked "for time when work is not available," if he happens to call in sick for a day or two, or if he takes a few hours off "for personal reasons."
- The ancien régime of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. treated "ambiguous" statutes as "implicit" delegations of authority to agencies, which had final authority to "fill any gap[s]" in the statute with "reasonable" interpretations. Loper Bright Enterprises v. Raimondo rejected that "fiction." A statutory ambiguity "is not a delegation to anybody," the Court explained, meaning that judges could not "defer" to an agency's interpretation whenever they faced an unclear statute. They must instead do what judges do: arrive at their own "independent judgment" about what the statute means.
- In doing away with deference, however, Loper Bright did not do away with discretion. As the Court explained, it will sometimes be the case that "the best reading of a statute is that it delegates discretionary authority to an agency." That is not the product of ambiguity. It is the product of "broad and open-ended" grants of authority under the heading of "terms like 'reasonable,' 'appropriate,' 'feasible,' [and] 'practicable,'" all of which are incapable of precise definition not because they are ambiguous, but because they unambiguously convey discretion. An "express and clear conferral of authority" to an agency "does not rest on Chevron's fiction" at all. It rests on an express delegation of power to an agency.
- What should a court do, then, when asked to review whether an agency has permissibly exercised delegated discretion? Loper Bright tells us. A court plays its part by (1) "recognizing constitutional delegations," (2) "fixing the boundaries of the delegated authority," and (3) "ensuring the agency has engaged in reasoned decisionmaking within those boundaries." A court must ensure that the statute contains an "intelligible principle" and is not an impermissible delegation of legislative power to an executive branch agency. It must determine the scope of the agency's discretion under the statute by setting out the task that the agency must perform. And it must ensure that the agency's action is both "reasonable and reasonably explained." Through it all, we must decide for ourselves "whether the law means what the agency says."
- Congress chose not to specify every aspect of what makes a position "bona fide executive, administrative, or professional" in character. That is precisely why it delegated authority to the Secretary to define and delimit those terms. Congress chose not to unduly limit the Secretary's options in implementing the exemptions, and neither will we.
- It might well be the case that the lines drawn by the Secretary are imperfect, especially on the margins. But that is in the nature of drawing lines. We ask only that the Secretary exercise "reasoned" judgment, not perfect judgment. That happened here.

***Dayton Power & Light Co. v. Federal Energy Regulatory Comm'n*, 126 F.4th 1107 (6th Cir. 2024)**

- Congress did not mandate that electric utilities join a regional transmission organization (RTO).
- Congress directed FERC to provide incentives to electric utilities that joined a regional transmission organization (RTO).
- FERC promulgated a rule allowing utilities to charge higher wholesale rates as an incentive for joining an RTO. Consistent with Congress's goal of encouraging RTO participation, FERC ultimately determined that a utility can qualify for the higher rate only if it voluntarily joins an RTO. FERC thus excludes utilities that are required to join an RTO by state law because the extra payment cannot "incentivize" membership.
- Ohio law requires utilities to join an RTO, so FERC denied the application of Dayton Power, an Ohio utility, for an RTO adder. Then, prompted by a challenge from the Ohio Consumer's Counsel (OCC), FERC removed the adder from another Ohio utility, AEP. But FERC left the adder intact for two others, Duke and FirstEnergy. Duke's and FirstEnergy's rates came from comprehensive settlement agreements, and FERC viewed the adder as inseparable from those settlements.
- Our task is to interpret Section 219(c) and determine whether FERC's voluntariness requirement is valid given the "best reading" of the statute. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 2266, 219 L.Ed.2d 832 (2024). Since this case was argued, the precedents governing agency deference have shifted. Id. at 2272–73 (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Under the new standard articulated in Loper Bright, we do not defer to an agency's reasonable interpretation of a statute, but we may still "seek aid" from the agency and resort to its "experience and informed judgment" for guidance. Deference would make no difference here. The "single, best" reading of Section 219(c) is that the RTO adder requires voluntary membership.
- Utilities are rewarded for taking optional steps that will achieve a particular improved outcome; they are not rewarded for performance that's already required.
- The statutory text and structure demonstrate that the "best reading" of Section 219(c)—one that gives full effect to both the letter and context of the law—is that the RTO adder is reserved for those utilities that voluntarily choose to join an RTO.
- The Ohio law targets intrastate transmission—an area explicitly reserved for states by the FPA in § 824(a) and § 824(b)(1), so it withstands the utilities' preemption challenges. The text of the Ohio statute reveals that the legislature's primary aim was to regulate transmission within Ohio's borders.
- We consider the utilities' preemption argument and hold that the FPA does not preempt state laws requiring RTO membership.
- We affirm FERC's denial of Dayton Power's application for an RTO adder in the Dayton Power proceeding and its revocation of AEP's RTO adder in the OCC proceeding. We reverse FERC's order in the OCC proceeding declining to revoke the RTO adder from Duke's and FirstEnergy's adder-inclusive settlement rates and remand for further proceedings consistent with this opinion.

***National Family Farm Coalition v. Vilsack*, 758 F. Supp. 3d 1060 (N.D. Cal. 2024), *action dismissed as moot*, 2025 WL 315412 (N.D. Cal. Jan. 28, 2025)**

- In 2004, the Animal and Plant Health Inspection Service (APHIS), housed within the U.S. Department of Agriculture (USDA), announced the intention to revisit regulations governing genetically engineered (GE) organisms. APHIS published a notice of proposed rulemaking in 2008 that kicked off over a decade of activity and concluded in a final rule the agency adopted in May 2020.
- Plaintiffs, who are non-profit and public-interest groups organized around concerns for farmers, crops, food safety, and the environment, object to the final rule. In plaintiffs' view, the final rule effectively abandoned federal government regulation of GE organisms, leaving GE crop developers and agribusinesses to their own devices without adequate safety and other oversight. Plaintiffs ask to set aside the final rule under the Administrative Procedure Act on the ground that APHIS acted arbitrarily and capriciously, and contrary to various federal statutes.
- The 2020 final rule plaintiffs challenge is the culmination of nearly 15 years of attempts by APHIS to update the part 340 GE-plant regulations.
- The final rule revised the scope of regulations under part 340 to reflect the fact that APHIS changed its risk assessment of GE plants to focus on the specific trait introduced in the plant and that trait's potential to pose plant-pest risks in the modified plant.
- The final rule differed from its predecessors in many respects. In salient part, the final rule categorically exempts GE plants created by conventional-breeding techniques. But unlike the 2017 proposal, the final rule does not regulate such plants under part 330. The final rule excludes from regulation under part 340 GE plants with "plant-trait-mechanism of action" combinations that the agency has determined do not pose plant-pest risks. A "mechanism of action" is the "biochemical process(es) through which genetic material determines a trait." The final rule does not treat noxious weeds as a trigger for part 340 regulation, unlike the 2008 and 2017 proposals. APHIS said that it was not "statutorily obligated to integrate noxious weed authority into a revised part 340" and that it did "not perceive a basis at this time for overhauling part 360 noxious weed regulations, which we believe have functioned well over the years, or establishing alternate regulations in title 7 governing noxious weeds." APHIS also said that it would "continue [its] current practice of considering the weediness" of GE plants when it considers their plant-pest risks. Lastly, the final rule extends record retention for GE-plant developers from one year to two years without requiring permit applicants to retain or prepare any new types of records.
- Plaintiffs sued to rescind the final rule under the Administrative Procedure Act.
- The complaint alleged that the final rule contravened various federal statutes and consequently was arbitrary and capricious. Specifically, plaintiffs alleged that, in promulgating the final rule, the agency failed to heed procedural requirements under the Endangered Species Act of 1973 (ESA), and the National Environmental Policy Act (NEPA). Plaintiffs also alleged that the final rule failed to implement directives set forth in the 2008 Farm Bill and that the rule violated the Plant Protection Act (PPA). And plaintiffs said that portions of the final rule relating to the exemptions unconstitutionally delegated statutory authority to private parties without Congress's express authorization.

- "[T]he Court will not substitute its own judgment for that of the agency" but will "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." Consequently, the Court "will not 'rubber-stamp' agency decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." "The Court's deference extends to less than stellar work by an agency, so long as its analytical path and reasoning can be reasonably discerned," although it is still incumbent on agencies to "engage in 'reasoned decisionmaking,' and "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'"
- "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." Loper Bright Enterp. v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L.Ed.2d 832 (2024). There is no question that the PPA expanded the definition of noxious weeds, and so the scope of the agency's regulatory authority as well, nor is there any dispute the statute charges the agency with the responsibility to "facilitate ... interstate commerce in agricultural products ... that pose a risk of harboring plant pests or noxious weeds in ways that will reduce ... the risk of dissemination of plant pests or noxious weeds."
- But plaintiffs did not identify any statutory text that "command[s]" the agency to discharge that responsibility in a particular way, let alone plaintiffs' preferred way. Rather, as the agency notes, the statute is replete with language indicating that the way in which that responsibility is to be discharged is within the agency's discretion. Where a "statute delegates authority to an agency ... courts must respect the delegation, while ensuring the agency acts within it." Loper Bright Enterp., 603 U.S. at 413, 144 S. Ct. at 2273.
- Overall, plaintiffs did not establish that the agency exceeded its statutory authority here. Plaintiffs say the agency itself previously interpreted the PPA as imposing a "statutory duty" to add noxious weeds as a trigger for part 340 regulations. Even if an agency's prior interpretations of a statute in rescinded NPRMs carried some persuasive value, which is not at all clear, see Loper Bright Enterp., 603 U.S. at 388, 144 S. Ct. at 2259 (citing Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)), the statements plaintiffs proffer were the agency's conclusions at the time about how to exercise its discretion, not interpretations of a statutory directive.
- Plaintiffs next contend that the final rule's failure to incorporate noxious weeds as a trigger for part 340 regulations was inadequately explained. This challenge fares better.
- The final rule states that APHIS "disagrees with the proposition that [it] is statutorily obligated to integrate noxious weed authority into a revised part 340" and that it instead believes it has discretion to do so. But APHIS's "assertion that it has the ... authority" to make such a decision "does not address why" it chose to make or not make the decision. In the final rule, APHIS "recognize[d]" that genetic engineering could introduce traits that increase the weedy aspects of a plant and stated, "[a]ccordingly, [it] would continue [its] current practice of considering the weediness of the unmodified plant and whether the new trait could in any way change the weediness." The rule further provides that APHIS would consider "potential effects on the weediness of other plants with which the engineered plant can interbreed" and "whether the plant with the specific trait being evaluated should be

considered for regulation pursuant to" the separate part 360 regulations. Statements about maintaining the status quo sidestep the problems with the status quo that APHIS "had previously recognized." The final rule's silence on this score indicates that APHIS "failed to consider an important aspect of the problem" that the agency itself had identified.

- The final rule concludes APHIS does not "perceive a basis at this time" for overhauling its noxious-weed regulations because it "believe[s]" those regulations "have functioned well over the years." But the agency's perceptions and beliefs are of little moment when, as here, they are asserted as fiat untethered to a clear and sound analysis. The agency had in hand OIG audit reports the agency understood to suggest that "incorporating the PPA's expanded definition of noxious weeds into the part 340 Rules would be preferable." Yet the rule does not address the relevant recommendations in those reports.
- APHIS's failure to address the limitations in the part 360 regulations with respect to GE plants that its prior assessments identified as justifying adding noxious weeds as a trigger to part 340 regulations was arbitrary and capricious. Ignoring concerns the agency had previously recognized is not "reasoned decisionmaking."
- "An agency conclusion that is in 'direct conflict with the conclusion of its own experts' ... is arbitrary and capricious." Nowhere in the final rule does APHIS acknowledge the conflicting scientific evidence concerning the basis on which the exemption is premised. That is arbitrary and capricious.
- Unlike its decision-making for the conventional-breeding exemption, APHIS recognized contrary scientific evidence and explained its disagreement with it based on other scientific evidence, namely its own expertise from three decades' worth of regulatory analyses. Agencies need not credit every piece of scientific evidence before them, and they are permitted to credit their own experts over others.
- To reiterate, the Court's task in an APA review case is to "ensure that the agency has made a rational analysis and decision on the record before it," not to "substitute its own judgment for that of the agency." Deference to the agency in the exercise of delegated authority in connection with technical matters such as these is appropriate where the record shows that the agency accounted for the relevant evidence and offered an explanation implicating its expertise.
- The record indicates that APHIS supported its views with scientific evidence, and plaintiffs make no argument that the rule conflicts with, or is unsupported by, the evidence on which the agency purported to rely or that there was other evidence undermining the conclusions the agency drew from its expertise.
- The Court concludes that the remedy that best balances the law and that which "equity demands," is vacatur of the final rule as of the date of this order. Plaintiffs themselves recognize that this form of vacatur suffices to return the industry and GE-crop regulation to the status quo ante.

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Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law

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Summary

"*Chevron* is overruled": On June 28, 2024, the Supreme Court overruled the *Chevron* framework in *Loper Bright Enterprises v. Raimondo*, holding that the *Chevron* framework violated Section 706 of the Administrative Procedure Act (APA). The *Chevron* framework required courts to defer to reasonable agency interpretations of ambiguous statutes. In its place, the Court directed the judiciary to exercise its independent judgment to determine the meaning of federal statutes.

The *Chevron* framework was named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* For four decades, the *Chevron* case, and the framework that grew out of it, was one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law. If a court determined that *Chevron* governed its analysis, at step one it would determine whether Congress directly addressed the precise issue before the court. If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent. If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step. At step two, courts were required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of the agency's interpretation. The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to

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are politically accountable and therefore have more claim to make policy than courts do.

The APA's Section 706, the Court held in *Loper*, codified existing judicial review practice at the time of its enactment in 1946. Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role as the final arbiters of the meaning of statutes. Given this history, the Court took specific aim at *Chevron*'s first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to an agency. This presumption, the Court held, violated the APA's "unremarkable yet elemental proposition … that courts decide legal questions by applying their own judgment." Despite the Court's direction that courts are obligated to exercise their independent legal judgment, the Court emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances outlined by the 1944 Supreme Court case *Skidmore v. Swift & Co*. The Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute, moreover, does not preclude a court from concluding that a particular statute has vested the agency with discretion. Where Congress has vested an agency with delegated authority, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."

Exactly how Congress, the executive branch, and the judiciary will react to the *Loper* decision is still an open question. In broad terms, *Loper* will likely have a much greater effect in the lower courts than at the Supreme Court, as the Supreme Court did not defer to an agency interpretation under *Chevron* since 2016. The lower courts, however, relied on the framework until the day *Chevron* was overruled. Whether agencies will lose more cases before the courts is another open question. Some evidence of the effect of *Chevron* on the lower courts indicates that overruling *Chevron* may depress agency successes in the lower courts where an agency interpretation of law is at

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issue. Nonetheless, in the absence of *Chevron*, courts may rely more heavily on *Skidmore* weight or find more readily that statutes delegate authority to agencies, thereby limiting agency losses in court. Further, *Chevron* did not apply to all agency actions—only to agency interpretations of statutes. Exercises of statutorily delegated policy discretion are (and will continue to be) reviewed under the APA's deferential arbitrary and capricious standard.

The extent to which *Loper* will affect the way agencies regulate and Congress legislates is yet to be seen. The *Loper* decision does not legally bind the executive branch or Congress—it directs *courts* how to resolve cases of statutory interpretation. *Loper* will likely have an indirect effect on each branch, however. Agencies may respond to *Loper* by drafting their interpretations to better mirror the way courts interpret statutes and limit expansive interpretations of the statutes they administer. Congress may respond by drafting more specific statutes, codifying *Chevron* or *Loper*, or using more express delegations in statutes.

Congress

- Legislative Productivity
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Introduction

On June 28, 2024, the Supreme Court overruled the *Chevron* framework in a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*).[1] The *Chevron* framework—named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—required federal courts to defer to federal agencies' reasonable interpretations of ambiguous statutory provisions the agencies administer.[2]

For four decades, the *Chevron* case, and the framework that grew out of it, has been one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. As one legal scholar put it: *Chevron* "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever."[3] For the past decade or so, however, *Chevron* had come under increasing fire from some corners of the federal judiciary and legal academia.[4] Once cited often and approvingly by a majority of Supreme Court Justices, *Chevron* fell into desuetude at the Court.[5] Over the past several terms, the Court has declined to apply or even cite *Chevron* in cases where it may once have governed.[6] Other methods

of statutory interpretation, such as the major questions doctrine, appear to have displaced *Chevron*, at least in some instances.[7] *Chevron*'s absence at the Court has not gone unnoticed, with several Justices commenting on *Chevron*'s absence as evidence that it should be overruled.[8]

Against this backdrop, the Court explicitly overruled the *Chevron* framework, holding that it violates Section 706 of the Administrative Procedure Act (APA).[9] For cases that fall within the ambit of the APA, Section 706 requires courts reviewing agency actions to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[10] The majority held that the APA's command required courts to exercise their own independent judgment on the meaning of federal statutes, but *Chevron* required courts to defer to reasonable agency interpretations of ambiguous statutes.[11] That deference requirement, the Court held, abdicated the judiciary's foundational function to "say what the law is."[12] Although the petitioners in *Loper* also challenged the *Chevron* framework on constitutional grounds, the majority's opinion did not address those arguments.[13]

The *Chevron* Framework

The *Chevron* framework required a court to defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation was reasonable.[14] The framework's namesake 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, set out a two-step process for determining whether a court must defer to an agency's statutory interpretation.[15]

The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law.[16] If a court determined that *Chevron* applied, at step one it would use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court.[17] If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent.[18] If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step.[19] At step two, a court was required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of an agency's interpretation.[20] The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to make policy than courts do.[21]

The *Loper* Decision

The Supreme Court's decision to overrule the *Chevron* framework relied exclusively on Section 706 of the APA. The APA generally governs judicial review of agency actions.[22] Section 706 of the APA states "the reviewing court shall decide all relevant questions of law."[23]

Judicial Practice Before Enactment of the APA

Section 706, the Supreme Court held, codified existing judicial review practice at the time of its enactment in 1946.[24] Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role to be the final arbiters of the meaning of statutes.[25] The Court began by quoting the now famous statement from the seminal 1803 case *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[26] Although *Marbury* embodied the "Framers' understanding" of the role of the federal judiciary, the judiciary also historically "accorded due respect" to the views of the executive branch entrusted with administering a statute.[27] That respect was "especially warranted" where the executive branch's interpretation was roughly contemporaneous with the enactment of the statute.[28] Agency interpretations that warranted judicial respect, however, "could inform … but did not supersede" the judgment of a court on a question of law.[29]

The Court acknowledged that it appeared that some cases decided before the enactment of the APA had applied various deference doctrines. Those cases, however, as understood by the Court, did not shift the foundational role of the courts, nor did they apply anything like the deference required under *Chevron*.[30] In a pair of pre-APA cases from the 1940s, *National Labor Relations Board (NLRB) v. Hearst Publications, Inc.*[31] and *Gray v. Powell*,[32] the Court applied what the *Loper* majority called "deferential review"—but only insofar as Congress had empowered the agency to determine the meaning of the statute.[33] In *Hearst Publications*, for example, the Court deferred to the NLRB's determination that newsboys were "employees" within the meaning of the National Labor Relations Act.[34] Deeming the newsboys (who were actually adult men) "employees" provided them the opportunity to engage in collective bargaining with their employer, Hearst Publications.[35] The Court concluded that the task of defining *employee* was "assigned primarily to the agency created by Congress to administer the Act."[36] The NLRB, the Court held, had "[e]veryday experience in administering the statute" and "familiarity with the circumstances and backgrounds of employment relationships in various industries."[37]

Gray was decided under similar circumstances. In that case, the Supreme Court found

that Congress had "specifically granted the agency the authority to" determine whether a coal-burning railroad with contracts with several coal mines was a coal "producer" pursuant to the Bituminous Coal Act of 1937. The *Gray* Court held "[w]here as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."[38]

The *Loper* majority reasoned that *Hearst Publications* and *Gray* are examples of deferential review "where application of a statutory term was sufficiently intertwined with the agency's factfinding" rather than evidence that the Court had adopted generally applicable *Chevron*-like deference doctrines prior to the enactment of the APA.[39] *Gray* and *Hearst Publications*, in the Court's reasoning, were examples of an adjudication-like action of applying a statutory term to the particular facts before it.[40] As a result, these cases, according to the Court, did not depart from the general rule at the time of the enactment of the APA that pure questions of law were to be answered by the courts —not agencies.[41]

The APA and *Chevron*'s Presumptions

Given this history, the Supreme Court took specific aim at *Chevron*'s first presumption —that statutory ambiguities indicate implicit delegation of interpretive authority to an agency.[42] This presumption, the Court held, violated the APA's "unremarkable, yet elemental proposition … dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[43] The majority explained that presumptions can be salutary but only where they approximate reality.[44] *Chevron*'s presumption, the Court explained, does not approximate reality, "because '[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.'"[45] Instead, the Court held that, when confronted with a statutory ambiguity, a court should not defer to an agency's interpretation but instead should do its "ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[46]

By sweeping away one of *Chevron*'s core assumptions about delegation, the majority declared that ambiguities in statutes pose questions of law, not questions of policy.[47] In holding that the judiciary, not agencies, is to resolve statutory ambiguities, the majority explained that the Framers understood "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," yet they still expected politically insulated judges to exercise independent legal judgment in resolving statutory ambiguities.[48]

Statutory Interpretation Under *Loper*

While the Supreme Court acknowledged that ambiguities in statutes surely exist, the majority held that a statute's meaning was fixed at the time of enactment, permitting one and only one interpretation of the statute.[49] The majority reasoned that poorly

drafted, complex, or technical statutes are no different than statutes with clear or obvious meanings—they both have meanings fixed at the time of enactment that a court is obligated to give effect to.[50] According to the majority, a court's job is to find this single "best" meaning by applying the "traditional tools of statutory construction."[51] Courts apply these tools to resolve any potential ambiguity so that the law does not "run out" or leave a "gap" for agencies to fill.[52] The Court itself did not list which tools it believes are included in the traditional tools of statutory construction.[53] Methods of statutory interpretation and how *Loper* may interact with them will be discussed in more detail below.[54]

Regardless of the methods a court uses to interpret a statute, the Court was confident that the judiciary was up to the task of determining the best meaning of any statute. "Resolution of statutory ambiguities," the Court explained, "involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.'"[55] The majority stressed that courts resolve statutory ambiguities all the time when reviewing statutes that has agencies have not yet interpreted or in cases where agencies are not involved.[56] In the Court's view, the legal nature of questions of statutory interpretation do not change just because an agency happens to be involved.[57] By characterizing the resolution of statutory ambiguities as a question of law, the Court swept away another one of *Chevron*'s presumptions—that ambiguities call for agency expertise.[58] In light of the majority's reasoning, there is no role for agency expertise to play in interpreting a statute because courts—not agencies—are experts in statutory interpretation.[59]

Application of the *Skidmore* Standard

Despite the Supreme Court's direction that courts are obligated to exercise their independent legal judgment, the majority emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances.[60] As the Court explained, the views of the executive branch may, in the words of the 1944 Supreme Court case *Skidmore v. Swift & Co.*, have the "power to persuade, if lacking the power to control."[61]

Prior to *Loper*, *Skidmore* primarily applied to agency interpretations that were not eligible to be evaluated under the *Chevron* framework.[62] The majority's frequent reference to *Skidmore* and use of language from that decision suggest that, going forward, the Court may expect lower courts to look to *Skidmore* to guide their consideration of agencies' preferred interpretations of ambiguous statutes. *Skidmore* does not require courts to defer to agencies but permits courts to give weight or respect to agency interpretations that the court considers persuasive.[63] The *Skidmore* case itself laid out a list of factors for courts to consider when determining whether an agency's interpretation commands the "power to persuade."[64] Under *Skidmore*,

> the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[65]

Skidmore has received far less attention from the courts than *Chevron* has and may need additional development by the courts to refine its application. How courts might apply *Skidmore* after *Loper* is discussed below.[66]

Delegations to Agencies and Statutory Interpretation

The Loper Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute does not preclude a court from deciding that a statute's best meaning is that "the agency is authorized to exercise a degree of discretion."[67] The majority identified two forms of delegation in particular.

Express Delegations

This discretion, the Court explained, could be provided by an express delegation to an agency from Congress to interpret a particular statutory term or phrase.[68] The Court cited several statutes where Congress has expressly delegated interpretive authority to an agency.[69] For instance, the Court cited a provision of the Fair Labor Standards Act, which states in relevant part:

> [A]ny 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*).[70]

According to the Court in *Loper*, the phrase *as such terms are defined and delimited by regulations of the Secretary* indicates that Congress delegated authority to the agency to define the terms referenced in that statutory provision. The Court's requirement that courts give effect to a statute's best meaning accordingly requires a court to respect Congress's explicit choice of which branch—executive or judicial—has the authority to render a final and binding interpretation of a statutory provision.[71]

Delegations of Policy "Flexibility"[72]

In addition to expressly delegating interpretive authority to an agency to interpret a particular word or phrase, the Court also identified instances where Congress has

delegated authority to an agency using terms or phrases "that '[leave] agencies with flexibility.'"[73] The Court identified terms such as *appropriate* and *reasonable* as indications that Congress has delegated flexibility to the agency to make policy within "the boundaries of the delegated authority."[74] The Court cited additional examples of statutory language that delegates this kind of flexibility.[75] For instance, the Court referred to the Clean Air Act, which states: "The Administrator shall regulate [power plants] … *if the Administrator finds such regulation is appropriate and necessary*."[76] In instances where such language is used, the majority reasoned that a court's role is to "ensur[e] the agency has engaged in 'reasoned decisionmaking' within [statutory] boundaries."[77]

Stare Decisis and Cases Decided at *Chevron* Step Two

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[78] In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[79] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[80] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[81] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[82] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases because what the court had found at step two was that an agency's interpretation was "lawful."[83] The Court appears to have adopted this argument in its opinion, holding that "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."[84] Despite the Court's holding, questions are likely to remain about what circumstances allow a court to overrule a past decision in favor of an agency based on the application of step two of *Chevron*. That issue is taken up in more detail below.[85]

The Dissent

The dissent, penned by Justice Kagan and joined by Justices Sotomayor and Jackson (the latter only with respect to the *Relentless* case),[86] defended the *Chevron* framework on grounds that largely track those that supported the continued application of *Chevron* for the past four decades.[87] *Chevron*, Justice Kagan wrote, is part of the "warp and woof of modern government" and "reflects what Congress would want": politically

accountable expert agencies—not judges—making policy.[88] Justice Kagan, providing examples, explained that regulatory statutes often contain ambiguities or gaps (sometimes purposefully so) that cannot be resolved without the exercise of some kind of policymaking expertise that the courts simply do not have.[89] Justice Kagan reasoned that statutes with such ambiguities or gaps have not fixed any "best" meaning at the time of enactment, and accordingly a court using the tools of statutory construction may find multiple possible readings for which the statute provides no rule of decision for a court to choose one over another.[90]

The judiciary's role, Justice Kagan articulated, is only to ensure that an agency's interpretation is a reasonable one, which ensures that courts stay out of policymaking.[91] This limited role for courts, Justice Kagan stressed, is one of judicial "humility," recognizing that agencies have a better claim to democratic legitimacy and more expertise in making policy than courts do.[92] In other words, she explained, "agencies often know things about a statute's subject matter that courts could not hope to."[93] Courts, Justice Kagan explained, can "muddle through" when asked to determine the meaning of an ambiguous statute, but, compared to an agency that Congress has entrusted to administer a statute that may deal with technical subjects such as wildlife regulation or medical drugs and devices, it is reasonable to believe that Congress would prefer the agency to have interpretive authority.[94]

Implications for the Federal Judiciary

As with the *Chevron* framework, the *Loper* decision is legally binding only on the judiciary: It sets out the proper methodology that courts must use for determining the meaning of a federal statute where an agency has also provided its own interpretation.[95] The *Loper* decision, however, will likely affect the Supreme Court differently than it will the lower courts. The Supreme Court has largely avoided applying the *Chevron* framework since 2016, while the lower courts, bound by precedent to apply *Chevron*, were applying the framework regularly until the Court handed down its *Loper* decision.[96]

The lower courts will also be called to address some of the questions left open by the *Loper* decision. Over the coming years, courts may address how they are to engage in statutory interpretation,[97] whether and how the *Skidmore* standard applies to agency interpretations of statutes,[98] how to evaluate delegations of discretion from Congress to agencies,[99] and *Loper*'s interaction with other doctrines such as the major questions doctrine and *Auer* deference, which applies to an agency's interpretation of its own ambiguous regulations.[100]

The Supreme Court

Between 2016 and its decision in *Loper* in 2024, the Court did not defer to agency interpretations under *Chevron* and often did not even mention the framework in cases where it would have once governed.[101] Even prior to the past decade, scholars had identified a trend that the Court was relying less on *Chevron* than might be expected.[102] From roughly the mid-1980s to the mid-2000s, studies found that the Supreme Court applied *Chevron* to about one-quarter[103] to one-third[104] of cases where an agency interpretation was at issue. Even where the Court applied *Chevron*, various studies found that the application of *Chevron* had little effect on the outcome of the case. A 2008 study, for instance, found that agencies prevailed about 76% of the time when the Court applied *Chevron*—similar to agencies' litigation successes in cases where the Court did not apply *Chevron*.[105]

Another study that analyzed cases decided between 1984 and 1990 (i.e., just after the Court decided the *Chevron* case) found similarly that the Court applied *Chevron* in only about one-third of cases to which it would have been applicable.[106] The same study found that despite *Chevron*'s "agency friendly" reputation, agencies had a lower litigation success rate when the Court applied *Chevron* than when it did not.[107] These studies indicate that, at least at the Supreme Court, *Chevron* may not have had a significant impact on the outcome of cases. Put another way by one pair of scholars, "The Court's questionable loyalty to *Chevron* suggests that the doctrine is not meant to discipline Supreme Court decisionmaking. Instead, the doctrine may better serve to control lower courts and provide nationwide uniformity."[108] This difference between the use of *Chevron* at the Supreme Court and in the lower courts has led some to claim that there was a "*Chevron* Supreme and a *Chevron* Regular."[109] Partially in light of this history at the Court, the majority in *Loper* dubbed *Chevron* a "decaying husk" with little practical reason for keeping it.[110]

Overruling *Chevron* may ultimately have little effect on the way the Court approaches questions of statutory interpretation that involve agencies. Rather than applying or even citing *Chevron*, the Court has often engaged in what is known as *de novo* review of statutory text. *De novo* literally means "anew" in Latin and, as applied to the judicial context, means that a reviewing court analyzes the meaning of statutory text without deference to an agency.[111] This type of review reflects the approach the Court in *Loper* directs courts to apply as the proper approach to statutory interpretation.[112] Overruling *Chevron*, accordingly, may have little impact on the outcome of cases at the Court, as the Court began engaging in *de novo* review well before it overruled *Chevron*.[113]

The Lower Courts

Overruling *Chevron* may have a larger impact on the lower courts. Until the day *Loper* was decided, the lower courts were applying the *Chevron* framework regularly.[114] According to legal scholars, *Chevron* was cited by the federal courts roughly 18,000 times in the four decades of its existence, making it the most cited administrative law

times in the four decades of its existence, making it the most-cited administrative law decision of all time and one of the most cited cases in history.[115] A 2017 study that evaluated more than 1,300 courts of appeals cases from 2003 to 2013—the largest study of courts of appeals decisions that refer to *Chevron*—found that the courts of appeals on average applied *Chevron* in close to three-quarters of cases addressing agency interpretations.[116] A subsequent study that surveyed federal appellate cases from 2020 to 2021 revealed that courts of appeals continued to apply *Chevron* at similar rates as those founds in the 2017 study.[117] In the more recent study, federal courts of appeals applied *Chevron* in close to 85% of cases where agency interpretation was at issue.[118] Thus, unlike the Supreme Court, the lower courts continued to apply *Chevron* in nearly all of the cases in which it would have applied prior to *Loper*.[119]

Loper instructs courts to apply their independent legal judgment in determining the best interpretation of statutes in light of any respect or weight given to agency interpretation under the *Skidmore* standard.[120] In other words, *Loper* instructs courts to engage in *de novo* review of questions of statutory interpretation involving agencies potentially tempered by the *Skidmore* standard.[121] Lower courts are familiar with the *de novo* standard. It is the standard that has traditionally been applied to questions of law where no agency had rendered an interpretation.[122] After *Loper*, that same standard will apply in statutory interpretation cases where *Chevron* would have once governed.[123] The shift from *Chevron* to a *de novo* standard may affect the outcome of those cases.

According to the 2017 study, in general, agencies were significantly more likely to prevail in the lower courts when a court applied the *Chevron* framework (77.4%)—even if the court decided that the statute was unambiguous and did not defer to the agency's interpretation—than when a court applied *Skidmore* (56.0%) or no deference regime whatsoever (38.5%).[124] Given these data, it is possible that overruling *Chevron* will, in the aggregate, diminish the chances that agencies will prevail in federal court in cases where questions of statutory interpretation arise.[125] Several factors may moderate that trend. According to the 2017 study authors, "courts could be strategically choosing deference regimes that more easily allow them to reach an outcome that matches their policy preferences."[126] In other words, some courts may have applied the *Chevron* framework in cases where the agencies were likely to prevail anyway and did not apply the framework where they believed that the agencies were not likely to win.

Agencies may also change their behavior to accommodate the courts' new standard of review.[127] A 2014 study indicated that agency rule drafters may adopt less "aggressive" interpretations of statutes when they did not expect *Chevron* to apply.[128]

The *Loper* decision itself also recognizes that in certain circumstances, agencies' interpretations should be given "great weight" or "respect" pursuant to *Skidmore*.[129] The Court also recognized that in some cases, the best reading of a statute is that

Congress delegated discretion to the agency—not the courts.[130] How the lower courts implement these principles from the *Loper* decision is yet to be seen. Nonetheless, they provide courts with the option to adopt an agency's interpretation under appropriate circumstances or determine that a statute has delegated the authority to resolve the statutory interpretation question to the agency.

The Court's citation to other pre-APA cases (such as *Hearst Publications*) that, in the Court's view, formed the traditional understanding of judicial review codified in Section 706 may also signal approval of the lower courts engaging in deferential review where an agency's interpretation is particularly fact-bound.[131] *Skidmore*, statutory delegations, and mixed questions of law and fact are discussed in more detail below.[132]

Some scholars have contended that *Chevron* may have saved lower courts time by permitting them to engage in meaningful review without having to start from scratch interpreting complex statutory regimes.[133] In the absence of the *Chevron* framework, it is possible that lower courts might turn to other doctrines that serve a similar function as *Chevron*.[134] Two of those doctrines—*Skidmore* and congressional delegations—are addressed in more detail below.[135]

The *De Novo* Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity

Scholars have described judicial standards of review as a continuum with independent judgment or *de novo* review on one end and *Chevron* deference at the other.[136] The *Loper* decision fits this model, holding that a court applying the *de novo* review standard is required to exercise its independent judgment to determine the best interpretation of a federal statute.[137] Under the *de novo* standard of review, an agency receives no deference whatsoever.[138]

The *de novo* standard of review typically refers to the methods courts apply to independently determine the meanings of statutes. The Supreme Court in *Loper* (as well as *Chevron*) called these methods the "traditional tools of statutory construction."[139] The Court's reference to "traditional tools," however, masks significant debate over which methods of statutory interpretation are included in a court's traditional toolkit.[140] While the Court used this same phrase in *Chevron*, the importance of particular interpretive methods has changed since *Chevron* was decided.[141] Most notably, when *Chevron* was decided, the statutory interpretation method known as *textualism*—which primarily focuses on the text of a law rather than legislative purpose or prevailing societal values—was not as widely adopted by the federal courts as it is currently.[142] It is unlikely that courts will return to pre-*Chevron* methods of statutory interpretation regardless of the Court's consistent reference to "traditional tools" of statutory interpretation.

Methods of Statutory Interpretation

The *Chevron* Court referred to the "traditional tools" of statutory interpretation in its discussion of how a court should engage in a *Chevron* step one analysis (i.e., to determine whether a statute is clear). As a result, a court's step one analysis in many ways mirrored how courts approached statutory interpretation as a general matter outside of the *Chevron* framework. Sweeping away the *Chevron* framework did not inaugurate a new approach to statutory interpretation: The methods the courts had been using at step one of *Chevron* and in cases where *Chevron* did not apply at all will continue to apply to cases in which agency interpretations of law are at issue. How courts approach statutory interpretation may accordingly shed light on how courts will approach legal challenges to agency interpretations of statutes after *Loper*.

Despite some convergence toward a focus on the text of a statute over the past four decades,[143] there remains significant current debate among judges and scholars over the proper methods of statutory interpretation.[144] There are different theories of statutory interpretation, and each interpretive school has a distinct view of which tools courts should appropriately deploy when they seek to discern statutory meaning.[145] Some studies suggest that many judges do not subscribe to any particular method of statutory interpretation, instead using different methods in different contexts.[146] Nonetheless, many (if not most) courts start their statutory interpretation analyses with the statutory text.[147] Moreover, there are several variants of textualism applied throughout the federal judiciary.[148] Many, however, share some common assumptions, such as that the words of a statute read in context are the best evidence of the meaning of the statute and that a court can identify the best meaning by resorting to rules of grammar and syntax, context, and canons of construction.[149]

A focus on text has consequences for which methods of statutory interpretation are considered valid. For example, judges who consider themselves textualists may discount the value of legislative history as poor evidence of the meaning of a statute because legislative history was not enacted through the legislative process as the text of the statute was.[150] They may turn to legislative history only when a court cannot resolve the meaning of a statute using other approaches or as a second order justification for an interpretation derived using more textualist methods.[151] Textualists may also turn to legislative history not as objective evidence of congressional intent but as evidence of ordinary meaning (i.e., how Congress used a statutory term).[152] Textualists are sometimes skeptical of methods of interpretation that impose judges' substantive values on the meaning of the text, such as clear statement rules or other substantive canons of construction.[153] As noted above, however, many judges take a more eclectic approach to statutory interpretation and may deploy these tools of interpretation at different times or in different ways.

In addition, some of the Supreme Court's more recent decisions have appeared to use older tools of statutory construction that were commonly used prior to *Chevron*. It was common prior to *Chevron* for courts to look to long-standing agency practice as evidence of a statute's meaning.[154] After *Chevron* was decided, there was some dispute over whether courts should continue to do so as part of the *Chevron* framework.[155] While the Court never entirely stopped referring to past agency practice,[156] more recently, the Court has appeared to rely on it more often.[157] The Court in *Loper* appeared to explicitly endorse past agency practice as an appropriate tool of statutory interpretation.[158] In *Loper*, for instance, the Court interpreted Section 706 of the APA by relying in part on the Department of Justice's long-standing interpretation of Section 706 set forth in a 1947 manual.[159] The *Loper* Court explicitly justified its use of past agency practice by citing *Skidmore*,[160] which identified a number of indicia to which a court may look to determine the persuasiveness of an agency's interpretation. Some of those indicia include the consistency of an agency's interpretation and whether the interpretation was issued contemporaneously with the statute.[161] *Skidmore* predated the APA by two years and, in the Court's view, forms part of the general background norms of judicial review that were codified in Section 706 of the APA.[162]

Statutory Ambiguity

Related to the broader debates in the legal community over the proper methods of statutory interpretation, the majority and the dissent in *Loper* split over whether statutory ambiguity could still exist even after the application of the traditional tools of statutory interpretation. The existence of statutory ambiguity was a central assumption of the *Chevron* framework.[163] *Chevron*'s first step required a court to apply the traditional tools of statutory construction to determine whether the statute at issue was clear or ambiguous.[164] The implicit assumption in the *Chevron* framework was that there would be some statutes that, even after the application of all the generally accepted methods of statutory interpretation, may not yield clear answers. In these situations, the *Loper* dissent argued that "Congress's instructions have run out."[165] The choice between different reasonable interpretations of an ambiguous statute was, according to the dissent's view, more akin to policy than to law.[166] Where statutory ambiguity existed, the Court in *Chevron* determined that the judiciary should stay out of making policy.[167] Accordingly, the APA's charge that courts "decide all relevant questions of law" did not conflict with *Chevron* on this account, because instances where courts deferred were not questions of law.[168]

The *Loper* Court rejected the claim that statutory ambiguity implies an absence of law.[169] For the majority, law never "run[s] out."[170] Questions of the meaning of a statute are, for the *Loper* Court, always questions of law susceptible to resolution by the application of the tools of statutory interpretation.[171] "[S]tatutes, no matter how

application of the tools of statutory interpretation.[171] "[S]tatutes, no matter how impenetrable, do—*in fact, must*—have a single, best meaning" that is "fixed at the time of enactment."[172] In *Loper* the Court left unsaid which tools produce the most persuasive evidence of statutory meaning—for example, the text of the statute, statutory purposes, or legislative history.[173] It is likely, given the views of a majority of Justices expressed in other opinions, that they would consider themselves textualists.[174] Although textualists typically focus on what is within the four corners of the statute, modern textualists also take into account certain types of "context."[175] Context can be as narrow as the context in which a contested word or phrase is used in the statute itself[176] or as broad as general constitutional norms.[177] Falling somewhere between those two poles, statutory structure,[178] enactment history[179] and prior judicial precedent[180] can also supply "context" for the meaning of a statute. Judges and scholars, however, debate the proper use of context, including how widely courts should look for context and under what circumstances some forms of context should be used.[181]

Regardless of which evidence is used to determine the meaning of a statute, the Court's statement that a statute's meaning (however determined) is fixed at a particular time—the time of enactment—implies that post-enactment policy considerations by, for example, agency personnel implementing the statute (as happened under *Chevron*) and possibly by courts interpreting the statute may be inappropriate as a means to provide meaning to a statute. If this reading of the *Loper* decision is correct, it may call into question certain tools of statutory construction (e.g., substantive canons of construction) that themselves are triggered by ambiguity and impose post-enactment and extratextual value choices on a statute's text.[182]

In a footnote in her dissent, Justice Kagan took up this issue, arguing that the majority's view that *Chevron* was based on an erroneous presumption when a court identified an ambiguity may call into question other presumptions that are likewise triggered by "a congressional lack of direction."[183] In Justice Kagan's view, like *Chevron*, these presumptions both rely on identifying a statutory gap or ambiguity and impose post-enactment values on the meaning of a statute.[184] The majority's skepticism of the existence of ambiguity as a trigger for *Chevron* may prompt courts to revisit some of these other presumptions.[185]

Whether and to what extent lower courts embrace the Court's view of statutory ambiguity is yet to be seen. The Court's skepticism of the existence of ambiguity, if taken at face value by the lower courts, may have implications for how courts approach statutory interpretation in general and which tools of statutory construction are considered applicable in particular. For instance, as described above, substantive canons are triggered only by ambiguity.[186] Substantive canons are judicial presumptions that impose certain substantive values on the outcome of a case.[187]

Unlike semantic canons, substantive canons are not derived from general assumptions about how ordinary speakers use English or how Congress uses statutory terms.[188] For instance, the federalism canons serve to preserve the federal-state balance, requiring Congress to make a clear statement before intruding on state authority.[189] As a result, substantive canons are viewed by certain judges with some trepidation because they impose judicial values that may not be represented in the text of the statute.[190]

Moreover, the application of *Skidmore* and other deference doctrines such as *Auer* deference, which are discussed in more detail below, may also be affected by the Court's skepticism of ambiguity.[191] *Skidmore*, like some canons of construction, has often been applied where a court is unable, after using the tools of statutory construction, to resolve a question of statutory meaning.[192] The same goes for *Auer* deference.[193] Like *Chevron*, *Auer* deference applies only where a court first identifies an ambiguity.[194] Thus, if it is not possible for ambiguity to exist after applying the traditional tools, *Skidmore* and *Auer* deference would never come into play. Whether these doctrines and tools of statutory construction will play a significant role or even persist in future cases is unclear.

It is possible to read the *Loper* majority's view more modestly. The Supreme Court stressed that courts should "*use every tool* at their disposal to determine the best reading of the statute."[195] Tools such as substantive canons, *Auer*, and *Skidmore* can help resolve statutory ambiguities and at least superficially appear to fit within the majority's view that questions about the meaning of statutes should be resolved through legal means.[196] Under this view, the Court was simply reiterating that questions of the meaning of law are legal questions to be resolved by *any* means peculiar to courts.[197] This more modest view stands in some tension with the Court's description of a statute as having a "single best" meaning "fixed at the time of enactment."[198]

Skidmore Weight

The Supreme Court cited *Skidmore* several times in the *Loper* decision.[199] The Court's frequent invocation of *Skidmore* appears to endorse courts' consideration of agency practice as potential evidence of the best meaning of a statute.[200]

Prior to *Loper*, *Chevron* deference applied only to an interpretation that had been issued by an agency that possessed statutorily delegated authority to regulate with the force of law and used that delegated authority to announce its interpretation.[201] Interpretations advanced in non-legally binding forms—such as guidance documents, policy statements, or interpretive rules—were not eligible for *Chevron* deference.[202] In the 2001 case *United States v. Mead*, the Supreme Court held that even where an agency interpretation, because of its lack of the force of law, was ineligible for *Chevron*, it may be eligible to be evaluated pursuant to *Skidmore*.[203]

Chevron and subsequent cases refining its application, such as *Mead*, accordingly

Chevron and subsequent cases refining its application, such as *Mead*, accordingly created a two-tiered standard of review for agency interpretations.[204] Agency interpretations that carried the force of law were eligible for evaluation under *Chevron*, while every other interpretation by an agency was potentially eligible for treatment pursuant to *Skidmore*.[205] By overruling *Chevron*, *Loper* collapsed this two-tiered system into a single standard of review, with the option for courts to evaluate an agency's interpretation pursuant to *Skidmore* where appropriate.[206] As a result, any agency interpretation is now potentially eligible to be evaluated under *Skidmore*, although, given the Court's statements regarding ambiguity, it is not clear how much of a role *Skidmore* will play in the future.[207]

Skidmore is considered to be less deferential than *Chevron* is.[208] Just how deferential *Skidmore* is, however, has been the subject of some debate.[209] The Court in *Mead*, for example, described *Skidmore* as providing "some deference"[210] to agency interpretations, though not "the same deference as [interpretations] that derive from the exercise of delegated lawmaking powers."[211] At bottom, unlike *Chevron*, *Skidmore* is understood to permit—but not require—a court to adopt an agency's interpretation.[212] *Skidmore* provided a framework through which a court might give special consideration to an agency's interpretation.[213]

It is still not entirely clear whether application of *Skidmore* post-*Loper* will resemble the courts' application of *Skidmore* during the time of *Chevron*. Only a relatively small number of cases have addressed *Skidmore* post-*Loper*. Moreover, prior to *Loper*, *Skidmore* typically applied only to agency interpretations that did not carry the force of law. In practice, this scope meant that most agency interpretations evaluated pursuant to *Skidmore* were not promulgated through notice and comment rulemaking and as a result may have lacked the thorough explanations that accompany agency actions promulgated through notice and comment. By making all agency interpretations potentially eligible for treatment under *Skidmore*, an agency's chance of prevailing in court on its preferred statutory interpretation may increase compared to win rates under *Skidmore* prior to *Loper*. This could be true because some number of interpretations promulgated through notice and comment rulemaking will likely include more thorough explanations of agencies' positions.[214] Nonetheless, empirical analyses of *Skidmore*'s effect on the outcome of cases and how courts applied it prior to *Loper* may provide clues as to what the application of *Skidmore* may look like in the years to come.

Analyses of *Skidmore* Pre-*Loper*

The way courts applied *Skidmore* before *Loper* may help illuminate how courts might approach *Skidmore* going forward. As an initial matter, *Skidmore* has received far less attention from the courts in the past decades than did *Chevron* and may need additional development by the courts to refine its application. Nonetheless, scholars studying judicial approaches to *Skidmore* were able to identify certain trends in its

studying judicial approaches to *Skidmore* were able to identify certain trends in its application. A 2007 study of cases applying *Skidmore* prior to the *Loper* decision identified significant variability in the ways in which courts applied *Skidmore*.[215] The study identified two conceptions of *Skidmore*.[216] In one conception—dubbed the "independent judgment conception"—the *Skidmore* standard evaluates an interpretation as persuasive on its merits or its rightness.[217] This view tends to discount *Skidmore*'s contextual factors, such as the long-standing nature of the interpretation.[218] "In effect, [under this view] *Skidmore* directs courts to treat the agency's view just as it would the view of any litigant."[219]

The Court's decision in *Christensen v. Harris County* exemplifies the independent judgment conception.[220] In that case, the Court was called on to evaluate a Department of Labor (DOL) interpretation of the Fair Labor Standards Act.[221] Although the Court found the statute silent on the question at hand, it began with an independent evaluation of the statute's text to find the "better" reading of the statute.[222] The Court's conclusion ran counter to the agency's interpretation.[223] Only then did the Court turn to *Skidmore*.[224] In applying *Skidmore*, the Court ignored *Skidmore*'s contextual factors, finding the agency's interpretation "unpersuasive" compared with its own interpretation.[225]

There is some question as to whether the independent judgment conception differs from finding that a statute has a clear meaning.[226] Some see the independent judgment conception as amounting to a court finding the statute clear.[227] In these cases, *Skidmore* takes on a subordinate role to other tools of statutory interpretation rather than extending respect.[228] The 2007 study found that the independent judgment conception represented the minority view in the lower courts, with 18.9% of the cases evaluated applying *Skidmore* in this way.[229]

The 2007 study identified a second approach it dubbed the "sliding-scale conception."[230] Under this view, application of *Skidmore* yields varying degrees of deference (or weight) to an agency's interpretation based on a court's evaluation of *Skidmore*'s contextual factors.[231] "The sliding-scale model … counsels special consideration of agency interpretations that courts do not necessarily afford to the views of other litigants."[232] Describing this approach, the Supreme Court explained that *Skidmore* "has produced a spectrum of judicial responses, from great respect on one end to near indifference at the other."[233] What differentiates it from the independent judgment conception is that, although applying the sliding-scale approach may result in a court giving little to no weight to an agency interpretation, the court treats the agency's interpretation as at least potentially deserving of greater respect than that of an ordinary litigant after evaluating *Skidmore*'s contextual factors.[234] The 2007 study found that the sliding-scale conception was by far the most commonly used by the lower courts, accounting for 74.5% of all the uses of *Skidmore* in the study.[235] While it

was the most commonly applied approach to *Skidmore* in the 2007 study, the study authors noted that the Supreme Court had "not offered firm rules" for the application of *Skidmore* or provided an exhaustive list of factors for courts to consider in applying *Skidmore*.[236]

Post-*Loper* Applications of *Skidmore*

As of December 2024, there are only a handful of cases addressing the application of *Skidmore* since the *Loper* decision.[237] In an early post-*Loper* example of the independent judgment approach, the U.S. Court of Appeals for the Fifth Circuit in *Restaurant Law Center v. Department of Labor* held that although courts should carefully consider long-standing and contemporaneous interpretations, those considerations never have "the power to control."[238] Rather, the court found that the statute clearly resolved the case and that *Skidmore*'s contextual factors could not outweigh the clear text of the statute.[239] The court's approach is consistent with the application of *Skidmore* prior to *Loper*.[240] Nevertheless, the number of cases applying the principles set out in *Loper* is still quite small. It may take some time before trends in the application of *Skidmore* can be identified.

Conversely, a handful of cases decided after July 2024 appear to have approached the application of *Skidmore* akin to the sliding-scale approach discussed above. In these cases, the courts, although not always ruling in favor of the agencies, engaged with the *Skidmore* indicia of persuasiveness as a way to measure the weight the agencies' interpretations should be given. In one case, the federal district court for the Northern District of Ohio found that a DOL regulation had the "power to persuade" based largely on its thoroughness and validity.[241] The court found the regulation was the product of "thorough consideration" during the notice and comment process and that the "reasoning behind the regulation is valid."[242] In another case from the U.S. Court of Appeals for the Eleventh Circuit, the court found another DOL interpretation "persuasive" because of its consistency over time.[243] DOL, the court found, had maintained the same interpretation of the Fair Labor Standards Act for 80 years.[244] Neither case, however, addressed whether a court must find the statute ambiguous before turning to *Skidmore*'s contextual factors.

The U.S. Court of Appeals for the Ninth Circuit has also begun applying *Skidmore*. In an appeal decided in September 2024, a panel of the Ninth Circuit applied *Skidmore* in what appears to be a highly deferential way.[245] The appeal arose from a decision of the Bureau of Immigration Appeals (BIA) interpreting the meaning of *crimes involving moral turpitude* found in the Immigration and Nationality Act.[246] The Ninth Circuit concluded that BIA's interpretation was "entitled to" *Skidmore* deference.[247] The court concluded that BIA's interpretation was entitled to "deference" because it was "thorough and well-reasoned," "consistent with judicial precedent," and "consistent with the generic

definition of theft."[248] The court did not determine whether BIA's interpretation was the best interpretation as the Supreme Court directed in *Loper*, nor did the court engage in its own statutory analysis.[249] The Ninth Circuit's decision was announced in a reported decision, which will have binding effect on future Ninth Circuit panels and the district courts within the geographic bounds of the Ninth Circuit. It is not clear whether the Ninth Circuit's more deferential approach to *Skidmore* will be applied in future cases. More broadly, it will take some time for any trends to emerge in how the courts are (or are not) applying *Skidmore*.

Delegations from Congress

Following *Loper*, the judiciary will also confront questions about whether and to what extent Congress has delegated authority to an agency. If the primary question courts faced applying the *Chevron* framework was whether the statute was ambiguous, one of the most important questions courts will face under *Loper* is whether Congress delegated authority to the agency to resolve the question at issue in the case. As the Supreme Court held in *Loper*, "[i]n 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."[250]

As discussed previously, the Court in *Loper* laid out a handful of examples to illustrate where Congress had delegated certain powers to an agency. In one set of examples, the Court pointed to statutes that expressly delegated to agencies the power to define statutory terms.[251] In another set of examples, the Court cited statutes that delegated discretionary regulatory authority to agencies.[252] In a third category, the Court explained that Congress sometimes delegates to agencies the authority to "fill up the details" of statutory schemes.[253] The Court appears to have treated these categories as illustrative, not intending to furnish an exhaustive list of ways in which Congress might delegate authority to an agency.[254]

The Court left open whether delegations must be express or whether courts could recognize implied delegations. At least one commentator has argued that the best understanding of the Court's opinion is that although the Court did away with *Chevron*'s general presumption that ambiguities are delegations of interpretive authority, it did not state that all delegations must be express.[255] For example, this commentator argued, delegations to "fill up the details" "might be discerned not from express delegation, but simply from Congress leaving essential details incompletely specified."[256] To read *Loper* to require express delegations would, this argument goes, cut against a background principle of statutory interpretation that holds that "what a legislature may do explicitly, it may do implicitly."[257] Whether and to what extent courts will recognize implicit delegations is yet to be seen. Post-*Loper* decision and as of the time of this writing, few courts have addressed the delegation issue in any depth.[258]

More fundamentally, in light of the Court's discussion of congressional delegations, some have questioned whether the *Loper* decision changed much at all. One law professor has argued that the Court's acknowledgement that courts must continue to respect statutory delegations from Congress has "recreated" *Chevron* "under a different label: '*Loper Bright* delegation.'"[259] Others have argued that something like *Chevron* deference may be inevitable.[260] One reason that *Chevron* likely took on such an important role in the lower courts is the differential capacity of the Supreme Court and the lower federal courts to engage in independent review of statutory interpretations advanced by agencies. While the Supreme Court hears roughly 75 cases per year—a handful of which involve agency interpretations of law—each lower court might handle thousands of cases per year.[261] Some contended that *Chevron* saved lower courts time by permitting them to engage in meaningful statutory review without having to start from scratch.[262] Removing this tool, some argue, will add to the already heavy burden of the federal courts.[263] That additional burden may create an incentive for the lower courts to apply *Loper* in ways that recreate something like *Chevron*, such as identifying statutory delegations or finding interpretations that are persuasive under *Skidmore* (discussed above).[264]

Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review

Even when courts determine that the best reading of a statute is that Congress delegated the relevant question to the agency to resolve, courts will still play a role. As the Supreme Court in *Loper* explained, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."[265] The Court's reference to "reasoned decisionmaking" and subsequent citation to *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* appears to indicate that the Court expects that where a court determines that the best reading of a statute is that Congress delegated the issue to the agency, the court should evaluate the reasonableness of the agency's action pursuant to the APA's arbitrary and capricious review standard.[266]

Section 706 of the APA defines the scope of judicial review of final agency actions.[267] In addition to providing the standard of review for questions of law, which formed the basis of the Court's decision in *Loper*, the APA also provides that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions" that violate any of the six standards in Section 706.[268] One of the mostly commonly invoked standards is the arbitrary and capricious standard, which requires agencies when exercising discretionary policymaking authority to do so in a reasonable way.[269]

The *State Farm* decision is credited with defining the arbitrary and capricious standard

of review in Section 706 of the APA—sometimes referred to as "hard look" review.[270] In now often-cited language, the Court held that, to survive judicial scrutiny under the arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[271] Elaborating on this standard, the Court explained that, among other things, "an agency rule would be arbitrary and capricious" if the agency's explanation of its action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[272] The arbitrary and capricious standard is deferential to agency policy choices.[273] The Court in *State Farm* held that a court may not use the arbitrary and capricious standard to substitute its judgment for that of the agency's.[274] So long as the agency's decision is a reasonable one, even if the court would prefer a different policy, it must be upheld.[275]

The *Loper* decision did not disturb the arbitrary and capricious review standard announced in *State Farm*.[276] *Chevron*, and by extension *Loper*, applied only to agency interpretations of law, not to exercises of an agency's discretionary policymaking authority.[277] That policymaking authority has traditionally been evaluated pursuant to the arbitrary and capricious review standard—it is not a question of statutory interpretation.[278] As the Court in *State Farm* indicated, the arbitrary and capricious standard is generally (although not always) applicable when an agency applies its expertise to evaluate facts and form a policy from that evaluation.[279] A classic example of an agency action subject to arbitrary and capricious review is the Environmental Protection Agency's (EPA's) regulation of ambient air quality that "in the judgment of the Administrator … [is] requisite to protect the public health."[280]

As the Court recognized in *Loper*, determining whether an agency acting pursuant to a statutory delegation of the type noted above acted unlawfully entails two inquiries—whether the agency acted within the scope of the delegation and whether the agency's decision is reasonable (i.e., is not arbitrary and capricious).[281] Although the first inquiry focuses on statutory meaning, and thus is subject to *de novo* review, the determination of statutory meaning does not dictate the agency's policy outcome—it only serves to set the parameters of the agency's decision.[282] The agency's ultimate decision would appear to be subject only to a reasonableness analysis.[283]

Along these lines, some legal scholars have argued that courts will continue their tradition of respecting agencies' assessments of data, collection of facts, and choices among competing policy options. In other words, these scholars argue, courts are likely to treat questions of statutory interpretation that "turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities, and likely outcomes" "as questions of policy judgment subject to standard arbitrary-and-capricious review."[284] The upshot for agency actions that a court determines are subject to the arbitrary and capricious review standard is that those actions will be reviewed under a

standard often understood to be similar to deference under *Chevron*.[285]

Nonetheless, the distinction between agency decisions that are "factbound" or mixed questions of law and fact and decisions regarding pure statutory interpretation is murky.[286] The Court has not set out a bright-line rule for how to differentiate between the two.[287] The *Chevron* case itself provides a useful example to illustrate the difficulty that courts may have in determining whether a case presents a question of law application or a "naked question of law."[288] The *Chevron* case concerned a provision of the Clean Air Act that authorizes EPA to regulate "stationary sources" of pollution.[289] The Court treated the case as one of statutory interpretation—about what *stationary source* means—ultimately creating the *Chevron* two-step framework to resolve that question.[290] Some have argued that *Chevron* could have been decided on grounds similar to those in *Hearst Publications*, where the Court treated the meaning of *employee* as a policy determination informed by the agency's application of its expertise to its findings of fact.[291] The regulation challenged in *Chevron* does not just provide an interpretation of *stationary sources* but engages with various factual scenarios regarding ownership of different facilities, geographical distribution of facilities, and third-party industrial classifications of sources.[292] In many ways, this argument goes, EPA's regulation at issue in *Chevron* is an example of the agency exercising authority delegated to it by Congress through the application of its factfinding abilities and expertise.[293]

There are important differences between *Hearst Publications* and *Chevron* that may partly explain the different approaches the Court took in each case. *Hearst Publications*, like *Gray*, was an appeal from an agency adjudication. That is, it was an appeal from a decision the agency made applying the relevant statute to a particular party before it. *Chevron*, however, was a challenge to a rulemaking. EPA's regulation in *Chevron* was generally applicable to any entity that fell within the sweep of the regulation. It was not directed at determining whether a particular facility was a "stationary source." Agency adjudications may lend themselves more easily to being categorized as presenting mixed questions of law and fact, because, by their nature, agency adjudications apply law to the particular facts presented by the party or parties before the agency. Regulations, although often based on factual determinations, are not typically directed at particular sets of facts connected to particular parties.[294] Nonetheless, the Court in *Loper* did not make this distinction and appears to have endorsed the approach the Court took in *Hearst Publications* and *Gray* as useful in informing the proper standard of review for mixed questions of law and fact regardless of the form of agency action.[295]

Because of the similarity between *Chevron* step two and the arbitrary and capricious standard, the Court had little incentive to explicitly define which issues should be reviewed under the *Chevron* framework and which should be evaluated under the

reviewed under the *Chevron* framework and which should be evaluated under the arbitrary and capricious standard.[296] Now that questions of law will be reviewed *de novo*, while exercises of policy discretion and mixed questions of law and fact will continue to be evaluated under the deferential arbitrary and capricious review standard, the Court may find reason to provide additional guidance on this issue.[297] Unless and until the Court refines its approach to differentiating these two spheres, it may be hard to predict whether any specific agency action will be reviewed under the *de novo* standard of review or the more deferential arbitrary and capricious standard.

Relationship with other Doctrines of Judicial Review

Major Questions Doctrine

Overruling *Chevron* has raised questions in the legal community over whether the major questions doctrine is still viable. For some, by overruling *Chevron*, the Supreme Court undermined the purpose of the major questions doctrine, while for others, it may still serve an independent purpose regardless of the existence of the *Chevron* framework.

The major questions doctrine requires an agency to point to clear congressional authorization if it seeks to regulate on an issue of great "economic and political significance."[298] The Supreme Court first referred to the major questions doctrine by name in a 2022 decision, but the doctrine has its roots in scattered cases over many years.[299]

Until recently, the major questions doctrine was closely associated with the *Chevron* framework and was often invoked as a part of the *Chevron* framework.[300] The major questions doctrine rests on a determination by the Court that one of the core assumptions that supported *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—was no longer tenable.[301] Where major questions are at stake, the Court has said, "there may be reason to hesitate before concluding that Congress … intended" to delegate resolution of that question to the agency.[302]

Further, while some cases suggested that the major questions doctrine might have been part of the *Chevron* analysis, the Court's approach has not been consistent. Initially, the Court invoked this concern while applying *Chevron*[303] to justify concluding that under the two-part test, the Court should not defer to the agency's construction of the statute.[304] The Court then shifted its approach slightly, holding that the fact that an agency interpretation implicates a major question renders the *Chevron* framework of review inapplicable.[305] In its most recent major questions cases, the Court has invoked the doctrine without resort to *Chevron* at all, suggesting that the more recent version of the doctrine operated as a principle of statutory interpretation independently from the *Chevron* framework.[306] In *Loper*, the Court reiterated that "*Chevron* does not apply if the question at issue is one of 'deep economic and political significance'"[307]

the question at issue is one of 'deep economic and political significance.'"

The Court made this statement in the context of a discussion of the "many refinements" the Court has made to *Chevron* in an attempt to "match *Chevron*'s presumption" regarding implicit legislative delegation "to reality."[308] The Court identified the major questions doctrine among these "many refinements."[309] Given these statements, the majority in *Loper* seemed to understand the major questions doctrine as a response to *Chevron*.[310] With *Chevron* overruled, some have questioned whether the major questions doctrine should be retained. One commentator has argued that now that *Chevron* is gone, there is no longer reason to apply the major questions doctrine to depart from applying ordinary textualist methods of statutory interpretation.[311] The Court's approach to statutory interpretation in *Loper* may support this argument. The major questions doctrine applies where a statute is less than clear,[312] but if courts, following *Loper*, find the single best meaning of a statute, then the major questions doctrine may not come into play, because there is no question what the meaning of the statute is.[313]

The *Loper* opinion also provides reason to believe that the major questions doctrine may be preserved. As already discussed, the opinion recognizes that Congress sometimes delegates to agencies the authority to regulate pursuant to broad terms such as *reasonable* and *appropriate*.[314] The Court explained that in those situations, a court's job is twofold: ensure that the agency has stayed within the bounds of the statutory delegation and come to its decision through "reasoned decisionmaking."[315] It is in fulfilling this first duty where courts might turn to the major questions doctrine. Broad grants of regulatory power subject to statutory limits such as "reasonable" may give rise to questions over how much authority Congress delegated to the agency at the outer margins of the agency's statutory authority. Were an agency to rely on a broad (but not specific) grant of power to regulate something of "vast economic and political significance,"[316] the major questions doctrine might play a role in resolving the case.

For instance, in the 2023 Supreme Court decision in *Biden v. Nebraska*, the Court held that the Department of Education's plan to cancel hundreds of billions of dollars of student loans was a major question and that the agency could not point to clear congressional authorization for such a plan.[317] At issue in that case was a provision of the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) that authorizes the Secretary of Education to "waive or modify any statutory or regulatory provisions" applicable to certain student loan programs.[318] The Court called the magnitude of the loan cancellation "staggering by any measure" and held that the plan was of the kind of politically and economically significant actions that mark a major question.[319] As such, the Court held, "it is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as

permission to "modify."""[320] To come to this conclusion, the Court relied, in part, on the Secretary's past uses of the HEROES Act.[321] The Court surveyed the Secretary's past invocations of power to waive or modify student loans and explained that past waivers were "modest and narrow in scope."[322] These modest and narrow uses of the waive or modify authority, the Court reasoned, supported the Court's view that Congress likely did not delegate the authority to cancel student loans generally.[323]

Although *Nebraska* was decided prior to *Loper*, it may provide an insight into where the major questions doctrine may still play a role—instances where agencies acting under broad, but not specific, statutory authorizations attempt to regulate in a novel way that a court finds to be economically or politically significant.

Auer (*Kisor*) Deference

Overruling *Chevron* has also raised questions about the viability of other deference doctrines, such as *Auer* deference.[324] *Auer* deference closely mirrors *Chevron* but applies to an agency's reasonable interpretations of its own ambiguous *regulations*.[325] This form of deference originated in a 1945 Supreme Court case *Bowles v. Seminole Rock & Sand Co.*, which concerned the proper interpretation of a maximum price regulation issued by the Office of Price Administration.[326] o determine the proper interpretation of the regulation, the Court explained that it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[327] Where that is the case, "[t]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[328] It is this formulation that later found its way into the 1997 Supreme Court case authored by Justice Scalia, *Auer v. Robbins*, from which the deference doctrine takes its name.[329]

In addition to mirroring *Chevron*'s structure, *Auer* also shares a similar foundation. The Court explained that it "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[330] As with *Chevron*, the Court assumed that Congress would have wanted the agency rather than a court resolving ambiguities because of an agency's "unique expertise and policymaking prerogatives," ability to conduct investigations, and political accountability.[331]

In 2019 the Supreme Court revisited—and on some accounts narrowed—*Auer* deference in *Kisor v. Wilkie*.[332] The petitioners asked the Court to overrule *Auer*, but in an opinion written by Justice Kagan, the Court "restate[d]" and "somewhat expand[ed]" on the principles governing the application of *Auer*.[333] The Court acknowledged that it had at times sent mixed signals regarding how to apply *Auer*, may have inadvertently suggested that deference was "reflexive," and in some cases had applied it "without significant analysis of the … regulation."[334]

The Supreme Court took the opportunity to remind lower courts that they should not be too quick to find ambiguity in a regulation. "[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous."[335] "The core theory of *Auer*," the Court held, "is that sometimes the law runs out."[336] Courts must first resort to all of the "traditional tools of construction" before declaring a regulation ambiguous.[337] A court "cannot waive the ambiguity flag just because it found the regulation impenetrable on first read."[338] The Court stressed that a court must use every tool—including the text, structure, history, and purpose of the regulation—before determining that there is no single right answer.[339]

Even after a court finds a regulation ambiguous, the Court clarified that not all reasonable interpretations "are entitled to deference."[340] *Auer*, like *Chevron*, presumes that Congress would want an agency rather than a court to resolve ambiguities in regulations, but the Court stressed that "such a presumption cannot always hold."[341] The Court then went on to provide an illustrative list of factors that indicate that deference is appropriate.[342] The interpretation must represent the agency's official position, implicate its substantive expertise, and be the product of "fair and considered judgment."[343] In the Court's view, if these guardrails are properly observed, *Auer* deference "often" does not apply.[344]

Despite *Kisor*'s refinement of *Auer*, its continued viability after *Loper* is a serious question. The *Loper* decision rested on an interpretation of Section 706 of the APA.[345] That same provision of the APA directing courts to "decide all relevant questions of law" applies equally to challenges to agency interpretations of their own regulations.[346] Professor Cass Sunstein has observed that "*Loper Bright* sits (umm, errr) uneasily with *Kisor*."[347] The *Kisor* opinion itself, he notes, is "essentially identical" to Justice Kagan's dissent in *Loper*.[348] It would, in his estimation, be "awkward" to revisit *Kisor* so soon after it was decided but equally awkward for the Court to preserve *Auer* deference.[349] That awkwardness stems primarily from the similarities between the presumptions underpinning *Chevron* that the *Loper* decision swept away and those that underpin *Auer*—that in many cases Congress would have wanted agencies to resolve ambiguities in their own regulations.[350] If the presumption that statutory ambiguities are implicit delegations of interpretive authority violates Section 706 of the APA, then it is possible that the same presumption for regulations also violates the APA. Whether the Court takes up this issue in the future, however, is an open question.[351]

Further Litigation: Prior *Chevron* Cases

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[352] In the briefing of the case and during oral argument, the litigants and some of

Loper. In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[353] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[354] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[355] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[356] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases, because what the court had found at step two was that an agency's interpretation was "lawful."[357] The Court appears to have adopted this argument in its opinion, holding that "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."[358]

The Court held that its decision to overturn *Chevron* is not itself a reason to overturn a prior case finding an agency's interpretation "lawful" pursuant to step two of *Chevron*.[359] Rather, litigants will have to make an additional showing that the older decision should be overturned on other grounds.[360] The *Loper* majority did not elaborate on what that additional showing could or should be.[361] It is possible that the additional showing could be that the agency's interpretation of the statute upheld in the prior case as "reasonable" under step two of *Chevron* is at variance with the present-day court's view of the "best" interpretation of that statute.

Despite the Court's holding, questions are likely to remain regarding the circumstances in which a court can overturn a prior decision that rested on application of *Chevron*'s second step. For instance, the *Loper* case leaves open the question of what exactly a court decided at step two of *Chevron*.[362] If, as has been commonly understood, a decision in favor of the agency at step two simply means that the agency chose one of the multiple possible reasonable interpretations of an ambiguous statute, then that decision may have little binding effect on a future court considering whether the agency's interpretation is the single best interpretation of the statute.[363] The Court in *Loper*, however, described decisions pursuant to step two as finding the agency's interpretation "lawful."[364] Accordingly, it may be the case that the Supreme Court was signaling to the lower courts that a decision at step two should be taken as more than just determining that an agency interpretation is a "reasonable" one.[365] Instead, the Court's use of the term *lawful* could be read to instruct lower courts to interpret prior decisions upholding agency interpretations at step two such that a court's prior decision carries more precedential weight than might otherwise be accorded a decision finding an agency interpretation reasonable. Although the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) has confronted this issue,[366] it will likely be some time before

there is enough case law to identify trends in how the lower courts are resolving this issue.

Loper does not address whether an agency retains the ability to change its interpretation of a statute that a court found to be ambiguous under *Chevron*. Finding a statute ambiguous under *Chevron* brought with it the assumption that Congress had implicitly delegated interpretive authority to the agency to resolve that ambiguity. *Loper* swept that assumption away as in conflict with Section 706 of the APA, holding that a statute has a fixed meaning at the time of enactment. As a practical matter, an agency likely could still change an interpretation upheld under step two and may choose to do so where the agency believes a different interpretation would better align with the best meaning of the statute. It is not clear how courts would evaluate this situation. The Sixth Circuit, for example, has suggested that *Loper* implicitly overruled *Brand X* and that agencies no longer have any authority to change their interpretations.[367]

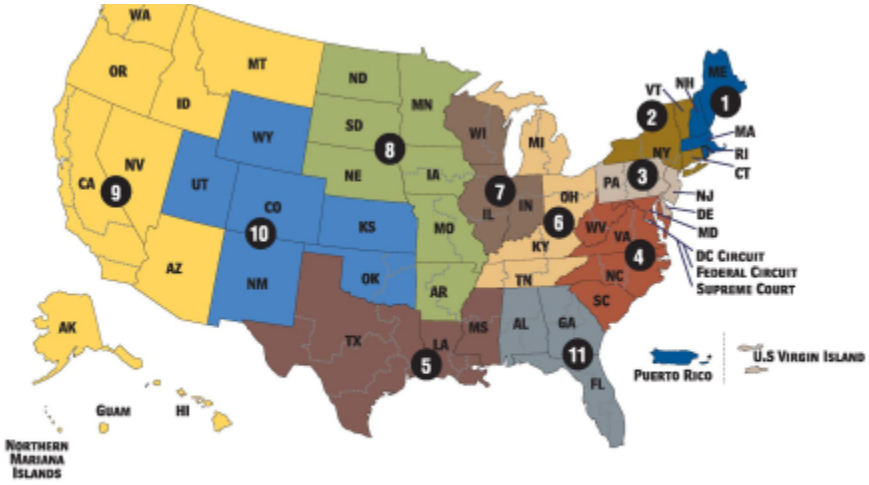
The Process of Relitigating Prior *Chevron* Cases

One significant consideration in assessing the practical effect of the Court's holding that *Loper* is not a reason to overrule prior cases relying on *Chevron* is whether a future court is bound by a prior case that relied on *Chevron* and, if it is, whether that court has the authority to overrule the prior case. As discussed in more detail below, the geographic jurisdiction and the hierarchy of the federal courts and the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*[368] may provide additional opportunities to challenge regulations upheld under *Chevron* step two. New challenges brought in a circuit that does not have any precedent on point will not be bound by circuit precedent from other courts of appeals. Further, decisions of the federal district courts are not precedential and accordingly do not bind future courts' decisions. As a result, although the *Loper* Court's holding regarding the precedential value of prior *Chevron* cases may limit certain challenges, the scope of the Court's holding does not reach all prior *Chevron* cases.

Geographic Jurisdiction of the Federal Courts

A decision by a federal court of appeals is binding precedent only for federal district courts within the geographic jurisdiction of the relevant court of appeals and future panels of the same circuit court of appeals.[369] There are 12 geographic federal courts of appeals in the United States (see **Figure 1** below).

Figure 1. Geographic Boundaries of the Federal Courts



Source: Administrative Office of the United States Courts, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Dec. 20, 2024).

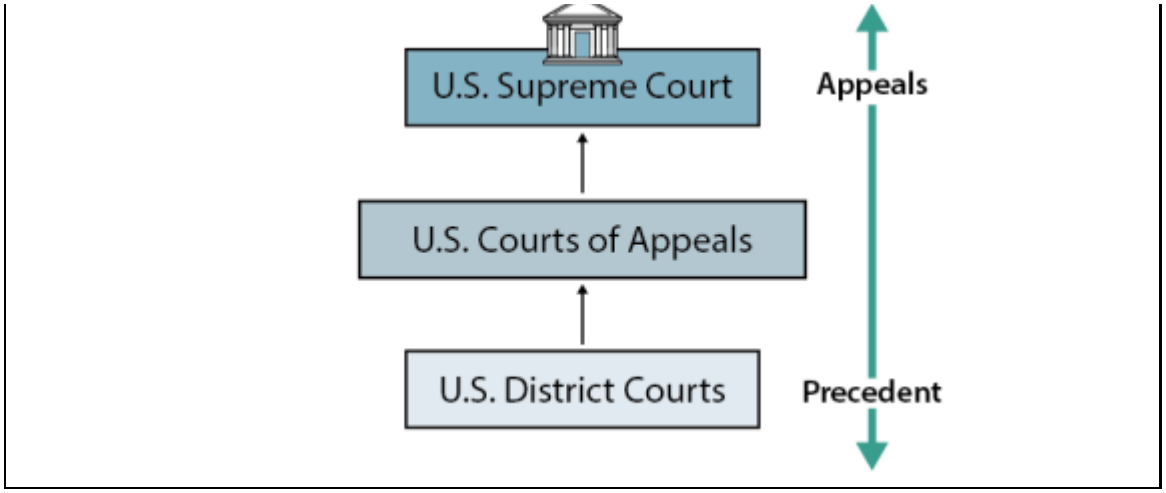
Notes: District court boundaries are delineated by gray lines within state boundaries. The U.S. Court of Appeals for the D.C. Circuit's geographical jurisdiction covers only the District of Columbia, but because many D.C. Circuit cases involve the federal government, decisions of the D.C. Circuit often bind agencies nationwide. Additionally, the U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction but can hear appeals on only a limited number of subjects.

If a plaintiff challenges a regulation in a jurisdiction that has not previously rendered a decision evaluating the regulation, then that court would not be bound by any precedent regarding the legality of the regulation. Decisions by courts in other jurisdictions regarding the legality of the regulation may be persuasive authority, but they would not control the outcome of the new case.[370] The *Loper* decision did not address this scenario, likely because decisions from one court of appeals have never been thought to be binding on decisions of its sister courts of appeals.[371] The *Loper* decision does not change that basic fact of the federal judiciary.[372]

Hierarchy of the Federal Courts

Even where a new challenge is brought in a jurisdiction that has already found an agency's interpretation to be reasonable under step two of *Chevron*, the court in which the challenge is brought may not have the authority to overturn the prior decision.[373] The binding nature of precedent flows down the hierarchy of a court system. Decisions made by higher courts, such as the Supreme Court, are binding on lower courts—federal courts of appeals and district courts.[374] A corollary is that lower courts have no authority to overturn binding precedent decided by a higher court.[375]

Figure 2. Hierarchy of the Federal Court System



Source: CRS.

A district court's decision has no precedential value—that is, it binds only the parties to the case but not future decisions of other district courts.[376] District courts also have no power to overturn a decision of the court of appeals.[377] A three-judge-panel of a court of appeals has no authority to overturn a decision of a prior three-judge panel.[378] A circuit court can overturn its own precedent through a special circuit court procedure known as a *rehearing en banc*.[379] A rehearing en banc is a hearing before a larger panel of appellate judges. In smaller circuits, all active judges on the court of appeals participate in en banc proceedings, while in larger circuits a subset of active judges may participate.[380] Rehearings en banc are discretionary, meaning that, unless the judges of the circuit vote to hear an appeal en banc, the only way to overturn a decision of the court of appeals is to seek review by the Supreme Court.[381]

Precedential weight, to the extent any attaches, attaches only to published opinions. Not all decisions by the federal courts are published, meaning not all appear in the official reports of the decisions of the federal courts. The judges who author the opinions decide which decisions should be published. Unpublished decisions of the federal courts of appeals are not binding and may be treated only as persuasive authority.[382]

The upshot for prior cases decided at *Chevron* step two is that cases decided by district courts or cases decided through unpublished opinions of courts of appeals have no precedential value. Accordingly, because they do not bind future courts analyzing the same agency interpretations, the *Loper* Court's pronouncement regarding prior *Chevron* cases likely does not apply in those situations. A case that was decided through a published opinion of a court of appeals may be considered binding precedent within the relevant circuit. Few courts have addressed the Supreme Court's direction to treat prior *Chevron* cases as binding precedent. The Sixth Circuit provided an early example of how a court might analyze this issue after *Loper* in *Tennessee v. Becerra*.

Tennessee v. Becerra: *Stare Decisis* and Loper Applied

In 2021, the Department of Health and Human Services (HHS) promulgated a regulation requiring federal grant recipients under Title X of Public Health Service Act (PHSA) to offer neutral, nondirective counseling and referrals for abortions to patients who request it.[383] Tennessee, a Title X grant recipient, challenged the regulation, arguing, among other things, that the requirement violates Section 1008 of the PHSA.[384] The Sixth Circuit affirmed the federal district court's denial of Tennessee's motion for a preliminary injunction to stop the enforcement of the Title X regulation.[385] In affirming the district court's denial, the court addressed the precedential value of two prior cases—one a Supreme Court case and another a prior Sixth Circuit case—that had held that Section 1008 was ambiguous and deferred to HHS's earlier interpretations of that section of the PHSA.[386] In addition, the prior Sixth Circuit case addressed the same 2021 regulation at issue in *Becerra*.[387] As a result, the Sixth Circuit had already found HHS's interpretation "lawful" under step two of *Chevron*.[388]

In light of *Loper*, Tennessee disputed whether these two prior cases had precedential effect.[389] Relying on *Loper*, the court held that "it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis."[390] *Loper*, the court held, opens the door only to new challenges to agency interpretations that have not yet been adjudicated.[391] Arguing, as Tennessee did, that *Loper* abrogated the precedential effect of the two prior cases, the court reasoned, would just be making an argument that the prior cases were wrongly decided.[392] *Loper* explicitly held, however, that argument is "not enough to justify overruling a statutory precedent."[393]

The Sixth Circuit's opinion is one of the first, if not the first, decision from a federal court of appeals addressing the precedential effect of a prior case decided pursuant to *Chevron* step two. As such, it is difficult to say whether other courts will approach the issue in the same way. For instance, *Loper* held that reliance on *Chevron* is not by itself enough to justify overruling prior precedent, but the Sixth Circuit in *Becerra* found that Tennessee did not present any other argument to the court other than that prior precedent relied on *Chevron*. Accordingly, it is unclear how courts may treat overruling prior precedent if presented with arguments that go beyond those made in *Becerra*.

Interactions with Corner Post, Inc. v. Board of Governors of the Federal Reserve System

Several days after the Supreme Court issued its *Loper* opinion, it issued an opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[394] The opinion addressed the statute of limitations for a claim brought against the government pursuant to the APA.[395] The APA itself has no statute of limitations, but Section 2401(a) of Title 28 provides a general statute of limitations for civil claims brought against the United States.[396] Section 2401(a) requires plaintiffs to bring suit "within six years after

the right of action first accrues."[397]

The Court held that a claim accrues when a plaintiff is first injured by a final agency action.[398] The Court's decision was a departure from decades of caselaw that had determined that, for the purposes of Section 2401(a), a claim accrues on the date the agency action becomes final for all plaintiffs.[399]

The import of the shift in interpretation of Section 2401(a) is best illustrated by the facts of the *Corner Post* case itself. Corner Post is a truckstop and convenience store located in North Dakota.[400] It opened for business in 2018.[401] Corner Post accepts credit cards for payment and as a result is required to pay an "interchange fee" to the bank that issued the credit card.[402] In 2011, the Federal Reserve, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, issued a regulation that set a maximum interchange fee that banks could charge to retailers.[403] Corner Post joined a suit against the Federal Reserve in 2021, challenging the Federal Reserve's regulation as allowing higher fees than permitted by Dodd-Frank.[404] Under then-prevailing caselaw in a majority of the federal circuit courts of appeals, a cause of action challenging the legality of the Federal Reserve's regulation accrued for any and all plaintiffs the date the regulation became final (2011) and expired six years later (2017), effectively barring Corner Post's suit.[405] Under the Supreme Court's interpretation of Section 2401(a), however, Corner Post's claim did not accrue until it was injured by the regulation (e.g., when it paid the first interchange fee).[406] That means that Corner Post's claim did not expire until six years after that initial injury—possibly sometime in 2024.[407]

Plaintiffs that are newly injured by older regulations (for example, by entering a regulated market) will now be able to challenge those regulations so long as they bring suit within six years of first being injured by the regulations. As a result, *Corner Post* may permit parties that did not exist at the time an agency took an action interpreting a statute to challenge that interpretation. That is true where a court had already found an agency interpretation reasonable under step two of *Chevron* or where the agency action was never challenged in court. *Corner Post* may, accordingly, lead to more agency interpretations being litigated under the principles set out in *Loper*.

Implications for Executive Branch Agencies

Neither the *Chevron* framework nor *Loper* applies directly to agencies; they direct how courts are to interpret a statute when an agency has issued its own interpretation.[408] Relatedly, *Chevron* did not give—and *Loper* did not take away—an agency's ability to interpret the statutes that it administers. When Congress vests an agency with regulatory authority, an agency will necessarily interpret the provisions of that statute when it takes action pursuant to the statute. *Loper* changed which branch of the federal

government—the judiciary or the executive—will have the final say about what the statute means when an agency's interpretation is challenged in court.[409] Where an agency's interpretation is never challenged in court, the agency will likely be the first and only interpreter of the statute.

That context does not mean that *Loper* will not have significant indirect effects on how agencies interpret statutes. As the lower courts resolve some of the questions left open by the *Loper* decision through case-by-case adjudication, agencies will likely shift their behavior in light of trends that emerge from the lower courts applying *Loper* and subject to their own particular success before the courts.

By its own terms, *Chevron* did not purport to instruct *agencies* how they should interpret the statutes that they administer.[410] Although the framework announced by *Chevron* was not binding on agencies, according to at least one study, it did have an effect on how agencies interpreted the statutes they administer. In a 2014 survey of agency personnel engaged in drafting regulations, approximately 43% of respondents agreed or strongly agreed (10% strongly agreed; 33% agreed) "that their agencies would be more aggressive in their interpretive practices" if they knew or strongly believed that a particular statutory interpretation would be entitled to *Chevron* deference.[411] Another 40% somewhat agreed.[412] Similarly, one commentator described *Chevron*'s effect as encouraging agencies to be "more adventurous" in interpreting statutes.[413]

Like the *Chevron* framework, *Loper*'s requirement to apply the traditional tools of statutory construction is directed at the courts; it does not directly bind or apply to agencies.[414] Nonetheless, as with *Chevron*, it is likely that *Loper* will have an indirect effect on agencies as the lower courts adjudicate more and more agency interpretations. By overruling *Chevron*, *Loper* may cause agencies to be more cautious in their interpretations. In the same 2014 study, when agency rule drafters were asked if they would be less aggressive in their interpretive practices if *Chevron* did not apply, roughly the same proportions strongly agreed (7%), agreed (31%), and somewhat agreed (45%).[415]

In addition to becoming more cautious in their interpretations, interpretations may also become more legalistic. In a 2005 essay, Donald Elliott, EPA's general counsel under President George H. W. Bush, explained that *Chevron* shifted power away from agency lawyers to other professionals within agencies.[416] Prior to *Chevron*, Elliott observed, agency lawyers exercised significant authority within agencies through the interpretation of the agencies' statutes.[417] In his telling, the predominant view of the courts prior to *Chevron* was that a statute had a single "best meaning" and it was an agency lawyer's job to identify the best meaning through the application of specialized legal means.[418] In this account, *Chevron* shifted how courts approach the meaning of statutes and, as a result, shifted the relative power of lawyers and other professionals

statutes and, as a result, shifted the relative power of lawyers and other professionals within agencies.[419] While *Chevron* was in place, agency lawyers attempted to describe the permissible range of discretion created by ambiguous statutory terms.[420] Agency policymakers would then select one of the permissible interpretations to adopt.[421] The shift to *Chevron* led to a policymaking dialogue within agencies over what policy an agency should adopt and why that was not possible prior to *Chevron*.[422] It is too early to tell whether overruling *Chevron* will result in the balance of power within agencies shifting back to lawyers. It is possible that, as the lower courts apply *Loper* in more and more cases, agencies may begin to rely more on agency lawyers to apply the specialized tools of statutory interpretation to identify the best meanings of statutes to increase their chances of prevailing in court.[423]

Overruling *Chevron* will also result in reifying interpretations of statutes such that agencies will no longer be able to change their interpretations without legislative intervention. The *Chevron* framework rested on a presumption that an ambiguity was an implicit delegation of interpretive authority to the agency to resolve that ambiguity.[424] One consequence of this assumption was that, where a court found an ambiguity, a court had no power to determine what the meaning of the statute was—that was for the agency.[425] As a result, even where a court had reviewed the statute, if it had determined that the statute was ambiguous, the agency could change its interpretation in the future.[426] So long as the new interpretation was reasonable, a court would be bound to defer to the agency's interpretation.[427] The *Chevron* decision itself recognized the policy discretion that attended ambiguous statutory provisions.[428] In a 2005 case captioned *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court explicitly confirmed this consequence of *Chevron*.[429] The Court held that in light of *Chevron*, "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[430]

The policy space or discretion that statutory ambiguity provided to agencies under *Chevron* was one factor the Court identified in *Loper* as a reason to overrule *Chevron*.[431] The *Loper* majority explained, "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 'unexplained inconsistency' being 'at most a reason for holding an interpretation to be arbitrary and capricious.'"[432] Except where Congress has delegated interpretive authority to an agency to interpret the statutory provisions at issue, *Loper* likely forecloses an agency's ability to change its interpretation after a court has determined the best meaning of a statute.[433] The *Loper* decision held that a statute has a single meaning fixed at the time of enactment.[434] Where a court has identified that meaning, there is no policy space within which an agency has discretion to choose among different reasonable interpretations.[435]

Loper also held that sometimes the single best meaning fixed at the time of enactment was that Congress delegated interpretive authority to an agency to define certain statutory terms.[436] In these circumstances, agency interpretations may be subject to only a reasonableness standard similar to *Chevron*'s second step.[437] Under these conditions it may be possible for an agency to change its interpretation even after the agency's interpretation was litigated. In that scenario, a court has fulfilled its duty to "say what the law is" by determining that the best meaning of the statute is that Congress vested the agency with discretion to define particular terms or phrases so long as it exercises that discretion reasonably.[438] As a corollary, although the agency may be able to change its interpretation of the statute, it has no power to adopt an interpretation that conflicts with the court's determination that the statute vests the agency with interpretive authority.[439]

Considerations for Congress

The *Loper* decision was based on an interpretation of the APA, not the Constitution. *Loper*, accordingly, did not diminish Congress's constitutional lawmaking authority. Put another way, *Loper* does not direct Congress to legislate in any particular way—it directs *courts* how to resolve cases of statutory interpretation. Because *Loper* does not directly bind Congress, whether *Loper* will affect how Congress legislates is still an open question.

Legislative Productivity

The *Loper* decision may affect Congress's approach to legislation in an indirect way. Courts and commentators argued that while *Chevron* was in place, Congress often legislated with it in mind.[440] That is, Congress may have made the same assumption that the *Chevron* decision made—that ambiguous terms in a statute would be interpreted by the relevant agency, not a court. The *Loper* decision disposed of that assumption when it held that *Chevron*'s general presumption about statutory ambiguity violated the APA.

Prior to the Court's decision in *Loper*, some had argued that Congress's assumption that courts would grant agencies deference pursuant to *Chevron* reduced Congress's incentive to pass new legislation—sometimes called "congressional abdication."[441] Proponents of this argument, including the petitioners in *Loper*, argued that because *Chevron* permitted agencies to change their interpretations of ambiguous statutes, Congress may not have thought it necessary to provide additional statutory authority for agencies to address new or unforeseen circumstances.[442] At oral argument, the petitioners argued that overruling *Chevron* would prompt Congress to limit using vague terms and take the lead in deciding questions of policy through an increase in legislation.[443] As of fall 2024, there is little data at the federal level regarding how

overruling *Chevron* may change legislative drafting.

A 2024 study of state legislatures' reactions to the varying deference regimes at play in different state courts may shed some light on how Congress might react.[444] The study used variations among different states' judicial deference doctrines and variations of the same state's judicial deference doctrine across time and compared them to "legislative productivity" in state legislatures.[445] It found that differences in deference doctrines had almost no effect on legislative activity.[446] To the extent that judicial deference had any effect, some evidence indicated that legislatures produced more statutory text and used more definitions while also relying on explicit delegations and vague and precatory terms.[447] The study noted that these results were a "mixed bag, sometimes aiding legislatures' efforts to produce high-quality legislation and sometimes impeding it."[448] The study itself cautions that data from states may not translate directly to Congress and that a focus on all legislative output from state legislatures might miss important effects from deference or the absence of it that might appear only in certain types of legislation.[449]

Legislative Specificity

Regardless of the experience of state legislatures, Congress has a number of options to respond to *Loper*. Congress could respond as the petitioners in *Loper* argued that it might—by drafting statutes with more specificity and fewer vague or ambiguous terms.[450] As noted above, *Loper* does not require any particular congressional response, but after *Loper*, where litigation occurs between an agency and a private party regarding the meaning of a statute, a court rather than an agency will determine the meaning of the statute. If Congress does not want a court to have the power to resolve vague or ambiguous statutory text, Congress could choose to draft statutes with more specificity, effectively choosing the policy it prefers rather than leaving the judiciary to interpret a vague or ambiguous term.

Some have argued that Congress currently lacks the institutional capacity to draft statutes with more specificity.[451] The House Committee on Administration held a hearing less than a month after the Court issued the *Loper* opinion seeking input on how *Loper* might change how Congress operates.[452] While the witnesses disagreed on a number of issues, they all agreed that were Congress to want to draft more specific statutes or increase oversight of agency rulemaking in response to *Loper*, it would need to increase the quantity and quality of congressional staff.[453]

Codifying *Chevron* or *Loper*

Congress could also respond by codifying some form of deference either for all agencies or for specific agencies or specific agency actions. As noted above, the *Loper* decision rested on an interpretation of the APA. As a result, Congress retains the

authority to amend the APA to require courts to defer to agency interpretations of federal law or to enact stand-alone statutes that apply to some agencies but not others. For example, in 2023, the Stop Corporate Capture Act was introduced in the House.[454] The bill would amend Section 706 of the APA to codify a version of *Chevron* deference. A companion bill was introduced in the Senate in July 2024.[455]

Codifying *Chevron* may raise constitutional concerns for some Justices. Justices Thomas and Gorsuch have both written publicly that they believe *Chevron* deference violates Article III of the Constitution.[456] Article III, their argument goes, requires that courts have the final word on the meaning of federal law.[457] *Chevron*, however, shifted the authority to render final binding interpretations of federal law to agencies under certain circumstances.[458] That shift, they believe, violates Article III's command as declared by the Court in *Marbury v. Madison* to "say what the law is."[459] The petitioners' appeal to the Court in the *Loper* case was built around the Article III argument.[460] Although the Court ultimately rested its decision on an interpretation of the APA, the Court referred back to 19th-century cases interpreting Article III to support its finding that the APA rendered in statute the traditional role of the courts to "say what the law is."[461] Thus, although the Court declined to decide the case on constitutional grounds, its decision was influenced by Article III cases that predated the APA.[462]

Conversely, Congress could also codify the *Loper* decision. By basing its decision on the meaning of the APA, the *Loper* decision essentially fixed the meaning of Section 706. Were Congress to want to reinforce *Loper*'s holding and potentially limit the effect were the Court to overrule *Loper*, it could amend the APA to explicitly bar the application of any kind of deference doctrine for cases brought pursuant to the APA. Prior to the *Loper* decision, the House had introduced the Separation of Powers Restoration Act (SOPRA) in the 106th[463], 107th[464], and 114th-118th Congresses.[465] SOPRA would amend Section 706 of the APA to require courts to apply *de novo* review to questions of law raised in cases brought pursuant to the APA.[466] Were it enacted prior to the *Loper* decision, it would have prevented courts from deferring to agency interpretations pursuant to *Chevron*—at least for cases brought pursuant to the APA. If SOPRA were enacted now, it would likely reinforce the *Loper* decision and prevent deference from applying to cases brought pursuant to the APA if the Court overrules *Loper* in the future.

Congress could also amend other judicial review statutes. Although the APA is the most prominent judicial review statute, the Administrative Conference of the United States has identified more than 600 other statutes that provide for judicial review of certain agency actions.[467] Many of those statutes do not include text similar to the language on which the Supreme Court based its decision in *Loper*.[468] Whether the Court's decision in *Loper*, which was based on an interpretation of the APA, extends to other judicial review provisions is an open question. Congress may wish to amend other non-APA

review provisions is an open question. Congress may wish to amend other non-APA judicial review provisions to either ensure that the *Loper* decision applies to judicial review conducted under those statutes or to codify deference for cases brought under those statutes.

Delegations to Agencies

Another potential congressional response to *Loper* is the use of different drafting techniques to delegate certain authority to agencies. As noted above, the Supreme Court in *Loper* recognized that Congress retains the authority to craft delegations of authority by statute that can empower agencies to interpret statutory terms or exercise discretionary authority.[469] The Court cited phrases such as *as determined by the Secretary* to indicate where Congress has empowered an agency, rather than a court, to render final and binding interpretations of particular terms or phrases.[470] Similarly, the Court cited phrases such as *the Administrator shall regulate if the Administrator finds such regulation appropriate and necessary* as delegations from Congress to an agency of policy discretion that the courts may not second-guess unless the agency exercises its discretion unreasonably.[471] Congress can use these drafting techniques to tailor the type and scope of delegation to an agency to ensure that the agency is able to exercise whatever authority Congress intends it to have. As the Court explained in *Loper*, a court's job when faced with a statutory delegation is to ensure that the agency has not exceeded the boundaries of the delegation and ensure that it exercises its delegated authority reasonably.[472]

Footnotes

1. 144 S. Ct. 2244 (2024).
2. 467 U.S. 837, 843 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
3. Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 Federalist Soc'y Rev. 265, 265 (2022).
4. *See* Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Alito, J., dissenting) (writing that *Chevron* is now an "increasingly maligned precedent" that the Court feels comfortable "simply ignoring"); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing that that *Chevron* "deserves a tombstone no one can miss."). Prior to being appointed to the Supreme Court, Justice Kavanaugh raised concerns that *Chevron* was conceptually muddled, while Chief Justice Roberts had suggested that *Chevron* should be significantly narrowed. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2136 (2016); City of Arlington v. FCC, 569

U.S. 290, 323–27 (2013) (Roberts, C.J., dissenting) (advancing a narrower theory of *Chevron*). For a survey of academic literature criticizing *Chevron* deference, see Christopher J. Walker, *Attacking* Auer *and* Chevron: *A Literature Review*, 16 Geo. J.L. & Pub. Pol. 103 (2018).

5. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 Duke L.J. 931, 1000 (2021).
6. *See Loper*, 144 S. Ct. at 2271 (stating that the Court has not deferred under *Chevron* since 2016).
7. *See Buffington,* 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023); CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).
8. *See, e.g.*, *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); Pereira v. Sessions, 585 U.S. 198, 221–22 (2018) (Alito, J., dissenting).
9. *Loper*, 144 S. Ct. at 2263.
10. 5 U.S.C. § 706(2).
11. *Loper*, 144 S. Ct. at 2266.
12. *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
13. Brief for Petitioners at 24, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).
14. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
15. *Id.*
16. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
17. *Chevron*, 467 U.S. at 843 n.9.
18. *Id.*
19. *Id.* at 843.
20. *Id*. at 844–45, 865–66.
21. *Id*. Justice Scalia later expressed another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. *See* United States v. Mead Corp., 533 U.S. 218, 241–42 (2001) (Scalia, J., concurring) (asserting that the *Chevron* decision "was in accord with the origins of federal-court judicial review," because a court would issue "the prerogative writ of mandamus" only if the executive officer "was acting plainly beyond the scope of his authority.").
22. 5 U.S.C. §§ 701–706.
23. *Id*. § 706.

24. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).
25. *Id.* at 2257–60.
26. *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
27. *Id.* The Court cited another of its early 19th-century cases, *Edwards' Lessee v. Darby*, for the proposition that from the very beginning of the Republic, courts accorded contemporaneous executive branch interpretations of "doubtful and ambiguous law ... very great respect." 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous [sic] 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.")
28. *Loper*, 144 S. Ct. at 2258.
29. *Id.*
30. *Id.* at 2259.
31. 322 U.S. 111 (1944).
32. 314 U.S. 402 (1941).
33. *Loper*, 144 S. Ct. at 2259.
34. *Hearst Publications*, 322 U.S. at 129–30.
35. *Id.* at 113–14.
36. *Id.* at 130.
37. *Id.* "In making [the NLRB's] determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." *Id.* (citing NLRB v. Nev. Consol. Copper Corp. 316 U.S. 105 (1942)).
38. *Gray v. Powell*, 314 U.S. 402, 412 (1941).
39. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2260 (2024).
40. *See id.* at 2259–60.
41. *Id.* In *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State*, Professor Thomas Merrill notes that one way to read *Hearst Publications* and similar cases is that the Court engaged in deferential review where the agency was engaged in applying the law to the facts before it (e.g., is a particular entity covered by a statutory term?)—not pure legal analysis. Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 39 (2022) [hereinafter The Chevron Doctrine]. This view aligns squarely with the majority in *Loper*. 144 S. Ct. at 2259 (calling the agency actions in *Hearst*

Publications and *Gray* "factbound"). If that is what in fact the Court was doing in *Hearst Publications* and *Gray*, then those cases do not necessarily stand for the proposition that the Court was engaged in something like a proto-*Chevron* analysis prior to the enactment of the APA. Nonetheless, Professor Merrill explains that *Hearst Publications* can also be understood to be an early instantiation of one of *Chevron*'s core assumptions—that ambiguities are implicit delegations of interpretive authority. The Chevron Doctrine 39-40.

42. *Loper*, 144 S. Ct. at 2265.
43. *Id.* at 2261.
44. *Id.* at 2265.
45. *Id.* (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989)).
46. *Id.* at 2267.
47. *Id.* at 2267–68.
48. *Id.* at 2266 (quoting The Federalist No. 37, at 236 (J. Madison) (J. Cooke ed. 1961).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.* Similarly, while the Court suggested in *Chevron* itself that courts should use "traditional tools of statutory construction" at step one, it did not elaborate on what those tools are. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).
54. *See infra* "The De Novo Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity." For a longer discussion of statutory interpretation, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023).
55. *Loper*, 144 S. Ct. at 2268 (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019)).
56. *Id.* at 2266.
57. *Id.*
58. *Id.* at 2268.
59. *Id.*
60. *Id.* at 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
61. *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140).
62. Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore

Standard, 107 Colum. L. Rev. 1235, 1245–46 (2007), (summarizing the evolution of the *Skidmore* doctrine).

63. *See Skidmore*, 323 U.S. at 140.
64. *Id.*
65. *Id.*
66. *See infra* "Skidmore Weight."
67. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).
68. *Id*.
69. *Id.* at 2263 nn.5–6.
70. 29 U.S.C. § 213(a)(15) (emphasis added).
71. *See Loper*, 144 S. Ct. at 2263.
72. The Court identified another category where Congress delegates authority to an agency. The Court identified it as authority for an agency to "prescribe rules to 'fill up the details'" of a statutory scheme. *Id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).
73. *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).
74. *Id.*
75. *Id.*
76. *Id.* at 2263 n.6 (citing 42 U.S.C. § 7412(n)(1)(A)) (emphasis added).
77. *Id.* at 2263 (quoting Michigan, 576 U.S. at 750). The Court's reference to "reasoned decisionmaking" may be a nod to a court's role in reviewing an agency's discretionary policy decisions, findings of fact, and exercise of its technical expertise under the APA's arbitrary and capricious standard of review. *See id.*; 5 U.S.C. § 706(2); Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). Under that standard, which will be discussed in more detail below, an agency must show that its decision was reasonable give the facts before it. *State Farm*, 463 U.S. at 43.
78. *Loper*, 144 S. Ct. at 2273.
79. *See* Brief for Respondents at 31, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-451); Transcript of Oral Argument at 59–61, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).
80. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984).
81. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982 (2005) (holding "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the

agency to fill, displaces a conflicting agency construction").

82. Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

83. *Id.*

84. *Loper*, 144 S. Ct. at 2273.

85. *See infra* "Further Litigation: Prior Chevron Cases."

86. Justice Jackson recused herself from Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023), because she was on the panel that decided Loper Bright Enters. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).

87. *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

88. *Id.*

89. *Id.* at 2296–97.

90. *Id.* at 2297.

91. *Id.*

92. *Id.* at 2295.

93. *Id.* at 2298.

94. *Id.*

95. *Id.* at 2273 (majority opinion) (holding that *courts* are no longer permitted to apply the *Chevron* framework).

96. *Id.* at 2271–72 (citing William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1125 (2008)) ("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."); Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, Notice & Comment, Yale J. on Regul. Blog (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ (studying the application of the *Chevron* framework in the lower courts in 2020 and 2021).

97. *See infra* "Methods of Statutory Interpretation."

98. *See infra* "Skidmore Weight."

99. *See infra* "Delegations from Congress."

100. *See infra* "Relationship with other Doctrines of Judicial Review."

101. *Loper*, 144 S. Ct. at 2271–72.

102. See William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme*

102. See William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1125 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 982 (1992).

103. William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1125 (2008).

104. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 982 (1992).

105. William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1099 (2008).

106. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 981–84 (1992).

107. *Id.* at 984.

108. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 18 (2017).

109. *Id.* at 6.

110. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

111. Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, Notice & Comment, Yale J. on Regul. Blog (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended; *De novo*, Black's Law Dictionary (12th ed. 2024) ("When a court engages in de novo review of a legal issue, it makes an independent determination without deference to any earlier analysis about the matter.").

112. *Loper*, 144 S. Ct. at 2266.

113. Kristen E. Hickman & Aaron L. Nielson. *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 934 (2021) (noting "At a minimum, the Justices seem more willing to find clarity using traditional tools of statutory interpretation, thereby avoiding Chevron deference altogether."); *see, e.g.*, Becerra v. Empire Health Foundation, 597 U.S. 424, 434 (2022) (resolving the case without mentioning *Chevron*); Am. Hosp. Ass'n v. Becerra, 596 U.S. 724, 734 (2022) (same); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 520–21 (2018) (holding that where a statute is clear after application of tools of statutory construction *Chevron* does not apply).

114. *See, e.g.*, Soumah v. Collett, No. TDC-23-2473, 2024 WL 3201096, at *7 (D. Md. Jun. 26, 2024); Associated Gen. Contractors of Am. v. DOL, No. 5:23-CV-0272-C, 2024 WL 3635540, at *11 (N.D. Tex. Jun. 24, 2024).

115. Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 Federalist Soc'y Rev.

265, 265 (2022); Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, Notice & Comment, Yale J. on Regul. Blog (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

116. Barnett & Walker, *supra* note 108, at 5.

117. McKinney, *supra* note 111.

118. *Id.*

119. *Id.*; Barnett & Walker, *supra* note 108, at 29.

120. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

121. *Id.*

122. *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (noting that questions of law are traditionally reviewable *de novo*).

123. *Loper*, 144 S. Ct. at 2266.

124. Barnett & Walker, *supra* note 108, at 30. These aggregate averages disguise significant variation in outcomes across different federal circuit courts of appeals, different agencies, and different subject matters. For example, the D.C. Circuit led the way in applying *Chevron*, relying on it in approximately 89% of cases that concerned agency interpretations of a statute, while the Sixth Circuit applied *Chevron* in 61% of cases involving agency interpretation. *Id.* at 44. Courts of appeals applied *Chevron* at high rates (75%-100%) to cases involving telecommunications, Indian affairs, and pensions, and courts deferred to agencies under *Chevron* at similar rates (83%-92%) in those same subject matter areas. *Id.* at 50, 54. Conversely, courts applied *Chevron* less frequently (52%-67%) in cases involving housing, tax law, and employment. *Id.* at 50. Furthermore, even when the courts applied *Chevron* in this latter group of cases, win rates for agencies were comparatively low (69%-81%). *Id.* at 54. Somewhat surprisingly, some agencies, such as the Federal Trade Commission, had a *higher* litigation success rate when courts did not apply *Chevron*. *Id.* at 54. Overruling *Chevron* will likely have differing effects within different circuits and across different agencies.

125. *See generally* Robert Lafolla, *GOP-Picked Judges Take Hard Line on Regulations Post*-Chevron, Bloomberg Law (Sep. 4, 2024), https://news.bloomberglaw.com/daily-labor-report/gop-picked-judges-take-hard-line-on-rules-after-chevrons-demise (finding that out of 26 cases decided after *Loper* agencies won only 4).

126. Barnett & Walker, *supra* note 108, at 32.

127. For a more detailed discussion, see *infra* "Implications for Executive Branch Agencies."

128. Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 724 (2014).

129. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

130. *Id.* at 2263.

131. *Id.* at 2259, 2263.

132. *See infra* "Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review"; "Skidmore Weight"; "Delegations from Congress."

133. *See* Barnett & Walker, *supra* note 108, at 71; Thomas W. Merrill, *Response: Chevron's Ghost Rides Again*, 103 B.U. L. Rev. 1717, 1738 (2023); Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. Rev. 1647, 1709 (2023).

134. *See* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 Geo. Mason L. Rev. 499, 504 (2024) (arguing "deference (of the controlling variety) is unlikely to disappear after *Loper Bright*").

135. *See infra* "Skidmore Weight"; "Delegations from Congress."

136. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in*

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Federal Land Ownership: Overview and Data

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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The federal government owns roughly 640 million acres, about 28% of the 2.27 billion acres of land in the United States. Four major federal land management agencies administer 606.5 million acres of this land (as of September 30, 2018). They are the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and National Park Service (NPS) in the Department of the Interior (DOI) and the Forest Service (FS) in the Department of Agriculture. A fifth agency, the Department of Defense (excluding the U.S. Army Corps of Engineers), administers 8.8 million acres in the United States (as of September 30, 2017), consisting of military bases, training ranges, and more. Together, the five agencies manage about 615.3 million acres, or 27% of the U.S. land base. Many other agencies administer the remaining federal acreage.

The lands administered by the four major agencies are managed for many purposes, primarily related to preservation, recreation, and development of natural resources. Yet the agencies have distinct responsibilities. The BLM manages 244.4 million acres and the FS manages 192.9 million acres under similar multiple-use, sustained-yield mandates that support a variety of activities and programs. The FWS manages 89.2 million acres of the U.S. total, primarily to conserve and protect animals and plants. In FY2018, the NPS managed 79.9 million acres in 417 diverse units to conserve lands and resources and make them available for public use. The 8.8 million acres of DOD lands are managed primarily for military training and testing.

The amount and percentage of federally owned land in each state vary widely, ranging from 0.3% of land (in Connecticut and Iowa) to 80.1% of land (in Nevada). However, federal land ownership is concentrated in Alaska (60.9%) and 11 coterminous western states (45.9%), in contrast with lands in the other states (4.1%). This western concentration has contributed to a higher degree of controversy over federal land ownership and use in that part of the country.

Throughout America's history, federal land laws have sought to dispose of some federal lands while keeping others in federal ownership. During the 19th century, many laws encouraged western settlement through federal land disposal. Mostly in the 20th century, emphasis shifted to retention of federal lands. Congress has provided the agencies with varying land acquisition and disposal authorities, ranging from restricted (NPS) to broad (BLM). As a result of acquisitions and disposals, from 1990 to 2018, total federal land ownership by the five agencies declined by 31.5 million acres (4.9%), from 646.9 million acres to 615.3 million acres. Much of the decline is due to BLM land disposals in Alaska and reductions in DOD ownership in favor of other legal arrangements. By contrast, land ownership by the NPS, FWS, and FS increased over the 28-year period. Further, 15 states had decreases of federal land during this period and the other states had varying increases.

Numerous issues affecting federal land management are before Congress. One set of issues relates to the extent of federal ownership and whether to decrease, maintain, or increase the amount of federal holdings; the concentration of federal lands in the West; the suitability and use of acquisition and disposal authorities; and the amount, type, and location of use of acquisition funding. A second issue is the priority of acquiring new lands versus addressing the condition of current federal infrastructure. The $19.38 billion maintenance backlog of the four major land management agencies is a factor in the debate. A third focus is the optimal balance between land protection and use (e.g., for energy development, livestock grazing, recreation, and other purposes), and whether federal lands should be managed primarily to benefit the nation as a whole or to benefit the localities and states in which the federal lands are located. Fourth, border control on federal lands along the southwestern border presents particular challenges due to the length of the border, differing agency missions, and divergent views on constructing border barriers.

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Introduction

Today the federal government owns and manages roughly 640 million acres of land in the United States, or roughly 28% of the 2.27 billion total land acres.[1] Four major federal land management agencies manage 606.5 million acres of this land, or about 95% of all federal land in the United States. These agencies are as follows: Bureau of Land Management (BLM), 244.4 million acres; Forest Service (FS), 192.9 million acres; Fish and Wildlife Service (FWS), 89.2 million acres; and National Park Service (NPS), 79.9 million acres. Most of these lands are in the West, including Alaska. A fifth agency, the Department of Defense (DOD) administers 8.8 million acres in the United States,[2] about 1% of all federal land.[3] Together, the five agencies manage about 615.3 million acres. The remaining acreage, approximately 4% of all federal land in the United States, is managed by a variety of other government agencies.

Ownership and use of federal lands have stirred controversy for decades.[4] Conflicting public values concerning federal lands raise many questions and issues, including the extent to which the federal government should own land; whether to focus resources on maintenance of existing infrastructure and lands or acquisition of new areas; how to balance use and protection; and how to ensure the security of international borders along the federal lands of multiple agencies. Congress continues to examine these questions through legislative proposals, program oversight, and annual appropriations for the federal land management agencies.

Historical Background

Federal lands and resources have played a significant role in American history, adding to the strength and stature of the federal government, serving as an attraction and opportunity for settlement and economic development, and providing a source of revenue for schools, transportation, national defense, and other national, state, and local needs.

The formation of the U.S. federal government was particularly influenced by the struggle for control over what were then known as the "western" lands—the lands between the Appalachian Mountains and the Mississippi River that were claimed by the original colonies. The original

[1] Total federal land in the United States is not definitively known. The estimate of 640 million acres presumes that the five agencies of focus in this report have accurate data on lands under their jurisdiction. The combined total for the five agencies is estimated at 615.3 million acres, as shown in **Table 1**. Other agencies are presumed to encompass about 20 million acres of federal land, although this estimate is rough. The estimate of 640 million acres generally excludes lands in marine refuges and national monuments and ownership of interests in lands (e.g., subsurface minerals, easements). It also does not reflect Indian lands, many of which are held in trust by the federal government but are not owned by the federal government. According to the Bureau of Indian Affairs (BIA), the United States holds approximately 56 million acres in trust for various Indian tribes and individuals. There are also other types of Indian lands. See U.S. Department of the Interior, BIA, "Frequently Asked Questions," at https://www.bia.gov/FAQs/.

[2] Acreage figures for the four land management agencies are current as of September 30, 2018; the Department of Defense (DOD) figure is current as of September 30, 2017 (the most recent available). The DOD figure excludes land managed by the U.S. Army Corps of Engineers.

[3] In addition, Forest Service (FS), Fish and Wildlife Service (FWS), National Park Service (NPS), and DOD manage varying acreages in the U.S. territories; FWS manages additional acres of marine refuges and national monuments; and DOD manages additional acres overseas.

[4] In this report, the term *federal land* is used to refer to any land owned (fee simple title) and managed by the federal government, regardless of its mode of acquisition or managing agency; it excludes lands administered by a federal agency under easements, leases, contracts, or other arrangements. *Public land* is used to refer to lands managed by the Bureau of Land Management (BLM) as defined in 43 U.S.C. §1702(e).

states reluctantly ceded the lands to the developing new government. This cession, together with granting constitutional powers to the new federal government, including the authority to regulate federal property and to create new states, played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the U.S. Constitution.

Subsequent federal land laws sought to reserve some federal lands (such as for national forests and national parks) and to sell or otherwise dispose of other lands to raise money or encourage transportation, development, and settlement. From the earliest days, these options took on East/West overtones, with easterners more likely to view the lands as national public property, and westerners more likely to view the lands as necessary for local use and development. Most agreed, however, on measures that promoted settlement of the lands to pay soldiers, to reduce the national debt, and to strengthen the nation. This settlement trend accelerated with federal acquisition of additional territory through the Louisiana Purchase in 1803, the Oregon Compromise with England in 1846, and cession of lands by treaty after the Mexican War in 1848.[5]

In the mid-to-late 1800s, Congress enacted many laws to encourage and accelerate the settlement of the West by disposing of federal lands. Examples include the Homestead Act of 1862 and the Desert Lands Entry Act of 1877. Approximately 1.29 billion acres of public domain land was transferred out of federal ownership between 1781 and 2018. The total included transfers of 816 million acres to private ownership (individuals, railroads, etc.), 328 million acres to states generally, and 143 million acres in Alaska under state and Native selection laws.[6] Most transfers to private ownership (97%) occurred before 1940; homestead entries, for example, peaked in 1910 at 18.3 million acres but dropped below 200,000 acres annually after 1935, until being fully eliminated in 1986.[7]

Although several earlier laws had protected some lands and resources, such as salt deposits and certain timber for military use, new laws in the late 1800s reflected the growing concern that rapid development threatened some of the scenic treasures of the nation, as well as resources that would be needed for future use. A preservation and conservation movement evolved to ensure that certain lands and resources were left untouched or reserved for future use. For example, Yellowstone National Park was established in 1872 to preserve its resources in a natural condition, and to dedicate recreation opportunities for the public. It was the world's first national park,[8] and like the other early parks, Yellowstone was protected by the U.S. Army—primarily

[5] These major land acquisitions gave rise to a distinction in the laws between *public domain lands*, which essentially are those ceded by the original states or obtained from a foreign sovereign (via purchase, treaty, or other means), and *acquired lands*, which are those obtained from a state or individual by exchange, purchase, or gift. About 90% of all federal lands are public domain lands, while the other 10% are acquired lands. Many laws were enacted that related only to public domain lands. Even though the distinction has lost most of its underlying significance today, different laws may still apply depending on the original nature of the lands involved.

[6] U.S. Dept. of the Interior, Bureau of Land Management, *Public Land Statistics, 2018*, Table 1-2, at https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2018.pdf.

[7] U.S. Dept. of Commerce, Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970* (Washington, DC: GPO, 1976), H.Doc. 93-78 (93rd Congress, 1st Session), pp. 428-429. The homesteading laws were generally repealed in 1976, although homesteading was allowed to continue in Alaska for another 10 years.

[8] Act of March 1, 1872; 16 U.S.C. §21, et seq. "Yo-Semite" had been established by an act of Congress in 1864, to protect Yosemite Valley from development, but was transferred to the State of California to administer. In 1890, surrounding lands were designated as Yosemite National Park, and in 1905, Yosemite Valley was returned to federal jurisdiction and incorporated into the park. Still earlier, Hot Springs Reservation (AR) had been reserved in 1832; it was dedicated to public use in 1880 and designated as Hot Springs National Park in 1921.

from poachers of wildlife or timber. In 1891, concern over the effects of timber harvests on water supplies and downstream flooding led to the creation of forest reserves (renamed national forests in 1907).

Emphasis shifted during the 20th century from the disposal and conveyance of title to private citizens to the retention and management of the remaining federal lands. During debates on the Taylor Grazing Act of 1934,[9] some western Members of Congress acknowledged the poor prospects for relinquishing federal lands to the states, but language included in the act left disposal as a possibility. It was not until the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) that Congress expressly declared that the remaining public domain lands generally would remain in federal ownership.[10] This declaration of permanent federal land ownership was a significant factor in what became known as the Sagebrush Rebellion, an effort that started in the late 1970s to strengthen state or local control over federal land and management decisions. Recently, there has been renewed interest in some western states in assuming ownership of some federal lands within their borders. This interest stems in part from concerns about the extent, condition, and cost of federal land ownership and the type and amount of land uses and revenue derived from federal lands. Judicial challenges and legislative and executive efforts generally have not resulted in broad changes to the level of federal ownership. Current authorities for acquiring and disposing of federal lands are unique to each agency.[11]

Current Federal Land Management

The creation of national parks and forest reserves laid the foundation for the current federal agencies whose primary purposes are managing natural resources on federal lands—the BLM, FS, FWS, and NPS. These four agencies were created at different times, and their missions and purposes differ. As noted, DOD is the fifth-largest land management agency, with lands consisting of military bases, training ranges, and more. These five agencies, which together manage about 96% of all federal land, are described below. Numerous other federal agencies—the U.S. Army Corps of Engineers, Bureau of Reclamation,[12] Post Office, the National Aeronautics and Space Administration, the Department of Energy, and many more—each administer relatively small amounts of additional federal lands.

[9] 43 U.S.C. §§315, et seq.

[10] 43 U.S.C. §§1701, et seq. The Federal Land Policy and Management Act of 1976 (FLPMA) also established a comprehensive system of management for the remaining western public lands, and a definitive mission and policy statement for the BLM.

[11] For a description of these authorities, see CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, by Carol Hardy Vincent et al.

[12] The Bureau of Reclamation (Reclamation), a federal agency created in 1902, is responsible for much of the water infrastructure in the 17 states west of the Mississippi River. Reclamation is the largest water wholesaler in the country and provides irrigation water for 10 million acres of farmland. Pursuant to its authorities to develop and maintain water resources infrastructure, Reclamation owns approximately 6 million acres of land in the western United States.

Agencies[13]

Bureau of Land Management

The BLM was formed in 1946 by combining two existing agencies.[14] One was the Grazing Service (first known as the DOI Grazing Division), established in 1934 to administer grazing on public rangelands. The other was the General Land Office, which had been created in 1812 to oversee disposal of the federal lands.[15] The BLM currently administers 244.4 million acres, more federal lands in the United States than any other agency. BLM lands are heavily concentrated (more than 99%) in the 11 contiguous western states and Alaska.[16]

As defined in FLPMA,[17] BLM management responsibilities are similar to those of the FS—sustained yields of multiple uses, including recreation, grazing, timber, energy and minerals, watershed, wildlife and fish habitat, and conservation. However, each agency historically has emphasized different uses. For instance, more rangelands are managed by the BLM, while most federal forests are managed by the FS. In addition, the BLM administers more than 700 million acres of federal subsurface mineral estate throughout the nation.[18]

Forest Service

The FS is the oldest of the four federal land management agencies. It was established in the Department of Agriculture (USDA) in 1905 and is charged with conducting forestry research, providing assistance to nonfederal forest owners, and managing the National Forest System (NFS).[19] Today, the FS administers 192.9 million acres of land in the United States,[20] predominantly in the West, while also managing about three-fifths of all federal lands in the East (as shown in **Table 5**).

The first forest reserves—later renamed national forests—originally were authorized to protect the lands, preserve water flows, and provide timber. These purposes were expanded in the Multiple Use-Sustained Yield Act of 1960.[21] This act added recreation, livestock grazing, and wildlife and fish habitat as purposes of the national forests, with wilderness added in 1964.[22] The

[13] For a list of CRS experts for federal land management agencies and issues, see CRS Report R42656, *Federal Land Management Agencies and Programs: CRS Experts*, by R. Eliot Crafton.

[14] Paul W. Gates, *History of Public Land Law Development*, written for the Public Land Law Review Commission (Washington, DC: GPO, Nov. 1968), pp. 610-622.

[15] The General Land Office administered the forest reserves prior to the creation of the FS in 1905.

[16] The 11 western states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Data on BLM acreage by state was provided by BLM to CRS on December 16, 2019. Figures represent acreage as of September 30, 2018.

[17] FLPMA is sometimes called the BLM Organic Act.

[18] Not all of the more than 700 million acres contain extractable mineral and energy resources.

[19] In 1891, Congress had authorized the President to establish forest reserves from the public domain lands administered by the Department of the Interior (Act of March 3, 1891; 16 U.S.C. §471). This authority was repealed in 1976. See also the Organic Administration Act of 1897, 16 U.S.C. §§473 et seq.

[20] U.S. Dept. of Agriculture, Forest Service, *Land Areas of the National Forest System—As of Sept 30, 2018*, Tables 1 and 4, at https://www.fs.fed.us/land/staff/lar/LAR2018/lar2018index.html. Data reflect land within the National Forest System, including national forests, national grasslands, purchase units, land utilization projects, experimental areas, and other areas. The FS manages an additional 28,937 acres in the U.S. territories.

[21] 16 U.S.C. §§528-531.

[22] The Wilderness Act of 1964, 16 U.S.C. §§1131-1136.

act directed that these multiple uses be managed in a "harmonious and coordinated" manner "in the combination that will best meet the needs of the American people." The act also directed the FS to manage renewable resources under the principle of sustained yield, meaning to achieve a high level of resource outputs in perpetuity without impairing the productivity of the lands.

Fish and Wildlife Service

The first national wildlife refuge was established by executive order in 1903, although it was not until 1966 that the refuges were aggregated into the National Wildlife Refuge System (NWRS) administered by the FWS.[23] The NWRS includes wildlife refuges, national monument areas, waterfowl production areas, and wildlife coordination units. Outside of the NWRS, the FWS administers lands for administrative sites, National Fish Hatcheries, and national monument areas. In total, the FWS administers 89.2 million acres of federal land in the United States, of which 76.6 million acres (85.9%) are in Alaska.[24]

The NWRS's mission is to administer a network of lands and waters for the conservation, management, and restoration of fish, wildlife, and plants and their habitats.[25] Other uses (recreation, hunting, timber cutting, oil or gas drilling, etc.) may be permitted, to the extent that they are compatible with the NWRS mission and an individual unit's purpose.[26] However, wildlife-related activities (hunting, bird watching, hiking, education, etc.) are considered "priority uses" and are given priority consideration in refuge planning. It can be challenging to determine compatibility, but the relative clarity of the mission generally has minimized conflicts over refuge management and use, although there are exceptions.[27]

National Park Service

The NPS was created in 1916 to manage the growing number of park units established by Congress and monuments proclaimed by the President.[28] By September 30, 2018, the National Park System had grown to 417 units with 79.9 million acres of federal land in the United States. About two-thirds of the lands (52.5 million acres, or 65. 6%) are in Alaska.[29] NPS units have

[23] National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§668dd-668ee.

[24] U.S. Dept. of the Interior, Fish and Wildlife Service, *2018 Annual Lands Report Data Tables, as of September 30, 2018*, Table 1A, at https://www.fws.gov/refuges/land/PDF/2018_Annual_Report_of_Lands_Data_Tables.pdf. Data reflect federally owned lands, submerged lands, and waters, over which the FWS has sole or primary jurisdiction in the 50 states. The FWS manages an additional 24,773 acres in the U.S. territories and an estimated 662 million acres within the U.S. Minor Outlying Islands, which primarily include marine areas in the Pacific Ocean.

[25] 16 U.S.C. §668dd(a)(2).

[26] In the case where the NWRS mission and a unit's purpose are in conflict, the unit's purpose takes priority (16 U.S.C. §§668dd(a)(4)(D)). For example, see CRS Report RL33872, *Arctic National Wildlife Refuge (ANWR): An Overview*, by Laura B. Comay, Michael Ratner, and R. Eliot Crafton.

[27] On some FWS lands, there are preexisting property rights, particularly of subsurface resources, but also easements or rights-of-way. In such cases, use of these rights may conflict with primary uses of a refuge. Where possible, the FWS may seek to acquire these rights through purchase from willing sellers.

[28] NPS was created by the Act of Aug. 25, 1916; 16 U.S.C. §§1-4.

[29] This text identifies the number of NPS units in existence on September 30, 2018, for consistency with the acreage data presented for the other agencies, which are from that date (except for DOD). See U.S. Dept. of the Interior, National Park Service, Land Resources Division, *Acreage by State*, as of 9/30/2018, at https://www.nps.gov/subjects/lwcf/upload/NPS-Acreage-9-30-2018.pdf. Data reflect federally owned lands managed by the NPS, as of September 30, 2018. Also, the NPS managed an additional 26,852 acres in the U.S. territories as of that date. Currently, the National Park System contains 419 units, with 80.0 million acres in the U.S. and an additional 26,852 acres in the territories as of December 31, 2019.

diverse titles—national park, national monument, national preserve, national historic site, national recreation area, national battlefield, and many more.[30]

The NPS has a dual mission—to preserve unique resources and to provide for their enjoyment by the public. Activities that harvest or remove resources from NPS lands generally are prohibited. Park units include spectacular natural areas, unique prehistoric sites, and special places in American history, as well as recreational opportunities. The tension between providing recreation and preserving resources has caused many management challenges.

Department of Defense

The National Security Act of 1947 established a Department of National Defense (later renamed the Department of Defense, or DOD) by consolidating the previously separate Cabinet-level Department of War (renamed Department of the Army) and Department of the Navy and creating the Department of the Air Force.[31] Responsibility for managing the land on federal military reservations was retained by these departments, with some transfer of Army land to the Air Force upon its creation.

There are more than 4,775 defense sites worldwide on a total of 26.9 million acres of land owned, leased, or otherwise possessed by DOD. Of the DOD sites, DOD owns 8.8 million acres in the United States, with individual parcel ownership ranging from 1 acre to more than a million acres.[32] Although management of military reservations remains the responsibility of each of the various military departments and defense agencies, those secretaries and directors operate under the centralized direction of the Secretary of Defense. With regard to natural resource conservation, defense instruction provides that

> The principal purpose of DOD lands, waters, airspace, and coastal resources is to support mission-related activities. All DOD natural resources conservation program activities shall work to guarantee DOD continued access to its land, air, and water resources for realistic military training and testing and to sustain the long-term ecological integrity of the resource base and the ecosystem services it provides.... DOD shall manage its natural resources to facilitate testing and training, mission readiness, and range sustainability in a long-term, comprehensive, coordinated, and cost-effective manner.[33]

Federal Land Ownership, 2018

The 615.3 million acres of federal land in the United States managed by the five major land management agencies represents about 27% of the total land base of 2.27 billion acres. **Table 1** provides data on the total acreage of federal land administered by the four major federal land management agencies and the DOD in each state and the District of Columbia. The lands administered by each of the five agencies in each state are shown in **Table 2**.[34] These tables

[30] See CRS Report R41816, *National Park System: What Do the Different Park Titles Signify?*, by Laura B. Comay.

[31] Act of July 26, 1947; 50 U.S.C. §3001 et seq. (2012).

[32] See U.S. Department of Defense, Office of the Deputy Assistant Secretary of Defense for Infrastructure, *Base Structure Report, Fiscal Year 2018 Baseline (A Summary of the Real Property Inventory Data)*, as of September 30, 2017, VI (hereinafter referred to as DOD FY2018 Baseline). Total DOD Inventory, pp. DOD-29 to DOD-88, at https://www.acq.osd.mil/eie/Downloads/BSI/Base%20Structure%20Report%20FY18.pdf. Unlike the data for the other agencies, the DOD data is current as of September 30, 2017. The source excludes U.S. Army Corps of Engineers lands.

[33] Department of Defense Instruction 4715.03 of March 18, 2011, p. 2.

[34] Some county-level data are available through the Payments in Lieu of Taxes (PILT) program, administered by the Department of the Interior. For these data, see at https://www.nbc.gov/pilt/states-payments.cfm. However, though most

reflect federal acreage as of September 30, 2018, except that DOD figures are current as of September 30, 2017. The figures understate total federal land, since they do not include lands administered by other federal agencies, such as the Bureau of Reclamation and the Department of Energy. **Table 1** also identifies the total acreage of each state and the percentage of land in each state administered by the five federal land agencies. These percentages point to significant variation in the federal presence within states. The figures range from 0.3% of land (in Connecticut and Iowa) to 80.1% of land (in Nevada). **Figure 1**, **Figure 2**, and **Figure 3** show these federal lands. **Figure 1** is a map of federal lands in the West; **Figure 2** is a map of federal lands in the East; and **Figure 3** is a map of federal lands in Alaska and Hawaii.

Although 15 states contain less than half a million acres of federal land,[35] the 11 western states and Alaska each have more than 10 million acres managed by these five agencies within their borders. This contrast is a result of early treaties, land settlement laws and patterns, and laws requiring that states agree to surrender any claim to federal lands within their border as a prerequisite for admission to the Union. Management of these lands is often controversial, especially in states where the federal government is a predominant or majority landholder and where competing and conflicting uses of the lands are at issue.

Table 1. Total Federal Land in the United States Administered by Five Agencies, by State, 2018

	Total Federal Acreage	Total Acreage in State	Federal Acreage's % of State
Alabama	880,188	32,678,400	2.7%
Alaska	222,666,580	365,481,600	60.9%
Arizona	28,077,992	72,688,000	38.6%
Arkansas	3,159,486	33,599,360	9.4%
California	45,493,133	100,206,720	45.4%
Colorado	24,100,247	66,485,760	36.2%
Connecticut	9,110	3,135,360	0.3%
Delaware	29,918	1,265,920	2.4%
District of Columbia	9,649	39,040	24.7%
Florida	4,491,200	34,721,280	12.9%
Georgia	1,946,492	37,295,360	5.2%
Hawaii[a]	829,830	4,105,600	20.2%
Idaho	32,789,648	52,933,120	61.9%
Illinois	423,782	35,795,200	1.2%
Indiana	384,726	23,158,400	1.7%

lands of the four major federal land management agencies are eligible for PILT payments, a small fraction are not. Also, DOD lands are among those generally not eligible for PILT payments. A small portion of PILT payments are made for certain lands managed by agencies other than the five covered in this report. Thus, the PILT county-level data do not always match the state acreage data shown in this report. For additional information on PILT, see CRS Report RL31392, *PILT (Payments in Lieu of Taxes): Somewhat Simplified*, by Katie Hoover.

[35] This includes 14 states and the District of Columbia. When referring to acreage figures in this report, *states* is often used to include the District of Columbia in addition to the 50 states.

	Total Federal Acreage	Total Acreage in State	Federal Acreage's % of State
Iowa	97,509	35,860,480	0.3%
Kansas	253,919	52,510,720	0.5%
Kentucky	1,100,160	25,512,320	4.3%
Louisiana	1,353,291	28,867,840	4.7%
Maine	301,481	19,847,680	1.5%
Maryland	205,362	6,319,360	3.2%
Massachusetts	62,680	5,034,880	1.2%
Michigan	3,637,599	36,492,160	10.0%
Minnesota	3,503,977	51,205,760	6.8%
Mississippi	1,552,634	30,222,720	5.1%
Missouri	1,702,983	44,248,320	3.8%
Montana	27,082,401	93,271,040	29.0%
Nebraska	546,852	49,031,680	1.1%
Nevada	56,262,610	70,264,320	80.1%
New Hampshire	805,472	5,768,960	14.0%
New Jersey	171,956	4,813,440	3.6%
New Mexico	24,665,774	77,766,400	31.7%
New York	230,992	30,680,960	0.8%
North Carolina	2,434,801	31,402,880	7.8%
North Dakota	1,733,641	44,452,480	3.9%
Ohio	305,502	26,222,080	1.2%
Oklahoma	683,289	44,087,680	1.5%
Oregon	32,244,257	61,598,720	52.3%
Pennsylvania	622,160	28,804,480	2.2%
Rhode Island	4,513	677,120	0.7%
South Carolina	875,316	19,374,080	4.5%
South Dakota	2,640,005	48,881,920	5.4%
Tennessee	1,281,362	26,727,680	4.8%
Texas	3,231,198	168,217,600	1.9%
Utah	33,267,621	52,696,960	63.1%
Vermont	465,888	5,936,640	7.8%
Virginia	2,373,616	25,496,320	9.3%
Washington	12,192,855	42,693,760	28.6%
West Virginia	1,134,138	15,410,560	7.4%
Wisconsin	1,854,085	35,011,200	5.3%
Wyoming	29,137,722	62,343,040	46.7%

	Total Federal Acreage	Total Acreage in State	Federal Acreage's % of State
U.S. Total	**615,311,596**	**2,271,343,360**	**27.1%**

Sources: For federal lands, see sources listed in **Table 2**. Total acreage of states is from U.S. General Services Administration, Office of Governmentwide Policy, *Federal Real Property Profile, as of September 30, 2004*, Table 16, pp. 18-19.

Notes: Figures understate federal lands in each state and the total in the United States. They include only land of the five largest land-managing agencies: BLM, FS, FWS, NPS, and DOD lands. Thus, the figures exclude federal lands managed by other agencies, such as the Bureau of Reclamation. They also exclude any land managed by the five agencies in the territories, DOD-managed acreage overseas, submerged lands in the outer continental shelf, and an estimated 662 million acres managed by FWS within the U.S. Minor Outlying Islands, primarily marine areas in the Pacific Ocean.

The total federal acreage column does not add to the precise total shown due to small discrepancies in the sources used. This is also the case for some other tables in this report. Also, here and throughout the report, figures might not sum to the totals shown due to rounding.

a. This figure includes approximately 253,000 acres of submerged lands and waters within the Hawaiian Islands National Wildlife Refuge. Thus, the percentage shown overestimates the area that is federally owned.

Table 2. Federal Acreage in Each State, by Agency, 2018

State	BLM	FS	FWS	NPS	DOD
Alabama	3,011	670,889	32,585	17,540	156,163
Alaska	71,397,880	22,138,560	76,649,320	52,455,308	25,512
Arizona	12,120,512	11,179,113	1,683,512	2,658,112	436,743
Arkansas	1,405	2,593,165	379,648	98,346	86,922
California	15,088,090	20,791,505	296,899	7,612,898	1,703,741
Colorado	8,352,437	14,487,064	174,983	665,260	420,503
Connecticut	0	23	1,754	5,846	1,487
Delaware	0	0	25,543	890	3,485
Dist. of Col.	0	0	0	8,476	1,173
Florida	2,239	1,203,418	293,636	2,469,173	522,734
Georgia	0	867,580	488,648	39,935	550,329
Hawaii[a]	0	0	309,594	358,160	162,076
Idaho	11,776,995	20,447,859	49,733	511,963	3,098
Illinois	20	304,538	90,000	12	29,212
Indiana	0	204,318	16,868	10,769	152,771
Iowa	0	0	73,427	2,708	21,374
Kansas	1	108,621	29,509	462	115,326
Kentucky	0	818,268	11,838	94,103	175,951
Louisiana	2,043	608,546	582,342	17,690	142,670
Maine	0	53,880	73,434	156,205	17,962
Maryland	548	0	49,795	41,532	113,487
Massachusetts	0	0	23,342	33,336	6,002
Michigan	610	2,874,631	117,816	632,280	12,262

State	BLM	FS	FWS	NPS	DOD
Minnesota	1,101	2,844,937	516,150	139,789	2,000
Mississippi	5,048	1,190,979	211,438	104,369	40,800
Missouri	59	1,507,891	61,368	54,569	79,096
Montana	8,022,852	17,186,331	653,097	1,214,193	5,928
Nebraska	5,325	351,205	174,401	5,899	10,022
Nevada	47,298,840	5,760,954	2,345,102	797,613	60,101
New Hampshire	0	753,921	34,716	13,696	3,139
New Jersey	0	0	73,785	35,683	62,488
New Mexico	13,500,023	9,225,354	332,058	468,968	1,139,371
New York	0	16,352	29,301	34,106	151,233
North Carolina	0	1,256,493	423,879	366,889	387,540
North Dakota	58,032	1,103,160	488,648	71,192	12,609
Ohio	0	244,440	9,109	20,290	31,663
Oklahoma	1,942	399,578	108,046	10,011	163,712
Oregon	15,742,384	15,697,445	575,379	196,197	32,852
Pennsylvania	0	513,891	12,614	53,460	42,195
Rhode Island	0	0	2,415	5	2,093
South Carolina	0	634,594	130,051	32,339	78,332
South Dakota	275,336	2,006,214	206,930	148,010	3,515
Tennessee	0	722,057	54,338	359,197	145,770
Texas	12,188	757,036	574,956	1,206,489	680,529
Utah	22,787,881	8,192,893	110,567	2,097,860	78,420
Vermont	0	410,654	34,195	9,836	11,203
Virginia	805	1,668,369	132,201	306,393	265,848
Washington	437,342	9,335,431	163,791	1,834,616	421,675
West Virginia	0	1,046,426	19,888	65,554	2,270
Wisconsin	2,488	1,524,576	202,424	61,835	62,762
Wyoming	17,493,875	9,215,971	70,930	2,345,619	11,327
U.S. Total	**244,391,312**	**192,919,130**	**89,205,999**	**79,945,679**	**8,849,476**
Territories	0	28,937	24,773	26,852	59,058
Overseas	0	0	0	0	12,816
Agency Total	244,391,312	192,948,059	89,230,772	79,972,531	8,921,349

Sources: For BLM, data provided to CRS by BLM on December 16, 2019. Data reflect BLM ownership as of September 30, 2018.

For FS: U.S. Dept. of Agriculture, Forest Service, *Land Areas of the National Forest System—As of Sept 30, 2018*, Tables 1 and 4, at https://www.fs.fed.us/land/staff/lar/LAR2018/lar2018index.html. Data reflect land within the National Forest System, including national forests, national grasslands, purchase units, land utilization projects, experimental areas, and other areas. **Table 1** shows an agency total of 192,948,059. However, the individual state and territory acreages copied here from **Table 4** appear to sum to 192,948,067. The reason for the

discrepancy is not apparent. In this table, the agency total is reflected as the total reported in **Table 1**, 192,948,059.

For FWS: U.S. Dept. of the Interior, Fish and Wildlife Service, *2018 Annual Lands Report Data Tables, as of September 30, 2018*, Table 1A, at https://www.fws.gov/refuges/land/PDF/2018_Annual_Report_of_Lands_Data_Tables.pdf. Data reflect federally owned land over which the FWS has sole or primary jurisdiction.

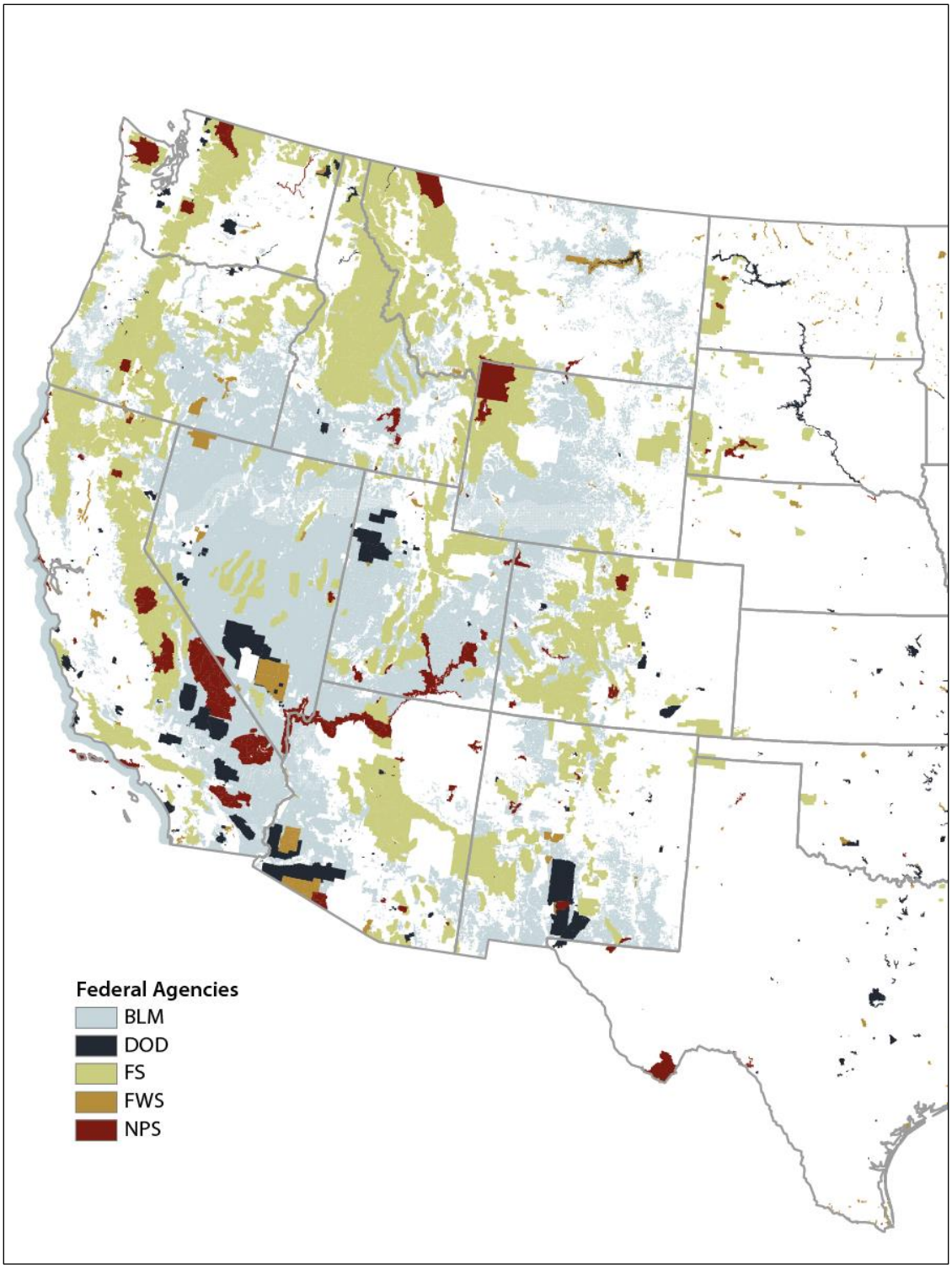
For NPS: U.S. Dept. of the Interior, National Park Service, Land Resources Division, *Acreage by State*, as of 9/30/2018, at https://www.nps.gov/subjects/lwcf/upload/NPS-Acreage-9-30-2018.pdf. Data reflect federally owned lands managed by the NPS.

For DOD: U.S. Department of Defense, Office of the Deputy Assistant Secretary of Defense for Infrastructure, *Base Structure Report, Fiscal Year 2018 Baseline (A Summary of the Real Property Inventory Data)*, as of September 30, 2017, VI. Total DOD Inventory, pp. DOD-29 to DOD-88, at https://www.acq.osd.mil/eie/Downloads/BSI/Base%20Structure%20Report%20FY18.pdf. Hereinafter this source is referred to as the DOD FY2018 Baseline. Unlike the data for the other agencies, the DOD data is current as of September 30, 2017. The source excludes U.S. Army Corps of Engineers lands.

Notes: See notes for **Table 1**.

a. This figure includes approximately 253,000 acres of submerged lands and waters within the Hawaiian Islands National Wildlife Refuge.

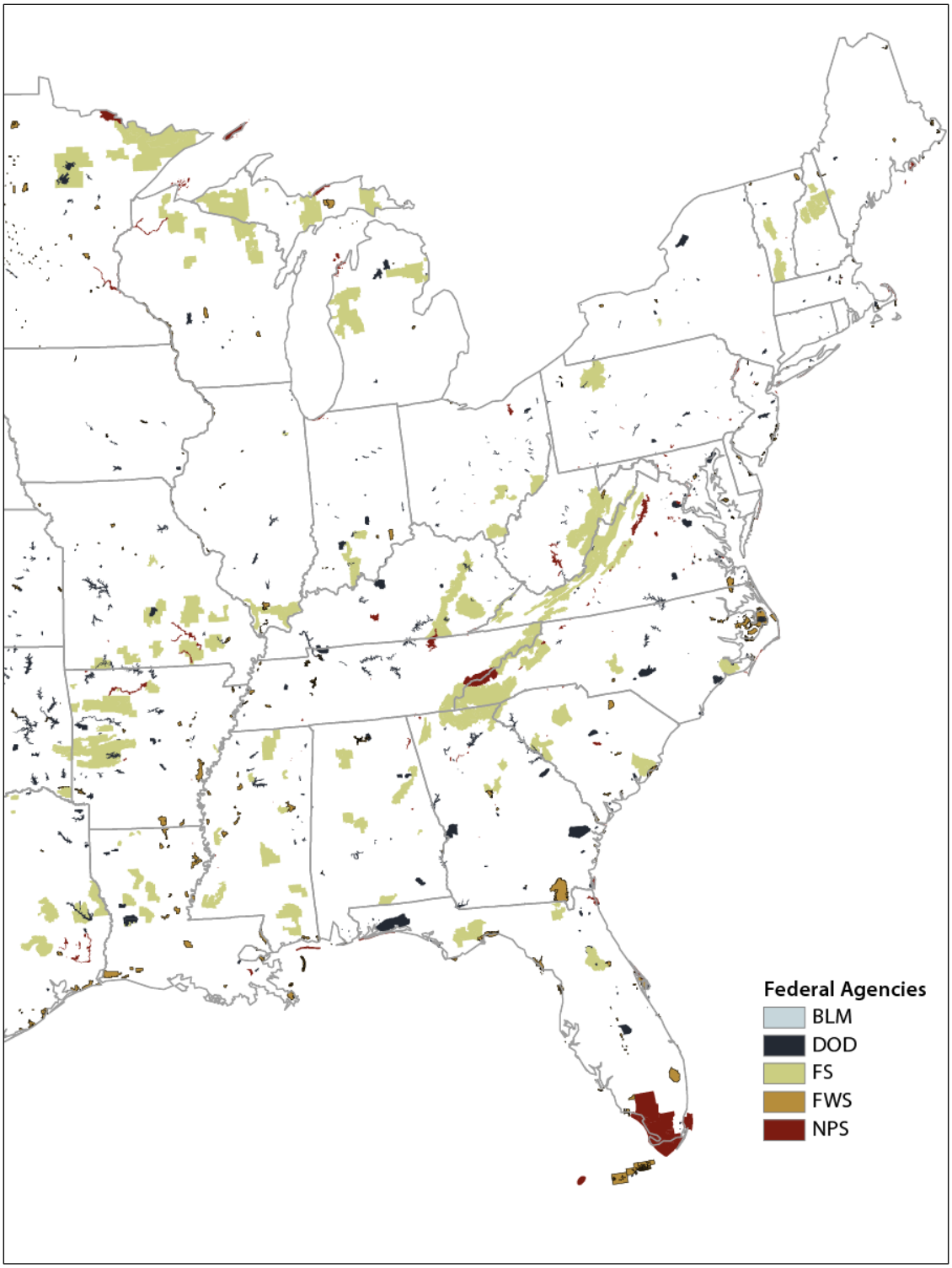
Figure 1. Western Federal Lands Managed by Five Agencies



Source: Map boundaries and information generated by CRS using federal lands GIS data from the National Atlas, 2005, and an ESRI USA Base Map.

Notes: Scale 1:11,283,485. The line along the coast of California indicates BLM administration of numerous small islands. Also, the map may reflect a broader definition of DOD land than shown in the data in **Table 2**.

Figure 2. Eastern Federal Lands Managed by Five Agencies



Source: Map boundaries and information generated by CRS using federal lands GIS data from the National Atlas, 2005, and an ESRI USA Base Map.

Note: Scale 1:13,293,047. Also, the map may reflect a broader definition of DOD land than shown in the data in Table 2.

Figure 3. Federal Lands in Alaska and Hawaii Managed by Five Agencies

Source: Map boundaries and information generated by CRS using federal lands GIS data from the National Atlas, 2005, and an ESRI USA Base Map.

Note: Hawaii scale 1:8,000,000. Alaska scale 1:20,000,000. Also, the map may reflect a broader definition of DOD land than shown in the data in Table 2.

Federal Land Ownership Changes, 1990-2018

Since 1990, total federal lands in the United States have generally declined. Many disposals of areas of federal lands have occurred. At the same time, the federal government has acquired many parcels of land, and there have been various new federal land designations, including wilderness areas and national park units. Through the numerous individual acquisitions and disposals since 1990, the total federal land ownership has declined by 31.5 million acres, or 4.9% of the total of the five agencies, as shown in **Table 3**.

The total acreage decline reflects decreased acreage for two agencies but increased acreage for three others. BLM ownership decreased by 27.6 million acres (10.2%), in large part due to the disposal of BLM land, under law, to the State of Alaska, Alaska Natives, and Alaska Native Corporations.[36] DOD land ownership also declined, by 11.7 million acres (56.8%). This decline was primarily due to changes in legal arrangements for managing military installations rather than changes in the sizes of the installations themselves. For instance, of the 26.9 million acres of defense sites (worldwide) in DOD's FY2018 Baseline report—more than 98% of which is in the United States or territories—8.9 million acres (33%) were federally owned,[37] 0.9 million acres (3%) were leased, and 17.1 million acres (63%) were managed through a legal interest that was "other" than owned or leased.[38] By comparison, of the 28.4 million acres of defense sites

[36] Other actions and factors contributed to the decline in BLM lands. For example, a reduction of about 1 million acres (primarily in the eastern states) resulted from a revision in the way the BLM reported acreage withdrawn or reserved for another federal agency or purpose.

[37] The 8.9 million figure used here includes lands worldwide, whereas the 8.8 million figure shown for 2018 elsewhere in this report reflects land in the United States only.

[38] Acreage figures are taken from the DOD FY2018 Baseline, pp. DOD-15 to DOD-16. That document indicates, on p. DOD-5, that total acreage figures include "government owned land, public land, public land withdrawn for military use, licensed and permitted land," and other types of arrangements.

(worldwide) in DOD's 2010 report, approximately 19.8 million (70%) were federally owned,[39] 0.5 million (2%) were leased, and 8.0 million (28%) were managed under another legal interest.

In contrast, the NPS, FWS, and FS expanded their acreage during the period, with the NPS having the largest increase in both acreage and percentage growth—3.8 million acres (5.0%). In some cases, a decrease in one agency's acreage was tied to an increase in acreage owned by another agency.[40]

Table 3. Change in Federal Acreage in the United States Since 1990, by Agency

	1990	2000	2010	2018	Change 1990-2018	% Change Since 1990
BLM	272,029,418	264,398,133	247,859,076	244,391,312	-27,638,106	-10.2%
FS	191,367,364	192,355,099	192,880,840	192,919,130	1,551,766	0.8%
FWS	86,822,107	88,225,669	88,948,699	89,205,999	2,383,892	2.7%
NPS	76,133,510	77,931,021	79,691,484	79,945,679	3,812,169	5.0%
DOD	20,501,315	24,052,268	19,421,540	8,849,476	-11,651,839	-56.8%
U.S. Total	**646,853,714**	**646,962,190**	**628,801,839**	**615,311,596**	**-31,542,118**	**-4.9%**

Sources: See sources listed **Table 2.**

Notes: See notes for **Table 1.** Also, estimates generally reflect the end of the fiscal year for the years shown, (i.e., September 30). However, DOD figures for the years indicated were not readily available. Rather, the DOD figures for the four columns were derived respectively from the FY1989 Base Structure Report (published in February 1988), the FY1999 Base Structure Report (with data as of September 30, 1999), the FY2010 Base Structure Report (with data as of September 30, 2009), and the FY2018 Base Structure Report (with data as of September 30, 2017).

The total federal acreage decline (shown in **Table 3**) is a composite of various decreases in acreage in 15 states and increases in acreage in 36 states (including the District of Columbia). A reduction in federal lands in Alaska was a major reason for the total decline in federal lands since 1990. As shown in **Table 4**, federal land declined in Alaska by 23.0 million acres (9.4%) between 1990 and 2018. As noted, this decline in Alaska is largely the result of the disposal of BLM land under Alaska-specific laws. Specifically, from 1990 to 2018, BLM land in Alaska declined by 21.1 million acres (22.8%).

Since 1990, federal land also has decreased in the 11 contiguous western states, by 10.7 million acres (3.0%). Reflected in the overall decline are reductions for 6 of the 11 states, with decreases of 6.3 million acres in Arizona, 3.7 million acres in Nevada,[41] and smaller decreases in four other states. Five of the 11 states each had increases ranging roughly from 0.2 million acres to 0.5 million acres, with the largest being 0.5 million acres in Colorado.

[39] The 19.8 million acre figure used here includes land worldwide, more than 97% of which is in the United States. The 19.4 million acre figure shown for 2010 in **Table 3** reflects land in the United States only.

[40] For instance, a decrease in BLM acreage and an increase in NPS acreage was the result of enactment of the California Desert Protection Act of 1994 (P.L. 103-433). Among other provisions, the law established one new national park unit and expanded two other park units on land that was owned by the BLM, and transferred ownership of the lands to the NPS. BLM estimated the total transfer of BLM land to the NPS for the three areas at 2.9 million acres.

[41] These reductions were due primarily to relatively large reductions of both BLM and DOD land in Arizona and of DOD land in Nevada.

Outside Alaska and the other western states, federal land increased by 2.1 million acres (4.5%). This increase was not uniform, with declines in some states and varying increases (in acreages and percentage) in others.

Table 4. Change in Federal Acreage in the United States Since 1990, by State

	1990	2000	2010	2018	Change 1990-2018	% Change Since 1990
Alabama	944,505	979,907	871,232	880,188	-64,317	-6.8%
Alaska	245,669,027	237,828,917	225,848,164	222,666,580	-23,002,447	-9.4%
Arizona	34,399,867	33,421,887	30,741,287	28,077,992	-6,321,875	-18.4%
Arkansas	3,147,518	3,418,455	3,161,978	3,159,486	11,968	0.4%
California	46,182,591	47,490,824	47,797,533	45,493,133	-689,458	-1.5%
Colorado	23,579,790	24,001,922	24,086,075	24,100,247	520,457	2.2%
Connecticut	6,784	9,012	8,557	9,110	2,326	34.3%
Delaware	27,731	28,397	28,574	29,918	2,187	7.9%
Dist. of Col.	9,533	8,466	8,450	9,649	116	1.2%
Florida	4,344,976	4,671,958	4,536,811	4,491,200	146,224	3.4%
Georgia	1,921,674	1,933,464	1,956,720	1,946,492	24,818	1.3%
Hawaii	715,215	682,650	833,786	829,830	114,615	16.0%
Idaho	32,566,081	32,569,711	32,635,835	32,789,648	223,567	0.7%
Illinois	353,061	403,835	406,734	423,782	70,721	20.0%
Indiana	274,483	394,243	340,696	384,726	110,243	40.2%
Iowa	33,247	83,134	122,602	97,509	64,262	193.3%
Kansas	281,135	300,465	301,157	253,919	-27,216	-9.7%
Kentucky	966,483	1,065,814	1,083,104	1,100,160	133,677	13.8%
Louisiana	1,578,151	1,565,875	1,330,429	1,353,291	-224,860	-14.2%
Maine	176,486	210,167	209,735	301,481	124,995	70.8%
Maryland	173,707	190,783	195,986	205,362	31,655	18.2%
Massachusetts	63,291	63,998	81,692	62,680	-611	-1.0%
Michigan	3,649,258	3,692,271	3,637,965	3,637,599	-11,659	-0.3%
Minnesota	3,545,702	3,581,741	3,469,211	3,503,977	-41,725	-1.2%
Mississippi	1,478,726	1,544,501	1,523,574	1,552,634	73,908	5.0%
Missouri	1,666,718	1,676,175	1,675,400	1,702,983	36,265	2.2%
Montana	26,726,219	26,745,666	26,921,861	27,082,401	356,182	1.3%
Nebraska	528,707	556,347	549,346	546,852	18,145	3.4%
Nevada	60,012,488	60,180,297	56,961,778	56,262,610	-3,749,878	-6.2%
New Hampshire	734,163	754,858	777,807	805,472	71,309	9.7%
New Jersey	146,436	164,865	176,691	171,956	25,520	17.4%

	1990	2000	2010	2018	Change 1990-2018	% Change Since 1990
New Mexico	24,742,260	26,829,296	27,001,583	24,665,774	-76,486	-0.3%
New York	215,441	229,097	211,422	230,992	15,551	7.2%
North Carolina	2,289,509	2,415,560	2,426,699	2,434,801	145,292	6.3%
North Dakota	1,727,541	1,729,430	1,735,755	1,733,641	6,100	0.4%
Ohio	234,396	289,566	298,500	305,502	71,106	30.3%
Oklahoma	505,898	696,377	703,336	683,289	177,391	35.1%
Oregon	32,062,004	32,703,212	32,665,430	32,244,257	182,253	0.6%
Pennsylvania	611,249	598,165	616,895	622,160	10,911	1.8%
Rhode Island	3,110	4,867	5,248	4,513	1,403	45.1%
South Carolina	891,182	872,173	898,637	875,316	-15,866	-1.8%
South Dakota	2,626,594	2,642,646	2,646,241	2,640,005	13,411	0.5%
Tennessee	980,416	1,251,514	1,273,974	1,281,362	300,946	30.7%
Texas	2,651,675	2,855,997	2,977,950	3,231,198	579,523	21.9%
Utah	33,582,578	34,982,884	35,033,603	33,267,621	-314,957	-0.9%
Vermont	346,518	428,314	453,871	465,888	119,370	34.4%
Virginia	2,319,524	2,381,575	2,358,071	2,373,616	54,092	2.3%
Washington	11,983,984	12,646,137	12,173,813	12,192,855	208,871	1.7%
West Virginia	1,062,500	1,096,956	1,130,951	1,134,138	71,638	6.7%
Wisconsin	1,980,460	2,006,778	1,865,374	1,854,085	-126,375	-6.4%
Wyoming	30,133,121	30,081,046	30,043,513	29,137,722	-995,399	-3.3%
U.S. Total	**646,853,714**	**646,962,190**	**628,801,639**	**615,311,596**	**-31,542,118**	**-4.9%**

Sources: See sources listed in **Table 2**.

Notes: See notes to **Table 1** and **Table 3**.

Current Issues

Since the cession to the federal government of the western lands by several of the original 13 states, many federal land issues have recurred. The extent of ownership continues to be debated. Some advocate disposing of federal lands to state or private ownership; others favor retaining currently owned lands; still others promote land acquisition by the federal government, including through increased or more stable funding sources. Another focus is on the condition of federal lands and related infrastructure. Some assert that lands and infrastructure have deteriorated and that agency activities and funding should focus on restoration and maintenance, whereas others advocate expanding federal protection to additional lands. Debates also encompass the extent to which federal lands should be developed, preserved, and open to recreation and whether federal lands should be managed primarily to produce national benefits or benefits primarily for the localities and states in which the lands are located. Finally, border security, along and near the southwestern border in particular, raises questions related to management of, and access to,

federal lands. These questions stem, in part, from the differing roles of the Department of Homeland Security (DHS) and the federal land management agencies.[42]

Extent of Ownership

The optimal extent of federal land ownership is an enduring issue for Congress. Current debates encompass the extent to which the federal government should dispose of, retain, or acquire lands in general and in particular areas. Advocates of retention of federal lands, and federal acquisition of additional lands, assert a variety of benefits to the public of federal land ownership. They include protection and preservation of unique natural and other resources; open space; and public access, especially for recreation. Some support land protection from development.

Disposal advocates have expressed concerns about the efficacy and efficiency of federal land management, accessibility of federal lands for certain types of recreation, and limitations on development of federal lands. Some support selling federal land for financial reasons, such as to help lower federal expenditures, reduce the deficit, or balance the budget. Others assert that limited federal resources constrain agencies' abilities to protect and manage the lands and resources. Other concerns involve the potential influence of federal land protection on private property, development, and local economic activity. Some seek disposal to states or private landowners to foster state, local, and private control over lands and resources.

Other issues center on the suitability of authorities for acquiring and disposing of lands and their use in particular areas. Congress has provided to the federal agencies varying authorities for acquiring and disposing of land.[43] With regard to acquisition, the BLM has relatively broad authority, the FWS has various authorities, and the FS authority is mostly limited to lands within or contiguous to the boundaries of a national forest. DOD also has authority for acquisitions.[44] By contrast, the NPS has no general authority to acquire land to create new park units. Condemnation for acquiring land is feasible, but, with the exception of DOD, rarely is used by these agencies. Its potential use has been controversial in some cases. The primary funding mechanism for federal land acquisition, for the four major federal land management agencies, has been appropriations from the Land and Water Conservation Fund (LWCF).[45] For the FWS, the Migratory Bird Conservation Fund (supported by sales of Duck Stamps and import taxes on arms and ammunition) provides an additional source of mandatory spending for land acquisition. Funding for acquisitions by DOD is provided in DOD appropriations laws. There continue to be different views as to acquisition funding, including the appropriate amount, type (discretionary and/or mandatory), and location of use.

With regard to disposal, the NPS and FWS have no general authority to dispose of the lands they administer, and the FS disposal authorities are restricted. The BLM has broader authority under provisions of FLPMA.[46] DOD lands that are excess to military needs can be disposed of under the surplus property process administered by the General Services Administration (GSA). While

[42] Additional discussion of federal land management issues is contained in CRS Report R43429, *Federal Lands and Related Resources: Overview and Selected Issues for the 116th Congress*, coordinated by Katie Hoover.

[43] For information on the acquisition and disposal authorities of the four major federal land management agencies, see CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, by Carol Hardy Vincent et al.

[44] See 10 U.S.C. §2663.

[45] For information on the Land and Water Conservation Fund, see CRS Report RL33531, *Land and Water Conservation Fund: Overview, Funding History, and Issues*, by Carol Hardy Vincent.

[46] 43 U.S.C. §1713.

surplus DOD real property is routinely disposed of by the GSA, legislation authorizing base realignment and closure (BRAC) rounds typically has authorized the Secretary of Defense to exercise GSA's disposal authority during BRAC rounds.[47]

It is not uncommon for Congress to enact legislation providing for the acquisition or disposal of particular lands where an agency lacks such authority or providing particular procedures for specified land transactions. Further, recent Congresses have considered measures to establish or amend broader authorities for acquiring or disposing of land.

Western Land Concentration

The concentration of federal lands in the West has contributed to a higher degree of controversy over federal land ownership in that part of the country. For instance, the dominance of BLM and FS lands in the western states has led to various efforts to divest the federal government of significant amounts of land. In recent years, some western states, among others, have considered measures to provide for or express support for the transfer of federal lands to states, to establish task forces or commissions to examine federal land transfer issues, and to assert management authority over federal lands. An earlier collection of efforts from the late 1970s and early 1980s, known as the Sagebrush Rebellion, also sought to foster divestiture of federal lands. However, that effort was not successful in achieving this end through legal challenges in the federal courts and efforts to persuade the Reagan Administration and Congress to transfer the lands to state or private ownership. Some supporters of continued or expanded federal land ownership have asserted that state and local resource constraints, other economic considerations, or environmental or recreational priorities weigh against state challenges to federal land ownership. In recent years, some states have considered measures to express support for federal lands or to limit the sale of federal lands in the state.[48]

As shown in **Table 1** and **Table 2**, the 11 contiguous western states and Alaska have extensive areas of federal lands. **Table 5** summarizes the data in **Table 1** to clarify the difference in the extent of federal ownership between western and other states. As can be seen in **Table 5**, 60.9% of the land in Alaska is federally owned, which includes 85.9% of the total FWS lands and 65.6% of the total NPS lands. In contrast, only 0.3% of DOD-owned lands are in Alaska. Of the land in the 11 contiguous western states, 45.9% is federally owned, which includes 73.4% of total FS lands and 70.6% of total BLM lands. In the rest of the country, the federal government owns 4.1% of the lands. The FS manages the largest portion of this land in other states—61.8%—and BLM manages the least—0.8%. Slightly more than half (51%) of DOD lands are in the other states, with slightly less than half (49%) in the 11 western states.

[47] For information on the disposal of surplus federal property by the U.S. General Services Administration (GSA), see 40 U.S.C. §101 et seq. and CRS Report R44377, *Disposal of Unneeded Federal Buildings: Legislative Proposals in the 114th Congress*, by Garrett Hatch. For information on DOD disposal during BRAC rounds, see CRS Report R45705, *Base Closure and Realignment (BRAC): Background and Issues for Congress*, by Christopher T. Mann.

[48] For a discussion of issues related to potential state management of federal lands, see CRS Report R44267, *State Management of Federal Lands: Frequently Asked Questions*, by Carol Hardy Vincent.

Table 5. Federal Acreage in the United States, by Agency and State or Region, 2018

	Alaska	11 Western States[a]	Other States	U.S. Total
BLM	71,397,880	172,621,231	372,201	244,391,312
FS	22,138,560	141,519,920	29,260,650	192,919,130
FWS	76,649,320	6,456,051	6,100,632	89,205,999
NPS	52,455,308	20,403,299	7,087,074	79,945,679
DOD	25,512	4,313,759	4,510,205	8,849,476
U.S. Total	222,666,580	345,314,260	47,330,762	615,311,596
Acreage of States	365,481,600	752,947,840	1,152,913,920	2,271,343,360
Percentage Federal	**60.9%**	**45.9%**	**4.1%**	**27.1%**

Sources: For federal lands, see sources listed in **Table 2**. Total acreage of states is from U.S. General Services Administration, Office of Governmentwide Policy, *Federal Real Property Profile, as of September 30, 2004*, Table 16, pp. 18-19.

Notes: See notes for **Table 1**. As mentioned, the U.S. total shown is not the precise sum of the figures in the first three columns due to small discrepancies in the sources used and rounding.

a. The 11 western states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

Maintaining Infrastructure and Lands

Debate continues over how to balance the acquisition of new assets and lands with the maintenance of the agencies' existing infrastructure and the care of current federal lands. Some assert that addressing the condition of infrastructure and lands in current federal ownership is paramount. They support ecological restoration as a focus of agency activities and funding and an emphasis on managing current federal lands for continued productivity and public benefit. They oppose new land acquisitions and unit designations until the backlog of maintenance activities has been eliminated or greatly reduced and the condition of current range, forest, and other federal lands is significantly improved. Others contend that expanding federal protection to additional lands is essential to provide new areas for public use, protect important natural and cultural resources, and respond to changing land and resource conditions.

The ecological condition of current federal lands has long been a focus of attention. For example, the poor condition of public rangelands due to overgrazing was the rationale for enacting the Taylor Grazing Act of 1934 and the creation of the BLM.[49] Today, debates on the health and productivity of federal lands center on rangelands, forests, riparian areas, and other resources. These lands and resources might be affected in some areas by various land uses, such as livestock grazing, recreation, and energy development. Many other variables might impact the health of federal lands and resources, including wildfires, community expansion, invasive weeds, and drought.

The deferred maintenance of federal infrastructure also has been a focus of Congress and the Administration for many years. Deferred maintenance, often called the maintenance backlog, is defined as maintenance that was not done when scheduled or planned. The agencies assert that

[49] S.T. Dana and S.K. Fairfax, *Forest and Range Policy: Its Development in the United States*, 2nd ed. (New York: McGraw-Hill Book Co., 1980), pp. 158-164.

continuing to defer maintenance of facilities accelerates their rate of deterioration, increases their repair costs, and decreases their value.

Congressional and administrative attention has centered on the NPS backlog. DOI estimated deferred maintenance for the NPS for FY2018 at $11.92 billion. Of the total deferred maintenance, 57% was for roads, bridges, and trails; 19% was for buildings; 6% was for irrigation, dams, and other water structures; and 18% was for other structures (e.g., recreation sites).[50] DOI estimates of the NPS backlog have increased overall since FY1999, from $4.25 billion in that year.[51] It is unclear what portion of the change is due to the addition of maintenance work that was not done on time or the availability of more precise estimates of the backlog. The NPS, as well as the other land management agencies, increased efforts to define and quantify maintenance needs over the past two decades.

While attention has focused on the NPS backlog, the other federal land management agencies also have maintenance backlogs. The FS estimated its backlog for FY2018 at $5.20 billion.[52] Of the total deferred maintenance, 61% was for roads,[53] 24% was for buildings, and the remaining 15% was for a variety of other assets (e.g., trails, fences, and bridges). For FY2018, DOI estimated the FWS backlog at $1.30 billion and the BLM backlog at $0.96 billion.[54] The four agencies together had a combined FY2018 backlog estimated at $19.38 billion.

The agency backlogs have been attributed to decades of funding shortfalls. However, it is unclear how much total funding has been provided for the maintenance backlog over the years. Annual presidential budget requests and appropriations laws typically have not identified funds from all sources that may be used to address the maintenance backlog. Opinions differ over the level of funds needed to address deferred maintenance, whether to use funds from other programs and new sources, and how to prioritize funds for maintenance needs.

Protection and Use

The extent to which federal lands should be opened to development, available for recreation, and/or preserved has been controversial. Differences of opinion exist on the amount of traditional commercial development that should be allowed, particularly involving energy development, grazing, and timber harvesting. Whether and where to restrict recreation, generally and for high-impact uses such as motorized off-road vehicles, also is a focus. How much land to dedicate to enhanced protection, what type of protection to provide, and who should protect federal lands are continuing questions. Another area under consideration involves how to balance the protection of wild horses and burros on federal lands with protection of the range and other land uses.

Debates also encompass whether federal lands should be managed primarily to emphasize benefits nationally or for the localities and states where the lands are located. National benefits can include using lands to produce wood products for housing or energy from traditional (oil, gas, coal) and alternative/renewable sources (wind, solar, geothermal, biomass). Other national benefits might encompass clean water for downstream uses; biodiversity for ecological resilience

[50] This information was provided to CRS by the DOI Budget Office on March 25, 2019. DOI estimates are based on DOI financial reports and may differ from figures reported by the agencies independently. As one example, DOI financial reports reflect agency-owned assets only, whereas figures reported by individual DOI agencies sometimes include other types of assets (e.g., leased assets).

[51] FY1999 is the first year for which an estimate is readily available.

[52] This information was provided to CRS by the Forest Service, Office of Legislative Affairs, on February 12, 2019.

[53] This estimate of the deferred maintenance for roads reflects passenger-car roads only.

[54] This information was provided to CRS by the DOI Budget Office on March 25, 2019.

and adaptability; and wild animals and wild places for human enjoyment. Local benefits can include economic activities, such as livestock grazing, timber for sawmills, ski areas, tourism, and other types of development. Local benefits could also be scenic vistas and areas for recreation—picnicking, sightseeing, backpacking, four-wheeling, snowmobiling, hunting and fishing, and much more.

At some levels, the many uses and values can generally be compatible. However, as demands on the federal lands have risen, the conflicts among uses and values have escalated. Some lands—notably those administered by the FWS and DOD—have an overriding primary purpose (wildlife habitat and military needs, respectively). The conflicts typically are greatest for the multiple-use lands managed by the BLM and FS, because the potential uses and values are more diverse.

Other issues of debate include who decides the national-local balance, and how those decisions are made. Some would like to see more local control of land and a reduced federal role, while others seek to maintain or enhance the federal role in land management to represent the interests of all citizens.

Border Security[55]

Border security presents special challenges on federal lands, given the extensive federal lands along the southwestern border with Mexico and the northern border with Canada. The federal lands on the borders tend to be geographically remote and include mountains, deserts, and other inhospitable terrain with limited law enforcement coverage. Moreover, the lands are managed by different federal agencies, under various laws, and for many purposes.

The southwestern border with Mexico has been a particular focus. There are various estimates and depictions of federal lands on or near the border. For instance, by one estimate, six different agencies manage 621.5 (linear) miles of federal lands along the southwestern border.[56] Second, a depiction of federal (and Indian) lands located within 50 and 100 miles from the U.S.-Mexican border is shown in **Table 4**. Third, according to the House Committee on Natural Resources, there are about 26.7 million acres of federal lands within 100 miles of the border (and an additional 3.5 million acres of Indian lands).[57] Nearly half of the federal lands (12.3 million acres) are managed by the BLM, and the remainder are managed by DOD (5.8 million acres), FS (3.8 million acres), NPS (2.4 million acres), FWS (2.2 million acres), and other federal agencies (0.2 million acres).

The extent to which federal and other lands along the southwestern border should be used for the construction of barriers to deter illegal immigration and other illegal activity is under current debate. Efforts to build border infrastructure to reduce illicit activity at the border, such as illegal entry and drug and contraband smuggling, are a priority for the Trump Administration as well as for some Members of Congress and portions of the public. By contrast, some Members of Congress and segments of the public oppose barrier construction as potentially costly, possibly

[55] For additional information, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, coordinated by Audrey Singer.

[56] The estimate of 621.5 linear miles was prepared by CRS. It excludes 71.9 miles of land managed by the Bureau of Indian Affairs, for a total of 693.4 miles of federal and Indian lands on the border. For additional information, see CRS In Focus IF10832, *Federal and Indian Lands on the U.S.-Mexico Border*, by Carol Hardy Vincent and James C. Uzel.

[57] See the map on the website of the House Committee on Natural Resources at https://republicans-naturalresources.house.gov/info/borderoverview.htm.

damaging to lands and resources, and unlikely to be a major deterrent to illegal activity, among other reasons.[58]

Within DHS, the U.S. Border Patrol (USBP) takes the lead role in staffing and securing the international borders, but more than 40% of the southwestern border abuts federal and tribal lands overseen by the FS and the four DOI agencies (including the Bureau of Indian Affairs) that also have law enforcement responsibilities.[59] Differences in missions and jurisdictional complexity among these agencies may hinder border control. To facilitate control efforts, three federal agencies—DHS, the Department of Agriculture (for the FS), and DOI—have signed memoranda of understanding (MOUs) on border security. These MOUs govern information sharing, budgeting, operational planning, USBP access to federal lands, and interoperable radio communications, among other issues.[60]

In general, federal efforts to secure the border are subject to the National Environmental Policy Act of 1969 (NEPA), which requires agencies to evaluate the potential environmental impacts of proposed programs, projects, and actions before decisions are made to implement them.[61] Implementing regulations require agencies to integrate NEPA project evaluations with other planning and regulatory compliance requirements to ensure that planning and decisions reflect environmental considerations.[62] Federal law confers the DHS Secretary with broad authority to construct barriers and roads along U.S. borders to deter illegal crossings. The Secretary may waive application of NEPA and other laws that the Secretary determines may impede the expeditious construction of these barriers and roads.[63] In the past, Congress has introduced legislation to broaden DHS's authority to be exempt from NEPA, land management statutes, and other environmental laws on the grounds that these laws (and related litigation) may impede DHS from taking actions on federal lands to secure the border. Some have opposed such legislation on the grounds that it would remove important protections for sensitive and critical habitats and resources and that the current authority is already sufficiently broad.

[58] For an overview of funding appropriated for border barrier constructions, see CRS Report R45888, *DHS Border Barrier Funding*, by William L. Painter and Audrey Singer. For a discussion of Department of Defense funding of border barrier construction see CRS Report R45937, *Military Funding for Southwest Border Barriers*, by Christopher T. Mann.

[59] U.S. Government Accountability Office, *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, p. 4.

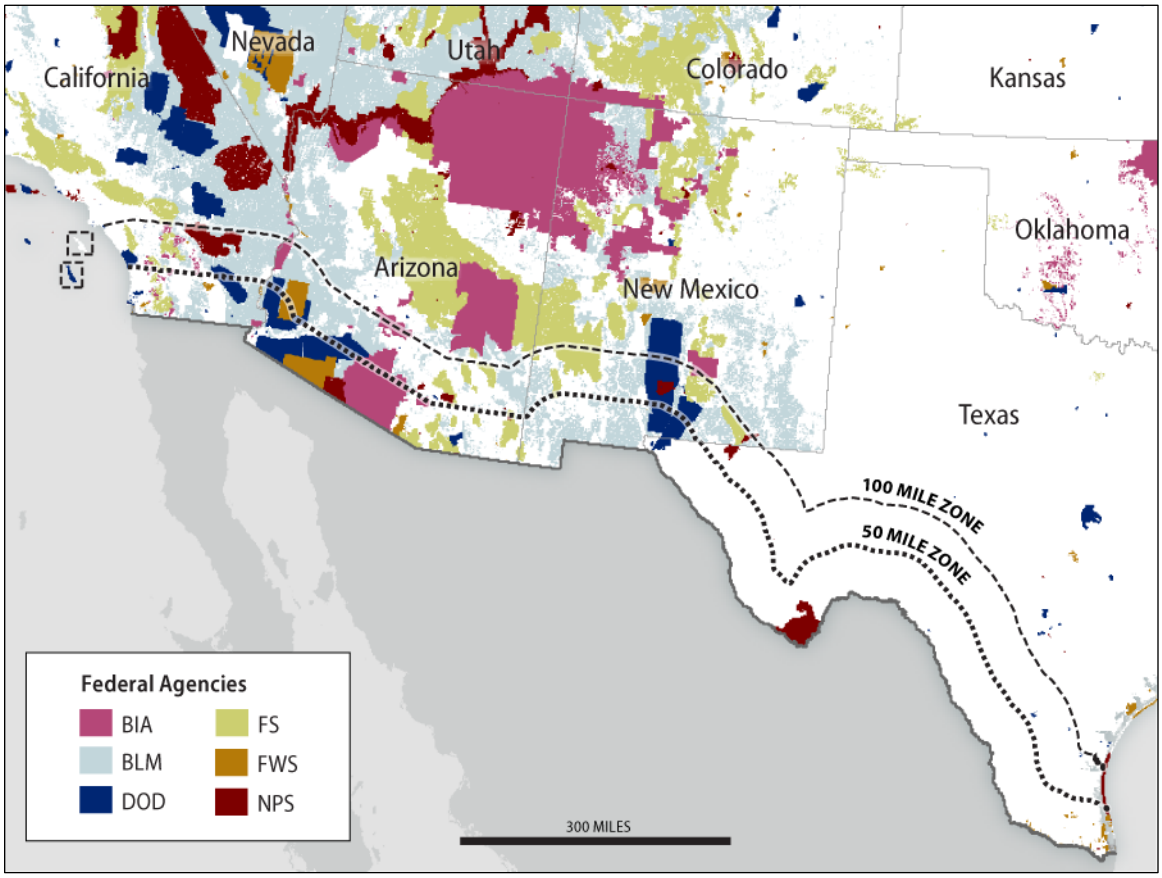
[60] For example, in 2006, DOI, DHS, and USDA entered into a memorandum of understanding entitled *Cooperative National Security and Counterterrorism Efforts on Federals Lands along the United States' Borders.* These departments have entered into additional memoranda of understanding addressing issues such as "road maintenance, secure radio communication, environmental coordination, and sharing of geospatial information, among others." U.S. Congress, House Committee on Natural Resources, Subcommittee on Oversight and Investigations, *The Consequences of Federal Land Management Along the U.S. Border to Rural Communities and National Security*, testimony of U.S. Department of the Interior's Interagency Borderlands Coordinator, Jon Andrew, 114th Cong., 2nd sess., April 28, 2016.

[61] P.L. 91-190; 42 U.S.C. §§4321-4347.

[62] For more information on DHS compliance with NEPA, see https://www.dhs.gov/national-environmental-policy-act-nepa-department-homeland-security-implementing-procedures. The U.S. Border Patrol is a component within DHS's U.S. Customs and Border Protection (CBP). For more information on CBP's compliance with NEPA, see https://www.cbp.gov/about/environmental-management-sustainability/nepa.

[63] Illegal Immigration Reform and Immigrant Responsibility Act, P.L. 104-208, div. C, §102(a)-(c), as amended by the REAL ID Act of 2005, P.L. 109-13, div. B, §102; the Secure Fence Act of 2006, P.L. 109-367, §3; and the Consolidated Appropriations Act, 2008 P.L. 110-161, div. E, §564(a). See also CRS Report R43975, *Barriers Along the U.S. Borders: Key Authorities and Requirements*, by Michael John Garcia, which discusses DHS's border infrastructure deployment authority and identifies laws waived for several border construction projects.

Figure 4. Federal and Indian Lands Near the Southwestern Border



Source: Map boundaries and information generated by CRS using U.S. Geological Survey, Gap Analysis Program (GAP). May 2016. Protected Areas Database of the United States (PAD-US), version 1.4 Combined Feature Class and an ESRI USA Base Map.

Notes: Two areas of land off the southwest border (in the Pacific Ocean) are shown in dashed boxes because they are within the 100-mile zone. Federal lands not owned by BLM, DOD, FS, FWS, and NPS or held in trust by the Bureau of Indian Affairs were not included due to their small size relative to the displayed federal lands.

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Land Disposal Authorities and Processes of the Bureau of Land Management

June 3, 2024

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CRS REPORT
Prepared for Members and
Committees of Congress

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Land Disposal Authorities and Processes of the Bureau of Land Management

Congress has provided various statutory authorities to the Bureau of Land Management (BLM), within the Department of the Interior, to dispose of federal lands through conveyance to another party. One such disposal authority is the Federal Land Policy and Management Act (FLPMA; 43 U.S.C. §§1701 et seq.). Another BLM disposal authority is the Recreation and Public Purposes Act (RPPA; 43 U.S.C. §§869 et seq.). The suitability of existing BLM disposal authorities, the circumstances of their use, and the extent of BLM land ownership overall form the backdrop for congressional consideration of measures to establish, eliminate, or modify authorities as well as measures to dispose of specific BLM lands.

FLPMA requires BLM to develop land use plans for its lands. Each plan is the basis for actions related to the covered lands and identifies lands potentially available for disposal under FLPMA, RPPA, or other authorities. FLPMA allows BLM to sell tracts of land that are identified for disposal through the land use planning process and that meet certain criteria. These criteria are that (1) the tract is difficult and uneconomic for BLM to manage and not suitable for management by another agency, (2) the tract is no longer needed for the purpose for which it was acquired or for any other federal purpose, or (3) disposal of the tract will serve important public objectives. FLPMA also authorizes BLM to exchange federal lands for nonfederal lands and sets out terms and conditions for exchanges. For instance, an exchange must be in the public interest and the federal and nonfederal lands must be in the same state and essentially of equal value.

RPPA allows BLM to sell or lease lands to states and other governmental units, federally recognized Indian tribes, and nonprofit entities for various public purposes, such as the establishment of parks, schools, police stations, and public works. Disposal must be in the public interest and requires a classification analysis of the specific intended use. Other conditions include acreage limitations for sales and term lengths for leases. BLM's general policy is to first issue a lease to help ensure the area is developed before authorizing a sale. Further, the price of the land depends in part on the type of entity that is to receive it (e.g., governmental or nonprofit), whether the land is sold or leased, and the intended use of the land.

BLM conveyances are governed by various requirements and processes. For example, land sales and exchanges under FLPMA and RPPA generally are subject to the federal environmental review process under the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.). The level of review depends on the significance of the potential environmental effects of the disposal. BLM typically has prepared environmental assessments for disposals under FLPMA or RPPA; highly complex disposals have, at times, required more detailed environmental impact statements. NEPA analyses may incorporate information prepared by agencies under other laws, such as consultations under Section 7 of the Endangered Species Act (ESA; 16 U.S.C. §§1531 et seq.) or reviews under Section 106 of the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.). Section 7 of the ESA requires federal agencies to ensure their actions do not jeopardize species listed under the ESA or adversely modify or destroy designated critical habitat. For Section 7 to apply, there must be discretionary federal involvement or control in the action. Section 106 of the NHPA requires federal agencies to review the potential impacts of their actions on historic properties and consult with interested parties to seek ways to avoid, minimize, or mitigate any adverse effects.

BLM typically obtains an appraisal of market value for land disposals under FLPMA, whether by sale or exchange. FLPMA specifies that lands may not be sold at less than their fair market value. BLM regulations state that an exchange of lands must be based on the market value of the federal and nonfederal lands. Market value typically is based on an economic assessment of the highest and best use. Under RPPA, lands generally are sold or leased for less than market value or for free, although some lands are sold or leased based on a formula that depends on an appraisal to determine market value.

There is no general statutory timeline for BLM to dispose of lands or authority governing the order in which disposals are undertaken. The length of time to complete disposals varies widely, ranging from months to years. It depends on the number, variety, and components of applicable requirements; attributes and variables of the lands; whether the parcel is identified in a land use plan; BLM priorities and workload; and the availability and expertise of BLM staff, among other factors. Exchanges can be more time consuming than disposals because they involve two transactions.

SUMMARY

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Introduction

Congress has broad constitutional power to manage the lands owned by the federal government, including the power to dispose of federal lands.[1] Congress has provided an array of statutory authorities to the Bureau of Land Management (BLM), within the Department of the Interior (DOI), to dispose of federal lands.[2] A *disposal* is the conveyance of BLM-administered land to a nonfederal party through methods such as sale and exchange. This report provides an overview of the main authorities and processes for BLM to dispose of federal land managed by the agency.[3] It focuses on two *standing* authorities that generally are among the primary authorities BLM uses to dispose of land. For lands meeting certain conditions, the Federal Land Policy and Management Act (FLPMA) authorizes BLM to sell lands to, or exchange lands with, any nonfederal party.[4] The Recreation and Public Purposes Act (RPPA) authorizes BLM to sell or lease lands to states and other governmental units, federally recognized Indian tribes, and nonprofit entities for specific purposes.[5]

In addition to these two standing authorities to convey land, this report covers selected related requirements and processes for conveyances.[6] They include BLM's land use planning process; notification, consultation, and coordination requirements; the environmental review process under the National Environmental Policy Act (NEPA);[7] Endangered Species Act (ESA) Section 7 consultation;[8] National Historic Preservation Act (NHPA) Section 106 requirements;[9] and land appraisals. It concludes with a discussion of factors contributing to the length of the land disposal process.

The BLM land use planning process, provides the framework for land disposals and thus is set out first in this report. Some requirements for disposals often are addressed concurrently by the agency, such as, consultation and coordination and assessments under ESA, NHPA, and NEPA, notwithstanding the order of their discussion in this report. Other land disposal actions may be taken later in the disposal process. An example is land appraisal, because appraisals typically are valid for one year only. Accordingly, appraisals are discussed in this report after other disposal requirements.

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[1] The Property Clause of the U.S. Constitution, Article IV, Section 3, clause 2, gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

[2] Land disposal authorities and actions of the Secretary of the Interior discussed in this report generally are exercised by BLM. Further, in some cases, this report refers to Bureau of Land Management (BLM) although the authorities specify the Secretary of the Interior.

[3] In this report, references to *federal land* and *land* generally encompass areas over which the BLM has full ownership (i.e., ownership in fee) as well as BLM interests in lands. An *interest in land* is something less than full ownership, such as an easement. Also, some of the information in this report is derived from a CRS report that provides an overview of the main authorities of BLM and other land management agencies to acquire and dispose of lands. See CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, coordinated by Carol Hardy Vincent.

[4] Federal Land Policy and Management Act (FLPMA) sale authority is at 43 U.S.C. §1713. Exchange authority is at 43 U.S.C. §1716.

[5] Recreation and Public Purposes Act (RPPA); 43 U.S.C. §§869 et seq.

[6] This report does not identify or discuss all pertinent provisions of FLPMA, RPPA, or other laws governing related requirements and processes, nor does it identify or discuss all related regulations and agency policies.

[7] National Environmental Policy Act (NEPA); 42 U.S.C. §§4321 et seq.

[8] Endangered Species Act (ESA); 16 U.S.C. §§1531 et seq.

[9] National Historic Preservation Act (NHPA); 54 U.S.C. §§300101 et seq.

Land Use Planning Process Under the Federal Land Policy and Management Act

FLPMA, enacted in 1976, is sometimes called BLM's *Organic Act* because it consolidated and articulated BLM's management responsibilities. Under the "multiple use" and "sustained yield" mandate set out in FLPMA,[10] BLM lands are managed for diverse purposes. These purposes include energy and mineral development, livestock grazing, timber harvesting, rights-of-way, recreation, preservation of cultural resources, and protection of species and habitat. Some areas are withdrawn from one or more uses or managed for a predominant use.[11]

FLPMA requires BLM to develop land use plans for its lands.[12] These plans sometimes are called *resource management plans* (RMPs) or, more simply, *plans*. Each BLM plan typically covers a broad area of BLM lands, such as those within the jurisdiction of a BLM district or field office, or BLM lands within a specially designated area, such as a national monument.[13]

Various processes and requirements apply when BLM develops an RMP. BLM develops the RMP through public participation and coordination with federal, state, local, and tribal planning efforts and assesses the potential environmental impacts of proposed RMPs under the NEPA process. The land use planning process begins with public scoping to identify the issues that should be addressed for the lands covered by the plan. BLM analyzes the issues and develops alternative management options, typically in a draft RMP and draft environmental impact statement (EIS).[14] BLM subsequently revises these draft documents based on comments and, after taking other required actions, issues a final RMP and EIS.[15]

Plans are the basis of every action related to BLM lands. In each RMP, BLM provides goals and direction for managing lands currently and in the future, determines the uses for the covered lands, sets out resource protection needs and ways of achieving them, and identifies lands that might be suitable for BLM to acquire. BLM also identifies lands potentially available for disposal by assessing whether parcels might meet the requirements for sales or exchanges under FLPMA, sales or leases under RPPA, and/or disposal under other authorities.

For BLM to dispose of a parcel, the parcel generally must be identified in an RMP as suitable for disposal and the conveyance must conform to the RMP. However, after the initial development of an RMP, it is possible for BLM to amend the plan to make available for disposal a parcel that

[10] In 43 U.S.C. §1702, FLPMA defines *multiple use* in part to include "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." The law also defines *sustained yield* as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."

[11] For information on the multiple use and sustained yield mission of BLM, see CRS Legal Sidebar LSB10982, *Federal Land Management: When "Multiple Use" and "Sustained Yield" Diverge*, by Adam Vann.

[12] 43 U.S.C. 1712. Regulations governing BLM resource management planning are at 43 C.F.R. §1610. Additional BLM policy sources include BLM Manual 1601—*Land Use Planning* and BLM Handbook H-1601-1—*Land Use Planning Handbook*, release 1-1693, March 11, 2005, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1601-1.pdf.

[13] BLM regulations specify that a plan must be developed on a resource or field office basis unless the BLM state director authorizes otherwise. 43 C.F.R. §1610.1(b).

[14] See, for instance, 43 C.F.R. §1601.0-6.

[15] For additional information on BLM's land use planning process, see the agency's "Planning and NEPA in the BLM" webpage at https://www.blm.gov/programs/planning-and-nepa. For additional information on notification, consultation, and coordination requirements and NEPA, see the pertinent sections in this report.

originally had not been identified.[16] BLM regulations provide that interest in having specific parcels of land offered for sale may be expressed through public input to the land use planning process or made directly to the pertinent BLM personnel.[17]

BLM typically does not engage in detailed reviews, analyses, and consultations regarding particular parcels as part of the land use planning process because circumstances affecting the parcels could change before they are disposed of. Instead, when a party expresses interest in acquiring a parcel identified as suitable for disposal in a plan, BLM engages in various reviews, analyses, and consultations to determine whether the parcel can be disposed of. These actions are undertaken pursuant to various laws. Some reviews may be conducted as part of the NEPA process, such as mineral, cultural, and other resource assessments. Analyses related to species and critical habitat are undertaken pursuant to ESA, and assessments related to historic properties are made pursuant to NHPA. BLM checks the cadastral survey and land status of the federal land to ensure its availability for disposal and, for exchanges, the title of the nonfederal land to ensure its acceptability for acquisition.[18] DOI conducts an appraisal to determine the value of the land being conveyed out of federal ownership and the value of land being acquired as part of any exchange.[19]

In addition, RPPA disposals have a specific classification requirement to determine whether an intended land use upon transfer would be consistent with RPPA and appropriate for the resources in the area.[20] Classification can be set out in the RMP or determined when an entity (e.g., a local government) applies to have the land conveyed. Classification often is done when there is an application for lands for a specific project.[21]

Federal Land Policy and Management Act Sales and Exchanges[22]

Sales

FLPMA authorizes BLM to sell certain tracts of land that are identified for disposal through the land use planning process. Such a tract must meet specific criteria:[23]

[16] See 43 C.F.R. §1610.5-3(c) and 43 C.F.R. §1610.5-5 pertaining to plan amendments.

[17] 43 C.F.R. §2710.0-6(b).

[18] A cadastral survey creates, marks, defines, retraces, or reestablishes the boundaries and subdivisions of BLM land in order to define the limits of title. The distinguishing features of a cadastral surveys are the establishment of monuments on the ground to define the boundaries of the land and their identification in land records by field notes and plats. See BLM, *Glossaries of BLM Surveying and Mapping Terms*, prepared by the cadastral survey training staff, Denver Service Center, 1980, p. 10, and BLM, *Public Land Statistics 2022*, Glossary, p. 241, https://www.blm.gov/sites/default/files/docs/2023-07/Public_Lands_Statistics_2022.pdf.

[19] Sections of this report discuss several of these reviews, analyses, and consultations.

[20] Regulations governing land classification are at 43 C.F.R. Part 2400. In particular, 43 C.F.R. §2400.0-3(f) identifies RPPA disposals as requiring classification.

[21] CRS consultation with BLM staff on September 18, 2023.

[22] As noted, sale authority is at 43 U.S.C. §1713 and exchange authority is at 43 U.S.C. §1716. Regulations governing FLPMA sales are at 43 C.F.R. Part 2710. Regulations governing FLPMA exchanges are at 43 C.F.R. Part 2200. Additional BLM policy sources include BLM Handbook H-2200-1—*Land Exchange Handbook*, release 2-297, August 20, 2007, https://www.blm.gov/sites/blm.gov/files/H-2200-1.pdf. Hereinafter referred to as *Land Exchange Handbook.*

[23] The criteria are set out in 43 U.S.C. §1713(a).

- The tract must be difficult and uneconomic to manage as part of the public lands because of its location or other characteristics and not suitable for management by another federal department or agency; or
- The tract must have been acquired for a specific purpose and must no longer be required for that or any other federal purpose; or
- Disposal of the tract must serve important public objectives, including but not limited to expansion of communities and economic development, that cannot be achieved prudently or feasibly on land other than public land and that outweigh other public objectives and values, including but not limited to recreation and scenic values, that would be served by maintaining such tract in federal ownership.

BLM generally determines the size of the tract to make available for sale by "the land use capabilities and development requirements."[24] FLPMA specifies that proposals to sell parcels of more than 2,500 acres first must be submitted to Congress and can be disapproved by Congress.[25] Also, FLPMA generally provides for the reservation of minerals to the United States in land sales, although it allows for conveyance of such rights in certain specified situations.[26]

Under FLPMA, lands may not be sold at less than their fair market value.[27] (For information on appraisal of a tract's fair market value, see "Appraisals," below.) They generally must be sold through competitive bidding.[28] However, modified competition and noncompetitive sales are allowed where the Secretary of the Interior determines it is necessary to assure equitable distribution among purchasers or to recognize equitable considerations or public policies. In determining the method of sale, factors for consideration include competitive interest, needs of state and local governments, adjoining landowners, historical uses, and equitable distribution of land ownership.[29]

Exchanges

FLPMA authorizes BLM to exchange lands. The land exchange process generally has five phases: (1) development of an exchange proposal, (2) feasibility evaluation, (3) processing and documentation, (4) decision analysis and approval, and (5) title transfer.[30] Each phase typically involves multiple actions. For example, the processing and documentation phase includes title review; public notice and comment; identification and mitigation of environmental effects under NEPA; assessments of mineral, cultural, and other resources; Native American consultations; threatened and endangered species consultations; and preparation and review of land appraisals.[31]

[24] 43 U.S.C. §1713(e).

[25] 43 U.S.C. §1713(c). In 2017, the U.S. Court of Appeals for the Ninth Circuit held in National Mining Association v. Zinke, 877 F.3d 845, 861 (9th Cir. 2017), that the concurrent resolution disapproval mechanism for withdrawals in FLPMA §204(c) constituted an unconstitutional legislative veto in light of the Supreme Court's ruling in Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 952-59 (1983), due to the omission of a presentment requirement in the statutory provision. The concurrent resolution disapproval mechanism for sales would raise the same constitutional concern.

[26] 43 U.S.C. §1719.

[27] 43 U.S.C. §1713(d).

[28] 43 U.S.C. §1713(f).

[29] 43 C.F.R. §2710.0-6(c).

[30] BLM, Handbook H-2200-1—*Land Exchange Handbook*, p. 1-15 - I-17.

[31] Additional detail on these five phases and land exchanges in general is contained in CRS Report R41509, *Land Exchanges: Bureau of Land Management (BLM) Process and Issues*, by Carol Hardy Vincent.

FLPMA sets out terms and conditions for exchanges.[32] The law requires that the federal and nonfederal lands in the exchange must be located in the same state.

Exchanges under FLPMA must be in the public interest. Public land may be exchanged if the Secretary of the Interior determines the public interest will be "well served."[33] FLPMA and accompanying regulations require that, when determining the public interest, the Secretary must consider numerous factors. These factors include achieving better federal land management, including by consolidation of lands; meeting the needs of state and local people for economic and community expansion; enhancing recreation and public access; and protecting fish and wildlife habitats, cultural resources, watersheds, wilderness, and aesthetic values.[34]

To make an exchange, the Secretary must find that the resource values and public benefits of the federal lands to be conveyed are not more than those of the nonfederal lands being acquired.[35] Further, the intended use of the conveyed federal lands should not conflict significantly with management of adjacent federal and Indian trust lands.[36] In making an exchange, BLM must reserve any rights or retain interests that are needed to protect the public interest or otherwise impose restrictions on the use of the federal lands conveyed.[37] BLM may not accept title to nonfederal land if there are reserved or outstanding interests that would interfere with the use and management of the lands or are inconsistent with the purposes for which the lands are being acquired.[38]

Under FLPMA, the values of the lands exchanged are to be equal or, if they are not equal, they are to be equalized by the payment of money up to 25% of the value of the federal lands being conveyed in the exchange.[39] The parties in the exchange may agree to waive this payment if the exchange meets certain requirements, including that the amount waived is not more than 3% of the value of the federal lands or $15,000, whichever is less.[40] Another way of equalizing value is for either party to add or remove lands. Further, the Secretary of the Interior may exchange lands that are of "approximately" equal value under certain conditions, including if the value of the federal lands does not exceed $150,000.[41] (For information on appraisals, see "Appraisals," below.)

BLM and other parties generally are required to bear their own administrative costs of an exchange; these may include, for instance, costs related to conducting land appraisals, mineral examinations, and cultural resource surveys and addressing deficiencies preventing highest and best use of the land.[42] However, if BLM determines it is in the public interest, the parties can agree that one party may bear costs and responsibilities typically assumed by the other, subject to certain terms.[43]

[32] 43 U.S.C. §1716.

[33] 43 U.S.C. §1716(a).

[34] 43 U.S.C. §1716(a); 43 C.F.R. §2200.0-6(b).

[35] 43 U.S.C. §1716(a).

[36] 43 C.F.R. §2200.0-6(b).

[37] 43 C.F.R. §2200.0-6(i).

[38] 43 C.F.R. §2201.8(c).

[39] 43 U.S.C. §1716(b).

[40] 43 U.S.C. §1716(b).

[41] 43 U.S.C. §1716(b); 43 C.F.R. §§2201.5 and 2201.6.

[42] 43 C.F.R. §2201.1-3.

[43] 43 U.S.C. §1716(f)(2)(B); 43 C.F.R. §2201.1-3.

Although some exchanges involve single parcels, BLM regulations also allow for the use of assembled land exchanges, which consolidate multiple parcels for one or more exchanges over time.[44] An assembled land exchange may be used to facilitate exchanges and reduce costs, for instance, by consolidating many federal parcels of limited value. In other cases, third parties may secure lands that BLM wants to acquire from multiple owners to facilitate negotiations. Both for-profit and nonprofit organizations have facilitated assembled land exchanges, typically functioning as brokers/agents for the exchange.

Recreation and Public Purposes Act Sales and Leases[45]

RPPA authorizes the disposal of BLM lands "to a State, federally recognized Indian Tribe, Territory, county, municipality, or other State, Tribal, Territorial, or Federal instrumentality or political subdivision for any public purposes, or to a nonprofit corporation or nonprofit association for any recreational or any public purpose consistent with its articles of incorporation or other creating authority."[46]

The lands can be sold or leased for various public purposes. Examples of public purposes include the establishment of parks, historic monument sites, fairgrounds, schools, hospitals, fire and police stations, courthouses, social services facilities, and public works, among others.[47]

RPPA and related authorities specify conditions and qualifications for land sales and leases.[48] Under BLM policies, BLM first issues a lease, or a lease with option to purchase, before selling the land.[49] This process is intended to help ensure the area is developed before BLM sells the land. A disposal must be in the public interest. The land may not be of national significance or more acreage than is reasonably necessary for the proposed use. The Secretary must be satisfied that the land is to be used for "an established or definitely proposed project" that includes development and management plans.[50] As noted, disposals under RPPA require a classification analysis of a specific intended use of the land to determine whether the disposal would be consistent with RPPA and the resources in the area. Such classification usually is done when there is an application for lands for a specific project. For proposals of over 640 acres, the appropriate

[44] BLM regulations, at 43 C.F.R. §2200.0-5(f), define an *assembled land exchange* as consolidation of multiple parcels of federal or nonfederal land for the purpose of one or more exchange transactions over a period of time.

[45] 43 U.S.C. §§869 et seq. Regulations governing RPPA sales are at 43 C.F.R. Part 2740. Regulations governing RPPA leases are at 43 C.F.R. Subpart 2912. Additional BLM policy sources for sales and leases include BLM Manual Handbook H-2740-1—*Recreation and Public Purposes*, release 2-275, May 10, 1993, https://www.blm.gov/sites/blm.gov/files/Media_Library_BLM_Policy_h2740-1.pdf, and a BLM "Recreation and Public Purposes Act Information Sheet" on the agency's website at https://www.blm.gov/sites/default/files/LandTenure_RecandPublicPurposesAct_InfoSheet.pdf. Hereinafter cited as "BLM RPPA Information Sheet."

[46] 43 U.S.C. §869.

[47] BLM regulations define *public purpose* as "providing facilities or services for the benefit of the public in connection with, but not limited to, public health, safety or welfare. Use of lands or facilities for habitation, cultivation, trade or manufacturing is permissible only when necessary for and integral to, i.e., and [sic] essential part of, the public purpose." 43 C.F.R. §2740.0-5(d).

[48] Information on conditions and qualifications is derived from the law at 43 U.S.C. §§869 et seq., regulations at 43 C.F.R. Part 2740, regulations for leases at 43 C.F.R. Part 2912, and the BLM RPPA Information Sheet. This report does not detail RPPA and associated provisions of regulations specific to solid waste disposal and the disposal, placement, or release of hazardous substances. See 43 U.S.C. §869-2 and 43 C.F.R. Subpart 2743.

[49] However, projects that include the disposal, placement, or release of hazardous materials (i.e., sanitary landfills) may only be sold. BLM RPPA Information Sheet, p. 1.

[50] 43 U.S.C. §869.

state, tribal, or local authority must have adopted comprehensive land use plans and zoning regulations applicable to the area.[51] Also, RPPA sales and leases must provide for the reservation of minerals to the United States.[52]

Additional conditions apply to leases under RPPA. These conditions include a stipulation that leases may not exceed 20 years for nonprofit entities and 25 years for governmental entities and may allow for renewal.[53] Leases may be terminated for noncompliance with the terms, including use of the land for purposes that were not authorized and failure to use the lands for the specified period. A lessee may apply for a new lease with any changes in terms and conditions, accompanied by consent to cancel an existing lease.[54]

For sales, the law specifies annual acreage limitations. For example, for recreational purposes, any state, state (park) agency, or political subdivision of a state may acquire up to 6,400 acres annually and may acquire "such additional acreage as may be needed" for roadside parks and rest sites of no more than 10 acres each.[55] As another example, in general, no more than 25,600 acres annually may be conveyed for recreational purposes in any state.[56] For purposes other than recreation, any state, state agency, political subdivision of a state, nonprofit entity, and federally recognized Indian tribe may acquire 640 acres annually.[57] For leases, the law does not set limitations on the acreage.

Under RPPA, the price of the land depends in part on the type of entity that is to receive it—for instance, whether the entity is governmental or nonprofit.[58] The price also depends on whether the lands are sold or leased and the intended use of the land. For governmental entities, RPPA provides that sales are to be made at no cost for recreational or historic monument purposes and sales for other purposes are to be made at a price determined by the Secretary of the Interior "through appraisal or otherwise after taking into consideration the purpose for which the lands are to be used."[59] The law provides that leases to governmental entities for recreation are to be made at no cost and leases for other purposes are to be made "at a reasonable annual rent."[60] For nonprofit entities, RPPA provides that sales are to be made at a price determined by the Secretary of the Interior "through appraisal, after taking into consideration the purpose for which the lands are to be used," and leases are to be made at a "reasonable annual rent."[61] BLM policies detail pricing schedules for different entities for varying purposes.[62] Some sales and leases qualify for special fixed pricing under BLM policies (e.g., $10 per acre for certain sales).[63]

[51] 43 U.S.C. §869.

[52] 43 U.S.C. §869-1.

[53] 43 C.F.R. §2912.1-1(a).

[54] 43 C.F.R. Subpart 2912.

[55] This and other acreage limitations are set out at 43 U.S.C. §869(b).

[56] 43 U.S.C. §869(b)(1)(C).

[57] 43 U.S.C. §869(b)(2).

[58] *Governmental* is used in this paragraph to encompass "State, federally recognized Indian Tribe, Territory, county, or other State, Tribal, Territorial, or Federal instrumentality or political subdivision in which the lands are situated, or to a nearby federally recognized Indian Tribe or municipal corporation in the same State or Territory," as set out in 43 U.S.C. §869-1.

[59] 43 U.S.C. §869-1.

[60] 43 U.S.C. §869-1.

[61] 43 U.S.C. §869-1.

[62] BLM RPPA Information Sheet, p. 2.

[63] Ibid.

Patents for lands sold under RPPA typically include a reversionary clause requiring the recipient to use the lands for the intended public purposes or the lands revert to the federal government.[64] This is because the lands are conveyed for free or below market value to a qualified applicant for specified public purposes.

BLM policies contain application requirements and guidance for parties interested in an RPPA sale or lease.[65] Depending on the magnitude of, and public interest in, the proposed use, "various investigations, studies, analyses, public meetings and negotiations may be required of the applicant prior to the submission of the application," according to BLM regulations.[66] BLM policies also address agency actions and procedures after receiving an RPPA application. These actions and procedures include determining if the proposal conforms with governing authorities such as the RMP, law, and regulations; evaluating the applicant's development and management plans, construction schedule, and financing to determine their adequacy and effectiveness; checking for the presence of unpatented mining claims (which would bar an RPPA disposal); conducting a cadastral survey of the land; obtaining an appraisal (for lands sold or leased based on market value); soliciting views and comments from agencies and the public; and engaging in environmental and other reviews and analyses, among other requirements.[67]

Other BLM Disposal Authorities

In addition to authority in FLPMA and RPPA, Congress has provided BLM with other standing authorities to dispose of land. One authority pertains to patents under the General Mining Law of 1872.[68] However, since FY1995, a series of moratoria in annual appropriations laws essentially have prevented this means of federal land disposal.[69] Certain laws provide specifically for the disposal of desert lands. The Carey Act authorizes transfers of desert lands to a state,[70] upon application and meeting certain requirements, and the Desert Entry Land Act allows citizens to reclaim and patent 320 acres of desert public land.[71]

The Federal Land Transaction Facilitation Act provides for the sale or exchange of BLM lands identified for disposal under BLM land use plans.[72] The law created a separate Treasury account

[64] 43 U.S.C. §869-2.

[65] BLM RPPA Information Sheet, pp. 4-6.

[66] 43 C.F.R. §2741.3(c).

[67] Some of these actions are set out in the BLM RPPA Information Sheet, pp. 6-7.

[68] Provisions of the General Mining Law of 1872 allow access to and development of hard-rock minerals on federal lands that have not been withdrawn from entry. With evidence of valuable minerals and sufficient developmental effort, the law allows mining claims to be patented, with full title (of surface and mineral rights) transferred to the claimant upon payment of the appropriate fee (30 U.S.C. §29). Nonmineral lands used for associated milling or other processing operations also can be patented (30 U.S.C. §42).

[69] Patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed. See, for example, Consolidated Appropriations Act, 2024 (P.L. 117-42), Division E, §404.

[70] Carey Act; 43 U.S.C. §641.

[71] Desert Entry Land Act; 43 U.S.C. §321. Desert land laws are seldom used today because the lands must be classified as available and the claimant must obtain sufficient water rights for settling on the land.

[72] The Federal Land Transaction Facilitation Act (FLTFA) originally was enacted on July 25, 2000, as P.L. 106-248, Title II. The law initially provided authority to BLM to sell or exchange land under FLTFA for 10 years, expiring on July 25, 2010. Subsequently, on July 29, 2010, the authority was extended for one year; it expired on July 25, 2011. The authority was revised and made permanent on March 23, 2018, by provisions of the Consolidated Appropriations Act, 2018 (P.L. 115-141, Division O, Title III).

for most of the proceeds from the sale or exchange,[73] and it provided for the use of those funds by the Secretary of the Interior and the Secretary of Agriculture.[74] The Secretaries may use the funds to acquire nonfederal lands (specifically inholdings), lands adjacent to federal lands that contain exceptional resources, and areas adjacent to inaccessible lands that are open to recreation. Up to 20% of the funds in the account may be used for administrative costs, and at least 80% of the funds for acquisition are to be used in the state in which the funds are generated.

BLM also has geographically limited land disposal authorities. The program with the largest revenue stream has been under the Southern Nevada Public Land Management Act of 1998.[75] The law authorizes the Secretary of the Interior to sell or exchange BLM land around Las Vegas,[76] with a goal of allowing for community expansion and economic development. Of total receipts, 85% are deposited into a special account and are available to the Secretary of the Interior for land acquisition and other activities in Nevada and 15% are allocated to Nevada for specified state and local purposes. Other provisions of law similarly authorize BLM land disposal in particular areas with specific allocations of the proceeds. In addition, BLM continues to dispose of land in Alaska as required by law, such as through transfers to the State of Alaska, Alaska Native Corporations, and individual Alaska Natives.[77] A total of about 150 million acres in Alaska is in the process of being transferred from federal ownership to state and private ownership.

In addition to providing BLM with standing disposal authorities, Congress enacts legislation authorizing or directing the disposal of particular parcels or types of land managed by BLM. BLM disposals under such legislated conveyances generally are subject to requirements and processes similar to those for BLM disposals under FLPMA and RPPA, unless Congress specifies otherwise. There may be other exceptions; for example, BLM might determine there is insufficient time or need to engage in an action, such as an appraisal of lands specified in law for disposal at no cost.[78]

Notification, Consultation, and Coordination Requirements[79]

BLM is required to provide for notification, consultation, and governmental coordination in management of lands generally. For instance, FLPMA requires the Secretary of the Interior to

[73] The FY2024 BLM budget justification notes that under the 1952 Interior and Related Agencies Appropriations Act, "states are paid five percent of the net proceeds (four percent of gross proceeds) from the sale of public land and public land products." See BLM, *Budget Justifications and Performance Information, Fiscal Year 2024*, p. XI-2. This same source notes that 4% of FLTFA collections are paid to the state where the land is sold; see pp. IV-3 and XII-14.

[74] The FLTFA Interagency Implementation Agreement, dated January 2022, provides for an approximate allocation of acquisition funds: 60% for BLM, 20% for U.S. Forest Service, 10% for U.S. Fish and Wildlife Service (FWS), and 10% for National Park Service.

[75] Southern Nevada Public Land Management Act of 1998; P.L. 105-263, as amended.

[76] In this report, authorities and actions of the Secretary of the Interior generally are exercised by BLM. Further, in some cases, this report refers to BLM although the authorities specify the Secretary of the Interior.

[77] Multiple provisions of law provide authority for conveyance of lands in Alaska. They include the 1906 Native Allotment Act, Alaska Statehood Act of 1959, Alaska Native Claims Settlement Act of 1971, Alaska Native Veterans Allotment Act of 1998, and Alaska Native Vietnam Era Veterans Land Allotment Program in P.L. 116-9, §1119. For information on the Alaska Native Claims Settlement Act, see CRS Report R46997, *Alaska Native Lands and the Alaska Native Claims Settlement Act (ANCSA): Overview and Selected Issues for Congress*, by Mariel J. Murray.

[78] This information is based in part on CRS consultation with BLM staff on September 18, 2023.

[79] In addition to the authorities referenced in this section, notification, consultation, and coordination requirements are (continued...)

provide for public involvement in land use planning and management, and it directs the Secretary to issue regulations establishing procedures to give federal, state, and local governments and the public "adequate notice and opportunity to comment upon and participate in the formulation of plans and programs" related to management of BLM lands.[80] BLM regulations set out requirements for public participation in land use planning.[81] Under this authority, BLM often receives input on planning from the general public, local user groups, and industry representatives, among other groups. Further, FLPMA provides for coordination of BLM land use inventory, planning, and management activities with the land use planning and management programs of other federal agencies, state and local governments, and tribes. It also provides for consistency of BLM plans with nonfederal government plans to the maximum extent practicable.[82] BLM regulations include related provisions.[83]

Related provisions of FLPMA pertain to notification, consultation, and coordination requirements for land conveyances in particular. For example, one provision directs the Secretary of the Interior to notify pertinent state and local governments at least 60 days before offering to dispose of lands under the act, to allow state and local governments to zone/regulate the area or change the zoning/other regulations for the area prior to conveyance.[84] BLM regulations contain additional directives. For instance, at least 60 days prior to a land sale under FLPMA, BLM is required to publish and send notice to interested parties. The notice must provide 45 days for comment by the public and interested parties. At least 60 days prior to a sale, BLM also is required to send notice to Members of Congress in whose districts or states the lands are located and to certain state and local officials. In addition, BLM must send notice to adjoining landowners, current landowners, and "other known interested parties of record."[85]

In addition to FLPMA, other authorities require notification, consultation, and/or governmental coordination in BLM land management generally and land disposal in particular. For example, RPPA requires the Secretary of the Interior to provide "an opportunity for participation by affected citizens in disposals" under the law, including public hearings or meetings as the Secretary deems appropriate.[86] For any proposed disposal of more than 640 acres, the law requires at least one public meeting and that comprehensive land use plans and zoning regulations for the area have been adopted by the appropriate state, local, or tribal authority, as noted.[87] Another example is Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[88] This provision requires federal agencies to disclose whether contamination is present and to remediate contamination prior to disposal, unless the recipient agrees to accept responsibility for the remediation in certain situations.[89]

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contained in BLM policy sources. These include BLM Manual 1780—*Tribal Relations*, BLM Handbook H-2200-1—*Land Exchange Handbook*, and BLM's 2012 guidance entitled *A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners*.

[80] 43 U.S.C. §1712(f).

[81] See, for example, 43 C.F.R. §1610.2.

[82] 43 U.S.C. §1712(c)(9).

[83] See, for example, 43 C.F.R. §1610.3.

[84] 43 U.S.C. §1720.

[85] 43 C.F.R. §2711.1-2.

[86] 43 U.S.C. §869(a).

[87] 43 U.S.C. §869(a).

[88] Comprehensive Environmental Response, Compensation, and Liability Act; 42 U.S.C. §9620(h).

[89] For additional information on these requirements and notification of other potential hazards, see BLM Handbook H-2000-02—*Environmental Site Assessments for Disposal of Real Property*, release 2-299, August 21, 2012, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_H-2000-02.pdf.

Additional authorities pertain to notification of Congress, as is the case for land sales under FLPMA exceeding 2,500 acres.[90] Further, explanatory statements accompanying annual appropriations laws have specified that exchanges involving federal lands valued at more than $1.0 million may not be completed until the House and Senate Committees on Appropriations have had 30 days to review the exchange. The explanatory statements also have directed that agencies provide advance notice to these committees of exchanges involving federal lands valued at between $0.5 million and $1.0 million.[91]

National Environmental Policy Act Environmental Review Process

A BLM land sale or exchange may be subject to the federal environmental review process under NEPA if it is a "major federal action" covered under the statute.[92] Section 321 of the Fiscal Responsibility Act of 2023 (FRA) amended NEPA to define this and other terms and specified certain review procedures in the statute.[93] These amendments codified various regulations that the Council on Environmental Quality (CEQ) promulgated to carry out NEPA, albeit with certain differences and additions.[94] On May 1, 2024, CEQ issued a rule to revise these regulations pursuant to the FRA amendments and for certain other purposes; the revised regulations will become effective on July 1, 2024.[95] Individual agencies also may revise their NEPA procedures pursuant to the FRA amendments and these CEQ regulations. DOI regulations for carrying out NEPA apply department-wide.[96] BLM outlined additional procedures in its *National Environmental Policy Act Handbook* for major federal actions under its jurisdiction.[97] DOI and BLM issued these procedures prior to the FRA, but many of these procedures are similar to those codified in the amendments to NEPA.

NEPA defines *major federal action* to mean "an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility."[98] This definition also excludes certain types of actions that are not subject to NEPA; for example, it excludes "activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority."[99]

Discretionary land sales or exchanges executed under BLM's standing authority (e.g., under FLPMA or RPPA) generally are subject to NEPA, unless the specific action is covered by an

[90] See footnote 25.

[91] Consolidated Appropriations Act, 2024, "Joint Explanatory Statement, Division E, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2024," *Congressional Record*, March 5, 2024, S1676.

[92] 42 U.S.C. §§4321 et seq.

[93] Fiscal Responsibility Act of 2023; P.L. 118-5. For an overview of NEPA as amended, see CRS In Focus IF12417, *Environmental Reviews and the 118th Congress*, by Kristen Hite.

[94] 40 C.F.R. Parts 1500-1508.

[95] Council on Environmental Quality, "National Environmental Policy Act Implementing Regulations Revisions Phase 2," 89 *Federal Register* 35442-35577, May 1, 2024.

[96] 43 C.F.R. Part 46.

[97] BLM Handbook H-1790-1—*National Environmental Policy Act Handbook*, release 1-1710, January 30, 2008, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf. Hereinafter referred to as *National Environmental Policy Act Handbook.*

[98] 42 U.S.C. §4336e(10).

[99] 42 U.S.C. §4336e(10)(B)(vii).

exclusion in NEPA.[100] Whether a land sale or exchange is subject to NEPA review also depends on certain other exclusions that could apply to some situations.[101] Land sales or exchanges that Congress directs in statute also generally are subject to NEPA review, unless the statute authorizing the sale or exchange expressly waives the requirement or removes all BLM discretion in executing the disposal (or unless the sales or exchanges are otherwise excluded under NEPA).[102] The BLM *Land Exchange Handbook* notes that legislatively directed land exchanges have varied widely in terms of whether Congress has specified in such legislation if NEPA analysis must be conducted.[103]

When NEPA applies to a land sale or exchange, the level of review that BLM must conduct depends on the significance of the proposed action's potential environmental effects. NEPA requires the preparation of an EIS for major federal actions "significantly affecting the quality of the human environment."[104] The act also requires that an EIS include analyses of the "reasonably foreseeable environmental effects" of a proposed action, a "reasonable range of alternatives" to carry out the purpose and need of the action, and certain other factors.[105] CEQ regulations specify additional information to support these analyses.[106] NEPA also requires agencies to request public comment when issuing a notice of intent to prepare an EIS.[107] CEQ regulations outline additional opportunities for public involvement.[108] Once an EIS is finalized, CEQ regulations require an agency to document its decision, consideration of alternatives, and analyses in a record of decision.[109]

NEPA directs agencies to prepare an environmental assessment (EA) when the proposed action "does not have a reasonably foreseeable significant effect" on the human environment to merit an EIS or when the significance of such effects is unknown, unless an exclusion applies under NEPA or another provision of law.[110] If an agency determines the proposed action's effects would be significant, an EIS would be required.[111] If an agency determines the effects would not be significant, the agency would issue a Finding of No Significant Impact (commonly referred to as FONSI), which would conclude the NEPA process for that action.[112] Agencies may provide opportunities for public involvement in preparing an EA, but such opportunities are not required by statute.

NEPA allows agencies to identify specific categories of major federal actions that normally would not have significant effects on the quality of the human environment sufficient to trigger a requirement to prepare a detailed statement (i.e., EIS) under NEPA, generally referred to as

[100] 42 U.S.C. §4336e(10)(B).

[101] 42 U.S.C. §4336(a).

[102] 42 U.S.C. §4336e(10); 42 U.S.C. §4336(a).

[103] BLM Handbook H-2200-1—*Land Exchange Handbook,* p. 1-5.

[104] 42 U.S.C. §4332(2)(C); 42 U.S.C. §4336(b)(1); 42 U.S.C. §4336e(6).

[105] 42 U.S.C. §4332(2)(C).

[106] 40 C.F.R. Part 1502.

[107] 42 U.S.C. §4336a(c).

[108] 40 C.F.R. §1506.6.

[109] 40 C.F.R. Part 1505.

[110] 42 U.S.C. §4336(b)(2). Council on Environmental Quality regulations, which predate the existing statutory provision, outline similar procedures for when agencies should prepare an environmental assessment (EA). See 40 C.F.R. §1501.5.

[111] 42 U.S.C. §4332(2)(C); 42 U.S.C. §4336(b)(1)-(2); 40 C.F.R. §1501.5(c)(1).

[112] 42 U.S.C. §4336e(7) and 40 C.F.R. §1501.6.

categorical exclusions.[113] CEQ regulations outline procedures for agencies to establish categorical exclusions.[114] To date, neither Congress, DOI, nor BLM has established a categorical exclusion for land sales and exchanges.[115]

In past practice, BLM typically has prepared an EA for land disposals conducted under FLPMA or RPPA, according to BLM.[116] However, for a highly complex area, BLM indicated the agency would more likely prepare an EIS.[117] The BLM National NEPA Register contains documents related to BLM land disposals.[118]

The timing of a NEPA review is largely driven by the complexity of the analyses. The scope of potential environmental effects that an agency must consider under NEPA is relatively broad. CEQ regulations define the term *environmental effects* or *impacts* for the purposes of NEPA to include not just ecological effects but also "aesthetic, historic, cultural, economic, social, or health effects, whether direct, indirect, or cumulative."[119]

Depending on the breadth of the potential effects and applicable laws, multiple federal, state, local, or tribal agencies may be involved in the preparation of analyses for an EA or EIS. NEPA establishes procedures for identifying lead, cooperating, and participating agencies and for coordination of their respective roles.[120] NEPA analyses may incorporate information prepared by lead, cooperating, or participating agencies under other laws, such as ESA consultations or NHPA reviews (discussed below). A land exchange could be more complex than a land sale, given that BLM would be required to consider foreseeable future uses of both the federal and nonfederal

[113] 42 U.S.C. §4336e(1) and 40 C.F.R. §1501.4. Categorical exclusions often are referred to as CE, CX, or CAT-EX.

[114] 40 C.F.R. §1501.4.

[115] Department of the Interior (DOI) department-wide categorical exclusions are listed in 43 C.F.R. §46.205, §46.210, and §46.215. Additional BLM categorical exclusions are listed in BLM Handbook H-1790-1, *National Environmental Policy Act Handbook*, pp. 17-20.

[116] CRS consultation with BLM staff on September 18, 2023.

[117] Ibid.

[118] The BLM National NEPA Register is on the BLM website, "BLM National NEPA Register" webpage, https://eplanning.blm.gov/eplanning-ui/home. See the following documents on the website for examples of land disposal:

For an example of a BLM EA for a land sale under FLPMA, see BLM's webpage on "Smith Mountain Land Sale (Disposal)," project information last updated on August 22, 2016, https://eplanning.blm.gov/eplanning-ui/project/62496/510**.** This EA pertains to the Smith Mountain Land Sale (CA), a direct sale of an approximately 40-acre parcel to an adjacent property owner, at not less than fair market value. The sale was to include the surface and mineral estate and a reservation to the United States for ditches and canals, and was subject to an existing right-of-way for a communication facility.

For an example of a BLM EA for a lease and conveyance under RPPA, see BLM's webpage on "Peralta Recreation & Public Purposes Act Project," project information last updated on August 8, 2019, https://eplanning.blm.gov/eplanning-ui/project/93074/510. This EA pertains to the Peralta RPPA Project (AZ). This project involved an application from a county for a 25-year lease, with an option for conveyance, of approximately 498 acres for a regional park. The EA also analyzed impacts of cancellation of an existing BLM grazing lease.

For an example of an environmental impact statement for a land exchange under FLMPA, see BLM's webpage on "Proposed Blue Valley Land Exchange," project information last updated on May 7, 2024, https://eplanning.blm.gov/eplanning-ui/project/81162/510, regarding the Blue Valley Land Exchange (CO). The exchange involves BLM conveyance of nine parcels totaling 1,489 acres and a cash equalization payment to the owner of Blue Valley Ranch, in exchange for nine parcels of nonfederal lands totaling 1,830 acres, a portion of which was donated. The exchange included mineral estates, water rights, and an access easement to the United States. A portion of the nonfederal land acquired by BLM would be transferred to the administrative jurisdiction of the U.S. Forest Service because the area is within the boundaries of a National Forest. (This description reflects corrections in an Errata document at 03032023 Blue Valley Ranch Extra Sheet for ROD.pdf (blm.gov)).

[119] 40 C.F.R. §1508.1.

[120] 42 U.S.C. §4336a(a).

land for a land exchange.[121] However, the complexity of NEPA analyses to evaluate a particular action ultimately would be site-specific. Land sales and exchanges may vary in terms of this complexity and whether an EA or EIS is required under NEPA.

Endangered Species Act Section 7 Consultation[122]

When disposing of public land, BLM must consider its obligations under the ESA.[123] Section 7 of the ESA requires federal agencies such as BLM to ensure their actions do not jeopardize species listed under the ESA or adversely modify or destroy designated critical habitat.[124] Agencies must make these determinations in consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (together, the Services), which administer the act.[125] Section 7 requirements generally apply to actions that federal agencies undertake directly, authorize (e.g., permit or license), or fund.[126] With regard to disposals by exchange, the Section 7 requirements would apply to the entire agency action, including the effect of accepting the nonfederal land into federal ownership.

For Section 7 to apply, there must be discretionary federal involvement or control in the action.[127] A disposal mandated by Congress in legislation gives BLM less discretion in carrying out the action than if BLM were to initiate a disposal under one of its standing authorities, such as FLPMA or RPPA. So long as BLM retains discretion in any aspect of carrying out a disposal, the requirements of Section 7 may apply to the action. Even if Section 7 applies to a particular action such that consultation is required, the discretion afforded the agency may affect other aspects of the consultation. Such aspects may include the *reasonable and prudent alternatives* (RPAs) available for the action, if the Services determine the action may jeopardize listed species, or the *reasonable and prudent measures* (RPMs) the Services may determine are necessary or appropriate to minimize the action's impact on listed species.[128]

The level of consultation required under Section 7 depends on the extent of the agency's discretion in carrying out the action and the action's anticipated effect on listed species and critical habitat. To assess the action's potential effect, the agency must determine the area likely to be affected, referred to as the *action area*.[129] The action area includes areas directly or indirectly affected by the action.[130] For example, for BLM disposals, the action area would include the land to be conveyed but also may include surrounding areas that may be affected by the transfer of ownership. For disposals by exchange, the action area would include the land to be taken into

[121] BLM Handbook H-2200-1—*Land Exchange Handbook*, p. 6-3.

[122] For additional information on the Section 7 consultation process, see CRS In Focus IF12423, *Endangered Species Act (ESA) Section 7 Consultation*, by Erin H. Ward and Pervaze A. Sheikh.

[123] 16 U.S.C. §§1531 et seq.

[124] 16 U.S.C. §1536(a)(2). Species are listed as endangered or threatened pursuant to Section 4 of the ESA. 16 U.S.C. §1533. Critical habitat, endangered species, and threatened species are defined in Section 3 of the ESA. 16 U.S.C. §1532(5), (6), & (20).

[125] 16 U.S.C. §1536(a)(2); 50 C.F.R. §402.01(b). Generally, FWS administers the ESA for terrestrial, freshwater, and catadromous species and the National Marine Fisheries Service administers the act for marine and anadromous species.

[126] 16 U.S.C. §1536(a)(2); 50 C.F.R. §402.02.

[127] 50 C.F.R. §402.03.

[128] 16 U.S.C. §1536(b)(4).

[129] 50 C.F.R. §402.02.

[130] Ibid.

federal ownership in addition to the land being conveyed and any other areas that may be affected.

Once BLM determines the action area for the disposal, it must determine whether listed species or critical habitat are present in the action area. FWS's "Information for Planning and Consultation" (IPaC) site provides resources to assist federal agencies with determining whether listed species or critical habitat may be affected by a particular project, among other things.[131] BLM may use the IPaC site to assess a particular disposal or seek assistance directly from FWS to make this determination.

If BLM determines that listed species or critical habitat may be present in the action area, it must assess the potential impact the disposal would have on the species and habitat. Depending on the nature of the disposal, BLM may be required to prepare a *biological assessment* or to otherwise provide the Services with "an account of the basis for evaluating the likely effects of the action."[132] Such an analysis might include examining the effects of removing federal management and any associated protections or requirements that apply only to federal land and the effects of any planned activities on the land following the conveyance. For example, when the U.S. Army Corps of Engineers and the U.S. Forest Service proposed to approve a mining project that would involve an exchange of federal lands for nonfederal lands, FWS considered the proposed future development by the mining company on the conveyed federal land to be an indirect effect of the proposed land exchange.[133]

When determining a proposed action's potential effects and whether formal consultation is required, BLM may choose to informally consult with the Services on the anticipated effects of a disposal and alternatives for modifying the action to reduce or eliminate anticipated effects on listed species or critical habitat.[134] When disposing of federal property, BLM may consider, for example, whether to include conditions or reversionary clauses in the deed (if permitted by the authorizing federal law) to provide for the protection of species or habitat.[135]

If BLM concludes the disposal may adversely affect listed species or critical habitat, it must initiate formal consultation with the Service(s) responsible for administering the ESA for the affected species.[136] BLM then initiates formal consultation by submitting a request in writing to the relevant Service that includes information about the proposed action and its anticipated effects on species and critical habitat.[137]

At the conclusion of formal consultation, the relevant Service issues a *biological opinion* (BiOp) setting forth how the disposal may affect listed species and critical habitat and, specifically, whether it is likely to jeopardize listed species or adversely modify or destroy critical habitat.[138] If the Service concludes the disposal as proposed is likely to jeopardize listed species or adversely modify critical habitat, it must suggest any RPAs that BLM could take in carrying out the disposal

[131] FWS, "Information for Planning and Coordination," https://ipac.ecosphere.fws.gov/.

[132] 50 C.F.R. §402.12; FWS and National Marine Fisheries Services, Section 3.4: "Biological Assessments," in *Endangered Species Consultation Handbook*, March 1998.

[133] FWS, *Biological Opinion: Effects to Canada Lynx, Gray Wolf, and Northern Long-Eared Bat from the Proposed NorthMet Project and Land Exchange*, February 2016, p. 2, https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/PolyMet/Northmet%20ROD%20App%20C-%20Bio%20opinion.pdf?ver=2019-03-22-085448-887.

[134] 50 C.F.R. §402.13.

[135] A *reversionary clause* requires the land to revert to federal ownership if the federal government determines the land is not being used in accordance with its specific intended purpose.

[136] 50 C.F.R. §402.14.

[137] 50 C.F.R. §402.14(b).

[138] 16 U.S.C. §1536(b)(3); 50 C.F.R. §402.14(h).

that would not violate the ESA.[139] Provided the Service concludes the disposal will not jeopardize listed species or adversely modify critical habitat—or identifies RPAs—then the BiOp includes an *incidental take statement* that specifies the anticipated impact of any incidental take of the species and operates as a permit to take the species without violating the ESA.[140] The incidental take statement also includes RPMs as necessary to minimize the impact on the species, as well as terms and conditions to implement such measures that the federal agency must abide by to receive the benefit of the effective permit.[141]

National Historic Preservation Act Section 106 Requirements[142]

Real property disposals typically are considered to be *undertakings* subject to the review process under Section 106 of the NHPA and its implementing regulations promulgated by the Advisory Council on Historic Preservation (ACHP).[143] Section 106 requires federal agencies to review the potential impacts of their actions on *historic properties* and consult with interested parties to seek ways to avoid, minimize, or mitigate any adverse effects.[144] Section 106 reviews generally follow a four-step process: (1) initiation, in which the agency determines whether the action is an undertaking subject to review; (2) identification of historic properties in the area of potential effects;[145] (3) assessment of whether the action would cause adverse effects to historic properties; and (4) resolution between parties on steps to address any adverse effects. Throughout the Section 106 process, federal agencies must consult with various entities—such as the state historic preservation officer (SHPO) or tribal historic preservation officer—to determine whether the relevant historic properties have been identified and to consider solutions to address potential adverse effects on those properties.

Regulations allow federal agencies to work with the ACHP to tailor the Section 106 process to meet their needs and develop alternate methods to meet their obligations under the NHPA.[146] In 1997, BLM executed a national programmatic agreement (nPA) with the ACHP and the National Conference of State Historic Preservation Officers to guide the BLM's planning and decisionmaking as it affects historic properties and to outline the manner in which the agency will comply with its Section 106 responsibilities. The nPA subsequently was revised and signed in

[139] 16 U.S.C. §1536(b)(3).

[140] 16 U.S.C. §1536(b)(4).

[141] Ibid.

[142] For additional information on the Section 106 process, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

[143] 54 U.S.C. §§300101 et seq. The Advisory Council on Historic Preservation (ACHP) is an independent agency comprised of federal, state, and tribal government members, as well as experts in historic preservation and members of the public. Through its authority under NHPA, the ACHP promulgated regulations for the Section 106 process found at 36 C.F.R. Part 800.

[144] A *historic property* is defined in 54 U.S.C. §300308 as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains relating to the district, site, building, structure, or object."

[145] As defined in 36 C.F.R. §800.16(d), the *area of potential effects* is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."

[146] 36 C.F.R. §800.14.

2012.[147] The agreement authorizes the development of state-specific protocol agreements between BLM state offices and SHPOs that set forth measures for alternative compliance for certain types of actions in 11 states.[148] Specifically, these protocols allow for "streamlined (as opposed to case-by-case) consultation" for undertakings that are determined to have no adverse effect on historic properties or for scenarios in which BLM and the relevant SHPO reach an agreement on the resolution of such adverse effects.[149] The nPA also established a Preservation Board composed of BLM historic preservation experts and line officers that provide policy recommendations to BLM managers at the local, state, and national levels. BLM policies and procedures—contained in agency manuals and handbooks—provide further direction on the agency's responsibilities under Section 106 and how to implement the nPA and state-specific protocol agreements.[150]

In general, the time needed—and the analysis required—to comply with Section 106 is contingent on the scale, complexity, and particulars of the project in question. For land disposals, such factors could include the geographic footprint of the proposed disposal, whether an area identified for disposal has been previously inventoried for historic properties, or whether any legal covenants or protections apply to the land or properties in question.[151] In addition, agencies often coordinate Section 106 compliance with other federal review processes, such as those required by NEPA.[152] As a result, it can be difficult to distinguish between requirements and the compliance timeline associated with NEPA and requirements that must be met under separate statutory mandates, such as Section 106.

[147] BLM, "Programmatic Agreement Among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers Regarding the Manner in Which the BLM Will Meet Its Responsibilities Under the National Historic Preservation Act," 2012, https://www.blm.gov/sites/blm.gov/files/National%20Programmatic%20Agreement.pdf (hereinafter "BLM, "National Historic Preservation nPA"). The 2012 agreement was set to expire after a period of 10 years, with an option for renewal in 2-year increments. In 2022, the ACHP, BLM, and National Conference of State Historic Preservation Officers executed a two-year extension to the nPA. In 2023, BLM announced a proposed revision to the nPA based on tribal, public, and signatory consultation and to extend it an additional 10 years. As of May 1, 2024, the revision process was not yet completed. In February 2024, the signatories executed another two-year extension to the nPA. The agreement is set to expire on February 9, 2026.

[148] The 11 states authorized to execute state-specific protocol agreements are Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, and Wyoming. Protocol agreements can be found at ACHP, "BLM Completes Revision of All State Protocols," https://www.achp.gov/BLM/State%20Protocols.

[149] BLM, "National Historic Preservation nPA."

[150] For example, see BLM, Manual 1780, *Tribal Relations*; BLM, Handbook H-1780-1, *Improving and Sustaining BLM—Tribal Relations*, release 1-1781, December 15, 2016, https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf; and BLM, Manual Series 8000, *Recreation & Cultural Programs*.

[151] Examples of BLM land disposals illustrate the range of associated NHPA analysis and documentation. For instance, the proposed exchange of 719 acres of BLM lands to the J. R. Simplot Company (Simplot) in exchange for 667 acres of nonfederal land required the agency to contract a third party to conduct a full class III cultural resource survey (see BLM, "BLM National NEPA Register: Documents," https://eplanning.blm.gov/eplanning-ui/project/119626/570). (Class III surveys are the most intensive field surveys and are intended to locate and record all historic properties in a given area.) By contrast, because BLM previously had conducted a class III survey as part of a broader 46,700-acre proposed conveyance analyzed in 2004 (see BLM, *2004 Final Las Vegas Valley Disposal Boundary Environmental Impact Statement (FEIS)*), the direct sale of a 10-acre parcel of land to the city of Henderson, NV, in 2018 did not require additional analysis (see BLM, "BLM National NEPA Register: 1 Parcel City of Henderson Direct Sale," https://eplanning.blm.gov/eplanning-ui/project/103848/510).

[152] In particular, regulations encourage federal agencies to use their broad environmental review process, carried out under NEPA, as an "umbrella" compliance process. Regulations for the coordination of the Section 106 process with NEPA can be found at 36 C.F.R. §800.8. Discussion of NEPA as an umbrella compliance process can be found at ACHP, "Integrating NEPA and Section 106," https://www.achp.gov/integrating_nepa_106.

Appraisals

BLM typically obtains an appraisal of market value for land disposals under FLPMA, whether by sale or exchange.[153] Both federal employees and contractors conduct appraisals.[154] Appraisals are guided by law, regulation, and other authorities, including the Uniform Appraisal Standards for Federal Land Acquisitions and the Uniform Standards of Professional Appraisal Practice.[155]

FLPMA specifies that lands may not be sold at less than their fair market value.[156] BLM regulations state that an exchange of lands must be based on the market value of the federal and nonfederal lands.[157] For FLPMA sales and exchanges, market value typically is based on the highest and best use of the property—that is, the highest and most profitable use for which the property is physically adaptable and needed or likely to be needed in the future.[158] Market value is based on an economic assessment of the highest and best use. The appraiser is to estimate the value of the lands as if in private ownership and available for sale in the open market, and must include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for similar properties in the competitive market. Interests in land—such as minerals or water rights—are considered to the extent consistent with highest and best use. In the absence of current market information, other methods may be used to estimate market value.[159]

The appraiser prepares a report estimating market value that describes the work conducted and sets forth the information and analysis supporting the estimate, among other information. Each appraisal report is assessed by a review appraiser. FLPMA provides that disputes over the appraised values of lands to be exchanged can be resolved by arbitration, bargaining, or other methods.[160]

Under RPPA, although lands generally are sold or leased for less than market value or for free, some lands are sold or leased based on a formula that depends on an appraisal to determine

[153] Some BLM authorities and related appraisal guidance use the term *market value*, and others use the term *fair market value*. In this section, the terms are used interchangeably.

[154] DOI, Appraisal and Valuation Services Office, is the lead federal office for conducting appraisals of BLM land and nonfederal land that is part of an exchange with BLM. For information on the work of the office, see the DOI website at https://www.doi.gov/valuationservices.

[155] See The Appraisal Foundation, *Uniform Appraisal Standards for Federal Land Acquisitions, 2016*, on the website of the Department of Justice at Uniform Appraisal Standards for Federal Land Acquisitions (justice.gov). Hereinafter referred to as Appraisal Foundation, *Uniform Appraisal Standards*. Although the document specifies appraisals for acquisitions, it also is used for disposals. For instance, BLM regulations at 43 C.F.R. §2710.0-6(f) state that for FLPMA land sales, "value is to be determined by an appraisal performed by a Federal or independent appraiser, as determined by the authorized officer, using the principles contained in the Uniform Appraisal Standards for Federal Land Acquisitions."

See The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, 2024. This document contains ethical and performance standards for the appraisal profession. For additional information on the document, see The Appraisal Foundation, "What Is USPAP?," https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbfa-41b3-9878-fac35923d2af.

[156] 43 U.S.C. §1713(d).

[157] 43 C.F.R. §2200.0-6(c).

[158] Appraisal Foundation, *Uniform Appraisal Standards*, p. 22.

[159] Information in this paragraph is derived from 43 C.F.R. §2201.3–2 for exchanges and, more generally, *Uniform Appraisal Standards*, including pp. 22-24.

[160] 43 U.S.C. §1716(d). Regulations governing bargaining and arbitration for exchanges are at 43 C.F.R. §2201.4.

market value. For instance, BLM may sell or lease land to a nonprofit entity at 50% of market value (or 90% if the use is not open to the public).[161]

Factors Contributing to Length of Disposal Process

There is no general statutory timeline for BLM to dispose of lands. The length of time to complete disposals varies widely among transactions, with some completed in months, others in one or two years, and still others several years or more. Further, there is no general statute governing the order in which BLM land disposals are undertaken. Instead, disposals are based primarily on agency priorities and workload.

BLM disposals generally must comply with various statutory and regulatory requirements and policies, unless exempted by Congress. Such requirements include those set out in this report, namely BLM land use planning; notification, consultation, and coordination requirements; ESA Section 7 consultations; NHPA Section 106 reviews; NEPA analyses; CERCLA environmental site assessments and remediation of contamination if needed; and land appraisals, among others. The number, variety, and components of these requirements are major factors in the time to complete disposals, although in some cases the requirements are undertaken simultaneously or with partial overlap. Even if not exempted by Congress, disposals mandated by Congress may reduce the extent of BLM discretion in disposing of the land and thereby may result in a more limited and potentially faster version of certain analyses, such as NEPA and ESA Section 7.

The attributes and variables of the lands themselves also contribute to the time to complete disposals. Challenges may arise where there is a wide variety of resources and land uses on the BLM parcels to be conveyed. Challenges also may arise related to the nonfederal lands to be acquired by exchange, such as environmental hazards or infrastructure on the lands, and title ambiguities, among others.

A parcel of land generally must be identified for disposal in an RMP for BLM to convey it.[162] Thus, additional time would be involved in amending an RMP to specify a parcel that had not been identified previously.

The authority used to dispose of land can affect the length of the process. For example, some disposals under RPPA may take less time because they do not require an appraisal to determine value. Instead, they are made at no cost or through special (fixed) pricing.

Exchanges

Estimates of the time to complete land exchanges have varied. The most recent estimates produced and made available by government agencies appear to have been issued more than a decade ago. The BLM *Land Exchange Handbook* estimated an average completion time of 18 to 24 months for 26 actions related to BLM exchanges. The source also noted that times may vary widely, from two months to several years for development of exchange proposals, with additional time for other actions such as evaluating the feasibility of proposals.[163] A 2009 report of the Government Accountability Office, determined that BLM completed 38 exchanges between October 2004 and June 2008, with an average completion time of four years from the time an

[161] BLM RPPA Information Sheet, p. 2. In other cases, BLM sells or leases lands under RPPA through other methods, such as for free or through special (fixed) pricing.

[162] BLM, "*Lands Potentially Available for Disposal*," https://www.blm.gov/programs/lands-and-realty/land-tenure/lands-potentially-for-disposal.

[163] BLM, Handbook H-2200-1, *Land Exchange Handbook*, p. 1-15.

agreement to initiate an exchange was signed between BLM and the other parties to the exchange.[164] More recently, BLM staff estimated that after formal initiation, a nongovernmental exchange that is relatively straightforward might be completed on average in 18 months to 24 months. However, they indicated that additional research would be needed to estimate with more certainty.[165]

In general, exchanges can be more time consuming than transactions involving only disposal of BLM land. This is because they involve two transactions—a disposal of BLM land and an acquisition by BLM of nonfederal land. On the complexities of exchanges, the BLM *Land Exchange Handbook* states,

> Proper consideration of land exchange proposals involves a substantial investment of time and resources by both Federal and non-Federal parties. Land exchange processing is often highly complex because of the wide range of individuals and entities that hold some form of valid right, title, or interest in the land being considered for exchange, determining land values, weighing public interests and effectively involving the public in the process.[166]

In effect, an exchange could double the requirements for consultation, evaluation, and appraisal, among other requirements. Further, the FLPMA requirement for equal value exchanges can be difficult to achieve.[167] The most complicated exchanges often involve tribes or state or local governments.[168] Such transactions require compliance both with authorities applicable to the federal lands and authorities applicable to the lands of the other government. Due to their intricacies, some exchanges have been facilitated by third parties and/or conducted in multiple phases.

Staffing Capacity

The number, availability, and expertise of BLM realty staff can affect the length of the disposal process. BLM realty staff generally have broad responsibilities that may compete for their time to conduct exchanges. These responsibilities may include assistance with issuing permits, implementing land withdrawals, acquiring lands, and issuing rights-of-way, among other activities. Some BLM field offices may have one or a few realty specialists responsible for managing transactions affecting hundreds of thousands or even millions of acres of BLM land. Further, the complexity of some land disposals can require deep expertise, and it may take several years for realty staff to become capable of handling such processes independently. Retirements and other departures of BLM realty staff may have impacted the capacity to process disposals.[169]

Similarly, DOI's capacity to conduct land appraisals can affect the length of the land disposal process. DOI has cited an insufficiency of appraisers as contributing to delays in land appraisals.[170] The DOI Appraisal and Valuation Services Office (AVSO) is the lead federal office for conducting appraisals for BLM and other DOI agencies. According to DOI, "[l]ack of staff has a direct impact on the timely delivery of appraisals to clients and improvement in the timeliness of service remains a top goal for AVSO as we continue to fill vacant appraisal

[164] Government Accountability Office, *Federal Land Management: BLM and the Forest Service Have Improved Oversight of the Land Exchange Process, but Additional Actions Are Needed*, GAO-09-611, June 2009, p. 14.

[165] CRS consultation with BLM staff on September 18, 2023.

[166] BLM, Handbook H-2200-1, *Land Exchange Handbook*, p. 1-1.

[167] For details on the equal value requirement, see the discussion of FLPMA in the "Exchanges" section of this report.

[168] CRS consultation with BLM staff on September 18, 2023.

[169] Information in this paragraph is derived in part from CRS consultation with BLM staff on September 18, 2023.

[170] DOI, *Budget Justifications and Performance Information, Fiscal Year 2024*, Office of the Secretary, Departmentwide Programs, pp. DO-93–DO-94.

positions."[171] DOI cited a profession-wide problem of a decrease over the past decade in the pool of appraisers to recruit from, together with no increase in people entering the profession. DOI identified actions being taken to address this deficiency, including special pay efforts, staff training, implementation of workplace efficiencies, and development of an apprenticeship program.

Congressional Role in Disposal of BLM Lands

Congress often faces questions regarding the adequacy of RPPA, FLPMA, and other BLM disposal authorities; the nature, extent, and location of their use; and the extent of BLM land ownership overall. These questions form the backdrop for congressional consideration of measures to establish, eliminate, or modify authorities as well as measures to dispose of specific BLM lands. For example, with regard to the establishment of new authorities, legislation introduced in the 117th Congress sought to authorize certain states to apply to relinquish land grant parcels in exchange for federal lands managed by BLM.[172] With regard to the elimination of authorities, moratoria on issuing mineral patents under the General Mining Law of 1872 have been included in annual appropriations laws since FY1995, as noted.[173] With regard to the modification of authorities, for example, the 117th Congress amended RPPA to specifically authorize disposal to federally recognized Indian tribes.[174]

In addition, Congress frequently considers legislation governing the disposal of specific parcels of BLM land. For example, provisions of P.L. 117-263 authorized exchanges of BLM and private land in Churchill County, NV, and directed conveyance of BLM parcels to Lander County, NV, for use for airport facilities, watershed protection, recreation, and parks.[175] In general, Congress might consider disposal legislation to provide BLM with authority in a particular situation when such authority is lacking, based on its evaluation of public needs. Congress also might seek to direct specific transactions, although BLM already has authority to dispose of lands, in order to facilitate the transactions. Further, Congress may seek to modify the applicable requirements by authorizing or directing actions not ordinarily permitted under an agency's authority to dispose of land. For instance, it might expedite the disposal process by including provisions that limit assessment and evaluation requirements or authorize the conveyance of land at reduced or no cost rather than at fair market value.

Congress also addresses disposal policy in the context of deliberations on the role and goals of the federal government in owning and managing land generally. Stakeholders have differing views on when federal ownership of lands is appropriate and how federal lands should be managed.[176] For example, some stakeholders contend that there is excessive federal influence over western lands and economies and that the federal government should divest itself of many lands. Other stakeholders support the policy of retaining lands in federal ownership on behalf of the public and sometimes advocate adding more lands to enhance protection. Recent Congresses considered

[171] Ibid, p. DO-94.

[172] H.R. 2348, 117th Congress.

[173] Patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed. See, for example, Consolidated Appropriations Act, 2024 (P.L. 118-42). Division E, Title IV, §404.

[174] RPPA was amended by provisions of the Consolidated Appropriations Act, 2023, at P.L. 117-328, Division DD, Title I, §104.

[175] P.L. 117-263, Division B, Title XXIX, §2908 (Churchill County, NV) and §2922 (Lander County, NV).

[176] As an example of varied stakeholder perspectives, see Property and Environment Research Center (PERC), "Should Federal Lands be Transferred to Western States? A PERC Forum," July 27, 2017, https://www.perc.org/2017/07/27/should-federal-lands-be-transferred-to-western-states/.

diverse bills pertaining to the extent of federal land ownership. Among other proposals, legislation in the 118th Congress would direct federal agencies with a net increase in lands through acquisition to offer an equal amount of land for sale.[177]

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[177] H.R. 172, 118th Congress.

Withdrawal of Federal Lands: Analysis of a Common Legislated Withdrawal Provision

January 15, 2021

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Committees of Congress

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SUMMARY

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January 15, 2021

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Withdrawal of Federal Lands: Analysis of a Common Legislated Withdrawal Provision

Lands and interest in lands owned by the United States (i.e., federal lands) have been withdrawn from agency management under various public land laws. Federal land withdrawals typically seek to preclude lands from being used for certain purposes (i.e., *withdraw* them) in order to dedicate them to other purposes or to maintain other public values. For example, some laws established or expanded federal land designations, such as wilderness areas or units of the National Park System, and withdrew the lands apparently to foster the primary purposes of these designations. Withdrawals affect lands managed by agencies including the four major land management agencies: the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS), all in the Department of the Interior, and the U.S. Forest Service (FS), in the Department of Agriculture.

Federal lands have been withdrawn under various authorities. Congress has enacted particular withdrawal provisions in similar form in many individual laws, referred to herein as *legislated withdrawals*. An analysis of the meaning of these provisions could aid congressional development and consideration of withdrawal legislation. In general, legislated withdrawals typically withdraw the land from one or more of three general categories of laws: (1) public land laws, (2) mining laws, and (3) mineral leasing laws. For analysis purposes, this report uses the following example provision that appears in some legislated withdrawals: *subject to valid existing rights, [the federal land] is withdrawn from (1) all forms of entry, appropriation, and disposal under the public land laws; (2) location, entry, and patent under the mining laws; and (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws*. Legislated withdrawals may include variations on this language depending on Congress's objectives for the parcels. A more complete understanding of the meaning of a specific legislated withdrawal might require examination of its legislative history and the laws, policies, and management plans governing the affected parcels.

The first component of the example provision generally would bar third parties from applying to take ownership and obtaining possession of the lands or resources on the lands under *public land laws*. However, the lack of a comprehensive list of public land laws—and the lack of a single, consistent definition of the term *public land laws* itself over time—makes it challenging to determine the precise meaning and applicability. The second component generally would prevent the withdrawn lands from being available for new mining (e.g., under the General Mining Law of 1872). The third component generally would prevent the withdrawn lands from being available for new mineral leasing, sale of mineral materials, and geothermal leasing (e.g., under the Mineral Leasing Act of 1920, Materials Act of 1947, and Geothermal Steam Act of 1970). Together, the three components primarily would affect BLM and FS, because laws governing lands managed by those agencies generally allow for energy and mineral development and provide broader authority to convey lands out of federal ownership than laws governing NPS and FWS lands. Typically, the three components would not bar various surface uses that otherwise might be allowed, possibly including recreation, hunting, and livestock grazing. However, some uses might be limited by Congress or by subsequent agency actions, such as amendments to land management plans, if the uses are inconsistent with the withdrawal's purposes.

Legislated withdrawals generally are made "subject to valid existing rights." Including this phrase appears to protect third-party (i.e., nonfederal) interests in withdrawn federal land from being terminated or limited by the withdrawal. Though commonly used, there is no universal definition or interpretation of which interests qualify as *valid existing rights*. The *validity* of the interest generally depends on whether the third party has met the requirements of the law under which it alleges to have secured the interest. In addition, the interest claimed by the third party generally must have *existed* at the time of withdrawal. Finally, the third party generally must have obtained a property interest in the land (e.g., ownership) to have a *right*—mere use of the land is insufficient. The "valid existing rights" that a particular withdrawal is "subject to" could arise under any number of current or former laws that allowed third parties to obtain interests in federal land. Accordingly, courts and agencies have interpreted the phrase on a case-by-case basis, considering the purpose and structure of the relevant law.

Where legislated withdrawals are enacted "subject to valid existing rights," the existing rights remain in effect after the withdrawal. In some cases, acquiring or "taking" those rights may serve the purpose of the withdrawal. The federal government may acquire such rights by taking the property through the power of eminent domain, which would require "just compensation" under the Takings Clause of the U.S. Constitution, or through voluntary transactions such as purchase, exchange, or donation. Congress may consider appropriating funds for any such acquisitions.

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Introduction

Lands and interest in lands owned by the United States (i.e., federal lands) have been withdrawn from agency management under various public land laws. Federal land withdrawals typically seek to preclude lands from being used for certain purposes in order to dedicate the lands to other particular purposes or maintain them consistent with certain public values. Congress may effectuate withdrawals through new laws or the executive branch may withdraw land under differing authorities (as noted below in this section).[1] This report focuses on one type of withdrawal provision that Congress has enacted in individual laws, hereinafter typically referred to as *legislated withdrawals*.

Though legislated withdrawals seek to withdraw the designated land from a specified set of laws, which set of laws and the exact terms used vary. The variation depends in large part on Congress's intent for how the lands should be managed by federal agencies and used by the public following the withdrawal. In general, legislated withdrawals typically withdraw the land from one or more of three general categories of laws: (1) public land laws, (2) mining laws, and (3) mineral leasing laws. This report bases its analysis on the following example provision, used in some legislated withdrawals, that includes all three categories of laws:

> Subject to valid existing rights, [the federal land] is withdrawn from:
>
> (1) all forms of entry, appropriation, and disposal under the public land laws;
>
> (2) location, entry, and patent under the mining laws; and
>
> (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws.[2]

In this report, each of these three components of a withdrawal provision is referenced by its adjacent number above. This exact provision appears in some withdrawal laws, but components thereof or variants on this language have been used in many other legislated withdrawals.[3] Many of the terms in this provision have historical roots and are interpreted differently by the courts and agencies in the public land context than in common parlance.[4]

To aid in the congressional development and consideration of withdrawal legislation, this report discusses the meaning of each of these three components, as well as the limitation that the withdrawal be "subject to valid existing rights." This analysis could aid Congress in drafting and enacting withdrawal measures with the particular components (or variations) desired for the land parcels at issue. Enhanced precision and clarity of withdrawal measures might augment agency understanding of how Congress intends the lands to be managed following enactment of a legislated withdrawal. It could also foster public understanding of allowable uses of federal lands that have been withdrawn legislatively.

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[1] The authority for Congress to make land withdrawals derives from the Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2. This provision gives Congress authority over the lands, territories, or other property of the United States, thus providing Congress broad authority over lands owned by the federal government.

[2] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[3] This provision or variants thereof appeared in 116th Congress bills and laws. See, for example, P.L. 116-9, 133 Stat. 580 (116th Cong.).

[4] See U.S. Department of the Interior, Bureau of Land Management (BLM), *Glossaries of BLM Surveying and Mapping Terms*, 2003 (searchable PDF), at https://www.blm.gov/or/gis/geoscience/files/BLMglossary.pdf; and Mansfield, Maria E. "A Primer of Public Land Law." Washington Law Review, vol. 68, no. 4, October, 1993. Hereinafter referred to as Mansfield, A Primer of Public Land Law.

Legislated withdrawals may affect lands managed by different federal agencies. This report focuses on withdrawals affecting lands of the four major federal land management agencies. These agencies are the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS), and the National Park Service (NPS), all in the Department of the Interior, and the U.S. Forest Service (FS), in the Department of Agriculture.

This report does not address standing authorities in statutes that have delegated withdrawal authority to the President or agencies. Among other examples, these laws allow the President to withdraw federal lands for national monument purposes under the Antiquities Act of 1906 and lands in the outer continental shelf from disposition under the Outer Continental Shelf Lands Act,[5] and allow the Secretary of the Interior to issue public land orders withdrawing land under the Federal Land Policy and Management Act of 1976 (FLPMA).[6] In addition, throughout U.S. history, many land withdrawals were made under authorities that have since been repealed by FLPMA and other laws.[7] This report does not address withdrawal authorities that are no longer in effect.

Purposes of Legislated Withdrawals

In general, legislated withdrawals often seek to preclude specified lands from being used for certain purposes so as to maintain other public values in the area or reserve the land for a particular public purpose or program. For example, some laws established or expanded federal land designations—such as wilderness areas, national conservation areas, national monuments, national recreation areas, and units of the National Park System—and withdrew the lands apparently to foster the primary purposes of these designations.[8] Another purpose of legislated withdrawals has been to facilitate the subsequent conveyance of federal lands to individuals or entities under specified terms and conditions.[9] Other withdrawal laws have reserved lands for use by the military for national defense purposes.[10] The purpose of other legislated withdrawals is not readily apparent from the enacted text,[11] though other congressional, federal agency, or public sources may have addressed the purposes.

[5] The Antiquities Act is codified at 54 U.S.C. §§320301-320303. The Outer Continental Shelf Lands Act is codified at 43 U.S.C. §1341(a).

[6] 43 U.S.C. §1714.

[7] Some repealed authorities allowed for withdrawals by executive orders, secretarial orders, and presidential proclamations.

[8] Examples of provisions of law that established or expanded land designations and contained withdrawals of the affected lands—primarily BLM and U.S. Forest Service (FS) lands—include the following: P.L. 111-11, §§1202, 1503, and 1803, among others, for designation of Wilderness Areas; §1974 and §§2202-2203, among others, for establishment of National Conservation Areas; §1204 for establishment of the Mount Hood National Recreation Area; §1205 for establishment of the Crystal Springs Watershed Special Resources Management Unit; §1808, to designate the Ancient Bristlecone Pine Forest; and §§2103-2104, to establish the Prehistoric Trackways National Monument. Other provisions were included in P.L. 113-291 (e.g., §3043 and §3092, designating or establishing units of the National Park System, and §3062, establishing the Hermosa Creek Special Management Area on FS lands).

[9] Examples include P.L. 113-107 and P.L. 113-291, §§3002(c), 3009(b), and 3009(d).

[10] Examples include P.L. 113-66, §§2931, 2941, and 2951.

[11] Examples include P.L. 109-385 and P.L. 106-113, in a proviso for the Forest Service Land Acquisition account.

Legislated Withdrawal Variations

Many laws have included the three components of legislated withdrawals essentially in the form set out in the "Introduction" to this report. However, legislated withdrawals might include variations on those components, as Congress determines what is appropriate to its objectives for the parcels at issue, which have varying legal effects. Such variations may include omitting one or more components, limiting the scope in some way, or specifying future application, as described below.

Omissions

Some legislated withdrawals have omitted one or more of the three components. For instance, in designating national scenic areas under FS management, one law omitted the first of the three components (*all forms of entry, appropriation, and disposal under the public land laws*),[12] as did provisions of law conveying specified BLM land.[13] Legislated withdrawals also have omitted specific terms or activities from the three components. For example, provisions of law authorizing and governing disposal of BLM land parcels under specified terms omitted "disposal" from the first component of the withdrawal language and specified that the withdrawal did not apply to "sales made consistent with this subsection."[14] Other laws have briefer withdrawal provisions that omit multiple parts of the three components. For example, some provisions of law authorizing land withdrawals for military purposes omitted both "entry" and "disposal" under the first component and "mineral materials" under the third component, among other differences.[15]

Limitations

In some cases, legislated withdrawals have included all three components of the withdrawal provision but expressly limited their scope. For instance, some provisions of law that withdrew lands from all forms of entry, appropriation, and disposal under the public land laws specified exceptions that allowed for particular disposals.[16] Other provisions of law that generally withdrew lands from mineral leasing authorized the Secretary of the Interior to lease oil and gas resources that were within a mile of the boundary of the withdrawal area, under specified terms and conditions.[17] Another law specified that the withdrawal would not pertain to particular parcels in the area.[18]

Future Applicability

Some legislated withdrawals have specified that provisions applicable to lands currently in federal ownership also apply to future federal acquisition of lands in the area. For instance,

[12] P.L. 111-11, §1104(l).

[13] P.L. 113-291, §3092(i).

[14] P.L. 111-11, §2601(d).

[15] P.L. 113-66, §§2931(a) and 2941(a). The text of the withdrawal provisions is similar, in providing that, subject to valid existing rights and except as otherwise provided, specified public land (including interests in land) and any lands within the boundary that become subject to the public land laws are "withdrawn from all forms of appropriation under the public land laws, including the mining laws, the mineral leasing laws, and the geothermal leasing laws."

[16] P.L. 111-11, §2606(c); P.L. 113-291, §3062(d); P.L. 113-291, §3092(f).

[17] P.L. 111-11, §3202(f).

[18] P.L. 113-291, §3062(b).

provisions of one law required that any lands acquired by the federal government within certain boundaries would be withdrawn as set out for lands already in federal ownership.[19] Similarly, a law establishing a national monument as a unit of the National Park System provided that lands acquired after enactment for inclusion in the monument would be subject to the withdrawal provisions set out for federal land within the monument at its establishment.[20] As another example, provisions of a law required that if any rights on the land were relinquished or otherwise acquired by the federal government after enactment, the land subject to those rights would be withdrawn under the terms specified for lands in federal ownership as of enactment.[21]

General Considerations in Determining Meaning

In some cases, it may not be readily apparent what, if any, difference in meaning Congress intends by variation in the terms and components of legislated withdrawals. For example, it may be unclear to what extent laws that bar "entry" only in the second component provide for a more limited withdrawal than laws that also bar entry in the first component.[22] Also, for laws that omit "mineral materials" from the third component,[23] it may be unclear whether the terms of the first and third components of the withdrawal nevertheless would preclude the sale of materials.[24]

The reasons for omitting particular terms from legislated withdrawals may not be clear from the text. Some laws might omit terms to protect continued or future land use for these activities; other laws might omit the same language because certain activities are not occurring or are unlikely to occur in the future on the withdrawn land. As an example, for parcels with no history of mineral development or findings or no evidence of mineral potential, Congress might not see a need to specify a withdrawal under the mining laws. In these cases, although the parcels might remain legally open to mineral development, in practice they might never be used for that purpose based on the resources on the lands. It is also possible that the omissions were inadvertent. Contrarily, the omissions may have been intentional because other sources, such as explanatory materials accompanying the laws, provide specificity and clarity as to the intent of the legislation.

A more complete understanding of a particular legislated withdrawal's meaning may require examining sources of information beyond the text of the law. Accordingly, agencies and courts determine the meaning and legal effect of legislated withdrawals on a case-by-case basis by examining existing authorities, legislative history, and agency documents.

Existing agency authorities governing the affected parcels could inform the meaning of a legislated withdrawal. For example, under general agency authorities, BLM and FS lands generally are open to energy and mineral development, and both agencies have authorities to convey lands out of federal ownership under certain conditions, as described in the section entitled "Entry, Appropriation, and Disposal." In contrast, lands managed by NPS generally are not open to such development or conveyance out of federal ownership. Thus, a legislated withdrawal of NPS lands might omit specifying that the parcels are withdrawn from these activities because other NPS authorities already preclude them. Similarly, it could be useful to

[19] P.L. 111-11, §2601(f).

[20] P.L. 113-291, §3092(a).

[21] P.L. 111-11, §3202(b).

[22] As an example of a law with entry only in the second component, see P.L. 111-11, §3202(a).

[23] See, for example, P.L. 111-11, §§1204(g) and 3202(a).

[24] In conversations with the Congressional Research Service (CRS), BLM staff have indicated that it is clearer to the agency when laws specifically address mineral materials.

consult any laws specific to the particular parcels at issue, such as laws establishing affected land units, which might contain requirements that differ from the authorities generally applicable to an agency's lands.

In addition, the legislative history of a legislated withdrawal, including committee report language, could provide insight as to congressional intent. For example, report language might contain more specificity than bill text as to the intended meaning of terms and components; the laws that apply to management of the parcels; and the activities that are continued, limited, or banned. Though such information is not itself part of the law, it can inform agencies' and courts' interpretations of the statutory text.[25]

Another potential source of information about how certain withdrawals may be interpreted is a land management plan. Management plans developed by agencies for land units and areas typically contain details on the types and locations of allowed activities and thus could be helpful in assessing the meaning of legislated withdrawal provisions. In some cases, an examination of agency guidance on withdrawals also could be useful, though the extent to which such guidance applies to legislated withdrawals is not readily apparent, as discussed in the following section ("Analysis of Legislated Withdrawal Components").

Analysis of Legislated Withdrawal Components

This section provides an analysis of the three components of the following example legislated withdrawal language:

> Subject to valid existing rights, [the federal land] is withdrawn from:
>
> (1) all forms of entry, appropriation, and disposal under the public land laws;
>
> (2) location, entry, and patent under the mining laws; and
>
> (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws.[26]

Information in this section is based on several sources. First, the Congressional Research Service (CRS) searched laws since the 106th Congress in Congress.gov to identify legislated withdrawals. Through this search, CRS identified a variety of legislated withdrawals as an illustrative, rather than a comprehensive, set of withdrawal laws. Information herein also draws on CRS conversations with realty experts and other staff of the four major land management agencies in December 2019 and January 2020, as well as on earlier conversations with BLM staff.[27]

In addition, CRS consulted some general authorities governing administrative withdrawals (e.g., provisions of FLPMA) and selected agency guidance. However, the extent to which agency guidance applies to legislated withdrawals is not readily apparent; the guidance may pertain

[25] For more information about how courts may use legislative history when interpreting statutes, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[26] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[27] CRS conversations with agency staff were held on the following dates: BLM, December 18, 2019; FS, January 13, 2020; National Park Service (NPS), January 22, 2020; and U.S. Fish and Wildlife Service (FWS), January 31, 2020. Earlier CRS conversations with BLM staff were conducted on various dates during 2018 and 2019. This report does not explicitly note each instance in which information presented was derived from consultations with agency staff, though this is sometimes noted for emphasis. For brevity, text references to agency consultations do not typically denote the agency or agencies that provided the information.

primarily or exclusively to administrative withdrawals.[28] For instance, regulations applicable to withdrawals by the Secretary of the Interior under FLPMA note that they "do not apply to withdrawals that are made by the Secretary of the Interior pursuant to an act of Congress which directs the issuance of an order by the Secretary."[29] Similarly, FWS withdrawal policies cite provisions of FLPMA and related regulations on procedures for agencies to submit withdrawal requests under that law.[30] FS guidance on withdrawals appears to focus on withdrawals under FLPMA and other broad laws.[31] NPS policy indicates that when acquisition within a park boundary is necessary, the agency will consider various methods, including withdrawal from the public domain; it does not elaborate on withdrawal policies or processes.[32]

As noted in the "Introduction," the legislated withdrawal example language at issue specifies, "Subject to valid existing rights," the identified federal land is withdrawn from the specified components. Thus, the three withdrawal components discussed below this clause all are "Subject to valid existing rights," though this is not consistently restated throughout the discussions. An analysis of the meaning of this terminology is provided in the section of this report entitled "Interpreting 'Subject to Valid Existing Rights.'"

Entry, Appropriation, and Disposal Under the Public Land Laws

The first component of the legislated withdrawal language at issue, as set out in the "Introduction," specifies that the federal land is withdrawn from (1) *all forms of entry, appropriation, and disposal under the public land laws*. This component is analyzed in two parts: first, the *public land laws*, and then the *entry, appropriation, and disposal.*

Public Land Laws

This language generally would bar activities authorized under various public land laws (subject to valid existing rights). There are numerous public land laws, but no land management agency maintains a comprehensive list of such laws and the lands to which each law applies, according to agency staff consulted for this report. Further, it is likely impossible to develop such a list, because currently there does not appear to be a single definition in law of the term *public lands* or a single definition in use by agencies of the term *public land law.* Moreover, different meanings may have been used over time, as discussed in this section.[33] The absence of a comprehensive list of public land laws and the lack of a single, consistent definition of *public lands* over time make

[28] As noted, legislated withdrawals are made under the Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2. Administrative withdrawals are made under various statutes, e.g., provisions of the Federal Land Policy and Management Act of 1976 at 43 U.S.C. §1714.

[29] 43 C.F.R. §2300.0-1(b).

[30] FWS, *Service Manual, 342 FW 5, Non-Purchase Acquisition*, Section 5.9—Withdrawal, at https://www.fws.gov/policy/342fw5.html.

[31] See, for instance, FS, *Forest Service Manual 2700*, Chapter 2760-Withdrawals, at https://www.fs.fed.us/im/directives/dughtml/fsm2000.html.

[32] NPS, *Management Policies 2006*, p. 32, at https://www.nps.gov/policy/MP_2006.pdf, and Director's Order #25: Land Protection, Section 10.0—Property Acquisition/Relocation Assistance and Section 11.0—Acquisition Methods, at https://www.nps.gov/policy/DOrders/DOrder25.htm#Acquisition_Assistance.

[33] For instance, one scholar observed that "When first approaching the task, the uninitiated may take comfort in the label 'public land law,' believing that such nomenclature indicates a unified field of law amenable to simple outline. In reality, however, the term is mere shorthand. Modern 'public land law' covers a myriad of individual agency mandates to manage particular lands and particular resources." The scholar further observed that "as a legal term, however, 'public lands' has had different meanings at various times." See Mansfield, A Primer of Public Land Law, p. 802.

it challenging to determine the precise meaning or applicability of this component of legislated withdrawals.

Public Domain Lands

Historically, the term *public land laws* referred to laws providing for disposal of the *public domain*, according to some scholars.[34] The public domain label was used for those lands that never left federal ownership. Typically, these lands were ceded by the original states or obtained from a foreign sovereign (e.g., by purchase or treaty).[35] In contrast, the federal government usually obtained *acquired lands* from a state or individual through exchange, purchase, condemnation, or gift. Roughly 90% of all federal lands were public domain, with roughly 10% acquired.[36] The distinction in types of lands based on their manner of acquisition has lost some of its underlying significance today, though different laws still may apply depending on whether the lands involved were public domain or acquired.

The term *public land laws* continues to apply today to public domain lands, according to some agency staff. Some of these staff also used the term *public domain* to refer to land currently managed by BLM. The application to BLM land also is asserted in FWS policy guidance stating

> The term 'public domain land' has been supplanted by the term "public land," defined in FLPMA as any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership.[37]

In this sense, public domain is used more narrowly to refer to the lands that continue to be managed by BLM rather than also to lands that have been reserved from the public domain for particular uses or purposes.38 Throughout U.S. history, various laws and administrative authorities were used to withdraw lands from the public domain to establish or enlarge land units, such as national forests (managed by FS) and national wildlife refuges (managed by FWS). Accordingly, such land units sometimes are referred to as having been reserved from the public domain.

Land Management Broadly

Some scholars have asserted a seemingly broader interpretation of the term *public land law*. According to one scholar, in modern usage, public land law does not indicate a "unified field of law amenable to simple outline."[39] It "covers a myriad of individual agency mandates to manage

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[34] David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, vol. 22, no. 2 (April 1982), p. 282. Hereinafter referred to as Getches, "Managing the Public Lands." See also Mansfield, "Primer of Public Land Law," p. 821.

[35] An apparently broader definition of *public domain lands* is contained in BLM's *Public Land Statistics 2019*, as follows: "Original public domain lands that have never left federal ownership; lands in federal ownership that were obtained in exchange for public domain lands or for timber on public domain lands; one category of public lands." See U.S. Department of the Interior, BLM, *Public Land Statistics 2019*, p. 242.

[36] U.S. General Services Administration, *Overview of the United States Government's Owned and Leased Real Property: Federal Real Property Profile as of September 30, 2003*, p. 16.

[37] FWS, *Service Manual, 342 FW 5, Non-Purchase Acquisition*, Section 5.9—Withdrawal, at https://www.fws.gov/policy/342fw5.html.

[38] Mansfield, "Primer of Public Land Law," p. 832. The definition of *public lands* in the Federal Land Policy and Management Act of 1976 (FLPMA) is codified at 43 U.S.C. §1702(e).

[39] Mansfield, "Primer of Public Land Law," p. 802.

particular lands and particular resources."[40] Under this broader interpretation, the term *public land* encompasses diverse land systems managed by different agencies under varying laws.[41]

Under another broad definition, the term *public land laws* refers to laws (and regulations) governing the retention, management, and disposition of the public lands.[42] This definition derives from the Public Land Law Review Commission, established by law in 1964 to "study existing statutes and regulations governing the retention, management, and disposition of the public lands."[43] In the establishing statute, Congress outlined the purpose of the commission:

> Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because ... administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary.[44]

The land within the statutory mandate of the Public Land Law Review Commission included not only BLM lands but also NPS, FS, and FWS lands.[45]

Entry, Appropriation, and Disposal

A withdrawal from entry,[46] appropriation, and disposal generally would bar third parties from applying to take ownership of the lands or resources on the lands under applicable law and from obtaining possession of the same.[47] It also would preclude the lands from being "appropriated" for (i.e., used for) a primary purpose other than the one intended by the legislated withdrawal (subject to valid existing rights), according to agency staff consulted for this report.[48] Further, such a withdrawal typically would prohibit the transfer of the land to other federal agencies, in cases where such authority otherwise would exist, and action by the Secretary of the Interior to take the lands into trust for Indian tribes.[49]

This language generally would prevent the lands from being conveyed out of (e.g., disposed from) federal ownership by sale or exchange. Currently, the four major federal land management agencies have varying degrees of authority to convey lands out of federal ownership, ranging

[40] Mansfield, "Primer of Public Land Law," p. 802.

[41] Mansfield, "Primer of Public Land Law," p. 831.

[42] Getches, "Managing the Public Lands," p. 282.

[43] P.L. 88-606, §4.

[44] P.L. 88-606, §2.

[45] Mansfield, "Primer of Public Land Law," pp. 802-803.

[46] Some former and current laws specifically refer to authority to "enter" federal lands or make "entry" to federal lands in order to obtain possession of the lands or resources thereon. As an example of a former law, the Homestead Act of 1862 authorized individuals meeting certain qualifications to "enter" and make "entry" to public lands in order to settle on the lands. The applicant, sometimes referred to as the "entryman," received title to the lands after a specified period, providing certain conditions were met. The text of the statute is at https://uscode.house.gov/statviewer.htm?volume=12&page=392. Among current laws, the Desert Land Act (43 U.S.C. §321) and the General Mining Law of 1872 (30 U.S.C. §§22-42) also use the terms.

[47] In this sentence and elsewhere in this report, *third parties* includes individuals, corporations, and certain governmental entities.

[48] As an example, FS lands withdrawn from "appropriation" could not later be administratively reserved or classified as power sites or used for reservoirs under provisions of the Federal Power Act, according to FS staff. Pertinent provisions of the Federal Power Act are at 16 U.S.C. §818.

[49] Information in this paragraph is derived primarily from CRS conversations with BLM and FS staff.

from no general authority to relatively broad authority. This component of legislated withdrawals is less likely to affect NPS and FWS than FS and BLM, because NPS and FWS lack general authority to dispose of lands, though there are exceptions. By contrast, FS has various authorities to dispose of land, although they are somewhat constrained and not used frequently, and BLM has relatively broad authority to dispose of land. BLM disposal authorities include exchanges and sales under FLPMA;[50] transfers to other governmental units or nonprofit entities for public purposes under the Recreation and Public Purposes Act;[51] geographically limited sale authorities, such as the Southern Nevada Public Land Management Act of 1998;[52] and patents under the General Mining Law of 1872.[53] With regard to the latter authority, since FY1995, a series of annual moratoria on funding for issuing mineral patents have been enacted into law.[54] These moratoria, contained in the annual Interior appropriations laws, in effect have prevented this means of federal land disposal. The language in this component generally would also ban the disposal of resources on the lands (such as minerals) and other interests in the lands, which are something less than full ownership (such as conservation easements).

The terms *entry*, *appropriation*, and *disposal* have lost some of their historical import through the repeal of certain disposal laws and infrequent use today of others.[55] For example, authority to dispose of public lands under the Homestead Act of 1862 was repealed in 1976 by FLPMA (with a 10-year extension in Alaska). As another example, desert lands can be disposed under other laws, though these laws are seldom used because the lands must be classified as available, and sufficient water rights for settling on the land must be obtained. The Carey Act authorizes transfer to a state of desert public land for settlement, irrigation, and cultivation, upon application and meeting certain requirements.[56] Relatedly, the Desert Land Act allows citizens to reclaim and patent 320 acres of desert public land.[57] Though the scope of these terms may have changed over time, this component continues to restrict certain actions, such as the transfer of land out of federal ownership where such authority otherwise would exist.

Effect on Surface Uses

Withdrawals from entry, appropriation, and disposal typically would not bar multiple surface uses, possibly including recreation, hunting, grazing, and issuance of rights-of-way, among others. In some cases, the authorities that govern an agency's lands generally prohibit some of these uses, such as livestock grazing on NPS and FWS lands. Where an agency has discretionary

[50] 43 U.S.C. §1716, §1713.

[51] 43 U.S.C. §869.

[52] P.L. 105-263, as amended.

[53] 30 U.S.C. §§22-42. A *patent* is an instrument by which the federal government conveys title to lands.

[54] However, patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed.

[55] For information on the primary current land disposal authorities of the four major federal land management agencies, see CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, coordinated by Carol Hardy Vincent.

[56] 43 U.S.C. §641.

[57] 43 U.S.C. §321. For information on obtaining desert lands under the Desert Land Act, see the "Q&A on Desert Land Entries" under the "Desert Land Act" section of the BLM website at https://www.blm.gov/programs/lands-and-realty/land-tenure/sales-and-exchanges. The "Q&A on Desert Land Entries" indicates that the authority applies to desert public lands in 12 states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming.

authority to permit surface uses, as in the case of BLM and FS for livestock grazing, such discretionary activities typically could continue on withdrawn lands, unless otherwise specified.

In other cases, the first component of the text could preclude particular surface issues. The withdrawal from "entry" in this component of the text, together with the withdrawal from "entry" under the second component, typically would prohibit location and entry under the mining laws, as discussed below. Further, some legislated withdrawals may affect authorized land uses that Congress considers inconsistent with the purposes of the withdrawal. For instance, a withdrawal to reserve lands for military use and to transfer administrative jurisdiction to the military could affect public access for recreation due to public safety reasons. Surface uses also could be affected by subsequent agency actions. For example, an agency might amend the relevant land management plan to restrict land uses in order to achieve a broad resource-protection goal of a particular legislated withdrawal.[58]

Location, Entry, and Patent Under the Mining Laws

The second component of the legislated withdrawal language at issue, as set out in the "Introduction," specifies that the federal land is withdrawn from (2) *location, entry, and patent under the mining laws*.

This component of legislated withdrawals generally would prevent the withdrawn lands from being available for new mining operations (subject to valid existing rights). It primarily would affect BLM and FS lands, because general laws governing these lands allow for mineral development, in contrast with the general laws governing NPS and FWS lands.

Mining of hard-rock minerals on federal lands is governed primarily by the General Mining Law of 1872 (the Mining Law). The original purposes of the Mining Law were to promote mineral exploration and development on federal lands in the western United States, offer an opportunity to obtain title to mines already being worked, and help settle the West. The Mining Law grants free access ("open to mineral entry") to third parties to prospect for minerals on open public domain lands and allows third parties, upon making a discovery, to stake (or *locate*) a claim on the deposit.[59] A valid claim entitles the holder to develop the minerals. The Mining Law continues to provide the structure for much of the western mineral development on public domain lands.[60]

With evidence of valuable minerals and sufficient developmental effort, the Mining Law allows mining claims to be patented, with full title (of surface and mineral rights) transferred to the claimant upon payment of the appropriate fee. Nonmineral lands used for associated milling or other processing operations also can be patented.[61] Patented lands may be used for purposes other than mineral development.[62]

The Mining Law is considered a nondiscretionary agency authority. That is, BLM lacks general discretion to reject a claim to valuable minerals where the claimant complies with the terms of

[58] Information in this section is derived from conversations between CRS and BLM staff in 2018 and 2019.

[59] The terms *open to mineral entry* and *locate* typically are used by BLM.

[60] 30 U.S.C. §§22-42.

[61] 30 U.S.C. §42.

[62] However, as noted above, since FY1995, appropriations laws have contained annual moratoria on funding for issuing mineral patents under the general mining laws. Patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed. The most recent annual mining patent moratorium is contained in the Further Consolidated Appropriations Act, 2020 (P.L. 116-94), Division D, §404.

law. In this way, the Mining Law differs from major laws affected by components one and three of legislated withdrawals.[63]

Withdrawals from location and entry under the mining laws typically would not affect various surface uses of the lands, which might include recreation, hunting, and grazing, among others, depending on the general authorities that govern the surface lands. However, subsequent agency actions, such as amendments to land management plans, could affect surface uses, as noted above.

Operation of the Mineral Leasing, Mineral Materials, and Geothermal Leasing Laws

The third component of the legislated withdrawal language, as set out in the "Introduction," specifies that the federal land is withdrawn from (3) *operation of the mineral leasing, mineral materials, and geothermal leasing laws*.

This component generally would prevent the withdrawn lands from being available for new mineral leasing, sale of mineral materials, and geothermal leasing (all subject to valid existing rights). It would affect mainly BLM and FS lands because the main laws governing these activities primarily apply to these agencies. These laws—the Mineral Leasing Act of 1920 (MLA), the Materials Act of 1947, and the Geothermal Steam Act of 1970—are discussed below. Moreover, general laws governing BLM and FS allow for multiple uses, including energy development, in contrast to the general laws governing NPS and FWS lands.[64]

As in the case of withdrawals under the Mining Law, withdrawals from mineral leasing, sale of mineral materials, and geothermal leasing typically would not affect multiple uses of the surface lands. However, subsequent agency actions, such as amendments to land management plans, could affect surface uses, as noted above.

Mineral Leasing Act of 1920

The third component of legislated withdrawals generally would prevent the withdrawn lands from being available for new mineral leasing (subject to valid existing rights). The MLA primarily governs the development of leasable minerals (e.g., oil, gas, coal, and certain agricultural minerals) on federal lands.[65] Under the MLA, the Secretary of the Interior, through the BLM, leases subsurface rights on federal lands (generally those under the jurisdiction of BLM and FS) that contain fossil fuel deposits, with the federal government retaining title to the lands. The MLA authorizes both competitive and noncompetitive bidding processes for oil and gas exploration and production leases.

The Materials Act of 1947

The third component of legislated withdrawals generally would prevent the withdrawn lands from being available for new disposal of materials on public lands (subject to valid existing rights).

[63] For instance, agencies with land disposal authority have general discretion as to whether to exercise their conveyance authority upon application by a prospective purchaser.

[64] Although energy development is not a general use of NPS and FWS lands, there are exceptions. For instance, for information on oil and gas activities on FWS lands, see CRS Report R45192, *Oil and Gas Activities Within the National Wildlife Refuge System*, by R. Eliot Crafton, Laura B. Comay, and Marc Humphries.

[65] 30 U.S.C. §181.

The primary law at issue, the Materials Act of 1947 (as amended),[66] gave the Secretary of the Interior and the Secretary of Agriculture authority to dispose of mineral materials including—but not limited to—sand, stone, gravel, pumice, and clay, and vegetative materials including—but not limited to—yucca, manzanita, mesquite, cactus, timber, and other forest products.[67] The law pertains to lands where the disposal of such mineral and vegetative materials otherwise is not expressly authorized by law, including the mining laws; is not expressly prohibited by law; and would not be detrimental to the public interest.[68] The law generally requires payment of "adequate compensation" for the materials, and it requires the pertinent Secretary to dispose of materials to the highest qualified bidder after advertising and other public notices. The law contains exceptions, including authorization for the pertinent Secretary to permit federal, state, and local governmental entities and not-for-profit entities to remove materials without charge under certain circumstances.

Geothermal Steam Act of 1970

The third component of legislated withdrawals also generally would prevent the withdrawn lands from being available for new geothermal leasing (subject to valid existing rights). The primary law governing geothermal energy development on federal lands is the Geothermal Steam Act of 1970.[69] The law sets out provisions governing the issuance and administration of geothermal steam leases. Under the law, the Secretary of the Interior, through BLM, authorizes leases on federal lands (generally lands under BLM and FS jurisdiction) for geothermal exploration and development. This law (and related regulations) governing geothermal steam leasing and administration provide for principles and processes that are similar to those for oil and natural gas leasing on federal lands under the MLA. For instance, the Geothermal Steam Act, like the MLA, authorizes both competitive and noncompetitive leasing processes.

Interpreting "Subject to Valid Existing Rights"

As noted in the "Introduction," Congress generally makes legislated withdrawals "subject to valid existing rights."[70] Congress generally withdraws public lands "to prevent the initiation of new claims" rather than to destroy "rights theretofore fairly earned."[71] By including the phrase "subject to valid existing rights," Congress protects third-party property interests (e.g., ownership) in withdrawn federal land.[72] Though commonly used, the phrase has no universal definition or agreed-upon interpretation.[73] Instead, as discussed in more detail in this section, courts and agencies have interpreted the phrase on a case-by-case basis in light of the purpose and

[66] 30 U.S.C. §§601-604.

[67] In this context, the authority to "dispose of" mineral materials means authorization for the "removal of" mineral materials from the land.

[68] 30 U.S.C. §601.

[69] 30 U.S.C. §§1001 et seq.

[70] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[71] Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 Interior Dec. 205, 210 (1935) [hereinafter 1935 Solicitor Opinion] (citing Williams v. Brening, 51 Pub. Lands Dec. 225 (1925) (on reh'g)).

[72] See, for example, Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 6-9 (1987).

[73] 1935 Solicitor Opinion, *supra* note 71, at 210-11; see also Laitos & Westfall, *supra* note 71, at 19-22.

structure of the law in which it appears.[74] Furthermore, third parties may have obtained their "valid existing rights" under any number of current or former laws that created avenues for obtaining interests in federal land.[75] As such, the examples of "existing rights" this report provides are illustrative rather than comprehensive.[76]

When Congress enacts legislated withdrawals "subject to valid existing rights," any existing rights remain in effect after the withdrawal. In some cases, the government may acquire or "take" certain rights to serve the purpose of the withdrawal. The federal government has authority to take private property for public uses through its eminent domain powers.[77] The Takings Clause of the U.S. Constitution limits this power by providing that private property cannot "be taken for public use, without just compensation."[78] As described further below in "Rights," however, some valid existing rights may not qualify as property interests that require compensation under the Takings Clause.[79]

Alternatively, legislated withdrawals may allow federal agencies to acquire valid existing rights through voluntary transactions, such as purchase or exchange.[80] The relevant federal agency may have preexisting statutory authority to acquire such rights.[81] If the agency does not have that authority or the authority is limited, Congress may consider providing such authority in the legislated withdrawal. Congress also may consider appropriating funds for any such acquisitions.

[74] See, for example, Laitos & Westfall, *supra* note 71, at 19-22.

[75] See, for example, 1935 Solicitor Opinion, *supra* note 71, at 210-11("It is hardly practicable to give a precise or general definition of the meaning of 'existing valid rights,' as used in the savings clause of the said Executive Order. The circumstances of each particular case will have to be considered in applying that provision.").

[76] While some examples discussed in this report involve laws that are no longer in effect, rights obtained under those laws still could be "valid existing rights" even after the law's expiration or repeal. Additionally, those examples show the historical understanding of "valid existing rights" and demonstrate legal principles that apply to similar laws that currently are in effect.

[77] United States v. Jones, 109 U.S. 513, 518-19 (1883).

[78] U.S. Const. amend. V; *Jones*, 109 U.S. at 518-19. See also, for example, Horne v. Dep't of Ag., 576 U.S. 350, 357-58 (2015) ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use. Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation." (citations omitted) (emphasis in original)); Meridian Land & Mineral Co. v. Hodel, 843 F.2d 340, 346-47 (9th Cir. 1988) (noting that during congressional debate, Congressman Udall objected to an amendment "because it takes from the bill a statement that valid legal rights should be preserved," which he did not think Congress "should do without paying compensation under the fifth amendment").

[79] The various constitutional considerations under the Takings Clause for "valid existing rights" are beyond the scope of this report. For more information on the Takings Clause, see CRS, Amdt5.5 Taking Private Property for Public Use, Constitution Annotated (2020), https://constitution.congress.gov/browse/amendment-5/.

[80] See, for example, P.L. 96-290, 94 Stat. 607 (1980) (amending an act establishing a wildlife refuge to include that the Secretary of the Interior "may acquire lands and waters or interests therein ... within the boundaries of the refuge by donation, purchase with donated or appropriated funds, or exchange"); P.L. 93-402, 88 Stat. 801 (1974) ("The Secretary may acquire by donation, purchase with donated or appropriated funds, or exchange, such lands and waters and interests therein (including in-holdings) that are adjacent to the [lands and waters reserved for the Great Dismal Swamp National Wildlife Refuge] and are within the area known as the Great Dismal Swamp ... as he determines to be suitable to carry out the purposes of this Act.").

[81] For instance, the Secretary of the Interior has authority to acquire interests in lands under FLPMA, 43 U.S.C. §1715, (acting through BLM), the National Wildlife Refuge System Administration Act, 16 U.S.C. §668dd(b), (acting through FWS), and the Migratory Bird Treaty Act, 16 U.S.C. § 715d (acting through FWS).

Defining "Valid Existing Rights"

As used in legislated withdrawals, a "valid existing right" is a third-party (i.e., nonfederal) interest in federal land that the relevant federal agency cannot terminate or unduly limit.[82] To have a valid existing right, the third party must

- have met the requirements under the relevant law to obtain a property interest in the land (i.e., the property interest must be *valid*);
- have had a protectable interest before the United States withdraws the land (i.e., the property interest was *existing* at the time of withdrawal);[83] and
- possess a property interest (or in some cases a possessory interest) in the land that constitutes a right for purposes of withdrawals (i.e., it must be a *right*).[84]

Valid

The validity of the interest depends on whether the third party has met the requirements of the law under which it alleges to have secured the property interest. First, the interest itself must be legitimate (i.e., supported by evidence of the factual basis required by the relevant statute). For example, to secure a mining claim as a valid right under the mining laws, a claimant must demonstrate that they have made a "valid discovery" of a valuable mineral deposit that can be extracted and marketed.[85]

Second, the third party must have complied with any procedural requirements set out in statute.[86] The "steps required to secure the right" similarly depend on the law on which the interest is based. For example, under the General Mining Law of 1872, to be eligible for exclusive possession and enjoyment (i.e., development) of a mineral deposit, a claimant must (1) make a discovery of a mineral vein, lode, or ledge and (2) properly stake (or *locate)* the claim.[87] To receive a land patent (i.e., title to the land) from the Secretary of the Interior for the land on which a valuable mineral discovery is located, the claimant must perform a requisite amount of work developing the claim and pay a fee.[88] Similarly, before purchasing up to 80 acres of public land as

[82] See, for example, The Bureau of Land Management Wilderness Review and Valid Existing Rights, M-36910 (Supp.), 88 Interior Dec. 909, 912 (1981) [hereinafter 1981 Solicitor Opinion]("'[V]alid existing rights' are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion."); Laitos & Westfall, *supra* note 71, at 26.

[83] As described below in "Existing," certain property interests may be allowed to relate back to the date the claimant first occupied the land before a withdrawal and be considered "existing" even if the right is not secured (i.e., the process for obtaining the right is not complete) until after the withdrawal.

[84] See, generally, Laitos & Westfall, *supra* note 71. Property interests versus possessory interests are discussed below in "Rights."

[85] *See, e.g.*, Vane Minerals v. United States, 116 Fed. Cl. 48, 55-59 (2014); Skaw v. United States, 13 Cl. Ct. 7, 28 (1987), *aff'd* 847 F.2d 842 (Fed. Cir. 1988); *see also* 43 C.F.R. § 3809.00(a). A valid discovery "occurs when the claimant demonstrates that a reasonably prudent person would be justified in expending further effort to develop the claim." *Vane Minerals*, 116 Fed. Cl. at 55. The claimant also must "establish that 'the mineral can be extracted, removed, and marketed at a profit.'" *Id.* at 56 (quoting United States v. Coleman, 390 U.S. 599, 602 (1968)).

[86] Russian-American Packing Co. v. United States, 199 U.S. 570, 575 (1905) ("[T]he mere settlement upon public lands without taking some steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States.").

[87] 30 U.S.C. §26.

[88] 30 U.S.C. §§28-29. However, since FY1995, a series of annual moratoria on funding for issuing mineral patents has been enacted into law. *See, e.g.*, P.L. 116-94, Div. D, tit. IV, § 404, 133 Stat. 3013 (2019). Patent applications filed on or before September 30, 1994, that met certain requirements have been allowed to proceed.

a trade and manufacturing site, the Trade Manufacturing and Site Act required the claimant to file a notice of location to claim of "unoccupied, unimproved, and unappropriated" land and apply to purchase the claim within five years of the notice.[89] Generally, a third party must complete the steps required by law to secure a *valid* "valid existing right" in federal land.

Existing

The second requirement for a third party to have a "valid existing right" is that the property interest existed at the time of withdrawal.[90] Depending on the legal basis for the right, a third party obtains an interest in federal land either (1) once they meet the statutory requirements, without the federal agency having to act, or (2) when the federal agency exercises its discretion to grant the property interest after the third party meets the relevant statutory requirements.[91] Third parties claiming property interests under laws that do not require the federal agency to grant the interest have an existing property interest as soon as they meet the law's requirements.[92] For example, a claimant under federal mining laws is entitled to the claim once they complete the statutory steps described above (discovery and location).[93] Whether the Secretary of the Interior has issued a land patent to transfer title to the claimant does not affect the claimant's right to the land; once federal mining law requirements are met, the property right "vests" (i.e., ownership is transferred to the claimant) and the right *exists*.[94] In some cases, the claimant need not complete all of the required steps before the withdrawal to obtain an existing right. If the law allows claims to relate back to occupancy (i.e., be back-dated to when the claimant first occupied the land), claimants may have *existing* rights if they occupied the land before withdrawal and ultimately complete the remaining steps required by law.[95]

Other laws provide that a claimant's interest in federal land only becomes a valid existing right once the Secretary has acted to make it valid.[96] For example, third parties acquire oil and gas leases when the Secretary of the Interior approves their application.[97] Although courts and agencies have recognized these leases as valid existing rights in various contexts, they have not recognized *applications* for oil and gas leases or other leasehold interests in federal land.[98]

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[89] 43 U.S.C. §687a-1, *repealed* effective Oct. 21, 1986, P.L. 94-579, title VII, § 703(a) (1976); 43 C.F.R. §2562.1 (1983).

[90] 1981 Solicitor Opinion, *supra* note 82 at 911 ("They are property interests rather than mere expectancies.").

[91] *Id.* at 912; Laitos & Westfall, *supra* note 71, at 25-36.

[92] Laitos & Westfall, *supra* note 71, at 12-13, 16-17.

[93] 30 U.S.C. §§26; *see also* 1981 Solicitor Opinion, *supra* note 82, at 912.

[94] Black's Law Dictionary (11th ed. 2019) (defining vest to mean "to confer ownership (of property) on a person). See, for example, Wyoming v. United States, 255 U.S. 489, 501, 508-09 (1921); Kern Oil Co. v. Clarke, 30 Pub. Lands Dec. 550, 550 (1901). During this time, the United States merely holds the title to the land in trust on behalf of the claimant until the land patent (i.e., the official document granting title) issues. See, for example, *Wyoming*, 255 U.S. at 501-02. Note, however, that since FY1995, a series of annual moratoria on funding for issuing mineral patents has been enacted into law. *See, e.g.*, P.L. 116-94, Div. D, tit. IV, § 404, 133 Stat. 3013 (2019). Patent applications filed on or before September 30, 1994, that met certain requirements have been allowed to proceed.

[95] James Milton Cann, 16 IBLA 374 (1974); *cf.* Ramstad v. Hodel, 756 F.2d 1379, 1382-86 (9th Cir. 1985).

[96] See, for example, James v. Canon, 84 Interior Dec. 176, 181 (1977) (affirming that lease offerors have no right to a lease).

[97] 30 U.S.C. §226.

[98] Compare Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 750-51 (9th Cir. 1975) (recognizing that an oil and gas lease is a property right) with James v. Canon, 84 Interior Dec. 176, 181 (1977) (affirming that lease offerors have no right to a lease). See also Miller v. Udall, 317 F.2d 573, 576 (D.C. Cir. 1963) ("[A]lthough filing an offer is a necessary condition or prerequisite to the issuance of a lease, it does not give the applicant a valid existing right to a lease.");

Courts and agencies have at times concluded that a third party has a valid existing right despite not having established an interest by law before the land is withdrawn.[99] The Solicitor of the Department of the Interior has offered "an expansive interpretation of 'existing valid rights' in the context of withdrawal"[100] that includes "all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal" and "[c]laims under the Color of Title Act of December 22, 1928."[101] A court or agency also may recognize a valid existing right, even if the claimant is not legally entitled to it, because it would be equitable (i.e., consistent with the principles of justice).[102]

Rights

Not all uses of or interests in federal land qualify as valid existing "rights." The third party usually must have obtained a *property interest* in the land to have a right; merely using the land generally is insufficient to establish a valid existing right.[103] To determine whether the asserted interest qualifies as a right, courts and agencies examine the law authorizing the interest and the withdrawal law.[104] Courts and agencies have recognized a number of property interests as protected rights, such as entitlements to land patents under mining laws and entry-based laws such as the Homestead Acts and the Trade and Manufacturing Site Act;[105] land grants to states;[106] rights-of-way;[107] and mineral leases.[108]

Courts and agencies also have deemed certain *possessory* interests protected, the most common example being perfected but unpatented mining claims.[109] However, they have declined to recognize other possessory interests as valid existing rights.[110] Courts and agencies have generally

1981 Solicitor Opinion, *supra* note 82, at 912 (describing when valid existing rights arise); Laitos & Westfall, *supra* note 71, at 12-19 (describing how courts and agencies have treated different types of interests in property).

[99] 1935 Solicitor Opinion, *supra* note 71, at 210.

[100] *Ramstad*, 756 F.2d at 1385.

[101] 1935 Solicitor Opinion, *supra* note 71, at 210. The Color of Title Act provides a means for BLM to resolve certain private party claims on public lands through conveyance of patents. *See* 43 U.S.C. §1068.

[102] See, for example, *Ramstad*, 756 F.2d at 1383-86; 1935 Solicitor Opinion, *supra* note 71, at 210-11; Black's Law Dictionary (11th ed. 2019) (defining equitable as "Just; consistent with principles of justice and right").

[103] 1981 Solicitor Opinion, *supra* note 82, at 911.

[104] *Id*. at 912.

[105] See, for example, Stockley v. United States, 260 U.S. 532, 536-42 (1922); Ramstad v. Hodel, 756 F.2d 1379, 1380-81 (9th Cir. 1985).

[106] Wyoming v. United States, 255 U.S. 489, 501-02 (1921).

[107] Sierra Club v. Hodel, 848 F.2d 1068, 1085-86 (10th Cir. 1988), overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). See also FLPMA §701(a) & (h), P.L. 94-579, Title I, §102, 90 Stat. 2744 (1976) (codified at 43 U.S.C. 1701 note).

[108] See, for example, Skaw v. United States, 740 F.2d 932, 935-36 (Fed. Cir. 1984).

[109] United States v. Locke, 471 U.S. 84, 88 (1985); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-37 (1963); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316-17 (1930); Laitos & Westfall, *supra* note 71, at 15-16. A mining claim is perfected but unpatented when the claimant has complied with all the requirements of the law but the United States has not issued a land patent to transfer title. See, for example, *Wilbur*, 280 U.S. at 316-17; Belk v. Meagher, 104 U.S. 279, 283-84 (1881).

[110] Wisenak, Inc. v. Andrus, 471 F. Supp. 1004, 1009 (D. Alaska 1979) (declining to recognize the doctrine of *pedis possessio*, which protects prospectors from encroachment by other explorers, as creating valid existing rights); Laitos & Westfall, *supra* note 71, at 18.

not recognized permits, such as grazing permits, as protected property rights for purposes of interpreting withdrawals, absent a specific provision in the withdrawal law or order.[111]

"Subject to" Valid Existing Rights

Once a third party establishes a "valid existing right" in withdrawn federal land, the relevant federal agency must determine how to manage the land "subject to" that right.[112] Valid existing rights limit the federal agency's ability to manage withdrawn land pursuant to the directives in the withdrawal legislation.[113] For example, under FLPMA, the Secretary of the Interior must manage any areas being considered for wilderness designation "so as not to impair the suitability of such areas for preservation as wilderness."[114] However, FLPMA's savings clause requires the Secretary to carry out actions under FLPMA—including wilderness management—"subject to valid existing rights."[115] As the Solicitor for the Department of the Interior recognized in a 1981 opinion, this savings clause limits prevents the Secretary from applying the nonimpairment standard in a way that "would prevent the exercise of any 'valid existing rights.'"[116]

Valid existing rights are not absolute rights that cannot be managed or limited.[117] The nature of the right depends on the law that created the right, the terms of any agreement involved (e.g., an oil and gas lease), and how the relevant federal agency exercises its discretion.[118] The Secretary of the Interior has taken the position that federal agencies may regulate valid existing rights provided that they do not regulate "to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right."[119]

Identifying Valid Existing Rights

Due to the large number of public land laws and natural resource laws under which parties may have obtained rights to federal land, and the variability in how parties obtain a "valid existing" right under each law, federal agencies or courts necessarily must analyze "valid existing rights" on a case-by-case basis.[120] The particular right retained by a party also may depend on various

[111] *Cf.* United States v. Fuller, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act ... make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit."); LaRue v. Udall, 324 F.2d 428, 431 (D.C. Cir. 1963) ("By no means should [a grazing permit provision of the Taylor Grazing Act] be construed as providing that, by maintaining a lien on his grazing unit, a permitee may also create and maintain a vested interest therein which will prevent the United States from exchange [the land]."); Bradshaw v. United States, 47 Fed. Cl. 549, 553 (Fed. Cl. 2000) ("[N]either the grazing permit, nor the historical grazing preference is a compensable interest.... "); see also Leigh Raymond, *Viewpoint: Are Grazing Rights on Public Lands a Form of Private Property?*, 50 J. RANGE MGMT. 431, 431-36 (1997).

[112] 1981 Solicitor Opinion, *supra* note 82, at 912-13.

[113] *Id.* at 913.

[114] 43 U.S.C. §1782(c).

[115] 43 U.S.C. 1701 note.

[116] 1981 Solicitor Opinion, *supra* note 82, at 911.

[117] *Id.* at 912 (citing Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950)).

[118] *See id.*

[119] *Id.* at 913-14.

[120] See, for example, *id.* at 912 ("Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application."). Conversations with staff at BLM, FS, FWS, and NPS confirmed that the agencies generally determine the valid existing rights that apply to a particular withdrawal on a case-by-case basis. CRS held conversations with agency staff specifically to obtain information for this report on the following dates: BLM,

other factors, including the site-specific conditions of the property.[121] The agencies rely primarily on master plats of public domain land units that BLM maintains, which track awarded leases, locations, entries, rights-of-way, easements, and other property interests. The agencies also may conduct independent title searches. Some agency regulations provide procedures for parties to obtain valid existing rights determinations under certain statutes.[122] Claimants may challenge "valid existing rights" determinations in administrative proceedings before the agency with jurisdiction over the land, if the agency so provides, or in court.[123]

Summary of Analysis

In exercise of its authority over federal lands, Congress considers and enacts legislation to withdraw lands from management under various laws. *Legislated withdrawals* often have common goals, components, and protections. A common goal is to preclude the lands from being used for certain purposes to foster other particular purposes or values. Common components include the removal of the affected parcels from operation under one or more categories of law, namely public land laws, mining laws, and/or mineral leasing laws. Common protections pertain to valid existing rights, to prevent termination or limitation of third-party property interests following the withdrawal. Though legislated withdrawals have much in common, Congress has enacted variations in their components and terms. These variations enable Congress to determine the appropriate management for the lands to reach its desired objectives.

Determining the meaning and effect of legislated withdrawals can be challenging. For example, there are numerous public land laws, but no single, consistent definition of this term or comprehensive list of such laws and the lands to which each law applies. Further, there are a large number of laws under which third parties may have obtained rights to federal land. Accordingly, agencies and courts determine the meaning and effect of legislated withdrawals on a case-by-case basis. To enhance clarity of intent, Congress can provide specifications in the text of the withdrawal laws and in accompanying explanatory documents.

Though legislated withdrawals are generally made subject to valid existing rights, Congress may provide for any such rights—or other property interests within the withdrawal boundaries—to be acquired through the power of eminent domain (with just compensation) or voluntary transactions such as purchases, donations, or exchanges. When enacting a legislated withdrawal, Congress may consider whether the purposes of the withdrawal may be served by allowing the relevant federal agency to pursue such acquisitions.

December 18, 2019; FS, January 13, 2020; NPS, January 22, 2020; and FWS, January 31, 2020. For brevity, text references to agency consultations do not typically denote the agency or agencies that provided the information.

[121] See, for example, 1981 Solicitor Opinion, *supra* note 82, at 913.

[122] See, for example, 30 C.F.R. §761.16 (providing for valid existing rights determinations under surface mining laws); 36 C.F.R. §§292.63, 292.64 (providing for valid existing rights determinations for the Smith River National Recreation Area); Vane Minerals v. United States, 116 Fed. Cl. 48, 57-59 (2014) (describing agency valid existing rights determination procedures for mining claims).

[123] See, for example, Shepley v. Cowan, 91 U.S. 330, 338 (1876); Kern Oil Co. v. Clarke, 30 Pub. Lands Dec. 550, 550 (1901).

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Deadlines Matter & the Two-Year Clock Is Ticking

The Fate of the Colorado River & the Future of Ag

The Colorado River system—lifeline to 40 million people and over 4 million irrigated acres—is hurtling toward a tipping point. With the current operating rules expiring in 2026, hydrology worsening, and state negotiations faltering, the Basin faces an uncomfortable truth: the old frameworks bought us time, but not enough. And with this year's anemic runoff, time is exactly what we're running out of.

1. The 2007 Interim Guidelines: A Temporary Truce

The 2007 Interim Guidelines were a well-intentioned attempt to coordinate operations between Lake Powell and Lake Mead during increasingly variable flows. They tied reservoir operations to storage tiers, created the ICS (Intentionally Created Surplus) system in the Lower Basin, and set the stage for shortage sharing below Hoover Dam. But the Guidelines were always a stopgap—designed to sunset in 2026—and they were not built for the 21st-century aridification we're now living through. [3][4][13][14]

2. The 2019 Drought Contingency Plans (DCPs): Buying Time

By 2019, back-to-back low-flow years had made clear that the Guidelines weren't enough. The DCPs added emergency stabilization measures:

- Upper Basin DCP focused on protecting Lake Powell's elevation (target: 3,525') and authorized releases from upstream reservoirs.
- Lower Basin DCP required deeper cutbacks from Arizona, California, and Nevada at declining Mead elevations, layered on top of the 2007 provisions.

Congress blessed the deal. But even then, it was clear this was duct tape over structural cracks. The DCPs didn't resolve the fundamental overuse problem—particularly in the Lower Basin. [5][6][18][26][27]

3. The 2023–2024 SEIS & Interior's Temporary Fixes

Facing near-record lows in Powell and Mead, Interior stepped in again, issuing a Supplemental Environmental Impact Statement (SEIS) to adjust operations through 2026. That SEIS aimed to conserve up to 3 million acre-feet through temporary, compensated reductions, mostly via Lower Basin voluntary agreements. But these are Band-Aids, not surgery. [7]

4. Negotiation Status: Not Well

States are now supposed to be negotiating new post-2026 operating rules. But so far, what's emerged are competing white papers, media campaigns, and deep mistrust. Key fault lines:

- Upper vs. Lower Basin: The Lower Basin acknowledges the need for big cuts—but wants

them shared. The Upper Basin argues it's already living within its means and shouldn't bear more reductions.
- California vs. Arizona: Still haunted by the junior-priority sword, Arizona is wary of being left holding the bag—again.
- Tribes: Still left out, despite legal entitlements to a significant share of the system and growing calls for equity and inclusion.
- Mexico: Vulnerable to reduced deliveries, even as climate change batters the delta and border-region farming.
Meanwhile, hydrology isn't waiting for consensus. Snowpack this year peaked well below normal, runoff into Powell is forecast around 2.9 MAF—far short of what's needed to meet demands and keep the system functional. [2][8][9][10][11][12][28][29]

5. Agriculture: Squarely in the Crosshairs

Ag uses ~75–80% of the Basin's water, and it's the only sector with large volumes available for quick conservation. But the farms and irrigation districts that helped build the American West are now on the front lines of forced fallowing, reduced reliability, and groundwater drawdowns. Without structural reforms and long-term incentives, the future of Basin agriculture is increasingly uncertain. [2][20][22]

6. The Two-Year Clock

Interior is aiming to release a draft EIS with new post-2026 operating alternatives by late 2025, with a final Record of Decision due in 2026. If the states can't reach agreement—soon—the feds will move ahead with their own plan. That's not just bureaucratic fallback; it's an open invitation to litigation, uncertainty, and potentially chaotic implementation. [2][8][9][12][16][17]

Conclusion: The Math Doesn't Lie

We are staring down a structural deficit of 2–4 million acre-feet per year, depending on the scenario. That shortfall won't be solved by wishful thinking or voluntary measures alone. Without a durable, basin-wide solution that includes shared sacrifice, tribal integration, and compensated conservation, the river's fate—and that of Western agriculture—will be decided by crisis, not consensus. [1][2][9][12]

James Eklund & Hannah Mink, Taft/ Sherman & Howard, Norse Sky Ranch

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Demand Management

Homestead

1922 Interstate Compact

"Law of the River"

Lake Mead

Flow Change

Snowpack Change

Change Accommodation

Demand Management

SAVING THE COLORADO RIVER

HOW DEMAND MANAGEMENT CAN SAVE THE COLORADO RIVER

by James Eklund, Eklund Hanlon, LLC (Denver, CO)

Introduction

THE CHALLENGE & THE OPPORTUNITY

In 1887, after a week at sea, my great-great grandmother Mary Gunderson led her blind husband, Ole, down the gangplank into New York City. Ole was the victim of a mining accident only days before their scheduled departure for America. The economy in Norway had collapsed and the couple sought a brighter future for their two young sons. The family made its way to the new (then twelve-years-old) state of Colorado to homestead on a tributary to the Grand River. The federal government had recently removed the indigenous Ute peoples from the land and opened it to homesteading. The river that dominated this landscape has carried many names, among them Rio del Tizon, the Grand River, and the Colorado River. For eleven years, 1873-1883, the river's performance was below what once was considered average (*i.e.* the average flow of the river 1906-1995). (Woodhouse, 2006). When the Gundersons arrived, the flows had returned to average and were about to enter a wet period that would form the backdrop for the consequential first round of modern management negotiations. (Woodhouse, 2006).

The river that carved the Grand Canyon now shaped new economies — economies that quickly grew too big to fail. Westerners sought ways to control and harness the river while confronting legal and hydrologic uncertainty. In 1922, the seven sovereign Basin States achieved a form of legal certainty through an interstate compact expressly consented to by Congress. The Colorado River Compact (Compact) was the first interstate compact apportioning water use in the nation's history. The Compact divided the river basin in two, apportioning Colorado River system water use between the Upper Basin and the Lower Basin. (The Upper Basin includes: Colorado, New Mexico, Utah and Wyoming; while the Lower Basin includes: Arizona, California and Nevada) The basin states and the federal government adopted agreements, laws, policies, and practices based on their understanding of the river's historic performance. Taken together, these instruments constitute what is now known as the "Law of the River." In 1935, a measure of hydrologic certainty was achieved, for the Lower Basin, with the filling of Lake Mead behind Hoover Dam. If the compact negotiators had been correct in their assumption that Colorado River flows would remain stationary, this article would end here. You, dear reader, are not so fortunate.

Anthropomorphic climate change has fundamentally shifted Colorado River hydrology and the foundation upon which the Law of the River was built. The once average annual river inflows of 18 million acre-feet were experienced and assumed by interstate negotiators — while we now only see 12.5 million acre-feet. In addition, more carbon in our atmosphere is producing warmer temperatures. Consequently, not only are we receiving less precipitation, but more of what we do receive falls in the form of rain instead of snow.

Moreover, snowpack behavior, once considered somewhat predictable and reliable, is now dramatically underperforming. In the 2020 water year, the Upper Basin saw above average snowpack (114%) misbehave to such an extent that it produced a mere 55% of average runoff. (Milly, 2020). These trends can be expected to continue. (Plucinski, 2019). Reasons for this are, firstly, the "aridification" of the Colorado River Basin, where temperature has risen and is rising such that sublimation occurs at higher rates and liquid water fails to occur. The second reason is the "spongeification" of the Colorado River Plateau whereby dry soils and depleted groundwater aquifers soak up the runoff that does materialize.

Nevertheless, the demands placed and the economies reliant on the Colorado River are still too big to fail. Our challenge, therefore, is to shift the Law of the River to accommodate the change in hydrology and encourage practices that can help save the river. Too small a shift risks failing to adequately address the challenge. A larger — perhaps necessary — response may upset the carefully crafted agreements that sovereigns and stakeholders throughout the basin have labored to reach. Unfortunately, the latest data and analysis shows we must prepare for river flows reduced by climate change.

Readying the Colorado River system and the 40 million people reliant on the river in seven states, two countries, and numerous American Indian Tribes requires a rethinking of the fundamental terms of the Law of the River. The picture can seem bleak and depressing — but take heart! These challenges also represent excellent opportunities to develop more reliable and sustainable Colorado River management. We *can* manage our way out of this problem while addressing climate change, thus saving the Colorado River for future generations. Demand management is a necessary management tool that we should be wielding with greater urgency.

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Demand Management

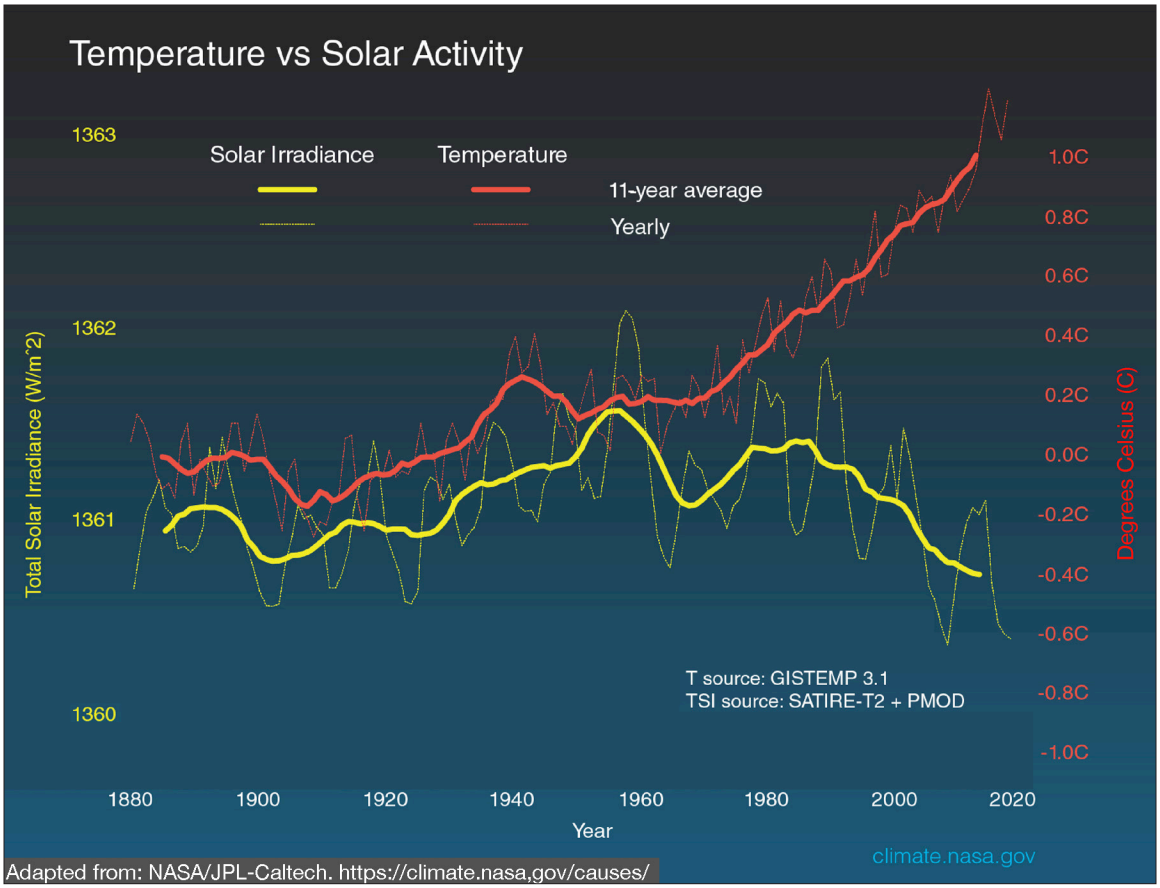
Warming Temperatures

Precipitation Change

Climate Change, Declining Agriculture, and the Law of the River

The Effects of Climate Change on the Colorado River

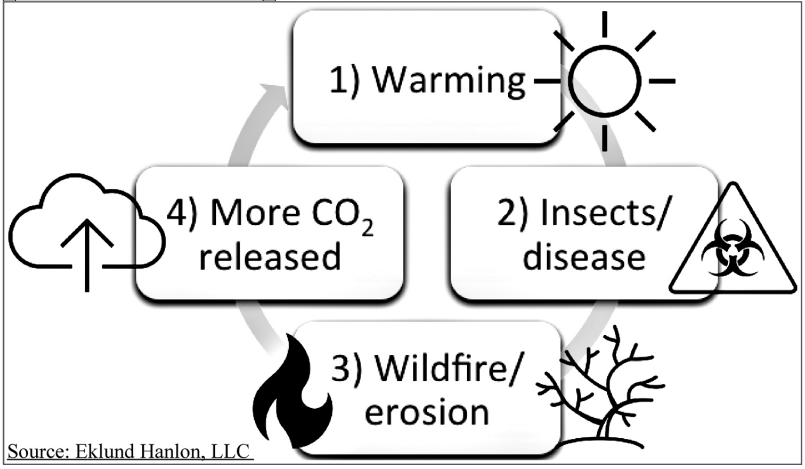
Anthropomorphic climate change is consequential for Colorado River management and presents an existential threat to communities, economies, and environments in the basin. More carbon in our atmosphere produces warmer temperatures. (NASA, 2011). Since the Gundersons homesteaded, average global temperatures have risen 1.4 degrees Fahrenheit. (NASA, 2011).



The above graph compares global surface temperature changes (red line) and the Sun's energy that Earth receives (yellow line) in watts per square meter since 1880. The amount of solar energy that Earth receives has followed the Sun's natural 11-year cycle of small ups and downs with no net increase since the 1950s. Over the same period, global temperature has risen markedly.

Not only are we receiving less precipitation, but more of what we do receive falls in the form of rain instead of snow.

In our integrated environmental systems, the problem is self-perpetuating:



Source: Eklund Hanlon, LLC

1) WARMING: more carbon dioxide in our atmosphere traps solar radiation and results in warmer temperatures
2) INSECTS/DISEASE: warmer temperatures provide a more favorable climate for forest insects and diseases
3) FOREST LOSS: the loss of entire forests in the Rocky Mountains to insects or disease contributes to increasingly destructive wildfire, desertification, and erosion of soils
4) CO_2 RELEASE: wildfire and soil erosion and degradation causes the release of carbon that was once sequestered into the atmosphere
5) DOWNWARD SPIRAL: the cycle continues and conditions worsen.

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Demand Management

Soil Degradation

"Buy-and-Dry"

Less Water Spurs Adaptation

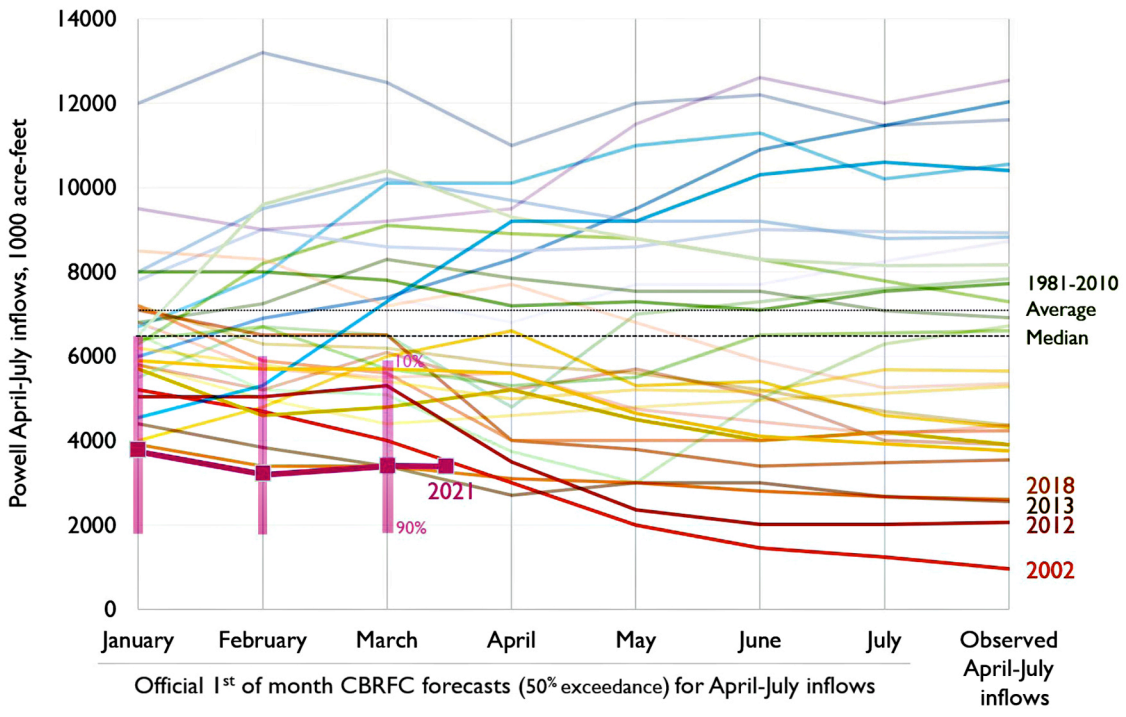
The most current scientific analysis and review of Colorado River data supports this unfortunate dynamic: "Our results underscore that greenhouse gas emissions reduction and moderating or decreasing atmospheric greenhouse gas concentrations may be critical to maintaining sufficient streamflow volumes to satisfy current and future water use while also complying with interstate and international water allocation agreements." (Wheeler, 2021; Miller, 2021).

Agriculture in the Colorado River Basin

Agriculture in the Western US has declined and so have our soils. Just as soil degradation has contributed to our condition, so too can soil regeneration be our salvation. The latest Agriculture Census, released in 2019, shows the amount of US agricultural land continued to decline as did the overall number of farming and ranching operations. The 2.04 million farms and ranches marked a three percent decline from 2012. Simply put, land use practices and climate change are resulting in erosion of our soils. (Borrelli, 2020).

Another principal threat to irrigated agriculture in the Western US is the practice of permanently transferring water from irrigated land (aka "buy-and-dry"). (Colorado's Water Plan, 2015). "Buy-and-dry" is generally disfavored under state water policy due to its potential to negatively impact agricultural communities and economies. (*Id*.). Colorado's Water Plan calls for measurable shifts from buy-and-dry to alternative transfer methods such as lease-fallowing arrangements.

If necessity is the mother of invention, some good news in all the dismaying water data may be that less water becomes the crucible in which new practices and collaborations take shape to: regenerate soils; increase sustainable food production; sequester carbon; and conserve water. Regenerative cropping and grazing management practices can increase water percolation and retention in soils. (Elevitch, 2018; Teague, 2018). A Demand Management program could encourage wider adoption of these practices while freeing up irrigation water that could help with water levels at Lake Powell. The science seems clear that even more strategic farming and ranching practices will be necessary to grow more with less water in a Colorado River Basin impacted by climate change while avoiding buy-and-dry. (Wheeler, 2021; Miller, 2021). A Demand Management program appears critical to provide agricultural producers with additional options moving forward.



Source: Jeff Lukas, @LukasClimate; data courtesy of NOAA CBRFC; https://www.cbrfc.noaa.gov/ Additional data and plots for Lake Powell inflow forecasts: https://www.cbrfc.noaa.gov/wsup/graph/front/espplot_dg.html?year=2021&id=GLDA3

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Demand Management

Compact Provisions

Upper Basin Burden

Too Little, Too Late

Purchasable Water Rights

Lake Powell & Lake Mead

Storage Abundance

"System Water"

Aridification

The Law of the River

The agreements, laws, policies, and practices that govern the use of Colorado River water constitute the "Law of the River." Complete and thorough descriptions of this canon exist elsewhere. For our purposes, it is sufficient to note the foundation of the Law of the River: *i.e.*, the Colorado River Compact of 1922. The Compact divided the river basin at Lee Ferry, Arizona, and apportioned 7.5 million acre-feet of consumptive use to the Upper Basin and 7.5 million acre-feet to the Lower Basin. Importantly, the Compact also prohibited the Upper Basin States from "caus[ing] the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years…" (Compact, 1922). The intent of this provision was to guard against the Upper Basin exceeding its apportionment from a river that experienced annual flows of 18 million acre-feet on average. When, however, climate change has reduced average flows to 12.5 million acre-feet, the non-depletion provision effectively places the entire burden of climate change on the Upper Basin. The negotiators and signatories to the Compact did not anticipate climate change and, therefore, did not intend one basin to bear the brunt of reduced river flows. For this reason, the non-depletion provision has become the chief obstacle to the equitable apportionment it was originally crafted to enforce.

This fact also suggests that minor surgery on the Law of the River provides too little medicine, too late. A recent study of reservoir elevations and inflows warns, "…the current management approach that allows only incremental changes to the Law of the River may be insufficient to adapt to the future conditions of the basin." (Wheeler, 2021). Instead, the perfect storm of climate change, aridification, and a structural deficit calls for major, evasive (and probably invasive) action.

Demand Management: Friend or Foe?

For nearly two years, the Upper Basin has engaged in lively debate about Colorado River Demand Management. Unfortunately, the hydrology has not slowed its descent to accommodate these discussions. The positive view of Demand Management holds that a program paying users to temporarily and voluntarily leave water in the river is a key tool to address a falling system in a manner that recognizes the American West's system of purchasable and transferable water rights. The negative position fears such a program would accelerate the decline of irrigated agriculture or the environment in the Upper Basin. Ironically, in a desperate attempt to cling to water that is no longer available, this position would limit agricultural water users' access to the very capital that could keep them in production. Importantly, the negative view offers no alternative solution to address a climate-change-impacted river system. Far from being a foe, read on to learn why Demand Management should be embraced like an old friend.

Pre-Continency Plan Disincentive

RE: LAKE POWELL & LAKE MEAD

Incentives matter, especially in a system of free enterprise with purchasable and transferable water rights. Prior to the signing of the Colorado River Drought Contingency Plan in 2019, sovereigns and water users in the Upper Basin of the Colorado River actually faced a structural *disincentive* to conserve water. Firmly in the grips of aridification where demand outstrips supply, how could this be? In addition to Mark Felt's (aka Deep Throat) advice to "follow the money" in the US West, it also pays to "follow the water." Following the water here brings us to the two largest reservoirs in the United States: the Upper Basin's insurance policy, Lake Powell, and the Lower Basin's bank account, Lake Mead.

Lake Mead and Lake Powell are the two largest human-made reservoirs in the United States. Lake Mead's capacity is 28,229,730 acre-feet and Lake Powell can hold 26,215,000 acre-feet of water, with a combined capacity of 54,444,730 acre-feet. At the current average inflow to the river (12,500,000 acre-feet), these two reservoirs could hold four years, four months' worth of the river's flow. As such, we have an abundance of water storage infrastructure, which means our Colorado River challenge is a water management challenge.

Any water in the Upper Basin conserved prior to 2019 was deemed "system water" the moment it hit Lake Powell. Colorado River system water is the water used to determine releases from Lake Powell, through the Grand Canyon, to Lake Mead. Because water conserved in the Upper Basin had no special designation, any water that made it to Lake Powell was used to calculate the releases and, therefore, could actually trigger a *larger* release of water from Lake Powell.

Negotiations

Faced with the threat of increasing aridification, the seven basin states and the federal government commenced emergency river management talks in 2017. Projections for Lake Powell and Lake Mead were alarming and showed that mere reliance on the operations policies then in place could bankrupt both reservoirs well in advance of the 2026 deadline for replacement criteria. (Interim Guidelines, 2007).

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Demand Management

Lower Basin Releases

Lower Basin Situation

The Upper Basin had long criticized the Lower Basin's water use that withdrew more water than flows into the system on an annual basis. The Upper Basin referred to this imbalance as "the structural deficit." Furthermore, for reasons too involved to review in detail here, the Lower Basin states were facing their own disincentives to bank water in Lake Mead. California, the largest user in the Lower Basin, wanted assurances that Arizona would refrain from ordering the release of water the Golden Bear had banked in Lake Mead. Arizona, on the other hand, felt compelled to order the release of its entire legal apportionment from Lake Mead because of its junior priority on the river (the junior priority was the sacrifice Arizona was required to make to gain congressional approval of the Central Arizona Project). The stage was set for negotiations that would determine whether terms could be reached. The Lower Basin's saga deserves its own article and I will not test your patience with it here.

Upper Basin Situation

The Upper Basin sovereigns sought more control over their shared destiny, especially given the entrenched nature and size of the structural deficit in the Lower Basin. Indeed, one of the reasons the system had not dropped even more quickly was because actual consumptive use in the Upper Basin failed, annually, to keep up with projections of greater water use. (Wheeler, 2021). Therefore, more water was showing up at Lake Powell, for subsequent release to Lake Mead, than the models predicted. This "extra" water in the system masked the real impact and rate of climate change. The true disruptive potential, however, of climate change would not remain hidden. The Lower Basin's structural deficit was so great that, even with the Upper Basin already on a physically imposed water diet, the reservoirs continued to fall. Something had to be done.

"Extra" Water Confusion

Due to political, practical, and temporal realities, any immediate solution would need to work within the existing Law of the River. For one thing, the need to act quickly was incompatible with the lengthy environmental review processes typically required when making fundamental changes to existing management policy. In an attempt to avoid legal and practical crises on the river, Upper Basin interests began discussing two concepts: 1) operation of the initial units of the Colorado River Storage Project (Flaming Gorge, Aspinall, and Navajo reservoirs) to allow releases of water to address critical Lake Powell levels; and 2) creation of a safe harbor that would allow water users to voluntarily manage their demands and send conserved water to Lake Powell, free from the threat that the volume of conserved water would trigger larger releases of water to Lake Mead.

Upper Basin Concepts

Colorado River Drought Contingency Plan

Over the course of 2018, the Upper Basin and Lower Basin concepts were discussed, debated, and eventually agreed to by the seven states and federal agency representatives. After much intrastate and interstate wrangling, the most recent addition to the Law of the River was settled on in a suite of agreements collectively known as the Colorado River Drought Contingency Plan (Contingency Plan or DCP). *See* Article, *TWR* #182 & Bovee, *TWR* #201. The states further agreed to pursue federal legislation directing the Secretary of the Interior to sign and implement the Contingency Plan agreements upon execution by the parties. On March 19, 2019, the Basin States wrote a letter to the US Congress requesting this legislation. In transmitting suggested legislative language, the Basin States noted that, much like the Contingency Plan itself, the language was "the product of collaboration and compromise" and that the Contingency Plan "will enhance existing water management tools in order to address a looming water crisis in the Colorado River Basin." (Contingency Plan, Attachment C). The states also stressed the urgency of the situation, "[i]t is the position of the Basin States, and water contractors within those states, that immediately enacting the proposed federal legislation and implementing the [Contingency Plan] reduces the probability that Lakes Powell and Mead will decline to critically low elevations — which could occur as early as 2021 — and promotes both domestic and binational participation in drought contingency planning." (Contingency Plan, Attachment C).

Contingency Plan (DCP)

Looming Crisis

When asked what the Law of the River means, many Colorado River negotiators quip, "whatever the seven states say it means." The retort proved true when, in an exceptionally polarized Congress, passage of the requested legislation occurred on April 8, 2019, a mere twenty days after the states submitted their request.

Quick Passage

The Contingency Plan consists of an umbrella "Companion Agreement" (officially titled "Agreement Concerning Colorado River Drought Contingency Management and Operations") and the following appended agreements:

- "Agreement for Drought Response Operations at the Initial Units of the Colorado River Storage Project Act"
- "Agreement regarding Storage at Colorado River Storage Project Act Reservoirs under an Upper Basin Demand Management Program"

Contingency Plan Specifics

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Demand Management

- "Lower Basin Drought Contingency Plan Agreement"
  - Exhibit 1: "Lower Basin Drought Contingency Operations"
  - Appendix 1: "Table of Extraordinary Conservation (EC) ICS available as of the Effective Date, in accordance with Section IV.A.1 of the LBOps"
- "Proposed Legislation" (Contingency Plan, 2019).

Responsive Operations of Reservoirs above Lake Powell

Lake Powell Target

The first agreement directs and authorizes the Secretary of the Interior to operate the Colorado River Storage Project Act reservoirs (Flaming Gorge, Aspinall, Navajo) to protect the Lake Powell "Target Elevation" of 3,525 feet above mean sea level. This includes the authority to take emergency action at these reservoirs. Unless the parties agree otherwise, this agreement terminates on December 31, 2025. (Contingency Plan, Attachment A1).

Demand Management

Demand Management Program

The second agreement authorizes the Secretary of the Interior to create an account "available for use by the Upper Division States" not subject to release or used to "cause a different release from Lake Powell than would have otherwise occurred under" the 2007 [Guidelines] or post 2026 operational rules." (Contingency Plan, Attachment A2). The agreement describes the four steps for approval of the Upper Basin Demand Management Program:

- First, the Upper Colorado River Commission makes findings that Demand Management is necessary.
- Second, the Upper Basin States and the Secretary of the Interior agree on the methodology, process and documentation for verification and accounting for Demand Management water.
- Third, the Upper Colorado River Commission approves of the Program.
- Finally, each Upper Basin State representative on the Upper Colorado River Commission approves the Program. (Contingency Plan, Attachment A2).

Surviving Termination (2057)

Whether or not the Law of the River is fundamentally altered under some alternative management paradigm, Demand Management is critical to the future of the Colorado River. The Contingency Plan recognizes this importance by allowing the concept of Demand Management to survive termination of the Contingency Plan through 2057. (Contingency Plan, Attachment A2).

Account Holders in Lake Powell: Sovereigns and Sovereigns Only

Sovereigns' Account

In describing the Demand Management account, the obvious is clear: sovereigns and only sovereigns are capable of holding water accounts in Lake Powell. At no point in the Basin States' contingency plan negotiations did Colorado or any other state voice support for any entity other than a sovereign holding water in the Demand Management account in Lake Powell. The signatories to the Colorado River Contingency Plan Demand Management Agreement were all signing on behalf of sovereigns and sovereigns only. (Contingency Plan, Attachment A2). Moreover, not only would private accounts held by non-sovereigns be inconsistent with the Demand Management agreement and approvals described above, but such accounts could also undermine the benefit of the bargain Colorado and the other Upper Basin States negotiated in 1922. This is because the mere existence of those accounts would move substantially closer to Upper Basin to Lower Basin transfers of water. Such transfers would fly in the face of the benefit of the bargain the Upper Basin States negotiated to use water at their own pace (as opposed to engaging in a race to develop prior appropriation rights that the Lower Basin had already won). Sovereigns and only sovereigns are or should be capable of holding water in Lake Powell. The role of a sovereign here is to design a program that encourages the participation of its non-sovereign water users (e.g. private individuals and businesses, special water districts, municipal water providers).

Holding Water in Powell

Post-Contingency Plan

PROGRAMS RESERVED TO THE STATES

Program Design

Belying the pending crisis, the Upper Basin has yet to take even the first of the four steps required for Demand Management program approval. While the signatory states created the Demand Management account upon approval by Congress and execution by the Upper Basin States, the negotiators intentionally reserved the design and detail of programs that would populate the account to the individual sovereign states.

Empty Account

While the Demand Management account now exists, it sits empty heading into yet another year of aridification. As of this writing, no state has approved a program to populate the account with water. Colorado, the state with both the largest contribution of water to the Colorado River, the largest Upper Basin apportionment, and the state where the discussion has been most involved to date, has yet to determine whether any program is feasible, achievable, worthwhile, or advisable. (CWCB, 2020).

The analogy of skydiving is apt. Thanks to the Contingency Plan, we now have a two-parachute rig strapped to our collective back. One parachute represents our ability to release water from reservoirs above Lake Powell to slow our descent. (Contingency Plan, Attachment A1). The second is Demand

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Demand Management

Approvals Needed

Banking in Powell

Conserved Water Payments

Streamflow Restoration

Water Temperature Impacts

Equitable Demand Reductions

Linkage

Management. (Contingency Plan, Attachment A2). The ground is quickly approaching. We can argue about the color of the second chute until it is too late, or we can pull the ripcord and start focusing on landing as safely as possible.

Our pace on achieving the four approvals must accelerate considerably in order for the second parachute to deploy in time. In the words of NASA Flight Director Gene Kranz, failure is not an option. Demand Management, alone, may prove insufficient to keep Lake Powell above the Target Elevation but we simply must deploy it to help arrest our descent. Making the decision to "go" requires leadership. Director Kranz speaks to this as well: "Leadership is fragile. It is more a matter of mind and heart than resources." (Kranz, 2000). Without courageous leadership, a perfectly good parachute will remain, useless, in our pack and our hard-won Demand Management account will continue to sit empty.

Demand Management Benefits

Colorado River Demand Management has the potential to benefit all water users, the environment, and regional economies. With the creation of the Demand Management account, the Upper Basin States have, for the first time, an incentive to encourage water users to conserve water for banking in Lake Powell. Moreover, because the account exists until at least 2057, this incentive does not depend on any facet of the Law of the River changing or remaining static.

The Demand Management Storage Agreement provides a path to compensated, voluntary, temporary payments for conserved water. Should Upper Basin uses have to be reduced for any reason, Demand Management is a way to effectuate that reduction in a manner that best avoids "buy-and-dry." (Colorado's Water Plan, 2015). Demand Management can help facilitate alternatives to buy-and-dry that keep water rights permanently tied to production agriculture, thereby helping increase food security.

Demand Management can also assist with streamflow restoration. Conserved water flowing to Lake Powell might be timed to maximize the benefit to endangered fish species and critical habitat in the Upper Basin. Fortunately, the decline of the Colorado River is coinciding with evolving environmental science that helps quantify the benefits when water is left in a river. (Szeptycki, 2018). These benefits can be quantified and monetized to benefit water users trying to decide whether to consume their water or to leave it in the river in a given year.

Downstream of Lake Powell, scientific analysis shows environmental benefits and detriments to both native and non-native fish species below Lake Powell depending on its contents. (Rosenberg, 2021). Cooler water temperatures result when reservoir contents are higher while warmer water is the product of lower water levels in reservoirs. While native fish may prefer warmer water temperatures from a drawn down Lake Powell, "they may also face invasion by warm water non-natives from Lake Mead." (Rosenberg, 2021). The "best strategy is an intermediate strategy, where you have water that's not too hot and not too cold…where you can still provide thermal conditions that are conducive to growth of native fish." (Dibble, 2021). Demand Management water in the Colorado River System can make it easier to hit this "Goldilocks Zone" where reservoir releases are neither too hot nor too cold.

An Urgent Call to Action

While you have been reading this article, our continued, collective skydive has brought us that much closer to an unacceptable, and unpleasant, reunion with the ground. Simple physics demands we act. Two recent studies underscore the fact that managing Upper Basin demands is critical to addressing the decline of the Colorado River. (Wheeler, 2021; Miller, 2021). One argues that "[e]quitable demand reductions will be an important part of water management in the Colorado River basin in the era of climate change." (Wheeler, 2021). A Demand Management program appears to be the most equitable and beneficial method for reducing demands without accelerating the buy-and-dry of irrigated agriculture.

Livelihoods, cultures, economies, food production, and environments are inextricably linked to the Colorado River. As such, sovereigns should involve both public and private sectors in making the next round of macro and micro water management decisions. The science seems clear that Colorado River management moving forward also requires more than a mere tweak here or there to the 2007 Guidelines for river operations. The fundamental tenants of interstate water management are overdue for a serious reevaluation. One part of the basin bearing the vast majority of climate change risk and reality is neither equitable nor sustainable. Moreover, to use a basketball analogy, the clock is not our friend. We are playing from behind and do not have the luxury of waiting until 2026 to adopt new water management policy.

Each stakeholder on the Colorado River has an important role to play and Demand Management can facilitate their involvement. By now, you probably have a sense of the roles that federal, tribal, interstate, state, and local governments play on the Colorado River. Less often discussed is the role of the private

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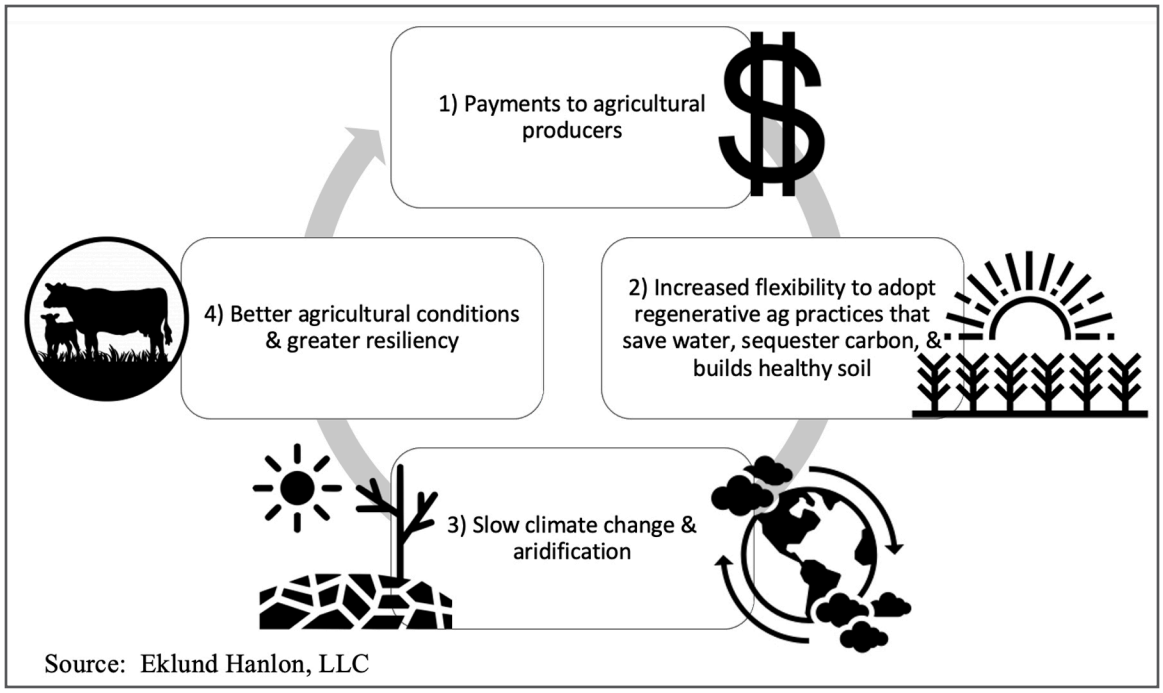
Demand Management

For-Profit Interests

sector. Importantly, private, for-profit interests include farmers and ranchers, rafting guides and flyfishing outfitters, main street businesses, and professional services industries. Given the scope and urgency of the challenge, excluding or vilifying stakeholders wastes precious time — time better spent cultivating and encouraging new water management ideas, innovation, and expertise from stakeholders from all sectors for the benefit of the Colorado River basin. (Ryder Howe, 2021). Providing agricultural producers access to capital in ways that avoid buy-and-dry and de-risk production is also important.

Demand Management Cycle



Source: Eklund Hanlon, LLC

Conclusion

The sovereigns in the Colorado River basin should move quickly to make effective, efficient, equitable, and holistic management decisions in response to climate change. Demand Management has the potential to encourage conservation, innovation, and collaboration. Allowing agricultural producers greater flexibility and options encourages regenerative agricultural practices that could help address climate change. Compensating Upper Basin water users for leaving water in the river is a critical tool currently available to us by virtue of the Contingency Plan and can help us control the system's descent. Upper Basin ranches like Mary and Ole Gunderson's and those on Ute Tribal lands, stand a chance of not only still being in active production but thriving and contributing to the solutions that save the Colorado River. In summary, effective and efficient Demand Management could jumpstart a different cycle: 1) money is paid to agricultural water users for temporarily leaving their water in the river; 2) the increased flexibility this capital provides producers increases their ability to adopt regenerative agricultural practices that save water, sequester carbon, and regenerates healthy soil; 3) regenerative practices help slow climate change and aridification; 4) slowing climate change and aridification results in better agricultural conditions and greater resiliency; and 5) a stronger agricultural sector increases yields and nutrient content that results in more money for producers.

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James Eklund advises private and public sector clients on water issues and policy at his law firm, Eklund Hanlon LLC, located in Denver, Colorado. He served the state of Colorado for over a decade as an Assistant Attorney General, legal counsel to Colorado's Governor, Director of the Colorado Water Conservation Board where he was the architect of Colorado's Water Plan, and Colorado's Colorado River representative when he signed the Colorado River Contingency Plan on behalf of the state of Colorado. He is a fifth generation Coloradan from the state's Western Slope where his great-great grandparents, Ole and Mary Gunderson, homesteaded in 1888 on a tributary to the Colorado River and where he still spends as much time as he can helping his parents run their cow-calf operation. He also teaches courses in the University of Denver's graduate environmental policy program. He loves to fly and would even stomach skydiving, depending, of course, on altitude and who packed the parachutes.

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CALENDAR

April 15 WEB
Finding and Retaining Good Leaders and Staff Webinar, 4:00 pm to 6:00 pm Eastern Time. Presented by EPA to Provide Insight Into Utility Operation & Maintenance. For info: www.epa.gov/small-and-rural-wastewater-systems/operating-and-managing-small-wastewater-and-water-utilities

April 15-16 WEB
Washington DC Roundtable: Interstate Council on Water Policy, Western States Water Council & National Water Supply Alliance Event, 4/15: Noon - 3:30 pm Central Time; 4/16: 9 am - 12:30 pm CT. Program will include Updates from the US Geological Survey, NOAA-National Weather Service, US Army Corps of Engineers, National Integrated Drought Information System, Key Congressional Committee Staff, and More. FREE / Registration Needed. For info: ICWP webpage (www.icwp.org) or WSWC webpage (https://westernstateswater.org); Sue Lowry, ICWP, 307/ 630-5804 or Sue@icwp.org

April 16 WEB
Berkeley Law's 2021 Environmental Awards Banquet, 4:00 pm to 6:00 pm Pacific Time. Presented by Center for Law, Energy, & the Environment. For info: https://na.eventscloud.com/ereg/index.php?eventid=608903&

April 16 WEB
Drought Planning Methodologies & Tools: Supply/Demand Visualization Tool & Water Demand Data Assessment Webinar, 10:00 am - Noon and 1:00 pm - 3:00 pm Pacific Time. Presented by the State Water Resources Control Board; Meeting ID: 946 4054 8166 | Passcode: 248201. For info: https://waterboards.zoom.us/j/94640548166?pwd=VDdzZWVhUWZrTzZjRGdmbjBNOEcrZz09

April 19 WEB
12th National Water Quality Monitoring Conference - "Working Together for Clean Water," National Water Quality Monitoring Council Event. For info: www.nalms.org/2021nmc/

April 19-22 CA
2021 AEP California State Conference: Planting the Seeds of Knowledge, Yosemite. Presented by Assoc. of Environmental Professionals. For info: www.califaep.org/programs.php

April 19-23 WEB
12th National Monitoring Conference: Working Together for Clean Water, Virtual Event. Presented by the National Water Quality Monitoring Council. For info: https://acwi.gov/monitoring/ or https://www.nalms.org/2021nmc/

April 21 WEB
WaterSmart Innovations Webinar, RE: Water as Hidden Resource; Marketing Native Plants; Technology & Collaborative Conservation. For info: https://watersmartinnovations.com/spring2021webinar/

April 22 WEB
Contaminated Sites Liability & Litigation Risk Webinar, 8:30 am - 5:30 pm Eastern Daylight Time. Canadian Institute Virtual Conference. For info: www.canadianinstitute.com/

April 22 WEB
Asset Management - Planning for the Future Webinar, 4:00 pm to 6:00 pm Eastern Time. Presented by EPA to Provide Insight Into Utility Operation & Maintenance. For info: www.epa.gov/small-and-rural-wastewater-systems/operating-and-managing-small-wastewater-and-water-utilities

April 22-23 WEB
Law of the Rio Grande - 20th Annual Virtual Conference, Hot Topics in Water Management & Conservation. For info: CLE International, 800/ 873-7130 or www.cle.com

April 22-23 WEB
Water Education Foundation (WEF) California Water 101 Workshop, RE: California Water History; Laws; Geography; & Politics. For info: www.watereducation.org/event-calendar

April 25-May 1 DC
Water Week 2021, Washington. TBA. Presented by National Assoc. of Clean Water Agencies. For info: www.nacwa.org/conferences-events/events-at-a-glance

April 26-28 WEB
2021 AWRA/CGWA Annual Symposium, Virtual Event. Presented by the Colorado Chapter of the American Water Resources Association & the Colorado Groundwater Association. For info: https://awracolorado.org/meetinginfo.php

April 26-29 TX
Texas Watershed Planning Short Course, Bandera. Mayan Dude Ranch. Sustainable Proactive Approaches to Managing Water Quality. For info: https://twri.tamu.edu/our-work/engaging-educating/texas-watershed-planning/workshop-schedule/2021/april/texas-watershed-planning-short-course/

April 27-28 DC
National Water Policy Fly-In, Washington. Hilton Washington DC National Mall. Presented by National Assoc. of Clean Water Agencies. For info: www.nacwa.org/conferences-events/event-at-a-glance/2021/04/27/nacwa-events/national-water-policy-fly-in

April 28 WEB
WaterSmart Innovations Webinar, RE: Reaching the Hard to Reach; Water Waste Technology; Water Efficiency Audits. For info: https://watersmartinnovations.com/spring2021webinar/

April 28 WEB
Lead and Copper Rule Revisions, EPA Roundtable, RE: Public Engagement to Obtain Further Input on EPA's Lead and Copper Rule Revisions (LCRR). For info: www.epa.gov/safewater

April 28-30 FL
PFAS Summit: Regulatory and Legal Issues; Monitoring; Treatment; Cleanup and Disposal Technologies; Tampa. Renaissance Tampa International Plaza Hotel. Attend In-Person or Virtually. For info: https://pfasforum.org

April 29 WEB
Emergency Response and Cyber Security Webinar, 4:00 pm to 6:00 pm Eastern Time. Presented by EPA to Provide Insight Into Utility Operation & Maintenance. For info: www.epa.gov/small-and-rural-wastewater-systems/operating-and-managing-small-wastewater-and-water-utilities

May 5 WEB
Lead and Copper Rule Revisions, EPA Roundtable, RE: Public Engagement to Obtain Further Input on EPA's Lead and Copper Rule Revisions (LCRR). For info: www.epa.gov/safewater

May 11-12 WEB
Emerging Water Technology Symposium, Meet Well-Known Experts from Across the Globe. For info: https://ewts.org

May 12-13 WEB
Association of California Water Agencies (ACWA) Spring Virtual Conference & Exhibition, RE: Critical Issues Affecting California's Water Industry. For info: www.watereducation.org/event-calendar

May 13 WEB
Immerse 2021 - A Virtual Benefit for the Freshwater Trust, 7pm - 8pm Pacific Time. Immerse in TFT's Analytical Approach & Data-Driven Work. For info: www.eventbrite.com/e/immerse-2021-a-virtual-benefit-for-the-freshwater-trust-tickets-138348840105

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Water Rights, Water Quality & Water Solutions in the West
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CALENDAR

(continued from previous page)

May 18-21 TN
National Pretreatment Workshop & Training, Nashville. Nashville Marriott at Vanderbilt University. Presented by National Assoc. of Clean Water Agencies. For info: www.nacwa.org/conferences-events/event-at-a-glance/2021/05/18/nacwa-events/national-pretreatment-workshop-training

May 19-20 WEB
Water & Wastewater Investor Forum, RE: New Investments; Growth Strategies; Financing Sources & Creative Deal Structures. For info: www.euci.com/events/ or 303/ 770-8800

May 25-27 VA
11th Annual Choose Clean Water Conference: A Changing Chesapeake, Richmond. TBA. For info: Drew Robinson, 443/927-8049, RobinsonAQ@nwf.org or www.choosecleanwater.org/choose-clean-water-conference/2021

May 26-27 CA
Smart Water Utilities USA 2021: Reducing Water Leakage Across the Network - Exhibition & Conference, Long Beach. Presented by the Choose Clean Water Coalition. For info: www.usa.smart-water-utilities.com/?join=VR

June 2-4 CA
20th Institute for Natural Resources Law Teachers, Monterey. TBA. Presented by Rocky Mountain Mineral Law Foundation. For info: www.rmmlf.org/conferences

June 10-11 WEB/WA
Water Law in Washington Seminar, For info: Law Seminars International, 206/ 567-4490, registrar@lawseminars.com or www.lawseminars.com

June 14-15 WI
Strategic Communications: H2O Workshop, Milwaukee. Saint Kate - The Arts Hotel. Presented by National Assoc. of Clean Water Agencies. For info: www.nacwa.org/conferences-events/event-at-a-glance/2021/06/14/nacwa-events/strategic-communications-h2o-workshop

June 18 CO
SEER Climate Change Conference, Denver. TBA. Presented by the American Bar Association - Section of Environment, Energy & Resources Law. For info: https://www.americanbar.org/groups/environment_energy_resources/events_cle/section_calendar_archive/

June 23 MT & WEB
Real Estate Development Conference, Bozeman. TBD. For info: The Seminar Group, 800/574-4852, info@theseminargroup.net or www.theseminargroup.net

June 23-24 TX
Hydraulic Fracturing & Production Chemicals 2021, Houston. Hotel Derek. For info: https://www.hydraulic-fracturing-chemicals.com/?join=VR

June 30-July 1 TX
Annual Texas Groundwater Conference, Austin. Omni Austin Hoel Southpark. Presented by the American Groundwater Trust. For info: https://agwt.org/civicrm/event/info?id=323&reset=1

June 30-July 1 WEB
Western Governors' Association 2021 Annual Meeting, TBA. For info: https://westgov.org/

Ethical Considerations in Estate Planning and Administration

David Claiborne, Parter & Founding Member, Sawtooth Law Offices, PLLC

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's

commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.13. Organization as Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14. Client with Diminished Capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.18. Duties to Prospective Client.

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Rule 3.4. Fairness to Opposing Party & Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1. Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communicating with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3. Dealing with Unrepresented Person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Fourth Amendment and Agriculture: Warrantless Access to Agricultural and Private Rural Lands

Robert Frommer and Joshua Windham

Introduction – Institute for Justice (10 minutes)

- We're a national non-profit public-interest law firm that litigates to defend constitutional rights, including property rights, free speech, and economic liberty. We do what's called strategic litigation, meaning we bring cases designed to move the law in a more pro-freedom direction over time. The goal (and our clients share this goal) is not just to help one person, but to set legal precedent that will help millions of people.

- Even before we started doing more Fourth Amendment work, we've had a long history of helping farmers push back on government abuse

    - In *DeVillier v. Texas*, 601 U.S. 285 (2024), IJ represented a Texas cattle rancher named Richie DeVillier **[Slide]** after the State of Texas built a highway barrier that flooded his land. The Fifth Amendment allows the government to take property for public use—as Texas did when it flooded Richie's land—but only if the government pays "just compensation." Texas hadn't paid Richie—it just flooded his land, land his family had worked for generations, and left him to deal with the consequences. The question in the case was whether Richie could sue Texas to seek that compensation, or whether he needed the Texas legislature's permission to do so. A couple months ago, the U.S. Supreme Court held that Richie had a right to sue Texas under Texas law—even without a statute—and allowed Richie's lawsuit to move forward. **[Opinion attached]**

    - In *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017), IJ represented Ocheessee Creamery, a small dairy farm in Florida owned by Mary Lou Wesselhoeft **[Slide]** after the Florida Department of Agriculture banned them from advertising their all-natural skim milk as . . . "skim milk" because she wanted to sell it as pure milk without additives. I'm not joking: Florida banned Mary Lou from calling her skim milk "skim milk" because she refused to add artificial ingredients back into it after skimming the fat off. In 2017, the Eleventh Circuit held that Florida's ban violated the First Amendment—farmers are allowed to truthfully describe their own products. That's free speech. **[Opinion attached]**

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- These are just a couple examples, but today we want to focus a bit more on the Fourth Amendment and how abusive searches and seizures affect rural landowners.

Fourth Amendment – Private Land (30 minutes)

- And we thought it would be useful to start with a quick primer on the Fourth Amendment, just to set the stage. The Fourth Amendment protects your right to be secure from unreasonable searches and seizures. Generally speaking, that means the government has to get a warrant based on probable cause before it searches or seize your property. If you go back and look at the historical events that inspired the Fourth Amendment, it was a response to what were called "general warrants." You can think of a general warrant like a blank check for a government official to search and seize property. They didn't require probable cause, they didn't require a specific description of the property to be searched or seized, and they didn't limit the scope of the search. They gave officials unfettered discretion to decide all of that for themselves. The Fourth Amendment was adopted, in large part, secure our property from these kinds of discretionary searches.
- The problem is, courts have invented all kinds of exceptions and loopholes that expose Americans to abusive searches and seizures. So, a few years ago, we started our Fourth Amendment Project **[Slide]** to start closing some of those loopholes. And we'd like to cover a few of those here—some we're already working on, and some that we're hoping to work more on.
    - Open fields doctrine
        - [Josh will tell the story of how he learned about the open fields doctrine using the *Rainwaters* case] **[Slide]**
        - What is the open fields doctrine? Simply put, it holds that all private land beyond the curtilage (the tiny ring of land around your home) receives zero Fourth Amendment protection. As a result, government officials can invade your land at will, roam around as they please, and spy on you—all without a warrant, probable cause, or any other limits. The open fields doctrine is essentially a general warrant for private land.
        - The U.S. Supreme Court announced the open fields doctrine exactly 100 years ago in *Hester v. United States* **[Opinion attached]**. We think that doctrine is wrong—and if you're interested in learning why, Josh wrote a law review article about it that's forthcoming in the GMU Law

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Review **[Article attached]**. But the doctrine is pretty entrenched as a matter of federal Fourth Amendment law. So we've taken a long-range approach. We're using state constitutions to push back on the doctrine at the state level, with the hopes of creating a domino effect that will one day convince SCOTUS to revisit the issue.

- [Discuss *Rainwaters*, *Highlander*, *Punxsutawney Hunting Club*, *Manuel* cases, including the recent *Rainwaters*] **[Slides for each] [Opinion attached]**

- Drone surveillance
  - Another issue related to the open fields is aerial surveillance. Unlike open fields, which is about physical entry onto private land, the aerial surveillance problem is rooted in the Supreme Court's distorted conception of the term "search" in the Fourth Amendment.
  - The Fourth Amendment forbids "unreasonable searches." But the reasonableness requirement—what most people think of as the warrant requirement—only kicks in if the government has conducted a "search" in the first place. The Supreme Court has given two definitions: (1) a physical information-gathering intrusion, and (2) a violation of a reasonable expectation of privacy. Applying that logic, the Court has upheld warrantless aerial surveillance as falling outside the definition of "search." *See California v. Ciraolo*, 476 U.S. 207 (1986). **[Opinion attached]** In our view, the Court is reading the term "search" far too narrowly.
  - [Explain our proposed ordinary meaning test—a search is a purposeful investigative act directed at you or your property] **[Tuggle amicus brief attached]**
  - [Rob will discuss *Maxon* case, and how the Michigan Court of Appeals dealt with these issues, before the Michigan Supreme Court vacated the decision and ultimately dodged the issue entirely]

- Closely regulated industries
  - A final issue we've worked on is something called the "closely regulated industries" exception to the warrant requirement. The idea here, according to the Supreme Court, is that some businesses are so "closely" or

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"pervasively" regulated that the owners of these businesses can't reasonably expect privacy. The exception allows warrantless inspections of businesses if (1) the business is closely regulated, and (2) three criteria are met: (a) the inspections are part of a regulatory scheme that furthers an important governmental interest, (b) warrantless inspections are necessary to further that interest, and (c) the regulatory scheme provides a fair substitute for a warrant by placing limits on the timing, frequency, duration, and scope of searches.

- [Josh will discuss *Patel* case and how lower courts are ignoring the limits the Supreme Court has placed on the exception by reading "closely regulated" and the various factors too loosely **[Opinion attached]**
- [Josh will discuss the *Bennett* case and how our client defeated warrantless taxidermy shop inspections there]

- There are also issues we haven't directly litigated, but that we're interested in learning more about.
    - One issue related to the open fields issue is the warrantless seizure of personal property on private land. This has come up in *Highlander* case—indeed, the warrantless seizure of game cameras is a common problem—but we have reason to think it's more widespread. It often comes up in the context of livestock seizures, for example. [Josh will briefly discuss the cattle seizure struck down in *Hopkins v. Nichols* 37 F.4th 1110 (6th Cir. 2022)] **[Opinion attached]**
    - Another issue that lies at the intersection of open fields and closely regulated industries is warrantless farm and crop inspections. We're <u>very interested</u> in filing a case about this. The problem is this: Most states have statutes authorizing Department of Agriculture officials to enter farms without a warrant to inspect plants and crops, and to conduct soil or water samples. We think these schemes violate the Fourth Amendment: They give state officials unfettered discretion to enter farms, roam around crops, and even take samples without any limits on their power.

<u>Future Efforts to Secure Private Land</u> (5 minutes)

- Our goal at IJ is to close these loopholes. In our view, private land isn't a constitutional stepchild—it's some of the oldest, most essential property we own. It's baked into our history as Americans, provides a

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way of life and a source of income for millions of people, and gives us a place to carve out a degree of privacy and autonomy for ourselves in this world. At IJ, we want to protect it. And that means, more than anything, fixing some of the major distortions in Fourth Amendment law we've talked about:

    - Restoring the ordinary meaning of the term "search" so that aerial surveillance isn't exempt from the Fourth Amendment
    - Overruling the open fields doctrine so that private land isn't subject to unfettered physical intrusions and seizures of personal property
    - Establishing that people don't give up their privacy rights when they open a business on their land—whether a taxidermy shop, a farm, or any other kind of economic use

- But to do all this, we need your help. One reason we were so excited to come to this conference was that we wanted to meet more people in the agricultural community. We need to know the regulatory problems you're facing so that we can focus our cases on problems that affect real people.
- *So, if you or somebody you know has dealt with the kinds of abuses we've talked about today, or anything similar, please come talk to us! We'd love to see if there's something we can do to help.*

Question and Answer Session (15 minutes)

Links to materials - Dropbox folder with Cases and Articles

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The Open Fields Doctrine Is Wrong

Joshua Windham[*]

Abstract. This year marks the centennial of the Fourth Amendment "open fields" doctrine. That doctrine holds that the vast majority of private land in the United States receives zero Fourth Amendment protection—and thus government officials can enter any land they please and conduct unfettered surveillance. The Supreme Court has given two main justifications for the doctrine: the Fourth Amendment's text does not mention land, and nobody can reasonably expect privacy on their land. This Article will argue that neither justification holds up. Even if "open" land deserves no Fourth Amendment protection, a contextual reading of the text and a proper application of the privacy test show that "closed" land—land we use and mark as private—deserves protection from arbitrary searches. The open fields doctrine should be overruled.

[*] Attorney and Elfie Gallun Fellow in Freedom and the Constitution, Institute for Justice. This Article reflects my personal views and not necessarily those of the Institute for Justice. Thanks to the Institute for Justice for the opportunity, to our donors for the resources, to our clients for the inspiration, and to my colleague Robert Frommer for the brainstorming.

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Introduction

Exactly a century ago, the Supreme Court held that the vast majority of private lands in the country—what it called "open fields"—receive no Fourth Amendment protection. That's true even if the lands are "closed" to the public by private use and markings that, under state trespass law, would be sufficient to exclude intruders. As a result, officials at every level can invade our land without a warrant or probable cause, roam around as they please, and even (say some courts) place cameras on the land to continue spying after they leave—and the Fourth Amendment has nothing to say.

That is wrong. The Supreme Court has given two main justifications for the open fields doctrine. In 1924, the Court gave a textual one: The Fourth Amendment protects "persons, houses, papers, and effects," but not land.[1] In 1984, the Court gave a privacy justification: Under *Katz*, the Amendment protects "reasonable expectations of privacy," and it's never reasonable to expect privacy on land beyond the curtilage (the tiny ring of land around the home).[2] While there may be reasons to question the Court's narrow reading of "houses" and effects,"[3] and the validity of the *Katz* test,[4] this Article doesn't fight those premises. Rather, I argue that the Court's textual and privacy analyses were wrong on their own terms.[5]

First, I tackle the textual argument. The Court's core error was that it failed to read the Fourth Amendment's "persons, houses, papers, and

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[1] Hester v. United States, 265 U.S. 57 (1924).

[2] Oliver v. United States, 466 U.S. 170 (1984).

[3] Specifically, I'm skeptical that "houses" means only four walls, a roof, and curtilage, and that "effects" means only personal property. *See Oliver*, 466 U.S. at 176–77, 180 & n.7. As for houses, at the founding, nine in 10 Americans lived off the land and ran "household factor[ies]" that integrated domestic and farm life in a way that "mobilized the entire family." BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 16–17 (1997). And there are, of course, myriad "houses" (warehouses, storehouses, public houses) that are not dwellings. So it seems plausible that "houses" is broader than the Euclidian concept that strikes our modern eyes. As for "effects," while some founding-era sources defined it to mean personal property, courts sometimes used it more broadly. *See, e.g.*, Hogan v. Jackson (1775) 98 Eng. Rep. 1096, 1099 (KB) (reading "effects" in a will to mean "worldly substance" or "all a man's property"); Ferguson v. Zepp, 8 F. Cas. 1154, 1155 (C.C.E.D. Pa. 1827) (No. 4,742) (same). This Article takes no position on the true meaning of these terms. The point is simply that these terms may warrant more reflection than the Court has given them.

[4] *See* William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (noting common critiques that "[t]he reasonable expectation of privacy concept has . . . serious defects, including its ambiguous meaning, it subjective analysis, its unpredictable application, its unsuitability for judicial administration, and its potential circularity").

[5] I'm not the first to critique the open fields doctrine. *See, e.g.*, Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 21–22 (1986) ("a severe threat to liberty" and "indefensible as a matter of precedent, history and common sense"); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 130–31 (2002) ("permits police to engage in what is criminal misconduct"); Elizabeth Kingston, *Keeping Up With* Jones*: The Need to Abandon the Open Fields Doctrine*, 52 CRIM. L. BULLETIN 1392 (2016) ("illogical considering existing case law"); Graeme Minchin, *The Incredible Shrinking Fourth Amendment*, 12 BEIJING L. REV. 813, 825–27 (2021) ("at odds with both constitutional rights and property law" and arose "out of thin air").

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effects" language in context. It cherry-picked five of the Amendment's 54 words-ignoring the common law, historical, and textual context in which those words arise-and assumed they exhaust its meaning. But they don't. Just as the First Amendment's text banning "Congress" from abridging "freedom of speech" doesn't exhaust its protections against censorship, the Fourth Amendment's "persons, houses, papers" language doesn't exhaust its protections from arbitrary searches. Taking the full context into account, "closed" land-land people use and mark as private -deserves Fourth Amendment protection.

Second, 1 tackle the privacy argument and reach the same conclusion from a different angle. Even if people who never use or mark their land lack a reasonable expectation of privacy, the open fields doctrine goes far beyond that. It holds that people never deserve privacy on land outside the curtilage-regardless of how they use or mark it. That's a mistake. People who use their land and take the steps required by state law to exclude intruders can reasonably expect privacy from intruders. Nor is there any good reason why curtilage sometimes deserves privacy but the land beyond it never does. The open fields doctrine should be overruled.

1. Summary of the Open Fields Doctrine

Before we can assess the open fields doctrine, we need to know how it works and how the Supreme Court has justified it. To preview, the open fields doctrine allows officials to invade the vast majority of private land in this country, and the Supreme Court has given two main reasons why: land does not appear on the Fourth Amendment's list of "persons, houses, papers, and effects," and it's never reasonable to expect privacy on land. After laying this groundwork, l'll show that neither justification holds up.

A. *The Open Fields Doctrine*

The Fourth Amendment's opening words protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." This typically means officials must get a warrant before searching private property.[6] Requiring a warrant-approval from a neutral magistrate that both certifies the official has probable cause and limits the scope of the search-ensures that private property is not "secure only in the discretion of [government] officers."[7]

The open fields doctrine holds that private land beyond the curtilage receives none of these protections. No warrant, no probable cause, and no other limits on the timing, frequency, or duration of searches. ln the

[6] Kentucky v. King, 563 U.S. 452, 459 (20n).
[7] Johnson v. United States, 333 U.S. ro, 14 (1948).

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Supreme Court's words, land has "no Fourth Amendment significance," so officials can invade it whenever and however they please.[8] Applying that logic, courts have upheld not only warrantless entries but even the warrantless installation of cameras on private land.[9]

Worse, the open fields doctrine covers the overwhelming majority of private land in the country. The Supreme Court has held that it applies to land that is "neither 'open' nor a 'field'" and despite any "steps [taken] to protect privacy."[10] In other words, it's a categorical rule. As the Sixth Circuit recently put it, "th[e] doctrine does not turn on the nuances of a particular case; the rather typical presence of fences, closed or locked gates, and 'No Trespassing' signs on an otherwise open field therefore has no constitutional import."n

Of course, the curtilage remains protected. But that's an extremely marginal issue. The Institute for Justice recently published a study that used public datasets and mapping software to measure the amount of private land that would qualify as "open fields" under current doctrine. Even assuming the curtilage extends out roo feet from every structure in the country-a generous assumption-only about 4% of all private land could even possibly qualify as curtilage.[12] The remaining 96%- about r.2 billion acres-are unprotected open fields.

B. *The Textual Justiflcation*

The Supreme Court announced the open fields doctrine in *Hester v. United States.*[13] There, federal officers got a tip that Hester was keeping moonshine at his father's farm.[14] The Supreme Court wrote shockingly little about the property, but the record shows that there was a house, a fence about 50-75 yards from the house, and a grove and a barn beyond the fence.[15] Without a warrant, the officers entered the grove, "concealed themselves," jumped the fence, saw Hester hand over a jug, and arrested

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[8] United States v. Jones, 565 U.S. 400, 4n (2012).

[9] *See, e.g.,* United States v. Vankesteren, 553 F.3d 286, 291 (4th Cir. 2009) (upholding warrantless placement of trail camera on private land); Spann v. Carter, 648 F. App'x 586, 587-88 (6th Cir. 2016) (unpublished) (same); State v. Brannon, 2015-Ohio-1488,, 32 (unpublished) (same).

[w] Oliver, 466 U.S. at 180 n.II, 182; *see also* 1 WAYNER. LAFAVE, SEARCH AND SEIZURE§ 2.4(a) (6th ed. Mar. 2024 update) ("In applying the *Hester* doctrine over the years, lower courts have applied the open fields characterization to virtually any lands not falling within the curtilage.").

"Hopkins v. Nichols, 37 F.4th mo, m8 (6th Cir. 2022) (internal quotation marks and brackets omitted).

"Joshua Windham & David Warren, Good *Fences?* Good *Luck,* REGULATION, Spring 2024, at ro-14, https://www.cato.org/regulation/spring-2024/good-fences-good-luck.

[·3] 265 U.S. 57 (1924).

[·4] *Hester,* 265 U.S. at 57-58.

[·5] Tro.f Record, *Hester,* 265 U.S. 57 (No. 243), at 15-16, 19; *see also* Saltzburg, *supra* note 5, at 8 n.32 (discussing "facts not found in the opinion" based on a review of "the entire record that was before the Supreme Court").

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him.[16] Hester moved to suppress the officers' testimony as the fruits of an unreasonable search.[17]

But the Supreme Court upheld the search. In all of two sentences, Justice Holmes declared that private land beyond the curtilage receives zero Fourth Amendment protection: "[I]t is enough to say that ... the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 BL Comm. 223, 225, 226."[18] In other words, *Hester* looked at just five of the Fourth Amendment's 54 words and reasoned: *Land is not listed, so land is not protected.*

Hester's narrow textualist approach was in step with the times. Just four years later, the Court held that tapping Roy Olmstead's phone lines to catch him selling liquor did not implicate the Fourth Amendment.[19] The Court cited *Hester* for the rule that the Amendment protects only what it lists, and reasoned that "[t]he language of the amendment cannot be extended and expanded to include telephone wires."[20] *Olmstead* was later overruled-yet *Hester* is alive and well.

C. *The Privacy Justification*

Four justices dissented in *Olmstead,* sowing the seeds of its demise. Justice Butler, joined by Justice Stone, thought the majority had erred by cabining the Fourth Amendment to the "literal meaning of the words" rather than using "the rule of liberal construction that has always been applied to provisions of the Constitution safeguarding personal rights."[21] Justice Brandeis rejected the majority's "unduly literal construction" of the text.[22] And Justice Holmes-the man who wrote Hester-panned the majority for "sticking too closely to the words of [the] law where those words impart a policy that goes beyond them."[23]

The *Olmstead* dissenters' more liberal approach prevailed in *Katz v. United States.*[24] There, the Supreme Court held that police conducted a "search" when they attached a recording device to the outside of a public phone booth to spy on Katz's private phone call.[25] The Court rejected the

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[16] *Hester,* 265 U.S. at 58; Tr. of Record, *Hester,* 265 U.S. 57 (No. 243), at 16.

[17] *Hester,* 265 U.S. at 58.

[18] *Id.* at 59.

[19] Olmstead v. United States, 277 U.S. 438, 455-57, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347, 352-53 (1967).

[20] *Olmstead,* 277 U.S. at 464-65 (citing, in part, *Hester,* 265 U.S. 57).

[21] *Id.* at 487-88 (Butler,)., dissenting); *id.* at 488 (Stone,)., dissenting) ("I agree also with ... Mr. Justice Butler so far as it deals with the merits.").

[22] *Id.* at 476 (Brandeis, J., dissenting).

[23] *Id.* at 469 (Holmes,)., dissenting).

[24] 389 U.S. 347 (1967).

[25] *Katz,* 389 U.S. at 352.

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"narrow view" that the Fourth Amendment is merely a list of "protected area[s]," reasoning that it "protects people" "from unreasonable searches" "[w]herever [they] may be."[26]

Katz brought about a sea change in Fourth Amendment law. Unlike *Hester* and *Olmstead*, which asked whether officials had invaded a listed item ("persons, houses, papers, [or] effects"), *Katz* asked whether officials had "violated the privacy upon which [a person] justifiably relied"—an inquiry that turned, at least in part, on the difference between "[w]hat a person knowingly exposes to the public" and "what he seeks to preserve as private."[27] Or, as Justice Harlan's later-adopted concurrence explained, the Fourth Amendment protects "reasonable expectation[s] of privacy."[28]

After *Katz*, there was an open question about *Hester*'s validity. While the issue loomed in *Katz*—the government cited *Hester* and Katz argued it was "wrong"—the Court did not resolve it.[29] So lawyers and scholars, armed with a new test, started arguing that landowners could establish a reasonable expectation of privacy by taking lawful steps—fences, signs, etc.—to exclude intruders.[30] These arguments were so successful that, by the early 1980s, six federal circuits and most state supreme courts had "rejected [*Hester*'s] per se rule" (*land is never protected*) in favor of *Katz*'s more fact-specific inquiry (*land is sometimes protected*).[31]

But the Supreme Court ended all that in *United States v. Oliver*.[32] Similar to *Hester*, police got an anonymous tip that Oliver was growing marijuana on his farm.[33] Without a warrant, they entered the farm, drove past a house to a locked gate posted with a "no trespassing" sign, walked past that gate, heard somebody shout "No hunting is allowed," and kept

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[26] *Id.* at 350–53, 359.

[27] *Id.* at 351–52.

[28] *Id.* at 360 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's "reasonable expectation of privacy" test).

[29] Tr. of Argument, *Katz*, 389 U.S. 347, at 9:00–9:10 (Katz's lawyer arguing "*Hester* is wrong."), 13:44–54 (Katz's lawyer distinguishing *Hester*), 21:56–22:06 (Katz's lawyer arguing "the *Hester* case has got to go"), 30:29–43 (government's lawyer relying on *Hester*), 37:40–47 (same).

[30] *See, e.g.*, Saltzburg, *supra* note 5, at 18, 22 (arguing that since "*Katz* generally permits a person to control property and to deny public access in order to keep it private," the Fourth Amendment should apply when "[p]rivate land [is] marked in a fashion to render entry thereon clearly against the wishes of the owner or person in control").

[31] At least according to one report. *See* United States v. Oliver, 686 F.2d 356, 361, 367–69 (6th Cir. 1982) (en banc) (Keith, J., dissenting) (collecting cases), *aff'd*, 466 U.S. 170 (1984).

[32] 466 U.S. 170 (1984).

[33] *Oliver*, 466 U.S. at 173–74. *Oliver* was consolidated with a similar case, *Maine v. Thornton* (No. 82-1273), which was on appeal from the Maine Supreme Court's decision that Thornton had established a reasonable expectation of privacy on his land by making efforts to exclude intruders. *Oliver*, 466 U.S. at 174–75 (citing State v. Thornton, 453 A.2d 489 (Me. 1982)); *see also* Bound by Oath, *Mr. Thornton's Woods*, INSTITUTE FOR JUSTICE (Dec. 8, 2023), https://ij.org/podcasts/bound-by-oath/mr-thorntons-woods-season-3-ep-1/ (exploring Mr. Thornton's story and interviewing him on his land).

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on walking until they reached a fenced marijuana field over a mile from Oliver's house.[34]

The Court upheld the warrantless search.[35] It began by reaffirming that "the rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment," noting that open fields are neither "houses" nor "effects" because "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[36] After reaffirming *Hester,* the Court turned to *Katz.*

The Court held that Oliver's "asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[37] The Court gave three reasons: First, "[t]here is no societal interest" in limiting "government interference or surveillance" on land. Second, fences and signs, unlike the walls of a home, don't prevent people from seeing land from the ground or air. Third, the common law treated curtilage as part of the home, which "implies ... no expectation of privacy legitimately attaches to open fields."i[8]

Since *Oliver,* the Court has returned to a "property rights baseline" that treats physical intrusions as Fourth Amendment searches.[39] In doing so, though, the Court has stressed that *Hester* remains good law. In 2012, the Court wrote that "an open field, unlike the curtilage of a home ... is not one of those protected areas enumerated in the [text]."[40] And in 2013, the Court wrote that open fields are not protected because they are "not enumerated in the ... text."[4,] Because *Hester* and every major open fields case since has started with the text, that is where my critique will start.

IL Response to the Textual Argument

The textual argument says that private land is not protected because it is "not enumerated in the [Fourth] Amendment's text."[42] The problem with this argument is that it fails to read the text in context. It isolates five of the Fourth Amendment's 54 words ("persons, houses, papers, and effects") and reads them as narrowly as possible, dropping the context in which those words arise. But context is crucial to meaning. Taking the full

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[34] *Oliver,* 466 U.S. at 173-74.

[35] *Id.* at 181, 184. In the Court's view, the entry was a "'search,' but not one 'in the constitutional sense.'" United States v. Jones, 565 U.S. 400, 4n n.8 (2012) (quoting *Oliver,* 466 U.S. at 170).

[36] *Oliver,* 466 U.S. at 176-77 & n.7 (citing Doe v. Dring (1814) ros Eng. Rep. 447, 449 (KB), and 2 WILLIAM BLACKSTONE, COMMENTARIES "16, "384, "385).

[1,] *Oliver,* 466 U.S. at 179.

[38] *Id.* at 179-80 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451,453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[39] Florida v. Jardines, 569 U.S. 1, 5 (2013) (citing *Jones,* 565 U.S. at 406 n.3).

[40] *Jones,* 565 U.S. at 4n (citing *Hester,* 265 U.S. at 59 (1924), and *Oliver,* 466 U.S. at 176-77).

[4,] Jardines, 569 U.S. at 6 (citing *Hester,* 265 U.S. 57).

[4,] *Id.*

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common law, historical, and textual context into account, the most reasonable inference to draw from the text is that "closed" land-land we use and mark as private-deserves protection from arbitrary searches.

A. *Meaning Requires Context*

Textual meaning requires context. Consider: My wife teaches fourth grade. At the beginning of every year, she gathers her students and asks them to come up with a list of classroom rules that will help promote a productive learning environment. Then she posts-or promulgates-the rules on the wall for everybody to see. One rule that shows up every year is "Keep your hands to yourself."

How should students read this rule? lf everything they need to know can be found in the dictionary definitions of those five words, then the correct reading is: *Don't touch anybody with your hands.* But that would produce some pretty odd results. Sam couldn't high-five or shake hands with Tom. Odder still, Sam could kick or throw things at Tom because, after all, the rule's text refers only to hands.

That's plainly wrong. lf Sam kicked Tom, he would be punished. And rightly so! We know that because context reveals a more sensible way to read the rule. The point of adopting the classroom rules, all agreed at the outset, was to promote a productive learning environment. Given that context, reading "Keep your hands to yourself' to mean *High-fives are banned and kicking is okay,* would defeat the point.

The better reading is: *Don't physically disrupt your classmates.* The phrase "Keep your hands to yourself' evinces-but does not exhaust-the conduct that won't be allowed in the classroom. lt provides a clear example of what *not* to do and leaves students to generalize, analogize, and infer from there. Kicking isn't mentioned, but it's forbidden.

Context plays the same role in legal interpretation. As Justice Barrett recently wrote, "the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning."[43] Sometimes, context can clarify semantic meaning (think of business norms clarifying contractual terms). Other times, semantic meaning is clear but context can clarify the inferences we ought to draw from the words (think of implied statutory preemption).

And context is equally important when reading constitutional text. Unlike statutes-easily revised solutions to the concrete policy problems of the day-constitutional provisions set the terms of the social contract, enshrine individual rights, and place limits on government power meant

[43] Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett,]., concurring) (citation omitted); *see also* Pulsifer v. United States, 144 S. Ct. 718, 730-31 (2024) (similar point about importance of reading text in context).

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to stand the test of time. By their very nature-a nature statutes do not share-constitutional provisions sweep broadly.

As Chief Justice Marshall wrote in *McCulloch v. Maryland* (1819), a constitution that tried to spell out its whole practical meaning

> would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.... Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.[44]

The Constitution does not and cannot say everything it means. But we can often *infer* meaning in particular cases from what it *does* say.

On this much, even jurists with opposing philosophies agree. Justice Antonin Scalia, an originalist, believed that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation-though not an interpretation that the language will not bear."[45] And Justice Thurgood Marshall, a living constitutionalist, believed that the Bill of Rights "was designed, not to prescribe with 'precision' ... but to identify ... fundamental human libert[ies]," and thus we should "strive, when interpreting these seminal constitutional provisions, to effectuate their purposes."[46]

Both Scalia and Marshall, notably, pointed to First Amendment law as an example of how this context-sensitive approach works in action.[47] Back to Scalia:

> Take, for example, the provision of the First Amendment that forbids abridgement of "the freedom of speech, or of the press." That phrase does not list the foll range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.[48]

Marshall made the same point: The phrase "freedom of speech" literally refers only to verbal utterances. "Yet, to give effect to the purpose of the [First Amendment], we have applied it to conduct designed to convey a message."[49]

Just think of all the non-verbal acts the Court has protected under the umbrella "freedom of speech." Marching in Nazi clothes? Protected. Nude dancing? Protected. Flag burning? Protected. Funding or refusing to fund

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44 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

41 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997) (citing *McCulloch,* 17 U.S. (4 Wheat.) at 407).

46 *Oliver,* 466 U.S. at 186-87 (Marshall,]., dissenting).

47 Scalia, *supra* note 45, at 37-38; *Oliver,* 466 U.S. at 187 n.5 (Marshall,]., dissenting).

48 Scalia, *supra* note 45, at 37-38.

49 *Oliver,* 466 U.S. at 187 n.5 (Marshall,]., dissenting) (citing Edwards v. South Carolina, 372 U.S. 229 (1963)).

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political advocacy? Protected. Listening to obscenity? Protected. Saying nothing at am Protected.[50]

Why are all these things protected? Because dictionaries don't tell us everything we need to know about the First Amendment.51 Like all Bill of Rights provisions, it embodies "broad principles."[52] So the Court doesn't just seize on the narrowest possible definition of "speech"-as *Hester* did with "houses" and *Oliver* did with "effects"-and stop there. Rather, the Court strives for "the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[53] And that means securing "rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[54]

Look at a famous example: *West Virginia State Board* of *Education v.* Barnette.[55] The plaintiffs there challenged a law that required students to recite the pledge and salute the flag, arguing that the First Amendment secured "a right of self-determination in matters that touch individual opinion."[56] Of course, the text does not mention any of that. But speech is about "communicating ideas," and without "freedom of the mind," free speech would mean nothing.[57] So there must be a broader "sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control."[58] With that deeper liberty in mind, the Court held that forcing a student to "declare a belief' "not in his mind" violates the First Amendment.[59]

The Fourth Amendment is entitled to the same broad construction. Indeed, one of the first major Fourth Amendment cases applied "the rule that constitutional provisions for the security of person and property

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[50] Nat'! Socialist Party of Am. v. Viii. of Skokie, 432 U.S. 43, 44 (1977) (per curiam) (marching in Nazi clothes); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (dancing without clothes); Texas v. Johnson, 491 U.S. 397,406 (1989) (burning the flag); Citizens United v. Fed. Election Comm'n, 558 U.S. 3ro, 339 (20ro) (ti.mdingpolitical speech); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 893-94 (2018) (refusing to fund political speech); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (listening to obscene speech); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saying nothing).

[5,] Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the Amendment's terms "(quoting NAACP v. Button, 371 U.S. 415,430 (1963)). The principle of broad construction applies to first amendment text beyond the phrase "freedom of speech." *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374,389 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society.").

[5,] *Globe Newspaper* Co., 457 U.S. at 604.

[53] Bridges v. California, 314 U.S. 252, 263 (1941).

[54] *Globe Newspaper,* 457 U.S. at 604.

[55] 319 U.S. 624 (1943).

[56] *Barnette,* 319 U.S. at 627-28, 631.

[57] *Id.* at 632, 637.

[58] *Id.* at 642. As the Court later put it: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley,* 394 U.S. at 565.

[59] *Barnette,* 319 U.S. at 631, 634, 642.

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should be liberally construed" because "[a] close and literal construction deprives them of half their efficacy."[60] The *Olmstead* dissenters cited this rule too. As Justice Butler wrote, "[t]his court has always construed the Constitution in light of the principles upon which it was founded," so the Fourth Amendment must be read to "safeguard[] against all evils that are like and equivalent to those embraced within the ordinary meaning of its words_"6,

Which raises the question: Are arbitrary searches of land "evils that are like and equivalent" to those listed in the Fourth Amendment's plain text? Yes they are. But to see why, we need to weigh the Amendment's full context. What property was secure, and insecure, at the founding? What kind of power was the Amendment adopted to constrain? What does the text around "persons, houses, papers, and effects" say about the Amendment's purpose? We'll turn to these questions now, starting with a point *Hester* raised: the common law.

B. *Common Law Trespass*

Reading *Hester,* one gets the sense that the common law protected only the home from invasions, but not the land beyond the home: "the distinction between the [open fields] and the house is as old as the common law. 4 BL Comm. 223, 225, 226."[62] In later cases, the Court cites the same part of Blackstone's *Commentaries* for the idea that only "the area immediately surrounding a dwelling house"-"not the neighboring open fields"-would have received "the same" common law protection as "the house."[63]

Just one problem: The Court's analysis relies solely on a part of the *Commentaries* about "BURGLARY, or nocturnal housebreaking," in a chapter on "Offences Against the Habitations oflndividuals."[64] This is not a fair use of the common law.[65] Obviously, a discussion of burglary will focus on the home. But if we want to understand how the Fourth

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[60] Boyd v. United States, n6 U.S. 616, 635 (1886); *see also* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory,* 48 STAN. L. REV. 555, 574-77 (1996) (noting *Boyd* "announced that [the Supreme Court] would interpret constitutional provisions protecting individual liberty expansively in order to enforce the values embodied in them; it would not be bound by restrictive canons of statutory construction").

[6'] *Olmstead,* 277 U.S. at 487-88 (Butler,)., dissenting); *id.* at 476-79 (Brandeis,)., dissenting) (applying *Boyd* principle).

[fo] *Hester,* 265 U.S. at 59 (1924) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES "'223, "'225, "'226).

[63] United States v. Dunn, 480 U.S. 294,300 & n.3 (1987); *see also Oliver,* 466 U.S. at 180.

[64] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES "'220, "'223.

[65] *See* Saltzburg, *supra* note 5, at 16 ("[T]he *[Hester]* Court neglected to mention that Blackstone described the curtilage for purposes of defining the crime ofburglary."); State v. Dixson, 766 P.2d ro15, ro22-23 (Or. 1988) ("We question Justice Holmes' reading of this section of Blackstone's treatise. In the chapter of Blackstone's *Commentaries* cited by the Supreme Court, Blackstone discussed ... burglary ..... ").

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Amendment's context informs the open fields issue, we need to know whether the common law protected land.

It did. At common law, it was illegal to trespass on private land.[66] As Blackstone himself explained in a chapter "On Trespass":

> Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close*; the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* [why he broke the close]. For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible material fence, as one field is divided from another or by a hedge; or, by an ideal, invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.[67]

Blackstone says this again and again: "[a trespass] signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property"; "the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression"; "the law of England . . . has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong."[68]

Common law trespass liability even extended to officials who acted without lawful authority.[69] The English cases widely understood to have inspired the founding generation's disdain for arbitrary searches were trespass cases that awarded damages against the officers.[70] While those cases all challenged home entries, one of them—*Entick v. Carrington*, which the Supreme Court has called a "monument of English freedom"[71] —reiterated Blackstone's point that the common law forbade trespassing on private land:

> By the laws of England, every invasion of property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[72]

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[66] *See, e.g.*, MATTHEW HALE, ANALYSIS OF THE LAW, *109 (describing common law action for "[t]respass by breaking any man's ground, hedges, [etc.], by the party (trespasser) himself, or by his command, or by his cattle, [etc.]") (cleaned up).

[67] 3 WILLIAM BLACKSTONE, COMMENTARIES *209–10.

[68] *Id.* at *209.

[69] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624–26, 661–62 (1999) ("At common law, a search or arrest was presumed an unlawful trespass unless 'justified.'").

[70] *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1196 (2016) (discussing "[t]hree influential cases [that] laid the groundwork for the Founders' rejection of general warrants: *Entick v Carrington* in 1765, *Wilkes v Wood* in 1763, and *Leach v Money* in 1765" (footnotes omitted)).

[71] *Jones*, 565 U.S. at 405 (quoting *Boyd*, 116 U.S. 626).

[72] Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (CP 1765).

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Professor Brian Sawers has defended the open fields doctrine on the ground that "Blackstone's doctrine was not accepted in the American colonies."[73] According to Sawers, "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land."[74] But the problem with the open fields doctrine—despite its name—is not that it allows invasions of land the owner has left *open to the public*, but that it allows invasions of land the owner has *closed to the public*.

The history Sawers points to draws this very distinction. He observes that "[t]he common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in. By statute, the colonials reversed the English rule, invariably within a few years of settlement."[75] This shift hardly shows that early Americans rejected the core of English trespass law: "entry on another man's ground without a lawful authority."[76] Instead, it shows that early Americans *preserved* and *adapted* trespass law to suit their novel circumstances.[77] They wanted to settle, but in a way that retained the "absolute rights of Englishmen."[78]

The early American shift to a "fence out" system, moreover, reflected a worldview that tied property rights to cultivation. John Locke famously wrote that property rights arise when a person "hath mixed" the "*Labour* of his Body . . . and the *Work* of his Hands" with "the State that Nature hath provided."[79] Blackstone agreed that "the idea of a more permanent property in the soil" arose from the need to cultivate wild land—for who

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[73] Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. U. L. REV. 471, 492 (2015).

[74] *Id.* at 490.

[75] Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 675 (2011); *see also* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 550 (1996) ("A wave of early nineteenth-century state statutes . . . appeared to reject the English 'fence-in' rule in favor of a new 'free-range' standard, which allowed stock to roam freely over private land without creating trespass liability.").

[76] 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

[77] *See* Buford v. Houtz, 133 U.S. 320, 328 (1890) (observing that "[n]early all the states in early days had what was called the 'Fence Law,'" which specified how to exclude intruders); McKee v. Gratz, 260 U.S. 127, 136 (1922) ("The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of *unenclosed and uncultivated land* in many parts at least of this country. *Over these* it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it." (emphasis added)); Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 904 (2019) (describing how colonial New Haven, Connecticut, enacted "a rigorous set of regulations govern[ing] the erection and maintenance of fences" to ensure property boundaries were marked, and even employed "one of the oldest government officials on the American continent . . . the fence-viewer . . . charged with inspecting fences to ensure they remained in good order" (cleaned up)).

[78] *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS (1772) ("The absolute Rights of Englishmen, and all freemen in or out of Civil Society, are principally, personal security[,] personal liberty[,] and private property."); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1763) (declaring "[t]he end of government . . . is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property"); *see also* 1 WILLIAM BLACKSTONE, *COMMENTARIES* *129 (listing among "the rights of the people of England" "the right of personal security, the right of personal liberty, and the right of private property").

[79] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1690).

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would toil "if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?"[80]

Locke and Blackstone were part of a broader intellectual movement that saw the right to exclude as key, but "[p]ossession—occupancy, use or labor" as the "fountainhead of property."[81] The founding generation embraced this view.[82] Which makes sense. In 1791, life happened on the land.[83] As John Dickinson wrote before the revolution: "This continent is a country of planters, farmers, and fisherman . . . ."[84] And as Justice Story recalled after: "The country was a wilderness, and the universal policy was, to procure its cultivation and improvement."[85]

The bottom line is that even if "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from *open land*,"[86] that's beside the point. Early Americans cherished both cultivation and the right to exclude, and their "fence out" system was an expression of those values. At the time the Fourth Amendment was adopted, a person who invaded fenced land—whether Washington's Mount Vernon or a frontier farm—was a trespasser. Yet it's precisely those *closed lands* that the open fields doctrine exposes to arbitrary searches.[87]

C. *No Arbitrary Searches*

A contextual reading of the Fourth Amendment also requires asking what sort of power it was meant to constrain. In First Amendment cases,

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[80] 2 WILLIAM BLACKSTONE, COMMENTARIES *7; *see also id.* at *9 (explaining that property is "originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use," where it will remain until he "abandon[s] it").

[81] Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379–403 (2003); *see also id.* at 405 ("Possession—understood as occupancy, use or labor—thus took its central place in the common-law rules concerning property."). On the topic of "possession," it's notable that several state constitutions before and after the fourth amendment's ratification protected a right to be secure in "possessions"—a term that, at the time, was widely understood to refer to land. *See* James C. Phillips, *A Corpus Linguistics Analysis of "Possessions" in American English, 1760–1776*, CHAP. L. REV. (forthcoming 2024) (manuscript at 1, 11–20 & n.1) (study showing that when Americans used the term "possessions" from 1760–1776, they were likely or clearly referring to land 86% of the time), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4668264; *see also* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protections Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 190–210 (1988) (similar argument).

[82] Mossoff, *supra* note 81, at 404.

[83] LAURIE, *supra* note 3, at 16.

[84] JOHN DICKINSON, LETTERS OF A PENNSYLVANIA FARMER (1767), Letter 11, at 21.

[85] Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829); *see* Sprankling, *supra* note 75, at 521–56 (giving examples of how "early American property law opinions justify the modification of traditional rules as necessary to adapt English law to American wilderness conditions" (footnote omitted)).

[86] Sawers, *Original Misunderstandings*, *supra* note 73, at 490 (emphasis added).

[87] While I've used Sawers as somewhat of a foil for my perspective, it's possible we'd agree on how all the major open fields cases should have been resolved. *Hester*, *Oliver*, and *Dunn* upheld entries of fenced farms. Given Sawers's focus on unfenced and unimproved land, I don't read him as defending the categorical open fields doctrine embodied in these decisions, but rather a narrower version that applies only to *open* lands.

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the Court often notes that censorship of individual expression and ideas is anathema to a free society. The founding generation did not want to live in a society where the government holds that kind of power. Can we identify a similar category of power the Fourth Amendment was adopted to limit?

History helps here. While it can't answer every interpretive question, the Fourth Amendment's "formative history" can still shed light on its "enduring purpose."[88] And, happily, for all the debate over its meaning, there's a remarkably "common consensus" that the Fourth Amendment was adopted to address "the evil of arbitrary government rummaging in people's lives."[89] It reflects a deep "[h]ostility to conferring discretionary search authority on common officers."[90]

The classic discretionary searches were carried out under English general warrants and colonial writs of assistance in famous controversies like *Paxton's Case* (1761), *Wilkes v. Wood* (1763), and *Entick v. Carrington* (1765).[91] The common law, with few exceptions, required officials to have a specific warrant—one issued by a judge, based on probable cause, and that limited the scope of the search—before invading private property.[92] General warrants violated these norms by granting discretionary power "to search unspecified places or to seize unspecified persons."[93]

Thus, when Massachusetts lawyer James Otis challenged the use of broad writs of assistance to search homes and warehouses for smuggled goods in *Paxton's Case*, he "complained that the general writ was 'a power that places the liberty of every man in the hands of every petty officer,' that it allowed officers 'to enter our houses when they please,' that it was an instrument of 'arbitrary power,' that it transformed officers into 'tyrant[s],' that it '[delegated] vast powers,' and that it failed even to impose the usual safeguard of requiring the officer to file a 'return' with the issuing court."[94]

While Otis lost *Paxton's Case*, the principle that officials should not wield discretionary power prevailed in *Wilkes* and *Entick*. Both cases arose after Lord Halifax issued general warrants for officers to search for

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[88] M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 906–07 (2010).

[89] Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 316–17 & n.189 (2016) (collecting cases and articles); *see also* Emily Berman, *Individualized Suspicion in the Age of Big Data*, 105 IOWA L. REV. 463, 479 n.69 (2020) (same).

[90] Davies, *supra* note 69, at 576–83.

[91] Friedman & Stein, *supra* note 89, at 315–16; Donohue, *supra* note 70, at 1196–1207, 1243–52.

[92] Donohue, *supra* note 70, at 1220, 1235.

[93] Michael, *supra* note 88, at 909; *see also* Davies, *supra* note 69, at 578–80 & nn.74–78 (explaining how leading common law authorities including Coke, Hale, Hawkins, and Blackstone rejected the idea that ordinary officers could wield discretionary search power).

[94] Davies, *supra* note 69, at 580–81 & n.81 (citing 2 LEGAL PAPERS OF JOHN ADAMS 140–43 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *see also* Donohue, *supra* note 70, at 1244–52 (explaining facts of *Paxton's Case*).

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the authors of papers critical of the Crown.[95] In *Wilkes,* the officers used that vast power to "ransack[] houses and printing shops in their searches, arrest[] forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seize[] incriminating papers-all under a single general warrant."[96] In *Entick,* the officers used "force and arms" to break into Entick's house, rooms, chests, and drawers, and to pore over his private papers.[97]

Wilkes and Entick sued the officers for trespass and won damages.[98] Chief Justice Pratt, echoing Otis, rejected the general warrants because they gave the officers far too much discretion. In *Wilkes,* Pratt explained that "a discretionary power given to messengers to search wherever their suspicions may chance to fall …. may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[99] Pratt struck a similar note in *Entick,* rejecting the idea that officers may search wherever they please "whenever the secretary of state shall think fit to charge, or even to suspect, a person."[100]

Part of what made the searches in *Paxton's Case, Wilkes,* and *Entick* so odious was that, unlike modern police, founding-era officers lacked inherent search power. "Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights."[101] Criminal investigation was instead a reactive process. A complainant would swear out an oath to a justice of the peace, who would decide "whether to activate the criminal justice apparatus for making arrests and searches" by issuing a warrant for an officer to track down the suspect.[102] The warrant was crucial, both to provide "binding instructions" and "to indemnify the constable against trespass claims."[103]

None of this context suggests that the Fourth Amendment tolerates discretionary searches of private land. Rather, the founding generation's disdain for arbitrary searches makes it far more likely that the point of listing "persons, houses, papers, and effects"-the property at risk in *Paxton's Case, Wilkes,* and *Entick-was* to stop discretionary searches before they spread. In the same way the First Amendment lists "freedom of speech," even though it protects a broader range of expression. In the same way "Keep your hands to yourself' calls out the paradigm case of classroom punching, even though it also forbids kicking. The reason to

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[95] Michael, *supra* note 88, at 909-ro.
[96] *Id.* at 9ro.
[97] *Id.* at 9ro-rr.
[98] *Id.*
[99] Wilkes v. Wood, 19 How St Tr n53, n67 (CP 1763).
[wo] Entick v. Carrington, 19 How. St. Tr. ro29, ro66 (CP 1765).
[w,] Davies, *supra* note 69, at 620-24.
[w,] *Id.* at 623-24.
[w3] *Id.* at 624.

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list some property was not to *exhaust,* but to *evince,* the arbitrary search power that officials should never be allowed wield.[104]

D. *The Complete Text*

Last, a contextual reading of the Fourth Amendment requires taking its whole text into account. *Hester* failed to do that. lt cherry-picked five of the Amendment's 54 words, ignoring prefatory text about the right "to be secure," text in the warrant clause about "the place to be searched," and the rule of construction that applies to all Bill of Rights provisions: the Ninth Amendment. All three points undercut *Hester*.

Start with the Fourth Amendment's first clause. Contrary to *Hester,* it does not protect only "persons, houses, papers and effects."[105] Rather, it protects *"the right of the people to be secure* in their persons, houses, papers, and effects."[106] That's a real difference. While it's clear the right "to be secure" covers the right to exclude, there's more to it.[107] Security has a broader meaning akin to freedom from threats, danger, or fear-a kind of assurance against intrusions.[108] To the founding generation, the looming threat of arbitrary searches was as much a problem as actual intrusions.[109]

Imagine a small family farm. There's a house at the center, farming throughout, and a perimeter fence. *Hester* says we only care about the house. The Fourth Amendment, though, says we should also care about the farmer's broader right "to be secure in [his] ... house[]." Surely if officers raided the farm without a warrant, posted up around the house, watched it for hours, and then placed cameras around the farm so they could continue spying after they left, that would threaten the farmer's security in his home.

The point of the right "to be secure" is that we shouldn't have to tremble in our homes or live in fear that the government will invade our persons, papers, or effects. Private land contains everything the Fourth Amendment protects. And for millions of Americans, fences and signs are how we keep strangers away from those things. Just as moats secure castles from invasion, private land secures our "persons, houses, papers,

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[104] One last analogy may help drive the point home. Suppose your kitchen floor floods. You see that your sink is leaking and hire a plumber to fix it. The plumber fixes the sink, but while doing so, spots a leaky pipe in the kitchen. Presumably, ifhe left without fixing the pipe, you"d be upset. Why? Because it doesn't matter where the water is coming from-you just don't want it on your floor. I'm making the same point about the fourth amendment. "Persons, houses, papers, effects" : arbitrary searches:: "Come fix my sink" : water on your kitchen floor.

[105] Hester v. United States, 265 U.S. 57, 59 (1924).

[106] U.S. CONST. amend. IV (emphasis added).

[107] Luke M. Milligan, *The Forgotten Right to Be Secure,* 65 HASTINGS L.J. 713, 734-50 (2014).

[108] *Id.* at 738-41.

[109] *Id.;* David H. Gans, *"We Do Not* Want *to Be Hunted": The Right to Be Secure* and Our *Constitutional Story* of Race and *Policing,* 117 COLUM. J. RACE & L. 239, 250-59 (2021).

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and effects" from arbitrary searches. By skipping past the term "secure," *Hester* discounted all that.

Or look at the Fourth Amendment's second clause. After the phrase *Hester* cites, the Amendment adds: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."no Again, founding-era officers lacked inherent search power and could typically only invade property with a warrant. By setting the bar for valid *warrants,* the founding generation was effectively dictating the requirements for valid *searches.m*

And here's the kicker: The warrant clause, which begins with "and"-implying more protection-requires a specific description of"the place to be searched." At the founding, "place" was a broad term that meant "a particular portion of space."m What is fenced land if not a "place"? The use of a term that plainly includes land at the heart of a clause designed to do much of the Fourth Amendment's lifting provides yet another clue that land deserves protection. Yet here too, *Hester* is silent.

Last, *Hester's* literalism suggests that a rule of construction-if one exists-should inform how we read the Fourth Amendment. Statutes, contracts, and the other legal documents often indicate how they should be read. And so does the Bill of Rights. The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."n[3] Of course, there are lively debates about what that means.n[4] My point isn't to stake out a position in that debate.

Rather, my point is that *Hester's* approach-a hyper-literal reading of the text-requires reading the Ninth Amendment literally too. And if we do, then it's clear the Fourth Amendment's list of "persons, houses, papers, and effects" must "not be construed to deny or disparage other rights retained by the people"-including the historical right to exclude

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no U.S. CONST. amend. IV.

m *See* Davies, *supra* note 69, at 554 ("At common law, controlling the warrant did control the ofi1cer for all practical purposes."); Gans, *supra* note ro9, at 261-62 (collecting writings from Madison, St. George Tucker, and William Rawle to the effect that the fourth amendment required specific warrants for searches).

m *See,* e.g., SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) ("Particular portion of space"); JOHN ASH, 2 THE NEW AND COMPLETE ENGLISH DICTIONARY (1775) ("a particular portion of space");)AMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) ("that part of space which any body possesses"); JOHNWALKER, A CRITICAL PRONOUNCING DICTIONARY (2d ed. 1797) ("Particular portion of space"); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("A particular portion of space, occupied or intended to be occupied by any person or thing, and considered as the space where a person or thing does or may rest or has rested, as distinct from space in general."); *see also* McCabe, *supra* note 81, at 214-15 (agreeing "place" includes land).

ni U.S. CONST. amend. IX.

n4 *See* ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 98-ro5 (2023) (summarizing debate).

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intruders.n[5] *Hester* can't it have both ways. Either we should read the text literally, in which case the Ninth Amendment says not to treat the Fourth Amendment as exhaustive, or we should read the text in context, in which case closed land deserves protection from arbitrary searches.

E. *Summary*

Hester was wrong to treat the phrase "persons, houses, papers, and effects" as an exhaustive list of what the Fourth Amendment protects. Three context clues show why: First, at common law, private land was secure from trespass, and early Americans preserved that rule with a "fence out" system. Second, at the founding, officials needed a specific warrant to search property. Discretionary searches, where they arose, were odious. Third, the whole text-the first clause's right "to be secure," the second clause's requirement that warrants describe "the place to be searched," and the Ninth Amendment's command not to the treat the "enumeration" of rights as exhaustive, all undermine *Hester's* literalism. Taking all these context clues together, the most reasonable inference to draw from the text is that closed land deserves protection from arbitrary searches.n[6]

111. Response to the Privacy Argument

The open fields doctrine is separately wrong under current doctrine if private land-at least in some cases-can satisfy the *Katz* privacy test. Under *Katz,* officials conduct a "search" when they intrude on something a person seeks to keep private and society would deem that expectation reasonable.n[7] I take no issue with the idea that, when a person makes no effort to exclude intruders, his land fails the *Katz* test.n[8] But *Oliver* went further. It held that any "expectation of privacy in open fields"-even if those fields are closed to the public-"is not an expectation that 'society

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[5] *cf:* Akhil Reed Amar, Heller, *HLR,* and *Holistic Legal Reasoning,* 122 HARV. L. REV. 145, 174-75 (2008) (arguing that even if the plain text of the Second Amendment does not include a personal right to keep arms for self-defense, reading that text together with the Ninth Amendment-which "was designed to reassure the American public that the fundamental rights that they believed they already had would not be lost merely because some of these rights were explicitly enumerated or because others were narrowly worded"-separately justifies the result in *Heller).*

[6] To borrow a phrase, arbitrary searches of fenced land are "like and equivalent to those [evils] embraced within the ordinary meaning of [the fourth amendment's] words." *Olmstead,* 277 U.S. at 487-88 (Butler,]., dissenting).

[7] *Katz,* 389 U.S. at 360 (Harlan,]., concurring) (articulating "reasonable expectation of privacy" test); *Smith,* 442 U.S. at 740 (adopting Justice Harlan's test).

[8] *See Oliver,* 466 U.S. at 193-94 (Marshall,]., dissenting) ("If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials.").

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recognizes as reasonable."'n[9] That was mistaken, and marching through *Oliver's* privacy analysis shows why.

A. *Intimate Activities*

Oliver's first point is that, unlike a home, "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[120] Every word of this is incorrect.

First, because people use different property in different ways, privacy necessarily shields distinct activities in distinct places. The mere fact that people use their land for distinct purposes than they use their home -even assuming those uses share little in common-does not make it illegitimate to expect privacy on land. The home may be where privacy expectations are highest, but it's not where they end.

Second, people engage in all sorts of intimate activities on their land. Several of my clients are landowners. I've heard them testify about how they've used their land to raise their children, to take quiet walks with their spouse, to find solitude in nature, to hunt or fish, to camp or have sex, etc. These are common activities that occur on private land across the country every day.m If privacy doesn't cover them, I don't know what privacy is for.

Third, the Court treats it as obvious that "the cultivation of crops" deserves no privacy. But that's far from obvious. At the founding, nine in ro Americans lived off the land.[122] They farmed and operated "household factories" that integrated domestic life and outdoor labor in a way that "mobilized the entire family."[123] That is, farming has long been a family enterprise. And it's one that requires autonomy and long-range focus-which requires privacy. Under *Katz,* we can reasonably expect privacy in office buildings and in cars on public roads. Why not when farming on our land?[124]

"9 *Id.* at 179.

no *Id.*

m *See id.* at 192 (Marshall,]., dissenting) ("Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refoge for wildlife, where flora and fauna are protected from human intervention of any kind." (footnotes omitted)).

m LAURIE, *supra* note 3, at 16.

ni *Id.*

"4 *Oliver,* 466 U.S. at 192 n.14 (Marshall,]., dissenting) ("We accord constitutional protection to businesses conducted in office buildings ... ; it is not apparent why businesses conducted in fields

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Fourth, even if "there is no social interest" in securing privacy on land-a big if-the Court has never weighed privacy by its social utility. Nor should it. The point of the right to exclude is that the landowner (like any other property owner) gets to choose who enters and when. lf a landowner forbids entry with a fence or signs, we can assume he regards his activities as private. Every state has a trespass statute-the modern descendants of founding-era fence statutes-that empowers landowners to exclude intruders.[125] lt defies logic to say that "society" has no interest in respecting landowners' privacy when they take every step required by state law to preserve their privacy.

B. No *Public Access*

Oliver's next point is that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. lt is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."[126] The Court is knocking down strawmen here.

The Court may be correct that land is often publicly accessible-but that's only because there is a lot of public and undeveloped private land in this country. The fact that my neighbors keep their doors open and allow public access to their homes does not mean 1 deserve no privacy in mine. Likewise, the fact that other people leave their land open to the public does not make it unreasonable for me to expect privacy on mine -especially when 1 take all the steps required under state law to exclude intruders.

Indeed, more recently, the Court has held that state "property law" reflects the expectations "recognized and permitted by society."[127] And existing data bear this out when it comes to closed land. ln a 20n study, 66.5% of respondents said that posting "no trespassing" signs on land creates a reasonable expectation of privacy.[128] ln a 1993 study, similarly, respondents said that searching fenced and posted cornfields was more

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that are not open to the public are less deserving of the benefit of the Fourth Amendment." (citation omitted)).

"5 *Compare,* e.g., 18 Pa. C.S. *§* 3503(b)(1) (empowering landowners to exclude intruders verbally or with fences or visible signs), *with* Br. for Plaintiffs-Appellants, *Punxsutawney Hunting Club v. Pennsylvania* Game *Commission* (23 WAP 2023) (case pending in the Pennsylvania Supreme Court), https://ij.org/wp-content/uploads/2021/12/Briet for-Appellants_lnternal-Correction.pdf; at 65 (App. 6) (collecting fencing statutes adopted in Pennsylvania from 1700-1905).

"6 *Oliver,* 466 U.S. at 179.

"7 Byrd v. United States, 584 U.S. 395,405 (2018).

"8 Henry F. Fradella et al., *Quantifying* Katz: *Empirically Measuring "Reasonable Expectations* of *Privacy" in the Fourth Amendment Context,* 38 AM. J. CRIM. L. 289, 354 (2orr).

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intrusive than a search of a newspaper office, a pat-down, an inspection of plumbing and wiring in a home, and the use of a beeper to track a car.[129]

Moreover, the Court's claim that fences and "no trespassing" signs don't prevent the public from "viewing open fields" is false and misses the point. If fences and signs do their jobs, people will not see the areas they could otherwise only see by entering. Indeed, that was true in every major open fields case-including *Oliver-where* officers had to enter closed land and prowl around until they found something. As for the Court's point about viewing, the open fields doctrine has never been about mere visual observation-it's about physical intrusions.

C. *The Curtilage Mistake*

Oliver's last point is that the common law treated curtilage as part of the home, which "implies that no expectation of privacy legitimately attaches to open fields."[130] This is a non sequitur. Whether the common law treated curtilage as part of the home does not tell us anything about whether it's reasonable, under *Katz,* for a person to expect privacy on his land. Indeed, *Katz* did not mention the common law at all. The question is whether a privacy expectation is reasonable-and surely a person who prays, or has sex, or holds an intimate conversation expects and deserves privacy whether she does these things in her fenced yard (curtilage) or in her fenced woods (open fields).

To the extent the common law matters under *Katz,* it would seem to matter only for the purpose of deciding whether society has historically deemed a privacy expectation reasonable. But if that's how it works, then *Oliver's* fixation on curtilage falls short. Just as the common law forbade *burglary* of the home and its curtilage, the common law forbade *trespass* onto land-a point Blackstone makes in the very section on which *Oliver* relies.[131] At common law, it was entirely reasonable to expect that people would not trespass on your land. And if people violated that expectation, you could sue them. All of that remains true today.[132]

Oliver's only other reason for drawing the line at curtilage is that a "case-by-case approach" would require "police officers ... to guess before

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[129] Christopher Slobogin & Joseph E. Schumacher, Reasonable *Expectations* of *Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look* at *"Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737-38 (1993).

[130] *Oliver,* 466 U.S. at 180 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[131] *See* 4 WILLIAM BIACKST0NE, COMMENTARIES "'226 (distinguishing "burglary" from "clausum fregit [breaking the close] ... by leaping over ideal invisible boundaries, may constitute a civil trespass").

[132] *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("[O]ne who owns or lawfolly possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude.").

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every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."[133] But just three years later, the Court adopted a four-factor curtilage test that requires officers to guess whether land is sufficiently secluded or used in ways that deserve privacy.[134] If officers are capable of applying these esoteric factors, it's hard to grasp why they would struggle to recognize "such unequivocal and universally understood manifestations of a landowner's desire for privacy" as fences and signs.[135]

D. *Summary*

Oliver's arguments for why we can never reasonably expect privacy on land lack merit. Now, as at the founding, people engage in countless deeply private activities on their land, and it's reasonable for people to expect that those activities will remain private when they take the steps required by state law to exclude intruders. Nor is there any principled reason why, if land around the home sometimes deserves privacy, land beyond that point never deserves it. The courts that held-after *Katz* but before *Oliver-that* private land can sometimes meet the *Katz* test got it right. The Supreme Court was wrong to hold otherwise.

Conclusion

Neither the textual nor the privacy justification for the open fields doctrine holds up. Taking the Fourth Amendment's full common law, historical, and textual context into account, *Hester* was wrong to read the text as a blank check for officials to invade our land whenever and however they please. And *Oliver* was wrong that it's never reasonable to expect privacy on our land. Under either analysis, closed land-land we use and mark as private-deserves protection. The Fourth Amendment was adopted to make us "secure" from arbitrary searches. The open fields doctrine reflects "an impoverished vision of that fundamental right."[136] One hundred years is enough.

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[133] *Oliver,* 466 U.S. at 181.

[134] *Dunn,* 480 U.S. at 3or; *see also id.* at 3ro (Brennan,]., dissenting) ("The [*Oliver]* Court expressly refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected.").

[135] *Oliver,* 466 U.S. at 194-95 (Marshall,]., dissenting).

[136] ***Id.*** at 197.

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N.D. Farm Bureau, Inc. v. Stenehjem

United States District Court for the District of North Dakota

September 21, 2018, Decided; September 21, 2018, Filed

Case No. 1:16-cv-137

Reporter

333 F. Supp. 3d 900 *; 2018 U.S. Dist. LEXIS 161572 **; 2018 WL 4550391

North Dakota Farm Bureau, Inc., Galegher Farms, Inc., Brian Gerrits, Breeze Dairy Group, LLC, North Dakota Pork Council, and Bill Price, Plaintiffs, vs. Wayne Stenehjem, in his official capacity as Attorney General of North Dakota, Defendant, Farmers' Educational and Cooperative Union of America North Dakota Division, d/b/a North Dakota Farmers Union, Intervenor-Defendant, Dakota Resource Council, a North Dakota Nonprofit Corporation, Intervenor-Defendant.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part *N.D. Farm Bureau, Inc. v. Stenehjem, 2019 U.S. Dist. LEXIS 145169, 2019 WL 4045643 (D.N.D., Aug. 27, 2019)*

Prior History: *N. Dakota Farm Bureau, Inc. v. Stenehjem, 2016 U.S. Dist. LEXIS 205100, 2016 WL 11782594 (D.N.D., Sept. 28, 2016)*

Core Terms

farm, family farm, limited liability company, ranch, domestic, shareholder, Farmers, residing, dormant, out-of-state, legislative history, physical presence, Dairy, contends, domestic corporation, farming operations, agriculture, declarations, district court, Pork, discriminatory purpose, pleadings, facial, definitions, severance, entities, limits, summary judgment motion, foreign corporation, statutory language

Case Summary

Overview

HOLDINGS: [1]-On its face, the family farm exception, *N.D.C.C. § 10-06.1-12*, prevents foreign corporations and foreign limited liability companies from engaging in the business of farming or owning farm land in North Dakota while permitting North Dakota corporations and limited liability companies to do so, thus, by definition, the statute had a discriminatory effect and violated the dormant *Commerce Clause*; [2]-The court ordered the State permanently enjoined from enforcing or seeking to enforce *§ 10-06.1-12* in a manner which limits its application to only North Dakota corporations and limited liability companies.

Outcome

Motions for summary judgment granted, in part, and denied, in part; motion to strike, motion to dismiss, and motion for judgment on the pleadings denied.

LexisNexis® Headnotes

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation

Business & Corporate Law > Corporations > Corporate Formation

Governments > Agriculture & Food > General Overview

Business & Corporate Law > Limited Liability

Companies > Formation

HN1[] Corporations, Corporate Formation

The Corporate or Limited Liability Company Farming law, *N.D.C.C. § 10-06.1-01 et seq.*, in its original form, the Corporate Farming Law prohibits corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. Chapter 10-06.1 is rooted in the desire to preserve rural agricultural land for use by family farmers by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.The Corporate or Limited Liability Company Farming law, *N.D.C.C. § 10-06.1-01 et seq.*, has been originally enacted in 1932 as an initiated measure. In its original form, the Corporate Farming Law prohibits corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. Chapter 10-06.1 is rooted in the desire to preserve rural agricultural land for use by family farmers by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.

Business & Corporate
Compliance > Businesses &
Corporations > Corporations > Corporate
Formation
Business & Corporate
Law > Corporations > Corporate Formation

Business & Corporate Law > Limited Liability
Companies > Formation

Governments > Agriculture & Food > General
Overview

HN2[] Corporations, Corporate Formation

N.D.C.C. § 10-06.1-12, the family farm exception, provides an exception for family farms to the general ban on corporate farming if the shareholders or members do not exceed fifteen in number, are family members within a specified degree of kinship, and meet other specified requirements. The family farm exception was added to the Corporate Farming Law in 1981. See *State v. J.P. Lamb Land Co., 401 N.W.2d 713, 715 (N.D. 1987)*. The Plaintiffs contend the family farm exception is facially discriminatory and violates the *Commerce Clause*, the Privileges and Immunities Clause, and the *Equal Protection Clause of the United States Constitution*, and *42 U.S.C. § 1983*. The Plaintiffs seek a declaration that the entirety of Chapter 10-06.1 is unconstitutional and an injunction prohibiting its enforcement.

Governments > Agriculture & Food
Business & Corporate
Compliance > Governments > Agriculture &
Food

Business & Corporate Law > Limited Liability
Companies > Formation

Business & Corporate
Compliance > Businesses &
Corporations > Corporations > Corporate
Formation
Business & Corporate
Law > Corporations > Corporate Formation

HN3[] Governments, Agriculture & Food

N.D.C.C. § 10-06.1-12 does not prohibit a domestic corporation or a domestic limited liability company from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of N.D.C.C. § 10-19.1 or the limited liability company meets all the requirements of N.D.C.C. § 10-32.1 which are not

inconsistent with the hapter.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN4[] **Supporting Materials, Affidavits**

Fed. R. Civ. P. 56(c) requires that an affidavit or declaration used to support a summary judgment motion must be made upon personal knowledge and that the content of the affidavit consists of facts that would be admissible at trial.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Fed. R. Civ. P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. Subject matter jurisdiction defines the court's authority to hear a given type of case. Jurisdictional issues are a matter for the court to resolve prior to trial.

Business & Corporate Law > Limited Liability Companies
Business & Corporate Compliance > Businesses & Corporations > Limited Liability Companies

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN6[] **Businesses & Corporations, Limited Liability Companies**

A federal district court's diversity jurisdiction is limited to civil actions where the matter in controversy exceeds $75,000 and is between citizens of different states. *28 U.S.C.S. § 1332(a)(1)*. It is well-established that diversity of citizenship is determined at the time the action is filed, and complete diversity among all parties is required under *28 U.S.C.S. § 1332* to invoke federal jurisdiction. Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship. An LLC's 's citizenship is the citizenship of each of its members.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN7[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A court deciding a motion under *Fed. R. Civ. P. 12(b)(1)* must distinguish between a facial attack and a factual attack on jurisdiction. In a facial attack, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under *Rule 12(b)(6)*. In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Civil Procedure > Preliminary Considerations > Justiciability > Case & Controversy Requirements

HN8[] **Justiciability, Case & Controversy Requirements**

U.S. Const. art. III, § 2 limits the subject matter jurisdiction of federal courts to cases and controversies. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. The three elements

which constitute the irreducible constitutional minimum of standing are injury in fact, causation, and redressability.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN9 **Summary Judgment, Burdens of Proof**

It is important to note that an inquiry into standing is not a review of the merits of the plaintiff's claims. At the summary judgment stage all material facts alleged must be accepted as true as long as they are capable of proof at trial. The burden is on the party responding to a summary judgment motion to present some evidence creating an issue of material fact on the issues of injury, causation, and redressability. Generalized allegations of injury resulting from the defendant's conduct will suffice to establish standing at the pleading stage.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN10 **Standing, Burdens of Proof**

A plaintiff's standing is distinct from the merits of the plaintiff's cause of action. Where there are multiple plaintiffs and multiple claims, at least one plaintiff must demonstrate standing for each claim and each form of relief being sought. If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the court must dismiss the action.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN11 **Standing, Burdens of Proof**

The plaintiffs meet the Article III standing requirement if any one of them has standing to sue. When a state statute is alleged to violate the dormant *Commerce Clause*, plaintiffs have standing if the law has a direct negative effect on their borrowing power, financial strength, and fiscal planning. An injury can be actual or threatened. The plaintiffs have standing to challenge the facial validity of a law when they allege an actual, well-founded fear the law will be enforced against them.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN12 **Standing, Injury in Fact**

A negative effect on borrowing power or denial of business opportunity constitute sufficient injury for Article III standing purposes.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN13 **Standing, Burdens of Proof**

It is not necessary for a plaintiff to show that he had contracted with an out-of-state company in order to show the injury necessary for standing to exist. This is because plaintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.

Civil

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN14[] Equal Protection, Nature & Scope of Protection

The basic underlying principle of the *Equal Protection Clause* requires the government to treat similarly situated people alike.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Elements

HN15[] Section 1983 Actions, Elements

In order to state a claim under *42 U.S.C.S. § 1983*, a plaintiff must allege the violation of a right, privilege, or immunity secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law, regulation, or ordinance. *Section 1983* does not itself create substantive rights or confer standing, but rather provides a remedy for the deprivations of rights established elsewhere. Standing must be established on another basis before a *section 1983* claim can proceed. In other words, a plaintiff who challenges the constitutionality of a state statute using *Section 1983* must establish only the traditional elements of Article III standing for the underlying claim as there are no Section 1983-specific standing requirements. *Section 1983*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN16[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. A court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. The non-moving party may not rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P. 56(c)(1)*. The court must consider the substantive standard of proof when ruling on a motion for summary judgment.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN17[] Congressional Duties & Powers, Commerce Clause

The *Commerce Clause* grants to the United States Congress the power to regulate Commerce among the several States. *U.S. Const. Art. I, § 8*. The *Commerce Clause* has long been understood to have a negative or dormant implication. The dormant *Commerce Clause* prohibits states from enacting laws that discriminate against or unduly burden interstate commerce. The purpose of the dormant *Commerce Clause* is to prevent states from promulgating protectionist policies which would inhibit free trade among the states. The *Commerce Clause* reflects a central concern of the Framers that was an immediate reason for calling the

Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN18 **Commerce Clause, Dormant Commerce Clause**

When a state law is challenged on dormant *Commerce Clause* grounds it is subject to a two-tiered analysis. The first tier analysis requires the court to determine whether the law discriminates against interstate commerce. Discrimination in this context means the differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later. A law can discriminate in three ways: 1) it can discriminate on its face; 2) it can have a discriminatory purpose; or 3) it can have a discriminatory effect. If a state law is determined to be discriminatory, it is per se invalid unless the state can show, under rigorous scrutiny, that it has no other means to advance the legitimate state interest. If a law is found non-discriminatory under a first tier analysis, the second tier analysis, otherwise known as the Pike balancing test, provides the law will be found unconstitutional if the burden it imposes on interstate commerce is clearly excessive in relation to its putative local benefits.

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation

Business & Corporate Law > Corporations > Corporate Formation

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Governments > Agriculture & Food > General Overview

Business & Corporate Law > Limited Liability Companies > Formation

HN19 **Corporations, Corporate Formation**

From the plain language of the definitions, it is clear that the family farm exception, *N.D.C.C. § 10-06.1-12*, requires the entity to be a North Dakota corporation or a limited liability company in order for the exception to apply. The court finds that such a requirement would clearly discriminate against out-of-state interests in violation of the dormant *Commerce Clause* under current Eighth Circuit case law. The differential treatment of in-state and out-of-state entities that benefits the former while burdening the latter violates the dormant *Commerce Clause*.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN20 **Standards of Review, Deference to Agency Statutory Interpretation**

Agency interpretation of statutory language should be given deference if the statutory language is ambiguous but not if the statutory language is clear, plain, and unambiguous. A statute is ambiguous if it is susceptible to differing but rational meanings. Statutory language must be given its most natural and obvious meaning.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

HN21[] Legislation, Interpretation

It is improper to resort to legislative history when the statute itself is plainly unambiguous. If the language of a statute is unambiguous, legislative intent is presumed clear from the face of the statute, legislative history should only be consulted when a statute contains textual ambiguity.

Governments > State & Territorial
Governments > Employees & Officials

Governments > Courts > Judicial Precedent

HN22[] State & Territorial Governments, Employees & Officials

In North Dakota, an Attorney General's opinion, while not binding on North Dakota courts, has important bearing on the construction and interpretation of a statue. An Attorney General's opinion which gives contemporaneous construction to a statute is entitled to special consideration. Legislative acquiescence over time affords an Attorney General's opinion greater weight. A weight is due an attorney general's opinion implicitly approved by the Legislature.

Business & Corporate Compliance > Businesses & Corporations > Corporations > Corporate Formation
Business & Corporate Law > Corporations > Corporate Formation

Business & Corporate Law > Limited Liability Companies > Formation

Governments > Agriculture & Food > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN23[] Corporations, Corporate Formation

The Court finds the operational requirements in N.D.C.C. § 10-06.1-12(6), the family farm exception, do not violate the dormant Commerce Clause. Despite the operational requirements do not require a physical presence on the farm, it would be helpful if the Legislature adopted a clarifying definition or otherwise revised the statutory language to make it clear no actual physical presence on the farm is required.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

Governments > Legislation > Interpretation

HN24[] Congressional Duties & Powers, Commerce Clause

To determine whether there was a discriminatory purpose behind a law, courts look to both direct and indirect evidence. Direct evidence includes statements by lawmakers and statements and conduct by drafters. Indirect evidence includes irregularities in the drafting process that hint at such a purpose.

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Legislatures

HN25[] Legislation, Interpretation

Witness testimony carries little weight in assessing legislative intent as witnesses are not lawmakers. The statements by lawmakers may evidence a discriminatory purpose.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN26[] Congressional Duties & Powers,

Commerce Clause

In some sense, every state law is enacted to further state interests. But this does not mean every state law violates the *Commerce Clause*. There must be a showing of discriminatory purpose. The *Commerce Clause* does not guarantee access to the corporate form. Noting a corporation is a creature of statute which cannot exist without the consent of the state and which is subject to whatever conditions a state may impose.

Constitutional Law > Congressional Duties & Powers > Commerce Clause

HN27 **Congressional Duties & Powers, Commerce Clause**

If a law fails any one of the three first-tier tests for facial discrimination, discriminatory purpose, or discriminatory effect, then the law survives only if the state can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

Governments > Legislation > Severability

HN28 **Legislation, Severability**

Severance is the preferred remedy under both North Dakota and federal law. The United States Supreme Court's preference is for enjoining only the unconstitutional language while leaving the remainder intact. The declaration of part of a law as being unconstitutional does not require a court to also declare the remainder void, unless all provisions are so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without the unconstitutional sections. It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the valid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. North Dakota law also contains a general savings clause which reinforces the principle of preferring severance to voiding an entire enactment. *N.D. C.C. § 1-02-20* provides that in the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

Governments > Legislation > Severability

HN29 **Legislation, Severability**

In determining whether severance is permissible, the primary question involves the ascertainment of legislative intent.

Counsel: **[**1]** For North Dakota Farm Bureau, Inc., Galegher Farms, Inc., Brian Gerrits, Breeze Dairy Group, LLC, Paul Ivesdal, North Dakota Pork Council, Bill Price, Global Beef Consultants, LLC, Plaintiffs: Claire Louise Smith, DORSEY & WHITNEY LLP, LEAD ATTORNEYS, DORSEY & WHITNEY LLP, FARGO, ND; JoLynn Markison, DORSEY & WHITNEY LLP, Minneapolis, MN.

For Attorney General of North Dakota, Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendant: Joseph P. Bialke, Matthew A. Sagsveen, Attorney General's Office, Bismarck, ND.

For Farmers' Educational and Cooperative Union of America, North Dakota Division, doing business as, North Dakota Farmers Union, Intervenor: Scott W. Carlson, LEAD ATTORNEY, Farmers' Legal Action Group, Inc., St. Paul, MN; Charles M. Carvell, PEARCE & DURICK, BISMARCK, ND.

For Dakota Resource Council, a North Dakota Non-Profit Corporation, Intervenor: Derrick L.

Braaten, JJ William England, Kyra Hill, BAUMSTARK BRAATEN LAW PARTNERS, BISMARCK, ND.

Judges: Daniel L. Hovland, Chief United States District Judge.

Opinion by: Daniel L. Hovland

Opinion

[*905] ORDER ON MOTIONS

Before the Court is Defendant North Dakota Attorney General Wayne Stenehjem's ("State") motion for partial summary judgment **[**2]** filed on June 21, 2017, and the Plaintiffs' motion for summary judgment filed on July 12, 2017. See Docket Nos. 64 and 71. Also before the Court is Defendant Dakota Resource Council's ("DRC") motion to strike filed on September 6, 2017, and Defendant Farmers' Educational and Cooperative Union of America North Dakota Division's ("Farmers Union") motion to dismiss and, in the alternative, motion for judgment on the pleadings filed on October 4, 2017. See Docket Nos. 93, 104, and 113. The motions have been fully briefed. See Docket Nos. 65, 72, 76, 78, 79, 80, 91, 92, 93-1, 95, 96, 100, 102, 105, 109, and 110. For the reasons set forth below, the motions for summary judgment are granted in part and denied in part. The motion to strike, motion to dismiss, and motion for judgment on the pleadings are denied.

I. BACKGROUND

On June 2, 2016, the Plaintiffs initiated this declaratory judgment action challenging the constitutionality of *Chapter 10-06.1 of the North Dakota Century Code*. See Docket No. 1. The Plaintiffs filed an **[*906]** amended complaint on August 17, 2016. See Docket No. 19. On January 1, 2017, the Court entered an order allowing Farmers Union and the DRC to intervene as Defendants. See Docket No. 56.

HN1[] Chapter 10-06.1 is officially known **[**3]** as the Corporate or Limited Liability Company Farming law ("Corporate Farming Law"). The Corporate Farming Law was originally enacted in 1932 as an initiated measure. See *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, 844 N.W.2d 892, 897 (N.D. 2014)*. In its original form, the Corporate Farming Law prohibited corporations from owning farm or ranch land or engaging in the business of farming or agriculture. Id. Since 1932, the law has been amended a number of times and it now permits a number of exceptions to the general rule prohibiting corporate farming. *Chapter 10-06.1* "is rooted in the desire to preserve rural agricultural land for use by family farmers" by making unlawful, with some exceptions, corporate farming and corporate ownership of farms as well as farming and ownership of farms by limited liability companies.

The Plaintiffs specifically challenge *HN2*[] *N.D.C.C. § 10-06.1-12* ("the family farm exception") which provides an exception for family farms to the general ban on corporate farming if the shareholders or members do not exceed fifteen in number, are family members within a specified degree of kinship, and meet other specified requirements. The family farm exception was added to the Corporate Farming Law in 1981. See *State v. J.P. Lamb Land Co., 401 N.W.2d 713, 715 (N.D. 1987)*. The Plaintiffs contend the family farm exception is facially **[**4]** discriminatory and violates the *Commerce Clause*, the *Privileges and Immunities Clause*, and the *Equal Protection Clause of the United States Constitution*, and *42 U.S.C. § 1983*. The Plaintiffs seek a declaration that the entirety of *Chapter 10-06.1* is unconstitutional and an injunction prohibiting its enforcement.

The relevant provisions of *Chapter 10-06.1* provide as follows:

> All corporations and limited liability companies, except as otherwise provided in this chapter, are prohibited from owning or leasing

land used for farming or ranching and from engaging in the business of farming or ranching. A corporation or a limited liability company may be a partner in a partnership that is in the business of farming or ranching only if that corporation or limited liability company complies with this chapter.

N.D.C.C. § 10-06.1-02.

HN3[⬆] This chapter does not prohibit a **domestic** corporation or a **domestic** limited liability company from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of *chapter 10-19.1* or the limited liability company meets all the requirements of *chapter 10-32.1* which are not inconsistent with this chapter. The following requirements also apply:

1. If a corporation, the corporation must not have more than fifteen shareholders. If a limited liability company, the limited **[**5]** liability company must not have more than fifteen members.
2. Each shareholder or member must be related to each of the other shareholders or members within one of the following degrees of kinship or affinity: parent, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece, great-grandparent, great-grandchild, first cousin, or the spouse of a person so related.
3. Each shareholder or member must be an individual or one of the following:

   a. A trust for the benefit of an individual or a class of individuals who are **[*907]** related to every shareholder of the corporation or member of the limited liability company within the degrees of kinship or affinity specified in this section.
   b. An estate of a decedent who was related to every shareholder of the corporation or member of the limited liability company within the degrees of kinship or affinity specified in this section.
4. A trust or an estate may not be a shareholder or member if the beneficiaries of the trust or the estate together with the other shareholders or members are more than fifteen in number.
5. Each individual who is a shareholder or member must be a citizen of the United **[**6]** States or a permanent resident alien of the United States.
6. If a corporation, the officers and directors of the corporation must be shareholders who are **actively engaged in operating the farm or ranch** and at least one of the corporation's shareholders must be an individual **residing on or operating the farm or ranch**. If a limited liability company, the governors and managers of the limited liability company must be members who are **actively engaged in operating the farm or ranch** and at least one of its members must be an individual **residing on or operating the farm or ranch**.
7. An annual average of at least sixty-five percent of the gross income of the corporation or limited liability company over the previous five years, or for each year of its existence, if less than five years, must have been derived from farming or ranching operations.
8. The income of the corporation or limited liability company from nonfarm rent, nonfarm royalties, dividends, interest, and annuities cannot exceed twenty percent of the gross income of the corporation or limited liability company.

N.D.C.C. § 10-06.1-12 (emphasis added). The dispute between the parties largely centers on the meaning of the word "domestic" and the phrases **[**7]** "actively engaged in operating the farm or ranch" and "residing on or operating the farm or ranch" in *Section 10-06.1-12*.

Plaintiff North Dakota Farm Bureau ("Farm Bureau") is a non-profit corporation organized under the laws of North Dakota, with its principal place of business in Fargo, North Dakota. The Farm

Bureau's voluntary membership consists of more than 26,000 farm, ranch, and rural families residing in North Dakota. The mission of the Farm Bureau is to advocate for agriculture and enhance the economic opportunities of its membership while promoting individual freedoms and self-reliance. The Farm Bureau contends the Corporate Farming Law interferes with its ability to fulfill its organizational purpose and injures it members because the law prohibits farmers from utilizing beneficial business structures and limits the value of their farms and ranches.

Plaintiff Galegher Farms, Inc., is a farming corporation organized under the laws of North Dakota, with its principal place of business in Thompson, North Dakota. Galegher Farms leases approximately 3,100 acres of North Dakota farmland for crop farming purposes. The president and vice-president of Galegher Farms are first cousins and currently meet **[**8]** the kinship requirements of *Chapter 10-06.1-12*. However, the president's son and the vice-president's nephew have expressed interest in becoming shareholders in the corporation but cannot as they do not meet the kinship requirements of *Section 10-06.1-12*. Galegher Farms contends it is harmed by the Corporate Farming Law's kinship requirements.

Plaintiff Brian Gerrits is an individual who resides in De Pere, Wisconsin. Gerrits **[*908]** is a member of a Wisconsin limited liability company, Breeze Dairy Group, LLC, that engages in dairy farming in Wisconsin. Gerrits contends *Chapter 10-06.1* prohibits him and Breeze Dairy from expanding into North Dakota which limits his ability to earn a living in his chosen occupation.

Plaintiff Breeze Dairy Group, LLC ("Breeze Dairy") is an LLC incorporated in the State of Wisconsin. Breeze Dairy was founded in 2003 in response to the changing farming economy. Breeze Dairy was formed in 2003 by five families who merged their dairy operations into a single limited liability company. Breeze Dairy contends it is not a "domestic" LLC as defined by North Dakota's Corporate Farming Law. For these reasons, Breeze Dairy contends it cannot expand into North Dakota and thus is harmed by **[**9]** *Chapter 10-06.1*.

Plaintiff North Dakota Pork Council ("Pork Council") is a non-profit corporation organized under the laws of North Dakota. The Pork Council promotes the interests of pork producers and provides them with educational resources and services which enhance profitability. The Pork Council contends *Chapter 10-06.1* interferes with its ability to fulfill its mission to help pork producers enhance profitably as it precludes them from utilizing beneficial business structures and limits the value of the pork production operations located within the state; causes them harm by limiting the number of pork producers in North Dakota, which in turn reduces its membership; and limits its members access to capital and thus limits the number of pork producers within North Dakota, which negatively impacts the Pork Council's membership.

Plaintiff Bill Price is an individual who resides in Center, North Dakota. Price is a farmer and rancher involved in multiple farming and ranching operations in North Dakota, including the Price Cattle Ranch which is organized as a limited liability partnership. Several of the operations in which Price is involved in have been unable to utilize the corporate **[**10]** business structure due to their inability to meet the requirements in *Chapter 10-06.1*, and they have also been unable to bring in capital through corporate investments. Price is the managing partner of Price Cattle Ranch. Price contends he would prefer to operate Price Cattle Ranch as a corporation or limited liability company but is prohibited by *Chapter 10-06.1* from doing so. Price also contends the next generation of the Price family will not be able to continue the Price Cattle Ranch as they do not meet the kinship requirements of *Section 10-06.1-12*.

Defendant Wayne Stenehjem is the Attorney General for the State of North Dakota. As Attorney General, Stenehjem is charged with enforcing

Chapter 10-06.1. The enforcement provisions include court-ordered divestment and civil penalties. See *N.D.C.C. § 10-06.1-24*.

Defendant Farmers Union is a non-profit organization founded in 1927 to provide assistance to farm families. Farmers Union is the largest general farm organization in North Dakota, with 45,500 member families. Farmers Union works to advance family farms and ranches and the quality of life for North Dakotans through member advocacy, educational programs, cooperative initiatives, and insurance services. In the early **[**11]** 1930s, Farmers Union drafted the language for what would ultimately become North Dakota's Corporate Farming Law. Farmers Union has long been committed to preserving and has actively defended North Dakota's Corporate Farming Law which it sees as the foundation of family farms, rural communities, the State's agrarian heritage, and stewardship of natural resources.

[*909] Defendant DRC is a nonprofit organization formed in 1978 with the purpose of protecting North Dakota's rural communities, family farms, agricultural economy, soil, land, and water. The DRC consists of approximately 1,000 members, more than half of whom are farmers and ranchers

II. LEGAL DISCUSSION

A. MOTION TO STRIKE

The DRC moves to strike portions of the declarations of John L. Galegher, Jr. (Docket No. 81), Brian Gerrits (Docket. No. 82), Tamra Heins (Docket No. 84), and Bill Price (Docket No. 85) filed by the Plaintiffs in support of their motion for summary judgment. See Docket No. 93. The DRC contends the declarations do not comply with *Rule 56(c) of the Federal Rules of Civil Procedure*. The Plaintiffs maintain they have complied with the requirements of *Rule 56(c)*.

HN4[↑] *Rule 56(c)* requires that an affidavit or declaration used to support a summary judgment motion must be made upon personal knowledge **[**12]** and that the content of the affidavit consists of facts that would be admissible at trial. A careful review of the declarations to which the DRC has objected reveals the Plaintiffs have complied with the rule. In this case, the Court is faced with cross-motions for summary judgment in a declaratory judgment action challenging the constitutionality of a state law. The declarations in question relate to the issue of standing and whether the Plaintiffs have suffered an injury. In this context, the witnesses are competent to give their lay opinions as to the impact of the Corporate Farming Law on themselves, their farming operations, their membership, and the organizations they operate. The Court would permit such testimony at trial. As such, the Court finds the DRC's contentions meritless and the motion is denied.

B. STANDING

The State contends the Plaintiffs lack standing to bring their *Commerce Clause* claim. Farmers Union contends the Plaintiffs lack standing to bring their claims for violation of the *Commerce Clause* (Count I), the *Privileges and Immunities Clause* (Count II), and the *Equal Protection Clause* (Count III) and *42 U.S.C. § 1983* (Count IV). The Plaintiffs concede their *Privileges and Immunities Clause* claim (Count II) should be dismissed as it is foreclosed by case law from the Eighth Circuit Court of Appeals. **[**13]** Upon careful review of the entire record, the Court concludes, for the reasons set forth below, that the Plaintiffs have standing.

HN5[↑] *Federal Rule of Criminal Procedure 12(b)(1)* governs motions to dismiss for lack of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639, 129 S. Ct. 1862, 173*

L. Ed. 2d 843 (2009). Jurisdictional issues are a matter for the Court to resolve prior to trial. *Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)*.

HN6[↑] A federal district court's diversity jurisdiction is limited to civil actions where the matter in controversy exceeds $75,000 and is between citizens of different states. *28 U.S.C. § 1332(a)(1)*. It is well-established that diversity of citizenship is determined at the time the action is filed, and complete diversity among all parties is required under *28 U.S.C. § 1332* to invoke federal jurisdiction. *Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 796 (8th Cir. 1998)*. "Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship." *OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007)*. An LLC's citizenship is the citizenship of each of its members. Id.

[*910] ***HN7***[↑] "A court deciding a motion under *Rule 12(b)(1)* must distinguish between a 'facial attack' and a 'factual attack'" on jurisdiction. *Osborn, 918 F.2d at 729 n.6*. In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it **[**14]** would defending against a motion brought under *Rule 12(b)(6)*." Id. (internal citations omitted). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of *12(b)(6)* safeguards." Id. (internal citation omitted). In this case, the facts are disputed, numerous affidavits have been submitted, and cross-motions for summary judgment are also pending. Thus, the Court will treat the motion as a factual attack, consider material outside the pleadings, and not assume the facts asserted in the complaint are true in ruling on the motion. See *Branson Label, Inc. v. City of Branson, 793 F.3d 910, 915 (8th Cir. 2015)*.

HN8[↑] Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "cases" and "controversies." *U.S. Const. art. III, § 2*. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. *Id. at 498*. The three elements which constitute the **[**15]** "irreducible constitutional minimum of standing" are injury in fact, causation, and redressability. *Lujan, 504 U.S. at 560-61*.

HN9[↑] It is important to note that an inquiry into standing is not a review of the merits of the plaintiff's claims. *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 878 (8th Cir. 2003)*. At the summary judgment stage all material facts alleged must be accepted as true as long as they are capable of proof at trial. Id. The burden is on the party responding to a summary judgment motion to present some evidence creating an issue of material fact on the issues of injury, causation, and redressability. Id. Generalized allegations of injury resulting from the defendant's conduct will suffice to establish standing at the pleading stage. See *Lujan, 504 U.S. at 561*; *Constitution Party of S.D. v. Nelson, 639 F.3d 417, 420 (8th Cir. 2011)*.

HN10[↑] A plaintiff's standing is distinct from the merits of the plaintiff's cause of action. *Am. Farm Bureau Fed'n v. United States EPA, 836 F.3d 963, 968 (8th Cir. 2016)*. Where there are multiple plaintiffs and multiple claims, at least one plaintiff must demonstrate standing for each claim and each form of relief being sought. *Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650-51, 198 L. Ed. 2d 64 (2017)*. If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the court must dismiss the action. *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist., 813 F.3d 1124, 1128 (8th Cir.*

2016).

1. COUNT I — DORMANT COMMERCE CLAUSE

The Defendants contend the Plaintiffs do not have standing to bring a dormant Commerce Clause claim because **[**16]** they have failed to introduce admissible **[*911]** evidence sufficient to establish that any Plaintiff has suffered an "actual or imminent" injury that is causally connected to any state action. The Plaintiffs contend otherwise. The Court concludes the Plaintiffs, much like the plaintiffs in *Hazeltine* and *Jones*, have standing because the Corporate Farming Law has a direct negative impact on their ability to raise out-of-state capital, earn income, increase farm values, and utilize preferred business structures. See S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003) (finding plaintiffs who expected an imminent loss of business had standing to challenge South Dakota's ban on corporate farming); Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006) (finding plaintiffs had standing to challenge a Nebraska ban on corporate farming because the law had a direct negative effect on their ability to earn income, borrow money, and optimize financial planning decisions).

HN11[] This case involves six plaintiffs. The Plaintiffs meet the Article III standing requirement if any one of them has standing to sue. N.D. v. Heydinger, 825 F.3d 912, 917 (8th Cir. 2016). When a state statute is alleged to violate the dormant Commerce Clause, plaintiffs have standing if the law "has a direct negative effect on their borrowing power, financial strength, and fiscal planning." Jones, 470 F.3d at 1267; Heydinger, 825 F.3d at 917. An injury can **[**17]** be actual or threatened. Keller v. City of Fremont, 719 F.3d 931, 947 (8th Cir. 2013). Plaintiffs have standing to challenge the facial validity of a law when they allege an "actual, well-founded fear the law will be enforced against them." Id. It is undisputed the State regularly enforces the Corporate Farming Law. As the declarations of Gerrits, Price, and Galegher demonstrate, the Plaintiffs have a reasonable belief, based upon the plain text of the statute, that the Corporate Farming Law will be enforced against them to their economic detriment. See Docket Nos. 81, 82, and 85. Thus, they have standing to assert a facial challenge to the constitutionality of the law.

Plaintiff Breeze Dairy Group is a Wisconsin LLC, and its chief executive officer is Brian Gerrits. Gerrits asserts in his declaration that Breeze Dairy would like to expand its dairy operations into North Dakota but cannot do so based on the plain language of the Corporate Farming Law which permits only "domestic" entities from farming in North Dakota. The Corporate Farming Law also requires at least one member or shareholder to "reside on or operate the farm or ranch." Breeze Dairy and Gerrits contend these restrictions prevent Breeze Dairy from expanding its farming operations **[**18]** into North Dakota, thus causing them economic harm.

Plaintiff Bill Price is a fourth generation North Dakota farmer and rancher. He has been engaged in multiple farming, ranching, and consulting operations in North Dakota over the last 25+ years. One such operation is the Price Cattle Ranch, a limited liability partnership. Price would like to bring out-of-state capital into his operations through corporate investments, but contends he is prohibited from doing so by the Corporate Farming Law. Price contends this prohibition causes him economic harm.

Plaintiff Galegher Farms, Inc. is a North Dakota corporation established in 1986. John Galegher, Jr., is the president and owner of Galegher Farms. It leases approximately 3,100 acres of North Dakota farmland for crop farming purposes. Galegher Farms would like to access out-of-state capital through corporate investment in order to fund its operations but is prohibited from doing so by the Corporate Farming Law. This prohibition increases the cost of capital investments and thus harms

Galegher Farms economically.

[*912] These injuries to Gerrits, Breeze Dairy, Price, and Galegher are comparable to the economic harms suffered by the plaintiffs in **[**19]** *Jones* and *Hazeltine*. See *Jones, 470 F.3d at 1267*; *Hazeltine, 340 F.3d at 592*. ***HN12***[⬆] A negative effect on borrowing power or denial of business opportunity constitute sufficient injury for Article III standing purposes. *Hazeltine, 340 F.3d at 592*. The Plaintiffs in this case have shown such an injury.

Contrary to the suggestion of the Defendants, the Plaintiffs here, who raise a facial challenge to the Corporate Farming Law, are not required to show they applied for and were denied certificates to farm in North Dakota in order to demonstrate an injury. ***HN13***[⬆] It is not necessary for a plaintiff to show that he had contracted with an out-of-state company in order to show the injury necessary for standing to exist. *Jones, 470 F.3d at 1267*. This is because "'plaintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.'" *Keller, 719 F.3d at 947* (quoting *Gray v. City of Valley Park, 567 F.3d 976, 984 (8th Cir.2009))*. The Plaintiffs' fears that the Corporate Farming Law will be enforced against them are well-supported by the plain language of the law and reinforced by the undisputed fact that the North Dakota Attorney General regularly enforces the law which provides **[**20]** for civil penalties and court-ordered divestment as remedies for violation of the law. See *Heydinger, 825 F.3d at 917*; see also Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., No. 47-2009-C-425 (Stutsman County Dist. Ct. Dec. 12, 2011) ("NAS I"); *Stenehjem ex rel. State v. Crosslands, Inc.*, No. 20-05-C-002 (Griggs County Dist. Ct. June 5, 2009) ("*Crosslands I* "). The Defendants' contention that the Plaintiffs have misinterpreted the Corporate Farming Law is unpersuasive as such an argument goes to the merits of the Plaintiffs' claims; such an examination being impermissible when assessing standing. *Warth, 422 U.S. at 500* ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

The Court finds the Plaintiffs have established, for purposes of standing, an actual and well-founded fear, supported by admissible evidence, that the Corporate Farming Law may be enforced against them. Having determined that a concrete and imminent injury has been shown, there can be no question that the injury has been caused by state action which can be redressed by a favorable ruling and a properly tailored injunction. *Jones, 470 F.3d at 1267*; *Keller, 719 F.3d at 947-48* (noting that when state action is subject to a facial challenge by a plaintiff **[**21]** who is a target or object of that action there is usually little question that the action has caused the plaintiff injury, and that a judgment and injunction preventing the action will redress it).

2. COUNT III — *EQUAL PROTECTION CLAUSE*

Farmers Union contends in its motion to dismiss that the Plaintiffs do not have standing to pursue an Equal Protection challenge to *Chapter 10-06.1* because they have not suffered any concrete harm. The Plaintiffs allege in the amended complaint that *Chapter 10-06.1* allows some North Dakota corporations and LLCs the opportunity to own farm land or ranch land in North Dakota while denying the same opportunities to out-of-state entities. Specifically, Plaintiffs contend *Section 10-06.1-12* creates exceptions to the general prohibition on owning farmland and ranchland **[*913]** for only domestic corporations and domestic limited liability companies, thereby treating them differently than it does foreign corporations and foreign limited liability companies. See Docket No. 19, ¶ 113.

HN14[⬆] The basic underlying principle of the *Equal Protection Clause* requires "the government to treat similarly situated people alike." *Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994)*.

As the Plaintiffs read *Section 10-06.1-12*, the family farm exception violates the simple command of the *Equal Protection Clause*, by treating corporations and limited **[**22]** liability companies interested or engaged in the business of farming and ranching differently based on where they are incorporated or organized. While the Defendants disagree with this reading of the family farm exception, it is certainly reasonable, and standing in no way depends on the merits of a plaintiff's claim or contention that particular conduct is prohibited by law. *Warth, 422 U.S. at 500*. The Plaintiffs have alleged they are harmed by the family farm exception as they are not "domestic" entities and thus are unable to take advantage of it, and it limits their access to out-of-state capital. These allegations are supported by declarations (see Docket Nos. 81, 82, 83, 85, and 97) setting forth specific facts which the Court must accept as true for purposes of determining standing. *Lujan, 504 U.S. at 561*. For instance, Breeze Dairy is a Wisconsin LLC and thus not a "domestic" LLC as the Plaintiffs read *Section 10-06.1-12*. Any member of the Farm Bureau or Pork Council seeking to take advantage of the family farm exception through the use of a "foreign" corporation or LLC would be unable to do so, while this would not be the case for "domestic" entities. The Court concludes that the Plaintiffs have adequately alleged how Chapter 10-06.1 **[**23]** injures them by treating them differently than it does domestic corporations and LLCs and individuals seeking to establish entities to own farmland or ranchland in North Dakota. Therefore, the Plaintiffs have standing to pursue an Equal Protection challenge.

3. COUNT IV — *42 U.S.C. § 1983*

HN15[↑] In order to state a claim under *42 U.S.C. § 1983*, a plaintiff must allege the violation of a right, privilege, or immunity secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law, regulation, or ordinance. *Neighborhood Enterprises, Inc. v. City of St. Louis, 540 F.3d 882, 885 (8th Cir. 2008)*. *Section 1983* does not itself create substantive rights or confer standing, but rather provides a remedy for the deprivations of rights established elsewhere. *Tarsney v. O'Keefe, 225 F.3d 929, 939 (8th Cir. 2000)*. "Standing must be established on another basis before a *section 1983* claim can proceed." Id. In other words, a plaintiff who challenges the constitutionality of a state statute using *Section 1983* must establish only the traditional elements of Article III standing for the underlying claim as there are no "*Section 1983*-specific" standing requirements. See *Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)* (finding standing to bring a claim under *Section 1983* existed because "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take **[**24]** significant and costly compliance measures or risk criminal prosecution"). Because the Plaintiffs have demonstrated they have standing to pursue their dormant *Commerce Clause* and Equal Protection claims, they also have standing to pursue relief under *42 U.S.C. § 1983*. As North Dakota Attorney General Wayne Stenehjem is the state official charged with enforcing *Chapter 10-06.1*, it was entirely **[*914]** appropriate to name him as a defendant in his official capacity. Farmers Union's arguments to the contrary go to the merits of a *Section 1983* claim rather than the standing issue and are unpersuasive.

C. JUDGMENT ON THE PLEADINGS

In the alternative to its standing argument, Farmers Union contends the amended complaint mischaracterizes and inaccurately describes the requirements of the Corporate Farming Law such that judgment on the pleadings is warranted. The Plaintiffs maintain these alleged mischaracterizations are simply their substantive position as to the proper interpretation and application of *Chapter 10-06.1*. The Court agrees that these interpretive disagreements are not

mischaracterizations that would justify judgment on the pleadings. Rather, such disputes go to the heart of the case and will be resolved below in relation to the **[**25]** summary judgment motions. Accordingly, Farmers Union's motion for judgment on the pleadings is denied.

D. DORMANT COMMERCE CLAUSE

The State and the Plaintiffs have both moved for summary judgment on the Plaintiffs' dormant *Commerce Clause* claim. ***HN16***[] Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007)*; see *Fed. R. Civ. P. 56(a)*. Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005)*. The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011)*. The non-moving party may not **[**26]** rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. Id.; *Fed. R. Civ. P. 56(c)(1)*. The court must consider the substantive standard of proof when ruling on a motion for summary judgment. *Anderson, 477 U.S. at 252*.

The Plaintiffs' dormant *Commerce Clause* contentions are two-fold. First, the Plaintiffs maintain that *Section 10-06.1-12* of the Corporate Farming Law, known as the family farm exception, prohibits out-of-state individuals and corporations from engaging in farming or ranching in North Dakota. See Docket No. 19, ¶¶ 36, 51, 57, and 70. Second, the Plaintiffs contend the family farm exception prevents North Dakota farmers from utilizing outside capital in their operations, or entering into business relationships with out-of-state corporations. See Docket No. 19, ¶¶ 36, 70, 71, and 78. Specifically, the Plaintiffs object to the phrases "domestic corporation" or "domestic limited liability company" and "actively engaged in operating the farm or ranch" and "residing on or operating the **[*915]** farm or ranch" found in the language of the family farm exception.

HN17[] The *Commerce Clause* grants to Congress the power "[t]o regulate Commerce . . . among the several States." *U.S. Const. Art. I, § 8*. The *Commerce Clause* has long been understood **[**27]** to have a "negative or dormant implication." *S. Union Co. v. Mo. Public Serv. Comm'n, 289 F.3d 503, 507 (8th Cir. 2002)*. The dormant *Commerce Clause* prohibits states from "enact[ing] laws that discriminate against or unduly burden interstate commerce." *Hazeltine, 340 F.3d at 592*. The purpose of the dormant *Commerce Clause* is to prevent states from promulgating protectionist policies which would inhibit free trade among the states. Id. The *Commerce Clause* "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Okla., 441 U.S. 322, 325, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)*.

HN18[] When a state law is challenged on dormant *Commerce Clause* grounds it is subject to a two-tiered analysis. *Hazeltine, 340 F.3d at 593*. The first tier analysis requires the court to determine whether the law discriminates against interstate commerce. *Jones, 470 F.3d at 1267*. "Discrimination in this context means the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later.'" *Hazeltine, 340 F.3d at 593* (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)*). A law can discriminate in three ways: 1) it can discriminate on its face; 2) it can have a discriminatory purpose; or 3) it can have a discriminatory effect. **[**28]** *Jones, 470 F.3d at 1267*; *Hazeltine, 340 F.3d at 593*. If a state law is determined to be discriminatory, it is *per se* invalid unless the state can show, under rigorous scrutiny, that it has no other means to advance the legitimate state interest. *Jones, 470 F.3d at 1270*; *Hazeltine, 340 F.3d at 593*. If a law is found non-discriminatory under a first tier analysis, the second tier analysis, otherwise known as the *Pike* balancing test, provides the law will be found unconstitutional "if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" *Hazeltine, 340 F.3d at 593* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*).

1. FACIAL DISCRIMINATION

The Court will first address whether the Corporate Farming Law discriminates on its face. In order to do that, the Court must address the two clauses in the family farm exception which the Plaintiffs contend violate the dormant *Commerce Clause*.

a. Domestic Corporation

The disputed portion of *Section 10-06.1-12* which references "domestic corporation" and "domestic limited liability company" provides as follows:

> This chapter does not prohibit a **domestic corporation** or a **domestic limited liability company** from owning real estate and engaging in the business of farming or ranching, if the corporation meets all the requirements of *chapter 10-19.1* or the limited liability company meets all the requirements **[**29]** of *chapter 10-32.1* which are not inconsistent with this chapter.

N.D.C.C. § 10-06.1-12 (emphasis added). The Corporate Farming Law does not define "domestic corporation" or "domestic limited liability company" but it does incorporate *North Dakota's Business Corporation Act (N.D.C.C. ch. 10-19.1*) **[*916]** and *North Dakota's Limited Liability Company Act (N.D.C.C. ch. 10-32.1*). See *N.D.C.C. §§ 10-06.1-13* and *10-06.1-14*. These Acts are fully applicable to the family farm exception, "except when inconsistent with the intent of this chapter" and thus the Court will look to them for definitions. Id.

Chapter 10-19.1 (the Business Corporation Act) defines "domestic corporation" as "a corporation, other than a foreign corporation, organized for profit and incorporated under or governed by this chapter." *N.D.C.C. § 10-19.1-01(16)*. It defines the term "foreign corporation," as "a corporation organized for profit which is incorporated under laws other than the laws of this state for a purpose for which a corporation may be incorporated under this chapter." *N.D.C.C. § 10-19.1-01(26)*. It defines "domestic limited liability company" as "a limited liability company, other than a foreign limited liability company, organized under or governed by chapter 10-32.1." *N.D.C.C. § 10-19.1-01(34)*. It defines the term "foreign limited liability company," as "a limited liability company **[**30]** organized under laws other than the laws of this state for a purpose for which a limited liability company may be organized under chapter 10-32.1." *N.D.C.C. § 10-19.1-01(27)*.

Chapter 10-32.1 (the North Dakota LLC Act) defines "domestic corporation" as "a corporation, other than a foreign corporation, organized for profit and incorporated under chapter 10-19.1." *N.D.C.C. § 10-32.1-02(9)*. It defines "domestic limited liability company" as "a limited liability company, other than a foreign limited liability company, organized under or governed by this chapter excluding a nonprofit limited liability company organized under or governed by chapter 10-36." *N.D.C.C. § 10-32.1-02(28)*. It defines the terms "foreign corporation" and "foreign limited liability company," virtually identically to the North Dakota Business Corporation Act. *N.D.C.C. §§ 10-32.1-02(20)* and *(21)*.

HN19[⬆] From the plain language of these definitions, it is clear that the family farm exception requires the entity to be a North Dakota corporation or a limited liability company in order for the exception to apply. The Court finds that such a requirement would clearly discriminate against out-of-state interests in violation of the dormant *Commerce Clause* under current Eighth Circuit case law. See *Jones, 470 F.3d at 1267* (stating differential treatment of in-state and out-of-state **[**31]** entities that benefits the former while burdening the latter violates the dormant *Commerce Clause*).

However, the Defendants maintain this interpretation of the term "domestic" is incorrect. The Defendants contend the word "domestic" means "within the United States." This position is taken by the North Dakota Attorney General, a position which effectively ignores the plain language of the statute and the laws it incorporates. The Defendants maintain this interpretation is permissible because the term "domestic" is ambiguous. The Defendants contend the meaning they afford the term "domestic" is supported by the legislative history, a state district court opinion, and is reasonable because it avoids constitutional infirmity. The Court finds that the Defendants' interpretation of the word "domestic" is unreasonable and clearly contrary to the plain language of the Corporate Farming Law and the state laws it incorporates.

Because the North Dakota Attorney General's interpretation is inconsistent with the clear and unambiguous statutory language, that interpretation need not be given deference. *Delorme v. N.D. Dep't of Human Servs., 492 N.W.2d 585, 587-88 (N.D. 1992)* (noting ***HN20***[⬆] agency interpretation of statutory language should be given deference if the statutory language is ambiguous **[**32]** but not if the statutory language is **[*917]** clear, plain, and unambiguous). A statute is ambiguous if it is susceptible to "differing but rational meanings." *Id. at 588*. Statutory language must be given its most natural and obvious meaning. *Jones, 470 F.3d at 1268*; *Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)* (noting that when the wording of a statute is unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit").

In this case, the terms "domestic corporation" and "domestic limited liability company" are expressly defined in Chapters 10-19.1 and 10-32.1 to mean a corporation or limited liability company created under the laws of North Dakota. *N.D.C.C. §§ 10-19.1-01(16)*, *(26)*, *(27)*, and *(34)* and *N.D.C.C. §§ 10-32.1-02(9)*, *(20)*, *(21)*, and *(28)*. By incorporating the requirements of Chapters 10-19.1 and 10-32.1, the Corporate Farming Law necessarily adopts those Chapters' definitions of "domestic corporation" and "domestic limited liability company." See N.D.C.C. §§ 10-06.1.13 and *10-06.1-14*. The household dictionary definitions provided by the Defendants are unpersuasive when the statute and the laws it incorporates define the terms in question. In addition, Black's Law Dictionary defines a "domestic corporation" as one "organized and chartered under the laws of a state" while a "foreign corporation" is one "organized and chartered under **[**33]** the laws of another state." Black's Law Dictionary (9th ed. 2009). The Black's Law Dictionary's definitions are consistent with the statutory definitions provided for under North

Dakota law.

As for the decision of the North Dakota state district court in *NAS I*, giving the term "domestic" the broad definition proposed by the State, the Court finds it unpersuasive. The state district court offered scant analysis in support of its conclusion and simply found the State's argument persuasive and supported by the legislative history. The lack of analysis renders the opinion unhelpful. The apparent reliance on legislative history misses the mark as well. ***HN21***[⬆] It is improper to resort to legislative history when the statute itself is plainly unambiguous. See *Olson v. Job Serv. N.D., 2013 ND 24, 826 N.W.2d 36, 40 (N.D. 2013)* (noting that if the language of a statute is unambiguous, "legislative intent is presumed clear from the face of the statute"); *Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063, 1071 (8th Cir. 2016)* (noting legislative history should only be consulted when a statute contains textual ambiguity).

While the broad meaning of the term "domestic" offered by the State is understandable from the standpoint of avoiding a dormant *Commerce Clause* violation, accepting the State's construction would render the Corporate Farming Law's incorporation **[**34]** of Chapters 10-19.1 and 10-32.1 meaningless. Because the Court can find no ambiguity in the term "domestic" as used in *Section 10-06.1-12*, and because when the term "domestic" is given its plain and ordinary meaning it gives preference to North Dakota entities, the Court finds this provision of the Corporate Farming Law clearly violates the dormant *Commerce Clause*.

b. Operational Requirements

Section 10-06.1-12(6), provides as follows:

> If a corporation, the officers and directors of the corporation must be shareholders who are **actively engaged in operating the farm or ranch** and at least one of the corporation's shareholders must be an individual **residing on or operating the farm or ranch**. If a limited liability company, the governors and managers of the limited liability company must be members who are **actively engaged in operating the farm or ranch** and at least one of its members **[*918]** must be an individual **residing on or operating the farm or ranch**.

N.D.C.C. § 10-06.1-12(6) (emphasis added). The Plaintiffs contend the emphasized language ("operational requirements") amounts to a requirement that at least one member or shareholder reside on the farm and such a requirement violates the dormant *Commerce Clause*. See *Jones, 470 F.3d at 1268* (finding the requirement of Nebraska law that at least one family member **[**35]** reside on or engage in the daily labor or management of the farm violated the dormant *Commerce Clause* as it favored Nebraska residents). A requirement that someone reside on or work on the farm clearly violates the dormant *Commerce Clause*. Id. Neither of the operational requirements are defined by the Corporate Farming Law.

The Defendants maintain North Dakota's family farm exception does not contain a day-today labor requirement, and it is not necessary for any shareholder to reside on the farm. Specifically, they contend the family farm exception's first requirement that a shareholder be "actively engaged in operating the farm or ranch" can be met by a shareholder performing management activities off-site. The Defendants argue the second requirement that at least one shareholder be "residing on or operating the farm or ranch" can also be satisfied by either residing on the farm or making operational decisions from afar and without a physical presence on the farm. The argument as to both requirements is essentially the same, namely the farm may be managed or operated from a distance or remotely without requiring a physical presence on the farm. For example, a non-resident shareholder living off the farm and outside **[**36]** North Dakota may operate a North Dakota family farm through management decisions made by that individual and the actual planting, harvesting, and

other operations may be contracted out to independent entities which perform custom agriculture services.

The dispute over the operational requirements essentially comes down to whether a physical presence in North Dakota is required to satisfy the statutory language. The Plaintiffs contend a physical presence is required while the Defendants contend no physical presence is required and management from a distance is acceptable. It is undisputed that if the Plaintiffs are correct, the dormant *Commerce Clause* is violated. Both parties have asserted reasonable interpretations of the statutory language which is not defined by the law itself.

The Defendants point to North Dakota Attorney General Opinion 82-25 (April 12, 1982) ("NDAG 82-25"), *NAS I*, and *Crosslands I* to support their interpretation of the operational requirements as not requiring a physical presence in North Dakota. See Docket Nos. 67-10, 67-11, and 67-12. The Plaintiffs contend that making management decisions from afar is a passive activity which does not satisfy the family farm exception's requirement **[**37]** of being actively engaged in the operation of the farm or ranch. See *Bornhorst v. Budzik, No. C8-90-393, 1990 Minn. App. LEXIS 851, 1990 WL 119348 (Minn. Ct. App. Aug. 21, 1990)* (unpublished) (concluding the plaintiffs were not actively engaged in farming under Minnesota law because they were simply investors who did not participate in the planting, cultivating, or harvesting of crops); *Rengstorf v. Richards, 417 N.W.2d 138 (Minn. Ct. App. 1987)* (finding the defendant was actively engaged in farming under Minnesota law because he harvested some hay himself); *7 C.F.R. § 1400.201* (discussing the meaning of actively engaged in farming under Department of Agriculture regulations as including "active personal labor" or "active personal management"). The Plaintiffs also **[*919]** point to the legislative history to support their interpretation.

In 1982, just a year after the family farm exception was enacted, the North Dakota Attorney General issued an opinion regarding the family farm exception that "a natural person who does not reside upon a farm or ranch, but manages the farming or ranching operation through employees, may incorporate that farm or ranch." See Docket No. 67-12. The Attorney General explained that the operational requirements encompass those physically doing daily work "as well those persons who make management decisions or who **[**38]** hire others to perform the physical labor needed in the operation of the farm or ranch." See Docket No. 67-12. ***HN22***[↑] In North Dakota, an Attorney General's opinion, while not binding on North Dakota courts, has "important bearing on the construction and interpretation of a statue." *Hughes v. State Farm Mut. Auto. Ins. Co., 236 N.W.2d 870, 876 (N.D. 1975)*. An Attorney General's opinion which gives contemporaneous construction to a statute is entitled to "special consideration." See *Johnson v. Wells Cty. Water Res. Bd., 410 N.W.2d 525, 529 (N.D. 1987)*; *Hilton v. N.D. Educ. Ass'n, 2002 ND 209, 655 N.W.2d 60, 65 (N.D. 2002)*.

The North Dakota Legislative Assembly has not expressed disagreement with NDAG 82-25 since the opinion was issued over three decades ago. Such legislative acquiescence over time affords an Attorney General's opinion greater weight. *N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, 625 N.W.2d 551, 563 (N.D. 2001)*; see also *Hilton, 655 N.W.2d at 65* (noting additional weight is due "an attorney general's opinion implicitly approved by the Legislature"). Since the Attorney General's opinion was issued in 1982, state agencies have relied upon NDAG 82-25 in implementing and enforcing the Corporate Farming Law. Because NDAG 82-25 was issued contemporaneously with the enactment of the family farm exception and has been impliedly approved by the North Dakota Legislature's inaction, the Court will afford it considerable weight in assessing the meaning of the operational requirements in *Section 10-06.1-12(6)*.

The family **[**39]** farm exception's operational

requirements have twice been reviewed in state district court in *NAS I* and *Crosslands I*. On both occasions, the state district court analyzed the family farm exception and found the operational requirements did not require a physical presence in North Dakota. See Docket Nos. 67-10 and 67-11. In 2009, the state district court in *Crosslands I* reviewed the family farm exception within Chapter 10-06.1, considered its text, applied principles of statutory construction, analyzed the applicable evidence, and concluded that the family farm exception "does not require persons to reside on the farm as long as there is an actively engaged person operating the farm or ranch." See Docket No. 67-11, p. 29. The state district court consequently concluded that the operational requirements in the family farm exception did not violate the dormant *Commerce Clause*. See Docket No. 67-11, p. 32. In 2011, the state district court in *NAS I* reviewed the family farm exception within Chapter 10-06.1, considered its text, applied principles of statutory construction, analyzed the applicable evidence, and concluded that the family farm exception "does not require a daily physical presence or daily **[**40]** labor to satisfy the 'actively engaged' or 'operating' requirements." See Docket No. 67-10, p. 28. The state district court further concluded that the family farm exception "does not favor North Dakota residents in close enough proximity that a daily commute is economically and physically possible." See Docket No. 67-10, p. 29. Both *NAS I* and *Crosslands I* offer reasoned analysis of the operational requirements and lend **[*920]** support to the interpretation offered by the Defendants.

The Plaintiffs argue the legislative history supports their contention that the family farm exception's operational requirements demand an actual physical presence on the farm or ranch. Specifically, the Plaintiffs rely upon exchanges between Allen Hoberg, Staff Council for the Legislative Council, and Senators Dotzenrod, Barth, Wright, and Sorum during a hearing on a 1979 bill (SB 2280). The 1979 bill, which was passed by the Legislature but vetoed by Governor Link, was similar to the 1981 bill (SB 2233) which forms the core of the current version of the Corporate Farming Law. See Ross H. Espeseth, North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law, 58 N.D. L. Rev. 283, 287 n. 38 (1982). During this exchange, Senator **[**41]** Dotzenrod stated that "there is nothing in this bill that states that an outside corporation with the qualifications of this bill couldn't come into North Dakota and buy land." See Docket No. 67-7, p. 4. Hoberg responded that "the provision in the bill states they must be 'natural' persons and must be related and actively engaged in farming in North Dakota." See Docket No. 67-7, p. 4. Senator Barth wanted it clarified that "in order to be an officer or director of the corporation, they must be actively engaged in farming or ranching" and Hoberg concurred. See Docket No. 67-7, p. 4. Senator Wright expressed concern about "outside corporations coming in to buy farm land." See Docket No. 67-7, p. 16. Senator Sorum "stated the term 'actively engaged' concerns him as it has no restrictions on it and felt it should be defined." See Docket No. 67-7, p. 16.

The Court finds these brief exchanges less than helpful in defining the operational requirements and shedding light on the question of whether an actual physical presence on the farm is required. No mention of defining the operational requirements is made. Indeed, Senator Sorum expressed a desire to define "actively engaged" but no definition **[**42]** was ever added to the bill and no discussion was held as to what a definition should entail. Further, while the 1979 bill may have been similar to the 1981 bill, the 1979 bill never became law and is not the focus of this lawsuit.

To support their interpretation, the Plaintiffs also rely on a discussion between several members of the Senate Agricultural Committee on the 1981 bill. The discussion is as follows:

> Senator Dotzenrod proposed an amendment for page 3, new subsection 10, which would say, "Each shareholder or member of the corporation must be actively engaged in operating the farm or ranch". (sic) Senator

> Sorum suggested instead that it read "the major shareholder be actively engaged in farming"; (sic) Senator Albers indicated that this might eliminate the small farmer and encourage large farms to incorporate only. In the case of off farm heirs: If one decided to sell their stock or share of the land, they could only sell to those who are actively engaged in farming the land, giving these people control of the destiny of the corporation.

See Docket No. 67-9, p. 5. While this discussion referenced the operational requirements several times, there was no mention of a physical presence **[**43]** on the farm being necessary. It would seem the discussion centered on whether some or all of the shareholders must be actively engaged in operating the farm and not on whether being actively engaged in operating the farm required a physical presence on the farm. The Court finds the discussion of little assistance.

The Plaintiffs' citation to comments made by James Marsden, then director of public affairs for the Farm Bureau, regarding **[*921]** the 1979 bill also unavailing. While statements from lawmakers are helpful in determining legislative intent, the Court gives scant weight to comments from witnesses such as Marsden, as statements from non-lawmakers are of little help in determining legislative intent. See *Jones, 470 F.3d at 1269* (noting statement by lawmakers may evidence a discriminatory purpose).

The Plaintiffs' reliance on Minnesota case law is equally unpersuasive as it bears virtually no relation to North Dakota's Corporate Farming Law, NDAG 82-25, *NAS I*, and *Crosslands I*. In addition, the provision of Minnesota law in question in *Rengstorf* and *Bornhorst* has been subject to varying interpretations. See *Federal Land Bank v. Wessels, No. C7-88-2233, 1989 Minn. App. LEXIS 493, 1989 WL 38400 (Minn. Ct. App. Apr. 25, 1989)* (unpublished) (noting a farmer residing in nursing **[**44]** home is actively engaged in operating the family farm if he is still part of the family operation of the farm, and the farmer's daughter is actively engaged in operating that same family farm if she is actively involved in financial or other aspects of the farming operation that do not require her physical presence in the state).

Further, the Plaintiffs' reliance on federal regulations is also unpersuasive. The cited federal regulation defines eligibility for farm program payments. See *7 C.F.R. § 1400.201(b)*. The regulation acknowledges active personal management alone can meet the requirement of being "actively engaged" in farming. Id. "Actively engaged in farming" means, in part, "active personal labor or active personal management, or a combination of active personal labor and active personal management." Id. Active personal management is defined as personally providing and participating in:

> (1) The general supervision and direction of activities and labor involved in the farming operation; or
>
> (2) Services (whether performed on-site or off-site) reasonably related and necessary to the farming operation, including:
>
> (i) Supervision of activities necessary in the farming operation, including activities involved **[**45]** in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities, as well as activities required to establish and maintain conserving cover crops on CRP acreage and activities required in livestock operations;
> (ii) Business-related actions, which include discretionary decision making;
> (iii) Evaluation of the financial condition and needs of the farming operation;
> (iv) Assistance in the structuring or preparation of financial reports or analyses for the farming operation;
>
> (v) Consultations in or structuring of business-related financing arrangements for the farming operation;

(vi) Marketing and promotion of agricultural commodities produced by the farming operation;
(vii) Acquiring technical information used in the farming operation; and

(viii) Any other management function reasonably necessary to conduct the farming operation and for which service the farming operation would ordinarily be charged a fee.

7 C.F.R. § 1400.3 (emphasis added). These activities do not have a physical presence requirement and would tend to support the position of the Defendants more so than the position of the Plaintiffs. Specifically, this definition acknowledges that management may be performed **[**46]** off-site and still meet the definition of "actively engaged in **[*922]** farming." Mud on the boots is not required.

Unlike North Dakota's family farm exception, both the Nebraska and South Dakota laws at issue in *Jones* and *Hazeltine* included explicit language requiring a physical presence on the farm. *Jones, 470 F.3d at 1265* and *1268* (citing *Neb. Const. art. XII, § 8*); *Hazeltine, 340 F.3d at 587-88* (citing *S.D. Const. art. XVII, § 22, cl. 1*). The Nebraska provision defined a family farm or ranch corporation as engaged in farming and made up of family members "at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." *Jones, 470 F.3d at 1265* (emphasis added). The South Dakota law required that "[d]ay-to-day labor and management shall require both daily or routine substantial physical exertion and administration." *Hazeltine, 340 F.3d at 587-88* (emphasis added). All North Dakota law requires is that the officers and shareholders be "actively engaged in operating the farm or ranch" and one member be a person "residing on or operating the farm or ranch." *N.D.C.C. § 10-06.1-12(6)* (emphasis added). As the Court has explained, these operational requirements do not include day-to-day labor or an actual physical presence on the farm. The North Dakota Attorney General has reached the very same conclusion which has withstood **[**47]** the test of time since 1982.

Based on a careful review of the record, the Court finds NDAG 82-25, combined with the state district court opinions in *NAS I* and *Crosslands I*, to be persuasive. North Dakota's operational requirements do not require a physical presence on the farm or in North Dakota. In this way, the requirements differ substantially from the laws at issue in *Jones* and *Hazeltine*. The acknowledgment that to be actively engaged in the operation of a farm does not necessarily require a physical presence on the farm is especially relevant in the modern internet age we now live in. The availability of the internet and everything that goes along with it, including video-conferencing and drone technology, makes the world a much smaller place. The Plaintiffs' contention in this regard is somewhat antiquated. ***HN23***[⬆] For these reasons the Court finds the operational requirements in *Section 10-06.1-12(6)* do not violate the dormant *Commerce Clause*.[1]

2. DISCRIMINATORY PURPOSE OR INTENT

The Plaintiffs contend the Corporate Farming Law was adopted with a discriminatory purpose, that being a preference for North Dakota family farm corporations to the detriment of out-of-state family farm corporations. In support of their contention, **[**48]** the Plaintiffs cite to the legislative history of the 1979 bill, which never became law, and the 1981 bill which did become law and now forms the core of North Dakota's Corporate Farming Law. The Defendants cite the historical record and the legislative history as not evidencing a discriminatory intent. The Defendants

[1] Despite the Court's finding that the operational requirements do not require a physical presence on the farm, it would be helpful if the Legislature adopted a clarifying definition or otherwise revised the statutory language to make it clear no actual physical presence on the farm is required.

maintain the purpose of the law is to preserve family farms, both in-state and out-of-state alike.

HN24[] To determine whether there was a discriminatory purpose behind a law, courts look to both direct and indirect evidence. *Jones, 470 F.3d at 1269*. Direct evidence includes statements by lawmakers and statements and conduct by drafters. Id. Indirect evidence includes "irregularities **[*923]** in the drafting process" that "hint at such a purpose." *Hazeltine, 340 F.3d at 594*.

The legislative history consists of approximately 160 pages. See Docket Nos. 67-7, 67-9, and 78-2). From this legislative history, Plaintiffs cite to nine statements which they contend offer direct evidence of a discriminatory intent. See Docket No. 72, p. 34. Only four of these statements are from legislators, the balance are from witnesses. *HN25*[] Witness testimony carries little weight in assessing legislative intent as witnesses are not lawmakers. See *Jones, 470 F.3d at 1269* (noting statements **[**49]** by lawmakers may evidence a discriminatory purpose); see also *Premachandra v. Mitts, 753 F.2d 635, 639-40 (8th Cir. 1985)* (discussing witness testimony and legislative history). Most of these statements have been discussed in relation to the operational requirements, and rejected. The Plaintiffs cite to Representative Olafson's statement that "the family farm is vital to ND's standard of living, and the right to incorporate will help in its preservation." See Docket No. 67-9, p. 1. This statement expresses a desire to protect family farms but it makes no mention of out-ofstate or outside interests, and the Court does not see how it can be read as supporting discrimination against out-of-state interests or treating them differently than North Dakotans.

Only two of the legislative comments, from Senators Dotzenrod and Wright, referenced "outside corporations" coming into North Dakota to buy farm land. See Docket No. 67-7, pp. 4 and 16. Senator Dotzenrod stated that "there is nothing in this bill that states that an outside corporation with the qualifications of this bill couldn't come into North Dakota and buy land." See Docket No. 67-7, p. 4. Senator Wright expressed concern about "outside corporations coming in to buy farm land." See Docket **[**50]** No. 67-7, p. 16. However, when carefully examined, these comments do not support the Plaintiffs contention but rather seem to support the position of the Defendants. As these senators apparently read the bill, outside corporations were allowed to come into North Dakota and farm, as long as they met the other requirements of the family farm exception which are not challenged in this case. Such murky comments do not reveal a preference for North Dakota family farms over the interests of out-of-state family farms. See *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (noting legislative history is often murky, ambiguous, and contradictory). The Court is also mindful of the wise admonition that one friend in a crowd is insufficient to prove legislative intent. See *Baptist Health v. Thompson, 458 F.3d 768, 775 n. 5 (8th Cir. 2006)*.

The Plaintiffs contend there is indirect evidence of a discriminatory intent against out-ofstate interests because no studies appear in the legislative history to support the contention that the family farm exception would benefit family farms. See *Hazeltine, 340 F.3d at 594-95* (noting a lack of evidence that a law will accomplish its stated purpose can be seen as indirect evidence of a discriminatory purpose). However, the legislative history in this case reveals otherwise. The information gathered by **[**51]** the legislature included a statement of support from the Young Farmers and Ranchers, a presentation and report from the North Dakota State Tax Department on the tax consequences of the bill, a written analysis from Iowa State University professor Neil E. Harl regarding the advantages of allowing corporate farming, an analysis from attorney William Guy III of the income tax, estate planning, and other non-tax advantages and disadvantages of allowing farm incorporation, and testimony from a representative of Communicating for Agriculture regarding

[*924] how enacting the family farm exception would help preserve family farms. See Docket No. 67-9, pp. 25-28, 29-38, 39-40, 51-57, 58-61, and 69-71. The consensus from these sources is that considerable tax and estate planning advantages would be available to family farmers if the family farm exception was enacted, and this would help preserve family farming. See *MSM Farms, Inc. v. Spire, 927 F.2d 330, 335 (8th Cir. 1991)* (finding, in the context of an equal protection challenge, that "[t]he people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land").

North Dakota's principle **[**52]** industry is agriculture. See *Coal Harbor Stock Farm v. Meier, 191 N.W.2d 583, 591 (N.D. 1971)*. North Dakota has had a Corporate Farming Law since 1932 when it was adopted via initiated measure. The 1932 law prohibited domestic and foreign corporations from "engaging in the business of farming or agriculture." *Asbury Hosp. v. Cass County, 72 N.D. 359, 7 N.W.2d 438, 443 (N.D. 1943)*. The law also prohibited all corporations from acquiring and holding real estate regardless of its use. The law drew no distinctions between in-state and outof-state corporations. "The public policy underlying the restrictions on corporate ownership of farmland or ranchland is rooted in the desire to preserve availability of rural agricultural land for use by family farmers." *Stenehjem ex rel. State v. Crosslands, Inc., 2010 ND 91, 782 N.W.2d 632, 637 (N.D. 2010)*; *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, 844 N.W.2d 892, 898 (N.D. 2014)*. The determination to "prohibit corporate farming as a business . . . was necessary to the economy of the State and the welfare of its citizens." *Meier, 191 N.W.2d at 591*. "It was the intent of the legislative assembly in enacting the corporate farming statute to prevent a tendency towards a monopoly by corporations in owning land and conducting farming operations." North Dakota Attorney General Opinion 46-54 (July 15, 1946) ("NDAG 46-54").

In 1981, the Legislative Assembly amended the Corporate Farming Law. The 1981 amendment continued the general prohibition against corporations owning **[**53]** land within the state, but included, for the first time, an exception allowing small family farms to incorporate, engage in farming, and own land. *N.D.C.C. ch. 10-06* (1981). The Corporate Farming Law incorporated by reference the requirements and definitions of the Business Corporation Act in 1983, and the Limited Liability Company Act in 1993. 1983 N.D. S.L. ch. 131, § 4; 1993 N.D. S.L. ch. 54 § 2; 1993 N.D. S.L. ch. 92, § 8. A review of the legislative history shows the family farm exception was intended to help preserve family farms by allowing the use of favorable tax structures, assisting with estate planning, protecting assets, limiting personal liability, making it easier to raise capital, and making it easier to provide employee benefits. See Docket No. 67-9, pp. 25-31, 51-61.

A careful review of the legislative history does not reveal an intent to discriminate against out-of-state interests. Rather, the purpose was to promote and preserve family farms by giving them the ability to use the corporate form, with some limitations, in an increasing complex and connected world. For instance, it was thought the corporate form would offer tax advantages and make it easier to pass the family farm from generation **[**54]** to generation. From the Court's review of the available legislative history, the purpose of enacting the family farm exception was to help keep family farming viable.

HN26[↑] In some sense, every state law is enacted to further state interests. But this does not mean every state law violates the *Commerce Clause*. There must be a showing **[*925]** of discriminatory purpose. There has long been an anti-corporate sentiment in North Dakota as evidenced by the 1932 ban on corporate farming which applied to all corporations, big and small, in-state and out-of-state alike. The *Commerce Clause* does not guarantee access to the corporate form. *State v. J.P. Lamb Co., 401 N.W.2d 713, 717 (N.D. 1987)* (noting a corporation is a creature of statute which

cannot exist without the consent of the state and which is subject to whatever conditions a state may impose). The 1981 family farm exception was intended to help preserve family farms through the limited use of corporations. Economic protectionism was not its intent. Things went somewhat awry in 1983 and 1993 when the Business Corporation Act and the Limited Liability Company Act definitions were incorporated by reference, but this does not change the purpose of the 1981 family farm exception which the Plaintiffs challenge. The Court finds as a matter **[**55]** of law that the family farm exception does not have a discriminatory purpose.

3. DISCRIMINATORY EFFECT

On its face, the family farm exception prevents foreign corporations and foreign limited liability companies from engaging in the business of farming or owning farm land in North Dakota while permitting North Dakota corporations and limited liability companies to do so. This is, by definition, a discriminatory effect. See *SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995)* (collecting cases discussing and finding discriminatory effects); *Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004, 1014 (W.D. Mo. 1998)* ("when a statute gives in-state companies an advantage over out-of-state companies, it has a discriminatory effect."). Accordingly, the Court finds the family farm exception has a discriminatory effect.

4. RIGOROUS SCRUTINY

HN27[↑] If a law fails any one of the three first-tier tests for facial discrimination, discriminatory purpose, or discriminatory effect, then the law survives only if the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)*. The State concedes the family farm exception cannot survive rigorous scrutiny and it has made no attempt to explain why other means are not available to promote the State's interest in protecting family **[**56]** farms. See Docket No. 65, p. 31. In addition, since the Court has determined the family farm exception discriminates both in its effect and on its face, the Court need not address the less rigorous second tier analysis. See *Pike v. Bruce Church Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*.

E. SEVERANCE

Having determined the family farm exception violates the dormant *Commerce Clause*, the Court must address whether the entire law must be enjoined or whether severance of some portion of the law will suffice as a remedy. The Plaintiffs contend Chapter 10-06.1 should be struck down in its entirety. The Defendants contend the offending language in the family farm exception can simply be severed and the remainder of the law allowed to stand. The Court agrees with the Defendants that severing the offending language is the most appropriate remedy.

HN28[↑] Severance is the preferred remedy under both North Dakota and federal law. See *Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)* (noting the United States Supreme Court's preference for enjoining only the unconstitutional **[*926]** language while leaving the remainder intact); *Tooz v. State, 76 N.D. 599, 38 N.W.2d 285, 291 (N.D. 1949)* (stating severance is preferred and "[i]t would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with **[**57]** or dependent on others which are unconstitutional"); *First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984)* ("The declaration of part of a law as being unconstitutional does not require a court to also declare the remainder void, unless all provisions are

so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without the unconstitutional sections."); *Kessler v. Thompson, 75 N.W.2d 172, 189 (N.D. 1956)* ("It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the valid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected."). North Dakota law also contains a general savings clause which reinforces the principle of preferring severance to voiding an entire enactment. *N.D. C.C. § 1-02-20* (providing that "[i]n the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, **[**58]** or part thereof directly involved in the controversy in which such judgment has been rendered."); *Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 425 (N.D. 1967)* (noting the applicability of *Section 1-02-20* to the entire North Dakota Century Code).

HN29[] In determining whether severance is permissible, the primary question involves the ascertainment of legislative intent. *Johanneson, 153 N.W.2d at 424*. Phrased another way, would the Legislative Assembly have enacted the law absent the offending provisions? In this case, the answer is clearly yes. North Dakota's Corporate Farming Law and the general prohibition on all corporate land ownership became law in 1932. See 1933 N.D. S. L. ch. 89. The family farm exception was not enacted until 1981. See 1981 N.D. S. L. ch. 134, § 4. The Corporate Farming Law was on the books for nearly fifty years before the family farm exception was added in 1981. The Corporate Farming Law incorporated by reference the requirements and definitions of the Business Corporation Act in 1983 and Limited Liability Company Act in 1993. Since the Corporate Farming Law was originally enacted without the family farm exception there is no reason to believe the Legislature would have preferred to repeal the entire law in 1981 when the family farm exception was added. When Governor **[**59]** Link vetoed a version of the family farm exception in 1979, the Legislature did not push for full scale repeal but again introduced the legislation in 1981, and was successful. Further, the Corporate Farming Law includes other exceptions, which are not challenged in this lawsuit, such as the exception for surface coal mining (*N.D.C.C. § 10-06.1-06*); certain industrial and business purposes (*N.D.C.C. § 10-06.1-07*); cooperatives (*N.D.C.C. § 10-06.1-08*); and certain non-profit organizations (*N.D.C.C. §§ 10-06.1-09* and *10-06.1-10*). These exceptions would be unnecessarily voided if the Court enjoined operation of the entire chapter as suggested by the Plaintiffs. The Court sees no reason to enjoin the Corporate Farming Law in its entirety, a law which operated on its own for nearly fifty years without the family farm exception, and which can clearly stand on its own. Indeed, all that is necessary is to enjoin the enforcement of **[*927]** the offending "domestic corporation" and "domestic limited liability company" language while leaving the remainder of the family farm exception intact. Accordingly, the Court finds severance is the appropriate remedy.

IV. CONCLUSION

For the reasons set forth above, the Defendant Farmers Union's motion to dismiss (Docket No. 104) and its alternative motion for **[**60]** judgment on the pleadings (Docket No. 113) are **DENIED**. The Defendant Dakota Resource Council's motion to strike (Docket No. 93) is **DENIED**. The State's motion for partial summary judgment (Docket No. 64) and the Plaintiffs' motion for summary judgment (Docket No. 71) are **granted in part and denied in part** as explained herein. Count Two of the amended complaint is dismissed.

The Court further **ORDERS** and declares that the State is permanently enjoined from enforcing or seeking to enforce *Section 10-06.1-12 of the North Dakota Century Code* in a manner which limits its application to only North Dakota corporations and limited liability companies, and must permit corporations and limited liability companies organized under the laws of other states to utilize the family farm exception, so long as they meet the other requirements of the current law which are not the subject of this litigation.

IT IS SO ORDERED.

Dated this 21st day of September, 2018.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge

United States District Court

End of Document

TIM GRIFFIN
ATTORNEY GENERAL

October 17, 2023

Northrup King Seed Co.
Syngenta Seeds
778 County Road 680
Bay, Arkansas 72411

Syngenta Seeds, LLC
2001 Butterfield Road, Suite 1600
Downers Grove, Illinois 60515

United Agent Group, Inc.
Agent for Service for Syngenta Seeds, LLC
609 SW 8th Street, Suite 600
Bentonville, Arkansas 72712

To Whom it May Concern,

I am writing for two purposes, both of which are related to Northrup King Seed Co. being listed as the owner of the Northeast Quarter of Section 25, Township 13 North, Range 5 East, Craighead County, Arkansas (the "Property").

First, I am placing you on notice that your holding of the Property appears to be in violation of Ark. Code Ann. § 18-11-110. Arkansas law bars a "prohibited foreign-party-controlled business" from acquiring or holding public or private land in the State of Arkansas, either directly or through affiliated parties.[1] The definition of "prohibited foreign party" includes several types of individuals or entities with a connection to a country subject to International Traffic in Arms Regulations ("ITAR").[2] The People's Republic of China is subject to ITAR.[3]

Publicly available information confirms that Northrup King Seed Co. a/k/a NK Seeds is a brand of Syngenta Seeds. Syngenta Seeds, in turn, is a business unit of Syngenta Group. Syngenta Group is registered in Shanghai, China, and is owned by China National Chemical Corporation a/k/a ChemChina, a Chinese state-owned chemical company. These links mean that "a party" is holding the Property "as an agent, trustee, or other fiduciary for a prohibited foreign-party-controlled business" in violation of the law.[4]

[1] A.C.A. § 18-11-110(b)
[2] *See* A.C.A. § 18-11-802(5)
[3] 22 C.F.R. § 126.1(d)(1)
[4] A.C.A. § 18-11-110(b)(2)

The Office of the Attorney General is tasked with enforcing this prohibition. If land held by a "prohibited foreign-party-controlled business" in violation of the statute is not divested within two years,[5] the Attorney General "shall commence an action in the circuit court."[6] If the criteria outlined in the statute are met, the "circuit court shall order that the public or private land be sold through judicial foreclosure."[7]

Please proceed with the divestment of the Property as required by Arkansas law. If you believe that the Property is *not* held in violation of Ark. Code Ann. § 18-11-110, please provide my office with the documentation you are relying on for that determination.

Second, under Ark. Code Ann. § 2-3-111, parties required to file a report with the United States Department of Agriculture ("USDA") under the Agricultural Foreign Investment Disclosure Act ("AFIDA") are also obligated to file a copy of that report with the Secretary of the Arkansas Department of Agriculture "within the time period required under federal law."[8]

Syngenta Seeds is a required reporter under AFIDA, and filed an AFIDA report concerning the Property with the USDA most recently on March 8, 2022. The report stated that "[u]ltimately, the foreign person that holds indirectly a significant interest in the person owning the [Property] is from China." Syngenta Seeds provided a copy of this AFIDA report to Secretary Wes Ward of the Arkansas Department of Agriculture on June 30, 2022. Construing the "time period required under federal law" most favorably to Syngenta Seeds, the filing of the AFIDA report with Secretary Ward was belated.[9]

For failure to file a report as required by Ark. Code Ann. § 2-3-111, the Attorney General "[s]hall impose a civil penalty not to exceed twenty-five percent (25%) of the fair market value" of the Property.[10] I am therefore imposing the maximum civil penalty of $280,000, a figure calculated as 25% of $1,120,000, the estimated current value for the Property provided by Syngenta Seeds on its filing with the USDA.

Please remit payment in this amount to my office within 30 days. Please also be advised that the Attorney General is authorized to "bring an action to collect the civil penalty" imposed.[11]

Thank you for your attention to these matters.

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[5] A.C.A. § 18-11-110(c)(1). Act 636 of 2023 became effective on August 1, 2023; for land held before that date, the violation would run from August 1, 2023, and the land would need to be divested by August 1, 2025.
[6] A.C.A. § 18-11-110(c)(2)
[7] A.C.A. § 18-11-110(c)(3)(A)
[8] A.C.A. § 2-3-111(a)
[9] The longest reporting period provided in 7 U.S.C. § 3501, the federal statute referenced in Arkansas law, is 180 days. This applies to "[a]gricultural land interests presently held by foreign persons… on the day before the effective date of this section." The latest possible date that this period would run from is the effective date of A.C.A. § 2-3-111, which was July 28, 2021. Adding the longest possible reporting period to the latest possible starting date of the reporting period yields a required reporting deadline in January of 2022—well before the report was filed with the Arkansas Department of Agriculture.
[10] A.C.A. § 2-3-111(b)(1)
[11] A.C.A. § 2-3-111(b)(2)

Respectfully,

Tim Griffin
Attorney General

cc: Todd Barlow, Lead State Affairs, Syngenta

(via electronic mail to todd.barlow@syngenta.com)

This form is available electronically. AMENDED ☐ Form Approved - OMB No. 0560-0097

FSA-153 (05-24-01)

U.S. DEPARTMENT OF AGRICULTURE
Farm Service Agency

AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT REPORT

NOTE: Read Instructions on Page 2 Before Filing In Any Date Below. If Additional Space is Needed, Use Page 2

1. TYPE ACTIVITY (See Page 2) *(Check one)*

A. Land Holding ☑ B. Land Acquisition ☐ C. Land Disposition ☐

D. Land Use Change To Agriculture ☐ E. Land Use Change To Non-Agriculture ☐

ITEM	OFFICE USE ONLY
2. Tract Location and Description	
A. LEGAL DESCRIPTION OR FSA TRACT NUMBER: 30795	
B. COUNTY OR PARISH: Craighead	C. NO. OF ACRES: 160
D. STATE: Arkansas	
3. Owner of Tract *(In Item 2A) (See Page 2)*	
A. NAME: Syngenta Seeds, LLC	
B. TAX ID NO. *(Ten digits)*: [redacted]	
C. LEGAL ADDRESS *(Street, City, State/Province, Country)*: 3411 Silverside Road, Suite 100 Wilmington, Delaware 19810	

D. Type of Owner *(If checked, skip Items D2 and D3)*	CHECK
1. Individual *(Including husband/wife). Indicate citizenship of husband and wife, if applicable.*	
a. Citizenship of Individual	
2. Government *(name of country)*	
3. Organization	
a. Type	
1) Corporation	
2) Partnership	
3) Estate	
4) Trust	
5) Institution	
6) Association	
7) Other	✓
b. Gov't. or country under whose law the organization is created: Delaware	
c. Principal place of business *(for organizations only)*: United States of America	
d. List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control 1/ in the person owning the land.	

E. Complete only if Item 1C, Land Disposition, is checked

1. NAME OF PERSON RECEIVING TRACT
2. ADDRESS *(Street, City, State/Province, Country)*

3. CITIZENSHIP USA ☐ FOREIGN ☐ UNKNOWN ☐

4. Representative of Foreign Person *(completing form, if applicable)*

A. NAME: Marisa Bocci

B. ADDRESS *(Street, State, Country)*: 925 Fourth Avenue, #2900
Seattle, WA 98104

C. TELEPHONE NO. *(Area Code)*: (206) 370-7638

D. Relationship of Representative to Foreign Person:	CHECK
1. Attorney	✓
2. Manager	
3. Agent	
4. Other *(Explain on Page 2)*	

ITEM	CHECK
5. Type of Interest Held in the Agricultural Land *(Check One)*	
A. Fee Interest *(ownership)* Whole	✓
B. Fee Interest *(ownership)* Partial WHAT PERCENT %	
C. Life Estate	
D. Trust Beneficiary	
E. Purchase Contract	
F. Other *(explain)*	
6. How was this Tract Acquired or Transferred?	CHECK
A. Cash Transaction	✓
B. Credit or Installment Transaction	
C. Trade	
D. Gift or Inheritance	
E. Foreclosure	
F. Other *(explain)* See "Attachment A"	✓

7. Value of Agricultural Land:	
A. Purchase Price of Land or if a land disposition, the original price paid by seller	$ 500,000.00
B. Non-Purchase, Estimated Value at the Time of Acquisition	$
C. What is the estimated current value or if a land disposition, the selling price of the tract of land?	$ 1,120,000
D. How much of purchase price in Item 7A remains to be paid?	$ 0

8. Date of Acquisition or Transfer *(See Page 2)*	MONTH	DAY	YEAR
	May	18	2017

9. Current Land Use *(Usual use of land. For idle land, report as Other Agriculture.)* Report in Whole Numbers	ACRES
A. Crop	150
B. Pasture	0
C. Forest or Timber	0
D. Other Agriculture	0
E. Non-Agriculture	10
F. Total *(Should equal Item 2C)*	160

10. Intended Use as of This Date. *(Check One or More or type "N/A" if Item 1C above is marked)*	CHECK
A. No Change	x
B. Other Agriculture	x
C. Non-Agriculture	

11. Relationship of Owner to Producer (If not applicable, for Items 11A through 11B, type "N/A"). Check one or more or type "N/A" if *Item 1C above is marked.*

A. Producer is:	
1. Owner	x
2. Manager	
3. Tenant or sharecropper (Item 11B *must be completed*)	
B. Rental agreement is: *(Not applicable if Item 1C above is marked)*	
1. A crop share	N/A
2. Cash or fixed rent	

12. The Producer on This Tract is: Check one or more. If not applicable, for Items 11A through 11B, type "N/A" *(Not applicable if Item 1C above is marked)*

A. The same person as when the tract was acquired	x
B. A new person	

13. CERTIFICATION *-I certify that the information entered in this report is complete and correct. I understand that falsification of reporting is subject to a civil penalty not to exceed 25% of the fair market value of the interest held in the tract of land.*

14. SIGNATURE (Owner or legally authorized representative) [signature] TITLE Assistant Secretary DATE (MM-DD-YYYY) 03-08-2022

NOTE: *The following statement is made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1995, as amended. The authority for requesting the following information is Pub. L. 95-460. The information will be used to determine the effects of foreign persons acquiring, transferring and holding agricultural land and the effects of such activity on family farms and rural communities. Furnishing the requested information is mandatory. Failure to comply or falsification of reporting is subject to civil penalty, not to exceed 25 percent of the fair market value of the interest held in the tract on the date of the assessment of such penalty.*

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0560-0097. The time required to complete this information collection is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. ***RETURN THIS COMPLETED FORM TO YOUR COUNTY FSA OFFICE.***

DETERMINATION OF "FOREIGN PERSON" STATUS

DEFINITION: "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, trust, estate, or any other legal entity.

You are a "foreign person" under the provisions of Pub. L. 95-460 and must complete the front side of this form (FSA-153) if your answer is "NO" to all the statements in Items 1, 2, and 3 below:	YES	NO
1. **I AM** a citizen of the United States.		
2. **I AM** a citizen of the Northern Mariana Islands or the Trust Territories of the Pacific Islands.		
3. **I AM** lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act.		
You are a "foreign person" under the provisions of Pub. L. 95-460 and must complete the front side of this form (FSA-153) if your answer is "YES" to any of the statements in Items 4a, 4b, and 5 below:	YES	NO
4. **I AM** a "person" other than an individual or government, which is created or organized under the laws of:		
a. A foreign government of which has its principal place of business located outside the United States.		✓
b. Any State of the United States, and in which significant interest or substantial control 1/ is held directly or indirectly by any foreign individual, government, or person.	✓	
5. **I AM** a foreign government.		✓

GENERAL INSTRUCTIONS

Complete this form for each tract of land. Report as a tract all acreages under the same ownership in each county or parish acquired or transferred on the same date. Land in different counties or parishes and land acquired or transferred on different dates must be reported as separate tracts.

Return the original to the County Farm Service Agency (FSA) Office where the tract of land is located. Retain a copy for your records. **DO NOT SEND THIS FORM DIRECTLY TO WASHINGTON, D.C. UNLESS GRANTED PERMISSION BY THE FSA IN WASHINGTON, D.C.**

After the original disclosure on FSA-153 on the tract(s) of land owned by the same person within a county or parish, each subsequent change of ownership or use must be reported by filing another FSA-153.

ITEM INSTRUCTIONS AND REPORTING DATES

ITEM 1. ONLY ONE BOX MAY BE CHECKED

If the tract of land to be listed under Item 2 on the front side of this document was:

- Owned on February 1, 1979, check **A. Land Holding** [X]) Reporting Date: This document is required to be completed and returned by August 1, 1979.

If the tract of land to be listed under Item 2 on the front side of this document was, on or after February 2, 1979:

- Acquired, check **B. Land Acquisition** [X]
- Disposed of, check **C. Land Disposition** [X]
- Changed from non-agricultural to agricultural use, check **D. Land Use Change to Agriculture** [X])
- Changed from agricultural to non-agricultural, use check **E. Land Use Change to Non-Agriculture** [X])

REPORTING DATE: If any of these activities are checked in Item 1, return the completed FSA-153 within ninety (90) days from the date of the transaction.

ITEM 8. The date entered would be as follows for the activity checked in Item 1:

Box A or B - Date acquired.
Box C - Date disposed of.
Box D or E - Date land use changed.

ADDITIONAL INFORMATION *(Use additional sheets if more space is needed)*

1/ Significant interest or substantial control as defined in 7 CFR Part 781.2 (k).

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD). To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410 or call (202) 720-5964 (voice or TDD). USDA is an equal opportunity provider and employer.

Attachment A
to
Agricultural Foreign Investment Disclosure Act Report

Syngenta Seeds, LLC

3.D.3.d. List on separate sheet, the Name, Address and Country of all foreign persons who individually or in the aggregate hold significant interest or substantial control in the person owning the land:

Syngenta Corporation, having an address at 3411 Silverside Road, Suite 100, Wilmington, Delaware 19810.

Syngenta Crop Protection AG, having an address at Rosentalstresse 67, Basel Switzerland 4058.

Syngenta AG, having an address at Rosentalstresse 67, Basel Switzerland 4058.

Ultimately, the foreign person that holds indirectly a significant interest in the person owning the land is from China.

6.F. How was this Tract Acquired or Transferred?

This filing is with respect to a change of control transaction that occurred on May 18, 2017 whereby the ultimate beneficial owner entity of the landowner entity changed from Switzerland to China.

7.C. Estimated Current Value of the Land

The estimated current value of the land is reflective of the current median price per acre in the County.

NORTHRUP KING SEED CO

778 CR 680

Basic | Land | Sales | Valuation | Taxes | Receipts | Improvements | Parcel Boundary

Basic Info

Parcel Number:	12-135251-00100
County Name:	Craighead County
Property Address:	NORTHRUP KING SEED CO 778 CR 680 **Map This Address**
Mailing Address:	NORTHRUP KING SEED CO Syngenta Seeds # 778 Cr 680 BAY AR 72411
Collector's Mailing Address:	NORTHRUP KING SEED CO Syngenta Seeds # 778 Cr 680 BAY, AR 72411
Total Acres:	160.00
Timber Acres:	0.00
Sec-Twp-Rng:	25-13-05
Lot/Block:	/
Subdivision:	
Legal Description:	N1/2 NE 80A S1/2 NE 80
School District:	BY BAY RURAL
Improvement Districts:	SFLD,DRAINAGE DISTRICT 29
Homestead Parcel?:	No
Tax Status:	Taxable
Over 65?:	No

NORTHRUP KING SEED CO

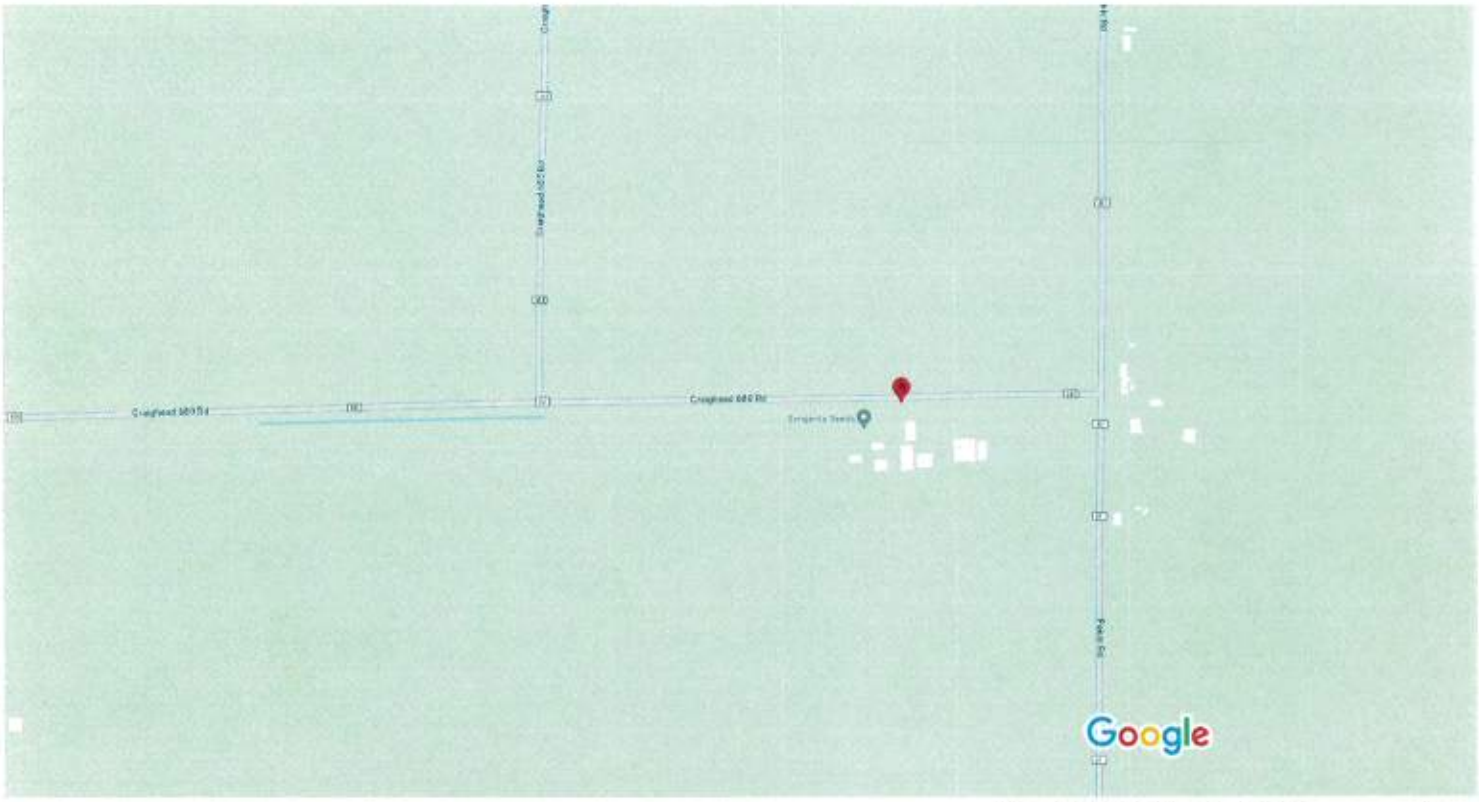
778 CR 680

Basic | Land | Sales | Valuation | Taxes | Receipts | Improvements | Parcel Boundary

Sales History

Filed	Sold	Price	Grantor	Grantee	Book	Page	Deed Type
7/13/1988	7/13/1988	500,000	COKER'S	NORTHRUP	362	335	WD(WARRANTY DEED)
12/30/1986	12/30/1986	315,000	ROHM & HAAS	COKERS	341	519	WD(WARRANTY DEED)

Google Maps 778 Co Rd 680



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Syngenta Seeds
4.9 (7)
Seed supplier
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Directions

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U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
NOV 13 2024
TAMMY H. DOWNS, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JONES EAGLE, LLC *f/k/a*
JONES DIGITAL, LLC **PLAINTIFF**

v. **CASE NO.:** 4:24CV-990-KGB

WES WARD, in his official capacity as the Secretary of the Arkansas Department of Agriculture; TIM GRIFFIN in his official capacity as the Attorney General of Arkansas; and STATE OF ARKANSAS **DEFENDANTS**

COMPLAINT

Plaintiff Jones Eagle, LLC ("Jones Eagle"), formerly known as Jones Digital, LLC, brings this complaint against defendants Wes Ward, in his official capacity as the Secretary of Agriculture of Arkansas, Tim Griffin, in his official capacity as the Attorney General of Arkansas, and the State of Arkansas ("Defendants").

I. INTRODUCTION

1. This action seeks injunctive and declaratory relief against Defendants' imminently threatened enforcement of two unconstitutional laws: Act 636 of 2023 ("Act 636") and Act 174 of 2024 ("Act 174") (jointly, "Acts 636 and 174").

2. Acts 636 and 174 are unconstitutional on their face and as applied to Jones Eagle.

3. Acts 636 and 174 discriminate based on race, alienage, and national origin in violation of Jones Eagle's rights to equal protection.

4. Acts 636 and 174 violate Jones Eagle's rights to due process of law.

5. Acts 636 and 174 discriminate against interstate and foreign commerce in violation of the commerce clause.

This case assigned to District Judge Baker
and to Magistrate Judge Ervin

6. Acts 636 and 174 invite enforcement efforts undertaken in the absence of reasonable suspicion and based on the perceived race, alienage, and national origin of investigative targets, which has resulted in ongoing and foreseeable future harm against Jones Eagle.

7. Acts 636 and 174 are preempted by federal law.

8. Acts 636 and 174 threaten takings of Jones Eagle's private property without just compensation.

II. JURISDICTION, VENUE, AND PARTIES

9. This Court has original jurisdiction under 28 U.S.C. § 1331 because the claims arise under the Constitution, laws, or treaties of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b).

11. Jones Eagle is a limited liability company which was formed under Delaware law as Jones Digital, LLC. Plaintiff amended its name from Jones Digital, LLC on October 4, 2024, through the submission of an amendment to the Delaware Secretary of State.

12. Wes Ward ("Secretary Ward") is a natural person and citizen of Arkansas and is sued in his official capacity as the Secretary of Arkansas Department of Agriculture ("Department"). Ark. Code Ann. § 25-23-202. Secretary Ward is the chief executive officer of the Department and exercises superintending authority over the activities of its agents, designees, employees, and representatives, including their conduct relating to Acts 636 and 174.

13. Tim Griffin ("Attorney General Griffin") is a natural person and citizen of Arkansas and is sued in his official capacity as the Attorney General of Arkansas. Attorney General Griffin exercises superintending authority over the activities of his agents, designees, employees, and representatives, including their conduct relating to Acts 636 and 174.

14. The State of Arkansas is a constituent political subdivision of the United States of America.

15. Jones Eagle brings federal claims for prospective injunctive relief and declaratory judgment against all Defendants under U.S. Const., amend. V and XIV; Fed. R. Civ. P. 57; 28 U.S.C. §§ 2201 and 2202; 42 U.S.C. §§ 1981 and 1983, and *Ex parte Young*, 209 U.S. 123 (1908).

16. Jones Eagle brings its taking claim for damages against the State of Arkansas, which lacks sovereign immunity applicable to claims for just compensation arising directly under the Fifth and Fourteenth Amendments to the Constitution of the United States in the absence of an adequate and available state cause of action. *DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938 (2024).

III. BACKGROUND

17. In May 1882, the United States passed the Chinese Exclusion Act, which banned all Chinese laborers from immigrating to the United States. The Chinese Exclusion Act was the first and only major U.S. law ever implemented to prevent all members of a specific racial group from immigrating to the United States. The law remained in force until 1943, when China became a wartime ally of the United States against Japan.

18. But Arkansas chose a different path. The Arkansas Constitution provides that "[n]o distinction shall ever be made by law, between resident aliens and citizens, in regard to the possession, enjoyment or descent of property." Ark. Const. Art. 2, § 20.

19. As the Arkansas Constitution makes clear, Arkansas law affords no compelling state interest to discriminate based on race, alienage, or national origin with respect to property rights.

20. In 1927, the Arkansas Supreme Court applied the Arkansas Constitution to strike down a state law called Act 249 of 1925, known as the "Alien Land Act." *Applegate v. Lum Jung Luke*, 173 Ark. 93, 291 S.W. 978 (1927).

21. The Arkansas Alien Land Act attempted to prohibit certain aliens from acquiring, possessing, enjoying, using, cultivating, occupying, or transferring real estate. *Id.*, at 979.

22. The Arkansas Supreme Court struck down the Arkansas Alien Land Act by applying Ark. Const. Art. 2, § 20. *Id.*, at 979 ("The manifest and only intent which can be extracted from the language is that all resident aliens in Arkansas, whether eligible to naturalization and citizenship under the laws of the United States, have the same right to acquire and enjoy the possession of property in this state, either by purchase or descent, that any natural citizen has.").

23. However, equal justice under law has not always been enjoyed by Asian-Americans in Arkansas.

24. During World War II, the United States War Relocation Authority established two internment camps in Arkansas: Jerome and Rohwer.

25. The Rowher internment camp was located in Desha County, Arkansas, less than 50 miles south from Jones Eagle's data center in Arkansas County, Arkansas.

26. In *Korematsu v. United States*, the Supreme Court found that certain wartime powers of the ***federal*** government allowed Congress and the President "to exclude those of Japanese ancestry from the West Coast war area at the time they did." 323 U.S. 214, 217, 65 S. Ct. 193, 194 (1944).

27. However, in 1948, the U.S. Supreme Court held that the 14th Amendment rights of Fred Oyama, a U.S. citizen and the son of Japanese immigrants, had been violated when the State of California moved to repossess land purchased by Oyama's non-citizen father in Oyama's name

while the family was incarcerated in an internment camp. *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269 (1948).

28. As a result of the *Oyama* decision and other developments in equal protection case law, most of the country's Alien Land Laws were repealed or struck down in the 1950s.

29. On August 10, 1988, President Reagan signed into law the Civil Liberties Act of 1988, which provided monetary restitution to surviving victims of Japanese-American internment camps during World War II. 50 U.S.C. §§ 4201, *et seq.*

30. At the signing ceremony, President Reagan recalled, "America stands unique in the world—the only country not founded on race but on a way, on an ideal. Not in spite of, but because of our polyglot background, we have had all the strength in the world. That is the American way. And yes, the idea of liberty and justice for all, that is still the American way."

31. On March 24, 2023, Jones Eagle, through its predecessor-in-interest, entered a commercial lease for real property in Arkansas County, Arkansas for the purpose of engaging in the business of operating a data center, including mining digital assets such as cryptocurrency.

32. Since entering into that lease agreement, Jones Eagle has taken concrete steps and expended considerable funds to plan and build a facility and conducts ongoing operations of its data center on the parcel.

33. Jones Eagle's data center operations on the parcel are lawful business operations that comply with facially non-discriminatory Arkansas laws. *See* Ark. Code Ann. § 14-1-602.

34. Thus, as to non-discriminatory legal requirements, Jones Eagle has complied "with every requisite deemed by the law, or by the public officers charged with its administration[.]" *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

35. Through government overreach, Defendants now seek to interfere with Jones Eagle's continued business operations and deprive Jones Eagle of its lawful business expectancies.

36. Defendants have launched a prolonged, pretextual investigation under a facially discriminatory statute that does not apply to Jones Eagle's leasehold interest.

37. Defendants have no reasonable likelihood of success in any proceedings that could be initiated under Act 636.

38. Act 636 does not apply to Jones Eagle's real property interest in Arkansas County, Arkansas because it is not "agricultural land" as defined by Act 636.

39. Qimin "Jimmy" Chen ("Mr. Chen") is an American citizen who exercises control over Jones Eagle as the sole owner of Eagle Asset Holding, Inc.

40. Mr. Chen was born in China and immigrated to the United States as a child.

41. Mr. Chen exercises control over the operations of Jones Eagle through his ownership of its majority interest-holding member, Eagle Asset Holding, Inc.

42. Despite actual notice of these facts, Defendants continue to threaten enforcement actions against Jones Eagle under Act 636 of 2023 and, potentially, Act 174 of 2024.

43. However, both Act 636 and 174 are unconstitutional.

44. Therefore, through this action, Jones Eagle requests that the Court enter judgment declaring that Acts 636 and 174 violate the U.S. Constitution and federal statutory law, and an injunction to restrain Defendants from efforts to enforce these discriminatory and unconstitutional laws against Jones Eagle.

A. The legislative history of Act 636 of 2023

45. On March 14, 2023, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee first considered SB 383 of 2023 ("SB 383"), which ultimately became enacted into law as Act 636 of 2023 ("Act 636").

46. SB 383 was sponsored by Arkansas State Senator Blake Johnson.

47. Within the first minute of Senator Johnson's committee speech in support of SB 383, Senator Johnson specified that the legislation was intended to apply to citizens and residents of China, stating "this prohibition is for those ITAR nations, and I'm gonna give you a few of those that are on the list: China, Cuba, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a piece—there's 24 of those nations that are on the ITAR list that we don't do defense secrets or trading with."

48. Senator Johnson made clear that the real purpose of Act 636 was to discriminate against persons believed to be Chinese, stating, "we have recently seen a balloon fly over our land and there is great concern over that, and I think the concern as well should be on the land that's below where that balloon was that's in Arkansas, and I feel like it's a defense—I mean if we can't feed or clothe ourselves as a nation, it's a defense issue for our nation and for Arkansas."

49. Senator Johnson's reference to a "balloon" was a reference to a Chinese high-altitude surveillance balloon that was shot down by the U.S. Air Force off the coast of South Carolina on February 4, 2023. F-22 Safely Shoots Down Chinese Spy Balloon Off South Carolina Coast. U.S. Department of Defense, *available at* https://www.defense.gov/News/News-Stories/Article/Article/3288543/f-22-safely-shoots-down-chinese-spy-balloon-off-south-carolina-coast/

50. After Senator Johnson's comments in support of SB 383, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee passed SB 383 by voice vote to be submitted for consideration on the floor of the Arkansas Senate.

51. On March 27, 2023, Senator Johnson introduced SB 383 on the floor of the Arkansas Senate.

52. In support of the bill, Senator Johnson stated, "I'm gonna read a few of those nations: China, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a few of those nations, there's 24 in all. This limits those nations. We had a balloon fly over. And everybody was worried about the balloon taking pictures of the land below it. If we don't want a balloon flying over our nation, we shouldn't want them owning land. We can't go over there and buy property, so this is what this bill does."

53. Following Senator Johnson's floor speech, the Arkansas Senate passed SB 383, which was transmitted to the Arkansas House.

54. On April 5, 2023, the Arkansas House considered SB 383 and passed it with a minor amendment.

55. On April 6, 2023, the Arkansas Senate reconsidered the House's amendment to SB 383 and passed it for approval by the governor.

56. On April 11, 2023, SB 383 was enacted as Act 636, which is codified as Ark. Code Ann. §§ 18-11-110 and 18-11-801, *et seq.*

B. The text of Act 636 of 2023

57. Through the enactment of Act 636, Subchapter 8 of Title 18 of the Arkansas Code became entitled "Foreign Ownership of Agricultural Land."

58. Act 636 purports to criminalize foreign ownership of an "interest in agricultural land," defined by Ark. Code Ann. § 18-11-802(1)(A).

59. Act 636 criminalizes ownership of agricultural land by a "prohibited foreign party," and defines "prohibited foreign party" in a manner intended to facially discriminate against persons perceived to be citizens or residents of China, by incorporating the International Traffic in Arms Regulations ("ITAR"). 22 C.F.R. § 126.1.

60. Act 636 facially discriminates against persons based on race, alienage, and national origin. Ark. Code Ann. § 18-11-802(5).

61. Act 636 purports to prohibit any "prohibited foreign party" from holding "significant interest" or "substantial control" in any "party other than an individual or government," to include corporations, limited liability companies, and other business organizations. Ark. Code Ann. § 18-11-802(8)(A)(i).

62. Criminal sanctions under Act 636 include imposition of a conviction of "a felony punishable by not more than two (2) years' imprisonment in the custody of the Division of Correction or a fine of fifteen thousand dollars ($15,000), or both." Ark. Code Ann. § 18-11-804(e).

63. Act 636 creates the Office of Agricultural Intelligence within the Arkansas Department of Agriculture, which is "authorized and directed to collect and analyze information concerning the unlawful sale or possession of agricultural land by prohibited foreign parties; and administer and enforce the provisions of this subchapter, including without limitation the reporting of a violation of this subchapter to the Attorney General under 18-11-804(c)." Ark. Code Ann. § 18-11-805.

64. Act 636 provides that "the office shall operate under the direction of" the Arkansas Secretary of Agriculture. Ark. Code Ann. § 18-11-805(d).

65. Act 636 provides no constraint or limitation on the discretion of the Secretary of Agriculture when "reporting of a violation of this subchapter to the Attorney General." Ark. Code Ann. § 18-11-805(b)(2).

66. Act 636 contains no limitations or guidelines to govern a finding of reasonable suspicion sufficient to sustain a referral by the Secretary of Agriculture for a criminal investigation by the Attorney General.

67. Act 636 invites and has caused harmful disparate treatment to Mr. Chen and Jones Eagle based on their perceived race, alienage, and national origin, including discrimination based on the perceived national origin of the names of persons affiliated with businesses and companies, such as Mr. Chen and Jones Eagle, many of whom have been subjected to criminal investigations in the absence of reasonable suspicion.

68. Acts 636 and 174 threaten substantial risk of persistent and recurring criminal investigations without reasonable suspicion or probable cause as against persons such as Mr. Chen, Jones Eagle, and others similarly situated.

69. Act 636 provides an affirmative defense for "a prohibited foreign party" that "is a resident alien of the State of Arkansas," which facially discriminates against resident aliens outside Arkansas. Ark. Code Ann. § 18-11-804(f).

70. Defendants have improperly exercised perceived statutory authority under Act 636 to target Jones Eagle, and others, on the basis of perceived race, alienage, and/or national origin of Jones Eagle and its affiliates.

71. Act 636 confers to the Attorney General a power to cause a taking of Jones Eagle's property rights through judicial foreclosure to be "disbursed to lien holders" without providing just

compensation to Jones Eagle as the original owner of the taken property. Ark. Code Ann. § 18-11-804(d)(1).

C. The legislative history of Act 174

72. On April 18, 2024, the Arkansas Senate City, County – Local Affairs committee first considered SB 78 and SB 79, which were sponsored by Arkansas State Senators Josh Bryant and Missy Irvin, respectively.

73. During his comments at the committee hearing, Senators Bryant and Irvin repeatedly emphasized the prohibition on "foreign ownership" to be imposed by SB 78 and SB 79.

74. During the legislative process, multiple state senators and witnesses, including local public officials, asserted that data asset mining businesses operating in Arkansas were controlled in whole or in part by the government of the People's Republic of China.

75. The Arkansas Senate City, County – Local Affairs committee passed SB 78 and 79 by voice vote to be submitted for consideration on the floor of the Arkansas Senate.

76. On April 24, 2024, SB 78 and SB 79 were submitted to the full Arkansas Senate after certain minor amendments.

77. Legislative discussion on SB 78 and SB 79 focused specifically on China.

78. Discussing SB 78 before the full Senate, Senator Bryant stated, "The last piece deals with foreign ownership. I think a commonality of the industry that is not playing well in Arkansas is the fact that they are not Arkansas-owned or American-owned.

79. Senator Bryant stated, "[t]hose that do not, we're going to ask them to leave our state and that includes all foreign adversarially-owned facilities and business models for this crypto-mining industry."

80. Senator Bryant continued, "On those particular examples, if they're foreign-owned, they'll have to divest to become American-owned at least and hopefully Arkansan-owned."

81. In directing a question to Senator Bryant on the Senate floor, Arkansas State Senator Bryan King stated, "I mean, to me it's almost like, on this foreign-ownership, ten months after Pearl Harbor, well we may need to look into the Japanese Navy."

82. Senator King stated, "Harrison was Pearl Harbored," in reference to a proposed crypto-mining development that was intended to be constructed in Harrison, Arkansas.

D. The text of Act 174

83. On or about May 3, 2024, the Arkansas General Assembly passed Act 174 of 2024 ("Act 174"), which effectuated amendments to Act 851 of 2023, known as the Arkansas Data Centers Act of 2023 ("Act 851").

84. Act 174 created a new section, 14-1-606, which is entitled "Ownership of digital asset mining business by prohibited foreign-party-controlled business prohibited—Definitions—Penalty—Reporting." Ark. Code Ann. § 14-1-606.

85. Act 174 defines "interest" as "an ownership interest of greater than zero percent (0%). Ark. Code Ann. § 14-1-606(a)(1).

86. Act 174 prohibits ***any*** interest in a "digital asset mining business" being held by a "prohibited foreign party." Ark. Code Ann. § 14-1-606(a)(2).

87. By virtue of ownership—even *de minimis* ownership—by a "prohibited foreign party," an otherwise lawful digital asset mining business is transformed into a "prohibited foreign-party-controlled business." *See id.*

88. Ark. Code Ann. § 14-1-606 provides a four-part definition of "prohibited foreign party," which is in turn defined "subject to § 126.1 of the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120.1 et seq., as existing on January 1, 2024."

89. However, Act 174's definitions of "interest" and "foreign party" are inconsistent with the federal definitions under the ITAR.

90. The Attorney General has essentially boundless discretion to "conduct an investigation" under Act 174, provided that "a person" makes a "request" or "upon receipt of information that leads the Attorney General to believe that a violation of this section may exist[.]. Ark. Code Ann. § 14-1-606.

91. Act 174 purports to give the Attorney General the power to "order" a "prohibited foreign party to divest all interest in the digital asset mining business." Ark. Code Ann. § 14-1-606(e)(1).

92. If the prohibited foreign party "fails to divest all interest in the digital asset mining business within three hundred sixty five (365) calendar days," then the Attorney General has a right of action to seek judicial foreclosure.

93. Proceeds of such a judicial foreclosure "shall be disbursed to the lienholders, in order of priority, except for liens that under the terms of the sale are to remain." Ark. Code Ann. 14-1-606(e)(B).

94. Act 174 makes no provision for any compensation to a "prohibited foreign party" whose property is actually taken by the government and sold by forced judicial foreclosure.

E. History of discriminatory enforcement efforts under Act 636

95. The short history of enforcement attempts under Act 636 is a history of failure due to the recurring absence of reasonable suspicion and probable cause.

96. On numerous occasions, Defendants' Act 636 referrals and investigations have been undertaken in the absence of reasonable suspicion. *See e.g.*, State's Investigation Determines Ownership of Property Near Ebbing Air National Base Doesn't Have Illegal Ties to Chinese

Government, Snyder, Josh, *Arkansas Democrat-Gazette*, Aug. 13, 2024, *available at* https://www.arkansasonline.com/news/2024/aug/13/states-investigation-determines-ownership-of/; China-based Company Risever Machinery's Jonesboro Factory Found Not to Be In Violation of Law on Land Ownership, Earley, Neal, *Arkansas Democrat-Gazette*, Dec. 26, 2023, *available at https://www.arkansasonline.com/news/2023/dec/26/china-based-companys-jonesboro-factory-found-not/*.

97. The Attorney General's investigation of 4811 S. Zero Street, LLC revealed that the principal of that Arkansas limited liability company had Taiwanese heritage, not Chinese heritage.

98. Filings by that company with the Arkansas Secretary of State contained a listed individual whose name appears to be of Chinese origin.

99. The Attorney General has not publicly disclosed any basis for reasonable suspicion of a violation of Act 636 by 4811 S. Zero Street, LLC.

100. As a staunch American ally, the Republic of China (Taiwan) is not a foreign nation listed on the ITAR.

101. The Attorney General's investigation of Risever Machinery LLC ("Risever") was an investigation into a company that Governor Asa Hutchinson had personally recruited from China.

102. Governor Hutchinson attended Risever's grand opening in Jonesboro, Arkansas on October 23, 2019, where Governor Hutchinson stated, "We're thrilled that the Risever plant is in production. It is one of several Chinese companies that are choosing to locate in Arkansas thanks in large part to our skilled workforce and low business costs." Risever to Begin Trial Operations in Jonesboro, *Talk Business & Politics*, October 23, 2019, *available at https://talkbusiness.net/2019/10/risever-to-begin-trial-operations-in-jonesboro/*.

103. To secure Risever's investment in Arkansas, Governor Hutchinson offered $1 million from the Governor's Quick Action Closing Fund, which was the culmination of a ten-month negotiation with the Arkansas Economic Development Commission and Jonesboro Unlimited, a private partnership organization that focuses on economic development in Jonesboro. *Id.*

F. Defendants' pretextual Act 636 investigation of Jones Eagle

104. On December 13, 2023, Governor Sarah Huckabee Sanders issued a press release entitled "Sanders Administration Holds China Accountable." *See https://governor.arkansas.gov/news_post/sanders-administration-holds-china-accountable/.*

105. That press release stated that Governor Sanders's "Administration today alerted Attorney General Tim Griffin's office of two companies that may be in violation of Act 636, which prohibits foreign-party-controlled businesses from owning Arkansas land." *Id.*

106. That press release announced an investigation under Act 636 into Risever, and also an otherwise wholly unrelated entity: Jones Digital, LLC, Jones Eagle's predecessor-in-interest.

107. Secretary Ward wrote, "A review of Jones Digital's ownership indicates that the entity may have significant ties to China." *Id.*

108. However, upon information and belief, Secretary Ward had done no "review of Jones Digital's ownership" on December 13, 2023.

109. Secretary Ward referred "potential violations" of Act 636 to Attorney General Griffin's office and requested that Attorney General Griffin "utilize the authority granted under

A.C.A. 18-11-704(c)(2) to determine if a violation of Act 636 has in fact occurred, and if so, commence appropriate legal action." *Id.*

110. Jones Eagle's real property interest is not "agricultural land" as defined under Ark. Code Ann. § 18-11-802(1)(A).

111. Therefore, Act 636 does not apply to Jones Eagle.

112. Since January 2, 2024, Jones Eagle and its predecessor-in-interest has been in frequent correspondence with the Attorney General's Office seeking to conclude that office's investigation based on Secretary Ward's referral under Act 636.

113. Jones Eagle has made numerous requests to meet and confer with the Attorney General's Office, but all those requests have been refused.

114. On January 12, 2024, Jones Eagle's predecessor-in-interest provided evidence, including specific third-party land surveys, which showed its leasehold interest was less than 10 acres and therefore could not meet the statutory definition of "agricultural land." Ark. Code Ann. § 18-11-802(1)(A).

115. Jones Eagle provided that evidence in response to the Attorney General's specific request for "documentation that shows Jones Digital is in compliance with Act 636 – specifically that its leasehold is less than 10 acres."

116. Despite actual knowledge that Jones Eagle's leasehold interest is not "agricultural land" as defined under Act 636, the Attorney General has refused to conclude the investigation under Act 636.

117. The Attorney General has refused to protect Jones Eagle's confidential business records from public disclosure, and the Attorney General has refused to a clawback request of Jones Eagle's privileged materials obtained from a third party without Jones Eagle's consent.

118. Jones Eagle's controlling interest is held by Mr. Chen, who is a U.S. citizen and domiciliary of Brooklyn, New York.

119. Mr. Chen's exercise of control over Jones Eagle extends back to its predecessor-in-interest, Jones Digital.

120. Mr. Chen is a naturalized American citizen with Chinese ancestry.

121. Defendants' coordinated efforts under Act 636 have been pretextual and discriminatory.

122. Defendants have no reasonable expectation of obtaining a valid conviction under Act 636 against Jones Eagle. *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988) (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6, 95 S. Ct. 1524, 1531 n. 6 (1975)).

123. Jones Eagle is suffering present and foreseeably compounding prejudice caused by Defendants' pretextual and discriminatory investigative efforts.

124. Jones Eagle will sustain irreparable harm if Defendants' unconstitutional activities are allowed to continue.

F. The Federal Government's role in foreign affairs, foreign investment, and national security

125. At the time of the Revolution, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 316, 57 S. Ct. 216, 219 (1936).

126. The federal government manages foreign affairs, foreign investment, and national security in the United States, including through two systematic federal regimes: (i) the Committee on Foreign Investment in the United States ("CFIUS"), which has been empowered to review foreign investment transactions, and (ii) the Office of Foreign Assets Control ("OFAC") within the

U.S. Treasury Department, which administers and enforces economic regulations and trade sanctions.

127. The U.S. Department of State occupies the field of regulating the International Traffic in Arms Regulations ("ITAR"), based on Congressional statutory delegation to the President, consistent with the supremacy of federal power in the arena of national defense policy in exercise of "the powers of external sovereignty." *Curtis-Wright*, 299 U.S. at 316.

128. Acts 636 and 174 intrude on fields occupied by Congress and the President in violation of the Supremacy Clause.

i. History of CFIUS

129. CFIUS was established on May 7, 1975, by President Ford through an executive order. E.O. 11858, 40 F.R. 20263. CFIUS became the interagency body of the federal executive branch responsible for overseeing issues of national security with respect to direct foreign investment, including real estate transactions. CFIUS was directed to, *inter alia*, monitor trends and developments in foreign investment in the United States, prepare guidance for foreign governments and consult regarding prospective major foreign governmental investments in the United States, review foreign investments that could have major implications for the national security interests of the United States, and consider proposals for new legislation or regulations relating to foreign investment as necessary.

130. Later, Congress enacted the Exon-Florio amendment to the Defense Production Act, included in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26. It established a mechanism for the federal executive branch to engage in a retrospective review of foreign investments. On December 27, 1988, President Reagan delegated that power to CFIUS by executive order, empowering it to conduct reviews, undertake

investigations, and make recommendations with respect to foreign investment data and policies. E.O. 12661, 54 F.R. 779. By 1991, the U.S. Treasury Department promulgated federal regulations implementing the Exon-Florio amendment, which were codified at 31 C.F.R. Part 800.

131. The next year, Congress amended the Exon-Florio provision with the Byrd Amendment to the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (1992). The Byrd Amendment broadened CFIUS's duties to investigate certain foreign investments, in particular, those in which the acquirer was controlled or acting on behalf of a foreign government, and those in which the acquisition would result in the control of a person engaged in interstate commerce within the United States that could affect national security.

132. Eventually, Congress passed, and President Bush signed, the Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49, 121 Stat. 246, giving Congress further oversight of CFIUS. FINSA also expanded the national security prerogatives within CFIUS's purview and required CFIUS to engage in even greater scrutiny of foreign direct investments. It also concretized CFIUS's position as a permanent federal agency by codifying it and granting it statutory authority, including certifying to Congress that a transaction that had been reviewed had no unresolved national security issues and providing Congress with confidential briefings, as well as annual classified and unclassified reports.

133. Most recently, Congress passed the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), Pub. L. No. 115-232, §§ 1701-28, 132 Stat. 2174-2207, which President Trump signed into law. The impetus for FIRRMA was the concern by many members of Congress over Chinese companies' growing investment in the United States. In response, Congress significantly expanded CFIUS's authority to investigate and review foreign

investments. Most notably, CFIUS was granted jurisdiction to review certain real estate transactions by foreign persons, specifically, those in close proximity to a military installation, or to a U.S. government facility, or property sensitive to national security. Congress also empowered CFIUS to review changes in foreign investor rights regarding U.S. businesses, as well as transactions in which a foreign government has a direct or indirect substantial interest. FIRRMA further authorized CFIUS to designate some countries as "countries of special concern" based on CFIUS's assessment as to whether that country has demonstrated or declared a strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. national security interests. In that regard, FIRRMA also formalized CFIUS's use of risk-based assessments to determine whether certain transaction pose threats to national security.

134. At the same time, Congress carefully calibrated the regulation of real estate purchases. For example, Congress constrained the President's power to prohibit transactions by exempting those involving only "a single 'housing unit.'" 50 U.S.C. § 4565(a)(4)(C)(i); *see* 31 C.F.R. §§ 802.223 (defining term), 802.216 (includes "adjacent land" incidental to use as housing unit.). That exception reflects the marginal national security implications of such transactions. In addition, the federal process is individualized, with the government reviewing particular transactions and purchasers to assess whether they pose any national security threat. 50 U.S.C. § 4565(d)(4). Penalties are narrowly tailored. Criminal liability attaches only where a person has made a false statement to CFIUS. 31 C.F.R. § 802.901(a)-(c), (g).

ii. History of OFAC

135. In addition to the CFIUS regime, the Treasury Department, through OFAC, is heavily involved with administering and enforcing economic and trade sanctions in support of U.S. national security and foreign policy objectives, including those authorized by Congress and the

President pursuant to the International Emergency Economic Powers Act of 1977 ("IEEPA"), Pub. L. No 95-223, §§ 201-08, 91 Stat. 1625, 1626-29. The Division of Foreign Assets Control, OFAC's immediate predecessor, was established under the Treasury Department in 1950. OFAC derives its authority from a variety of federal laws regarding economic sanctions and embargoes, particularly IEEPA.

136. OFAC is intended to prevent "prohibited transactions," which it defines as "trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC or expressly exempted by statute." OFAC administers and enforces economic sanctions programs against countries, businesses, and groups of individuals, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. It maintains and regularly updates several sanction lists identifying countries, entities, and individuals considered to be threats to national security.

iii. History of ITAR

137. The International Traffic in Arms Regulations ("ITAR") are regulations promulgated by the State Department pursuant to authority vested in the President by the Arms Export Control Act of 1976 ("AECA"), Pub. L. 90-629, 90 Stat. 729, codified at 22 U.S.C. §§ 2278, *et seq.*

138. On March 8, 2013, President Obama delegated via executive order that statutory authority to the Secretary of State to oversee the export and temporary import of certain defense articles and services. E.O. 13637, 78 F.R. 16129.

139. The ITAR strikes a deliberate, delicate balance as to the application of federal criminal statutes and regulatory controls over an assortment of federal agencies.

140. The ITAR contains its own definitions of foreign ownership and foreign control over firms "owned by one or more foreign persons," and "foreign control is presumed to exist where foreign persons own 25 percent or more of the outstanding voting securities unless one U.S. person controls an equal or larger percentage." 22 C.F.R. § 120.65.

141. 22 C.F.R. § 126.1(d)(1) contains specific prohibitions "for defense articles and defense services," which presently includes the foreign states of Belarus, Burma, China, Cuba, Iran, North Korea, Syria, and Venezuela.

142. But the State Department has chosen to distinguish between foreign states for which "defense articles and defense services" "have a policy of denial," without limitation, and those foreign states which have "a policy of denial" "as specified." 22 C.F.R. § 126.1(d)(2).

143. The latter category includes 16 separate foreign states, including Cyprus.

144. No member of the General Assembly mentioned Cyprus at any point during consideration of Acts 636 and 174, nor any interest in regulating any conduct by Cypriots.

145. In sum, the federal government—through statutes, executive orders, executive agencies, and inherent powers—occupies the fields of foreign affairs, foreign investment, national security, and the intersection thereof.

146. Acts 636 and 174 conflict with the deliberate, delicate balance that the federal government has struck with respect to these matters.

Count One: Violation of Equal Protection

147. The Equal Protection Clause of the 14th Amendment to the U.S. Constitution provides that: "No State shall […] deny to any person within its jurisdiction the equal protection of the laws."

148. The Equal Protection Clause protects all persons in the United States, regardless of their race, alienage, or national origin, including Jones Eagle and its affiliates.

149. The Equal Protection Clause prohibits the States from denying any person equal protection of the laws based on the person's race, alienage, or national origin. This includes laws that appear neutral on their face but are motivated by discriminatory intent and result in discriminatory practices or disparate treatment due to race, alienage, or national origin.

150. Acts 636 and 174 target Jones Digital and its affiliates based on their perceived race, alienage, and national origin.

151. Defendants have undertaken discriminatory and pretextual efforts to target Jones Eagle with investigations under Act 636 in the absence of reasonable suspicion.

152. Acts 636 and 174 were enacted with the purpose and intent to discriminate against persons based on race, alienage, and national origin, in particular, Chinese nationals and naturalized U.S. Citizens of Chinese heritage, such as Mr. Chen.

153. Acts 636 and 174 make impermissible classifications based on race, alienage, and national origin that are not justified by a compelling state interest.

154. Acts 636 and 174 are not narrowly tailored to meet a compelling state interest.

155. As a matter of Arkansas constitutional law, discriminatory classifications regulating property rights based on race, alienage, or national origin are not a legitimate governmental interest. Ark. Const. Art. 2, § 20; *Applegate v. Lum Jung Luke*, 173 Ark. 93, 291 S.W. 978 (1927).

156. Intentional discrimination against out-of-state business is not a legitimate state purpose. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985).

157. Acts 636 and 174, and Defendants' history of enforcement efforts, invidiously target Jones Digital, and persons similarly situated, based on their perceived race, alienage, and national origin, which has resulted in Defendants' discriminatory practices and disparate treatment.

158. Acts 636 and 174 deprive Chinese persons, naturalized U.S. Citizens of Chinese heritage, and persons perceived to be Chinese, from the equal protection of the laws, including laws relating to their fundamental rights.

159. No action to enforce either Act 636 or 174 has yet been commenced; however, Jones Eagle believes such enforcement efforts are imminent.

160. The imminent enforcement efforts of Acts 636 and 174 will cause ongoing and irreparable harm to Jones Eagle.

161. Acts 636 and 174 have caused Jones Eagle to be discriminated against and subject to disparate treatment by Defendants and others based on Jones Eagle and its affiliates' perceived race, alienage, and national origin.

162. Acts 636 and 174 deprive Jones Eagle of the opportunity to grow business expectancies by limiting their ability to attract capital investment and reducing the value of Jones Eagle's business expectancies and current and potential real property interests, causing irreparable harm to Jones Eagle's goodwill.

163. In implementing and enforcing the provisions of these laws, Defendants are acting under color of state law to deprive Jones Eagles, its affiliates, and other individuals of their rights, privileges, and immunities granted under the U.S. Constitution and federal law.

Count Two: Violation of the Right to Procedural Due Process

164. The Due Process Clause of the 14th Amendment provides: "No State shall [...] deprive any person of life, liberty, or property, without due process of law[.]"

165. The protections of the Due Process Clause apply to all persons in the United States, regardless of their race, alienage, and national origin, including Jones Eagle.

166. The Due Process Clause protects the fundamental rights and liberty interests of all persons in the United States from unreasonable governmental interference through state action, including that which is arbitrary, irrational, oppressive, discriminatory, and egregious. This entails the right to procedural due process, which consists, at a minimum, of the right to fair notice and an opportunity to be heard.

167. The new prohibitions imposed under Acts 636 and 174 target Jones Eagle and other persons based on their perceived race, alienage, or national origin by attempting to prevent Jones Eagle from owning its leasehold interest and operating its lawful business operations.

168. Acts 636 and 174 violate the Due Process Clause under the 14th Amendment to the U.S. Constitution, both facially and as applied to Jones Eagle, on the following grounds:

a. Act 636 is impermissibly vague, indefinite, and ambiguous because it fails to clearly define "agricultural land"; and it therefore fails to provide sufficient notice about which properties and persons are subject to its classifications, prohibitions, penalties, and requirements.

b. Acts 636 and 174 are impermissibly vague, indefinite, and ambiguous because they do not state whether they have retroactive application to existing interests in land or business expectancies; and they therefore fail to provide sufficient notice about which properties and persons are subject to their classifications, prohibitions, penalties, and requirements.

c. Acts 636 and 174 set no standards to define "reasonable suspicion," "probable cause," or any other guardrails against arbitrary and discriminatory enforcement efforts, many of which have already been undertaken.

169. The vagueness and lack of adequate guidelines under Acts 636 and 174 authorizes and encourages arbitrary and discriminatory enforcement across Arkansas, including with respect to Jones Eagle.

170. The enactment and enforcement of Acts 636 and 174 have caused and will continue to cause ongoing and irreparable harm to Jones Eagle.

171. In implementing and enforcing the provisions of this law, Defendants are acting under color of state law to deprive Jones Eagle, its affiliates, and other individuals of their rights, privileges, and immunities granted under the U.S. Constitution and federal law.

Count Three: Violation of the Commerce Clause

172. The commerce clause prohibits the enforcement of state laws driven by economic protectionism.

173. Acts 636 and 174 facially discriminate against out-of-state commerce in favor of in-state commerce.

174. Ark. Code Ann. § 18-11-804(a) expressly discriminates against resident aliens of the United States who reside outside Arkansas.

175. Conversely, Ark. Code Ann. § 18-11-804(a) expressly favors resident aliens of the United States who reside within Arkansas.

176. Act 636 provides an affirmative defense to resident aliens who reside in Arkansas but withholds that affirmative defense from resident aliens who reside outside Arkansas. Ark. Code Ann. § 18-11-804(f).

Count Four: Violation of the Supremacy Clause of the U.S. Constitution Preemption of Acts 636 and 174 by Federal Regimes Governing Foreign Affairs, Foreign Investment, and National Security

177. The Supremacy Clause of the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, Para. 2.

178. The Supremacy Clause establishes the doctrine of federal preemption, which mandates that federal law preempts state law in any area over which Congress has expressly or impliedly reserved exclusive authority or which is constitutionally reserved to the federal government, or where state law conflicts or interferes with federal alw or objectives.

179. Acts 636 and 174 are preempted by federal regimes governing foreign affairs, foreign investment, and national security, including CFIUS, OFAC, and ITAR. Under federal law, CFIUS is authorized, *inter alia*, to review foreign investment transactions with respect to national security concerns, as well as to review real estate transactions by foreign persons, specifically, those pertaining to properties in close proximity to military installations, U.S. government facilities, or properties of national security sensitivity. OFAC is responsible for administering and enforcing economic regulations. And the ITAR sets carefully crafted restrictions on transactions with foreign parties with sensitive implications for national security and foreign affairs.

180. Foreign relations, the power to deal with national security threats posed by foreign countries, and foreign commerce are the exclusive powers of the federal government. The U.S. Constitution vests the federal government the primary powers to manage foreign affairs and to

regulate foreign commerce. *See, e.g.*, U.S. Const., Art. I, Sec. 10, Cl. 1, 3 (foreign affairs); U.S. Const., Art. I, Sec. 8, Cl. 3 (commerce with foreign nations).

181. The federal government has long occupied the fields of foreign affairs, foreign investment, national security, and the intersection thereof, especially with respect to foreign relations with China.

182. Given the comprehensiveness of federal statutory, regulatory, and administrative schemes, federal law has "occupied" the entire field, thus precluding any state regulation such as attempted under Acts 636 and 174.

183. The State of Arkansas has explicitly stated its intent to regulate in these areas of foreign affairs and foreign investment, as they bear on national security, when enacting Acts 636 and 174.

184. The Governor of Arkansas and members of the Arkansas General Assembly have repeatedly emphasized the need to legislate based on "the defense issue for our nation" and to "hold China accountable."

185. In so doing, Acts 636 and 174 attempt to regulate through state law a field exclusively occupied by the federal government, specifically, the intersection between foreign affairs, national security, and foreign investment, including foreign real estate transactions and interstate and foreign commerce.

186. The prohibitions and penalties imposed under Acts 636 and 174 usurp the power vested by the Constitution and by Congress in the federal government to investigate, review, and take action with respect to foreign investments, including real estate transactions, that implicate national security policy.

187. Acts 636 and 174 intrude upon the federal government's power to govern foreign affairs generally.

188. Act 174 locks its definition of "prohibited foreign party" to the ITAR's classification list under 22 C.F.R. § 120.1 as to a specific date: January 1, 2024, even as Act 174 attempts to supplant the ITAR's definition of "foreign party," as defined by the ITAR. Ark. Code Ann. § 14-1-606(a)(3).

189. In so doing, Act 174 would continue to apply to a foreign nation, even if that nation is removed from the ITAR by the State Department; conversely, Act 174 could not apply to a foreign nation that the State Department later adds to the ITAR, resulting in foreseeable inconsistency between state and federal law.

190. Thus, Act 174 seeks to establish Arkansas's own foreign policy, thereby intruding upon the federal government's exclusive power to govern foreign affairs. *See Zschering v. Miller*, 389 U.S. 429 (1968).

191. Acts 636 and 174 intrude upon the federal government's power to govern foreign commerce, generally. By prohibiting "prohibited foreign parties" from specific countries from owning and acquiring agricultural land and business interests in Arkansas, both laws discriminate against out-of-state individuals and entities based on race, alienage, and national origin, in particular, Chinese persons. They therefore burden international commerce, especially with respect to foreign investment.

192. Acts 636 and 174 unavoidably conflict with the deliberate, delicate balance that the federal government has struck with respect to foreign affairs, foreign investment, and national security, and accordingly, they are preempted by federal law.

193. By their plain text, Acts 636 and 174 would punish a non-resident Cypriot for acquiring an interest in "agriculture land" in Arkansas, or for buying even a single share in a public company that conducts data asset mining activities in Arkansas.

Count Five: Taking Without Just Compensation

194. Acts 636 and 174 threaten to take Jones Eagle's property without just compensation.

195. "The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation.'" *Murr v. Wisconsin*, 582 U.S. 383, 392, 137 S. Ct. 1933, 1942 (2017) (citing U.S. Const. amend. V.).

196. A property owner has the right to bring a taking claim against a State directly under the Fifth Amendment in the absence of an adequate and available state cause of action. *See DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938 (2024).

197. There is no adequate and available cause of action available to Jones Eagle under Arkansas law to bring a taking claim against the State of Arkansas.

198. Jones Eagle's acquisition and use of its real property was lawful when it was established.

199. Acts 636 and 174 attempt to criminalize Jones Eagle's pre-existing lawful use of its property, which constitutes a taking of Jones Eagle's property without compensation in violation of due process of law. *Blundell v. City of West Memphis*, 258 Ark. 123, 522 S.W.2d 661 (1975).

200. Acts 636 and 174 intentionally, discriminatorily, and specifically interferes with Jones Eagle's distinct investment-backed expectations.

201. Acts 636 and 174 provide for forced divestiture of private property with no requirement to make just compensation to the owner.

202. The State of Arkansas has given no compensation to Jones Eagle, and neither Act 636 nor Act 174 obligates the State of Arkansas to do so.

203. In the absence of just compensation, all Defendants must be enjoined from proceeding with any enforcement measures under Acts 636 and 174 that would deprive Jones Eagle of its private property or its distinct investment-backed expectations.

204. Jones Eagle has already expended substantial capital investments to construct and operate its data center facility in Arkansas County, Arkansas.

205. If either Act 636 or Act 174 is allowed to be enforced, then Jones Eagle is entitled to recover from the State of Arkansas just compensation in the amount of its past capital expenditures and the anticipated net revenue from its distinct investment-backed expectations for the reasonable duration of its anticipated business expectancies.

REQUESTS FOR RELIEF

WHEREFORE, plaintiff Jones Eagle, LLC requests that the Court enter judgment in its favor and:

A. Declare Acts 636 and 174 unconstitutional under the 14th Amendment to the U.S. Constitution because they violate Jones Eagle's rights to equal protection.

B. Declare Acts 636 and 174 unconstitutional under the 14th Amendment to the U.S. Constitution, facially and as applied, because they violate Jones Eagle's rights to due process.

C. Declare Acts 636 and 174 unconstitutional under the commerce clause as they facially discriminate in favor of in-state commerce to the detriment of interstate commerce.

D. Declare Acts 636 and 174 unconstitutional under the Supremacy Clause of the U.S. Constitution as preempted by federal law.

E. Declare Acts 636 and 174 unconstitutional as takings without just compensation under the 5th and 14th Amendments to the U.S. Constitution.

F. Preliminarily and permanently enjoin Defendants from implementing and enforcing Acts 636 and 174 against Jones Eagle.

G. Order Defendants to destroy all records obtained concerning Jones Eagle, including affidavits and registrations, that Defendants have acquired pursuant to Acts 636 and 174.

H. Award Jones Eagle their reasonable attorneys' fees, costs, and expenses.

I. Grant all other relief this Court deems just and proper.

Dated: November 13, 2024

KUTAK ROCK LLP

By: _____

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Attorneys for Plaintiff Jones Eagle, LLC

JS 44 (Rev. 03/24)

CIVIL COVER SHEET

4:24-cv-990-KGB

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS Jones Eagle, LLC

(b) County of Residence of First Listed Plaintiff Kent, Delaware
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Kutak Rock LLP 501-975-3000
124 W. Capitol Ave. Ste. 2000 LR, AR 72201

DEFENDANTS Wes Ward; Tim Griffin; State of Arkansas

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 USC §1983; Ex Parte Young

Brief description of cause:
Action for declaratory and injunctive relief

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE November 13, 2024

SIGNATURE OF ATTORNEY OF RECORD Alexander Jones

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

JONES EAGLE LLC **PLAINTIFF**

v. **Case No. 4:24-cv-00990-KGB**

WES WARD, in his official capacity as Secretary of the Arkansas Department of Agriculture, *et al.* **DEFENDANTS**

REDACTED PRELIMINARY INJUNCTION ORDER

Before the Court are two pending motions. First, there is a motion for temporary restraining order and preliminary injunction filed by plaintiff Jones Eagle, LLC ("Jones Eagle") (Dkt. No. 7). Jones Eagle requests that the Court enjoin defendants Wes Ward ("Secretary Ward"), in his official capacity as Secretary of the Arkansas Department of Agriculture, Tim Griffin ("Attorney General Griffin"), in his official capacity as Attorney General of Arkansas, and the State of Arkansas (collectively "Defendants"), from enforcing Arkansas Act 636 of 2023 ("Act 636"), Arkansas Code Annotated §§ 18-11-110 and 18-11-801, *et seq.*, and Arkansas Act 174 of 2024 ("Act 174"), Arkansas Code Annotated § 14-1-606. Second, there is a motion to dismiss filed by Defendants (Dkt. No. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1331, and venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

On November 21, 2024, the Court held a hearing on the pending motion for temporary restraining order and preliminary injunction at which counsel for all parties were present. Although the November 21, 2024, hearing was adversarial rather than *ex parte*, the Court concluded that it was not the sort of adversarial hearing that included an opportunity to present sufficient evidence, testimony, and argument so as to allow the basis of the relief requested to be strongly challenged. Therefore, the Court considered only Jones Eagle's request for a temporary restraining order at that time. On the basis of evidence and arguments presented at the November

21, 2024, hearing, the Court issued a temporary restraining order on November 25, 2024, enjoining Defendants, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle or its principal Qimin "Jimmy" Chen within the time permitted by Federal Rule of Civil Procedure 65(b)(2) (Dkt. No. 20).

On December 4, 2024, the Court held a contested evidentiary hearing on Jones Eagle's request for a preliminary injunction and Defendants' motion to dismiss at which counsel for all parties were present. The parties presented evidence and arguments at the hearing, and the issues have been fully briefed. The pending motions are ripe for adjudication.

Accordingly, for the following reasons, the Court grants Jones Eagle's request for a preliminary injunction (Dkt. No. 7) and denies Defendants' motion to dismiss (Dkt. No. 16). The Court enjoins defendant Secretary Ward and defendant Attorney General Griffin, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

I. Factual Background

These facts are taken from the testimony and exhibits presented at the November 21, 2024, and December 4, 2024, hearings, as well as the other exhibits in the record.

Arkansas Act 636 Of 2023

1. On or about March 14, 2023, the Arkansas Senate Agriculture, Forestry, and Economic Development Committee first considered SB 383 of 2003 ("SB 383"), which ultimately became enacted into law as Act 636 of 2023 ("Act 636") (*See* Dkt. No. 1, ¶ 45).

2. SB 383 was sponsored by Arkansas State Senator Blake Johnson who spoke in support of the bill, saying in part, "[W]e have recently seen a balloon fly over our land and there is great concern over that, and I think the concern as well should be on the land that's below where

that balloon was that's in Arkansas, and I feel like it's a defense—I mean if we can't feed or clothe ourselves as a nation, it's a defense issue for our nation and for Arkansas." (Dkt. No. 30-2; *see also* Dkt. No. 1, ¶ 46).

3. The Arkansas Senate Agriculture, Forestry, and Economic Development Committee passed SB 383 by voice vote to be submitted for consideration on the floor of the Arkansas Senate (*See* Dkt. No. 1, ¶ 50).

4. On March 27, 2023, Senator Johnson introduced SB 383 on the floor of the Arkansas Senate and spoke in support of the bill, stating: "I'm gonna read a few of those nations: China, Iran, North Korea, Syria, Venezuela, Afghanistan, Haiti, Iraq, Lebanon, Libya, Russia, Somalia, that's just a few of those nations, there's 24 in all. This limits those nations. We had a balloon fly over. And everybody was worried about the balloon taking pictures of the land below it. If we don't want a balloon flying over our nation, we shouldn't want them owning land. We can't go over there and buy property, so this is what this bill does" (Dkt. No. 30-2).

5. On April 11, 2023, SB 383, which included certain previously made amendments, was enacted as Act 636, codified as Arkansas Code Annotated §§ 18-11-110 and 18-11-801, *et seq.* (*See* Dkt. No. 1, ¶ 56).

6. In pertinent part, Act 636:

(a) Prohibits a "prohibited foreign-party-controlled business" from acquiring any interest in public or private land in Arkansas pursuant to Arkansas Code Annotated § 18-11-110, with certain exceptions as set forth in Arkansas Code Annotated § 18-11-110(e), and subjects those violating the statute to penalties pursuant to Arkansas Code Annotated § 18-11-110(c)(2)-(4) and criminal penalties pursuant to Arkansas Code Annotated § 18-11-110(d).

(b) Prohibits foreign ownership of an "interest in agricultural land," as defined by Arkansas Code Annotated § 18-11-802(1)(A).

(c) Criminalizes ownership of agricultural land by a "prohibited foreign party," as defined by Arkansas Code Annotated § 18-11-802(5), with reference to the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 126.1.

(d) Prohibits any "prohibited foreign party," with certain exceptions set forth in Arkansas Code Annotated § 18-11-804(f), from holding "significant interest" or "substantial control" in an interest as set forth in the statute. Ark. Code Ann. § 18-11-802(8).

(e) Subjects those violating the statute with respect to agricultural lands to penalties pursuant to Arkansas Code Annotated § 18-11-804(b)(2), (b)(3), (c)(3), (c)(4), and (d), and criminal penalties pursuant to Arkansas Code Annotated § 18-11-804(e).

7. Act 636 creates the Office of Agricultural Intelligence within the Arkansas Department of Agriculture, which is "authorized and directed to collect and analyze information concerning the unlawful sale or possession of agricultural land by prohibited foreign parties; and administer and enforce the provisions of this subchapter, including without limitation the reporting of a violation of this subchapter to the Attorney General under § 18-11-804(c)." Ark. Code Ann. § 18-11-805.

8. Act 636 provides that "the office shall operate under the direction of" the Arkansas Secretary of Agriculture. Ark. Code Ann. § 18-11-805(d).

9. Defendant Secretary Ward testified at the preliminary injunction hearing and described his understanding that, if his agency receives inquiries related to potential violations of Act 636 and his agency feels like there is something there, he refers the matter to the Arkansas

Attorney General to make the Arkansas Attorney General aware or for the Arkansas Attorney General to take a closer look.

10. Act 636 provides the Arkansas Attorney General, if led to believe a violation of Act 636 may exist at least as to agricultural lands, shall have subpoena power. Ark. Code Ann. § 18-11-804(c)(2).

11. Act 636 contemplates enforcement action by the Arkansas Attorney General. Ark. Code Ann. §§ 18-11-110(c)(2); 18-11-804(c)(3).

Arkansas Act 174 Of 2024

12. On April 18, 2024, the Arkansas Senate City, County – Local Affairs committee first considered SB 78 and SB 79, which were sponsored by Arkansas State Senators Josh Bryant and Missy Irvin, respectively (*See* Dkt. No. 1, ¶ 72).

13. During discussions regarding SB 78 and SB 79, Senator Bryant made the following comments: "The last piece deals with foreign ownership. I think a commonality of the industry that is not playing well in Arkansas is the fact that they are not Arkansas-owned or American-owned. . . . Those that do not, we're going to ask them to leave our state and that includes all foreign adversarially owned facilities and business models for this crypto-mining industry. . . . On those particular examples, if they're foreign-owned, they'll have to divest to become American-owned at least and hopefully Arkansan-owned" (Dkt. No. 30-3).

14. On or about May 3, 2024, the Arkansas General Assembly passed Act 174, which effectuated amendments to Act 851 of 2023, known as the Arkansas Data Centers Act of 2023 ("Act 851") (*See* Dkt. No. 1, ¶ 83).

15. Act 174, in pertinent part:

(a) Created a new section entitled "Ownership of digital asset mining business by prohibited foreign-party-controlled business prohibited—Definitions—Penalty—Reporting." Ark. Code Ann. § 14-1-606.

(b) Defines "interest" as "an ownership interest of greater than zero percent (0%)." Ark. Code Ann. § 14-1-606(a)(1).

(c) Prohibits any interest in a "digital asset mining business" being held by a "prohibited foreign party." Ark. Code Ann. § 14-1-606(a)(2).

(d) Provides that an otherwise lawful digital asset mining business is transformed by virtue of any ownership by a "prohibited foreign party" into a "prohibited foreign-party-controlled business." Ark. Code Ann. §§ 14-1-606(a)(2); 14-1-606(a)(3).

(e) Sets out a four-part definition of "prohibited foreign party," which in turn is defined "subject to § 126.1 of the International Traffic in Arms Regulations ('ITAR'), 22 C.F.R. § 120.1 et seq., as existing on January 1, 2024." Ark. Code Ann. § 14-1-606(a)(2).

(f) Grants the Arkansas Attorney General discretion to "conduct an investigation" provided that "a person" makes a "request" or "upon receipt of information that leads the Attorney General to believe that a violation of this section may exist." Ark. Code Ann. § 14-1-606(d).

(g) Authorizes the Arkansas Attorney General to "order" a "prohibited foreign party to divest all interest in the digital asset mining business within three hundred sixty-five (365) calendar days." Ark. Code Ann. § 14-1-606(e)(1).

(h) Provides that, if the "prohibited foreign party: "fails to divest all interest in the digital asset mining business within three hundred sixty five (365) calendar days," then

the Arkansas Attorney General has a right of action to proceed in circuit court. Ark. Code Ann. § 14-1-606(e)(2).

(i) Subjects those violating the statute to penalties pursuant to Arkansas Code Annotated § 14-1-606(e)(3), (e)(4), and (e)(5).

16. Arkansas Act 174's definitions of "interest" and "foreign party" are inconsistent with the federal definitions under ITAR.

Investigation Into Jones Eagle

17. On December 13, 2023, the Arkansas Governor issued a press release entitled "Sanders Administration Holds China Accountable." (Dkt. No. 30-1). That press release publicly identified Jones Eagle's predecessor, Jones Digital, and another Arkansas entity and stated that the Arkansas Governor's "Administration today alerted Attorney General Tim Griffin's office of two companies that may be in violation of Act 636, which prohibits foreign-party-controlled businesses from owning Arkansas land." (Dkt. No. 30-1).

18. In December 2023, defendant Secretary Ward sent a letter to defendant Attorney General Griffin making a referral for an investigation under Act 636 of 2023 (Dkt. No. 30-24). That letter was directed to Jones Eagle's predecessor-in-interest, stating "[a] review of Jones Digital's ownership indicates that the entity may have significant ties to China." (Dkt. No. 30-24). Defendant Secretary Ward stated, "[t]he Arkansas Department of Agriculture believes that Jones Digital LLC and potentially other similarly situated digital asset or crypto-mining operations may be operating in violation of Act 636." (Dkt. No. 30-24). Defendant Secretary Ward referred "potential violations" of Act 636 and requested that defendant Attorney General Griffin "utilize the authority granted under A.C.A. 18-11-704(c)(2) to determine if a violation of Act 636 has in fact occurred, and if so, commence appropriate legal action." (Dkt. No. 30-24).

19. Defendant Secretary Ward testified that his agency wanted to announce and make public the referral of Jones Eagle to the Arkansas Attorney General; his agency was not trying to hide that referral.

20. Defendant Secretary Ward acknowledged that his referral letter to the Arkansas Attorney General was a part of the Arkansas Governor's press release regarding the referral of Jones Eagle to the Arkansas Attorney General.

21. Jones Eagle sought information from Defendants about the reasonable suspicion or probable cause that would show a violation of Act 636 and specifically on what Defendants relied to state that Jones Eagle "may have significant ties to China" (Dkt. Nos. 19-4; 30-4).

22. Defendant Attorney General Griffin requested documentation from Jones Eagle to show that its parcel was less than 10 acres, as relevant to the statutory definition of "agricultural land" under Act 636 (Dkt. Nos. 19-7; 30-7).

23. Jones Eagle voluntarily provided that proof the next day (Dkt. Nos. 19-8; 30-8). According to Mr. Chen, Jones Eagle's lease occupies around two acres of land based on a lease with its landlord (Dkt. No. 7-1, ¶ 12). Mr. Chen voluntarily provided copies of publicly available records to defendant Attorney General Griffin to show the acreage of the lease, including a third-party survey (Dkt. No. 7-1, ¶ 13). Based on that showing, Jones Eagle requested that Defendants conclude their investigation under Act 636, but Defendants refused to conclude the investigation (Dkt. Nos. 19-8; 30-8).

24. On September 10, 2024, defendant Attorney General Griffin issued an investigative subpoena seeking documents from Jones Eagle (Dkt. Nos. 17-1; 30-9). Jones Eagle received service of the subpoena on September 24, 2024 (*Id.*). The subpoena directed a response deadline of September 25, 2024 (*Id.*). Jones Eagle sought to meet and confer with defendant Attorney

General Griffin about the scope of the investigation, but defendant Attorney General Griffin refused (Dkt. Nos. 19-10; 19-11; 30-10; 30-11).

25. Defendant Attorney General Griffin filed a petition for citation of contempt and order to appear and show cause in Baxter County, Arkansas, Circuit Court on November 8, 2024, concerning the investigative subpoena that remains pending in Baxter County, Arkansas, state court (Dkt. No. 17-1).

26. Jones Eagle filed this lawsuit on November 13, 2024 (Dkt. No. 1).

Jimmy Chen

27. Jimmy Chen is a United States citizen currently residing in New York who was born in China, immigrated to the United States in 2003 as a child, and became a United States citizen (Dkt. Nos. 7-1, ¶¶ 2-3; 30-13). He graduated from the University of Illinois and worked for Wal-Mart in Bentonville, Arkansas, for several years after graduating (Dkt. No. 7-1, ¶¶ 4-5).

28. Mr. Chen is the manager of Jones Eagle and the sole owner of Eagle Asset Holding, Inc., which has a controlling interest in Jones Eagle (Dkt. No. 7-1, ¶¶ 6-7).

Jones Eagle

29. Arkansas passed Act 851 known as the Arkansas Data Centers Act of 2023, Ark. Code Ann. § 14-1-601, *et seq.*, in April 2023, which aims to regulate the digital asset mining business and which Mr. Chen understood as the State of Arkansas welcoming investment in the state for crypto mining businesses.

30. From November 1, 2023, to on or about May 20, 2024, Jones Digital, LLC, was involved in prior litigation in the United States District Court of the Eastern District of Arkansas with Arkansas County, Arkansas, and officials associated with Arkansas County, in Case No. 2:23-cv-00220-LPR, resulting in the court in that case granting, in part, and denying, in part, a motion

for temporary restraining order and preliminary injunction on November 20, 2023, and entering on May 1, 2024, an amended consent decree based on the parties' joint proposal for a consent decree. Mr. Chen testified that, after Jones Digital began operating in Arkansas County, amendments were made to ordinances that Jones Digital filed suit to challenge.

31. On October 12, 2023, Jones Digital, LLC, entered into an Operating Agreement (Defs.' Ex. 2, JE Subpoena 183-212). Mr. Chen testified that he has no documentation reflecting ownership of Jones Digital, LLC, prior to developing the operating agreement.

32. On December 27, 2023, Jones Digital, LLC, amended its operating agreement (Dkt. No. 30-17).

33. According to Mr. Chen, the December 27, 2023, amended operating agreement reflects the ownership of Jones Eagle, and there are no other members of Jones Eagle other than those reflected on the document (Dkt. No. 30-17).

34. Mr. Chen testified that, prior to this December 27, 2023, amendment, [redacted] Mr. Chen believed at the time of this December 27, 2023, amendment that [redacted]

35. However, Mr. Chen testified that [redacted] Based on the December 27, 2023, operating agreement, Alpha Digital One, LLC has a [redacted] ownership interest in Jones Eagle; Mr. Chen's company, Eagle Asset Holding, Inc., has a [redacted] ownership interest in Jones Eagle; and Taoyi Maintenance, LLC, another minority member, has a [redacted] interest in Jones Eagle (*Id.*).

36. [redacted]

37. On October 4, 2024, Jones Eagle formally changed its name from Jones Digital, LLC, by a filing submitted to the Delaware Secretary of State (Dkt. No. 1, ¶ 9). Jones Eagle is a limited liability company formed under Delaware law as Jones Digital, LLC (Dkt. No. 1, ¶ 11).

38. On March 24, 2023, Jones Eagle, through its predecessor-in-interest, entered into a commercial lease for real property in Arkansas County, Arkansas, for the purpose of engaging in the business of operating a data center, including mining digital assets such as cryptocurrency (Dkt. Nos. 1, ¶ 31; 30-44). The commercial lease included two amendments (Dkt. No. 30-44).

39. Jones Eagle is in the business of providing crypto mining hosting services to its upstream customers (Dkt. Nos. 7-1, ¶ 27; 30-16).

40. Jones Eagle has a written contract with [redacted] that was executed in December 2023 (Dkt. No. 30-16). [redacted].

41. [redacted]

42. According to Mr. Chen's testimony, Jones Eagle pays county, state, and federal taxes, paying over $10,000.00 monthly for the state and local taxes with federal taxes to be assessed after the first of the calendar year.

43. Along with the lease, and among other investments for the business, Jones Eagle made construction investments, asset investments, energy construction fee sharing, and hired a general contractor to handle the construction, presenting proof of these arrangements and the payments for them (Dkt. No. 30-14).

44. Jones Eagle is required to provide, among other things, physical space, heating and cooling, water, stable electric service, and stable internet service to its customer to ensure its customer's computers are operational, as its business model essentially entails hosting computers that are owned by the customer.

45. Jones Eagle has a written contract with Entergy for the power capacity Jones Eagle requires and uses, which includes Jones Eagle keeping a monetary deposit with Entergy (Dkt. No. 30-15).

46. Mr. Chen testified as to how Jones Eagle generates a profit from its customer contract and as to the anticipated profit.

47. Mr. Chen testified that investigation into Jones Eagle related to Acts 636 and 174 has been all over the news; has impacted Jones Eagle's clients and potential clients and impacted investors and potential investors; and a lot of individuals have inquired as to the investigation.

48. Mr. Chen maintains that enforcement of Acts 636 and 174 could threaten Jones Eagle from being able to operate and service its customers at its data center in Arkansas County, Arkansas (Dkt. No. 7-1, ¶¶ 29-30).

49. Mr. Chen testified that Jones Eagle has no other use for the facility it leases other than as a data center.

50. Mr. Chen testified that the investigation has caused individuals not to want to purchase Jones Eagle and the Arkansas County site or to offer a much lower than market price for Jones Eagle and the Arkansas County site, upwards of 50 to 60% less than the market price.

51. Mr. Chen maintains that Acts 636 and 174 limit his ability to grow his business; make it harder to attract investors, customers, and other business partners; and cause loss of goodwill to an incalculable but substantial degree (Dkt. No. 7-1, ¶¶ 24-26, 31).

52. Mr. Chen avers that Jones Eagle's relationships with its customers are critical for the company to thrive (Dkt. No. 7-1, ¶ 28).

53. Currently, Jones Eagle contracts with a dominant customer in this market, and if Jones Eagle were required to cease operations, Jones Eagle would lose its reputation and goodwill. Jones Eagle's current contracts would be broken; existing customers would leave and not be expected to return at future sites; potential future customers would be chilled from hiring Jones Eagle; Jones Eagle's ability to expand its business would suffer; and Jones Eagle would be unable to bid on larger service contracts or to accept projects on short notice, all of which would impact Jones Eagle's reputation, goodwill, and commercial viability (Dkt. No. 7-1, ¶¶ 32-36).

II. Motion To Dismiss

Defendants move to dismiss Jones Eagle's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim (Dkt. No. 16). Further, Defendants assert that dismissal is warranted because the case is unripe for judicial review (*Id.*). Alternatively, Defendants seek to have the case dismissed on *Younger* abstention grounds (*Id.*). Jones Eagle responded in opposition to Defendants' motion (Dkt. No. 25). The Court examines each of Defendants' arguments for dismissal.

A. Legal Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claim or claims stated in the complaint. *See Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Although a complaint "does not need detailed factual allegations" to survive a Rule 12(b)(6) motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Stated differently, the allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

A court considering a motion to dismiss must accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from those facts in favor of the non-moving party. *See Farm Credit Servs. of Am., FLCA v. Haun*, 734 F.3d 800, 804 (8th Cir. 2013); *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 914 (8th Cir. 2001). However, a court need not credit conclusory allegations or "naked assertion[s] devoid of further factual enhancement." *Retro Television Network, Inc. v. Luken Commc'ns, LLC*, 696 F.3d 766, 768 (8th Cir. 2012) (alteration in original) (quoting *Iqbal*, 556 U.S. at 678).

B. Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). Standing doctrine includes both prudential and constitutional considerations, but "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. A party invoking federal jurisdiction must "demonstrate standing . . . for each form of relief that they seek," *Becker v. N.D. Univ. Sys.*, 112 F.4th 592, 595 (8th Cir. 2024) (alteration in original) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)), and each claim brought, *TransUnion*, 594 U.S. at 431. As such, the burden lies with the plaintiff to establish every element of the Article III standing inquiry. *Animal Legal*

Def. Fund v. Reynolds, 89 F.4th 1071, 1077 (8th Cir. 2024) (quoting *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 720 (8th Cir. 2021)).

Where, as here, an injunction is sought:

> [T]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 794 (8th Cir. 2016) (alteration in original) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). This mirrors the requirements for Article III standing more generally. *See, e.g.*, *Becker*, 112 F.4th at 595. The Supreme Court has emphasized that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Arc of Iowa v. Reynolds*, 94 F.4th 707, 710 (8th Cir. 2024) (quoting *TransUnion*, 594 U.S. at 435)). "If the risk is too speculative, Article III standing is lacking." *Id.* at 11.

When it comes to prudential standing—that is, the aspects of standing doctrine that go beyond Article III's requirements—the Eighth Circuit has expressly declined to decide whether it is a jurisdictional issue, *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938–39 (8th Cir. 2013), and, following the Supreme Court, seems to question the continued viability of the doctrine. *See Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). The Supreme Court has provided no clear articulation of the requirements for prudential standing, but has stated that it encompasses at least three broad principles: (1) the general prohibition on a litigant's raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and (3) the requirement that a plaintiff's complaint fall within the zone

of interests protected by the law invoked. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

In the present case, Defendants argue that Jones Eagle has suffered no injury in fact because "there has been no enforcement action taken against Plaintiff" under Act 636 or Act 174 (Dkt. No. 17, at 6). Defendants emphasize that "there has been no determination as to whether Plaintiff is a 'prohibited foreign party' as defined in the statutes, and therefore, there has been no action taken by any government actor . . . to commence an action against Plaintiff for violating either act," and that "this is not a case where the plaintiff argues an intention to engage in conduct that would be prohibited" (*Id.*, at 9). Defendants liken this case to *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), in which the Supreme Court found that no injury in fact existed in a challenge to the Foreign Intelligence Surveillance Act of 1978 because the plaintiffs' belief that they would be targeted for surveillance under the Act was too speculative for Article III purposes. *Id.* at 410–20.

On the factual record before the Court at this stage, Defendants' argument is unconvincing. As Defendants themselves note, for purposes of establishing an Article III injury in fact, "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur" (Dkt. No. 17, at 6). *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 409, 414 n.5). Supreme Court and Eighth Circuit precedent make clear that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *Christian Action League of Minn. v. Freeman*, 31 F.4th 1068, 1072 (8th Cir.), *cert. denied*, 143 S. Ct. 304 (2022) (quoting *Susan B. Anthony List*, 573 U.S. at 159). The Eighth Circuit has further emphasized that this is a

"forgiving standard" for plaintiffs. *L.H. v. Indep. Sch. Dist.*, 111 F.4th 886, 893 (8th Cir. 2024) (quoting *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021)). As such, so long as Jones Eagle's conduct is *arguably* proscribed by the challenged statutes and Jones Eagle faces a "credible threat of prosecution," it has suffered an injury in fact sufficient for constitutional purposes.

First, with respect to Act 636, it strains credulity to characterize this action as merely anticipating a future injury. Defendant Secretary Ward publicly referred Jones Eagle to the Attorney General's Office for investigation for potential violation of Act 636, and Jones Eagle has been under public investigation by the Attorney General Griffin ever since (Dkt. Nos. 1, ¶¶ 104–09, 112–18; 30-1). The Attorney General brought an action against Jones Eagle in Baxter County Circuit Court to enforce a subpoena issued as a part of that investigation (Dkt. No. 17-1). The subpoena covers a wide range of sensitive business documents, including virtually any communication between anyone associated with Jones Eagle and any person or entity associated with China or a whole host of other countries (Dkt. Nos. 17-1, at 7–8; 30-9). Under these circumstances, whether or not Jones Eagle is actually in violation of Act 636's terms, it has suffered real, concrete harm under the enforcement regime created by the statute. Defendants' contention that being publicly singled out and subjected to a broad, indefinite government investigation backed by court-enforced subpoenas is insufficient to establish an injury in fact for Article III purposes with respect to the authorizing statute is simply irreconcilable with longstanding precedent. Indeed, even if this action is regarded as a pre-enforcement challenge, Jones Eagle has shown that it faces a credible threat of prosecution, and the actions of Defendants sufficiently indicate that Jones Eagle's land at least arguably falls under the statute's terms—whether or not Jones Eagle is correct in arguing that the statute should not apply to it. This is a

far cry from the speculation about potential future application of the statute in *Clapper*; Jones Eagle has been publicly targeted for investigation and subjected to a subpoena and legal proceedings. *See Clapper*, 568 U.S. at 411–14; *cf. Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 778 (8th Cir. 2019) (finding a sufficiently "credible threat of enforcement" if wineries disregarded a state statute prohibiting use of out-of-state ingredients). The Court finds that Jones Eagle has suffered a sufficient injury in fact so as to challenge Act 636.

Second, with respect to Act 174, [redacted] it is at least arguable that the statute applies to Jones Eagle. In any case, the threat of enforcement is far from speculative.

Further, it is Defendants who state unequivocally in this action that "violations of Act 636 may constitute violations under [Act 174] as well" and that Defendants have initiated a state court proceeding against Jones Eagle "pursuant to an investigation into . . . potential violations of Act 636 of 2023 and Act 174 of 2024" (Dkt. No. 17, at 3, 12). Given that Jones Eagle is actively under investigation for potential violations of both Act 174 and Act 636—which Defendants admit

overlaps with Act 174—and faces subpoena enforcement proceedings related to this investigation, Jones Eagle has shown that it faces a more-than-credible threat of enforcement with respect to Act 174. For these reasons, the Court finds that Jones Eagle has suffered a sufficient injury in fact so as to challenge Act 174.

Defendants make no argument that Jones Eagle fails to satisfy the other elements of the standing analysis. Jones Eagle's injury is fairly traceable to Defendants, who are responsible for enforcing the challenged statutes and have initiated an investigation and state court proceedings against Jones Eagle. Likewise, a favorable judicial decision would provide Jones Eagle with sufficient redress in the form of an injunction prohibiting enforcement of the allegedly unconstitutional statutes and a declaratory judgment that the statutes are unconstitutional. None of the prudential standing factors counsel against allowing Jones Eagle to proceed in this action. The Court therefore finds that Jones Eagle has established that it has Article III and prudential standing at this stage to seek a preliminary injunction against Defendants.

For the foregoing reasons, the Court determines at this stage of the litigation that Jones Eagle has standing to proceed with this action and seek a preliminary injunction against Defendants and that the matter is ripe for adjudication.[1]

C. *Younger* Abstention

A federal district court with jurisdiction "has a virtually unflagging obligation to hear and resolve questions properly before it." *FBI v. Fikre*, 601 U.S. 234, 240 (2024) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). However, in *Younger*

[1] For purposes of their ripeness challenge, Defendants state that "[i]n this case, the standing and ripeness issues 'essentially boil down to the same question,' so the analysis collapses together" (Dkt. No. 17, at 10 (quoting *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 608 (8th Cir. 2022))). As such, the Court finds ripeness for the reasons explained in the Court's standing analysis.

v. Harris, 401 U.S. 37 (1971), the Supreme Court recognized a limited exception—grounded in the principles of comity and federalism—to this general obligation for cases in which there is a "parallel, pending state criminal proceeding." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 69–70 (2013). Specifically, *Younger* held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Younger*, 401 U.S. at 55. The Court later expanded the application of *Younger* beyond criminal proceedings to two categories of state civil proceedings: (1) civil enforcement proceedings; and (2) civil proceedings "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," such as civil contempt orders and requirements for posting of bond pending appeal. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989) ("*NOPSI*"). *Younger* abstention does not apply outside these categories of cases. *Sprint*, 571 U.S. at 70.

In determining whether *Younger* applies, the Supreme Court has identified three factors that district courts should consider: (1) whether there is an "ongoing state judicial proceeding"; (2) whether the proceedings "implicate important state interests"; and (3) whether there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). These are "additional" factors that are to be considered only if the case fits into one of the categories identified in *NOPSI*. *Sprint*, 571 U.S. at 81.

The Eighth Circuit has distilled the entire *Younger* analysis into a three-part inquiry:

> First, does the underlying state proceeding fall within one of the three "exceptional circumstances" where *Younger* abstention is appropriate? Second, if the underlying proceeding fits within a *Younger* category, does the state proceeding satisfy what are known as the "*Middlesex*" factors? And third, even if the underlying state proceeding satisfies the first two inquiries, is abstention nevertheless inappropriate because an exception to abstention applies?

Wassef v. Tibben, 68 F.4th 1083, 1087 (8th Cir. 2023) (quoting *375 Slane Chapel Rd., LLC v. Stone Cnty., Mo.*, 53 F.4th 1122, 1127 (8th Cir. 2022)).

There are at least four potential "exceptions" to *Younger*. The first, outlined in *Younger* itself, is where there is a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in the state court proceeding. *Younger*, 401 U.S. at 55. Second, there is an exception for the rare circumstance in which the plaintiff does not have the opportunity to press the federal claim in the state court proceeding. *See Moore v. Sims*, 442 U.S. 415, 432 (1979) (discussing the holding of *Gerstein v. Pugh*, 420 U.S. 103 (1975)). Third, there is an "extremely narrow" exception for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 613–14 (8th Cir. 2018) (first quoting *Plouffe v. Ligon*, 606 F.3d 890, 894 (8th Cir. 2010); then quoting *Younger*, 401 U.S. at 53–54); *see also Wassef*, 68 F.4th at 1087 (quoting *Younger*, 401 U.S. at 53–54) (noting *Younger* exception where a criminal statute is "flagrantly and patently" unconstitutional on its face). Finally, a number of courts have recognized a fourth exception for "facially conclusive" federal preemption claims. *Minn. Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 554–55 (8th Cir. 2018). Although the Eighth Circuit has declined to decide whether such an exception is a "required part of the abstention analysis," *see id.* at 554 n.5, at least three circuits apply this exception as part of their abstention analysis. *See Colonial Life & Accident Ins. Co. v. Medley*, 572 F.3d 22, 27–28 (1st Cir. 2009); *Woodfeathers, Inc. v. Washington Cnty.*, 180 F.3d 1017, 1021–22 (9th Cir. 1999); *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 478 (6th Cir. 1997).

Defendants argue that the Attorney General's petition for citation of contempt and order to appear and show cause, filed in Baxter County, Arkansas, Circuit Court on November 8, 2024, falls within the category of "civil enforcement proceedings" to which *Younger* applies under *NOPSI* (Dkt. Nos. 17, at 11–12; 17-1, at 1–3). In *Sprint*, the Supreme Court emphasized that this category refers to enforcement actions that are "'akin to a criminal prosecution' in 'important respects.'" *Sprint*, 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)). For purposes of determining whether a civil proceeding is sufficiently "akin to a criminal prosecution," the Eighth Circuit, following *Sprint*, has pointed to three factors: (1) whether the action was commenced by the State in its sovereign capacity; (2) whether the proceeding was initiated to sanction the federal plaintiff for some wrongful act; and (3) whether there are other similarities to criminal actions, such as a preliminary investigation culminating in the filing of formal charges. *375 Slane Chapel Rd.*, 53 F.4th at 1128. Defendants argue that the Baxter County proceeding satisfies all of these factors (Dkt. No. 17, at 12).

There is no binding precedent in the Eighth Circuit as to whether a petition to enforce a subpoena filed before the initiation of formal criminal proceedings qualifies as a civil enforcement proceeding "akin to a criminal prosecution" for purposes of *Younger* abstention. On the one hand, a line of cases from the Southern District of New York holds that the issuance of investigative subpoenas by a state attorney general pursuant to an investigation into potentially illegal activities qualifies for abstention under *Younger* and *NOPSI*. *See Cuomo v. Dreamland Amusements, Inc.*, Nos. 08 Civ. 7100(JGK), 08 Civ. 6321(JGK), 2008 WL 4369270, at *9 (S.D.N.Y. Sept. 22, 2008) (quoting *J. & W. Seligman & Co. Inc. v. Spitzer*, No. 05 Civ. 7781(KMW), 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007)). The Southern District of New York has continued to use this standard even after the Supreme Court's most recent articulation of the *Younger* doctrine in *Sprint*.

See Trump v. Vance, 395 F. Supp. 3d 283, 295 (S.D.N.Y.), *aff'd in part, vacated in part on other grounds, remanded*, 941 F.3d 631 (2d Cir. 2019), *aff'd and remanded*, 591 U.S. 786 (2020). The Second Circuit itself has made no definitive pronouncement on the matter. *See id.*

However, the weight of authority indicates otherwise. Other circuits that have examined similar issues have concluded that mere investigations and civil investigative proceedings, including subpoenas issued before the grand jury or prosecutorial information stage, categorically do not qualify for *Younger* abstention. *See Google, Inc. v. Hood*, 822 F.3d 212, 223–24 & n.7 (5th Cir. 2016); *Guillemard–Ginorio v. Contreras–Gomez*, 585 F.3d 508, 519 (1st Cir. 2009); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1227 (4th Cir. 1989). More to the point in this case, however, is a pair of recent Third Circuit cases holding that petitions to enforce subpoenas filed by a state in state court are not qualifying civil enforcement proceedings under *Sprint* and *NOPSI*.

In *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230, 235–37 (3d Cir.), *cert. denied sub nom. TitleMax of Delaware, Inc. v. Vague*, 142 S. Ct. 2870 (2022), the Third Circuit found that a petition filed by the Pennsylvania Department of Banking and Securities in Pennsylvania Commonwealth Court to enforce an investigative subpoena did not qualify under *Younger* because it failed the second *Sprint* factor—it was filed to "enforce a subpoena, not to sanction TitleMax." The petition action was "'not retributive in nature' or 'imposed to punish . . . some wrongful act.'" *Id.* at 237 (alteration in original) (quoting *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 140 (3d Cir. 2014)). The Third Circuit went on to emphasize that "threat of contempt for noncompliance with an order that the state court may enter in the future is insufficient to convert the Petition Action as it currently stands into a quasi-criminal case." *Id.*

The Third Circuit expanded on its holding in *TitleMax* in *Smith & Wesson Brands, Inc. v. Attorney General of New Jersey*, 27 F.4th 886 (3d Cir. 2022). In *Smith & Wesson*, the New Jersey

Attorney General issued a subpoena seeking documents from Smith & Wesson as part of an investigation into potential violations of the New Jersey Consumer Fraud Act. *Id.* at 889. Instead of complying with the subpoena, Smith & Wesson filed a complaint in federal court alleging the subpoena violated its constitutional rights. *Id.*. The New Jersey Attorney General subsequently filed a petition in state court to enforce the subpoena, and the state court issued a show cause order and threatened Smith & Wesson with contempt. *Id.* at 890. The state court, as well as the New Jersey Supreme Court on appeal, rejected Smith & Wesson's constitutional objections and forced Smith & Wesson to produce the documents. *Id.* Smith & Wesson then amended its federal complaint to include a First Amendment retaliation claim. *Id.*

The Third Circuit found that *Younger* abstention was not appropriate. *Id.* at 893. Specifically, it found that the petition action did not fall into the *Younger* category of civil enforcement proceedings "akin to a criminal prosecution" because the second and third *Sprint* factors were not satisfied. *Id.* at 892. The petition action did not implicate the second *Sprint* factor because the subpoena enforcement action did not concern a violation of the underlying law, the New Jersey Consumer Fraud Act. *Id.*. The petition action alleged a violation of a "procedural rule" rather than a substantive duty. *Id.* Likewise, the third *Sprint* factor was not implicated because there was no "preliminary investigation culminating in the filing of a formal complaint or charges," because the state court petition did not arise from the substantive investigation but rather from the failure to comply with the subpoena. *Id.* at 892–93. The Third Circuit also emphasized that the penalties for failure to comply with a subpoena are not "self-executing; a court will impose them only after the subpoenaed party violates a court order," which, in this case, never happened. *Id.* at 893.

The Third Circuit likewise found that the subpoena enforcement action did not fall into the final *Younger* category of "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" because "no substantive outcome had occurred" in the form of a court order. *Id.* at 893–94. In the case at issue there was only "a possibility of contempt." *Id.* at 894–95. As such, *Younger* abstention categorically did not apply to the subpoena enforcement proceeding. Two district courts outside of the Third Circuit have adopted the reasoning in *Smith & Wesson*. *See Media Matters for Am. v. Bailey*, Case No. 24-cv-147 (APM), 2024 WL3924573, at *5–7 (D.D.C. Aug. 23, 2024); *Trump v. James*, Case No. 1:21-cv-1352 (BKS/CFH), 2022 WL 1718951, at *9 (N.D.N.Y. May 27, 2022).

Notably, in *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981), the Eighth Circuit found that subpoenas issued by an Arkansas prosecuting attorney who was acting in place of a grand jury pursuant to Arkansas law qualified for *Younger* abstention. *Id.* at 1182. However, as the Fifth Circuit noted in *Google*, *Kaylor* is distinguishable from subpoenas issued pursuant to civil investigations because the *Kaylor* subpoenas were issued pursuant to an ongoing criminal proceeding—the prosecutor's investigation was the legal equivalent of a grand jury proceeding under Arkansas law.[2] *Google*, 822 F.2d at 224 n.7. The Fifth Circuit also emphasized that *Kaylor* was decided before the Supreme Court clearly delimited *Younger*'s scope in *Sprint*, a case which notably overturned the Eighth Circuit's hitherto more expansive application of abstention doctrine. *Id.*

[2] It is likewise worth noting that the prosecutorial subpoena power under Arkansas law applies specifically to criminal proceedings and is codified at Arkansas Code Annotated § 16-43-212. *See Anderson v. State*, 163 S.W.3d 333, 349–50 (Ark. 2004) (describing prosecutorial subpoena power under Arkansas law). By contrast, the subpoena power upon which Defendants rely in this case applies more broadly to civil and criminal investigations and is not tethered to the formal criminal process. *See* Ark. Code Ann. §§ 14-1-606(d); 18-11-804(c)(2); 25-16-705.

For all of these reasons, this Court determines that the Baxter County case does not fall into one of the *Younger* categories and therefore categorically does not qualify for abstention.

D. Conclusion On Motion To Dismiss

Based on this analysis, having considered the arguments of the parties, the Court denies Defendants' motion to dismiss (Dkt. No. 16).

III. Preliminary Injunction

A. Legal Standard

District courts in the Eighth Circuit must consider four factors in deciding whether to grant a preliminary injunction:

> (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest.

Wilbur-Ellis Co., LLC v. Erikson, 103 F.4th 1352, 1355–56 (8th Cir. 2024) (quoting *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013)). "While 'no single factor is determinative,' the probability of success factor is the most significant." *Id.* at 1356 (quoting *Home Instead*, 721 F.3d at 497). Furthermore, in the Eighth Circuit, laws passed through the democratic process are entitled to a "higher degree of deference." *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 299 (8th Cir. 2020) (quoting *Rodgers v. Bryant*, 942 F.3d 451, 455–56 (8th Cir. 2019)). In such cases, it is never sufficient for the moving party to establish that there is a "fair chance" of success. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). Instead, the appropriate standard, and threshold showing that must be made by the movant, is "likely to prevail on the merits." *Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 517 (8th Cir. 2024) (quoting *id.*). Only if the movant has demonstrated that it is likely to prevail on the merits should the Court consider the remaining factors. *Rounds*, 530 F.3d at 732.

A preliminary injunction "is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant," here, Jones Eagle. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021) (quoting *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003)). The Eighth Circuit has noted that a movant carries a "heavier" burden when the granting of a preliminary injunction "has the effect of awarding the movant substantially the relief it could obtain after a trial on the merits." *H&R Block, Inc. v. Block, Inc.*, 58 F.4th 939, 946 (8th Cir. 2023). At the end of the day, however, "[a] district court has broad discretion when ruling on a request for preliminary injunction." *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, 114 F.4th 660, 669 (8th Cir. 2024) (quoting *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013)).

B. Likelihood Of Success On The Merits

1. Facial Versus As-Applied Challenge

Jones Eagle attacks Acts 636 and 174 both facially and as applied (Dkt. Nos. 1, ¶ 2; 7, ¶ 3). Facial challenges are "to be discouraged." *United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010) (quoting *Sabri v. United States*, 541 U.S. 600, 608–09 (2004)). This is because they "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)). As such, facial challenges are "hard to win," *id.*, and indeed are "the most difficult challenge to mount successfully" against a statute. *Stephens*, 594 F.3d at 1037 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When it comes to the legal standard to be applied, "[a] facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the

challenged law must be demonstrated and the corresponding 'breadth of the remedy.'" *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010)). To succeed on a facial challenge, a plaintiff must "establish that no set of circumstances exists under which the [law] would be valid." *Moody*, 144 S. Ct. at 2397 (alteration in original) (quoting *Salerno*, 481 U.S. at 745). For these reasons and given the preliminary nature of the record, the Court considers only Jones Eagle's as-applied challenge to Acts 636 and 174 at this time.

2. *Ex Parte Young* Analysis

The Court finds that Jones Eagle's suit is proper under the *Ex Parte Young*, 209 U.S. 123 (1908), exception to Eleventh Amendment immunity and rejects Defendants' argument on this point. The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). However, there are exceptions to this rule. Relevant here, a suit against a state official may go forward in the limited circumstances identified by the Supreme Court in *Ex Parte Young.* Under the *Ex Parte Young* doctrine, a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law. In determining whether this exception applies, a court conducts "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part)). Here, there is no dispute that the relief Jones Eagle seeks is prospective.

Further, to be amenable for suit challenging a particular statute, the state actor must have "some connection with the enforcement of the act." *Reprod. Health Servs. v. Nixon,* 428 F.3d 1139, 1145–46 (8th Cir.2005). Here, Jones Eagle has demonstrated a sufficient connection between Defendants and the enforcement of Acts 636 and 174 to satisfy this standard.

To the extent Defendants maintain that the Supremacy Clause alters this analysis, the Court rejects that position in reliance on *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015). The *Armstrong* Court observed that, based upon precedents, "in a proper case, relief may be given in a court of equity. . . to prevent an injurious act by a public officer." *Id.* (quoting *Carroll v. Safford,* 44 U.S. 441, 463 (1845)). The Court explained:

> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. *See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956). It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause.

Id.

3. Avoidance Of Constitutional Adjudications

Jones Eagle attacks Acts 636 and 174 as preempted by federal law and as violative of the Equal Protection Clause, the Fourteenth Amendment Due Process Clause, the Commerce Clause, and the Takings Clause of the United States Constitution (Dkt. No. 1, ¶¶ 2–8, 147–205). The allegations also seem to hint at a Fourth Amendment claim (*See* Dkt. Nos. 1, ¶¶ 6, 66–68, 95–99, 168; 8, at 25–26; 27, at 38–39). Although the constitutional issues presented in this case are serious, the Court notes that the Supreme Court has "'often stressed' that it is 'importan[t to] avoi[d] the premature adjudication of constitutional questions.'" *Matal v. Tam*, 582 U.S. 218, 230–31 (2017) (alterations in original) (quoting *Clinton v. Jones*, 520 U.S. 681, 690 (1997)). Thus,

federal courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 231 (alteration in original) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *see also Clinton*, 520 U.S. at 690, n.11 (noting that this requirement applies to the "entire Federal Judiciary" and listing cases in footnote). The Supreme Court has further stated that, although "basically constitutional in nature" because they "deriv[e their] force from the operation of the Supremacy Clause," federal preemption claims are "'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 272, n.6 (1977); *see also North Dakota v. Heydinger*, 825 F.3d 912, 927 (8th Cir. 2016) (Colloton, J., concurring in the judgment); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 971, n.5 (9th Cir. 2017); *Colo. Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, 693 F.3d 1214, 1222 (10th Cir. 2012); *C.E.R. 1988, Inc. v. Aetna Casualty & Surety Co.*, 386 F.3d 263, 272 n.13 (3d Cir. 2004). The Court will therefore examine Jones Eagle's federal preemption claims first as a threshold issue before turning to its constitutional claims.

4. Foreign Affairs Preemption

Two fundamental constitutional issues underlie the federal preemption issues presented in this case. The first is the Supremacy Clause of Article VI, which undergirds federal preemption doctrine generally. It provides that the "Constitution," "Laws," and "Treaties" of the United States "shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State notwithstanding." U.S. Const. art. VI, cl. 2. As such, under federal preemption doctrine, any "state law that conflicts with federal law is 'without effect,'" whether that conflict be express or implied. *Pharm. Rsch. & Mfrs. of Am. v. McClain*, 95 F.4th 1136, 1140 (8th Cir. 2024) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). In this regard, "'[t]he purpose of

Congress is the ultimate touchstone' of pre-emption analysis." *Id.* (alteration in original) (quoting *Cipollone*, 505 U.S. at 516). The moving party has the burden of showing preemption. *Pharm. Care Mgmt. Ass' n v. Wehbi*, 18 F.4th 956, 967 (8th Cir. 2021).[3]

The second issue is the exclusive authority over foreign affairs that the Constitution vests in the federal government, evinced in an array of constitutional provisions. *See* U.S. Const. art. I, § 8, cl. 3 (power to regulate foreign commerce); *id.* cl. 4 (power over naturalization); *id.* cl. 10 (power to define offenses against the law of nations); *id.* cl. 11 (power to declare war); *id.* § 10 (placing various restrictions on state actions that implicate foreign affairs); *id.* art. II, § 2, cl. 2 (power to negotiate treaties, appoint ambassadors, ministers, and consuls). The Supreme Court accordingly has long recognized that "[n]o State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). "[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (quoting *Ping v. United States*, 130 U.S. 581, 606 (1889)). The legal implications of this federal exclusivity are straightforward. In the words of the Supreme Court, "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* "[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418 (2003) (alteration in original) (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)). The Founders themselves were emphatic on this point. *See Nat'l*

[3] Defendants make the offhanded observation that "the Supremacy Clause does not provide a cause of action" (Dkt. No. 24, at 31). As noted above, Jones Eagle brings its claims pursuant to *Ex Parte Young*, not an implied right of action under the Supremacy Clause.

Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (quoting *The Federalist* Nos. 22, 42, and 45); *Hines*, 312 U.S. at 63 n.11 (quoting Thomas Jefferson).

At the intersection of these two constitutional issues is the foreign affairs doctrine. "Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 213 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023) (quoting *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012)); *see Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). This may occur through either conflict preemption or field preemption. *Mayor & City Council of Baltimore*, 31 F.4th at 213; *Gingery*, 831 F.3d at 1228; *A.O.A. v. Rennert*, Case No. 4:11-cv-44-CDP, 2023 WL 346001, at *28 (E.D. Mo. Jan. 20, 2023), *aff'd sub nom. Reid v. Doe Run Res. Corp.*, 110 F.4th 1049 (8th Cir. 2024). Jones Eagle argues that Acts 636 and 174 fall afoul of both foreign affairs conflict preemption and field preemption (Dkt. No. 27, at 8–19).[4] The Court will examine each in turn.

a. Conflict Preemption

Foreign affairs conflict preemption occurs when there is a "'sufficiently clear conflict' between the state law and an express foreign policy" of the federal government. *Mayor & City Council of Baltimore*, 31 F.4th at 213 (quoting *Garamendi*, 539 U.S. at 420–24); *Gingery*, 831 F.3d at 1229 ("[A] state action must yield to federal executive authority where 'there is clear evidence of conflict between the policies adopted by the two.'") (quoting *Garamendi*, 539 U.S. at

[4] Although Jones Eagle does not invoke the foreign affairs doctrine by name, its conflict and field preemption arguments rely almost entirely on the body of Supreme Court case law associated with the doctrine (*See* Dkt. Nos. 8, at 27–36; 27, at 4–19). The Court therefore examines the preemption issues raised by Jones Eagle under the rubric of the foreign affairs doctrine.

421); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11 (1st Cir. 2010) (noting the Supreme Court's holding in *Garamendi*). Notably for present purposes, such conflicts may occur when the basic policy objectives of the state and federal regimes are the same. As the Supreme Court emphasized in *Garamendi*, "the fact of a common end hardly neutralizes conflicting means." *Garamendi*, 539 U.S. at 399; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). Simply put, where state and federal policy differ in their "means," the state policy inevitably compromises the federal government's ability to "to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381.

Jones Eagle points to the comprehensive and complex federal regulatory regime governing foreign investment evinced in support of its conflict preemption arguments. Jones Eagle argues that Acts 636 and 174 conflict with at least two sets of federal regulations in this regard. First, there is the regime for screening foreign investment transactions associated with the interagency Committee on Foreign Investment in the United States ("CFIUS"), as statutorily codified by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), Pub. L. 115-232, 132 Stat. 2174, and the Office of Foreign Assets Control of the United States Department of the Treasury (Dkt. No. 8, at 27–34). Second, Jones Eagle argues that the classifications made by Acts 636 and 174 also conflict with the statutory definitions of foreign ownership and foreign control set forth in the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120.1 *et seq.*, issued by the United States Department of State pursuant to the Arms Export Control Act of 1976 ("AECA"), 22 U.S.C. § 2278, *et seq.*, and by the President of the United States through executive order, Executive Order Number 13637, 78 Fed. Reg. 16129 (*Id.*, at 34).

The Court turns first to FIRRMA. FIRRMA's regulatory regime subjects a wide array of private business transactions involving "foreign persons" to national security review,

investigation, and approval or disapproval at the discretion of the President, acting through CFIUS. 50 U.S.C. § 4565. Among these, the CFIUS regime specifically covers "the purchase or lease by, or a concession to, a foreign person of private or public real estate" that is sensitive for national security reasons with respect to federal installations, facilities, or properties. *Id.* § 4565(a)(4)(B)(ii). Real estate transactions in urbanized areas and involving single housing units are specifically exempted from review. *Id.* § 4565(a)(4)(C)(i).

Arkansas law takes a different view as to what sort of foreign investment ought to be prohibited. Act 636 provides that "prohibited foreign parties"—defined to include, among others, any citizen, resident, or entity of a country subject to ITAR, Arkansas Code Annotated § 18-11-802(5)—shall not acquire "any interest in agricultural land in this state." Ark. Code Ann. § 18-11-804. Act 174 provides that "prohibited foreign parties" shall not acquire or hold by grant "any interest in a digital asset mining business in this state." Ark. Code Ann. § 14-1-606. Acts 636 and 174 thus appear on their face to conflict with FIRRMA's comprehensive regulatory scheme for security review of foreign investment. Not only do Acts 636 and 174 infringe upon Congress's carefully considered calibration as to when foreign ownership interests in American real estate and businesses ought or ought not to be subject to scrutiny, they also purport to deprive the President of the discretion to approve or deny specific foreign investments based on the criteria that Congress judged to be relevant in making such determinations—the very discretion which lies at the heart of the CFIUS regime. Arkansas's blanket ban on certain categories of foreign ownership in Acts 636 and 174 thus clearly conflicts with the cautious, transaction-specific approach taken by Congress to foreign investment in FIRRMA.

Beyond the conflict in their regulatory approaches, Acts 636 and 174 also conflict with FIRRMA's regime in terms of how they define foreign ownership. FIRRMA subjects to review

transactions involving the acquisition of certain interests by "foreign persons." A "foreign person" is defined as: "(1) Any foreign national, foreign government, or foreign entity; or (2) Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity." 31 C.F.R . § 800.224. By contrast, a "prohibited foreign party" under Acts 636 and 174 would include by their terms a United States citizen who is a resident of an ITAR country, such as, for instance, an American citizen who is a resident of Hong Kong or Cyprus. Ark. Code Ann. §§ 14-1-606, 18-11-802. The foreign investment restrictions of FIRRMA and Acts 636 and 174 are thus in conflict both in terms of what investments they prohibit and to whom their prohibitions apply. Even leaving aside the fact that Congress has deliberately chosen not to subject the categories of foreign investment prohibited by Acts 636 and 174 to special scrutiny, it is not hard to imagine a scenario in which a foreign investment transaction specifically approved by the President through the CFIUS review process would nevertheless run afoul of Act 636 or Act 174, rendering the President's express approval nugatory.[5] This would conflict with federal foreign affairs policy—and the same conflict occurs here, where the foreign investment regime carefully crafted by Congress and the President has deliberately excluded the sorts of transactions and interests at issue in this case from even the possibility of heightened security review. *See Yifan Shen, et al. v. Comm'r, Fla. Dep't of Agric., et al.*, Case No. 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024) (enjoining pending appeal Florida's restrictions on real estate ownership by Chinese domiciliaries on grounds of FIRRMA preemption).

ITAR adds another wrinkle to the regulatory puzzle, given that Acts 636 and 174 piggyback off its list of countries for which the United States has a policy "to deny licenses and other

[5] This could happen, for instance, if the President were to approve after CFIUS review the purchase of Arkansas farmland (or a digital asset mining business) adjacent to a military facility by a "prohibited foreign party" under Act 636 or Act 174.

approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries." 22 C.F.R. § 126.1. The ITAR list of countries has no apparent legal import for federal policy outside of this specific defense export-control context. Acts 636 and 174's attempt to expand the list of prohibitions against these countries is thus plainly in conflict with the determination of Congress and the State Department as to the breadth and depth of restrictions to be placed upon them. Even were this not the case, as Jones Eagle points out (Dkt. No. 7, at 14), the requisite levels of foreign ownership and control that trigger Acts 636 and 174 conflict with the relevant thresholds for foreign ownership and foreign control employed by the State Department for ITAR purposes. *Compare* Ark. Code Ann. §§ 18-11-110(a), 803(a), 14-1-606(a), *with* 22 C.F.R. § 120.65. This, of course, is entirely aside from the abovementioned conflict between the State Department's definition of "foreign person" for ITAR purposes and Acts 636 and 174's definitions of "prohibited foreign party."

To add one final layer of conflict to this regulatory maze, Act 636 and Act 174 do not even employ consistent definitions of "prohibited foreign party," since the definition in Act 636 is pegged to 22 C.F.R. § 126.1, whereas Act 174's definition is pegged to 22 C.F.R. § 126.1 "as existing on January 1, 2024." *Compare* Ark. Code Ann. § 18-11-802(5) *with* § 14-1-606(a)(2). Thus, a situation could easily arise where the list of countries to which ITAR (and Act 636) applies differs from the list of countries to which Act 174 applies. In any case, on the record before the Court, no aspect of Jones Eagle's business runs afoul of ITAR, so Act 636 and Act 174's imposition of restrictions on Jones Eagle based upon a tenuous link with an ITAR country is plainly in conflict with federal policy as to the purpose and scope of the ITAR list and its associated restrictions.

In the face of these rather straightforward conflicts between federal policy and Acts 636 and 174, Defendants point to general presumption against preemption where states are legislating in areas within their "historic police powers." *Pharm. Rsch. & Mfrs.*, 95 F.4th at 1140. However, Defendants fail to note that, on the contrary, "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." *Natsios*, 181 F.3d at 76; *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 740 (N.D. Ill. 2007) (accord). Indeed, even in areas traditionally regulated by the state, the Supreme Court has indicated that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Garamendi*, 539 U.S. at 419 n.11 (alteration in original) (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507–508 (1988)). This is particularly the case where the state regulation targets specific foreign countries. *See id.* at 399 (noting the "weakness of the State's interest, when evaluated in terms of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies"). Even in areas at the core of state police power, "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

Even assuming that both Act 636 and Act 174 lie within the scope of Arkansas's "historic police powers," the Supreme Court's decision in *Zschernig* is controlling here. In that case, the Court dealt with an Oregon statute providing for escheat in cases where a nonresident alien claimed real or personal property unless three requirements were satisfied:

> (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

Id. at 430. The Court found the statute was preempted despite the fact that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates," *id.* at 440, and that the Solicitor General of the United States, acting as *amicus curiae*, "d[id] not contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Id.* at 434. The statute was preempted, even in the absence of a conflicting treaty or statute, *see id.* at 441, because it "affect[ed] international relations in a persistent and subtle way" by inviting Oregon courts to scrutinize foreign regimes in its application. *Id.* at 435–40. The Supreme Court found that this carried "more than 'some incidental or indirect effect in foreign countries'" for purposes of foreign affairs field preemption. *Id.* at 434. The reasoning of *Zschernig* applies even more strongly in this case, where Acts 636 and 174 go so far as to target specific foreign countries for economic restrictions and conflict with the express foreign policy of the federal government as represented by the FIRRMA and ITAR regimes.

For these reasons, the Court finds that Jones Eagle is likely to prevail on its conflict preemption claim with respect to both Acts 636 and 174.

b. Field Preemption

Foreign affairs field preemption applies when a "state law or policy 'disturb[s] foreign relations' or if a State attempts to 'establish its own foreign policy.'" *Mayor & City Council of Baltimore*, 31 F.4th at 213 (quoting *Zschernig*, 389 U.S. at 441); *A.O.A.*, 23 WL at *28 (accord). This occurs when two elements are met: (1) the "real purpose" of the state policy at issue does not concern an area of traditional state responsibility; and (2) it intrudes on the federal government's foreign affairs power. *Gingery*, 831 F.3d at 1229 (quoting *Movsesian*, 670 F.3d at 1229). The fundamental question with respect to the second element is whether "the state law 'has more than

some incidental or indirect effect in foreign countries.'" *Mayor & City Council of Balt.*, 31 F.4th at 213 (alteration in original) (quoting *Zschernig*, 389 U.S. at 434); *A.O.A.*, 23 WL at *28 (accord). There need not be any showing of conflict between state and federal policy in this regard. *Kyocera Document Sols. Am., Inc. v. Div. of Admin.*, 708 F. Supp. 3d 531, 545 (D.N.J. 2023) (quoting *Zschernig*, 389 U.S. at 418).

For the reasons stated above in its analysis of Jones Eagle's conflict preemption claim, the Court also finds that Jones Eagle is likely to succeed on its field preemption claim under the foreign affairs doctrine with respect to both Acts 636 and 174. *See Crosby*, 530 U.S. at 387–88 (affirming injunction against Massachusetts's Burma Act); *Shen*, 2024 U.S. App. LEXIS at *3 (enjoining pending appeal Florida's restrictions on real estate ownership by Chinese domiciliaries); *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013) (affirming injunction against Florida's Cuba Amendment); *Kyocera*, 708 F. Supp. 3d at 561 (enjoining New Jersey's Russia Act); *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1088 (D. Mont. 2023) (enjoining Montana's TikTok ban); *Giannoulias*, 523 F. Supp. 2d at 750–51 (enjoining Illinois's Sudan Act).

5. Constitutional Claims

Because the Court determines that Jones Eagle is likely to prevail on its federal preemption claims, the Court, in accordance with the long-established judicial policy of avoiding premature adjudication of constitutional claims, declines to make any ruling on Jones Eagle's other constitutional claims at this time. The Court notes, however, that, on the limited record before it, Jones Eagle has the better of the argument with respect to all of its remaining claims.

For these reasons, the Court finds as a threshold matter that Jones Eagle is likely to succeed on the merits of its as-applied challenge to Acts 636 and 174. The Court now turns to the other preliminary injunction factors.

C. Irreparable Harm

To be entitled to a preliminary injunction, the movant must show it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Thus, "[s]peculative harm does not support a preliminary injunction." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012); *see also Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) ("[T]o demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.") (quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996))). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342 (8th Cir. 2024). Jones Eagle "is not required to prove with certainty the threat of irreparable harm, but it must prove that 'irreparable injury is likely in the absence of an injunction.'" *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1018 (8th Cir. 2022) (quoting *Winter*, 555 U.S. at 22). "The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction[.]" *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

Jones Eagle has been publicly targeted by name and subjected to investigation by Defendants for almost a year. Jones Eagle faces irreparable harm from the public investigation and threatened enforcement actions under Acts 636 and 174 in the form of damage to reputation and goodwill. *See Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789–90 (8th Cir.

2010) (finding loss of goodwill among customers sufficient to establish a threat of irreparable harm) (citing *Med. Shoppe Int'l, Inc. v. S.B.S. Bill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003)). Moreover, Jones Eagle and Mr. Chen risk imprisonment, fines, and judicial foreclosure. Jones Eagle has shown that it is likely to sustain irreparable harm absent entry of the preliminary injunction.

Defendants claim that Jones Eagle "delay[ed] in filing" its lawsuit, undermining evidence of irreparable harm (Dkt. No. 24, at 36 (citing *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977))). The Court finds persuasive Jones Eagle's argument that it attempted cooperation with Defendants and that the public investigation recently escalated through a "burst of prosecutorial alacrity." *See Netflix, Inc. v. Babin*, 88 F.4th 1080, 1092 (5th Cir. 2023) (finding "inflection point" of assertions of constitutional rights "difficult to overlook"). The injuries to goodwill and reputational harms associated with prolonged investigation and potential enforcement actions are irreparable injuries. For all of these reasons, Jones Eagle has shown it is likely to sustain irreparable harm absent entry of a preliminary injunction.

D. Balance Of Harms

This Court "has broad discretion when ruling on a request for preliminary injunction" to balance the four factors to achieve the most equitable result. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1035 (8th Cir. 2016) (quoting *Novus Franchising*, 725 F.3d at 893). Compared to the likely prospect of irreparable harm to Jones Eagle, Defendants will sustain no appreciable harm by entry of a preliminary injunction. Given the Court's preemption analysis, the Court determines Jones Eagle is likely to prevail on its argument that Defendants have no interest in regulating matters of foreign affairs. To the extent Defendants argue that "the State's presumptively reasoned democratic processes" "are entitled to a higher

degree of deference and should not enjoined lightly," (Dkt. No. 24, at 37), the Court agrees with Jones Eagle that this interest is what is protected by the requirement of *Rounds* that Jones Eagle show it is likely to succeed on the merits of this dispute. The balance of the equities factor favors Jones Eagle.

E. Public Interest

Defendants are correct that the Court should preserve the status quo. Entry of the preliminary injunction does that by preserving "the relative positions of the parties." *Benisek v. Lamone*, 585 U.S. 155, 161 (2018) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Allowing the temporary restraining order to expire would upend the status quo by allowing Defendants to commence enforcement activities when Defendants have no constitutional interest in regulating matters of foreign affairs, foreign relations, or national security. The public interest factor weighs in favor of Jones Eagle.

F. Security

Under Federal Rule of Civil Procedure 65(c), a district court may grant a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In these proceedings, Defendants have neither requested security in the event this Court grants a preliminary injunction nor presented any evidence that Defendants will be financially harmed if they are wrongfully enjoined. For these reasons, the Court declines to require security from Jones Eagle.

G. Conclusion On Motion For Preliminary Injunction

For the foregoing reasons, the Court grants Jones Eagle's motion for preliminary injunction (Dkt. No. 7) and enjoins defendant Secretary Ward and defendant Attorney General Griffin, and

all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

IV. Severability

Given this Court's analysis and the statutory scheme of Act 636 and Act 174, severability is not appropriate.

V. Conclusion

For the foregoing reasons, the Court denies Defendants' motion to dismiss (Dkt. No. 16). The Court grants Jones Eagle's motion for preliminary injunction (Dkt. No. 7) and enjoins defendant Secretary Ward and defendant Attorney General Griffin, and all those acting in concert with them, from enforcing any provision of Act 636 or Act 174 against Jones Eagle until further Order from this Court.

It is so ordered this 9th day of December, 2024.

Kristine G. Baker
Chief United States District Judge

Table F-2.
U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
Total	**517,308**	**310,631**	**8,884**	**197,244**	**549**	**23,107**	**12,582**	**8,456**	**1,520**	**549**	**494,201**	**298,049**	**428**	**195,724**
DC	**443**	**268**	**66**	**108**	**1**	**86**	**19**	**63**	**3**	**1**	**357**	**249**	**3**	**105**
1st	**13,080**	**6,616**	**226**	**6,220**	**18**	**616**	**327**	**205**	**66**	**18**	**12,464**	**6,289**	**21**	**6,154**
ME	638	472	29	134	3	70	34	28	5	3	568	438	1	129
MA	4,706	2,952	108	1,645	1	297	168	103	25	1	4,409	2,784	5	1,620
NH	952	647	11	292	2	64	39	9	14	2	888	608	2	278
RI	968	672	8	288	0	41	31	8	2	0	927	641	0	286
PR	5,816	1,873	70	3,861	12	144	55	57	20	12	5,672	1,818	13	3,841
2nd	**24,939**	**16,577**	**975**	**7,343**	**44**	**2,039**	**1,052**	**889**	**54**	**44**	**22,900**	**15,525**	**86**	**7,289**
CT	3,337	2,747	18	572	0	114	96	12	6	0	3,223	2,651	6	566
NY,N	3,688	2,732	35	913	8	107	51	33	15	8	3,581	2,681	2	898
NY,E	10,357	6,023	496	3,838	0	1,046	606	440	0	0	9,311	5,417	56	3,838
NY,S	4,962	3,364	401	1,164	33	650	220	379	18	33	4,312	3,144	22	1,146
NY,W	2,333	1,501	24	806	2	100	60	24	14	2	2,233	1,441	0	792
VT	262	210	1	50	1	22	19	1	1	1	240	191	0	49
3rd	**28,774**	**15,224**	**2,032**	**11,352**	**166**	**3,013**	**745**	**1,992**	**110**	**166**	**25,761**	**14,479**	**40**	**11,242**
DE	2,891	945	1,242	546	158	1,586	183	1,242	3	158	1,305	762	0	543
NJ	13,199	7,564	529	5,102	4	798	249	499	46	4	12,401	7,315	30	5,056
PA,E	4,687	2,146	72	2,469	0	236	133	70	33	0	4,451	2,013	2	2,436
PA,M	3,469	1,745	32	1,691	1	122	74	31	16	1	3,347	1,671	1	1,675
PA,W	4,510	2,820	146	1,541	3	259	105	139	12	3	4,251	2,715	7	1,529
VI	18	4	11	3	0	12	1	11	0	0	6	3	0	3
4th	**40,777**	**20,956**	**385**	**19,424**	**12**	**1,375**	**811**	**370**	**182**	**12**	**39,402**	**20,145**	**15**	**19,242**
MD	11,108	6,907	85	4,114	2	363	229	80	52	2	10,745	6,678	5	4,062
NC,E	4,604	1,101	87	3,414	2	203	74	84	43	2	4,401	1,027	3	3,371
NC,M	2,068	947	13	1,108	0	68	45	13	10	0	2,000	902	0	1,098
NC,W	2,187	910	28	1,248	1	106	55	27	23	1	2,081	855	1	1,225
SC	4,651	1,486	38	3,127	0	138	93	36	9	0	4,513	1,393	2	3,118
VA,E	11,353	6,409	87	4,855	2	308	195	83	28	2	11,045	6,214	4	4,827
VA,W	3,171	1,883	23	1,260	5	91	55	23	8	5	3,080	1,828	0	1,252
WV,N	693	532	9	152	0	31	18	9	4	0	662	514	0	148
WV,S	942	781	15	146	0	67	47	15	5	0	875	734	0	141

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
5th	**50,075**	**23,801**	**1,536**	**24,679**	**59**	**3,592**	**1,850**	**1,511**	**172**	**59**	**46,483**	**21,951**	**25**	**24,507**
LA,E	2,558	582	49	1,927	0	111	50	46	15	0	2,447	532	3	1,912
LA,M	1,152	535	12	605	0	32	19	12	1	0	1,120	516	0	604
LA,W	5,716	1,036	44	4,623	13	103	42	42	6	13	5,613	994	2	4,617
MS,N	4,178	1,453	18	2,704	3	62	27	18	14	3	4,116	1,426	0	2,690
MS,S	4,951	2,516	24	2,409	2	108	73	24	9	2	4,843	2,443	0	2,400
TX,N	10,925	6,054	374	4,472	25	950	528	369	28	25	9,975	5,526	5	4,444
TX,E	5,250	2,890	86	2,274	0	371	259	81	31	0	4,879	2,631	5	2,243
TX,S	8,302	4,287	784	3,215	16	1,252	422	777	37	16	7,050	3,865	7	3,178
TX,W	7,043	4,448	145	2,450	0	603	430	142	31	0	6,440	4,018	3	2,419
6th	**76,389**	**46,431**	**312**	**29,627**	**19**	**1,328**	**865**	**296**	**148**	**19**	**75,061**	**45,566**	**16**	**29,479**
KY,E	5,326	3,312	23	1,989	2	72	43	23	4	2	5,254	3,269	0	1,985
KY,W	5,764	2,604	22	3,138	0	66	38	22	6	0	5,698	2,566	0	3,132
MI,E	16,830	11,316	48	5,461	5	203	117	45	36	5	16,627	11,199	3	5,425
MI,W	3,566	2,477	14	1,068	7	110	73	14	16	7	3,456	2,404	0	1,052
OH,N	13,723	10,718	44	2,957	4	246	179	42	21	4	13,477	10,539	2	2,936
OH,S	11,046	7,642	24	3,379	1	216	168	22	25	1	10,830	7,474	2	3,354
TN,E	6,817	3,668	27	3,122	0	127	91	26	10	0	6,690	3,577	1	3,112
TN,M	5,077	2,565	83	2,429	0	217	122	77	18	0	4,860	2,443	6	2,411
TN,W	8,240	2,129	27	6,084	0	71	34	25	12	0	8,169	2,095	2	6,072
7th	**52,032**	**30,375**	**317**	**21,303**	**37**	**1,272**	**826**	**304**	**105**	**37**	**50,760**	**29,549**	**13**	**21,198**
IL,N	21,582	12,151	200	9,207	24	754	501	193	36	24	20,828	11,650	7	9,171
IL,C	2,690	1,882	9	794	5	73	45	9	14	5	2,617	1,837	0	780
IL,S	1,726	918	11	795	2	36	13	11	10	2	1,690	905	0	785
IN,N	6,416	3,668	24	2,724	0	90	58	22	10	0	6,326	3,610	2	2,714
IN,S	9,903	5,587	42	4,273	1	143	92	38	12	1	9,760	5,495	4	4,261
WI,E	7,058	4,339	18	2,697	4	118	83	18	13	4	6,940	4,256	0	2,684
WI,W	2,657	1,830	13	813	1	58	34	13	10	1	2,599	1,796	0	803

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
8th	**31,913**	**19,587**	**197**	**12,073**	**56**	**895**	**540**	**188**	**111**	**56**	**31,018**	**19,047**	**9**	**11,962**
AR [2]	6,654	2,624	48	3,965	17	185	87	43	38	17	6,469	2,537	5	3,927
IA,N	1,314	1,156	11	144	3	64	49	9	3	3	1,250	1,107	2	141
IA,S	1,888	1,530	12	340	6	59	35	12	6	6	1,829	1,495	0	334
MN	8,574	6,268	24	2,278	4	209	166	23	16	4	8,365	6,102	1	2,262
MO,E	5,802	3,440	42	2,317	3	121	70	42	6	3	5,681	3,370	0	2,311
MO,W	3,970	1,951	21	1,994	4	84	49	20	11	4	3,886	1,902	1	1,983
NE	2,533	1,672	21	824	16	104	53	21	14	16	2,429	1,619	0	810
ND	554	482	12	58	2	45	24	12	7	2	509	458	0	51
SD	624	464	6	153	1	24	7	6	10	1	600	457	0	143
9th	**86,666**	**69,016**	**1,126**	**16,466**	**58**	**4,424**	**3,074**	**992**	**300**	**58**	**82,242**	**65,942**	**134**	**16,166**
AK	211	146	9	54	2	29	17	9	1	2	182	129	0	53
AZ	11,335	9,221	131	1,973	10	434	285	117	22	10	10,901	8,936	14	1,951
CA,N	5,965	3,675	237	2,053	0	593	325	203	65	0	5,372	3,350	34	1,988
CA,E	10,677	8,415	84	2,164	14	494	330	83	67	14	10,183	8,085	1	2,097
CA,C	25,911	21,526	385	3,989	11	1,633	1,248	320	54	11	24,278	20,278	65	3,935
CA,S	5,068	4,363	40	665	0	255	205	40	10	0	4,813	4,158	0	655
HI	1,200	748	8	443	1	55	41	7	6	1	1,145	707	1	437
ID	2,145	1,879	28	237	1	91	61	25	4	1	2,054	1,818	3	233
MT	736	616	11	105	4	38	19	11	4	4	698	597	0	101
NV	8,302	6,789	84	1,428	1	267	183	77	6	1	8,035	6,606	7	1,422
OR	6,594	4,983	28	1,578	5	203	138	26	34	5	6,391	4,845	2	1,544
WA,E	2,122	1,723	20	375	4	70	41	19	6	4	2,052	1,682	1	369
WA,W	6,372	4,916	60	1,391	5	259	181	54	19	5	6,113	4,735	6	1,372
GU	28	16	1	11	0	3	0	1	2	0	25	16	0	9
NMI	0	-	-	-	-	-	-	-	-	-	-	-	-	-
10th	**26,986**	**19,444**	**217**	**7,308**	**17**	**1,042**	**747**	**208**	**70**	**17**	**25,944**	**18,697**	**9**	**7,238**
CO	7,761	6,094	103	1,560	4	465	334	97	30	4	7,296	5,760	6	1,530
KS	3,868	1,953	44	1,861	10	132	68	43	11	10	3,736	1,885	1	1,850
NM	1,420	1,213	7	199	1	62	52	6	3	1	1,358	1,161	1	196
OK,N	1,763	1,574	4	184	1	59	48	4	6	1	1,704	1,526	0	178
OK,E	1,064	951	6	107	0	38	32	6	0	0	1,026	919	0	107
OK,W	3,782	2,913	10	858	1	124	105	10	8	1	3,658	2,808	0	850
UT	6,802	4,306	29	2,467	0	124	85	28	11	0	6,678	4,221	1	2,456
WY	526	440	14	72	0	38	23	14	1	0	488	417	0	71

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
11th	**85,234**	**42,336**	**1,495**	**41,341**	**62**	**3,425**	**1,726**	**1,438**	**199**	**62**	**81,809**	**40,610**	**57**	**41,142**
AL,N	9,827	3,937	31	5,856	3	157	113	30	11	3	9,670	3,824	1	5,845
AL,M	5,995	1,061	28	4,904	2	70	35	28	5	2	5,925	1,026	0	4,899
AL,S	3,573	779	17	2,776	1	48	27	17	3	1	3,525	752	0	2,773
FL,N	2,099	1,535	49	515	0	115	60	47	8	0	1,984	1,475	2	507
FL,M	21,094	15,761	469	4,858	6	1,179	664	446	63	6	19,915	15,097	23	4,795
FL,S	13,963	7,387	290	6,268	18	701	358	265	60	18	13,262	7,029	25	6,208
GA,N	19,082	9,637	571	8,852	22	1,026	409	565	30	22	18,056	9,228	6	8,822
GA,M	5,981	1,710	31	4,233	7	91	40	31	13	7	5,890	1,670	0	4,220
GA,S	3,620	529	9	3,079	3	38	20	9	6	3	3,582	509	0	3,073

NOTE: The nature of debt is business if the debtor is a corporation or partnership, or if debt related to the operation of a business predominates. Nonbusiness debt includes consumer debt, as defined in Section 101 of the U.S. Bankruptcy code, or other debt that the debtor indicates is not consumer debt or business debt. Because the bankruptcy database is continually updated, the numbers in this table may not match those in previously published tables. The United States territorial courts assume the jurisdiction of United States bankruptcy courts within their respective territories, which do not have separate bankruptcy courts.

[1] Other Chapters includes cases filed under chapters 9 (3), 12 (216) and 15 (330) as well as Section 304 (0).

[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
Total	**517,308**	**3**	**216**	**330**	**516,759**
DC	**443**	**0**	**1**	**0**	**442**
1st	**13,080**	**0**	**17**	**1**	**13,062**
ME	638	0	3	0	635
MA	4,706	0	1	0	4,705
NH	952	0	1	1	950
RI	968	0	0	0	968
PR	5,816	0	12	0	5,804
2nd	**24,939**	**0**	**10**	**34**	**24,895**
CT	3,337	0	0	0	3,337
NY,N	3,688	0	8	0	3,680
NY,E	10,357	0	0	0	10,357
NY,S	4,962	0	0	33	4,929
NY,W	2,333	0	2	0	2,331
VT	262	0	0	1	261
3rd	**28,774**	**0**	**4**	**162**	**28,608**
DE	2,891	0	0	158	2,733
NJ	13,199	0	2	2	13,195
PA,E	4,687	0	0	0	4,687
PA,M	3,469	0	1	0	3,468
PA,W	4,510	0	1	2	4,507
VI	18	0	0	0	18
4th	**40,777**	**0**	**12**	**0**	**40,765**
MD	11,108	0	2	0	11,106
NC,E	4,604	0	2	0	4,602
NC,M	2,068	0	0	0	2,068
NC,W	2,187	0	1	0	2,186
SC	4,651	0	0	0	4,651
VA,E	11,353	0	2	0	11,351
VA,W	3,171	0	5	0	3,166
WV,N	693	0	0	0	693
WV,S	942	0	0	0	942

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
5th	**50,075**	**1**	**24**	**34**	**50,016**
LA,E	2,558	0	0	0	2,558
LA,M	1,152	0	0	0	1,152
LA,W	5,716	0	13	0	5,703
MS,N	4,178	0	3	0	4,175
MS,S	4,951	0	2	0	4,949
TX,N	10,925	1	6	18	10,900
TX,E	5,250	0	0	0	5,250
TX,S	8,302	0	0	16	8,286
TX,W	7,043	0	0	0	7,043
6th	**76,389**	**0**	**19**	**0**	**76,370**
KY,E	5,326	0	2	0	5,324
KY,W	5,764	0	0	0	5,764
MI,E	16,830	0	5	0	16,825
MI,W	3,566	0	7	0	3,559
OH,N	13,723	0	4	0	13,719
OH,S	11,046	0	1	0	11,045
TN,E	6,817	0	0	0	6,817
TN,M	5,077	0	0	0	5,077
TN,W	8,240	0	0	0	8,240
7th	**52,032**	**0**	**7**	**30**	**51,995**
IL,N	21,582	0	0	24	21,558
IL,C	2,690	0	2	3	2,685
IL,S	1,726	0	2	0	1,724
IN,N	6,416	0	0	0	6,416
IN,S	9,903	0	1	0	9,902
WI,E	7,058	0	2	2	7,054
WI,W	2,657	0	0	1	2,656

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
8th	**31,913**	**2**	**51**	**3**	**31,857**
AR [2]	6,654	0	16	1	6,637
IA,N	1,314	0	3	0	1,311
IA,S	1,888	0	4	2	1,882
MN	8,574	0	4	0	8,570
MO,E	5,802	1	2	0	5,799
MO,W	3,970	0	4	0	3,966
NE	2,533	1	15	0	2,517
ND	554	0	2	0	552
SD	624	0	1	0	623
9th	**86,666**	**0**	**32**	**26**	**86,608**
AK	211	0	1	1	209
AZ	11,335	0	2	8	11,325
CA,N	5,965	0	0	0	5,965
CA,E	10,677	0	14	0	10,663
CA,C	25,911	0	3	8	25,900
CA,S	5,068	0	0	0	5,068
HI	1,200	0	0	1	1,199
ID	2,145	0	1	0	2,144
MT	736	0	4	0	732
NV	8,302	0	0	1	8,301
OR	6,594	0	5	0	6,589
WA,E	2,122	0	1	3	2,118
WA,W	6,372	0	1	4	6,367
GU	28	0	0	0	28
NMI	0	-	-	-	-
10th	**26,986**	**0**	**14**	**3**	**26,969**
CO	7,761	0	2	2	7,757
KS	3,868	0	10	0	3,858
NM	1,420	0	1	0	1,419
OK,N	1,763	0	0	1	1,762
OK,E	1,064	0	0	0	1,064
OK,W	3,782	0	1	0	3,781
UT	6,802	0	0	0	6,802
WY	526	0	0	0	526

Table F-2. (December 31, 2024—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
11th	**85,234**	**0**	**25**	**37**	**85,172**
AL,N	9,827	0	3	0	9,824
AL,M	5,995	0	2	0	5,993
AL,S	3,573	0	1	0	3,572
FL,N	2,099	0	0	0	2,099
FL,M	21,094	0	3	3	21,088
FL,S	13,963	0	5	13	13,945
GA,N	19,082	0	1	21	19,060
GA,M	5,981	0	7	0	5,974
GA,S	3,620	0	3	0	3,617

[1] Total Chapter 15 column includes cases filed under chapter 15 (330) as well as Section 304 (0).
[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2 Quarterly.
U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Three-Month Period Ending March 31, 2025, Based on Data Current as of March 31, 2025

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
Total	**134,063**	**82,059**	**2,039**	**49,850**	**115**	**5,648**	**3,300**	**1,910**	**323**	**115**	**128,415**	**78,759**	**129**	**49,527**
DC	**112**	**75**	**10**	**27**	**0**	**15**	**6**	**9**	**0**	**0**	**97**	**69**	**1**	**27**
1st	**3,301**	**1,731**	**49**	**1,518**	**3**	**127**	**73**	**42**	**9**	**3**	**3,174**	**1,658**	**7**	**1,509**
ME	134	97	4	32	1	11	6	4	0	1	123	91	0	32
MA	1,199	802	19	378	0	62	44	17	1	0	1,137	758	2	377
NH	215	154	6	55	0	17	11	5	1	0	198	143	1	54
RI	264	189	1	74	0	9	8	1	0	0	255	181	0	74
PR	1,489	489	19	979	2	28	4	15	7	2	1,461	485	4	972
2nd	**6,518**	**4,339**	**253**	**1,908**	**18**	**571**	**306**	**228**	**19**	**18**	**5,947**	**4,033**	**25**	**1,889**
CT	894	715	4	175	0	28	22	2	4	0	866	693	2	171
NY,N	888	680	7	198	3	28	11	7	7	3	860	669	0	191
NY,E	2,846	1,663	157	1,026	0	318	178	140	0	0	2,528	1,485	17	1,026
NY,S	1,227	831	73	308	15	156	68	67	6	15	1,071	763	6	302
NY,W	596	395	12	189	0	32	19	12	1	0	564	376	0	188
VT	67	55	0	12	0	9	8	0	1	0	58	47	0	11
3rd	**7,419**	**4,127**	**355**	**2,928**	**9**	**573**	**199**	**342**	**23**	**9**	**6,846**	**3,928**	**13**	**2,905**
DE	646	265	247	128	6	315	62	247	0	6	331	203	0	128
NJ	3,482	2,099	54	1,329	0	121	64	46	11	0	3,361	2,035	8	1,318
PA,E	1,289	605	19	665	0	59	39	15	5	0	1,230	566	4	660
PA,M	897	464	7	425	1	26	15	7	3	1	871	449	0	422
PA,W	1,104	694	27	381	2	51	19	26	4	2	1,053	675	1	377
VI	1	0	1	0	0	1	0	1	0	0	0	-	-	-
4th	**10,515**	**5,582**	**84**	**4,842**	**7**	**309**	**192**	**78**	**32**	**7**	**10,206**	**5,390**	**6**	**4,810**
MD	2,826	1,754	24	1,048	0	90	57	23	10	0	2,736	1,697	1	1,038
NC,E	1,179	274	25	877	3	52	16	24	9	3	1,127	258	1	868
NC,M	505	239	1	265	0	8	7	1	0	0	497	232	0	265
NC,W	569	259	6	304	0	27	16	6	5	0	542	243	0	299
SC	1,219	416	6	794	3	32	21	6	2	3	1,187	395	0	792
VA,E	2,965	1,794	12	1,158	1	64	49	9	5	1	2,901	1,745	3	1,153
VA,W	858	527	3	328	0	18	15	3	0	0	840	512	0	328
WV,N	178	134	5	39	0	12	6	5	1	0	166	128	0	38
WV,S	216	185	2	29	0	6	5	1	0	0	210	180	1	29

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
5th	**13,267**	**6,362**	**422**	**6,475**	**8**	**916**	**457**	**414**	**37**	**8**	**12,351**	**5,905**	**8**	**6,438**
LA,E	632	157	9	466	0	29	19	8	2	0	603	138	1	464
LA,M	283	129	2	152	0	5	3	2	0	0	278	126	0	152
LA,W	1,399	292	5	1,100	2	13	6	4	1	2	1,386	286	1	1,099
MS,N	1,062	439	3	620	0	23	18	3	2	0	1,039	421	0	618
MS,S	1,337	684	9	643	1	23	14	7	1	1	1,314	670	2	642
TX,N	2,920	1,571	166	1,181	2	313	137	166	8	2	2,607	1,434	0	1,173
TX,E	1,455	803	36	615	1	106	64	35	6	1	1,349	739	1	609
TX,S	2,340	1,149	160	1,029	2	272	102	158	10	2	2,068	1,047	2	1,019
TX,W	1,839	1,138	32	669	0	132	94	31	7	0	1,707	1,044	1	662
6th	**19,825**	**12,296**	**81**	**7,441**	**7**	**301**	**192**	**72**	**30**	**7**	**19,524**	**12,104**	**9**	**7,411**
KY,E	1,437	922	0	515	0	10	8	0	2	0	1,427	914	0	513
KY,W	1,499	698	6	795	0	17	9	6	2	0	1,482	689	0	793
MI,E	4,552	3,141	17	1,393	1	45	20	15	9	1	4,507	3,121	2	1,384
MI,W	961	644	2	312	3	20	11	2	4	3	941	633	0	308
OH,N	3,390	2,707	10	672	1	46	32	10	3	1	3,344	2,675	0	669
OH,S	2,670	1,831	2	837	0	46	44	1	1	0	2,624	1,787	1	836
TN,E	1,812	1,006	7	798	1	39	25	6	7	1	1,773	981	1	791
TN,M	1,398	738	26	633	1	63	37	23	2	1	1,335	701	3	631
TN,W	2,106	609	11	1,486	0	15	6	9	0	0	2,091	603	2	1,486
7th	**13,313**	**7,787**	**61**	**5,450**	**15**	**328**	**241**	**59**	**13**	**15**	**12,985**	**7,546**	**2**	**5,437**
IL,N	5,558	3,191	37	2,330	0	162	121	36	5	0	5,396	3,070	1	2,325
IL,C	699	503	2	192	2	20	16	2	0	2	679	487	0	192
IL,S	479	265	3	210	1	50	43	3	3	1	429	222	0	207
IN,N	1,626	930	4	692	0	18	14	4	0	0	1,608	916	0	692
IN,S	2,511	1,343	6	1,156	6	37	24	6	1	6	2,474	1,319	0	1,155
WI,E	1,713	1,030	5	678	0	21	13	5	3	0	1,692	1,017	0	675
WI,W	727	525	4	192	6	20	10	3	1	6	707	515	1	191

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
8th	**8,214**	**5,087**	**66**	**3,042**	**19**	**271**	**161**	**63**	**28**	**19**	**7,943**	**4,926**	**3**	**3,014**
AR [2]	1,695	712	15	965	3	57	39	12	3	3	1,638	673	3	962
IA,N	355	314	1	33	7	15	7	1	0	7	340	307	0	33
IA,S	510	398	1	107	4	15	10	1	0	4	495	388	0	107
MN	2,361	1,765	2	592	2	65	51	2	10	2	2,296	1,714	0	582
MO,E	1,432	865	16	549	2	42	20	16	4	2	1,390	845	0	545
MO,W	1,012	472	26	513	1	46	16	26	3	1	966	456	0	510
NE	591	369	1	221	0	17	12	1	4	0	574	357	0	217
ND	125	104	3	18	0	7	4	3	0	0	118	100	0	18
SD	133	88	1	44	0	7	2	1	4	0	126	86	0	40
9th	**22,735**	**18,291**	**312**	**4,124**	**8**	**1,129**	**779**	**276**	**66**	**8**	**21,606**	**17,512**	**36**	**4,058**
AK	47	29	2	16	0	3	1	2	0	0	44	28	0	16
AZ	2,877	2,330	41	505	1	110	67	39	3	1	2,767	2,263	2	502
CA,N	1,498	979	44	475	0	117	75	33	9	0	1,381	904	11	466
CA,E	2,908	2,318	19	565	6	116	79	19	12	6	2,792	2,239	0	553
CA,C	6,632	5,531	124	977	0	454	330	109	15	0	6,178	5,201	15	962
CA,S	1,356	1,198	7	151	0	67	57	5	5	0	1,289	1,141	2	146
HI	278	155	2	121	0	12	8	0	4	0	266	147	2	117
ID	519	472	3	44	0	15	13	2	0	0	504	459	1	44
MT	183	143	5	35	0	14	7	5	2	0	169	136	0	33
NV	2,182	1,804	35	343	0	84	48	34	2	0	2,098	1,756	1	341
OR	2,055	1,602	11	442	0	63	43	11	9	0	1,992	1,559	0	433
WA,E	562	464	8	89	1	24	13	8	2	1	538	451	0	87
WA,W	1,629	1,259	11	359	0	50	38	9	3	0	1,579	1,221	2	356
GU	9	7	0	2	0	0	-	-	-	-	9	7	0	2
NMI	0	-	-	-	-	-	-	-	-	-	-	-	-	-
10th	**6,553**	**4,713**	**44**	**1,792**	**4**	**265**	**206**	**42**	**13**	**4**	**6,288**	**4,507**	**2**	**1,779**
CO	1,801	1,421	26	354	0	119	87	25	7	0	1,682	1,334	1	347
KS	842	460	5	375	2	28	19	5	2	2	814	441	0	373
NM	399	352	3	44	0	20	17	2	1	0	379	335	1	43
OK,N	437	377	1	59	0	22	21	1	0	0	415	356	0	59
OK,E	243	214	0	29	0	5	5	0	0	0	238	209	0	29
OK,W	970	724	2	242	2	35	30	2	1	2	935	694	0	241
UT	1,740	1,063	6	671	0	31	23	6	2	0	1,709	1,040	0	669
WY	121	102	1	18	0	5	4	1	0	0	116	98	0	18

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 7	Total Chapter 11	Total Chapter 13	Total Other Chapters [1]	Predominant Nature of Debt								
						Business					Nonbusiness			
						All Chapters	Chapter 7	Chapter 11	Chapter 13	Other Chapters [1]	All Chapters	Chapter 7	Chapter 11	Chapter 13
11th	**22,291**	**11,669**	**302**	**10,303**	**17**	**843**	**488**	**285**	**53**	**17**	**21,448**	**11,181**	**17**	**10,250**
AL,N	2,515	1,022	9	1,483	1	33	19	9	4	1	2,482	1,003	0	1,479
AL,M	1,523	278	5	1,240	0	11	5	4	2	0	1,512	273	1	1,238
AL,S	958	207	7	744	0	16	9	7	0	0	942	198	0	744
FL,N	564	416	13	135	0	32	21	11	0	0	532	395	2	135
FL,M	5,628	4,299	89	1,236	4	285	189	83	9	4	5,343	4,110	6	1,227
FL,S	3,655	2,035	64	1,553	3	186	105	58	20	3	3,469	1,930	6	1,533
GA,N	4,993	2,753	102	2,137	1	229	118	101	9	1	4,764	2,635	1	2,128
GA,M	1,606	511	10	1,077	8	38	14	10	6	8	1,568	497	0	1,071
GA,S	849	148	3	698	0	13	8	2	3	0	836	140	1	695

NOTE: The nature of debt is business if the debtor is a corporation or partnership, or if debt related to the operation of a business predominates. Nonbusiness debt includes consumer debt, as defined in Section 101 of the U.S. Bankruptcy code, or other debt that the debtor indicates is not consumer debt or business debt. Because the bankruptcy database is continually updated, the numbers in this table may not match those in previously published tables. The United States territorial courts assume the jurisdiction of United States bankruptcy courts within their respective territories, which do not have separate bankruptcy courts.

[1] Other Chapters includes cases filed under chapters 9 (0), 12 (88) and 15 (27) as well as Section 304 (0).

[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

Table F-2 Quarterly.
U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code,
During the Three-Month Period Ending March 31, 2025, Based on Data Current as of March 31, 2025

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
Total	**134,063**	**0**	**88**	**27**	**133,948**
DC	**112**	**0**	**0**	**0**	**112**
1st	**3,301**	**0**	**3**	**0**	**3,298**
ME	134	0	1	0	133
MA	1,199	0	0	0	1,199
NH	215	0	0	0	215
RI	264	0	0	0	264
PR	1,489	0	2	0	1,487
2nd	**6,518**	**0**	**4**	**14**	**6,500**
CT	894	0	0	0	894
NY,N	888	0	3	0	885
NY,E	2,846	0	0	0	2,846
NY,S	1,227	0	1	14	1,212
NY,W	596	0	0	0	596
VT	67	0	0	0	67
3rd	**7,419**	**0**	**3**	**6**	**7,410**
DE	646	0	0	6	640
NJ	3,482	0	0	0	3,482
PA,E	1,289	0	0	0	1,289
PA,M	897	0	1	0	896
PA,W	1,104	0	2	0	1,102
VI	1	0	0	0	1
4th	**10,515**	**0**	**3**	**4**	**10,508**
MD	2,826	0	0	0	2,826
NC,E	1,179	0	2	1	1,176
NC,M	505	0	0	0	505
NC,W	569	0	0	0	569
SC	1,219	0	0	3	1,216
VA,E	2,965	0	1	0	2,964
VA,W	858	0	0	0	858
WV,N	178	0	0	0	178
WV,S	216	0	0	0	216

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
5th	**13,267**	**0**	**7**	**1**	**13,259**
LA,E	632	0	0	0	632
LA,M	283	0	0	0	283
LA,W	1,399	0	2	0	1,397
MS,N	1,062	0	0	0	1,062
MS,S	1,337	0	1	0	1,336
TX,N	2,920	0	2	0	2,918
TX,E	1,455	0	1	0	1,454
TX,S	2,340	0	1	1	2,338
TX,W	1,839	0	0	0	1,839
6th	**19,825**	**0**	**7**	**0**	**19,818**
KY,E	1,437	0	0	0	1,437
KY,W	1,499	0	0	0	1,499
MI,E	4,552	0	1	0	4,551
MI,W	961	0	3	0	958
OH,N	3,390	0	1	0	3,389
OH,S	2,670	0	0	0	2,670
TN,E	1,812	0	1	0	1,811
TN,M	1,398	0	1	0	1,397
TN,W	2,106	0	0	0	2,106
7th	**13,313**	**0**	**15**	**0**	**13,298**
IL,N	5,558	0	0	0	5,558
IL,C	699	0	2	0	697
IL,S	479	0	1	0	478
IN,N	1,626	0	0	0	1,626
IN,S	2,511	0	6	0	2,505
WI,E	1,713	0	0	0	1,713
WI,W	727	0	6	0	721

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
8th	**8,214**	**0**	**19**	**0**	**8,195**
AR [2]	1,695	0	3	0	1,692
IA,N	355	0	7	0	348
IA,S	510	0	4	0	506
MN	2,361	0	2	0	2,359
MO,E	1,432	0	2	0	1,430
MO,W	1,012	0	1	0	1,011
NE	591	0	0	0	591
ND	125	0	0	0	125
SD	133	0	0	0	133
9th	**22,735**	**0**	**8**	**0**	**22,727**
AK	47	0	0	0	47
AZ	2,877	0	1	0	2,876
CA,N	1,498	0	0	0	1,498
CA,E	2,908	0	6	0	2,902
CA,C	6,632	0	0	0	6,632
CA,S	1,356	0	0	0	1,356
HI	278	0	0	0	278
ID	519	0	0	0	519
MT	183	0	0	0	183
NV	2,182	0	0	0	2,182
OR	2,055	0	0	0	2,055
WA,E	562	0	1	0	561
WA,W	1,629	0	0	0	1,629
GU	9	0	0	0	9
NMI	0	-	-	-	-
10th	**6,553**	**0**	**4**	**0**	**6,549**
CO	1,801	0	0	0	1,801
KS	842	0	2	0	840
NM	399	0	0	0	399
OK,N	437	0	0	0	437
OK,E	243	0	0	0	243
OK,W	970	0	2	0	968
UT	1,740	0	0	0	1,740
WY	121	0	0	0	121

Table F-2 Quarterly. (Three Months Ending March 31, 2025—Continued)

Circuit and District	Total All Chapters	Total Chapter 9	Total Chapter 12	Total Chapter 15 [1]	All Other Chapters
11th	**22,291**	**0**	**15**	**2**	**22,274**
AL,N	2,515	0	1	0	2,514
AL,M	1,523	0	0	0	1,523
AL,S	958	0	0	0	958
FL,N	564	0	0	0	564
FL,M	5,628	0	4	0	5,624
FL,S	3,655	0	1	2	3,652
GA,N	4,993	0	1	0	4,992
GA,M	1,606	0	8	0	1,598
GA,S	849	0	0	0	849

[1] Total Chapter 15 column includes cases filed under chapter 15 (27) as well as Section 304 (0).
[2] The United States Bankruptcy Court for Arkansas (AR) includes both the Eastern and Western Districts of Arkansas.

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Doug's Elec. Serv. v. Miller

Court of Appeals of Arkansas, Division Four

August 28, 2002, Opinion Delivered

CA 01-1343

Reporter
79 Ark. App. 28 *; 83 S.W.3d 425 **; 2002 Ark. App. LEXIS 427 ***

DOUG'S ELECTRICAL SERVICE, INC., APPELLANT v. Mike MILLER and Cliff Goodin, APPELLEES

Prior History: [*1]** APPEAL FROM POPE COUNTY CIRCUIT COURT [NO. E-2001-319]. HONORABLE DENNIS SUTTERFIELD, CIRCUIT JUDGE.

Disposition: Affirmed.

Core Terms

easement, extinguished, deed, ownership, merger, summary judgment, servient estate, quiet, severance, trial court, recreate, parcels, revived

Case Summary

Procedural Posture

Appellant landowner filed a petition in the Pope County Circuit Court, Arkansas, to remove an easement burdening its land and benefitting the land of appellee neighbors. The trial court granted the neighbors' motion for summary judgment. The landowner appealed.

Overview

The neighbors' predecessor in title owned land that included an access easement across an adjacent parcel of land owned by her son. When the neighbors' predecessor in title died, the son became the owner of the dominant estate along with his sisters. Thereafter, the son quieted title to the property by having a court decree the servient property remained encumbered by the easement. After the landowner acquired the servient estate, the neighbors sought to pave the easement. The landowner unsuccessfully sought to remove the easement. On appeal, the landowner argued the trial court erred in granting the neighbors summary judgment because the easement was extinguished by merger of the dominant and servient estates, and was not subsequently revived. The appellate court held the doctrine of merger did not apply when the two properties were held under the ownership of the son of the neighbor's predecessor in interest because the burden did not come into a single ownership. The appellate court concluded the quiet title action served to reaffirm the easement and indicated an intent to continue the servient nature of the landowner's property.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Civil Procedure > Judgments > Summary

Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Summary Judgment, Supporting Materials**

When reviewing orders of summary judgment, an appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion. Ark. R. Civ. P. 56(c)(2) (2002). If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied.

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN2[] **Easements, Termination of Easements**

Arkansas recognizes the doctrine of merger of dominant and servient estates thereby extinguishing a former encumbering easement.

Real Property Law > Encumbrances > Restrictive Covenants > Enforcement of Restrictive Covenants

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN3[] **Restrictive Covenants, Enforcement of Restrictive Covenants**

A servitude is terminated when all the benefits and burdens come into a single ownership. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates.

Real Property Law > ... > Limited Use Rights > Easements > General Characteristics

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

HN4[] **Easements, General Characteristics**

In order to extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right, and an easement is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate. Merger of estates is a question of intent.

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN5[] **Limited Use Rights, Easements**

Merger does not apply to estates held in co-ownership, but only to estates held in severalty; however, merger does not occur where only one estate is held by tenants in common.

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN6[] **Easements, Termination of Easements**

Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates. However, upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise, but if it does arise, it does so because it was newly created at the time of the conveyance. Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance. The standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

Headnotes/Summary

Headnotes

1.

JUDGMENT -- SUMMARY JUDGMENT -- APPELLATE REVIEW. -- When reviewing orders of summary judgment, the appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered; the proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party.

2.

JUDGMENT -- SUMMARY JUDGMENT -- SHIFTING BURDEN. -- Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof.

3.

JUDGMENT -- SUMMARY JUDGMENT -- WHEN PROPER. -- Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion.

4.

JUDGMENT -- SUMMARY JUDGMENT -- WHEN DENIED. -- If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied.

5.

EASEMENTS -- MERGER -ARKANSAS RECOGNIZES DOCTRINE. -- Arkansas recognizes the doctrine of merger.

6.

EASEMENTS -- SERVITUDE -- WHEN TERMINATED. -- A servitude is terminated when all the benefits and burdens come into a single ownership; the rationale for this doctrine is that when the benefits and burdens are united in a single person or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates.

7.

EASEMENTS -- MERGER -- REQUIREMENTS FOR EXTINCTION BY. -- To extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right; an easement is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate.

8.

EASEMENTS -- MERGER -- QUESTION OF INTENT. -- Merger of estates is a question of intent.

9.

EASEMENTS -- MERGER -- CONVEYOR'S OWNERSHIP OF BOTH ESTATES WOULD NOT EXTINGUISH EASEMENT. -- The *Restatement (First) of Property § 497, Comment b*, states that merger does not apply to estates held in co-ownership, but only to estates held in severalty; the *Restatement (Third) of Property, Servitudes, § 7.5, Illustration 7*, provides that merger does not occur where only one estate is held by tenants in common; thus, it appeared that the conveyor's ownership of both estates would not extinguish the easement, regardless of whether he owned the dominant estate as a joint owner or a tenant in common.

10.

EASEMENTS -- SEVERANCE -- NEW EASEMENT ARISING FROM. -- Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates; however, upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise, but if it does arise, it does so because it was newly created at the time of the conveyance; such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance; the standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

11.

EASEMENTS -- NEW EASEMENT -- LANGUAGE IN DEED TO APPELLANT WAS SUFFICIENT TO CREATE. -- The appellate court found that the language in the deed from the conveyor to appellant was sufficient to create a new easement; it is an express easement created by a written instrument, and the description of the easement was such that a surveyor could go on the land and locate the easement from the description,

as evidenced by the survey commissioned by appellant that indicated the easement.

12.

JUDGMENT -- SUMMARY JUDGMENT -- CIRCUIT COURT DID NOT ERR IN GRANTING. -- Where the evidence clearly showed that the conveyor had the requisite intent to recreate the easement in the quiet-title decree and to convey the property to appellant subject to the easement; where the easement was reflected in documents in appellant's chain of title, as well as in his survey, real-estate contract, and title-disclosure documents; and where it was clear from the record that appellant had actual notice of the easement, the trial court accordingly found that there were no material issues of fact to be litigated, and summary judgment was appropriate as a matter of law; the appellate court could not say that the court erred in granting the summary judgment.

Counsel: Hurst Law Firm, P.L.L.C., by: Q. Byrum Hurst, Jr., and Travis J. Morrissey, for appellant.

Laws & Murdoch, P.A., by: Ike Allen Laws, Jr., for appellees.

Judges: ANDREE LAYTON ROAF, Judge. HART and VAUGHT, JJ., agree.

Opinion by: ANDREE LAYTON ROAF

Opinion

[427] [*30]** ANDREE LAYTON ROAF, Judge. Appellant, Doug's Electrical Service ("Doug's Electrical"), filed a quiet-title petition to remove an easement burdening its land and benefitting the land of appellees, Mike Miller and Cliff Goodin. The trial court granted appellees' motion for summary judgment, and Doug's Electrical appeals. On appeal, Doug's Electrical argues that the trial court erred in granting summary judgment, because the easement at issue was extinguished by merger of the dominant and servient estates and was not subsequently revived. We affirm.

Both parcels of land involved in this case were once owned by Jessie Bell Smith. Mrs. Smith transferred the south portion of her property to her son, Doyle Smith, in a warranty deed dated September 8, 1987. This deed provided that the land conveyed **[*31]** was subject to a seventy-foot-wide right-of-way running between the two parcels, along and parallel with the south edge of a ditch that ran east to west. At some point after this deed was recorded, **[***2]** Mrs. Smith died and the north portion of the property came into the ownership of Doyle Smith and his two sisters, Delores Buffington and Mary Williams. [1] Doyle Smith then brought a quiet title action against Buffington and Williams involving the parcel deeded to him by Jessie Bell Smith in 1987. Buffington and Williams consented to quiet title in Doyle Smith, with the provision that there be a seventy-foot-wide easement along the north side of the property for utilities and a road and another easement on the south side of the property for ingress and egress. A quiet title decree was entered on September 24, 1996, specifically reciting that the property was "subject to a 70 feet (sic) wide easement along the North side."

On October 25, 1996, Doyle Smith conveyed the property at issue to Doug's Electrical by warranty deed that also recited a seventy-foot-wide easement across the north side, in addition to an easement on the south **[***3]** side of the property and any other easements of record. The property owned by Doyle Smith, Buffington, and Williams was later conveyed to appellees, Mike Miller and Cliff Goodin. On April 24, 2001, Doug's Electrical sued appellees to quiet title to the seventy-foot easement after it learned that appellees planned to put a road on the easement. The trial court granted summary

[1] The record does not reflect how Smith and his sisters held title to this property.

judgment in favor of appellees, and Doug's Electrical brings this appeal.

On appeal, Doug's Electrical argues that the trial court erred in granting summary judgment because the easement was extinguished by merger of the dominant and servient estates and was not subsequently revived. ***HN1***[⬆] When reviewing orders of summary judgment, the appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Chambers v. Stern, 347 Ark. 395, 64 S.W.3d 737 (2002)*. The proof submitted must be viewed in the light most favorable to the nonmoving **[*32]** party, and "any doubts or inferences must be resolved against the moving party." *Renfro v. Adkins, 323 Ark. 288, 295, 914 S.W.2d 306, 309-10 (1996)*. **[***4]** Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. *Id.* **[**428]** Summary judgment is proper when the nonmoving party fails to show that there is a genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law on the issues set forth in the motion. Ark. R. Civ. P. 56(c)(2) (2002). If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied. *Plant v. Wilbur, 345 Ark. 487, 47 S.W.3d 889 (2001)*.

Doug's Electrical first contends that the easement contained in the deed from Jessie Bell Smith to Doyle Smith was extinguished when Doyle Smith became the owner of the dominant estate while concurrently owning the servient estate. Doug's Electrical cites *Massee v. Schiller, 237 Ark. 809, 376 S.W.2d 558 (1964)*, in support of its argument that the ownership of both the dominant and servient estates creates a merger of the two titles, thus extinguishing the encumbering **[***5]** easement. The appellants in *Massee* claimed ownership of a twenty-foot-wide lane by adverse possession. *Id.* The court did not expressly address the issue of merger, but stated that a prior common ownership of both parcels at issue "annihilated any inferior interest or title such as adverse possession or easement" that the owner might have previously acquired against the former owner of one of the parcels. *237 Ark. at 811-12, 376 S.W.2d at 559*. Also, in a second appeal involving the same parties, the court stated that the easement ran with the ownership of the dominant owners' land until ownership of the easement was merged with ownership of the servient estate or until the easement was abandoned. *Massee v. Schiller, 243 Ark. 572, 420 S.W.2d 839 (1967)*. Thus, it appears that ***HN2***[⬆] Arkansas recognizes the doctrine of merger.

Merger has been applied in other jurisdictions and is recognized by the Restatement of Property. *See, e.g., Freeman v. Rost Family Trust, 973 P.2d 1281*, (Colo. Ct. App. 1999); *Ellis v. **[*33]** McClung, 291 Ill. App. 3d 448, 683 N.E.2d 911, 225 Ill. Dec. 408 (1997)*; *Mularoni v. Bing, 2001 MT 215, 306 Mont. 4405, 34 P.3d 497 (2001)*; **[***6]** *Faulconer v. Williams, 327 Ore. 381, 964 P.2d 246 (1998)*; *Radovich v. Nuzhat, 104 Wn. App. 800, 16 P.3d 687 (2001)*; *Restatement (Third) of Property, Servitudes, § 7.5* (1998); *Restatement (First) of Property § 497* (1944). ***HN3***[⬆] "A servitude is terminated when all the benefits and burdens come into a single ownership." *Restatement (Third) of Property, Servitudes, § 7.5*. The rationale for this doctrine is that when the benefits and burdens are united in a single person, or group of persons, the servitude ceases to serve any function, and because no one else has an interest in enforcing the servitude, the servitude terminates. *Id.* at cmt. a.

In this case, however, it appears from the record that the ownership of the dominant and servient estates did not come into the ownership of a single person or group of persons. Doyle Smith owned the servient estate outright, but after his mother died he came into ownership of the dominant estate jointly

with his sisters, Buffington and Williams. *HN4*[⬆] In order to extinguish an easement by merger, the unity of title or ownership must be co-extensive in validity, quality, and all other circumstances of right, and an easement **[***7]** is not extinguished by the acquisition by the owner of one estate of title to only a fractional part of the other estate. *Mularoni v. Bing, supra* (citing 28A C.J.S. *Easements* § 123 (1996)); *Ellis v. McClung, supra.* Merger of estates is a question of intent. *Ellis v. McClung, supra.*

It is not clear from the record precisely how Doyle Smith and his sisters **[**429]** acquired the property from their mother. The *Restatement (First) of Property § 497, Comment b*, states that *HN5*[⬆] merger does not apply to estates held in co-ownership, but only to estates held in severalty [2]; however, the caveat in Comment b states that the Restatement takes no position on whether the doctrine of merger applies where there is unity of ownership of an undivided fractional interest, such as by a tenant in common, with a like fractional interest in the other tenement. The *Restatement [*34] (Third) of Property, Servitudes, § 7.5, Illustration 7*, provides that merger does not occur where only one estate is held by tenants in common. Thus, it appears that Doyle Smith's ownership of both estates would not extinguish the easement, regardless of whether he owned the **[***8]** dominant estate as a joint owner or a tenant in common. However, the outcome of this case does not rest solely upon resolution of this issue; even if the easement was extinguished by merger, the question remains as to whether the easement was revived in the subsequent conveyances.

In this regard, Doug's Electrical also argues that the extinguished easement was not subsequently revived, even though the easement was recited in his chain of title and in his deed from Doyle Smith. *HN6*[⬆] Once an easement has been extinguished through merger, the easement does not come into existence again merely by severance of the estates. *Restatement (First) of Property § 497, cmt. h.* However, upon severance, "a new easement authorizing a use corresponding to the use authorized by the **[***9]** extinguished easement may arise," but if it does arise, "it does so because it was newly created at the time of the conveyance." *Id.* "Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance." *Id.* The *Restatement (Third) of Property, Servitudes, § 7.5* also states that the standards for recreating an easement that has been extinguished are the same standards that are required to create an easement in the first instance.

There are no Arkansas cases addressing this issue. Doug's Electrical cites to cases from other jurisdictions that hold that an easement cannot be revived merely by severance of the merged estate in conjunction with language in subsequent deeds referring to the extinguished easement. In *Capital Candy Co. v. Savard, 135 Vt. 14, 369 A.2d 1363 (1976)*, the court stated that the easement was not recreated upon severance where the subsequent deeds merely referred to a nonexistent easement that had been extinguished. However, in *Radovich v. Nuzhat, supra*, the court disagreed with this **[***10]** view, and cited the Restatement view, stating that the opinion in *Capital Candy* does not indicate whether those deeds contained language actually describing the easement or **[*35]** merely incorporated the description by reference. The court stated that, to the extent that *Capital Candy* and other cases could be read to hold that language sufficient to create a new easement is not sufficient to recreate an extinguished easement, it disagreed and declined to follow them. *Id.*

In this instance, we find that the language in the deed from Doyle Smith to Doug's Electrical is

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[2] An estate in severalty is one "which is held by the tenant in his own right only, without any other person being joined or connected with him in point of interest during the continuance of his estate." *Black's Law Dictionary* 1374 (6th ed. 1990).

sufficient to create a new easement. It is an express easement created by a written instrument, and the description of the easement is such that a surveyor could go on the land and locate the easement from the description, as evidenced **[**430]** by the survey commissioned by Doug's Electrical that indicated the easement. *See* *Wilson v. Johnston, 66 Ark. App. 193, 990 S.W.2d 554 (1999)*.

Moreover, even if other evidence of intent to create a new easement were necessary to recreate the extinguished easement, as under the view of *Capital Candy Co., supra*, such evidence exists in this case. The descriptions **[***11]** of the easement found in deeds subsequent to its alleged extinguishment are not mechanistic recitals of the description in the original deed from Jessie Bell Smith to Doyle Smith, as alleged by Doug's Electrical. The language describing the easement changed from the original deed to the description of the easement found in the Decree Quieting Title and in the deed to Doug's Electrical. The easement was previously described as running along the south edge of the ditch, but in the subsequent conveyances, the easement is described as across the north side of the property. Also, the servient estate was not described in exact metes and bounds in the original deed, but in the subsequent deeds, the estate is described by degrees, minutes, and seconds. In addition, the documents dealing with the quiet title action between Doyle Smith and his sisters show that this easement was bargained for by the sisters when they consented to the quiet title and is contained in the quiet title decree. This evidence clearly shows that Doyle Smith had the requisite intent to recreate the easement in the quiet-title decree, and to convey the property to Doug's Electrical subject to this easement. In fact, the **[***12]** easement was reflected in documents in Doug's Electrical's chain of title, as well as in his survey, real-estate contract, and title-disclosure documents, and it is clear from the record that Doug's **[*36]** Electrical had actual notice of this easement. The trial court accordingly found that there were no material issues of fact to be litigated, and summary judgment was appropriate as a matter of law. We cannot say that the court erred in granting the summary judgment.

Affirmed.

HART and VAUGHT, JJ., agree.

End of Document

SPECIAL WARRANTY DEED

(WITH RESTRICTIVE COVENANTS, RESERVATIONS, AND RETAINED EASEMENTS)

THIS SPECIAL WARRANTY DEED, made this _____ day of _____ 20____, between _____ (collectively the "Grantors"), and ___ _____ ("Grantee"),

WITNESSETH, the Grantors, for and in consideration of the sum of $1 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and confirm unto the Grantee, its successors and assigns forever, the real property in _____, described on the attached Exhibit A (the "Real Property"),

SUBJECT TO THE FOLLOWING:

I) MATTERS OF RECORD. All easements, rights of way, leases, licenses, setbacks, protective and restrictive covenants, reservations, and restrictions of record, if any.

II) RETAINED EASEMENT. Grantors hereby retain a [Identify Easement Boundary], with all reasonable right of ingress and egress by Grantors and their agents, successors, and assigns for the purpose of accessing the [Identify Dominant Estate]. This easement shall be a perpetual easement and run with the Real Property.

III) RESERVATION OF MINERALS. Grantors and their successors and assigns reserve all oil, gas, and other minerals, and the reasonable right of surface use for the extraction or production thereof.

IV) RESTRICTIVE COVENANT. Grantee is prohibited from [Insert Restrictive Covenant]. This restrictive covenant shall run with the land.

TO HAVE AND TO HOLD THE SAME, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever.

AND GRANTORS do hereby covenant, promise, and agree to and with Grantee, that Grantors shall **WARRANT** the Real Property in the quiet and peaceable possession of Grantee against all and every person or persons claiming the whole or any part thereof by, through, or under the Grantors.

IN WITNESS WHEREOF, the Grantors have caused this Special Warranty Deed to be executed on the date set forth above.

[Signature Pages and Exhibit "A" Intentionally Omitted]

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Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

June 13, 2024

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R48094

CRS REPORT
Prepared for Members and
Committees of Congress

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Foreign Ownership, Control, and Influence (FOCI) Risks in the Food and Agriculture Sector

SUMMARY

R48094

June 13, 2024

Brian E. Humphreys
Analyst in Science and Technology Policy

In recent years, congressional concerns over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector) have grown. FA Sector critical infrastructure encompasses many elements of the nation's food supply chain. Examples include farms, grain elevators, certain testing laboratories, meatpacking facilities, and supermarkets.

The U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) are the designated Sector Risk Management Agencies (SRMAs) for the FA Sector (1 of 16 federally designated critical infrastructure sectors). The SRMAs identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather, and cybersecurity. Partnerships are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a shared enterprise focused on ensuring availability and continuity of "national critical functions."

However, FOCI risks more often relate to the control, exploitation, or malicious use of otherwise operable systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing critical infrastructure security and resilience (CISR) voluntary partnership framework. Potential FOCI risks in the FA Sector include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

The Biden Administration has released several policy directives that address various infrastructure and supply chain issues specific to the FA Sector or—more broadly—to FOCI risks affecting multiple sectors. This includes a 2022 National Security Memorandum (NSM), "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which contains provisions that expand federal regulatory reviews of foreign acquisitions of agricultural firms to include food security (in addition to national security) and that mandate supply chain security assessments by federal agencies (including USDA in the FA Sector).

Many recent assessments note trends toward consolidation and foreign ownership within key segments of U.S. agriculture. For example, a USDA report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential supply chain risk, although it did not specifically identify FOCI as a factor. A 2021 joint report on FA Sector risks by the Department of Homeland Security (DHS) and the Office of the Director of National Intelligence (ODNI) warned of the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign. Foreign-owned or -controlled multinationals already have large, legally acquired holdings in various FA Sector segments.

Some Members of Congress have expressed concern about the People's Republic of China's (PRC's) acquisition of major food processing and agrochemical firms that have significant market share in the United States. Some public interest groups allege that multinationals may abuse IP protections for agrochemicals and genetically engineered seed, effectively control use of agricultural land, and gain access to farm-level data. Multinationals counter that IP protections allow for investments in new technologies and provision of innovative products at affordable prices to U.S. food producers. Foreign acquisitions of U.S. farmland have also caused concern, prompting legislative proposals that would restrict certain acquisitions. According to USDA, as of December 31, 2022, foreign entities—mainly Canada and some Western European countries—held an interest in 44.3 million acres of U.S. agricultural land, or about 3.4% of the total. PRC-linked holdings are small by comparison but have garnered scrutiny.

Policy options for Congress exist in several areas related to FOCI risks in the FA Sector. These areas include (1) federal reviews of foreign investments and acquisitions of FA Sector assets, (2) requirements for data and reporting of foreign land purchases, (3) resourcing of SRMA programs and activities, (4) assessments of FOCI risk, and (5) IP protections in the bioeconomy and farming.

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Introduction

In recent years, congressional concerns have grown over potential risks to domestic food security posed by foreign ownership, control, and influence (FOCI) of critical infrastructure in the U.S. food and agriculture sector (FA Sector). *Critical infrastructure* is defined in statute as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[1] Critical infrastructure systems and assets in the FA Sector encompass many elements of the nation's food supply chain. Examples include farms, grain elevators, farm supply wholesalers, certain testing laboratories, meatpacking facilities, bars and restaurants, and supermarkets.[2]

The national critical infrastructure security and resilience (CISR) enterprise combines both varying degrees of regulation and voluntary public-private partnerships for information sharing and best practices.[3] The Department of Homeland Security (DHS) coordinates national strategy, interagency activities, and public-private partnerships for infrastructure security and resilience. DHS delegates sector leadership to other federal agencies in some cases, including the FA Sector. The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives.[4]

CISR programs and activities in the FA Sector are led by the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA), which are the FA Sector's designated Sector Risk Management Agencies (SRMAs). Public-private partnerships are largely voluntary and are premised on the overarching assumption that private-sector owners of critical systems and assets are good-faith actors in a risk management enterprise focused on protecting critical systems and assets and the functions they enable.[5] USDA and FDA identify four main categories of risk to FA Sector-related functions: food contamination and disruption (accidental or intentional), disease and pests, severe weather (i.e., droughts, floods, and climate variability), and cybersecurity.[6]

FOCI risks in the FA Sector are not associated with the incapacity or destruction of critical systems and assets or disruption of essential functions. More often, FOCI risks relate to the

[1] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (P.L. 107-56). The FA Sector is 1 of 16 designated critical infrastructure sectors under current presidential directives. For information on the critical infrastructure risk management framework, see Department of Homeland Security (DHS), *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), and DHS, *Food and Agriculture Sector-Specific Plan*, 2015, pp. 5-7, https://www.usda.gov/sites/default/files/documents/2015-food-and-agriculture-sector-specific-plan.pdf (hereinafter FA SSP).

[2] See Appendix 6, FA SSP. According to the DHS Cybersecurity and Infrastructure Security Agency (CISA), the FA Sector has critical dependencies with several other designated critical infrastructure sectors, including Water and Wastewater Systems, Transportation Systems, Energy, and Chemical. However, an examination of foreign ownership risks in these sectors and their potential applicability to the FA Sector is beyond the scope of this report. Likewise, this report does not cover foreign ownership of systems, assets, and networks outside U.S. jurisdiction or imports of essential foreign-sourced agricultural production materials into the United States.

[3] See White House, "National Security Memorandum on Critical Infrastructure Security and Resilience," (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience.

[4] Ibid.

[5] FA SSP.

[6] For information on the critical infrastructure risk management framework, see DHS, *The National Infrastructure Protection Plan (NIPP) 2013: Partnering for Critical Infrastructure Security and Resilience*, 2013, and FA SSP, pp. 5-7.

control, exploitation, or malicious use of productive systems and assets by self-interested foreign adversaries—instances where the good faith of asset owners cannot be assumed. This type of risk has not been consistently or systematically assessed within the existing CISR voluntary partnership framework.

Potential FOCI risks in the FA Sector identified in this report include prioritization of foreign markets over domestic food security considerations; intellectual property (IP) theft of strategically important genetic engineering research; illicit or forced technology transfer; control of agricultural land and basic agricultural inputs; access to sensitive infrastructure information (e.g., vulnerability assessments based on voluntary disclosures by private-sector entities); and control of critical cyber systems, assets, and networks.

This report provides analysis of potential FOCI risks in the FA Sector and the bearing these risks might have on the overall security and resilience of the sector. The report also provides options for congressional legislation and oversight.

Background: The Food and Agriculture Sector

Presidential directives established critical infrastructure sectors that encompass broad areas of the economy, government, and public services.[7] There are currently 16 sectors and numerous subsectors. The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY2021 NDAA; P.L. 116-283) defined the role of SRMAs.[8] In each sector, SRMAs chair the Government Coordinating Councils (GCCs), which provide for coordination among interagency and intergovernmental partners. Sector Coordinating Councils (SCCs) operate as counterparts to the GCCs, representing the interests of private-sector partners and other nongovernmental stakeholders within a given sector. SCCs are voluntary, self-organized, and self-governing bodies, often chaired by private-sector industry leaders.

The Department of Health and Human Services (HHS), acting through FDA, and USDA are the designated co-SRMAs for the FA Sector. FA SCC membership is composed of major industry enterprises and trade groups.[9] Most sectors have a recognized Information Sharing and Analysis Center (ISAC), which serves as a hub for threat reporting, analysis, and information sharing with sector partners on cybersecurity and other matters.

The FA Sector's ISAC was originally formed in 2002 but closed in 2008 after failing to attract an active user base.[10] Sector stakeholder interests were then represented by the Food and Ag Special Interest Group (SIG) within the Information Technology (IT) ISAC. Some observers criticized

[7] White House, "National Security Memorandum on Critical Infrastructure Security and Resilience" (NSM-22), presidential memorandum, April 30, 2024, https://www.whitehouse.gov/briefing-room/presidential-actions/2024/04/30/national-security-memorandum-on-critical-infrastructure-security-and-resilience/.

[8] See Section 9002, "Sector Risk Management Agencies." These coordinating bodies are chartered under Critical Infrastructure Protection and Advisory Council (CIPAC) auspices. CIPAC authorities, originally established by DHS in 2006 pursuant to the Homeland Security Act of 2002 (P.L. 107-296), afford certain exemptions from public reporting of meetings and disclosure of sensitive infrastructure information. See DHS, "Critical Infrastructure Partnership Advisory Council," 71 *Federal Register* 14930, March 24, 2006.

[9] For a full list of FA Sector Coordinating Council membership and links to the current charter, see CISA, "Food and Agriculture Sector: Council Charters and Membership," https://www.cisa.gov/food-and-agriculture-sector-council-charters-and-membership.

[10] The Food Marketing Institute, an industry group, established an agriculture Information Sharing and Analysis Center (ISAC) in 2002 prior to the establishment of DHS as an agency but disbanded it in 2008 due to "lack of activity and information flow," according to media reports. See "Food Sector Abandons Its ISAC," *Security Management*, September 1, 2008, https://www.asisonline.org/security-management-magazine/articles/2008/09/food-sector-abandons-its-isac/.

this arrangement as inadequate to the scale of cyber threats faced by the FA Sector.[11] Industry leaders rebranded the Food and Ag SIG as the Food and Agriculture Sector ISAC in 2023.[12] Although the new ISAC continued to operate under IT-ISAC auspices, its leaders asserted that the change would raise the profile of the organization and clarify its mission.[13] Separately, in 2022, DHS sponsored preliminary development of a state-level pilot ISAC for FA Sector issues through the National Agriculture Biosecurity Center at Kansas State University.[14]

Policy options for Congress include whether current information-sharing organizations are appropriately organized and have the necessary resources to meet FA Sector cybersecurity and other security needs, as well as legislation to create new information-sharing organizations.[15]

Risk Management in the FA Sector

SRMAs consider a wide range of plausible man-made and natural hazard events that could negatively affect availability and continuity of critical infrastructure functions.[16] CISR programs and activities in the FA Sector to date have been limited in scale and centered on traditional agency missions, such as maintaining the national food safety system and safeguarding farm production of raw foodstuffs from contamination.

FOCI risks affecting food and agriculture may be addressed through national security reviews of certain covered foreign investment transactions, including mergers and acquisitions, by the interagency Committee on Foreign Investment in the United States (CFIUS)—CFIUS authorities are governed by Section 721 of the Defense Production Act of 1950 (P.L. 81-774), as amended. CFIUS may recommend that the President block certain foreign investments, including those that would result in foreign control of any critical infrastructure, if it determines that the transaction would threaten to impair U.S. national security and the risk cannot be mitigated. CFIUS may review certain covered foreign investment and real estate transactions involving the acquisition of

[11] See Eric Geller, "The Dangerous Weak Link in the U.S. Food Chain," *Wired*, April 6, 2023, https://www.wired.com/story/us-food-agriculture-isac-cybersecurity/. The Food and Agriculture Industry Cybersecurity Support Act, introduced in the 118th Congress (S. 2393 and H.R. 1219), would mandate creation of a cybersecurity clearinghouse for the sector hosted by the National Telecommunications and Information Administration, a Department of Commerce agency.

[12] Food and Ag ISAC (an IT ISAC Community), "Built by Industry for Industry," https://www.foodandag-isac.org/, and "Food and Ag-ISAC Forms to Protect Agrifood Sector from Cybersecurity Threats," *Food Safety Magazine*, May 26, 2023, https://www.food-safety.com/articles/8617-food-and-ag-isac-forms-to-protect-agrifood-sector-from-cybersecurity-threats.

[13] Tim Starks, "The Food and Agriculture Industry Gets a New Center to Share Cybersecurity Information," *Washington Post*, May 24, 2023, https://www.washingtonpost.com/politics/2023/05/24/food-agriculture-industry-gets-new-center-share-cybersecurity-information/.

[14] FDA, USDA, DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2022*, p. 17, https://www.fda.gov/media/171959/download; Kansas State University, "Creation of a Kansas Food and Agriculture Information Sharing and Analysis Organization," https://www.k-state.edu/govrelations/federal/NABC-CreationofaKansasFoodandAgricultureInformationSharingandAnalysisCenter.pdf.

[15] Representative Pfluger introduced a bill in the 118th Congress, "Food and Agriculture Industry Cybersecurity Support Act" (H.R. 1219), which directs the Government Accountability Office to report on the feasibility of creating a dedicated FA Sector ISAC.

[16] CISA defines a set of 55 National Critical Functions as "functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof."

agricultural land and corporate entities, and may consider "elements of the agriculture industrial base that have implications for food security."[17]

However, the range of transactions CFIUS covers is relatively narrow, focusing on national security risks of corporate acquisitions, noncontrolling investments, and real estate transactions, rather than CISR writ large. Options for Congress include legislation to expand CFIUS jurisdiction over transactions in the FA Sector and to add the Secretary of Agriculture as a full member of CFIUS.[18] Another option is to provide USDA with additional appropriations to fund expansion of CFIUS-related programs and activities to cover a wider range of FOCI risks in the FA Sector.

SRMA Organization and Resourcing for FA Sector Engagements

USDA SRMA responsibilities reside with USDA's National Security Division within the Office of Homeland Security (OHS). The division oversees the agency's programs and participation in interagency activities, which may include FOCI-related risk management activities under programs such as CFIUS, Critical Infrastructure and Insider Threat, Foreign National Vetting, Intelligence, and FA Sector.[19] FDA SRMA responsibilities reside with the Office of Analytics and Outreach/Food Defense and Emergency Coordination Staff at the Center for Food Safety and Applied Nutrition (CFSAN). Neither USDA/OHS nor FDA/CFSAN receives dedicated appropriations for SRMA-related programs and activities. Instead, SRMA engagement appears to be carried out in addition to other customary activities included in these offices' program portfolios.[20]

USDA requested $225,000 in funds to support OHS engagements with FA Sector stakeholders in its FY2024 budget request.[21] Referencing a ransomware attack on JBS—a Brazilian-owned meat processing firm with extensive operations in the United States—USDA/OHS stated that as "cybersecurity threats and vulnerabilities continue to grow, USDA is unable to conduct ... SRMA responsibilities[,] which could have a significant impact on the safety and security of U.S. agriculture" because of a lack of dedicated appropriations for this purpose.[22] The FDA budget

[17] Executive Order (E.O.) 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022. Committee on Foreign Investment in the United States (CFIUS) reviews may involve consultation with a designated USDA official. CFIUS is an interagency body comprising nine Cabinet members and others, as appointed. For more information on CFIUS authorities and activities, see CRS In Focus IF10177, *The Committee on Foreign Investment in the United States*, by Cathleen D. Cimino-Isaacs and Karen M. Sutter.

[18] See CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson.

[19] See USDA, National Security Division, "National Security Division Related Topics," https://www.usda.gov/da/ohs/nsd.

[20] Based on review of the FA SSP; USDA Office of Homeland Security (OHS), *2024 USDA Explanatory Notes*, 2023, https://www.usda.gov/sites/default/files/documents/02-2024-OHS.pdf; Department of Health and Human Services (HHS), *Food and Drug Administration: Justification of Estimates for Appropriations Committees*, 2023, https://www.fda.gov/media/166182/download; FDA, "Food Defense," https://www.fda.gov/food/food-defense; and FDA, "What We Do at CFSAN," https://www.fda.gov/about-fda/center-food-safety-and-applied-nutrition-cfsan/what-we-do-cfsan.

[21] See USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7; and Geller, "The Dangerous Weak Link in the U.S. Food Chain." Geller notes, "By comparison, the Energy Department requested $245 million for its Office of Cybersecurity, Energy Security, and Emergency Response."

[22] USDA OHS, *2024 USDA Explanatory Notes*, p. 2-7.

justification for FY2025 does not show any dedicated SRMA appropriations for FA Sector activities.[23]

USDA and FDA list FA Sector engagement activities in annual Food and Agriculture Sector Specific Plan (FA SSP) progress reports, including exercises with FA Sector stakeholders.[24] The exercises include several food defense emergency scenarios but do not include FOCI-related threats or other FOCI issues that might affect emergency response. In April 2024, the Cybersecurity and Infrastructure Security Agency (CISA) hosted the Cyber Storm IX exercise, a major national cybersecurity exercise, which focused on the FA Sector as a possible target of cyberattacks.[25] The extent to which potential FOCI-related vulnerabilities or threats were incorporated into the exercise scenario is not clear.[26]

The USDA Office of Inspector General (OIG) has participated in the interagency Foreign Influence Investigations Working Group, but it is not clear what the scope of the activity was or whether the group is still active.[27] Some former agency officials and infrastructure protection experts have publicly voiced general concerns about the scope and effectiveness of FA Sector SRMA engagements with key stakeholders, according to media reports, although these concerns do not appear to be specific to management of FOCI risks.[28]

USDA is not an official member of CFIUS but is sometimes brought in at the Treasury Department's discretion on certain transactions. Some Members of Congress have argued that USDA should be a full member given the number of CFIUS cases and sensitive foreign acquisitions involving agriculture, biotechnology, and other USDA equities.[29] USDA/OHS currently has one staff member fully dedicated to CFIUS, according to the agency's FY2024 budget justification. USDA requested an additional $500,000 and two full-time employees in anticipation of a potential increase in the scope of CFIUS activity, to include a wider array of agriculture-related transactions. According to its FY2024 budget justification, USDA concluded an agreement with the Treasury Department, giving it "enhanced access" to CFIUS cases that "requires additional OHS and [Office of the General Counsel] resources to ensure we support the

[23] HHS, FDA, *Justification of Estimates for Appropriations Committees: Fiscal Year 2025*, 2024, https://www.fda.gov/media/176925/download.

[24] See DHS, *Food and Agriculture Sector Annual Report: Fiscal Year 2021*, https://www.fda.gov/media/165833/download. FDA provides free emergency exercise scenarios for FA Sector stakeholders on its website, "Food Related Emergency Exercise Bundle (FREE-B) Download," https://www.fda.gov/food/food-defense-tools/food-related-emergency-exercise-bundle-free-b-download. The content is listed as current as of March 5, 2024.

[25] See Jen Easterly, "Prepared Together—Cyber Storm IX Recap," Cybersecurity and Infrastructure Security Agency (CISA), May 16, 2024, https://www.cisa.gov/news-events/news/prepared-together-cyber-storm-ix-recap. According to Jen Easterly, the CISA Director, "Participating organizations worked directly with CISA and coordinating bodies such as Sector Risk Management Agencies and Information Sharing and Analysis Centers to understand roles and capabilities during a cyberattack."

[26] CISA has released after-action reports for past Cyber Storm exercises, typically several months after their conclusion. No after-action report for Cyber Storm IX is available as of this writing.

[27] See FY2021 FA SSP annual progress report, and USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October 2022, p. 32, https://usdaoig.oversight.gov/sites/default/files/reports/2023-12/SARC_FY%25202022_Second%2520Half_508.pdf.

[28] Geller, "The Dangerous Weak Link in the U.S. Food Chain." For example, Geller quotes Mark Montgomery, former executive director of the Cyberspace Solarium Commission, as saying that USDA as co-SRMA is "significantly less effective" than other SRMAs. Brian Harrell, a former assistant director for infrastructure security at CISA, is quoted as saying that the FA Sector needs its own ISAC to provide "a true operational assessment."

[29] For example, Congressman Frank Lucas, "Lucas Legislation Addressing Foreign Land Acquisition Passes Through Committee," press release, September 29, 2023, https://lucas.house.gov/posts/lucas-legislation-addressing-foreign-land-acquisition-passes-through-committee.

agreement between Departments. Previously USDA reviewed less than 50 CFIUS cases annually, and since August 2022, our workload has increased to over 250 cases."[30]

Options for Congress include requesting additional information about the scope and extent of FDA and USDA activities to support CISR (and specifically FOCI) risk management programs and activities in the FA Sector and providing appropriations to support additional SRMA engagement with the FA Sector. A potential oversight question for Congress could be whether FOCI-related risks are included in relevant exercise scenarios provided by SRMAs (see above). Congressional oversight could also include examination of reports and data on sector engagement from the relevant FA Sector SRMAs—to include appropriate quantifiable metrics and criteria of success. Greater overall engagement with industry stakeholders may clarify what, if any, differences exist between the rate and quality of foreign- and U.S.-owned firms' participation in public-private partnerships and the nature of those differences.

DHS Leadership and Coordination

DHS is responsible for overall coordination of federal CISR activities. It maintains food and agriculture defense programs and activities through the Office of Health Security to support the FA Sector according to legislative requirements and executive branch policy directives.[31] In addition, DHS previously provided grant funding to the University of Minnesota Center of Excellence for food protection and defense, which now operates independently as the Food Protection and Defense Institute. The institute supports interdisciplinary research on protection of the global food supply, "including supply chain resilience, information sharing, risk analysis and assessment, education, epidemiology, [and] economics," among other topics.[32]

In 2019, CISA introduced National Critical Functions as a conceptual framework for identifying and assessing cross-sector risk to essential or systematically important infrastructure systems, assets, and networks, to complement and expand the existing sector-based CISR framework. CISA defines National Critical Functions as

> functions of government and the private sector so vital to the United States that their disruption, corruption, or dysfunction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.[33]

The 55 designated National Critical Functions include production and provision of agricultural products and services, and human and animal food products and services.[34]

[30] USDA OHS, *2024 USDA Explanatory Notes*, pp. 2-7.

[31] See DHS, *DHS Fact Sheet on National Security Memorandum-16 on Strengthening the Security and Resilience of United States Food and Agriculture*, 2022, https://www.dhs.gov/sites/default/files/2022-11/NSM_DHS%20FACT%20SHEET%20on%20NSM%20Food%20and%20Agriculture.pdf; also see DHS, Science and Technology Directorate (DHS S&T), "Food and Agriculture Defense," https://www.dhs.gov/science-and-technology/food-and-agriculture-defense. According to the web page, "S&T's food and agriculture defense work includes risk assessments; threat characterizations; countermeasures to defend against pathogens, pests, and toxins; food defense and ingestion threat modeling; characterizations of chemical threats for food contamination and adulteration; laboratory experiments and foundational research; diagnostics; veterinary medical countermeasures; decontamination strategies; trainings; and coordination with partners for joint efforts that defend food and agriculture systems."

[32] See University of Minnesota, Food Protection and Defense Institute, "Protecting the Global Food Supply Through Research, Education, and the Delivery of Innovative Solutions," https://foodprotection.umn.edu/.

[33] See CISA, "National Critical Functions," https://www.cisa.gov/national-critical-functions.

[34] See CISA, "National Critical Functions Set," https://www.cisa.gov/national-critical-functions-set.

Related Programs, Policies, and Directives

The 2013 National Infrastructure Protection Plan (NIPP) and the FA SSP have provided the primary risk management guidance for FA Sector stakeholders over the past decade.[35] The FA SSP defines risk "in the context of the NIPP 2013 ... as the potential for loss, damage, or disruption to the Nation's critical infrastructure resulting from destruction, incapacitation, or exploitation during some future manmade or naturally occurring event."[36] These documents outline an organizational approach and framework for sector risk management—primarily through voluntary public-private partnerships—but generally do not direct specific agency actions. FA Sector Annual Reports provide updates on progress toward meeting FA SSP goals.[37] (The FA SSP and the subsequent annual progress reports do not specifically identify foreign ownership of agricultural land or sector assets as threats to the FA Sector.)

Section 9002 of the FY2021 NDAA (P.L. 116-283) directed the Secretary of Homeland Security to assess the current CISR policy framework and assess the need for changes to the existing critical infrastructure sectors. In November 2021, CISA submitted a statutorily mandated report on its assessment of the CISR framework and preliminary findings. It suggested, among other things, that the review process offered "an opportunity" to designate a Bioeconomy Sector separate from the existing FA Sector.[38] (The National Security Memorandum [NSM] on Critical Infrastructure Security and Resilience [NSM-22] retained existing sectors without modification but did not foreclose the possibility of new sectors in the future.) The bioeconomy is the portion of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). Some of the FOCI risks in the FA Sector, such as IP protection of genetically engineered seed traits, relate to the bioeconomy.

Options for congressional action include oversight over DHS updates of its CISR policy framework as mandated in the FY2021 NDAA, to include changes to risk assessment scope and methods, and creation of a new Bioeconomy Sector. Another option would be oversight of executive branch programs and activities set forth in Executive Order (E.O.) 14017, NSM-16, NSM-22, Section 9002(b) of P.L. 116-283, and other laws, policies, and directives that may have a bearing on assessment of FOCI risks in the FA Sector.

National Security Memorandum for the FA Sector

On November 10, 2022, the White House released an NSM, "Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16), which covers the security and resilience of food and agriculture systems and supply chains; directs federal agencies to take actions to "identify and assess threats, vulnerabilities, and impacts" from high-consequence and catastrophic incidents; and prioritize resources "to prevent, protect against, mitigate, respond to,

[35] NSM-22 directs SRMAs to submit new sector-specific plans to the Secretary of Homeland Security within 270 days of issuance—January 25, 2025—and then biennially by February 1 of each year.

[36] FA SSP, p. 5.

[37] See FDA, "Food and Agriculture Sector and Other Related Activities: Food and Agriculture Sector Reports," https://www.fda.gov/food/food-defense-initiatives/food-and-agriculture-sector-and-other-related-activities. The website has links to four FA Sector Annual Reports since 2015, for 2020, 2021, 2022, and 2023, respectively.

[38] CISA, *FY 2021 National Defense Authorization Act: Section 9002(b) Report*, November 12, 2021, p. 2, https://www.cisa.gov/resources-tools/resources/section-9002b-report. The term bioeconomy "refers to the share of the economy based on products, services, and processes derived from biological resources (e.g., plants and microorganisms). The bioeconomy is crosscutting, encompassing multiple sectors, in whole or in part (e.g., agriculture, textiles, chemicals, and energy)." See CRS Report R46881, *The Bioeconomy: A Primer*, by Marcy E. Gallo.

and recover from the threats and hazards that pose the greatest risk."[39] It supersedes previous White House policy guidance given in Homeland Security Presidential Directive 9 (HSPD-9), issued in 2004.[40]

NSM-16 identifies a wide range of threats facing sector stakeholders, to include chemical, biological, radiological, and nuclear (CBRN) threats; intentional introduction of hazardous contaminants; natural or genetically engineered pathogens and pests; and cybersecurity breaches leading to disruption of networked systems or IP theft. As with the earlier plans and directives, it does not specifically identify foreign ownership and control as a threat.

NSM-16 assigns primary responsibility for coordinating executive branch actions to the Assistant to the President for National Security Affairs (APNSA). The APNSA must provide an annual report to the President summarizing implementation progress, identifying capability gaps, and providing recommendations to close those gaps. Relevant provisions and reporting requirements are summarized in **Table 1**.

In March 2023, the FA Sector SRMAs and DHS jointly published the interim risk review mandated under NSM-16. The review contains a short section on foreign acquisitions in the FA Sector as a "potential factor contributing to risk," which states[41]

> Foreign acquisition of U.S. agricultural assets may pose risks to the U.S. food and agriculture sector in some cases. For example, a recent research report prepared to support the deliberations of the U.S.-China Economic and Security Review Commission describes several potential risks to U.S. agriculture associated with recent acquisitions and attempted acquisitions of U.S.-based agricultural assets (including agricultural land, intellectual property [such as IP related to genetically modified seeds], and U.S.-based food producers and logistics companies), which may include loss of economic competitiveness, reduced exports, negative environmental impacts, and associated public health risks.[42]

The review supports several other required assessment and planning products mandated by NSM-16 (see **Table 1**), which are in progress as of this writing, according to information posted on agency websites.[43]

Three other relevant E.O.s preceded NSM-16—E.O. 14081 on the bioeconomy, E.O. 14083 related to CFIUS reviews, and E.O. 14017 on supply chain security and resilience. They are discussed below.

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[39] See White House, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture," presidential memorandum, November 10, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/10/national-security-memorandum-on-on-strengthening-the-security-and-resilience-of-united-states-food-and-agriculture/.

[40] White House, "Homeland Security Presidential Directive 9 (HSPD-9), Defense of United States Agriculture and Food," presidential memorandum, January 30, 2004, https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040203-2.html.

[41] HHS, USDA, DHS, *National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture: 120-Day Food and Agriculture Interim Risk Review*, March 2023, p. 16, https://www.fda.gov/media/170114/download.

[42] Ibid., p. 22.

[43] See FDA, "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (content current as of March 5, 2024), https://www.fda.gov/food/food-defense/national-security-memorandum-strengthening-security-and-resilience-united-states-food-and; and USDA, "Vulnerability Assessments" (content current as of July 31, 2023), https://www.fsis.usda.gov/food-safety/food-defense-and-emergency-response/food-defense.

Table 1. Agency Deliverables in "National Security Memorandum on Strengthening the Security and Resilience of United States Food and Agriculture" (NSM-16)

Department and Agency	Requirement	Timeline	Status
DOJ, DHS (in coordination with DOD and relevant agencies)	Provide threat assessment to leaders of relevant federal agencies on actors, threats, delivery systems, and methods that could be directed against the FA Sector.	Within 60 days (January 9, 2023) of publication of NSM-16, then annually.	No information
USDA, HHS, other relevant agencies (in coordination with FSLTT partners)	Conduct sector vulnerability assessment based on identified threats.	Within 180 days (May 9, 2023) of publication of NSM-16, then as needed.	In progress
DHS (in coordination with DOJ, USDA, HHS, and relevant agencies)	Provide comprehensive data-driven sector risk assessment informed by required threat and vulnerability assessments, prioritizing highest risks.	Within 1 year (November 10, 2023) of publication of NSM-16, then annually.	In progress
USDA, HHS (in coordination with relevant agencies)	Develop strategy and action plan based on risk assessment. Provide information on resilience capabilities, costs, and benefits; conduct risk mitigation analysis; and recommend research and development options to support mitigation.	Within 180 days of risk assessment completion, then revisions as needed.	In progress
USDA, HHS, DHS (in coordination with relevant agencies)	Conduct interim risk review on critical and emergent risks to FA Sector.	Within 120 days (March 10, 2023) of publication of NSM-16.	Published

Sources: CRS analysis of NSM-16 and U.S. Department of Agriculture (USDA) and Food and Drug Administration online updates.

Notes: DHS = Department of Homeland Security; DOD = Department of Defense; DOJ = Department of Justice; FA Sector = Food and Agriculture Sector; FSLTT = federal, state, local, territorial, and tribal; HHS = Department of Health and Human Services.

Executive Order on Bioeconomy

On September 12, 2022, President Biden issued E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy."[44] The E.O. focused on the economic potential of the bioeconomy and federal support of research and development (R&D), data sharing, workforce training, regulatory reforms, and other goals and objectives. In addition, it contained a security-related objective:

> Secure and protect the United States bioeconomy by adopting a forward-looking, proactive approach to assessing and anticipating threats, risks, and potential vulnerabilities (including digital intrusion, manipulation, and exfiltration efforts by foreign adversaries), and by partnering with the private sector and other relevant stakeholders to jointly mitigate risks to protect technology leadership and economic competitiveness.

[44] E.O. 14081, "Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy," 87 *Federal Register* 56849, September 15, 2022.

Accordingly, the E.O. instructed the APNSA and the Assistant to the President for Economic Policy to coordinate with the Secretaries of Defense and Agriculture and other agency leaders to identify actions to "mitigate risks posed by foreign adversary involvement in the biomanufacturing supply chain and to enhance biosafety, biosecurity, and cybersecurity in new and existing infrastructure." Additionally, it required the Secretary of Homeland Security to conduct vulnerability assessments of bioeconomy-related critical infrastructure and National Critical Functions and to "enhance coordination with industry on threat information sharing, vulnerability disclosure, and risk mitigation for cybersecurity and infrastructure risks to the United States bioeconomy."

For more information on E.O. 14081 and bioeconomy issues, see CRS Report R47274, *White House Initiative to Advance the Bioeconomy, E.O. 14081: In Brief*; CRS Report R46881, *The Bioeconomy: A Primer*; and CRS Report R47265, *Synthetic/Engineering Biology: Issues for Congress*.

Executive Order on CFIUS

On September 15, 2022, President Biden issued E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," to update the factors taken into consideration in the CFIUS review process as part of ongoing implementation of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA; P.L. 115-232, Title XVII, Subtitle A).[45] E.O. 14083 notes that certain foreign investments "may undermine supply chain resilience efforts and therefore national security by making the United States vulnerable to future supply disruptions" and directs CFIUS to consider the effect of covered transactions on supply chain resilience and security, including with respect to "elements of the agriculture industrial base that have implications for food security," among other sectors. For more information on E.O. 14083, see CRS In Focus IF12415, *CFIUS Executive Order on Evolving National Security Risks and CFIUS Enforcement Guidelines*.

Executive Order on America's Supply Chains

On February 24, 2021, President Biden signed E.O. 14017, "America's Supply Chains," to ensure that supply chains are "resilient, diverse, and secure" against threats and hazards that might affect the "availability and integrity of critical goods, products, and services."[46] It contains two requirements related to foreign investment issues (not specific to the FA Sector): (1) a progress report on developing domestic critical minerals supply chains and (2) recommendations for federal incentives and regulatory changes to encourage domestic and foreign investment in critical goods and materials. As with the more recent NSM, it assigns the White House coordination role to the APNSA. It requires each critical infrastructure sector SRMA to produce a report on relevant supply chain risks within one year. USDA, as co-SRMA in the FA Sector, published the required report (hereinafter the USDA supply chain report) in February 2022.[47]

[45] E.O. 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States," 87 *Federal Register* 57369, September 15, 2022.

[46] E.O. 14017, "America's Supply Chains," 86 *Federal Register* 11849, March 1, 2021.

[47] USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, https://www.ams.usda.gov/supply-chain.

Prospective Cyber Incident Reporting Requirements

In April 2024, DHS issued a proposed rule, "Cyber Incident Reporting for Critical Infrastructure Act Reporting Requirements."[48] The proposed rule was issued in compliance with provisions of the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA), enacted under Division Y of the Consolidated Appropriations Act, 2022 (P.L. 117-103). It requires CISA to (1) engage in rulemaking to mandate reporting of cybersecurity incidents to the agency, (2) enforce noncompliance with required reporting, and (3) disseminate analysis based on the information collected. The FA Sector annual progress report for FY2022 noted that the FA Sector GCC and SCC "assisted in shaping the implementation" of CIRCIA requirements, without providing further detail.[49]

According to P.L. 117-103, the reporting requirements apply to entities in federally designated critical infrastructure sectors "that [satisfy] the definition established by the Director in the final rule." In designating covered entities, CISA proposed both general (e.g., size) and sector-based criteria. CISA declined to apply sector-based criteria to the FA Sector following consultations with the co-SRMAs.[50] Instead, CISA would apply a general size-based criterion to agricultural enterprises, which exempts small businesses from regulatory compliance, likely "based on the mean, median, or mode of number of employees across such entities."[51] According to CISA, the intent is to cover larger entities in the FA Sector to allow for development of "sector-specific threat and trends analysis."[52] The threat of state and non-state foreign adversaries was discussed throughout the proposed rule. However, the discussion did not include potential FOCI risks.

Potential FOCI Risks in the FA Sector

Supply Chain Security

A 2021 joint report on FA Sector risks by DHS, the Office of the Director of National Intelligence (ODNI), academics, and industry stakeholders (hereinafter the joint report) identified certain FOCI threats in agricultural supply chains.[53] Specifically, it identified the possibility of a "takeover of [an] important supply chain entity by foreign investors" as part of an economic coercion and manipulation campaign but did not elaborate on specific cases, threats, or acquisition mechanisms.[54] A 2022 report (hereinafter the Review Commission report) by the congressionally mandated U.S.-China Economic and Security Review Commission provided information on these and other issues as they related to China. The report stated that acquisition of major domestic agribusinesses may "confer undue leverage over U.S. supply chains" and lead to restructuring of supply chains that negatively affects domestic producers and service providers.[55]

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[48] DHS, "Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements," 89 *Federal Register* 23644, April 4, 2024 (hereinafter CIRCIA rulemaking).

[49] FA SSP FY2022 update, p. 12, https://www.fda.gov/media/171959/download.

[50] CIRCIA rulemaking, p. 23702.

[51] Ibid.

[52] Ibid., p. 23683.

[53] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, Washington, DC, 2021.

[54] Ibid., p. 61.

[55] Lauren Greenwood, *Staff Research Report: China's Interests in U.S. Agriculture: Augmenting Food Security* (continued...)

The Review Commission report also identified risks of IP theft, illicit technology transfer, and foreign control of domestic FA Sector supply chains. According to the report, these activities are part of a coordinated and deliberate policy of the government of the People's Republic of China (PRC) to address China's domestic food security challenges by increasing productivity through illicit technology transfer and overseas diversification of its agricultural supply chains.[56] In addition, the report warned that the PRC-linked firms may attempt to reverse-engineer illegally acquired U.S. seed varieties to identify vulnerabilities to crop disease and other threats.

The USDA supply chain report identified the growing ownership concentration in meat and poultry manufacturing, pesticides and crop seeds, and farm machine parts as sources of potential risk.[57] It did not specifically identify FOCI as a threat or risk factor. However, foreign-owned or -controlled multinationals have significant presence in these areas of production.

Foreign Acquisition of Seed and Agricultural Chemical Suppliers

In 2016, ChemChina announced plans to acquire Syngenta, a Swiss-based agricultural conglomerate (with extensive business operations in the United States) for $43 billion.[58] The acquisition—claimed as the largest foreign acquisition by a PRC company at the time—became the subject of CFIUS review and was eventually approved.[59] While CFIUS reviews are not public, media reports suggested that the review would likely focus on defense-specific issues, such as proximity of Syngenta facilities to U.S. military bases and ownership of potentially sensitive military contracts, more than food-security-related FOCI issues.[60]

In a press release following CFIUS's approval of the transaction, Senator Grassley (IA) stated

> It's clear that China is looking at purchasing companies with food production expertise as part of a long-term strategic plan and a component of their national security. We need to be looking at these mergers in the same way, so it makes sense for CFIUS to take that angle

Through Investment Abroad, U.S.-China Economic and Security Review Commission, May 26, 2022, p. 3, https://www.uscc.gov/annual-report/2022-annual-report-congress.

[56] The government of the People's Republic of China has released national-level strategies in recent years highlighting acquisition of biotechnology from foreign firms as a priority. For more information, see CRS In Focus IF11684, *China's 14th Five-Year Plan: A First Look*, by Karen M. Sutter and Michael D. Sutherland.

[57] According to the report, "In 2019, the four largest fed cattle processing companies accounted for 85 percent of the total U.S. annual slaughter; the four largest hog processing companies accounted for 67 percent of the total annual hog slaughter; and the four largest chicken processing companies accounted for 53 percent of the total annual slaughter." See USDA, *Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience*, Washington, DC, February 2022, p. 13.

[58] Syngenta is one of the four largest suppliers of crop seeds and agricultural chemicals in the United States, according to the USDA Economic Research Service. See USDA Economic Research Service, "Two Companies Accounted for More than Half of Corn, Soybean, and Cotton Seed Sales in 2018-2020," https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=107516.

[59] Michael Shields, "ChemChina Clinches Landmark $43 Billion Takeover of Syngenta," Reuters, May 5, 2017, https://www.reuters.com/article/idUSKBN1810CM/; Shangjing Li, "Simpson Thacher Helps ChemChina Obtain CFIUS Clearance for $43 Bln Syngenta Buy," *Asian Legal Business*, August 26, 2016, https://china.legalbusinessonline.com/node/73060; ChemChina and Syngenta, "ChemChina and Syngenta Receive Clearance from the Committee on Foreign Investment in the United States," press release, August 22, 2016, https://www.syngenta.com/sites/syngenta/files/press-release-pdf/2017/20160822-en-joint-release.pdf.

[60] Diane Bartz, "ChemChina, Syngenta to Move Quickly on U.S. National Security Review," Reuters, February 3, 2016, https://www.reuters.com/article/idUSKCN0VD03C/; "'No Security Issues' in Syngenta Sale to China," *CHEManager International*, July 4, 2016, https://www.chemanager-online.com/en/news/no-security-issues-syngenta-sale-china.

> into consideration when reviewing these transactions. The fact that a state-owned enterprise may have yet another stake in U.S. agriculture is alarming.[61]

In 2020, ChemChina and Sinochem—a Chinese state-owned multinational chemical manufacturing conglomerate—consolidated their agricultural assets into Syngenta.[62] In response, some Members of Congress called upon the Treasury Secretary, as chair of CFIUS, to include food security issues in assessments of any foreign acquisitions of FA Sector entities.[63] In the 118th Congress, several bills under consideration would expand CFIUS reviews of foreign investment transactions in the FA Sector to include food security issues and would mandate regular USDA membership as opposed to informal, ad hoc participation.

The Consolidated Appropriations Act, 2024 (P.L. 118-42, §787), enacted in March 2024, requires the Secretary of Agriculture to be included as a member of CFIUS on a case-by-case basis with respect to covered transactions involving agricultural land, agriculture biotechnology, or the agriculture industry (including agricultural transportation, agricultural storage, and agricultural processing), as determined by the chair of CFIUS in coordination with the Secretary of Agriculture.[64] Congress provided $2 million in appropriated funds, to remain available until expended, for USDA to implement this provision.

Foreign Acquisition of Meat and Poultry Suppliers

The MITRE Corporation noted in a July 2021 report (hereinafter the MITRE report) on domestic meat and poultry supply chains that some foreign-owned U.S. meat and poultry providers prioritized exporting meat products to their home country rather than supplying domestic consumption needs when spot shortages occurred during the COVID-19 public health emergency.[65] Further, the report recommended that FA Sector SRMAs and certain interagency partners identify foreign ownership of key processing and production facilities and analyze "the policy implications of non-compliance with U.S. government mandates during an emergency."[66]

Four major multinational agricultural companies control the majority of U.S. beef production. Two of these—JBS and National Beef Packing Company—are owned or controlled by Brazilian

[61] Office of Sen. Chuck Grassley, "Grassley Statement on Conclusion of CFIUS Review of ChemChina-Syngenta Merger," press release, August 22, 2016, https://www.grassley.senate.gov/news/news-releases/grassley-statement-conclusion-cfius-review-chemchina-syngenta-merger.

[62] Reuters, "ChemChina, Sinochem Merge Agricultural Assets - Syngenta," January 5, 2020, https://www.reuters.com/article/idUSKBN1Z40HA/.

[63] House Foreign Affairs Committee, "McCaul, Crawford Urge Treasury Department to Review Merger Between Chinese Government-Backed Military Companies," press release, April 15, 2021, https://foreignaffairs.house.gov/press-release/mccaul-crawford-urge-treasury-department-to-review-merger-between-chinese-government-backed-military-companies/.

[64] Other legislation in the 118th Congress would broaden CFIUS's authorities to review and potentially prohibit certain foreign purchases of real estate and/or agricultural land (e.g., H.R. 917/S. 369, H.R. 558, S. 1066, H.R. 1448, H.R. 4577, H.R. 5078/S. 2060), add USDA as a permanent CFIUS member agency (e.g., H.R. 683/S. 168, S. 2312, H.R. 3378, H.R. 4577, S. 2312, H.R. 5078/S. 2060), and expand the defined scope of U.S. critical infrastructure to explicitly include agricultural systems and supply chains (e.g., H.R. 513/S. 68).

[65] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, MITRE Corporation, July, 2021, p. 4, https://www.mitre.org/sites/default/files/2021-10/pr-21-1826-us-food-supply-chain-security-a-network-analysis.pdf.

[66] Ibid., p. 6.

entities.[67] Similarly, the acquisition of Smithfield Foods by WH Group Limited—a PRC firm—conferred control of 20% of the domestic pork processing industry to a foreign owner.[68]

Reports that some foreign-owned meat processing plants prioritized deliveries to their home countries during the COVID-19 pandemic could also be a subject for congressional oversight and legislation.

Food Processing, Packaging, and Production

The MITRE report found that trends toward consolidation of entities were highly pronounced in the processing, packaging, and production of meat and poultry, creating a "dense and complex network" with several "key hubs" that were potentially vulnerable to disruption by man-made or natural causes:[69]

> With their high connectivity, these five key hubs have significant and extensive influence on the resilience and continuity of the U.S. meat supply chain. A disruption in any one of these hubs can have a large downstream effect on the rest of the network. The potential for disruption is further exacerbated by the network structure of "super embedded hubs" where each of these five key hubs are tightly interconnected.[70]

The MITRE report considered several types of intentional threats to such hubs, to include biological, physical, or cyber-based attacks. The report did not specifically consider FOCI risks as they might relate to any of these types of attacks. It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts or whether the fact of foreign ownership itself may be a threat in some cases. A report by the Food Protection and Defense Institute (hereinafter the FPDI report) asserts that cybersecurity vulnerabilities, exacerbated by poor technical competence and a lax security culture, are widespread throughout FA Sector supply chains, but the FPDI report does not attribute specific risks to FOCI threats in the FA Sector.

Although not specific to the FA Sector, E.O. 14083 of September 2022 states

> investments by foreign persons with the capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity—such as ... the operation of United States critical infrastructure ... may pose a risk to national security.

It is not yet clear whether FOCI risks to critical infrastructure identified in E.O. 14083 would fall within the scope of various risk management activities mandated in NSM-16, because the latter directive is still in the early implementation phase as of the date of this report (see "National Security Memorandum for the FA Sector" section).

Agricultural and Food Supporting Facilities

Agricultural and food supporting facilities include R&D facilities. The joint report states that these may be targeted by foreign entities for purposes of espionage, theft of trade secrets, and IP

[67] Christopher Walljasper, "More Foreign Ownership of U.S. Beef Processors Raises Food Safety Concerns," *Investigate Midwest*, December 19, 2019, https://investigatemidwest.org/2019/12/18/more-foreign-ownership-of-u-s-beef-processors-raises-food-safety-concerns/.

[68] See Fitch Ratings, "Fitch Affirms Smithfield Foods, Inc.'s IDR at 'BBB'; Outlook Stable," October 10, 2022, https://www.fitchratings.com/research/corporate-finance/fitch-affirms-smithfield-foods-inc-idr-at-bbb-outlook-stable-10-10-2022.

[69] Bradford Brown et al., *U.S. Food Supply Chain Security: A Network Analysis*, p. 4.

[70] Ibid.

theft.[71] Further, these activities may confer competitive advantages on foreign entities and provide "coercion points on aggressive corporate takeovers of U.S. corporations."[72] The joint report identifies "small and emerging corporations, universities, and government research organizations" as the most vulnerable entities of such targeting.[73]

Regulatory, Oversight, and Industry Organizations

The USDA OIG noted investigations involving foreign influence or interference in the FA Sector in some recent reports to Congress. In its FY2022 (second half) semiannual report to Congress, the USDA OIG reported substantiated allegations of insider threat activity involving a senior official at USDA's Animal and Plant Health Inspection Service (APHIS). Investigators found that the official maintained "inappropriate relationships" with foreign nationals, failed to report personal and official foreign travel, violated IT security, and accepted a gift from a foreign official without properly reporting it.[74] The FY2020 (first half) report noted that OIG audited USDA controls to prevent "unauthorized access to, and transfer of, USDA-funded research technology to foreign countries" by foreign research collaborators and found weaknesses that required correction by USDA agencies.[75] Semiannual USDA OIG reports for FY2023—the most recent available as of this writing—do not note any FOCI-related activities.

An option for Congress would be to exercise its oversight authorities to ascertain whether the recommended corrections suggested by USDA OIG to prevent further occurrences of IP theft by foreign entities were implemented. Another option for Congress would be to request the relevant OIG report in nonredacted form from USDA.

The Role of Transnational Criminal Organizations

A 2019 study included in the FPDI report found that FOCI threats in the FA Sector were not necessarily limited to otherwise legitimate business transactions. According to the FPDI study, "transnational criminal organizations (TCOs) are already heavily involved in large-scale food-related crimes such as counterfeiting, economically motivated adulteration, theft and resale, and smuggling."[76] Further, cargo thefts are often aided by malicious cyber intrusions to penetrate agricultural supply chains and to identify and reconnoiter targets.[77]

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[71] Office of the Director of National Intelligence and DHS, *Threats to Food and Agricultural Resources*, p. 26.

[72] Ibid.

[73] Ibid.

[74] See USDA Office of Inspector General, *Semiannual Report to Congress: Second Half April 1, 2022–September 30, 2022*, no. 88, October, 2022, p. 87, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/SARC_FY%25202022_Second%2520Half_508.pdf. No motive was reported. Among other activities, the Animal and Plant Health Inspection Service (APHIS) has oversight responsibilities in animal health, biotechnology, imports and exports of food and plant products, and international services. The Department of Justice (DOJ) declined to prosecute the official; their security clearance was revoked by the agency.

[75] USDA Office of Inspector General, *Semiannual Report to Congress: First Half, October 1, 2019–March 31, 2020*, no. 83, May 2020, p. 5, https://usdaoig.oversight.gov/sites/default/files/reports/2023-04/sarc2020_1st_half_508.pdf. The public report was fully redacted. According to USDA, "Due to the nature of our findings and the agency's responses, the report contains sensitive content. Thus, we are withholding it from public release due to concerns about the risk of circumvention of law." See USDA Office of Inspector General, *USDA's Controls to Prevent the Unauthorized Access and Transfer of Research Technology*, p. 1, https://www.oversight.gov/sites/default/files/oig-reports/50701-0002-21.pdf.

[76] Food Protection and Defense Institute, *The Cyber Risk to Food Processing and Manufacturing*, September 2019, p. 9, https://conservancy.umn.edu/bitstream/handle/11299/217703/FPDI-Food-ICS-Cybersecurity-White-Paper.pdf.

[77] Ibid.

In some cases, foreign-controlled firms have been targeted by TCOs for criminal exploitation or have themselves engaged in criminal practices. According to media reports, meat production by JBS facilities in the United States was disrupted in 2021 by a ransomware attack, which JBS attributed to a Russian TCO.[78] It is not clear whether foreign-owned entities are more vulnerable to these attacks than their U.S.-owned counterparts. The previous year, J&F Investimentos S.A., the Brazilian investment group that controls JBS,[79] pleaded guilty to violations of the Foreign Corrupt Practices Act as part of a bribery scheme in Brazil to obtain financing and other benefits and agreed to pay a $256 million criminal penalty.[80]

Foreign Control of U.S. Farmland

FOCI risks to U.S. farmland may involve direct ownership of the land or de facto control over land use for agricultural purposes, such as use of specific seed varieties and pesticides.

Land Ownership Risks

Increasing scarcity of arable land globally coupled with increasing demand for agricultural commodities has made U.S. farmland an attractive investment for certain foreign entities. Motivations for land acquisitions may be economic, strategic, or both. USDA tracks foreign acquisition of agricultural and nonagricultural land under authorities of the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA; P.L. 95-460). According to USDA, as of December 31, 2022, foreign persons and entities held an interest in 44.3 million acres of U.S. agricultural and nonagricultural land, accounting for 3.4% of total privately owned land.[81]

Owners from five countries (Canada, the Netherlands, Italy, the United Kingdom, and Germany) accounted for approximately 62% of all foreign-owned U.S. agricultural land in 2022. Other countries with aggregate owner holdings of more than 500,000 acres were Portugal, France, Denmark, Luxembourg, Mexico, Switzerland, the Cayman Islands, Japan, and Belgium. As of year-end 2022, USDA reports that PRC entities accounted for 383,935 acres, or 0.8%, of total foreign-owned U.S. agricultural land.[82]

Ownership of U.S. agricultural land by PRC entities, as reported by USDA under AFIDA, appears negligible, accounting for less than 1% of total foreign-owned U.S. agricultural land as of year-end 2022. However, the Review Commission report raised concerns about the noncommercial purposes of PRC acquisitions (i.e., increasing China's food security) and the apparent acceleration of the pace of acquisitions, which have elicited concern both from Congress and

[78] Tom Polanske and Jeff Mason, "U.S. Says Ransomware Attack on Meatpacker JBS Likely from Russia," Reuters, June 1, 2021, https://www.reuters.com/world/us/some-us-meat-plants-stop-operating-after-jbs-cyber-attack-2021-06-01/.

[79] See JBS, "Ownership and Corporate," https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/.

[80] DOJ, "J&F Investimentos S.A. Pleads Guilty and Agrees to Pay over $256 Million to Resolve Criminal Foreign Bribery Case," press release, October 14, 2020, https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign.

[81] CRS from USDA, *Foreign Holdings of U.S. Agricultural Land Through December 31, 2022* (Report 6), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/2022_afida_annual_report_12_20_23.pdf. Data cover sole foreign and joint U.S. ownership of privately held agricultural and nonagricultural land (out of a total of 1,290.5 million acres).

[82] Ibid. For more background on the Agricultural Foreign Investment Disclosure Act of 1978 and foreign ownership of farm land, see CRS In Focus IF11977, *Foreign Ownership and Holdings of U.S. Agricultural Land*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

from certain agricultural stakeholders and industry observers.[83] Legislation to restrict certain sales of agricultural land, tighten disclosure requirements, and expand federal review of foreign investment transactions has been introduced in recent Congresses.[84]

Neither USDA, FDA, nor businesses associated with the FA Sector track or compile data on any associated farm assets and property conveyances that may be attached to the farmland ownership or property investment, such as buildings, equipment, machinery, livestock, and IP and other production-related or technology rights. This may create data gaps that complicate analysis of relevant events or trends. Congress may consider what data categories used for AFIDA disclosures are sufficient to identify FOCI-related risks to the FA Sector.

Technology Use Agreements for Basic Agricultural Inputs

Large agrochemical and seed firms—many foreign owned—commonly require customers to sign technology use agreements for use of seed and pesticides. Technology use agreements for patented seed varieties typically impose legally enforceable conditions on end users (farmers) that cover a range of common agricultural practices.[85] Some public interest groups and critics claim that the current patent system gives too much power to large firms, exceeds congressional intent, and allows for agency overreach in granting and enforcing IP rights.[86]

"Ownership of [seed] biotech traits enable a level of control over every acre containing the trait," one law firm wrote in response to a 2022 USDA request for public comment on competitiveness in the agricultural seed production business. "The contractual terms reach far beyond grants of [IP] rights and impose wide-ranging, intrusive, and often poorly defined, obligations and requirements on licensees."[87]

Enforcement clauses of technology use agreements may allow firms to have unrestricted access to licensees' properties and facilities, business records (including receipts for chemicals and herbicides), internet service provider details, required crop-record submissions to USDA, and detailed records of farming practices (e.g., fertilizing, planting, and harvesting).[88] Violations may result in lawsuits or cancellation of use agreements, which may have the practical effect of cutting off access to seed supply for planting.

Some public interest groups assert that corporate collection and ownership of detailed data on farming practices may also raise fair data use and privacy issues. According to the American Antitrust Institute, "digital farming will likely enhance incentives to amass and appropriate valuable farm data for potential use as a strategic competitive asset."[89]

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[83] See Review Commission report.

[84] For more information on recent legislation and policy development, see CRS In Focus IF12312, *Foreign Ownership of U.S. Agriculture: Selected Policy Options*, by Renée Johnson, and CRS Report R47893, *Selected Recent Actions Involving Foreign Ownership and Investment in U.S. Food and Agriculture: In Brief*, by Renée Johnson.

[85] For an overview of relevant legislation, court cases, and enforcement policies as presented to farmers, see Wisconsin Department of Agriculture, Trade and Consumer Protection, *What Is the U.S. Plant Variety Protection Act?* https://datcp.wi.gov/Documents/BrownBagSeed.pdf.

[86] For a public interest group perspective on congressional intent and other legal issues, see Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, Center for Food Safety & Save Our Seeds, 2013, pp. 13-15, https://www.centerforfoodsafety.org/files/seed-giants_final_04424.pdf.

[87] Joel E. Cape, *Comments of Cape Law Firm*, Cape Law Firm, USDA Docket No. AMS-AMS-22-0025, June 15, 2022, pp. 2 and 4, https://www.regulations.gov/comment/AMS-AMS-22-0025-0062.

[88] Debbie Barker et al., *Seed Giants vs. U.S. Farmers*, p. 23.

[89] Diana L. Moss, *Comments of the American Antitrust Institute*, American Antitrust Institute, USDA Docket No. (continued...)

Because foreign-owned agrochemical and seed firms predominate in the U.S. market (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section), it follows that foreign-owned and -controlled entities may be able to amass detailed farm-level data—whether collected through IP enforcement activities or other means—across broad swaths of U.S. agricultural land.

Global agriculture firms assert that the patent system incentivizes and protects long-term R&D investments, which are necessary to produce seed traits such as those that have made higher crop yields possible over time at reasonable cost to farmers.[90] Additionally, they assert that acquisition of farm-level data facilitates development of precision agriculture products, as well as individualized recommendations for seed and herbicide use that benefit farmers.

In 2021, the Biden Administration directed USDA to prepare a report on consolidation within the agricultural seed industry, for which the agency subsequently sought public comment.[91] Commenters—ranging from small organic farmers to major multinational conglomerates—noted the trend toward consolidation and globalization in the seed industry, the seed industry's convergence with the agrochemical industry, and the increasing prevalence of seeds engineered to withstand various treatments (often sold by the same firms) against pests, weeds, and disease. In general, arguments centered on ecological, economic, and competitiveness concerns, rather than potential FOCI risks. Nonetheless, in some cases, foreign firms' acquisitions of major seed producers have raised security concerns (see "Foreign Acquisition of Seed and Agricultural Chemical Suppliers" section).

Options for Congress include amending patent law to clarify its intent regarding the use of utility patents for genetically engineered seed traits and examining IP enforcement practices that foreign-owned firms may use to collect farm-level data and whether data are aggregated and used in ways that safeguard U.S. security interests.

Conclusion

FOCI within the U.S. FA Sector is widespread. Foreign-owned multinationals are present throughout the sector, in segments such as meat processing, agricultural chemicals, and crop seeds. Some foreign acquisitions of corporate entities or agricultural land may be subject to CFIUS review but are generally legal and generally allowed. In the R&D field, collaboration with foreign nationals and research institutions is commonplace in both the public and private sector. Further, the national CISR enterprise itself frequently relies on collaboration of U.S. public- and private-sector entities with their foreign counterparts. SRMAs generally assume that asset owners are good-faith actors, regardless of nationality.

However, FOCI may also present potential risks to the FA Sector, as seen in allegations of unauthorized technology transfer, theft or misappropriation of IP, prioritization of overseas markets over domestic demand, and attempted land purchases near sensitive military assets. Other potential areas of concern, such as farm-level data gathering by multinational firms and alleged

AMS-AMS-22-0025, May 16, 2022, p. 17, https://www.antitrustinstitute.org/wp-content/uploads/2022/05/USDA-Comment-Agbiotech-6-10-22-REVISED-FINAL-FOR-AAI-WEBSITE.pdf. Another nonprofit, The Open Markets Institute makes substantially similar arguments in its comments. See Open Markets Institute, *The Open Markets Institute's Comments on "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs*," May 16, 2022, pp. 5-7, https://www.regulations.gov/comment/AMS-AMS-22-0025-0033.

[90] For example, see Syngenta, "Intellectual Property & Regulatory," https://www.syngenta.com/en/about/faq/intellectual-property-regulatory.

[91] USDA Agriculture Marketing Service, "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs," https://www.regulations.gov/document/AMS-AMS-22-0025-0001.

abuse of IP protections to control farming practices, relate primarily to concerns about corporate consolidation and concentration that are not specific to foreign ownership. Nonetheless, some Members of Congress and other observers have raised concerns over foreign acquisitions of U.S. and multinational firms in key FA Sector segments.

The full extent to which specifically *foreign* ownership, control, or influence over critical infrastructure systems and assets affects the overall level of risk to critical functions of the FA Sector (i.e., the safe production, distribution, and supply of food) has yet to be established. Much of the publicly available reporting is conjectural and anecdotal, complicating any more systemic analysis of FOCI risk to the FA Sector. Legislative mandates for data gathering on certain commercial transactions (e.g., AFIDA) and cybersecurity incident reporting (e.g., CIRCIA), as well as executive branch directives to appropriate federal agencies to conduct relevant studies, may offer an opportunity for more authoritative analyses.

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DOWNEYBRAND

MEMORANDUM

FROM: ERNEST A. CONANT

DATE: JUNE 4, 2025

RE: GROUNDWATER BANKING & RECHARGE IN CALIFORNIA

This memorandum provides a high-level overview of legal principles and concepts related to the storage and recovery of groundwater in California. Its focus is on a banking arrangement where there is an intent to recharge imported or previously stored surface water through the banker's recharge operations and an intent to recover the stored water, whether recovery is carried out by the storing district itself or its water users. I summarize the law related to groundwater banking and recent changes in groundwater management and law in California, and at the end of the memorandum provide some practical pointers how one can develop a groundwater banking program.

"Banking" can have many different meanings throughout the West—it can be temporary storing water in a surface reservoir (as some agencies and states have used in coordination with the U.S. Bureau of Reclamation on the Colorado River system) or it can mean a transfer, lease or exchange in some contexts. In this memorandum we focus on groundwater banking as that term as become to be known in California in light of California case law, legislation and practice.

Groundwater recharge and banking has become more important in recent years in California with limited surface water supplies as a result of drought and environmental regulatory constraints, and implementation of the Sustainable Groundwater Management Act (SGMA) discussed below limiting pumping of native groundwater in many basins. Groundwater recharge and banking is recognized and encouraged by the State's leadership--the Governor's "California's Water Supply Strategy—Adapting to a Hotter, Drier Future" (August 2022), among other things, calls for creating up to 4 million acre-feet of new storage to capitalize on big storms when they occur and store water for dry periods, including expanding groundwater recharge by at least 500,000 acre-feet on average annually.

This memorandum is based on my observations and experience practicing water law in California for over 40 years, but is not to provide legal advice to anyone, and not necessarily the position of any of our clients or that of any governmental agency in California.

A. The Legal Framework for Groundwater and Storage and Banking

First, the basics of the morass of groundwater law in California. The Courts have said "First priority goes to the landowner whose property overlies the groundwater. These 'overlying rights' are analogous to riparian rights in that they are based on ownership of adjoining land, and they have priority. . .Surplus groundwater also may be taken by an appropriator and priority among 'appropriative rights' holders generally follows the similar principle that 'the one first in time is the first in rights' [citation omitted]. With groundwater there is an exception, however, that gives rise to a third category of rights. Under certain circumstances, an appropriator may gain

'prescriptive rights' by using groundwater to which it is not legally entitled. . .[citation omitted]" *Antelope Valley Groundwater Cases* 62 Cal.App. 5th 992, 1022 (2021). In very limited circumstances the courts have also recognized "pueblo rights" where a city is a predecessor to a pueblo that had "paramount rights based on Spanish and Mexican law, to use the waters. . .to the extent of its municipal needs and those of its inhabitants" *City of Los Angeles v. City of San Fernando* 14 Cal. 3d 199, 245 (1975).

In this memorandum we focus on overlying rights, the groundwater rights typically used in California's vast agricultural economy, and the right to store or retrieve imported water in groundwater basins.

Adoption of the Sustainability Groundwater Management Act of 2014.

The 2014 Sustainable Groundwater Management Act (**SGMA**) changed California's historic approach to the administration of groundwater rights—for the first time permitting (and in some cases, directing) that local governmental agencies regulate the extraction and use of groundwater. Historically, that regulation had occurred only on an ad hoc basis, in the context of adjudication actions or local ordinances. SGMA's basic framework directs that local entities (Groundwater Sustainability Agencies, or "**GSAs**"), through adoption of Groundwater Sustainability Plans ("**GSPs**"), to identify sustainability standards pursuant to which a basin must be managed, and quantifiable metrics that determine whether those standards have been met. SGMA empowers GSAs with broad authorities to intervene, either through affirmative demand management, fee structures, or the implementation of projects targeted at addressing those issues.

State structures provide an additional level of oversight—if either the plan adopted by the GSA or the actions taken by the GSA fail to move the basin sufficiently toward sustainability, the basin may be referred to the State Water Resources Control Board ("**State Water Board**") for a probationary basin designation, and ultimately may be subject to management by the State. Through actions taken to implement its GSPs, a GSA can control groundwater extractions by, among other things, providing for "groundwater extraction allocations" (Water Code §10726.4(a)(2)).[1] However, "[n]othing in [SGMA], or any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law. . . (§ 10720.5(b), emphasis added).

It's ironic that California, generally seen as a very "progressive" state, until recently has been far behind most Western states in terms of regulating use of groundwater. Use of groundwater has been a critical element of sustaining the California agricultural economy, which in recent times has become more reliant on groundwater because of lack of surface water from the federal Central Valley Project, California's State Water Project and other projects, due in large part to extended droughts and increased environmental regulatory constraints on diversion and use of surface water otherwise available.

[1] This authority passes to the SWRCB, in the event that it assumes jurisdiction of a non-performing basin through an "Interim Plan."

Case Law Development of Groundwater Banking.

San Fernando, supra, one of the longest reported cases of the California Supreme Court, sets out the common law considerations for groundwater rights and groundwater banking and retrieval of stored water. *San Fernando* arose in 1955 when the City of Los Angeles brought an action to enjoin others from extracting water from the Upper Los Angeles River Area that it claimed the City had stored in the basin as a result of its historic and ongoing operations. A commentator generally summarized *San Fernando* and another recently decided case, *Niles Sand and Gravel Co. Inc. v. Alameda Water District,* 37 Cal. App. 3d 924 (1974), as recognizing the following rights:

- The right to store water in a natural underground basin without compensating overlying landowners;
- The right to protect the stored water from expropriation by others and from inequitable operational burdens;
- The right to recapture the stored water when it is needed; and
- The public's priority to stored water underground when there is a shortage of underground storage space.[2]

Subsequent cases established additional principles:

- That the rights of overlying pumpers are distinct from those of groundwater bankers extracting stored water. *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* 109 Cal. App. 4th 891, 910 (2003) ("Extraction and storage are different physical processes; establishing a hydrologic link between them is not sufficient to show that a legal interest of one creates an interest in the other.")
- That groundwater storage space is a public resource. *Id.* at 912 ("Appellants' [So Cal Water] proposal fails to ensure that the storage space will be used for the public benefit.")
- That groundwater bankers' rights are constrained by the principal that their activities should not harm the basin. *Id*. at 916 (". . .the Water Rights Holders have an interest in the natural replenishment and an interest to ensure that any imported water does not harm the basin.").
- That, as in the case of surface water, water recharged into the aquifer "stream" could be reclaimed by the appropriator, provided that this entity imports water into the aquifer with the intent to reappropriate it, rather than abandon it. *Orange County Water Dist. v. Sabic Innovative Plastics US LLC* 14 Cal App. 5th 343, 411 (2017)

[2] V. Gleason, Water Projects Go Underground 5 Ecology L. Q. 625 (1976) 667-68.) Based on the *Central and West Basin* case noted below, the last bullet needs to be qualified that banking of imported water cannot harm the basin.

For decades, agencies have relied upon these and other case law as the common law to develop banking programs within or outside their boundaries or in partnership with others to recharge, store and recover imported water, primarily in Southern California and the San Joaquin Valley. Collectively, these agencies have invested at least hundreds of millions of dollars in such projects, with the rights arising from those programs recognized in various groundwater adjudications.

Interplay Between SGMA and Banking Under Common Law.

SGMA contemplates that GSAs will have a role in at least overseeing groundwater banking and storage programs or projects, both authorizing the GSA itself to conserve and store water for later use, as well as requiring that the GSP map current and potential recharge locations, and that entities carrying out recharge operations provide reports on those operations to the GSA (§§ 10726.2(b), 10727.2(a)(5), and 10726). Indeed, part of its legislative purpose was to ". . .increase groundwater storage and remove impediments to recharge" (§ 10720.1(g)). The GSA's work in conserving and storing water, however "shall not alter another person's or agency's existing groundwater conjunctive use or storage program except upon a finding that [it]. . .interferes with implementation of the agency's groundwater sustainability plan." (§ 10726.2(b); emphasis added).

GSAs through a GSP, may control groundwater extractions, including "establishing groundwater extraction allocations". . . but "A limitation on extractions by a groundwater sustainability agency shall not be construed to be a final determination of rights. . ." (§ 10726.4(a)(2). Additionally, the GSA may authorize temporary or permanent transfers or carry over of groundwater extraction allocations (§§ 10726.4(a)(3) and (4)).

A GSP would necessarily need to account for direct recharge or return flows from an ongoing conjunctive use project for its water balance to demonstrate sustainability. But nothing in SGMA suggests that another agency cannot carry out a banking project to recharge, store and extract imported surface water as recognized by common law absent SGMA. In fact, SGMA contemplates such activities through the need to report recharge to storage to the applicable GSA, as noted above (§ 10726).

Any proposal for banking should be consistent with the common law groundwater principles outlined above. However, we note that the common law focuses specifically on imported water introduced specifically for later use. Agencies have not typically laid "claim," in a water right sense, to groundwater that is the result of incidental recharge operations by way of return flows and conjunctive use, but this may be changing as a result of SGMA implementation, particularly in connection with the development of basin water budgets related to existing recharge and sustainable yield.

Given this structure, and the GSAs' ongoing responsibility to ensure the sustainable management of the groundwater basin, any proposal to issue credits or account for recharged water for use in future extractions should be coordinated with the GSA. This coordination could extend along a continuum from a formal banking system administered by the GSA and integrated into its demand management program at one extreme, to a basic acknowledgement from the GSA that certain volumes of water recharged into the basin by participants will be accounted for as stored water subject to withdrawal (and not part of the native yield).

B. Implications of Streamlined Adjudication Statutes (SAS)

Streamlined Adjudication Statute of 2015 (SAS)

Where water right holders have a dispute as to the extent of their right to groundwater in a basin, the Code of Civil Procedure has historically offered a court adjudication process. Through the regular adjudication process, a court will hear evidence regarding the respective rights of each claimant in a basin (or portion thereof), and issue a decree setting forth the rights of all claimants. The process is time-intensive and heavily reliant on the establishment of a factual record surrounding groundwater use, land use, and the history of the basin. Prior to SGMA's enactment, there had been 26 adjudications litigated under regular provisions of the Code of Civil Procedure, and there was criticism that this historic approach was overly cumbersome and time consuming.

The 2015 Streamlined Adjudication Statutes (SAS), codified at Code of Civil Procedure § 830 et seq., provide special procedures for comprehensive groundwater adjudication actions. Under these provisions, if more than 50% of the parties, supported by extractors of at least 75% of extractions, propose a stipulated judgment to the Court, the Court may approve if it meets certain criteria and following a hearing process (CCP § 850(d)). Small users (less than 5 acre-fee annually) may be exempted by the court from the adjudication process. (CCP § 833(d)). Initiating a streamlined adjudication, however, is not an off-ramp to the normal SGMA compliance path for a covered basin: where a GSP is required, the court "shall manage the proceedings in a manner that minimizes interference with timely completion and implementation" of a GSP (Water Code § 10737.2). SAS provides that the court may determine *all* groundwater rights of the basin, including use of storage space (CCP § 834(a)).

SAS Potentially Addressing Dormant Overlying Rights.

Prior to the enactment of the SAS, *Wright vs. Goleta Water District* 174 Cal.App.3d 74 (1985) was the leading case concerning unexcised or dormant overlying groundwater rights. In that case, the appellate court declined to apply the principles set out in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, which would allow the court to subordinate a dormant riparian right to an exercised appropriative right. Through newly enacted Code of Civil Procedure §§ 870(b)(7), the SAS in essence modified *Wright* and specifically providing that in administering a streamlined adjudication, the Court "may consider applying the principles established in [*Long Valley*]."

SAS vs SGMA Plans

SAS is also a tool that users in certain basins have used to challenge a local GSPs. Of particular note:

- *Las Posas Valley Water Rights Coalition, et al. v. Fox Canyon Groundwater Management Agency, et al.*. The *Las Posas* judgment now under review by the Second District Court of Appeal, among other things, restricts use of unexercised overlying rights by requiring the new users to potentially pay for the cost of importing additional water that would not otherwise be available to the basin and not reducing the "operating yield," and that is one of the issues raised in the appeals. The earliest we would expect a decision in this appeal is late 2025.

- *Indian Wells Groundwater Authority v. Superior Court* (Fourth District Court of Appeals Case No G064757, issued November 14, 2024): In *Indian Wells Groundwater Authority*, the GSA is arguing that a SAS proceeding cannot revise the determination of the safe/sustainable yield that the GSA through its GSP determined.

We are aware of four adjudications that have been brought under SAS, and expect others to be filed as GSAs and users work to implement their GSPs (or reach impassable conflicts in doing so).

A bill now pending in the Legislature, AB 1413, seeks to clarify and change certain elements of the SAS as it relates to GSPs adopted under SGMA. Among other things it would prevent one from challenging through a SAS proceeding the sustainable yield of a basin established under a GSP if no action to invalidate the GSP was filed.

C. Outline of Major Considerations in the Development of a Banking Program

Below we outline various issues for discussion in developing any coordinated voluntary banking program. These include both policy questions with potential legal implications, as well as items that require engineering and/or hydrologic analysis to inform the discussion. These practical practice pointers are intended to help one in identifying potential costs, benefits, pitfalls, and opportunities for potential groundwater banking programs:

Major Considerations

- Is the physical setting and geology of the area conducive to groundwater banking operations?
    - *Consider*: Is there the ability to efficiently recharge through recharge basins or on-farm recharge? If not, are there areas not served by surface water that could be developed into an in-lieu program, or alternatively, are groundwater injection wells feasible?
    - *Consider:* Is there surface water available (and how much) to recharge and a realistic way to convey it to the contemplated recharge facilities?
    - *Consider*: If infrastructure is needed, how will it be financed?
- Once water is applied, how will the ultimate amount delivered to the basin be determined and accounted for? Who will be responsible for providing this accounting? Do all participants share the same assumptions regarding loss accounting?
    - *Consider:* Determination of losses can vary significantly by seasons, soil type, and location in a basin. Types of losses may include evaporative, transportation/conveyance, migration, etc.
    - *Consider*: Who will determine the methodology for losses, and how will consensus be achieved? Is there a need for an Engineering Committee either through the applicable GSA(s) or with group of surrounding agencies?

- *Consider*: Who will be the "bookkeeper" for water in and out of the basin? How will that accounting interact with GSA water budgets or other GSA-led programs?

- Starting date of any accounting or credits—does recharge relate back to any prior activities?

- Is "in lieu" recharge going to be permitted and recognized? "In lieu" recharge or banking is the practice of providing surplus surface water to historic groundwater users, thereby leaving groundwater in storage for later use. Special rules may be necessary to insure it does not result in expanded development.

- What other agencies in the area could be partnered with or have objections to the proposed project? Is there need for some form of mediation to early on resolve any issues?

    - *Consider*: How to assure that the Banking activity does not unreasonably interfere with natural replenishment for the benefit of overlying users or others—see *Central and West Basin* case reference above—this can be an important consideration particularly in some basins where there may be limited storage available.

    - *Consider*: Will the group do business with outside water users/interests who may help finance facilities, or will operations be restricted to local agencies?

    - *Consider:* If return/recovered water is conveyed through others' facilities, will return water quality be an issue?

- Are there major environmental issues—what level of review under the California Environmental Quality Act (CEQA) and/or the National Environmental Policy Act (NEPA)will be required? Will permits be required from the California Department of Fish and Wildlife and/or U.S Fish and Wildlife Service and/or U.S. Corps of Engineers?

- Are permits required from the State Water Board for acquisition/diversion or storage of water?

- How long will it take to get the project in place? Is there need for a pilot program to get started and demonstrate feasibility?

- How best to engage public after the project is defined?

How to Get Started

One doesn't need to have resolved every issue, including the "considerations" listed above, to get started with some form of planning process. And, in many cases, work may already be underway to resolve questions surrounding the technical feasibility and scope of potential recharge operations. Other actions that may drive progress forward include:

- Identifying key principles of agreement and planning assumptions for participating stakeholders, and memorializing these among the group. These might include, for example, parameters related to technical assumptions (what "yield" is assigned to each area, and what operations will be part of the agreement), financial considerations (how much will each participant contribute), or administrative parameters (who will hire any consultants, and how will that work be directed and supervised).

- Aggregating existing work on the feasibility of recharge and banking operations in the region, and (as necessary) directing a reconnaissance-level study to evaluate the physical setting and possible options; a more detailed hydrogeologic study may need to be completed after it is clearer what project is realistic.

- Gathering data from existing pilot projects, and identifying any appropriate test projects to "prove up" future options for management and operations.

- Identifying a clear path for communication with neighboring agencies, including GSAs, to avoid unnecessary concerns and opposition through the "rumor mill" as options for accounting and participation are explored.

- Reviewing operations in other basins, and identifying accounting principles/processes that are most appropriate for this region. Ultimately an accounting system to properly account for stored imported water will need to be developed with "buy-in" from all or most affected agencies, possibly sponsored by the applicable GSA, and early communication to do in a cooperative spirit will be helpful.

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IN FOCUS

Updated December 27, 2024

Farm Bill Primer: Background and Status

The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs. It provides an opportunity for policymakers to comprehensively and periodically address agricultural and food issues. The farm bill has typically been renewed about every five years since the 1930s (CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2024*).

What Is in a Farm Bill?

The breadth of the farm bill is optional and determined mostly by the joint jurisdiction of the House and Senate agriculture committees. Initially, farm bills focused on support for a handful of staple commodities—corn, soybeans, wheat, cotton, rice, peanuts, dairy, and sugar. Since 1973, farm bills have become increasingly expansive, when a nutrition title was first included. Other prominent additions include formerly stand-alone laws, such as conservation, credit, and research. New topics were added, such as bioenergy and horticulture. In 2024, the farm bill considered by the House committee (H.R. 8467) and introduced in the Senate (S. 5335) contained the same 12 titles as the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334; see **text box**).

The omnibus nature of the farm bill can create broad coalitions for policies that individually might not have a majority of support in the legislative process. In recent years, more stakeholders have become involved in the farm bill debate representing conservation, rural development, nutrition, local food systems, and organic production.

When Does the Farm Bill Expire?

The 2018 farm bill was written to cover five years through FY2023 and the 2023 crop year. Congress enacted a one-year extension in November 2023 for 2024 (P.L. 118-22, Division B, §102) and a second one-year extension in December 2024 to cover FY2025 and the 2025 crop year (P.L. 118-158, Division D).

Without reauthorization, some farm bill programs expire and may not continue operations. Most nutrition assistance programs can be continued by providing appropriations. Farm commodity programs need to be reauthorized for future crop years. The farm bill also suspends long-abandoned permanent laws from the 1940s for the farm commodity programs that used supply controls and price regimes that would be costly to implement if their suspension expires. Other programs like crop insurance have permanent authority and do not need reauthorization (CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*).

What Does the Farm Bill Cost?

Farm bills authorize programs in two spending categories: mandatory and discretionary. They authorize mandatory funding for programs based on multiyear budget estimates (*baseline*) and estimates of what provisions in newly enacted bills cost (*scores*). Programs authorized for discretionary funding are not funded by the farm bill and depend on future appropriations action. Mandatory programs usually dominate the farm bill debate (CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*).

Farm bills have both 5-year and 10-year budget projections for the programs that operate as entitlements based on formulas and eligibility criteria. The 10-year projection for the 2018 farm bill was $867 billion over FY2019-FY2028 (**Table 1**). Four titles accounted for 99% of the 2018 farm bill's mandatory spending: nutrition (primarily the Supplemental Nutrition Assistance Program, SNAP), farm commodities, crop insurance, and conservation. Programs in all other farm bill titles accounted for about 1% of mandatory outlays and receive mostly discretionary funds.

Titles in Recent Farm Bills

Title I, Commodities: Provides support for major commodity crops, including wheat, corn, soybeans, peanuts, rice, dairy, and sugar. Authorizes disaster assistance.

Title II, Conservation: Encourages environmental stewardship of farmlands and improved management through land retirement programs, working lands programs, or both.

Title III, Trade: Supports U.S. agricultural export programs and international food assistance programs.

Title IV, Nutrition: Provides nutrition assistance for low-income households through programs, including SNAP.

Title V, Credit: Offers direct government loans and guarantees to producers to buy land and operate farms and ranches.

Title VI, Rural Development: Supports rural housing, community facilities, business, and utility programs through grants, loans, and guarantees.

Title VII, Research, Extension, and Related Matters: Supports agricultural research and extension programs to expand academic knowledge and help producers be more productive.

Title VIII, Forestry: Supports forestry management programs run by U.S. Department of Agriculture (USDA) Forest Service.

Title IX, Energy: Encourages the development of farm and community renewable energy systems through various programs, including grants and loan guarantees.

Title X, Horticulture: Supports the production of specialty crops, USDA-certified organic foods, and locally produced foods and authorizes a regulatory framework for industrial hemp.

Title XI, Crop Insurance: Enhances risk management through the permanently authorized Federal Crop Insurance Program.

Title XII, Miscellaneous: Includes programs and assistance for livestock and poultry production, support for beginning farmers and ranchers, and other miscellaneous and general provisions.

Table 1. Projected Budget for the 2018 Farm Bill, the June 2024 Baseline, and the CBO Score of H.R. 8467
(million dollars, 10-year mandatory outlays)

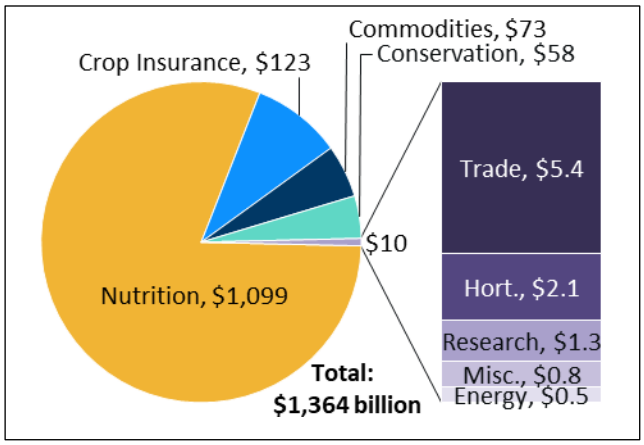
Title	2018 Farm Bill at Enactment FY2019-FY2028	CBO Baseline (June 2024) FY2025-FY2034	Changes in H.R. 8467 (CBO score)[a] FY2025-FY2034
Commodities	$61,414	$72,511	+$37,027
Conservation	59,748	58,419	+4,521
Trade	4,094	5,430	+2,420
Nutrition	663,828	1,099,396	-27,099
Credit	-4,558	—[b]	0
Rural Dev.	-2,362	—[b]	0
Research	1,219	1,300	+3,493
Forestry	10	—[b]	+0
Energy	737	500	+50
Horticulture	2,047	2,100	+360
Crop Ins.	77,933	123,468	+4,819
Miscellaneous	3,091	800	+2,495
Total	**$867,200**	**$1,363,924**	**+$28,086**

Source: CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*; CRS analysis of the Congressional Budget Office (CBO) June 2024 baseline for SNAP and the USDA Mandatory Farm Programs for the five largest titles and amounts in law for other titles; and CBO, "Estimate of H.R. 8467 Relative to CBO's June 2024 Baseline Projections," November 8, 2024.

a. The score is the change relative to the June 2024 baseline. CBO has not released a score for S. 5335.

b. Baseline for the credit title is likely negative, indicating payments into the Farm Credit System Insurance fund. The rural development title has no current programs with baseline. Baseline for the forestry title is $10 million or less.

Figure 1. Baseline for Farm Bill Programs, by Title
(billion dollars, 10-year mandatory outlays, FY2025-FY2034)



Source: CRS using the CBO June 2024 baseline for the five largest titles and amounts in law for programs in other titles.

The June 2024 Congressional Budget Office (CBO) baseline is the latest projection for the major farm bill programs. **Table 1** and **Figure 1** include these updates and the funding indicated in law for other farm bill programs not included in the CBO projection. The June 2024 baseline has $662 billion over 5 years (FY2025-FY2029) and $1,364 billion over 10 years (FY2025-FY2034).

What Are the Current Issues?

On May 23, 2024, the House Committee on Agriculture ordered reported a farm bill, H.R. 8467, the Farm, Food, and National Security Act of 2024. On November 18, 2024, the Senate Committee on Agriculture, Nutrition, and Forestry chair introduced a farm bill, S. 5335. The Senate committee took no further action on this bill.

Throughout 2024, budget issues pursuant to achieving various policy goals were leading obstacles in advancing the farm bill. The major policy issues included increasing

"reference prices" for the farm commodity programs that would provide greater payments to farmers when market prices fall below a target support level. Both bills would have provided some level of increases. Another policy goal in both bills was to incorporate one-time conservation funding from P.L. 117-169 (referred to as the Inflation Reduction Act) into the permanent farm bill conservation baseline. Both bills increased mandatory funding for export promotion, agricultural research, and animal health programs. Both bills would also have restricted USDA's ability to use the Commodity Credit Corporation (CCC) to initiate farm assistance outside the farm bill. In nutrition policy, the House bill would have prevented USDA from reevaluating the market basket for the Thrifty Food Plan (TFP) in SNAP in a way that exceeds the cost of inflation.

The baseline CBO initially used to evaluate H.R. 8467 was the May 2023 baseline, which indicated that the bill would increase mandatory spending by $33.0 billion over nine years (FY2025-FY2033). CBO subsequently scored the bill against the June 2024 baseline, which indicated a smaller increase in spending. Nonetheless, the score remained budget increasing for budget enforcement rules such as pay-as-you-go (PAYGO), which assume bills should not increase the federal budget deficit. This latest score indicated that H.R. 8467 would increase mandatory spending by $28 billion over 10 years (**Table 1**). CBO has not released a score of S. 5335.

By policy areas, the major budgetary changes in H.R. 8467 include a net increase of about $37.0 billion over 10 years for commodity support programs, including limiting the CCC; a net increase of $4.5 billion for conservation programs; a net decrease of $27.1 billion for the domestic nutrition programs, including by limiting the TFP; and 10-year increases of $2.4 billion for trade, $3.5 billion for research, $4.8 billion for crop insurance, and $2.5 billion for the miscellaneous title (CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*).

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IF12047

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IN FOCUS

Updated December 27, 2024

Farm Bill Primer: Budget Dynamics

Congress is considering a new farm bill because the 2018 farm bill (P.L. 115-334) and the latest of its two one-year extensions (P.L. 118-158, Division D) begin expiring at the end of FY2025 (CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*). In 2024, the House Committee on Agriculture ordered reported H.R. 8467, and the Senate Agriculture Committee chair introduced S. 5335.

Farm Bills from a Budget Perspective

Federal spending for agriculture is divided into two main categories—mandatory and discretionary spending:

- **Mandatory** spending is authorized primarily for the farm commodity programs, conservation, crop insurance, and the nutrition assistance programs. A farm bill authorizes outlays for mandatory programs when the law is enacted.

- **Discretionary** appropriations are authorized for most other programs, including rural development, research, and credit programs. Farm bills set program parameters. Funding may be provided in appropriations acts.

Some farm bill programs have received both types of funding. Discretionary appropriations are the primary source for many programs, but mandatory spending usually dominates the farm bill budget debate and is the focus here.

Importance of Baseline to the Farm Bill

The Congressional Budget Office (CBO) **baseline** is a projection at a particular point in time of what future federal mandatory spending would be under the assumption that current law continues. The baseline is the *benchmark* against which proposed changes in law are measured.

When a bill is proposed that would affect mandatory spending, the **score** (cost impact) is measured in relation to the baseline. Changes that increase spending relative to the baseline have a *positive* score; those that decrease spending relative to the baseline have a *negative* score.

Increases in a bill's total cost beyond the baseline may be subject to budget constraints, such as pay-as-you-go (PAYGO) rules. Reductions from the baseline may be used to offset costs for other provisions that have a positive score or used to reduce the federal deficit. The annual budget resolution determines whether a farm bill is held budget neutral or can increase or must decrease spending.

Recent Farm Bills' Budget Positions

In the past 25 years, farm bills have had both positive and negative scores relative to their baselines, according to CBO. The 2002 farm bill had a positive score and increased spending by $73 billion over 10 years under a budget resolution during a budget surplus. The 2008 farm bill was budget neutral, although it added $9 billion to outlays over 10 years by using offsets from a tax-related title. The 2014 farm bill had a negative score, reducing spending by $16 billion over 10 years. The 2018 farm bill was budget neutral with increases in some titles offset by reductions in others. In 2024, the House committee's bill, H.R. 8467, would have increased the 10-year cost by $28 billion.

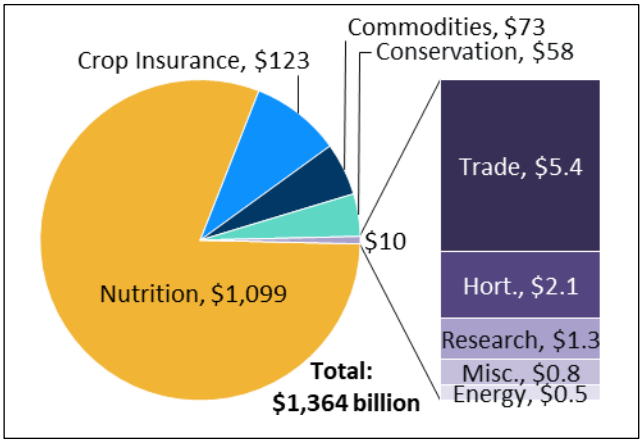
CBO's June 2024 Baseline

The current baseline used to score the farm bill is the June 2024 CBO baseline. A new CBO baseline with updated projections of spending is expected in the spring of 2025.

Farm bills have 5-year and 10-year budget projections according to federal budgeting practices. Converting the baseline update for programs into farm bill titles and adding funding indicated in law for other farm bill programs, CRS estimates that the 2024 baseline for all farm bill titles is $662 billion over 5 years (FY2025-FY2029) and $1,364 billion over 10 years (FY2025-FY2034) (**Figure 1**).

For individual agriculture-related programs with a mandatory spending baseline, excluding nutrition, current projections are for $265 billion of outlays over the next 10 years (**Figure 2**).

Figure 1. Farm Bill Titles with Mandatory Baseline
(billions of dollars, 10-year projected outlays, FY2025-FY2034)



Source: Created by CRS using the Congressional Budget Office (CBO) June 2024 baseline for the five largest titles and amounts indicated in law for programs in other titles.

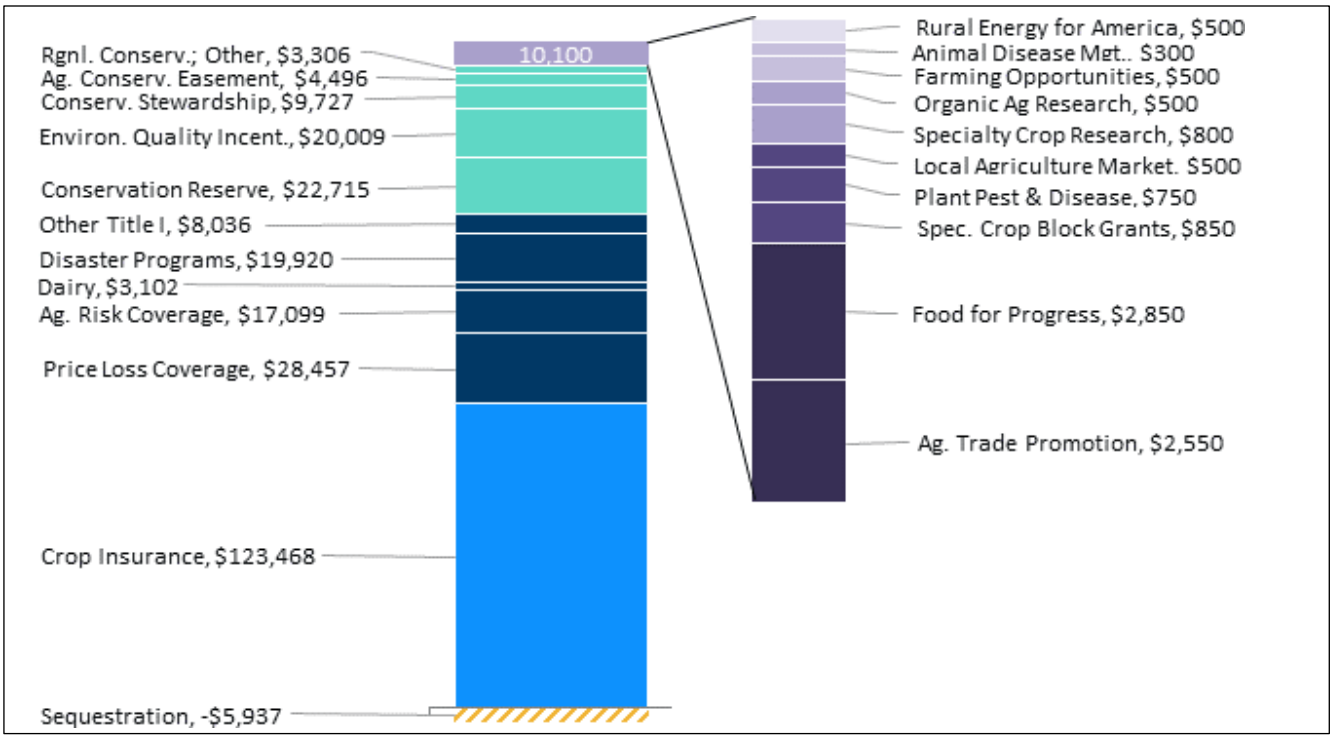
Extension of the Farm Bill in 2025

The latest one-year extension of the farm bill covers FY2025 and the 2025 crop year. It authorizes the continuation of mandatory and discretionary programs; for

programs with a mandatory spending baseline, Congress did not need to offset any cost for the extension.

Figure 2. Agriculture Programs with Baseline in the Farm Bill

(millions of dollars, 10-year projected outlays [excluding the nutrition title], FY2025-FY2034)



Source: Created by CRS using the CBO June 2024 baseline and amounts indicated in law for programs in other titles.

Programs Without Baseline

Twenty-one programs received mandatory funding in the 2018 farm bill but do not have a baseline to cover the cost of their reauthorization. The 2023 farm bill extension for FY2024 provided $177 million of one-year mandatory funding to 19 of those programs. The December 2024 extension for FY2025 did not provide any additional mandatory funding for any of these programs (CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*).

Supplemental Funding Not in the Baseline

Supplemental spending is not part of the baseline but may be important because of its size in recent years and may have created expectations for the farm bill. In FY2019 and FY2020, the Trump Administration provided over $25 billion for producers affected by retaliatory tariffs. From FY2020 to FY2022, Congress and the Trump and Biden Administrations provided pandemic assistance over $30 billion to farms and over $60 billion for nutrition. Congress has authorized more than $42 billion of ad hoc agricultural disaster assistance since 2018. The Biden Administration announced $3.5 billion for climate-smart commodities and $2.3 billion for trade promotion and global food aid, among other initiatives. The American Relief Act (P.L. 118-158) provided $10 billion of economic assistance for farmers in 2025. P.L. 117-169 (referred to as the Inflation Reduction Act) added over $17 billion for conservation and energy title programs. Unobligated balances may be cancelled or repurposed.

2024 Farm Bill Markup

When the House Agriculture committee marked up H.R. 8467 in May 2024, CBO had not released an official score of the bill. In August 2024, CBO published a score using the year-old May 2023 baseline that indicated the bill would increase mandatory spending by $33.0 billion over nine years (FY2025-FY2033). In November 2024, CBO updated the score of the bill using the June 2024 baseline, concluding that the bill would increase mandatory spending by $28 billion over 10 years. This new score indicated a smaller increase in spending, though it was still not budget neutral for meeting budget enforcement rules.

The latest score indicated that the major changes in H.R. 8467 included a net increase of about $37.0 billion over 10 years for commodity support programs, after accounting for the new restrictions on the Secretary of Agriculture's authority to use the Commodity Credit Corporation; a net increase of $4.5 billion for conservation programs including incorporating funding from P.L. 117-169 (referred to as the Inflation Reduction Act); a net decrease of $27.1 billion for the domestic nutrition programs, including by limiting future increases to the Thrifty Food Plan (TFP) that is used to determine Supplemental Nutrition Assistance Program (SNAP) benefit levels; and an increase of $13.6 billion for other titles (CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*).

The Senate Committee on Agriculture, Nutrition, and Forestry did not mark up S. 5335, and CBO has not released a score for it.

Jim Monke, Specialist in Agricultural Policy

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Farm Bill Primer: Programs Without a Budget Baseline

From a budgetary perspective, many farm bill programs that receive mandatory funding are assumed to continue beyond the end of their authorization. That is, they have a continuing *baseline* beyond the end of a farm bill that gives them built-in future funding if Congress decides that the programs are to continue. Baseline can be reallocated or used as an offset for deficit reduction. Mandatory spending programs do not need annual discretionary appropriations.

Authorizing or reauthorizing mandatory funding for *farm bill programs without baseline* results in a positive score (cost) and would need to be offset by reductions elsewhere for the bill to remain budget neutral.

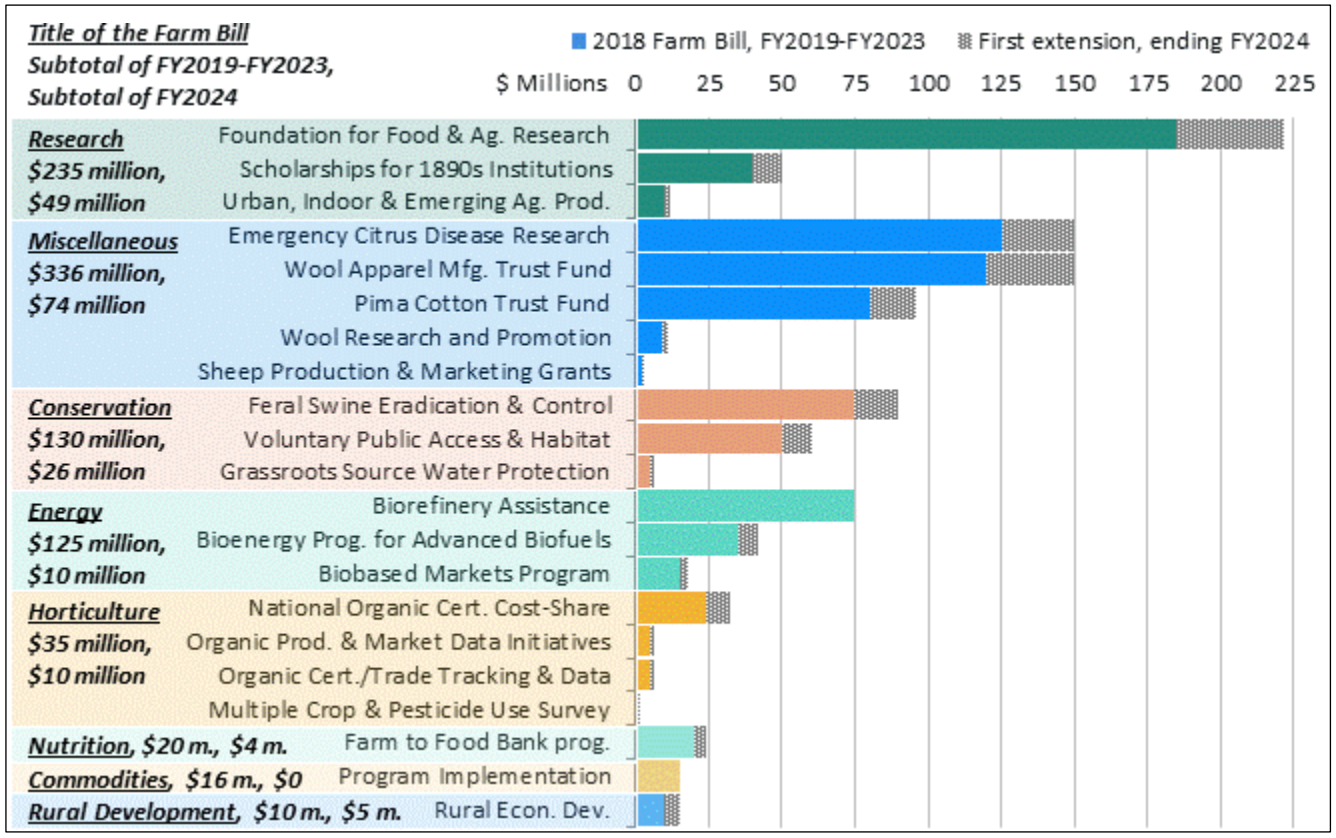
The first one-year farm bill extension of the farm bill during FY2024 (P.L. 118-22, Division B, §102) provided $177 million of mandatory funding to 19 of the 21 programs in the 2018 farm bill without a budget baseline (Agriculture Improvement Act of 2018, P.L. 115-334; **Figure 1**). The second one-year extension for FY2025 (P.L. 118-158) did not provide additional funding for these programs.

Why Some Programs Have Baseline, Others Not

Under budget rules, a program with mandatory spending authority in the last year of its authorization generally may be assumed to continue as if it did not expire and have baseline (2 U.S.C. §907(b)(2)), as explained by the Congressional Budget Office (CBO) in the annual *Budget and Economic Outlook*. This is the case for long-standing farm bill programs. Some of the newer, smaller farm bill programs do not continue in the baseline because the authorizing and budget committees did not provide them a baseline to continue.

CBO projects future government spending in its official budget baselines but has not published a list of expiring farm bill programs without a continuing baseline. To compile this list, CRS analyzed the CBO score of the 2018 farm bill, current CBO baseline projections, the statutory text of the farm bill, and the text of the extension acts, looking for programs that received mandatory funding but do not have baseline for reauthorization (**Figure 1**).

Figure 1. 2018 Farm Bill Programs Without a Budget Baseline, by Title



Source: CRS analysis of P.L. 115-334, P.L. 118-22, P.L. 118-158, and CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*, Table 3.
Notes: Includes 2018 farm bill programs that received mandatory funding but had no baseline beyond FY2023. The first farm bill extension, P.L.

118-22, Division B, §102, provided one year of funding for most programs. The second extension, P.L. 118-158, Division D, §4101(e), did not.

Types of Programs Affected

In the 2018 farm bill, 21 programs across 8 of the 12 titles do not have a baseline, per CRS analysis. They received $906 million of mandatory spending authority at enactment of the 2018 farm bill (colored bars in **Figure 1**). This was less than 0.3% of $428 billion total mandatory spending projected for all farm bill programs over FY2019-FY2023.

While the subset is small over the entire farm bill, the impact varies by title of the bill. For example, the single program in the rural development title receiving mandatory funding is affected. No programs in the trade, credit, forestry, or crop insurance titles are affected. For the research title, 34% of mandatory funding for the title is affected. By comparison, less than 0.1% of funding in the farm commodities and nutrition titles are affected.

Some provisions exist within programs with a baseline but nonetheless result in a cost to reauthorize. The Transition Incentive Program within the Conservation Reserve Program, which was excluded from the farm bill extension, is an example. These are not included in this analysis.

First Extension Provided Funding with an Offset

The farm bill extension for FY2024 (P.L. 118-22, Division B, §102) provided one year of mandatory funding to 19 of the 21 programs without baseline ($177 million; the gray hatched bars in **Figure 1**). Included programs generally received one-fifth of their five-year allocation that was in the 2018 farm bill. These programs remain without baseline beyond the extension and expired with FY2024.

Two of the programs that did not receive additional funding in the extension are Program Implementation funding in the commodity title (a one-time supplement in 2019) and the Biorefinery Assistance program in the energy title. The extension fully offset the mandatory funding provided to the 19 programs by rescinding unobligated balances in the Biorefinery Assistance account ($177 million) remaining from the 2014 and 2018 farm bills. Even after rescission, the Biorefinery Assistance program—a loan guarantee program that has operated at low cost during the low interest rate environment of the last decade—may retain sufficient funding to operate during FY2024.

Second Extension Provides No Such Funding

The second one-year farm bill extension for FY2025 (P.L. 118-158, Division D) did not provide additional funding for any of the programs without baseline (§4101(e)).

Comparison with Past Farm Bills

Farm bill programs without a budget baseline have been an issue since the 2008 farm bill. As Congress considers the next farm bill, fewer programs without a budget baseline exist than during previous farm bill debates (**Table 1**).

During past reauthorizations, some affected programs received mandatory funding during the farm bill but not permanent baseline. In other cases, programs received permanent baseline during reauthorization by consolidating them into a larger umbrella program to exceed a $50 million scoring threshold, which required extra funding in the 10-year score.

- Of the 37 programs with no baseline after the 2008 farm bill expired, the 2014 farm bill provided 29 of the programs with $6.2 billion over FY2014-FY2018.

- Of the 39 programs with no baseline after the 2014 farm bill expired, the 2018 farm bill provided 23 of the programs with $1.6 billion over FY2019-FY2023; nine of which received permanent baseline, costing an additional $1.5 billion over FY2024-FY2028.

Table 1. Time Series of Farm Bill Programs Without Baseline That Received Mandatory Funding

Farm Bill	Programs	Expiration	$ million[a]
2008 farm bill	37	FY2012	$9,131[b]
2013 extension	0	—	$0
2014 farm bill	39	FY2018	$2,824
2018 farm bill	21	FY2023	$906
2024 extension	19	FY2024	$177
2025 extension	0	—	$0

Sources: CRS In Focus IF10780, *Farm Bill Primer: Programs Without Baseline Beyond FY2018*, and CRS Report R41433, *Programs Without a Budget Baseline at the End of the 2008 Farm Bill.*

a. Amounts are for five years for a farm bill or one year for an extension.

b. At enactment in 2008, the five-year estimated cost of affected programs was $9.131 billion. In 2012, the estimated cost to reauthorize the programs was as high as $14 billion.

The situation facing these programs in FY2025 is similar to a previous one-year extension of the farm bill in 2013 (P.L. 112-240, Title VII). None of the programs without baseline received additional mandatory funding. Although the extension in January 2013 added new "authorizations of appropriations" for many programs without baseline, those authorizations went unfunded in the eventual FY2013 appropriations act in March 2013.

For the next farm bill reauthorization, a smaller number of programs have no baseline and comprise a smaller dollar amount than in previous reauthorizations. This may make it easier for Congress to balance some of the budget considerations in the next farm bill than when it wrote the 2014 and 2018 farm bills.

CRS Products

CRS In Focus IF12047, *Farm Bill Primer: Background and Status*

CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*

CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*

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IF12115

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The Commodity Credit Corporation (CCC)

Updated May 15, 2025

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CRS REPORT
Prepared for Members and
Committees of Congress

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The Commodity Credit Corporation (CCC)

SUMMARY

R44606

May 15, 2025

Megan Stubbs
Specialist in Agricultural Conservation and Natural Resources Policy

The Commodity Credit Corporation (CCC) has served as a mandatory funding mechanism for agricultural programs since 1933. The CCC Charter Act enables the CCC to broadly support the U.S. agriculture industry for authorized purposes and programs including commodity and income support, natural resources conservation, export promotion, international food aid, disaster assistance, agricultural research, and bioenergy development.

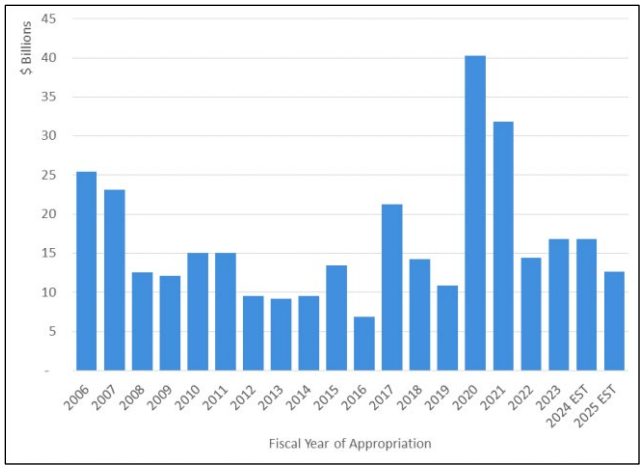
While CCC is authorized to carry out a number of activities, it has no staff of its own. Rather, U.S. Department of Agriculture (USDA) employees and facilities carry out all of its activities. CCC is overseen by the Secretary of Agriculture and a board of directors, which are also USDA officials. CCC has capital stock; buys, owns, sells, and donates agricultural commodities; and provides loans and payments to farmers and ranchers. It has a permanent indefinite borrowing authority of $30 billion from the U.S. Treasury. By law, it receives an annual appropriation equal to the amount of the previous year's net realized loss (see inset figure). This replenishes its borrowing authority from the Treasury and allows it to cover authorized expenditures that will not be recovered. Variations in its annual appropriation each year do not indicate any action by Congress to change program support but rather reflect changes in farm program payments and other discretionary uses of CCC's authority that fluctuate based on economic circumstances and weather conditions.

The majority of CCC activities are authorized through omnibus farm bills—most recently the Agriculture Improvement Act of 2018 (2018 farm bill, P.L. 115-334) and related extensions (P.L. 118-158, Division D; and P.L. 118-22, Division B, §102). Farm bill authorization directs programs to use CCC's borrowing authority, thereby dispensing with the need for an annual appropriation for individual programs. The use of this mandatory spending authority has expanded over time.

The CCC Charter Act also grants the Secretary of Agriculture broad powers and discretion to use the CCC, sometimes referred to as Section 5 authority, to fund activities that support agriculture. The mandatory funding nature of CCC activities may make CCC an attractive funding mechanism but one that is subject to budget enforcement rules if used by Congress. USDA's use of CCC is not subject to the same congressional budget procedures; therefore, certain USDA actions may increase federal spending without needing to be offset under congressional budget enforcement rules.

This discretionary use has been restricted by Congress in the past, which can reduce the Secretary's options to use CCC. Since FY2018, no restriction has been placed on USDA's use of CCC, and both the Trump and Biden Administrations have used CCC for various purposes to support U.S. agriculture. Congress may consider future restrictions as a cost saving measure for budget reconciliation, to offset other spending (e.g., through farm bill reauthorization), or for deficit reduction. Restrictions on CCC's discretionary use authority could impact USDA's ability to respond to adverse economic conditions facing U.S. agriculture, such as trade disruptions or commodity purchases. Congressional support for discretionary use of CCC typically varies depending on amount and purpose. CCC funding and activities authorized by USDA are at the discretion of the Secretary of Agriculture and may change or be suspended by the Secretary of Agriculture at any time (e.g., the current Administration may change or suspend actions taken by a previous Administration).

CCC Net Realized Loss, FY2006-FY2025 (est.)



Sources: Compiled by CRS from USDA, Farm Service Agency (FSA), *Commodity Estimates Book*, FY2008-FY2017 President's Budgets (Output 3); USDA, FSA, *Data Master*, FY2008 through FY2017 President's Budgets; and USDA, FY2016 through FY2025 *Explanatory Notes-Commodity Credit Corporation*, "Account 1: Net Realized Losses." FY2024 and FY2025 estimates are from the FY2025 Explanatory Notes.

Notes: Total funding for CCC is constrained by the $30 billion borrowing limit that does not adjust for inflation. The totals presented are nominal budget authority in billions of dollars not adjusted for inflation. The net realized loss estimated for FY2020 and FY2021 is above the $30 billion borrowing limit due, in part, to a midyear appropriation in FY2020 that reimbursed a portion of the loss before the end of the fiscal year. Actual losses occur in the fiscal year prior to the year of appropriation.

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The Commodity Credit Corporation (CCC) has served as the financial institution for carrying out federal farm commodity price support and production programs since 1933. It is a wholly government-owned entity that exists solely to finance authorized programs that support U.S. agriculture. It is subject to the supervision and direction of the Secretary of Agriculture at the U.S. Department of Agriculture (USDA). The CCC mission was conceived mainly as one of commodity support, but over time it has expanded to include an increasingly broad array of programs, including export and commodity programs, resource conservation, disaster assistance, agricultural research, and bioenergy development.

While CCC operates according to a large number of statutory authorities, its broad powers allow it to carry out many operations to meet the objectives of supporting U.S. agriculture. This broad mandate, and its significant borrowing authority, has traditionally drawn little attention. For most of its history, CCC's responsibilities have been expanded through legislative directives such as the farm bill. From FY2012 through FY2017, Congress took actions to limit the use of CCC funds by USDA through restrictions in appropriations language. Beginning in FY2018, Congress lifted these restrictions, allowing for USDA to use CCC's broad powers and discretionary authority for various payments and purchases related to supporting U.S. agriculture.[1] The expanded use of CCC since FY2018 has generated questions about what the CCC is, how it operates, what its current uses are, and what it may be used for in the future. This report provides a brief review of CCC's unique history, funding structure, general operation, and recent issues associated with its use and possible future restrictions.[2]

Origin of the Commodity Credit Corporation

For over a decade prior to the creation of CCC in 1933, the farm economy struggled with low levels of income from depressed commodity prices and increasing costs for supplies and services. The first major federal effort to boost commodity prices was through the Federal Farm Board, established by the Agricultural Marketing Act of 1929.[3] An inadequate and ultimately failed effort to eliminate commodity surpluses was attempted by making loans to cooperative associations for the purpose of carrying out surplus purchase operations. Without the ability to control production, it was impossible to eliminate surplus stocks. This led to proposals to regulate the harvested acreage of farm commodities and the quantities sold. The concept of acreage and marketing controls was incorporated in to the Agricultural Adjustment Act of 1933 (AAA).[4]

The AAA sought to reduce production by paying producers to participate in acreage control programs. Funding came from a tax on companies that processed farm products. Additional provisions of the law dealt with fair marketing practices and voluntary agreements between producers and handlers of commodities to regulate marketing. CCC was created as the financial institution to carry out and fund the activities of the AAA. Executive Order 6340 of October 17, 1933, directed the incorporation of CCC in the state of Delaware.[5]

[1] These payments are discussed in the "Discretionary Use" section.

[2] Other CRS reports cover in detail programs and activities authorized through the Commodity Credit Corporation (CCC). For additional information regarding programs and activities authorized through CCC, see CRS farm bill and farm support reports at http://www.crs.gov/iap/agriculture-and-food.

[3] P.L. 71-10; 46 Stat. 11.

[4] P.L. 73-10; 48 Stat. 31.

[5] Executive Order 6340, "Creating the Commodity Credit Corporation," *Public Papers of the Presidents of the United States: Franklin D. Roosevelt* (Washington: GPO, October 16, 1933).

The Delaware charter authorized CCC, among other things, to buy and sell farm commodities; lend; undertake activities for the purpose of increasing production, stabilizing prices, and ensuring adequate supplies; and facilitate the efficient distribution of agricultural commodities. It was originally capitalized in 1933 with $3 million appropriated by Congress. In 1936, sufficient stock was acquired to raise the capitalization to $100 million. Its capital stock remains at this level.[6] In 1939, Executive Order 8219 ordered that all rights of the United States arising out of the ownership of CCC be transferred to the Secretary of Agriculture.[7]

At that time, low prices became so critical for cotton and corn producers that waiting for another season for supply controls to impact the market was judged to be untenable. With the establishment of CCC, it became possible to make *price-support loans*, now commonly referred to as nonrecourse loans, allowing farmers to obtain cash using crops as collateral. These loans provided farmers funds to hold their products off the market until prices improved. The first loans were made to cotton farmers for more than the market price. Since loans were higher than the market price and the loans were nonrecourse, they could be satisfied by forfeiting the cotton pledged as collateral against the loan, thereby serving as a form of price support and effectively establishing a floor price for the domestic market.[8] Funding for these first loan operations came from a tax on commodity processing and from CCC's $3 million capital account, which was appropriated under authority of the National Industrial Recovery Act and the Fourth Deficiency Act.[9]

Constitutional difficulties with some provisions of the AAA, and practical shortcomings with other elements of the law, led to additional legislation in the 1930s that continues to provide permanent authority for many USDA activities. Subsequent omnibus "farm bills" set most of the policy goals and program constraints for farm price and income support operations that are funded through CCC.

CCC Charter Act

The Government Corporation Control Act of 1945[10] (GCCA) required all wholly owned government corporations to be reincorporated as agencies or instrumentalities of the United States. Accordingly, Congress passed the Commodity Credit Corporation Charter Act of 1948 (Charter Act).[11] All CCC rights, duties, assets, and liabilities were assumed by the federal corporation, and the Delaware corporation was dissolved.

[6] The Reconstruction Finance Corporation originally acquired the $100 million capitalization stock. The Reconstruction Finance Corporation was a New Deal–era government corporation that provided financial support and loans, including the recapitalization of banks.

[7] Executive Order 8219, 4 *Federal Register* 3565, August 10, 1939. Executive Order 7848, 3 *Federal Register* 632, March 22, 1938, had previously designated the Secretary of the Treasury as the holder of CCC's capital stock.

[8] David Godfrey, "The Commodity Credit Corporation," Texas Tech University, 1974, http://hdl.handle.net/10601/1696.

[9] 48 Stat. 195, and 48 Stat. 274, respectively.

[10] The Government Corporation Control Act of 1945 (GCCA, 31 U.S.C. §§9101-9110) standardized budget, auditing, debt management, and depository practices for government corporations. The GCCA is not a general incorporation act such as those in effect in the states. The charter for each federal government corporation is the separate enabling legislation passed by Congress. The GCCA also does not offer a general definition of what constitutes a government corporation. It simply enumerates the organizations covered by the act. For additional information, see General Accounting Office, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD 96-14, December 1995, https://www.gao.gov/products/GGD-96-14.

[11] P.L. 80-806; 62 Stat. 1070; 15 U.S.C. §714.

Government Corporations in General

Government corporations have existed for over a century. The exact number of government corporations depends on how they are defined (ranging from around a dozen to over 40). While no single definition exists, they are generally defined as agencies of the federal government established by Congress to perform a public purpose. Commonly, they provide a market-oriented product or service and are intended to produce revenue that meets or approximates its expenditures. Generally, government corporations must submit annual management reports to Congress and are assigned to committees of subject matter jurisdiction. Many have a board of directors and are overseen by political appointees or executive branch officials. Commonly, government corporations are perceived as discrete entities with individual administrative requirements defined in law.[12]

According to the Charter Act, the purpose of CCC is to stabilize, support, and protect farm income and prices; assist in maintaining balanced and adequate supplies of agricultural commodities; and facilitate the orderly distribution of commodities. A list of some of CCC's authorities (paraphrased from Section 5 of the Charter Act, 15 U.S.C. §714c) conveys a sense of its broadly stated powers:

- Support agricultural commodity prices through loans, purchases, payments, and other operations.[13]
- Make available materials and facilities in connection with the production and marketing of agricultural products.
- Procure commodities for sale to other government agencies; foreign governments; and domestic, foreign, or international relief or rehabilitation agencies and for domestic requirements.
- Remove and dispose of surplus agricultural commodities.
- Increase the domestic consumption of commodities by expanding markets or developing new and additional markets, marketing facilities, and uses for commodities.
- Export, or cause to be exported, or aid in the development of foreign markets for commodities.
- Carry out authorized conservation or environmental programs.
- Carry out other operations specifically authorized by Congress.

Congressionally Authorized Activities

The majority of CCC operations are governed by statutory authorities that direct USDA on how to administer CCC activities and in what amounts to fund them. Over time, Congress has added new activities to CCC's original mission, including conservation, specialty crop support, and bioenergy development (see text box below). Most of these activities are authorized in periodic omnibus farm bills.[14] In carrying out these operations, CCC is directed, to the maximum extent practicable, to use the usual and customary channels, facilities, and arrangements of trade and commerce.[15]

[12] Government Accountability Office (GAO), *Federally Created Entities: An Overview of Key Attributes*, GAO-10-97, October 2009, pp. 13-16, https://www.gao.gov/products/GAO-10-97.

[13] Amendments to the Commodity Credit Corporation Charter Act in 2004 preclude tobacco from being considered within the definition of "agricultural commodities" (P.L. 108-357).

[14] CRS In Focus IF12047, *Farm Bill Primer: Background and Status*.

[15] 15 U.S.C. §714c.

Examples of CCC Activities and Programs

CCC is authorized to fund a broad array of programs supporting U.S. agriculture. These programs are typically authorized through omnibus farm bills, most recently the 2018 farm bill (CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*). A general description of the assistance that has been congressionally authorized and examples of associated programs are listed below. This is not an exhaustive list.

Commodity and Income Support provides farm payments and loans when crop prices or revenues decline for major commodity crops—including wheat, corn, soybeans, peanuts, and rice—as well as other support mechanisms for dairy, cotton, and sugar (e.g., Agriculture Risk Coverage, Price Loss Coverage, and Dairy Margin Coverage).

Conservation provides financial and technical assistance for voluntary participation in resource conservation programs to protect soil, water, wildlife, and other natural resources on private lands (e.g., Environmental Quality Incentives Program, Conservation Reserve Program, and Agricultural Conservation Easement Program).

Disaster provides payments for livestock and crop production losses resulting from weather events and disease outbreaks (e.g., Livestock Forage Disaster Program, Noninsured Crop Disaster Assistance Program, and Tree Assistance Program).

Export and Foreign Food Assistance promotes U.S. agricultural products abroad, develops export markets, and supports international food assistance programs (e.g., Agricultural Trade Promotion Program and Food for Progress Program).

Bioenergy provides assistance for the research, development, and adoption of renewable energy—primarily biofuels (e.g., Biorefinery Assistance Program and Rural Energy for America Program).

Specialty Crops supports research, market promotion (including organic certification), and pest and disease prevention for fruits, vegetables, tree nuts, floriculture, and other ornamental products (e.g., Specialty Crop Block Grant Program and Specialty Crop Research Initiative).

Discretionary Use (Section 5 Authority)

The CCC authorities provided to the Secretary of Agriculture under Section 5 of the CCC Charter Act allows the Secretary a level of discretion to carry out many broad operations in support of U.S. agriculture. This discretion (sometimes referred to as Section 5 authority) has been used during CCC's history for various purposes, including purchases of food for distribution, responses to adverse economic conditions, and to fund USDA priorities (see **Table 1**). The scope and scale of this use traditionally has been targeted to specific events, crops, or domestic needs.

Table 1. Examples of USDA's Discretionary Use of CCC

FY2015-FY2024

Fiscal Year	Program Name	Total Authorized Funding Level
2015	Biofuels Infrastructure Partnership Program	$100 million
2016, 2018	Cotton Ginning Cost Share	$542 million
2018-2019	Food Purchase and Distribution Program	$2,600 million
2018-2019	Market Facilitation Program	$28,000 million
2020	Higher Blends Infrastructure Incentive Program	$100 million
2020	Seafood Assistance Program	$530 million
2020	Coronavirus Food Assistance Program (CFAP)	$6,500 million
2021	Drought Recovery & Water Smart Practices	$500 million
2021-2024	School Food/Child Nutrition Support	$4,000 million
2022	Partnerships of Climate-Smart Commodities	$3,500 million
2023	Food Aid to Address Global Hunger	$1,060 million

Fiscal Year	Program Name	Total Authorized Funding Level
2023-2024	Regional Agricultural Trade Promotion Program	$1,680 million

Source: Compiled by CRS from USDA press releases, *Federal Register* notices, and budget documents.

Notes: The nominal authorized level of funding, as announced by USDA, is included. Actual expenditures may vary from authorized levels. Reallocations from unused announced funding are not included. This table is not comprehensive, and no comprehensive list of USDA's discretionary use of CCC is publicly available.

Congress can alter USDA's use of CCC authority through direct amendments to the CCC Charter Act or through limitation, such as in appropriations, on how CCC funds may be used. The latter occurred from FY2012 to FY2017, when Congress limited USDA's discretion to use CCC's authority to remove surplus commodities and support prices. The limitation was included in annual appropriation acts (see text box below).

Restrictions on CCC Use: FY2012-FY2017

Each annual appropriation between FY2012 and FY2017 temporarily prohibited the use of select discretionary authority under CCC. This restriction was specific to any surplus removal activities or price support activities under Section 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. §714c).[16] This restriction did not affect USDA's ability to administer authorized programs under the 2014 farm bill (P.L. 113-79).[17]

This recurring provision was a reaction to administrative activities following 2009 crop losses, in which the Obama Administration announced that it would implement a disaster program under "Section 32" authority.[18] In 2010, USDA spent $348 million distributed across three categories: (1) select crop producers (upland cotton, rice, soybeans, and sweet potatoes),[19] (2) poultry producers, and (3) aquaculture producers. USDA used CCC authority to make purchases that usually would have otherwise been made with Section 32 funds for domestic feeding programs.[20]

Critics of the 2009 disaster assistance, in Congress and elsewhere, objected to USDA using its authority to make such payments without a legislative mandate. Concerns at that time about the limits on CCC's mandate were related to assistance—or lack thereof—for cottonseed payments, dairy assistance, and biofuel infrastructure.

The FY2018 Consolidated Appropriations Act (P.L. 115-141) did not include these restrictions, thereby allowing the Secretary of Agriculture full use of the CCC Charter Act's discretionary authority. The Secretary of Agriculture used this authority in 2018 and 2019, when it was announced that USDA would be taking several actions to assist farmers in response to economic trade damage from retaliatory tariffs that targeted various U.S. products.[21] USDA used its discretion under the CCC Charter Act to authorize up to $28 billion in total assistance—referred to as the "trade aid" package—for certain agricultural commodities.[22] Secretaries of Agriculture

[16] For example, see Section 715 of the Consolidated Appropriations Act of 2016 (P.L. 114-113) or Section 715 of the Consolidated Appropriations Act of 2017 (P.L. 115-31).

[17] Appropriations acts also limited clause 3 of Section 32, which provides that funds may be used to reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption (7 U.S.C. §612c).

[18] U.S. Department of Agriculture's (USDA) Section 32 program is funded by a permanent appropriation of 30% of the previous year's customs receipts, less certain mandatory transfers. Section 32 funds are used for a variety of activities, including child nutrition programs, the purchase of commodities for domestic food programs, and farm disaster relief. For more information, see CRS Report R48141, *Trends in USDA Procurement of U.S. Food and Agricultural Products*.

[19] On October 22, 2010, USDA announced it would begin making payments to producers in eligible counties under the Crop Assistance Program using payment rates established for each crop. A fact sheet is available at http://www.fsa.usda.gov/Internet/FSA_File/cap10pfs.pdf.

[20] USDA, *Background on 2009 Disaster Assistance*, http://www.agri-pulse.com/uploaded/Disaster_Backgrounder.pdf.

[21] For more information, see CRS Insight IN10880, *China's Retaliatory Tariffs on Selected U.S. Agricultural Products*.

[22] For more information, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*; and CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*.

have continued to use their administrative discretion to authorize funding and food purchases in response to economic disruptions and administrative priorities (see **Table 1**).

Management of CCC

The Charter Act makes CCC an agency and instrumentality of the United States within USDA, subject to the supervision and direction of the Secretary of Agriculture. A board of directors appointed by the President, consisting of the Secretary and seven other USDA officials, is responsible for the management of CCC.[23] CCC officers and advisors—also USDA officials—are charged with maintaining liaisons with other governmental and private trade operations on the CCC's behalf.

The CCC has no personnel of its own. Rather, USDA employees and facilities carry out all of its activities. Administrative functions generally fall to the USDA agencies directed to administer the various CCC programs. The majority of its functions are administered by the Farm Service Agency (FSA).[24] Other agencies also administer CCC programs, including the Natural Resources Conservation Service, the Agricultural Marketing Service, the Foreign Agricultural Service, and the Food and Nutrition Service. CCC reimburses other agencies for their administrative costs.

CCC cannot acquire property or interest in property unless it is related to providing storage for program implementation or protecting CCC's financial interests.[25] CCC is allowed to rent or lease space necessary to conduct business (e.g., warehousing of commodities).

Financing CCC

CCC is responsible for the direct spending and credit guarantees used to finance the federal government's agricultural commodity price support and related activities that are undertaken by authority of agricultural legislation (such as farm bills) or the Charter Act itself. It is, in brief, a broadly empowered financial institution. The money that CCC needs comes from its own funds (including its $100 million capital stock, appropriations from Congress, and its earnings from sales and fees) and from borrowings. In accordance with government accounting statutes and regulations, CCC is required to submit an annual business-type budget statement to Congress. This is typically released annually with the President's budget request.[26]

The Office of Management and Budget (OMB) also plays a role in how CCC funds are administered through an apportionment process, which allows OMB to set a limit on the funds available for obligation and subsequent outlay.[27] OMB apportions funds for select CCC programs and operating expenditures.[28] OMB is precluded, however, from apportioning funds "for price

[23] 15 U.S.C. §714g.

[24] The bylaws of CCC name the administrator of the Farm Service Agency (FSA) as executive vice president of CCC, which "shall have general supervision and direction of the day-to-day conduct of the business of the Corporation and its officers." USDA, CCC, *Bylaws of the Corporation*, May 3, 2022, https://www.usda.gov/sites/default/files/documents/usda-ccc-bylaws.pdf.

[25] 15 U.S.C. §714b(h).

[26] CCC budget estimates can be found annually at USDA, Office of Budget and Program Analysis, https://www.usda.gov/about-usda/general-information/staff-offices/office-budget-and-program-analysis.

[27] General Accounting Office, *Commodity Credit Corporation: Information on the Availability, Use, and Management of Funds*, GAO/RCED-98-114, April 1998, http://www.gao.gov/assets/230/225533.pdf.

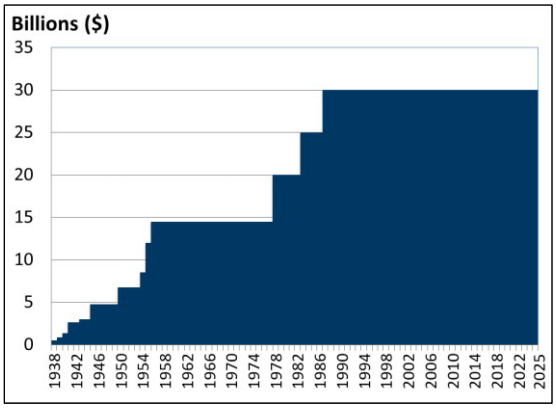
[28] In accordance with the Antideficiency Act, as amended (31 U.S.C. §1512), among other statutory requirements.

support and surplus removal of agricultural commodities" and therefore may not limit funds for this purpose unless it relates to administrative expenses.[29]

Borrowing Authority and Related Appropriations

CCC borrows from the U.S. Treasury to finance its programs. CCC has permanent indefinite authority to borrow from the Treasury (and also private lending institutions) within limits set by Congress in statute. As the amount of money used to carry out its activities has grown over time, the borrowing limit has steadily increased (**Figure 1**). CCC's borrowing authority has been capped at $30 billion since 1987.[30]

Figure 1. CCC's Borrowing Authority
1938-2025



Source: CRS from USDA, *Reports of Financial Conditions and Operations of the CCC*, various years.

Notes: The graph illustrates the year in which legislation authorized an increase in the nominal borrowing authority. Prior to 1938, CCC had no specific borrowing authority. In 1954, Congress passed two increases, one to $8.5 billion and a second to $10 billion.

Most CCC-funded programs are classified as mandatory spending programs and therefore do not require annual appropriations in order to operate. Mandatory spending, however, is subject to budget enforcement procedures such as cut-as-you-go (CUTGO) and pay-as-you-go (PAYGO) rules.[31]

CCC activity is often described using two similar but different measures. The first is *net expenditures*, which is a combination of outlays and receipts. The second is *net realized losses*, which are expenditures that will never be recovered.

Net Expenditures

CCC recoups some money from authorized activities (e.g., sale of commodity stocks, loan repayments, and fees), though not nearly as much money as it spends, resulting in net expenditures. Net expenditures include all cash outlays minus all cash receipts, commonly referred to as "cash flow." CCC outlays or expenditures represent the total cash outlays of the CCC-funded programs (e.g., loans made, conservation program payments, commodity purchases, and disaster payments). Outlays are offset by receipts (e.g., loan repayment, sale of commodities, and fees). In practice a portion of these net expenditures may be recovered in future years (e.g., through loan repayments).

Net Realized Losses

CCC also has net realized losses, also referred to as nonrecoverable losses. These refer to the outlays that CCC will never recover, such as commodities sold or donated, uncollectible loans,

[29] 31 U.S.C. §1511(b)(1)(A).

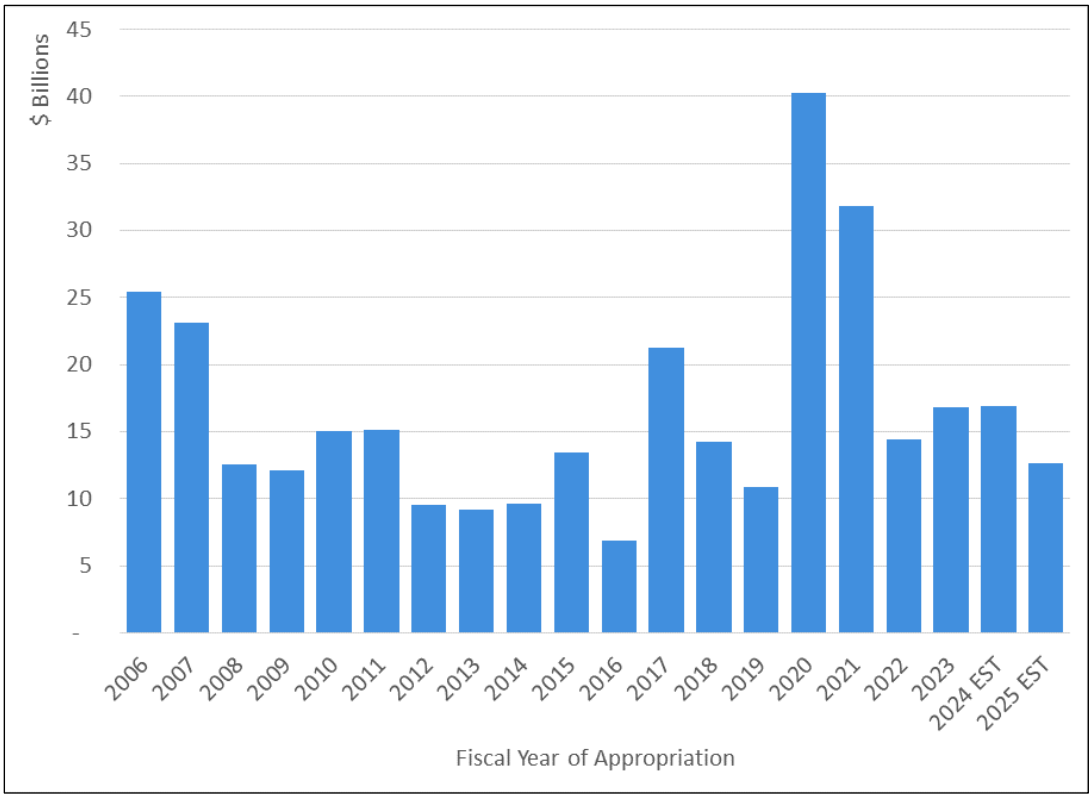
[30] 15 U.S.C. §714b(i).

[31] In general, pay-as-you-go (PAYGO) rules require legislation that is projected to increase mandatory spending or reduce revenues to also include offsetting provisions over a specified period. For more information on the House and Senate PAYGO rules, see CRS Report R41510, *House Rule XXI, Clause 10: The CUTGO Rule* and CRS Report RL31943, *Budget Enforcement Procedures: The Senate Pay-As-You-Go (PAYGO) Rule*, respectively. For information on how budget enforcement affects the farm bill, see CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*.

storage and transportation costs, interest paid to the Treasury, program payments, and operating expenses. The net realized loss is the amount that CCC, by law, is authorized to receive through appropriations to replenish its borrowing authority (see **Figure 2**).[32]

Figure 2. CCC Realized Losses

FY2006-FY2025



Sources: Compiled by CRS from USDA, Farm Service Agency (FSA), *Commodity Estimates Book,* FY2008-FY2017 President's Budgets (Output 3); USDA, FSA, *Data Master*, FY2008 through FY2017 President's Budgets; and USDA, FY2016 through FY2025 *Explanatory Notes-Commodity Credit Corporation*, "Account 1: Net Realized Losses." FY2024 and FY2025 estimates are from the FY2025 Explanatory Notes.

Notes: Total funding for CCC is constrained by the $30 billion borrowing limit that does not adjust for inflation. The totals presented are nominal budget authority in billions of dollars not adjusted for inflation. The net realized loss estimated for FY2020 and FY2021 is above the $30 billion borrowing limit due, in part, to a midyear appropriation in 2020 that reimbursed a portion of the loss before the end of the fiscal year.

Appropriations to Reimburse Net Realized Loss

The annual appropriation for CCC varies each year based on the net realized loss of the previous year.[33] For example, the FY2021 appropriation (P.L. 116-260) covered the net realized loss for the previous year of $31.8 billion. This reduced by more than half the next year, to cover a net realized loss of $14.4 billion. The decline does not indicate any action by Congress to change

[32] 15 U.S.C. §713a-11.

[33] According to a General Accounting Office report, CCC changed the manner in which it calculates its request for an appropriation to cover its net realized losses in 1998 in response to recommendations from USDA's Office of Inspector General. Prior to 1998, the annual appropriation request included estimates for prior and future losses. This resulted in an over-appropriation of about $5 billion in FY1996 due to overestimates of CCC's prior and future losses. General Accounting Office, *CCC: Information*, GAO/RCED-98-114.

program support; it reflects changes in farm program payments and other uses of CCC's authority that fluctuated based on economic circumstances and weather conditions. Also, CCC's assets, which include loans and commodity inventories, are not considered to be "losses" until CCC ultimately disposes of the asset (e.g., by sales, exports, or donations). Once CCC has disposed of these assets, its total losses are realized and are added to other program expenses less any other program income.

Reimbursement Timing

Congress has annually appropriated CCC funding to cover its net realized losses incurred in the previous fiscal year. The total amount appropriated is based on the required financial statement and audit of the CCC following the completion of a fiscal year.[34] The financial statement and audit typically are not completed until several months following the end of the fiscal year, thereby resulting in a gap between the end of the fiscal year and the receipt of the annual appropriated reimbursement.

Many farm program payments are required to be made annually in October (e.g., Agricultural Risk Coverage, Price Loss Coverage, Conservation Stewardship Program, and the Conservation Reserve Program).[35] In most years, CCC has enough room within the borrowing authority limit to make these payments before receiving its annual appropriated reimbursement. In years of high expenditures, CCC could reach its borrowing authority limit before receiving its appropriation.[36] If CCC reaches its borrowing limit, all functions and operations of CCC would be suspended until the borrowing authority is restored through the reimbursement that is pursuant to an appropriation.

The timing of this appropriation may be altered if Congress were to authorize reimbursement before the conclusion of the annual financial statement or at a time other than the conclusion of the fiscal year. Both of these timing adjustments have occurred in recent years.

Anomaly

In the absence of an enacted Agriculture appropriation at the beginning of a fiscal year, Congress may pass a continuing resolution (CR) to continue operations and prevent a government shutdown. In general, a CR continues the funding rates and conditions that were in the previous year's appropriation. In some cases, exceptions (or "anomalies") are also included in CRs to provide changes and exceptions to the general funding rate or to address special circumstances. In FY2017 and FY2019-FY2021, CCC expenditures for the previous fiscal year were high enough that Congress included an anomaly in CRs allowing CCC to receive its annual reimbursement before completion of the required financial statement and audit. The anomaly did not change the amount reimbursed or the financial reporting requirement, only the timing of when CCC could receive reimbursement. Under a CR without the anomaly, CCC could still receive its annual reimbursement following the completion of the required financial statement and audit. Congress

[34] 15 U.S.C. §713a-11. Audits are in accordance with 31 U.S.C. §9105.

[35] For example, the farm bill directs that for certain farm commodity programs, such as the Price Loss Coverage program "the payments shall be made beginning October 1, or as soon as practicable thereafter, after the end of the applicable marketing year for the covered commodity" (7 U.S.C. §9016(e)).

[36] The Congressional Budget Office (CBO) baseline projection for CCC estimates these first quarter of the fiscal year outlays in its estimate of the availability of funds for discretionary use. CBO, *Baseline Projection for USDA Farm Programs*, "Appendix B. Assumptions for Estimating CCC Section 5 Use Under the $30 Billion Borrowing Limit," January 2025, https://www.cbo.gov/data/baseline-projections-selected-programs#23.

may also include an anomaly in a regular appropriation that could shift the timing of when CCC could receive reimbursement.

Supplemental Appropriation

CCC operates as a line of credit, borrowing funds from the U.S. Treasury as needed to carry out its activities. The net realized loss is provided through appropriations and reimbursed to the Treasury, effectively lowering the CCC's outstanding debit. Typically, the reimbursement occurs annually through the annual appropriations process; however, Congress can choose to authorize a reimbursement of CCC's net realized losses before the end of the fiscal year, thereby reducing CCC's debit and allowing additional expenditures in a given fiscal year. This occurred in FY2020, when the CARES Act (P.L. 116-136, §11002) allowed for up to $14 billion of CCC's net realized losses to be reimbursed as of the June 2020 financial report. This supplemental appropriation did not permanently raise the CCC's borrowing authority limit but rather paid off a portion of its debit earlier than usual, allowing it to incur more expenses within FY2020 and FY2021. This is why the net realized loss for FY2020 and FY2021 in **Figure 2** is above the $30 billion borrowing authority threshold. Supplemental appropriations to reimburse the CCC are uncommon; most of which having occurred in the 1980s.[37]

Non-Borrowing Authority Appropriations

Some CCC operations are financed through appropriated funds and are unrelated to the permanent indefinite borrowing authority described above. These activities have included specific statutory authorities for separate reimbursements—for example, export credit guarantee programs, foreign donations, concessional sales under the Food for Peace Program (P.L. 83-480, also known as P.L. 480), and disaster aid.

Historically, CCC had what was referred to as a "parent/child" account relationship with U.S. Agency for International Development (USAID). CCC allocated funds (as the parent) to USAID (as the child) to fund P.L. 480 Title II and Bill Emerson Humanitarian Trust transportation costs and other administrative costs in connection with foreign commodity donations. CCC then reported USAID's budgetary and proprietary activities in its financial statements.[38] On January 20, 2025, President Trump began taking actions affecting U.S. foreign assistance and USAID. As of this writing, USAID's role in providing foreign assistance and the use of CCC for these purposes is evolving.[39]

Congress may also appropriate funding to programs or activities authorized to receive CCC funds but not drawn from the borrowing authority. For example, the act commonly referred to as the Inflation Reduction Act of 2022 (IRA, P.L. 117-169) authorized additional funding for conservation, rural development, and forestry programs that are authorized to receive CCC funds. Funding provided by the IRA is in addition to funding received through CCC.[40]

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[37] In the 1980s, CCC received nine supplemental appropriations to cover losses that exceeded the borrowing authority limit at the time. Congress increased the borrowing authority limit three times in the same period (1982, 1983, and 1987; see **Figure 1**).

[38] USDA, Office of Inspector General, *Commodity Credit Corporation's Financial Statements for Fiscal Years 2024 and 2023*, Audit Report 06403-0007-11, November 2024, https://usdaoig.oversight.gov/reports/audit/commodity-credit-corporations-financial-statements-fiscal-years-2024-and-2023.

[39] For additional information, see CRS In Focus IF10261, *U.S. Agency for International Development: An Overview*.

[40] For example, P.L. 117-169, §21001, directs "using the facilities and authorities of the Commodity Credit Corporation" (but not the funds), as compared to other provisions of farm bills that state to "use the funds, facilities, and authorities of the Commodity Credit Corporation" (e.g., 16 U.S.C. §3841).

Considerations for Congress

The mandatory funding nature of CCC activities may make it an attractive funding mechanism for both Congress and the Secretary of Agriculture. Any expansion of activities or programs authorizing mandatory funding by Congress is subject to budget enforcement rules and may require a spending/revenue offset or a waiver of congressional budgetary rules. USDA's discretionary use of CCC is not subject to the same congressional budget offset requirements; therefore, certain USDA actions can increase federal spending without budget enforcement procedures requiring offsets. Both the Trump and Biden Administrations used CCC for various purposes to support U.S. agriculture.[41] These administrative actions were undertaken using CCC's discretionary authority; therefore, no budget offset was required under congressional budget procedures. CCC's indefinite funding authority means that expenditures for USDA's CCC uses were automatically reimbursed as a net realized loss. Without offsets, this increases total federal spending.

Congress has restricted the use of CCC in the past and may consider future restrictions as a cost saving measure for budget reconciliation, to offset other spending (e.g., through farm bill reauthorization), or for deficit reduction. Such a restriction was proposed in the 118th Congress as part of the House ordered to be reported farm bill.[42] The bill proposed restricting USDA's discretionary use of CCC between FY2025 through FY2034, which was estimated to save $5.4 billion over the 10-year scoring period.[43] The savings would have partially offset additional spending on other farm support measures.[44] Restrictions on CCC's discretionary use authority, however, could impact USDA's ability to respond to adverse economic conditions facing U.S. agriculture, such as trade disruptions, or to make commodity purchases.

Congressional support for discretionary use of CCC typically varies depending on the amount used and for what purpose.

During the first Trump Administration, the total amount authorized by USDA through CCC for the trade aid package was more than previous individual discretionary uses of CCC.[45] This increase in spending brought CCC close to its borrowing authority limit of $30 billion; congressional action altered the timing of CCC's appropriation and of a supplemental appropriation that restored CCC's borrowing authority.[46] While these congressional actions by the 116th Congress could be viewed as congressional support for the trade aid package, some in

[41] For example, during the first Trump Administration, USDA used CCC to mitigate commodity price declines from retaliatory tariffs on a variety of U.S. agricultural products. See USDA, "[Archived] Market Facilitation Program," https://www.farmers.gov/archived/protection-recovery/mfp. An example during the Biden Administration was CCC's use to issue payments for agricultural producers to implement "climate-smart" production practices. See USDA, "[Archived] Partnerships for Climate-Smart Commodities Project Summaries," https://web.archive.org/web/20250110181709/https://www.usda.gov/climate-solutions/climate-smart-commodities.

[42] H.R. 8467; §1608.

[43] CBO, "Estimate of H.R. 8467 Relative to CBO's June 2024 Baseline Projections," November 8, 2024, https://www.cbo.gov/publication/60972.

[44] For more information, see "Budgetary Impact" in CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*.

[45] For additional information on MFP, see CRS In Focus IF11289, *Farm Policy: Comparison of 2018 and 2019 Market Facilitation Programs*; and CRS In Focus IF11245, *FY2019 Supplemental Appropriations for Agriculture*.

[46] See "Reimbursement Timing" section; §119 of the FY2020 continuing appropriations act (P.L. 116-59); §118 of the FY2021 continuing appropriations act (P.L. 116-159); and §11002 of the CARES Act (P.L. 116-136).

Congress still questioned the amount and distribution of expenditures, yet wanted to avoid the consequence of reaching the borrowing limit and the effects on other CCC programs.[47]

During the Biden Administration, CCC funds were used to create market opportunities for U.S. agricultural and forest products produced using climate-smart production practices. Although the development of markets is an included use of CCC Section 5 authority, the approach of the initiative to incentivize commodities produced using climate-smart practices caused some in Congress to question its validity.[48] The Government Accountability Office determined that USDA's use of CCC's Section 5 authority for the initiative was an authorized use.[49] Legislation has been introduced that would expand CCC's authorized uses, and other legislation proposes to restrict it.[50]

CCC funding and activities authorized by a Secretary of Agriculture, including current and past Secretaries, are at the discretion of the current Secretary of Agriculture. Previously announced uses may change or be suspended by an Administration at the Secretary of Agriculture's discretion.[51] Congress may continue or amend these activities through legislation; funding to do so may be subject to congressional budgetary constraints. Despite the temporary nature of the activities authorized by the Secretary through CCC, funds are available until expended once transferred from CCC to a USDA agency for implementation. If funding authorized for a purpose during a previous Administration is not carried out by the subsequent Administration, USDA is not to return the funds to CCC but rather may use the funds for other programs or purposes authorized under CCC Section 5 authority or return the funds to the Treasury.[52]

Conclusion

CCC is a government-owned and broadly empowered financial institution supporting U.S. agriculture. Its activities are derived from authorities granted by Congress. It is one of several mandatory funding mechanisms used in omnibus farm bills but is not the largest when measured by funds obligated.[53] The nature of its borrowing authority and use of funding can raise questions

[47] For example, see Letter from Sen. Debbie Stabenow et al. to Sonny Perdue, Secretary of Agriculture, November 12, 2019, https://www.agriculture.senate.gov/mfp-letter; and Letter from Sen. John Hoeven et al. to Nancy Pelosi, Speaker of the U.S. House of Representatives, September 17, 2019, https://republicans-agriculture.house.gov/UploadedFiles/CCC_Letter.pdf.

[48] See Letter from Rep. Dan Newhouse et al. to Tom Vilsack, Secretary of the U.S. Department of Agriculture, October 28, 2022, https://westerncaucus.house.gov/uploadedfiles/10.28.22_ccc_climate_smart_commodities_letter_signed.pdf; and Letter from Sen. Chuck Grassley and Rep. Chip Roy to Chuck Schumer, Majority Leader of the U.S. Senate and Mike Johnson, Speaker of the House of Representatives, December 7, 2023, https://www.grassley.senate.gov/imo/media/doc/grassley_roy_to_congressional_leaders_-_farm_bill.pdf.

[49] GAO, *Decision: U.S. Department of Agriculture—Use of Commodity Credit Corporation Funds for Various Programs*, B-334146.1, September 20, 2023.

[50] For example, in the 118th Congress, H.R. 6690 and S. 2876 would have expanded CCC's authorized uses, and H.R. 8467 and S. 2244 would have restricted CCC use.

[51] For example, the Local Food Purchase Assistance Cooperative Agreement Program (LFPA) was authorized during the Biden Administration and cancelled during the Trump Administration. According to media reports, a USDA spokesperson was quoted as saying, "These programs [LFPA], created under the former Administration via Executive authority, no longer effectuate the goals of the agency." Marcia Brown, "USDA Cancels $1B in local food purchasing for schools, food banks," *Politico*, March 10, 2025.

[52] GAO, *Decision: USDA—Use of CCC*, B-334146.1.

[53] For more on total funding for agricultural activities, see CRS Report R48431, *Agriculture and Related Agencies: FY2025 Appropriations*.

about how CCC's functional operations support some of USDA's core farm program activities and whether they should or could be expanded or reduced.

The authorities that Congress has granted to CCC allow it to carry out many operations that are consistent with the objective of supporting U.S. agriculture. These same broad powers and the CCC's borrowing authority have also made CCC an object of attention, and of controversy at times, among the legislative and executive branches, stakeholders, and some interest groups.

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WOTUS & Water Quality in the West in a Post-Sackett World

Theresa A Dunham
Kahn, Soares & Conway, LLC

Sackett v. EPA 598 U.S. 651 (2023)

General Background

- Latest Supreme Court decision in the long-running debate as to when is a wetland also a water of the United States (WOTUS), or alternative, what is the geographic extent of Clean Water Act (CWA) jurisdiction.
- Ninth Circuit held that property owners' lot contained wetlands covered under the Clean Water Act based on the "significant nexus" test.
- A significant nexus exists if the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.
- Supreme Court granted certiorari to address the long-standing issue of, *What is the proper test for determining whether wetlands are waters of the U.S.?*

Summary of Prior History of Cases Decided by U.S. Supreme Court

Case	Key Rule Established
U.S. v. Riverside Bayview Homes 474 U.S. 121 (1985)	Applied the migratory bird rule.
SWANCC v. Army Corps 531 U.S. 159 (2001)	Rejected the migratory bird rule.
Rapanos v. U.S. 547 U.S. 715 (2006) (plurality opinion)	4 Justices: Coverage does not extend beyond two categories of waters – (1) relatively permanent bodies of water connected to traditional navigable waters; and, (2) wetlands with close proximity to traditional waters and that are "as a practical matter indistinguishable from waters of the United States." 4 Justices: Deferred to Government's determination. 1 Justice (Kennedy) concurring in judgment established the "significant nexus" test between the wetland in question and a navigable water.

Revolving Door of Regulations in Response

2015 Obama Rule – Incorporating Significant Nexus Test
2019 Obama Rule Repealed

2020 Trump Rule – Limiting geographic extent
2023 Biden Rule – Repealed Trump rule, returns to Significant Nexus Test
2025 Joint Memo Guidance re: "Continuous Surface Connection"
2025 Trump request for comments, listening sessions, new revision of regulations

The Sackett Decision

The Justices Line Up… Nine votes in judgment but not in opinion			
Majority Opinion	Concurring Opinion	Concurring in Judgment	Concurring in Judgment
Alito (author) CJ Roberts Thomas Gorsuch Barrett	Thomas (author) Gorsuch	Kagan (author) Sotomayor Jackson	Kavanaugh (author) Sotomayor Kagan Jackson

Key Factors Considered by the Majority

- Significant nexus test uncertain, difficult to apply, complicated manual
- Requires expert consultants to make determinations and advocate for project proponents Army Corps determinations
- Lack of ability to obtain Corps determination
- Process costly, inefficient and vague
- Significant civil and criminal penalties if you are wrong

Majority Opinion Holding

- *"We hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"*
- Two part test to determine if a wetland is a water of the United States
  - (1) Adjacent body of water is a relatively permanent body of water connected to traditional interstate navigable water
  - (2) Wetland has a continuous surface connection with the water, making it difficult to determine where the 'water' ends and the 'wetland' begins

Implications for the West

- Decision limits geographic scope of the CWA jurisdiction
- Excludes seasonal vernal pools that would not be considered adjacent wetlands connected to a water of the United States
- Opponents of *Sackett* claim that nearly 60 million acres of wetlands and streams are no longer subject to the CWA

Examples of Post-*Sackett* Litigation

- *White v. U.S. Environmental Protection Agency* 737 F.Supp.3d 310, Decided June 17, 2024
  - Portions of plaintiff's property are in a low-lying region along a creek and a river is prone to flooding
  - Plaintiff attempted improvements to minimize flooding risks and facilitate productive uses, including agriculture and mineral extraction.
  - EPA claimed plaintiff's flood control work took place in wetlands adjacent to federally regulated waters
  - Plaintiff challenged the EPA's amended August 2023 rule, claiming that the "adjacent wetlands" provisions do not conform with *Sackett*'s interpretation of the CWA
  - Plaintiff alleges the Amended Rule unlawfully omits *Sackett's* "indistinguishability" requirement for wetlands to be subject to federal regulatory authority
  - Plaintiff filed a complaint in March of 2024 and request for preliminary injunction in April
  - Motion for Preliminary Injunction Denied, failure to show likely to succeed on the merits
- *U.S. v. Valentine* 751 F.Supp.3d 617, Decided September 27, 2024
  - Defendants, in the logging business, upgraded and extended forest roads on their land
  - In 2018, Army Corps issued a cease-and-desist order alleging illegal filling of federally regulated wetlands
  - Defendants argued that *Sackett* made clear that wetlands may only be regulated if they are "indistinguishable" from "waters of the United States"
  - Court denied Defendants' motion for partial judgment because the Army Corps has jurisdiction due to continuous surface connection with water of the U.S.

Another Case to Watch that Impacts the West

PCFFA v. Karl Strock, et al. 657 F.Supp.3d 1341 (2023) – On appeal to the Ninth Circuit Court of Appeal

Key Issue in the Case

Extent of the exemption from National Pollutant Discharge Elimination System Permits for agricultural return flows

The Case

- PCFFA et al. allege that defendants (Conant, et al., San Luis & Delta-Mendota Water Authority, and intervenor defendant Grassland Water District) are discharging pollutants from the San Luis Drain without an NPDES permit
- Under § 1342(l)(1) ("The Agricultural Return Flows Exception"), "[t]he Administrator shall not require a permit . . . for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit." 33 U.S.C. § 1342(l)(1)
- PCFFA argues that discharges from the San Luis Drain are not entirely from agricultural return flow and are unrelated to crop production thus all discharges from the drain need an NPDES permit
- Additional sources of pollutants identified by PCFFA include
    i. Groundwater originating from beneath "non-irrigated" land adjacent to the Drain which seeps into the Drain through cracks and weep holes
    ii. Sediment that has settled out over time in the Drain from the waters it carries, and which is purportedly discharged into Mud Slough "when it is scoured and reworked by flows in the Drain"
    iii. Water transported into tile drains underneath the retired agricultural land occupied by a solar project.
    iv. Flows of polluted water in the Drainage Area that allegedly stem from "highways, residences and other non-irrigated lands".
- Defendants counter that the four sources are either:
    i. Independently exempt under the Act as nonpoint sources
    ii. Related to crop production
    iii. Unproven in their existence,
    iv. Or a combination of all three.
- District Court Holding: There was no genuine dispute of material fact regarding whether plaintiffs' alleged sources of pollutants constitute nonpoint sources or whether they stem from "activities related to crop production," and thus, these alleged sources of pollutants do not prevent application of the Agricultural Return Flows Exception.

Amicus Brief Filed By Western Agricultural and Water Interests

- Irrigated agriculture in the west depends on drainage systems and necessary infrastructure to support crop production
- Congress' purpose for the Exemption was to put irrigated agriculture on equal footing with non-irrigated agriculture under the CWA
- Exemption allows agriculture in the west to grow without onerous impediments under the CWA
- California independently regulates nonpoint source discharges from irrigated agriculture
- Requiring NPDES permits for discharges from agricultural drains equates to treating return flows as point source discharges, which would defeat the purpose of the exemption
- If incidental seepage, precipitation, and other nonpoint sources of pollution were found to negate the Exemption, this would lead to absurd results or may even destroy the exemption altogether

Status of the Case

- Case fully briefed before the Ninth Circuit Court of Appeal
- Hearing held October 2024

Dealing with Government Agencies: Ethical Considerations

Lawson Fite, Shareholder, Schwabe, Williamson, & Wyatt, P.C.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4. Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.11. Special Conflicts of Interest for Former & Current Government Officers & Employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13. Organization as Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a

matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14. Client with Diminished Capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.18. Duties to Prospective Client.

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness to Opposing Party & Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality & Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.9. Advocate in Nonadjudicative Proceedings.

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

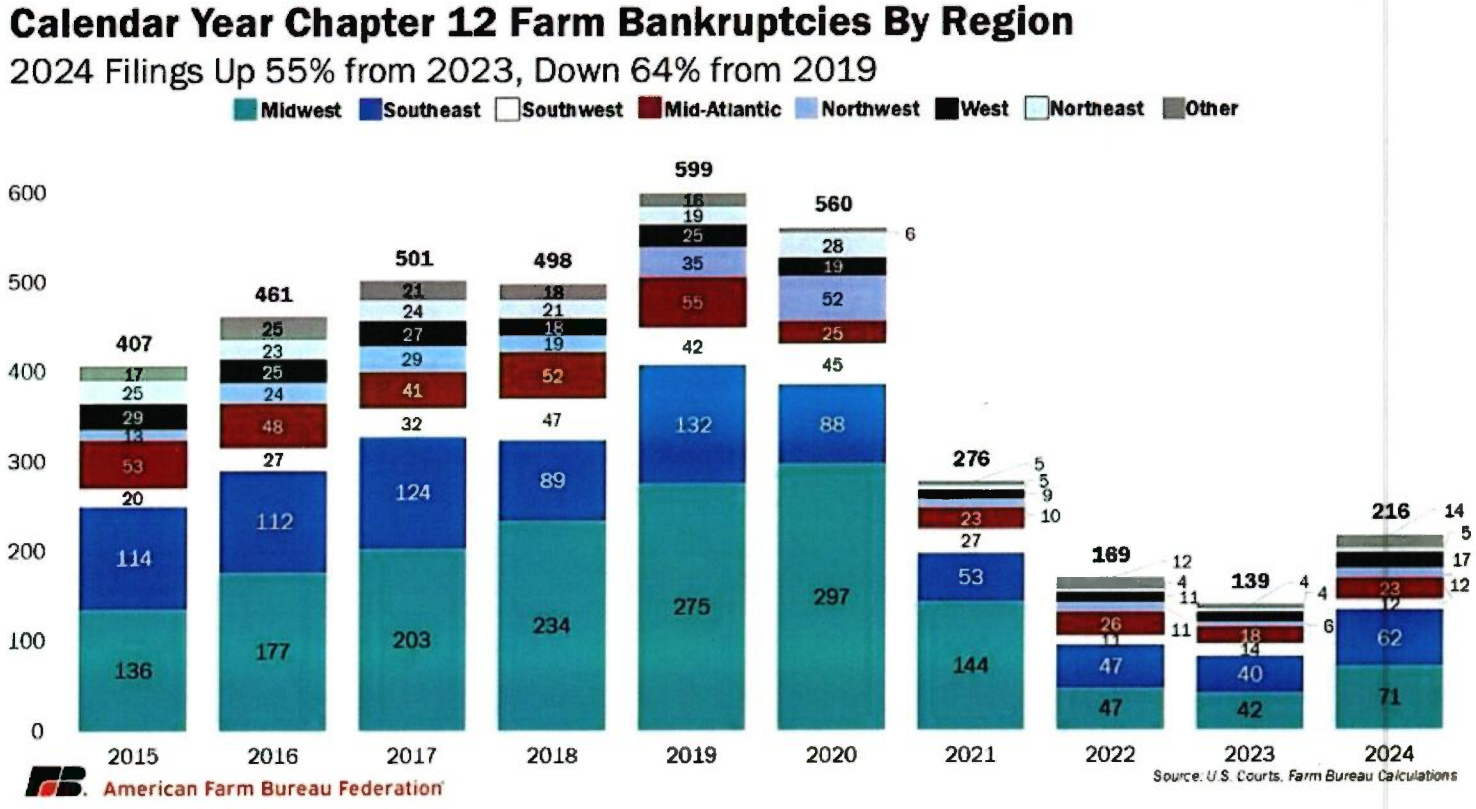
2024 Farm Bankruptcies Highlight Worsening Farm Credit

Samantha Ayoub
Associate Economist

An indicator of farm financial health across the country, Chapter 12 bankruptcy provides farmers and ranchers with increased flexibility for paying off debt, and is used when all other options have been exhausted. AFBF Market Intel reports have long followed annual filings of Chapter 12 farm bankruptcies, through good and bad years for the farm economy.

Unfortunately, as we look ahead to another year of declining farm receipts, particularly in crop markets, we can look back to 2024 and see the impacts of that drop in income in the increase in the number of farms filing for bankruptcy.

The U.S. Courts reports that 216 farm bankruptcies were filed in 2024, up 55% from 2023. This is still 64% lower than the all-time high of 599 filings in 2019. However, 2024 is the end of a four-year downward trend in bankruptcies, which appears to mark a turning point in long-term farm financial health.



Farm Bankruptcies by Region

All but one region had increases in Chapter 12 bankruptcy filings last year. Bankruptcy filings in territories and states outside the contiguous 48 states – designated "Other" by the U.S. Courts – more than tripled in 2024, hitting a five-year high of 14 bankruptcies. However, this is still lower than any year between 2007 and 2019.

Chapter 12 bankruptcies filed in the Northwest doubled from 2023 to 2024. With 12 filings, they tied the Southwest for the region with the second fewest filings. The Southwest was the only region with a decrease in filings (down 14% from 2023) after being the only region to increase in Chapter 12 filings in 2023. After experiencing significant droughts and weather-related losses in the Southwest in 2023, all states except Utah had lower weather losses in 2024.

All other regions – Southeast, West, Northeast, Mid-Atlantic and Midwest – had double-digit increases in filings from 2023 to 2024. The number of filings in each of these regions varies drastically. The Northeast had a 25% increase to five Chapter 12 filings in 2024, one more than in 2023. The Midwest had a 69% increase in 2024 to 71 filings. The Southeast followed closely behind with 62 filings, a 55% increase.

As Row Crop Revenue Declines, Farm Bankruptcies Rise in Certain Regions

Row crop markets have experienced sharp decreases in cash receipts for three years, with expected further declines of over 4% and 6% in corn and soybean receipts, respectively, in 2025. Cotton had a nearly 24% decrease in cash receipts in 2024 but is the only major row crop forecast to post an increase in cash receipts in 2025. Chapter 12 bankruptcies lag declines in farm income as farms must exhaust their ability to pay back debt before filing. It is likely that the downward trend in net farm market returns, combined with even longer-term declines in government payments in 2024 due to an outdated farm bill, drove more farmers in the Grain Belt and South to their last resort of farm bankruptcy in 2024.

2024 Chapter 12 Farm Bankruptcies By Region

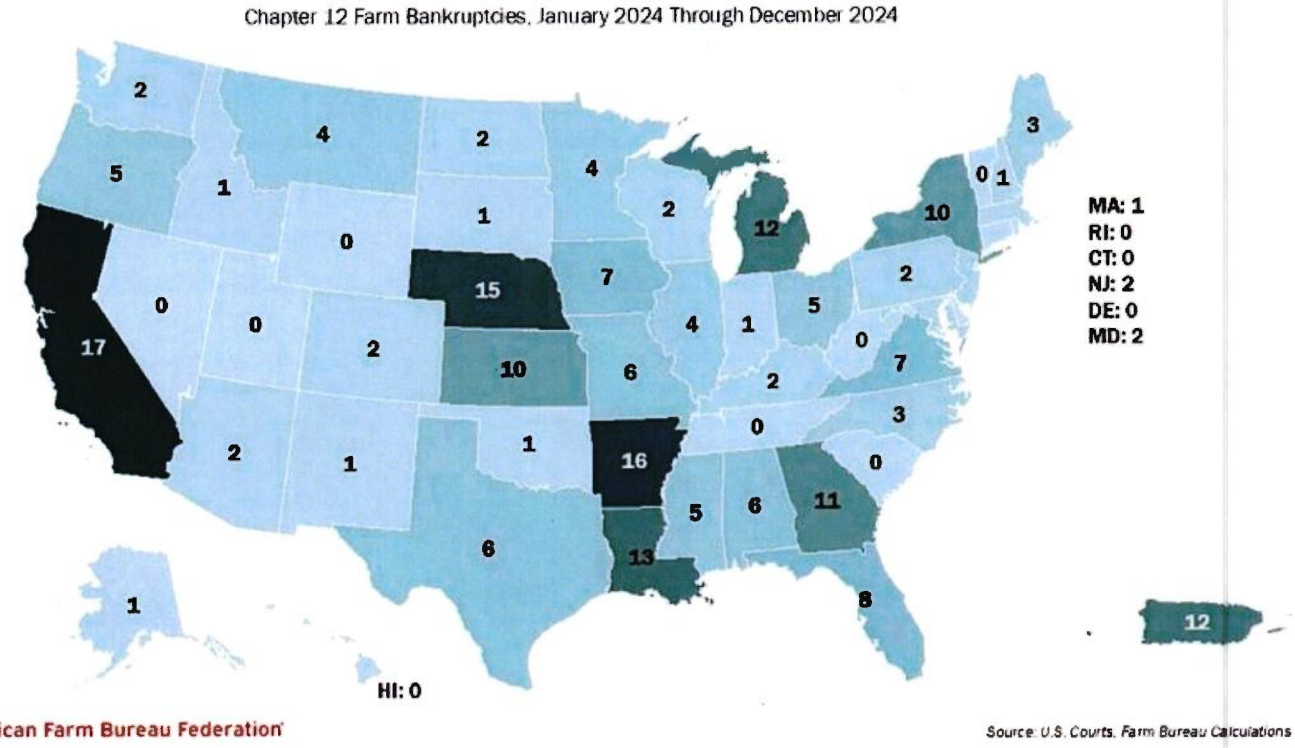
Region	Filings	Year-over-Year Change*
Mid-Atlantic Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia & West Virginia	23	+28%
Midwest Iowa, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota & Wisconsin	71	+69%
Northeast Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island & Vermont	5	+25%
Northwest Idaho, Montana, Oregon, Washington & Wyoming	12	+100%
Other Alaska, Guam, Hawaii, Puerto Rico, the District of Columbia & the Virgin Islands	14	+250%
Southeast Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina & Tennessee	62	+55%
Southwest Arizona, Colorado, New Mexico, Oklahoma, Texas & Utah	12	-14%
West California & Nevada	17	+55%

*12-Month Period Ending in Dec 2024 Relative to 12-Month Period Ending in Dec 2023
Source: U.S. Courts; Farm Bureau Calculations

Chapter 12 Bankruptcies by State

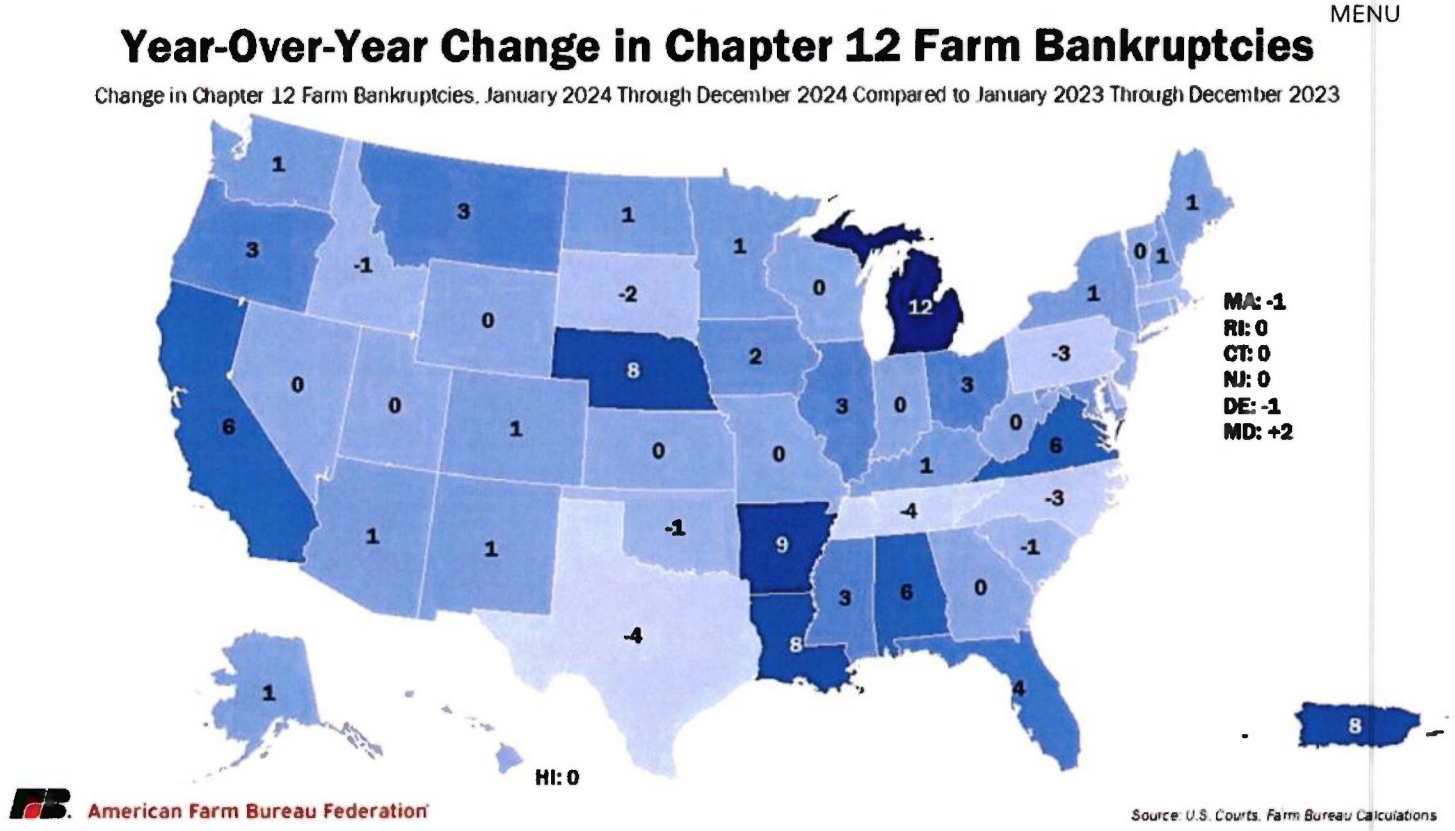
On a state level, the total number of bankruptcies widely varies. Thirteen states/territories had no bankruptcies, while California had the most at 17.

Chapter 12 Farm Bankruptcies in 2024



The states and territories that had no filings in 2024 differ from 2023. In 2024, 14 states and territories had zero filings. Seven states went from having no filings in 2023 to at least one in 2024. Washington, D.C., had its first farm bankruptcy filing in the 21st century, and the first instance in the same time frame that Tennessee has not had a filing.

Only 10 states had a decrease in filings in 2024. Pennsylvania and North Carolina tied for the largest decrease in filings, three less than 2023, for both to have three filings in 2024.



Twenty-eight states and territories had an increase in filings in 2024, nine more than last year. Michigan had the largest increase in filings with 12 cases, up from zero in 2023. Eight other states and territories had double-digit filings in 2024: California (17), Nebraska (15), Kansas (10), Arkansas (16), Louisiana (13), Puerto Rico (12), Georgia (11) and New York (10).

A Struggling Farm Economy

Net farm income in 2024 reached a four-year low, decreasing nearly 24% in just two years. Lowered revenues and above-average production costs continue to squeeze farmers and ranchers on both sides of the balance sheet, threatening farm liquidity – their ability to pay off their financial obligations. As such, farm operating loans continue to surge to cover expenses.

According to the Kansas City Federal Reserve, non-real estate farm loans at commercial banks rose 25% from the end of 2023 to 2024. At the same time, interest rates on agricultural loans remain at decade-high levels. Interest expenses rose nearly 4% in 2024 to over $29.5 billion, closely following a 4% increase in farm debt in 2024. Farm debt is expected to continue to increase in 2025 to nearly $562 billion. As farms continue to carry larger debt loads without increasing net cash revenue, they also experience worsening credit. Loans across farm country, including real estate, production and agribusiness loans, increased in "less than acceptable" loan ratings, signifying a larger share of loans at risk of

nonpayment. Loans facing serious risk of default in the Seventh District of the Federal Reserve, which covers much of the Midwest, rose to the highest level since 2020. Fortunately, farm delinquency rates remained under 1% in 2024.

Bankruptcy filing may not always be a solution for farms facing financial hardship. While *ad hoc* assistance is expected to buoy net farm income through 2025, long-term trends continue to dampen farm financials, particularly credit conditions. Nearly 2% of farmers will be unable to qualify in 2025 for the loans they received in 2024, according to the Federal Reserve Bank of Chicago. In previous years, farmers and ranchers supported their credit with continuously increasing farmland values, but those increases have slowed. The Federal Reserve Bank of Chicago's estimates show farmland values in their district declining 1% in 2024 due to lower crop values. As farms lose options to support continued borrowing and use up their limited working capital, many farms may close before reaching the point of bankruptcy.

Conclusion

Increasing Chapter 12 bankruptcy filings provide a glimpse into the long-term conditions in farm country. Farmers and ranchers filing for bankruptcy have exhausted all other resources for covering their debt and expenses, and as the farm economy continues to be squeezed by decreased receipts and increased expenses, farm financials will be strained.

As we enter the start of another planting season, many farmers are surely making tough decisions on how to finance their operations. With all these factors in mind, they are also still waiting on the *ad hoc* economic and disaster aid from the American Relief Act of 2025 to be dispersed to sustain their short-term operations. Long-term, these worsening credit conditions highlight the calls for updated support for farmers as we enter the third year of farm bill negotiations.

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29 SEP

Bankruptcy on the Farm: A Look at the Chapter 12 Option

(https://nationalaglawcenter.org/bankruptcy-on-the-farm-a-look-at-the-chapter-12-option/)

Categorized **Bankruptcy (https://nationalaglawcenter.org/category/bankruptcy/)**, **Micah Brown (https://nationalaglawcenter.org/category/author/micah-brown/)**, **Taxation (https://nationalaglawcenter.org/category/taxation-2/)**

Financial conditions during the past few years have been harsh for agricultural producers. Low commodity prices and extreme weather conditions have decreased income for many farmers, making it more difficult for farmers to repay their loan debt. For this reason, **there has been a recent surge in farm bankruptcies (https://www.reuters.com/article/us-usa-farms-bankruptcy/u-s-farm-bankruptcies-hit-an-eight-year-high-court-data-idUSKBN1ZT2YE)**. Deciding whether to file for bankruptcy is not an easy decision to make, but there are **alternatives to bankruptcy (https://nationalaglawcenter.org/wp-content/uploads/assets/articles/bankruptcy/Assessing-bankruptcy-option.pdf)**. However, these alternatives are not always available. Filing for bankruptcy may be the only opportunity for a farmer who is greatly in debt to recover. Because of the current market slump and ongoing pandemic, understanding which type of bankruptcy proceeding for an agricultural producer is ever more important.

Bankruptcy Background

Bankruptcy is governed by federal law. Title 11 of the United States Code contains the Bankruptcy Code which provides the provisions for case administration, creditor claims, debtor's estate, and bankruptcy relief. The chapters of the Code containing debtor-relief provisions are specifically designed for particular types of debtors or different outcomes for debtors.

In general, bankruptcy provides an opportunity for an individual or business to either liquidate assets or reorganize debts. Chapter 7 of the Code provides the process for liquidation bankruptcy. Under liquidation bankruptcy, also referred to as "straight bankruptcy," a debtor will turn over all assets to a bankruptcy trustee who distributes cash from the disposition of the assets to creditors, and obtains a discharge from the debts for the debtor. If a debtor prefers rehabilitation or reorganization of their debts, they will file for bankruptcy under Chapters 11, 12, or 13, depending on what type of debtor they are. For this type of bankruptcy, a debtor will retain their assets and develop a plan to repay creditors.

Both types of proceedings seek to provide a debtor with a fresh start, but the outcomes largely differ. Therefore, a farmer-debtor committed to filing for bankruptcy must determine what their goals are for during and after the bankruptcy process. For a more in-depth discussion on the background of bankruptcy and the types of proceedings, visit the Center's **Bankruptcy Overview (https://nationalaglawcenter.org/overview/bankruptcy/)**.

Chapter 12 Background

Bankruptcy law provides a unique type of proceeding directly tailored to agricultural producers. In 1986, Congress responded to the financial crisis challenging farmers throughout the 1980s by enacting a temporary section of the Bankruptcy Code specifically applicable to farmers known as Chapter 12. Since then, many changes have been made to Chapter 12. A significant change to the chapter came in 2005 when Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act. This piece of legislation made Chapter 12 a permanent part of the Code, and also extended eligibility to fishermen. Recently, the enactment of the Family Farmer Relief Act of 2019 increased the Chapter 12 operating debt cap from $4,153,150 to $10 million, meaning farmers with debts not exceeding $10 million are eligible to file for Chapter 12 bankruptcy.

In creating Chapter 12, Congress sought to provide a framework that would enable a farmer to successfully reorganize their finances so they could repay all or part of their debts while also keeping the farm operation in business. Chapter 12 may be a desirable course, but the farmer or farm business must meet the eligibility requirements. In general, Chapter 12 is available to a "family farmer" with "regular annual income." 11 U.S.C. § 101(19). A "family farmer" includes not just an individual debtor, but also an individual and their spouse, corporations, cooperatives, and partnerships. The Code sets forth specific eligibility requirements for the different types of petitioners.

To qualify for Chapter 12 bankruptcy, individual petitioners must satisfy a four-part eligibility test: (1) they are engaged in a **farming operation (https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=11-USC-1049145805-71778017&term_occur=999&term_src=title:11:chapter:1:section:101)**; (2) their debts do not exceed $10 million; (3) no less than fifty percent of their debts arise from farming; (4) and more than fifty percent of their income comes from farming for the taxable year preceding filing or in each of the second and third taxable years preceding filing. 11 U.S.C § 101(18)(A).

Corporations, cooperatives, and partnerships are also subject to an eligibility test, but six requirements must be met: (1) at least fifty percent of stock or equity is held by one family and its relatives; (2) those family members conduct the farming operation; (3) have at least eighty percent of the family's assets relate to the farming operation; (4) the family's debts do not exceed $10 million; (5) more than fifty percent of the family's debts arise from the farming operation; (6) and if the debtor is a corporation issuing stocks, the stocks cannot be publicly traded. 11 U.S.C. § 101(18)(B).

Advantages of Chapter 12

A debtor who meets the Chapter 12 eligibility requirements is not immediately required to file under that chapter. Most likely a debtor that is eligible to file under Chapter 12 will also be eligible to file under Chapters 7, 11, and 13. Depending on the debtor's situation, one of those chapters may better serve their bankruptcy goals. However, unlike other bankruptcy chapters, Chapter 12 was created to protect farmer interests.

One situation in which a family farmer may prefer a Chapter 12 proceeding over another type of bankruptcy is when the goal is to continue the farming operation. Although chapters 11 and 13 allow the debtor to continue their business operations, Chapter 7 does not. A Chapter 7 filing will cause an immediate stop to all farming activity and each of the farmer's assets will be liquidated. This type of bankruptcy is the quickest and least expensive, and for a farmer interested in discontinuing their farming operation, Chapter 7 will satisfy that objective. However, for a debtor intending to continue the farming operation, Chapter 12 is the more appropriate type of bankruptcy.

When it comes to repaying creditors, Chapter 12 may better serve a farmer's goals because it provides a farmer with far more flexibility and control over reorganization of their debts than other types of bankruptcy. When a debtor files for reorganization bankruptcy, they are required to propose a plan for how their creditors will be repaid. A Chapter 12 filing grants a farmer the ability to consider past production expenses, income, and future plans to make their repayment plan is practical. Debtors in Chapter 13 are individuals "whose income is sufficiently stable and regular," and the payment plans usually require monthly payments. 11 U.S.C. § 101(30). Because of the nature of the farming industry, many farmers would have difficulty making regular monthly payments to creditors. Thus, Chapter 12 will likely be more useful because it allows farmers to propose a repayment plan with seasonal payments that coincides with harvesting and marketing of the farmer's commodities, unlike the other chapters of bankruptcy.

Another reason a farmer may prefer to initiate a Chapter 12 proceeding over another type of bankruptcy is to sell assets. Debtors in bankruptcy often seek to sell assets for the purpose of funding their business operations. However, the Bankruptcy Code requires Chapter 11 and 13 debtors to meet strict standards in order to properly sell assets. The Code requires these debtors sell property "free and clear" of liens. 11 U.S.C. § 363(f). Meanwhile, a farmer in Chapter 12 is not restricted to these requirements if the farmer is selling "farmland or farm equipment." Being able to sell these assets free and clear of liens enables farmers to pay down their debts and end the bankruptcy process successfully.

Additionally, Chapter 12 provides tax advantages for farmers selling assets. A Chapter 11 debtor is required to pay any capital gains produced by a sale of assets. This tax will be treated as a priority claim, which means the debtor must pay the full amount of the claim. However, for farmers in Chapter 12, tax claims arising from "the sale . . . of any property used in the debtor's farming operation" are treated as unsecured claims instead of priority claims. 11

U.S.C. § 1232(a). Unsecured claims in bankruptcy are claims that may not have to be paid in full or at all. This is a great advantage for a farmer under Chapter 12 because the income from the sale will not be restricted to repay a tax claim.

One last advantage of Chapter 12 over Chapters 11 or 13 is that Chapter 12 debtors may modify any secured loan through a legal principle called "cramdown." Cramdown is where the debtor pays the present market value of the property rather than the amount owed on the loan. For example, if a debtor owes $40,000 on a loan and the underlying asset for the loan is worth $25,000, the debtor can reduce the loan debt to the present market value of $25,000. Though cramdown is available in Chapters 11 and 13, the Bankruptcy Code has limited a debtor's ability to use cramdown on the mortgage of their principal residence. However, this restriction does not exist in Chapter 12. Thus, a Chapter 12 farmer-debtor can use cramdown to have the principal balance of the mortgage reduced to the current value of the property. Using cramdown on a mortgage can be significant for a farmer that lives on the same land they farm.

To read about the entire Chapter 12 bankruptcy process, click **here (https://nationalaglawcenter.org/wp-content/uploads/assets/articles/bankruptcy/Overview-of-Bankruptcy-Law.pdf)**.

To read Chapter 12 of the Bankruptcy Code, click **here (https://www.law.cornell.edu/uscode/text/11/chapter-12)**.

For more National Agricultural Law Center information on Bankruptcy, click **here (https://nationalaglawcenter.org/research-by-topic/bankruptcy/)**.

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By J. David Krekeler

Why Might Farmers Be Choosing Subchapter V?

J. David Krekeler
Krekeler Law, SC
Madison, Wis.

David Krekeler is the founder of Krekeler Law, SC in Madison, Wis. He also serves as a receiver in both supplemental and chapter 128 proceedings, and he is a member of both the Bankruptcy, Insolvency and Creditors' Rights Section of the Wisconsin State Bar and the Western District Bankruptcy Bar.

Farm bankruptcy filings under chapter 12 have been declining over the last several years. Wisconsin led the nation in chapter 12 reorganization case filings in 2017, 2018 and 2020. The filings over the last five years have been the lowest since chapter 12 was made permanent in 2005, with only four cases filed in 2023 and only two as of November 2024.[1] The trends have been the same nationally (Exhibit 1 shows the number of chapter 12 cases filed in 2017-24). While farm reorganizations have declined, filings under subchapter V have dramatically increased, as illustrated in Exhibit 2.

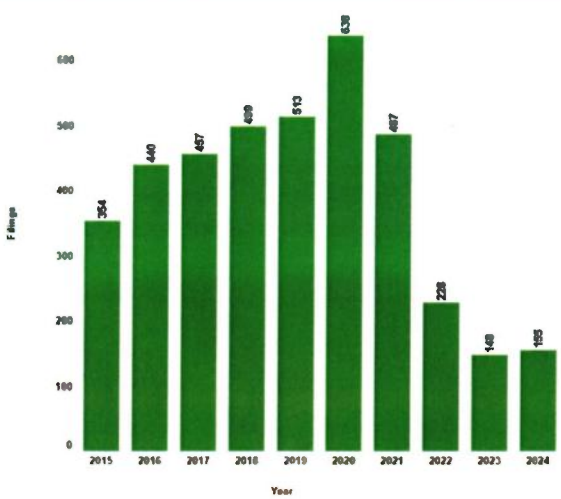
There are a lot of possible reasons for this decline, and it is almost certainly due to no single factor. For example, the total number of U.S. farms has dropped by nearly 150,000 since 2017.

Farmers saw record-breaking income in 2022, but that dropped precipitously from 2023-24. Land values have continued to increase, providing farmers with more collateral and more equity cushion, as well as the ability to stave off a bankruptcy filing for a longer period of time.

However, the numbers also suggest that more farmers might be seeking subchapter V relief, thus lowering the numbers for chapter 12. While farm bankruptcies have been dropping, the number of subchapter V cases has grown steadily. A comparison of the costs and benefits of these two forms of relief reveals some good reasons as to why some farmers are among the small businesses taking advantage of subchapter V.

1 During this same period, since 2020, the author's firm has filed four farm cases under chapter 11, and two of those were under subchapter V.

Exhibit 1: Chapter 12 Cases Filed During the 12-Month Periods Ending March 31



Factors Favoring Subchapter V

Trustee Assistance

Subchapter V trustees may assist in getting a plan confirmed. Section 1183(b)(7) of the Bankruptcy Code provides that the trustee is to facilitate the development of a consensual reorganization plan.

The handbook for subchapter V trustees directs the trustee to discuss a proposed plan with the debtor and the debtor's principal creditors. It specifically states that the trustee should be proactive in promoting and facilitating planned negotiations. It also points out that the trustee may even participate in plan negotiations. Chapter 12 trustees rarely perform such a function.

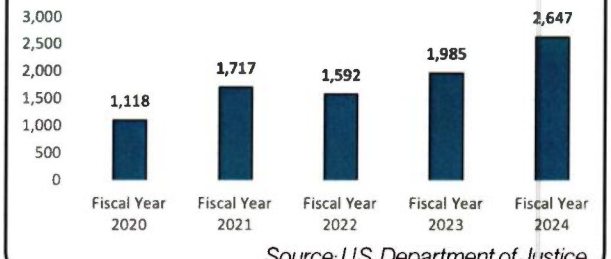
Status Conference

A status conference is required to be held by the court within 60 days after the order for relief.[2] The debtor is required to file a report at least 14 days prior to the conference, and this report is to detail the debtor's efforts to attain a consensual plan.[3]

Some might say that these requirements make subchapter V less attractive, but in many respects, this early requirement to work on a plan is beneficial to the debtor. It better prepares the debtor to meet the 90-day deadline for filing a plan. While chapter 12 debtors could certainly do this on their own, these requirements ensure that progress is being made, and progress is good for the debtor.

2 § 1188(a).
3 § 1188(c).

Exhibit 2: Chapter 11 Subchapter V Statistical Summary Through Sept. 30, 2024



Source: U.S. Department of Justice.

IOWA STATE UNIVERSITY
Center for Agricultural Law and Taxation

A Review of Farm Bankruptcy

October 1, 2020 | Kristine A. Tidgren

Overview

The founders of our country believed that debtors should have an opportunity for a fresh start. The Constitution authorizes Congress to create bankruptcy laws. U.S. Const. Art. I, Sect. 8. The U.S. Supreme Court has stated, "Bankruptcy gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This fresh start occurs through a "bankruptcy discharge," which generally releases debtors from personal liability for certain debts, preventing creditors from collecting those debts in the future.

The current Bankruptcy Code (enacted in 1978) created six different types of bankruptcy cases. These bankruptcy provisions are usually referenced by the number of the Chapter in the Code where they are found.

- Chapter 7 – Liquidation
- Chapter 9 - Municipalities
- Chapter 11 – Business Reorganization
- Chapter 12 – Family Farmer Reorganization
- Chapter 13 – Individuals with Regular Income
- Chapter 15 – Cross-Border Insolvency

In 2019, Congress passed the Small Business Reorganization Act, which provides a new option for small businesses wishing to reorganize. This new provision, Subchapter V of Chapter 11, is available only to small business debtors with no more than $2,725,625 in debt. The CARES Act temporarily expanded this limit to $7,500,000.

Although Chapter 12 is specifically designed for the family farmer, farmers may file for bankruptcy relief under Chapters 7, 11, 12, or 13. Each provision has advantages and limitations.

Initiating a Case

A voluntary bankruptcy case is commenced by filing a petition with the bankruptcy court. The filing of the petition constitutes an "order of relief." 11 U.S.C. § 301.

Automatic Stay

Although the provisions of the different chapters are very different, they all share the protection of an "automatic stay." At the time a bankruptcy petition is filed, the automatic stay temporarily halts lawsuits, foreclosures, garnishments, and creditor collection activities. The length and application of the stay vary according to the type of bankruptcy. Because of the automatic stay, the bankruptcy court generally oversees tax claims, tax determinations, and tax discharges in bankruptcy.

Chapter 7

Chapter 7 is a liquidation bankruptcy. This means that the farmer is getting out of business. The debtor initiates this relief by filing a petition, including a schedule of assets and liabilities, a schedule of income and expenses, a statement of financial affairs, and a schedule of contracts and unexpired leases. This filing creates an "estate" comprising all of the debtor's property. In a Chapter 7 action, the court appoints a trustee to collect the debtor's non-exempt assets, reduce some to cash, and make distributions to creditors as provided in the Code. Secured creditors generally retain the benefit of their security interests in particular collateral. An unsecured creditor, upon making a proof of claim, receives payment under Chapter 7 only if proceeds from assets not pledged to secured creditors are available to sell. Then, unsecured creditors generally collect on a pro-rata basis in relation to the amount of their claims, as compared to the overall debt. But first, the trustee must pay the cost of administration and priority unsecured claims, such as child support and tax debt.

Individuals, partnerships, and corporations (with some exceptions) can file for Chapter 7 bankruptcy protection, but only individuals can receive a discharge, releasing them from personal liability for certain dischargeable debts. Some debts, such as child support, are not dischargeable in bankruptcy. Likewise, only individual debtors are allowed to keep assets considered "exempt" under either the Bankruptcy Code and state law. 11 U.S.C. § 522. The Bankruptcy Code allows states to replace federal exemptions with their own. In some

jurisdictions, the individual debtor may choose between the federal exemptions or the state law exemptions. Some of the federal bankruptcy exemptions include:

- Automobile ($4,000 in equity in one vehicle)
- Child Support and Alimony
- Health Aids
- Implements, books, and tools of the trade up to $2,525.
- Jewelry (up to $1,700)
- Personal Injury Settlement up to $25,150
- Animals, crops, clothing, appliances and furnishings, books, household goods, and musical instruments (up to $625 per item or $13,400 total)
- Pensions and IRAs up to $1,362,800
- Homestead ($25,150 in equity)

The States of Illinois and Iowa (see, e.g., Iowa Code § 627.6; Iowa Code §§ 499A.18, 561.2, 561.16) provide their own state exemptions. Wisconsin applies the federal exemptions.

Corporations or partnerships liquidating under Chapter 7 must distribute all of their assets to creditors. Corporations are terminated after a Chapter 7 liquidation. General partners remain personally liable for the unpaid debt of a partnership after a liquidation.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 prohibits debtors from discharging debt under Chapter 7 if they have the "means" or income to make payments over a period of time to creditors. These debtors must instead file for Chapter 13 relief. Chapter 13 is generally designed for the discharge of consumer debt, not business debt.

In a Chapter 7 bankruptcy, the secured creditor is generally entitled to retrieve non-exempt collateral, unless the debtor chooses to redeem or reaffirm the debt. Debtors typically have 30 days from the filing of the petition to make this declaration. Secured creditors are not entitled to the value of the collateral in excess of the debt owed.

The primary advantages of a Chapter 7 liquidation bankruptcy are that it is relatively inexpensive, and it generally requires only 90 days from filing to discharge.

Chapter 11

Chapter 11 of the Bankruptcy Code allows business debtors to reorganize their debt and continue operating their business. It is not well designed for a farming business because of its "absolute priority" rule (described below), its administrative complexity, and its expense. It is, however, the only bankruptcy reorganization option for a farming business with debt exceeding $10 million.

A Chapter 11 petition may be filed by individuals, partnerships, and corporations, with certain exceptions. Along with the petition, the debtor must file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs. Chapter 11 has no debt limit.

In a Chapter 11 case, the "debtor in possession" acts as a fiduciary, responsible for accounting for property, examining and objecting to claims, and filing information reports. A United States trustee supervises the administration of the case. The trustee, for example, conducts a meeting of the creditors. A creditors' committee ensures fair representation to the unsecured creditors. The debtor has 120 days after the filing of the petition to file a reorganization plan, and 180 to have the plan "accepted" by the creditors. The court can extend these deadlines if necessary. Creditors have the right to reject a plan. To be confirmed, at least one class of impaired creditors must accept the plan.

Any party in interest may file an objection to confirming the plan. The court will hold a confirmation hearing, after which the court must find that the plan is:

- **Feasible**
    - The court must find that confirmation is not likely to be followed by liquidation or the need for another reorganization.
- Proposed in good faith
- In the best interest of creditors
- Providing **adequate protection** payments to secured creditors if the stay, use, sale, or lease of assets under the bankruptcy will result in a decrease in the value of the collateral
- Providing that claims and interests are designated in classes (i.e., secured, unsecured with priority, unsecured, etc.)
- Providing that any classes of claims or interests that are impaired or unimpaired under the plan are specified
- Providing that the debtor may not receive or retain any property under the plan unless claims of the impaired dissenting classes of unsecured creditors are paid in full (or the debtor contributes new value). An impaired class of creditors accepts a plan only if it is approved by two-thirds in amount and a majority in number of the holders of claims who cast votes.
    - In other words, the plan must provide for the payment of all debt unless the creditors agree otherwise. (**absolute priority**)
- Otherwise in compliance with the Bankruptcy Code

The Court has a "mandatory independent duty" to determine whether the plan conforms to these requirements. The confirmation of the plan discharges the debtor from debts that arose before the date of the confirmation. Once the plan is confirmed, the debtor must make payments and is contractually bound by the plan of reorganization. Confirmation vests the property of the estate in the debtor. The automatic stay is

lifted, and any default after confirmation means that creditors can use state law remedies to collect. Once the estate has been fully administered, a final decree closing the estate is entered.

Chapter 11 can provide longer payment schedules, including 15 to 30 years for real estate and three to seven years for machinery. Interest rates are generally two percent greater than the yield on U.S. Treasury notes or bonds. After filing, the debtor must seek approval of the court to obtain additional secured debt. Similarly, the use of cash collateral is not allowed absent approval of creditors or the court. The court requires monthly reports, and the trustee fees are paid by the debtor. Chapter 11 provides no specific time period for making repayments under the confirmed plan. The feasibility requirement, however, limits the length to one that is reasonable. For many smaller business debtors, the period is three to five years.

Chapter 12

Originally enacted in 1986 to provide temporary relief for "family farmers," Congress made Chapter 12 permanent in 2005. Chapter 12 was created during the farm crisis of the 1980s because Chapter 11 was unworkable for these debtors. Most significantly, the absolute priority rule of Chapter 11 prevented farm debtors from retaining any equity interest in their farm over the objection of unsecured creditors, unless those creditors were paid in full. It was also administratively burdensome and costly. In most cases, financially distressed farmers had no choice but to liquidate. Since the inception of the Chapter 12 bankruptcy, Congress has provided debtors with favorable tax treatment to allow them to downsize and remain in business. This special tax provision is discussed more thoroughly below.

Eligibility - Individuals

A Chapter 12 case may be filed by a "family farmer or family fisherman with regular annual income." [i] 11 U.S.C. § 109(f). To qualify as a "family farmer" eligible for Chapter 12 bankruptcy, the following requirements must be met:

- Must be engaged in farming operations at the time of filing.
    - Does not generally include former farmers or those who are engaged in farm-related businesses or lease-only activities, but off-farm income can be used to make payments. *In re Williams*, No. 15-11023, 2016 Bankr. LEXIS 1804 (W.D. Ky.).
- Farmer's debts cannot exceed **$10,000,000 (adjusted every three years).**
    - The original debt limit was $1,500,000, which was raised to $3,237,000 in 2005. By 2019, inflation had increased the limit to $4,411,400, but this amount kept some otherwise "family farmers" from qualifying for Chapter 12 protection. On August 23, 2019, the Family Farmer Relief Act of 2019 went into effect. This law increased the amount of debt a "family farmer" may have to $10,000,000.
    - Fifty percent of this index-adjusted debt must arise from the farming operation.
        - The home mortgage is included only if it secures the farm debt.

- Must have earned more than half of gross income from farming in year prior (or in each of the 2nd and 3rd years prior to the filing).
    - Gross income, evidenced on line 9 of Schedule F should be used (not gross receipts). Tax return is prima facie evidence.

11 U.S.C. § 101(18).

Eligibility - Entities

Corporations or partnerships, including LLCs, are eligible for file for Chapter 12 bankruptcy protection if:

- More than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family (relative is interpreted broadly);
- The family or such relatives must conduct the farming operation;
- At least 80 percent of the value of its assets consists of assets related to the farming operation;
- The total indebtedness cannot exceed **$10,000,000** (less for a commercial fishing operation);
- At least 50 percent of its aggregate non-contingent, liquidated debts on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and
    - **Residential debt exclusion can count if a shareholder or partner lives in the house, even if they are not involved in the farming operation.**
- No stock is publicly traded

Chapter 12 Commencement

To initiate a Chapter 12, the debtor files a petition including a schedule of assets and liabilities, a schedule of current income and expenses, a schedule of executory contracts and unexpired leases, and a statement of financial affairs. Husbands and wives may file joint or individual petitions. Upon filing, the automatic stay begins, and a trustee is appointed to oversee the case. The clerk provides notice of the proceeding to all creditors listed in the paperwork filed by the debtor.

The Proposed Plan

The debtor must file a plan within 90 days of the bankruptcy petition (unless the court extends the deadline). The plan payment period is generally three years unless the court approves a longer plan "for cause." 11 U.S.C. § 1222(c). The longer period is required if the plan does not propose to pay 100 percent of child support or alimony claims. In that case, the five-year plan must propose to spend all of the debtor's disposable income.

Chapter 12 offers a number of favorable tax and non-tax related provisions to debtors. The most helpful non-tax provision of Chapter 12 is the abrogation of the **absolute priority** rule. Instead of requiring debtors to

repay *all* debt, Chapter 12 requires that unsecured creditors must receive as much as they would in a Chapter 7 liquidation. Additional non-tax *requirements* of a Chapter 12 plan include:

- Net disposable income must be paid to the trustee for distribution to unsecured creditors until discharge. 11 U.S.C. § 1222(a)(1).
- The plan must provide for full payment, in deferred cash payments, of all priority claims under 11 U.S.C. § 507, unless the holder of the claim agrees to accept less favorable treatment, 11 U.S.C. § 1222(a)(2).
- The plan must provide the same treatment for each class of claim or interest within a particular class unless the holder of claim or class agrees to less favorable treatment, 11 U.S.C. § 1222(a)(3).

In addition to these requirements, the Chapter 12 plan *may* include these provisions:

- The plan may treat claims for a consumer debt of the debtor where the debtor is a co-obligor differently than other unsecured claims, 11 U.S.C. § 1222(b)(1).
- The plan may modify the rights of holders of secured claims, including the rights of residential mortgage lenders, 11 U.S.C. § 1222(b)(2);
    - Contracts for repayment of secured debt can be extended or re-amortized (15 to 30 years for real estate or three to seven years for machinery). Interest paid on secured claims is typically two percent above the yield on a U.S. Treasury note or bond. *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).
- The plan may provide for the curing or waiving of any default, 11 U.S.C. § 1222(b)(3);
- The plan may provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or other unsecured claim, 11 U.S.C. § 1222(b)(4);
- The plan may permit the debtor to assume, reject or assign any executory contract of unexpired lease of the debtor to the extent permitted by 11 U.S.C. § 365 and to the extent not previously rejected by the debtor, 11 U.S.C. § 1222(b)(6);
- The plan may provide for payment from either property of the estate or other property of the debtor, 11 U.S.C. § 1222(b)(7);
- The plan may provide for the sale of all or any part of the property of the estate or the distribution of all or any part of the property of the estate among those having an interest in the property, 11 U.S.C. § 1222(b)(8); and
- The plan may provide for the payment of allowed secured claims for a discretionary period–including beyond the period of the plan for making payments to the trustee, as determined by the debtor, 11 U.S.C. § 1222(b)(9).

Operation of the Farm During Pendency of the Case

The debtor will continue to operate the farm as provided in 11 U.S.C. § 1203. As a fiduciary of the bankruptcy estate, the debtor must pay all taxes owed to the IRS and state taxing authorities. The debtor may also engage in the following activities:

- Dispose of property in the estate in the ordinary course of business without notice and a hearing.
    - This means that the debtor can use proceeds from sales of grain, livestock, and milk not pledged to a secured creditor for living expenses and for continued farming activities.
- The debtor may obtain unsecured credit in the ordinary course of business, and the debt will be allowable as an administrative expense under 11 U.S.C. § 503(b)(1).
- The Chapter 12 trustee may sell machinery or farmland or farm equipment free and clear of any interest of an entity other than the estate under circumstances other than those permitted by 11 U.S.C. § 363(f), the latter of which is available to the debtor.
    - This provision is unique to chapter 12 cases and allows for the right sizing of farming operations prior to the proposal of a chapter 12 plan.

The debtor, however, must receive court approval for the following:

- Using, selling or leasing property in the non-ordinary course of business. This includes the sale or purchase of machinery or livestock or real property. 11 U.S.C. § 363(c).
- Using cash collateral. If the cash collateral is used, **adequate protection** must be provided.
- To acquire secured or priority debt. 11 U.S.C. §1206.

Plan Confirmation

Within 45 days of the debtor filing the plan, the court will hold a confirmation hearing to ensure that the requirements of the Code are met. To be confirmed, the debtor bears the burden to show that the plan must meet the following requirements set forth in 11 U.S.C. § 1225:

- The plan was proposed in good faith.
- All fees and costs are paid.
- The plan meets the "best interest of the creditors test," meaning that the property to be distributed to pay unsecured claims is equal to or greater than the amount that would be paid on each claim in a Chapter 7 case.
- The plan must provide for the secured creditor in one of three ways: (1) through a consensual agreement with the debtor, (2) by surrendering the collateral to the creditor, or (3) by allowing the secured creditor to retain the lien and receive the present value of the secured portion of its claim.
    - Adequate protection must be provided to secured creditors to protect the value of their interest in the collateral retained by the debtor. 11 U.S.C. § 1205(b)(1)–(3).
- The plan must be "feasible," meaning that the debtor will be able to make all required payments.
- The debtor must be current on post-petition domestic support obligations.
- If an unsecured claim holder or the trustee objects, the plan will be confirmed if:
    - The plan devotes all disposable income to making payments under the plan,

- The value of the property to be distributed under the plan is not less than the debtor's disposable income, or
- The property to be distributed under the plan on account of an unsecured claim has a value, as of the effective date of the plan, not less than the amount of the claim.

With rare exception, confirmation of the Chapter 12 plan vests all property of the estate in the debtor. 11 U.S.C. § 1227(b). This property will be free and clear of any claim or interest of any creditor provided for in the plan. 11 U.S.C. § 1227(c).

Once the plan is confirmed, the trustee distributes funds to creditors according to the terms of the plan. The debtor must provide the trustee with a monthly report. The Chapter 12 debtor receives a discharge only after all of the plan payments are made. Debt such as alimony or child support is not dischargeable. Rarely, the debtor may receive a "hardship" discharge for extraordinary circumstances, even if all payments are not made. A standard discharge under 11 U.S.C. § 1228(a) covers all debts of the debtor provided for by the plan, with the exception of secured debts to be paid beyond the plan term and any debts specifically excepted from discharge under 11 U.S.C. § 523(a).

Taxation in Bankruptcy

A separate taxable bankruptcy estate is created when an individual seeks Chapter 7 or Chapter 11 bankruptcy protection. In these cases, the trustee files a Form 1041 on behalf of the estate. At the conclusion of the proceedings, the debtor takes over any remaining tax attributes, including those that first arose during the administration of the bankruptcy estate.

No separate taxable bankruptcy estate is created in Chapter 12 or when a corporation or partnership seeks bankruptcy protection. In a Chapter 12 bankruptcy, the debtor continues to file the same federal income tax returns that were filed prior to the bankruptcy petition, Form 1040 or 1040-SR, U.S. Individual Income Tax Return. The debtors report all income received during the entire year and deduct all allowable expenses. Debt canceled due to the debtor's bankruptcy is not included in income. I.R.C. § 108(A)(1)(a). To the extent the debtor has any losses, credits, or basis in property that were previously reduced as a result of canceled debt, these reductions must be included on the debtor's return.

Tax Claims

Tax liens are secured claims. Federal tax liens arise at the time the tax is *assessed* and attach to all the taxpayer's property, as well as the taxpayer's after-acquired property. The lien continues until the tax and related penalties and interest are paid. Because the IRS may enforce its lien even if the tax debt is discharged, bankruptcy should be filed *before* the IRS files its lien.

In a bankruptcy, federal tax claims secured by a federal tax lien that are valid against the bankruptcy trustee are usually satisfied first. After that, unsecured federal tax claims generally must compete with other unsecured claims. Whether they are paid will depend upon their assigned priority. 11 U.S.C. § 507. Outside of Chapter 12, most tax claims are **priority** unsecured claims. Unsecured claims without a priority status are satisfied last. A special rule impacts tax claims secured with perfected tax liens in a Chapter 7 case. 11 U.S.C. 724(b). These claims are satisfied after unsecured priority seven claims (including administrative expenses and domestic support claims) and just before unsecured priority eight claims (priority unsecured tax claims).

Creditors (including the IRS) must file a proof of claim with the bankruptcy court. A claim for taxes can be either a claim secured by a perfected tax lien or an unsecured claim. Perfected liens generally pass through bankruptcy proceedings unaffected, even if the debtor's personal liability for the debt is discharged.

Chapter 11 plans will not be confirmed if the IRS or state taxing authority holding an unsecured priority tax claim objects to the plan *unless* the plan provides that the holder will receive regular installment payments in cash:

- In an amount equal to the allowed amount of the claim;
- over a period no longer than five years from the date of the petition; and
- in a manner no less favorable than the most favored nonpriority unsecured claim

If the IRS makes a special request, the court will not confirm a reorganization plan if the principal purpose of the reorganization plan was the avoidance of taxes. 11 U.S.C. 1129(d). This provision does not apply to Chapter 12.

Special Chapter 12 Tax Rule

A key change implemented by the BAPCPA was the addition of 11 U.S.C. § 1222(a)(2)(A). This provision retained the requirement that a Chapter 12 must provide for full payment of § 507 priority unsecured claims, but stated that claims owed to a governmental unit that arose as a result of the "sale, transfer, exchange, or other disposition of a farm asset used in the debtor's farming operation" were treated as **general unsecured claims subject to discharge**.

Stripping these claims of their priority was intended to allow Chapter 12 confirmations that otherwise would be denied because of large capital gain or depreciation recapture arising from the sale of farm assets. Before this rule, if a farmer sold assets in an effort to raise cash to allow the farming operation to continue, the tax bill generated by the sale subsumed a good part of the proceeds and robbed the debtor of the cash needed to make payments under a plan. The plan would fail because it would not be feasible.

Although helpful, 11 U.S.C. § 1222(a)(2)(A) led to a split in the circuits regarding whether the rule applied to prepetition *and* post-petition sales. Ultimately, the United States Supreme Court sided with the Ninth Circuit

and ruled that the special rule applied only to prepetition sales. *Hall v. U.S.*, 132 S. Ct. 1882 (2012). The 5-4 decision made it nearly impossible for farmers to discharge in a Chapter 12 bankruptcy capital gains tax or depreciation recapture income arising due to the sale of property *after* the filing of the petition. This prevented debtors from right-sizing once the bankruptcy petition was filed.

On October 26, 2017, The Family Farmer Bankruptcy Clarification Act of 2017 fixed this problem by creating new 11 U.S.C. § 1232. The provision states:

- Any unsecured claim of a governmental unit against the debtor or the estate that arises before the filing of the petition, or that arises after the filing of the petition and before the debtor's discharge under section 1228, as a result of the sale, transfer, exchange, or other disposition of any property used in the debtor's farming operation—
    - shall be treated as an unsecured claim arising before the date on which the petition is filed;
    - shall not be entitled to priority under section 507;
    - shall be provided for under a plan; and
    - shall be discharged in accordance with section 1228.

In other words, if a debtor sells property after the Chapter 12 has been filed, the special priority-stripping rule applies to the gain in the same way as if the assets were sold *before* the filing. By treating tax claims as general unsecured claims, farmers can retain more property necessary to continue their farming operation rather than being forced to sell it to pay off tax liability.

Which Claims Qualify?

There remains some debate among courts as to what claims (beyond those arising from capital gain from the sale of a farming asset) are impacted by the priority-stripping provisions of § 1222 (now § 1232). Courts often apply a five-factor test in making this determination: The claim arose (1) as a result of (2) the sale, transfer, exchange, or other disposition (3) of any property (4) used in (5) the debtor's farming operation. Courts have found this to include income from the sale of crops and livestock, *Knudson v IRS*, 581 F.3d 696 (8th Cir. 2009), a partnership interest in a farming operation, *Hemann*, 2013 WL 1385404 (Bankr. N.D. Iowa 2013), and crop insurance proceeds, *In re Pedersen*, 593 B.R. 785 (Bankr. N.D. Iowa 2018). In a pre-2017 case, a Kansas court found that the provision did not apply to crop insurance proceeds. *In re Keith*, case No. 10-12997, 2013 WL 3467315 (Bankr. D. Kan. Jul.8, 2013).

In determining the amount of the claim that is stripped of its priority, the Eighth Circuit has allowed what's been called the "marginal method" of calculation. No court has rejected this method. Under the marginal method, the tax professional prepares a traditional and a pro forma return. The traditional return is the actual return for the year at issue. It is the only return that will be filed. The pro forma return is calculated *without* the income from the sale of the farm property.

The difference between the tax due on these two returns is the amount that is *deprioritized* under § 1232. This amount is reported to the court in the proposed plan.

Considerations Before Filing Chapter 12

Chapter 12 provides the following key advantages:

- Deprioritization of tax claims, allowing farm property to be sold to restructure the business in a more efficient way.
- Debtor may retain the asset, even though the unsecured creditors do not receive full payment for their claims, as long as all disposable income is paid out during the plan period. There is no absolute priority rule.
- The debtor may reduce the balance of secured claims to the value of the collateral, including the claim against the debtor's house.
- The automatic stay applies to co-debtors on consumer debts as well.
- Payment terms on secured debt can be stretched out, re-amortized, and the interest rate adjusted.
- Payments may be made on a monthly, yearly, or other basis, depending upon the income stream of the farm.
- The process is efficient and economical.

Limitations of Chapter 12

For most debtors, the most challenging Chapter 12 requirement is feasibility. Debtors who have been unable to continue their operation because of financial impairment may be hard pressed to show that they will be able to make the required plan payments. In recent history less than 50 percent of Chapter 12 plans have been successfully completed through discharge. That could change given recent changes to the Code detailed above.

In the 1980s, Chapter 12 was able to restructure debt payments with much lower interest rates. Today's low interest rates generally remove this benefit; however, debtors may be able to generate cash if they sell assets to right-size the farm. This is made possible by the special Chapter 12 tax provisions.

Required Analysis

When determining whether to file a Chapter 12 bankruptcy, a debtor must consider:

- Feasibility as determined through cash flow projections,
- The liquidation value of the assets, to show that the unsecured creditors would receive as much under the plan as in liquidation, and
- The timing of the filing with respect to the sale of assets, tax attributes such as NOLs, and other considerations.

Discharge of Debt Income

Sometimes outside of bankruptcy lenders will forgive some or all of a financially distressed taxpayer's debt. Generally, if a creditor forgives debt for any reason other than for making a gift to the debtor, the income is included in the taxpayer's income as cancellation of debt income (CODI). The same rule applies to repossessed property. The taxpayer will be deemed to have sold the repossessed property at its fair market value to the lender. The difference between the FMV and the debt owed is CODI, potentially subject to income tax. In the case of depreciated equipment, the taxpayer will also owe ordinary income tax for the I.R.C. § 1245 recapture in the year of repossession.

A number of exceptions, however, apply to this rule. I.R.C. § 108(a)(1) provides that gross income generally does not include CODI if any of the following apply:

- The cancellation takes place in a bankruptcy case
- The cancellation takes place when the debtor is insolvent
- The canceled debt is a "qualified farm debt"
- The canceled debt is a qualified real property business debt (in the case of a tax-payer other than a C corporation)
- The canceled debt is qualified principal residence indebtedness which is discharged before 2018

Qualified Farm Indebtedness

Farmers can exclude CODI from gross income if it is qualified farm debt owed to a qualified person. This exclusion applies only if the farmer was solvent when the debt was canceled or, if insolvent, it applies only to the extent the canceled debt is more than the amount by which the debtor was insolvent. Debt is qualified farm debt if both the following requirements are met: (1) It was incurred directly in operating a farming business and (2) at least 50 percent of gross receipts for the last three years preceding the year of debt cancellation were from the farming business.

A qualified person is a person actively and regularly engaged in the business of lending money. A qualified person includes any federal, state, or local government, or any of their agencies or subdivisions. The USDA is a qualified person. A qualified person does not include a related person, a person who receives a fee from the taxpayer's investment in the property, or a person from whom the taxpayer acquired the property.

Reducing Tax Attributes

Generally, if a taxpayer is able to exclude canceled debt from income under one of the exclusions noted above, they must reduce the following tax attributes (certain credits and carryovers, losses and carryovers, basis of assets, etc.) (but not below zero) by the amount of the canceled debt excluded.

- NOLs and NOL carryovers for year of discharge
- Net capital loss and capital loss carryovers for year of discharge
- Passive activity loss carryovers from year of discharge
- Three times the sum of the following:
    - General business credit carryover
    - Minimum tax credit available as of the following tax year
    - Foreign tax credit carryover to or from the year of discharge and
    - Passive activity credit carryover from year of discharge

[i] Although this provision also protects family fisherman, this article only discusses farmers.

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INTRODUCTION TO CHAPTER 12 PRACTICE

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National Association of Consumer Bankruptcy Attorneys

HISTORY OF CHAPTER 12 BANKRUPTCY

- The farm crisis of the late 1980s gave birth to chapter 12 of the Bankruptcy Code.
- Falling land values and grain prices combined with soaring interest rates and tightening credit gave rise to one of the worst farm crises of the 20th century.
- Farmers responded by driving their tractors to Washington, D.C.
- Congress responded in 1986 by giving farmers a reorganization tool of unprecedented power and efficiency, and in 2005 made chapter 12 a permanent part of the Bankruptcy Code

THE NEW FARM CRISIS

DOWNWARD CYCLE IN FARMING

- Farming income reached high levels in 2010-2011.
- But from 2012-2016 farming income fell 34 percent, more than $50 billion, after adjusting for inflation.
- Farm-sector debt has reached levels near the peak levels of the late 1970s and early 1980s.
- Rising interest rates coupled with reduced income and increased debt suggests that some farmers might not be able to repay debt in future years.

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THE NEW FARM CRISIS

FEDERAL RESERVE WARNING

- In November 2018 the Federal Reserve Bank of Minneapolis warned of rising Chapter 12 bankruptcies, used by family farmers to restructure debt.
  - "Over the 12 months ending in June 2018, 84 farm operations in Ninth District states had filed for chapter 12 bankruptcy protection—more than twice the level seen in June 2014."
  - The Fed said that the strain of low commodity prices compounded by recent tariffs "is starting to show up not just in bottom-line profitability, but in simple viability."
  - Obtained at https://www.minneapolisfed.org/publications/fedgazette/chapter-12-bankruptcies-on-the-rise-in-the-ninth-district.

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 and 13 similarities
  - ✓ Usually administered by standing trustee.
  - ✓ Proceeds under trustee supervision until completion of the plan.
  - ✓ Can restructure secured debts using the *In re Till* interest rate.
  - ✓ Debtor receives a discharge upon completion of the plan.

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Tax advantages: § 1232 allows a deprioritization of taxes due on the sale of assets as part of a confirmed plan, allowing farmers to "right-size" their operations and avoid large capital gains taxes that would otherwise be due.
  - ✓ Can modify mortgages on principal residences by bifurcating undersecured claims under § 506 of the Bankruptcy Code, adjusting interest rates, and even re-amortizing mortgage loans beyond a 30-year period.
    - Compare 1222(b)(2) to 1322(b)(2):
      - 1222(b)(2) "the plan may--modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."
      - 1322(b)(2) "the plan may--modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Can modify secured debts with much greater flexibility. Compare 1225(a)(5) to 1325(a)(5):

REQUIREMENTS	CHAPTER 12	CHAPTER 13
Secured creditor options: accepts plan, cram down or surrender	**Yes**	Yes
Hanging paragraph with 910 and 365 day restrictions on cram down	**No**	Yes
Distributed through plan via equal monthly amounts	**No**	Yes
Monthly amounts must be enough to provide adequate protection	**No**	Yes
Lienholder retains lien until PMT in full or discharge	**No**	Yes

CHAPTER 12: SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13
  - ✓ Plan is not due until 90 days after the case is filed.
  - ✓ Plan payments not due until after confirmation.
  - ✓ Plan payments can be structured around farm's cash flow cycles.
  - ✓ Confirmation must occur within a specific time frame.
    - ✓ Concluded no later than 45 days after the filing of the plan. See 11 U.S. Code § 1224.

CHAPTER 12:
SIMPLER AND MORE POWERFUL THAN EITHER CHAPTER 11 OR 13

- Chapter 12 Advantages over chapter 13 BIG POINTS SUMMARY
  - Chapter 12 allows the repayment of secured creditors, if appropriate, over a period longer than the life of the chapter 12 plan even though the original indebtedness is not so amortized.
    - See11 U.S.C. § 1222(b)(9)
  - Chapter 12 allows modification of the rights of holders of security interests in all real and personal property without regard to its residential nature, so that secured creditors collateralized by the farmstead can be reamortized without the need for cure of default.

ELIGIBILITY

- Pursuant to § 109 (f), "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title."
- Farming: Activities involving the tillage of soil and raising of crops, raising of livestock or poultry, or livestock products in an unmanufactured state

TESTS FOR ELIGIBILITY

FAMILY FARMER (INDIVIDUAL)

- Debts are not over $4,153,150 (as of 2018);
- At least 50 percent of debt is farm-related debt (not including home mortgage, unless the mortgage is a farm mortgage); and
- More than 50 percent of the debtor's income is from farming (measured by the previous tax year or the two tax years before the previous tax year)

FAMILY FARMER (CORPORATION)

- At least 50 percent of shares owned by one family or by one family and farming relatives;
- More than 80 percent of the value of the corporate assets consists of assets related to farming;
- Debts are not over $4,153,150 (as of 2018);
- At least 50 percent of debt is farm-related debt; and
- Corporation is not publicly traded;

TESTS FOR ELIGIBILITY

FAMILY FISHERMAN

- Debts are not over $1,924,550.00 (as of 2018);
- Must consist of commercial fishing operation.
- Similar to requirements for Family Farmers.

ELIGIBILITY

- Definitions found at:
  - "Family farmer" in § 101(18),
  - "Family fisherman" in § 101(19A),
  - "Family farmer with regular annual income" in § 101(19),
  - "Family fisherman with regular annual income" in § 101(19B),
  - "Farming operation" in § 101(21).

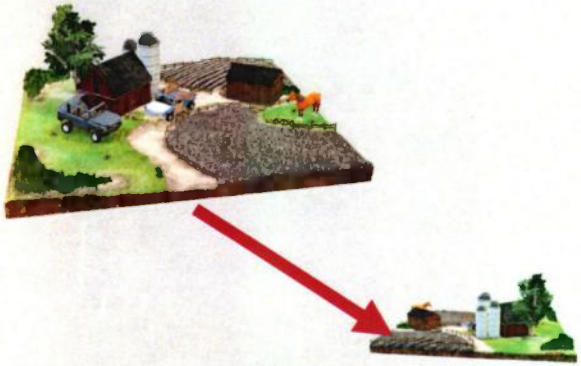
DIFFERENT TYPES OF CHAPTER 12 PLANS

- Traditional reorganization

- Goals:
  - Preserve farm's nature and scale
  - Reduce debt service
  - Increase efficiency
  - Return to profitability
- Need stems from a specific event that disrupts finances
- Questions
  - Is the farm still viable with reorganization?
  - What is production cost vs market price?

DIFFERENT TYPES OF CHAPTER 12 PLANS

- Downsizing and conversion



- Goals:
  - Reduce scale of operation
  - Converting to a different or more diverse production base
    - E.g. Dairy farm to a crop farm
  - Return to profitability
- Carefully assess resources of the farm and what changes can reduct debt and increase profitability.
- Questions
  - Will the surrender of unnecessary equipment, land or livestock increase profitability?
  - Will changing from a strictly wholesale market (like milk) to a more diversified market (like a farmer's market) be effective?

DIFFERENT TYPES OF CHAPTER 12 PLANS

- Sale

- Goals:
  - Save the home but sell farmland, property, livestock
  - Debtor maintains control over marketing and sale
  - Take advantage of special tax rules on capital gains
- Debtor no longer wishes to work the farm
- Question
  - Will the plan be better than a liquidation in a chapter 7?

THE MOST POWERFUL — YET MOST UNDERUTILIZED — CHAPTER OF THE CODE

- According to the 2012 census of agriculture, there were approximately 2 million farms in the U.S.,yet for the 12-month period ending Sept. 30, 2018, only 468 chapter 12 cases were filed.
- Why?
  - Many farmers and fisherman don't know chapter 12 exists.
  - Most bankruptcy attorneys tend to avoid chapter 12 and try to shoehorn the case into a 7 or 13.

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THE MOST POWERFUL — YET MOST UNDERUTILIZED — CHAPTER OF THE CODE

- If you can do a chapter 13 you can also file a chapter 12.
- Discuss chapter 12 options with local FFA or other groups to get the word out that there are options for farmers and fishermen.
- Attorneys fees may be significantly higher than found in chapter 7 or 13 cases.

Financial Stress and Farm Bankruptcies in U.S. Agriculture

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Financial Stress and Farm Bankruptcies in U.S. Agriculture

Abstract

Purpose: We evaluate farm financial stress within the U.S. over the past twenty years and the agricultural and economic factors which have impacted farm businesses. We further evaluate the effect of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on farm financial stress. In particular, Chapter 12 bankruptcies -- which can only be filed by farmers -- were only a temporary measure until BAPCPA made Chapter 12 a permanent fixture in bankruptcy law.

Design: We utilize filings of Chapter 12 bankruptcies from 1997 until 2016 as a proxy for farm financial stress. Panel fixed effects models are used to determine relevant factors affecting financial stress for farmers from agricultural and macroeconomic perspectives. Further, models incorporating pre- and post-BAPCPA regimes are utilized.

Findings: We find that macroeconomic factors (interest and unemployment rates) are strong predictors of farm bankruptcies for farms while agricultural land values are the only consistent strong predictor among the agricultural factors. When evaluating the post-BAPCPA regime, only agricultural land values continue to be a significant predictor of farm bankruptcies. Our findings also indicate a dynamic relationship with agricultural land values, where current year values are negatively related but previous year land values are positively related to bankruptcies.

Value: We provide an analysis of the post-BAPCPA regime on farm bankruptcies that has not been evaluated within the literature yet. Further, our findings illuminate discussion on a potentially dynamic relationship with financial stress and agricultural land values.

Keywords: farm bankruptcies, financial stress

JEL Codes: Q14

Introduction

The increased widespread financial stress from the farm crisis of the 1980's required policy intervention from Congress, which enacted legislation to mitigate the damages to the agricultural sector. This crisis was partially due to a rapid rise in farmland values -- largely purchased on credit -- followed by a sudden drop in values coupled with high interest rates, easy access to credit, and plummeting net farm incomes. Many farmers experienced financial stress, i.e. they struggled to generate enough cash flow to meet their debt service payments. Prior options of bankruptcy for farms generally required the liquidation of their farmland, a depressed asset at the time, which would result in cessation of operation. With the passage of the Family Farmer Bankruptcy Act of 1986, Chapter 12 bankruptcy became the preferable option for family farms as it helped ease financial stress and allowed for continued operation of their farm following a debt restructuring plan. Chapter 12 was originally set to expire in October 1993 but Congress extended the expiration date eleven times (Harl, 2006). In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) amended Chapter 12 bankruptcy to be a permanent option, allowed for higher debt limits, and implemented less strict income requirements than before.

Trends in declining net farm income, increasing debt use, and stagnating land values are projected to continue beyond 2017 and pose a problem to the agricultural sector (Patrick et al., 2016). These factors place financial stress on farms, which may or may not be able to sustain these levels of stress (Briggeman, 2010). The current trends follows a period of rapid appreciation of land values and net farm incomes, which parallels the 1980's farm crisis. While the farm sector debt-to-asset ratio peaked above 20% in 1985, debt-to-asset ratios have not been above 15% since 1995 which helps illustrate that the magnitude of financial stress today is not as severe as the 1980's farm crisis (Ellinger et al., 2016). One critical difference between the 1980's farm crisis and the current economic climate of the agricultural sector is a farm's ability to seek financial relief through Chapter 12 bankruptcy. The option to file for Chapter 12 bankruptcy changes the farmer-lender relationship with the legal consensus being that the relationship favors the farmer and that this relationship strengthened with passage of BAPCPA (Bromley, 1987; Flaccus and Dixon, 1988; Harl, 2006). While the existence of Chapter 12 bankruptcy affects this farmer-lender relationship, the bankruptcy filing rate for farms has been used as a proxy for

financial stress over periods in which bankruptcy laws have not substantially changed (Dixon et al., 2004; Stam et al., 1991).

We provide a quantitative approach to examining factors that affect the financial stress of the agricultural economy with particular interest in the post-BAPCPA climate. Using Chapter 12 bankruptcy filing rates from 1997 to 2016 as our proxy for financial stress, we use panel fixed-effects models to evaluate how macroeconomic factors and farm financial sector performance affects farm bankruptcy rates across the United States and the extent to which, if any, BAPCPA has impacted the agricultural sector. Our study utilizes the Agricultural Resource Management Survey (ARMS) to provide regional level estimates of variables which are hypothesized to affect the agricultural sector of the economy. We contribute to the literature by providing a recent analysis of Chapter 12 bankruptcies and the first evaluation of how BAPCPA affects a farm's financial standing. To our knowledge, the most recent econometric analysis utilizing Chapter 12 bankruptcies is Dixon et al. (2004) which uses state-level filing rates from 1986 to 2002.

Our findings indicate that macroeconomic factors (interest rates and unemployment rates) have strong, positive influence over farm bankruptcy filing rates while measures of the regional agricultural economy do not appear to have a significant effect except for agricultural land values. The agricultural land values indicate a potentially dynamic relationship as current year values are negatively related to farm bankruptcies but lagged values are positively related to farm bankruptcies. Further, we evaluate the effects of BAPCPA -- which made Chapter 12 a permanent fixture in bankruptcy law and increased debt limits and coverage for farmers. Our findings indicate that there is not a significant rise (or fall) in farm bankruptcies post-BAPCPA when controlling for agricultural and macroeconomic factors. However, there does appear to be a regime shift in the relationship between farm bankruptcies post-BAPCPA with respect to the interest and unemployment rates that would suggest these rates are no longer predictive indicators of farm bankruptcies post-BAPCPA. The result for agricultural land values remains post-BAPCPA, although their magnitudes are lessened.

Bankruptcy Overview

Modern day bankruptcy began with the Bankruptcy Reform Act of 1978. The Act consolidated the previous Chapters X and XI to form the modern day Chapter 11 bankruptcy, commonly referred to as the reorganization plan. This act further encouraged Chapter 13 bankruptcy (the wage earner's plan) over the Chapter 7 (liquidation) under the assumption that a Chapter 13 plan would pay more towards creditors and debtors would emerge with better credit afterwards. Previously all states recorded the primary occupation of the filer, but this practice abruptly ended for most states with the 1978 Act thus limiting the ability to effectively track bankruptcies for farmers after 1978.

These particular Chapters (7, 11, and 13) have largely remained the same in terms of their intended targets, although specifics associated with these Chapters have varied over time. Chapter 7 is the liquidation of a filer's nonexempt assets where the proceeds of such assets are used to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code. Chapter 7 is the most common form of bankruptcy across both business and personal filings with 64.3% and 70.0% of total filed respectively since 1996. Chapter 11 is a reorganization plan for a debtor that allows the filer to continue operations subject to its major creditors' approval of said plan. The filing fees are highest for this option and the most complex of all options since it requires approval of multiple creditors. Chapter 11 is generally used by large corporations and the majority of its filings are by businesses (with businesses representing 88.9% of all Chapter 11 filings since 1996), although individuals are permitted to file for Chapter 11. Chapter 13 allows for the restructuring of debts of the filer to be paid out to creditors over a period of time -- generally three to five years although this has varied -- subject to the filer having a regular stream of income, their level of income, and a limit on their amount of debt. Chapter 13 is predominantly filed by individuals, although there are also businesses which file for Chapter 13.

The Family Farmer Bankruptcy Act of 1986 marked the largest change in bankruptcy law for farmers as a new Chapter in the bankruptcy code was created -- Chapter 12 which was modeled after Chapter 13 -- and gave farmers four options for filing for bankruptcy. The Act was meant as a temporary measure for Congress to provide financial relief for farmers during the

1980s farm crisis[1] and represented a shift from the previous farm-lender friendly towards farm-debtor friendly (White, 1987). While after the 1978 Act the recording of primary occupation for a filer was generally ended by most states, North Dakota maintained records of primary occupation of filers for all Chapters. Smith (1987) notes that from 1974 to 1980, farm related bankruptcies accounted for only 3.1% of all bankruptcies in North Dakota but increased to 11.0% between 1981 and 1987. The peak of farming bankruptcies in North Dakota reached 46.6 bankruptcies filed per 10,000 farms in 1987. The rise indicated financial stress within the farming economy and was symptomatic of the need for a new form of bankruptcy designed for farmers.

To qualify for a Chapter 12 filing, a family farmer must pass the debt and income tests. The initial debt test stated that aggregate debts could not exceed $1,500,000 and at least 80% of debt arises from a farming operation. The income test required that the farmer receive more than 50% of their gross income from farming operations in the preceding tax year. If the tests are passed, a farmer can submit a Chapter 12 plan which could reduce the amount of secured claims to the value of the underlying collateral and pay those claims over three to five years (Dull, 1986). Filing for bankruptcy may reduce the amount owed, extend the payment period, and/or lower the interest rate on existing loans due to the write down of secured debt if the current fair market value is less than the original loan value. O'Neill (2006) lays out the procedures for filing a Chapter 12 bankruptcy.

A farm in financial stress might not file for Chapter 12 bankruptcy if they cannot pass the debt or income tests, or if they are unaware that Chapter 12 is an option for their family business. Under these scenarios, a farm then has Chapters 7, 11, and 13 available to them. Matthews et al. (1992) studied all farm bankruptcies in Missouri from 1987--89 and found that the majority of

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[1] Farm real estate values were high, farm products brought relatively good prices, interest rates were high, and farms tended to be highly leveraged. Shortly thereafter, the bubble burst on the farm economy, with farm product prices dropping sharply and real estate values tumbling but with interest rates remaining high and credit becoming increasingly hard to obtain. Many farms faced significant financial difficulty.

filings were Chapter 7, although Chapter 12 did make up 44% of the filings. While farms may file for other Chapters of bankruptcy -- and thus we do not have a completely measured value for farm bankruptcies -- only farms can file for Chapter 12 which serves as a lower-bound estimate for the total number of farm bankruptcies.

Chapter 12 was originally set to expire in October of 1993, but it was subsequently extended by Congress eleven times (Harl, 2006). Chapter 12 became a permanent fixture in bankruptcy law and its coverage expanded with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. The 2005 Act increased coverage of Chapter 12 to include family fisherman, who were subject to the same debt and income tests from the 1986 Act. For family farmers, the percentage of debt arising from farming operations requirement decreased from at least 80% to at least 50% and the debt limit increased from $1,500,000 to $3,237,000. The debt limit is adjusted for inflation every three years with the limit at $4,031,575 in 2016. The income test, which previously required at least 50% of gross income via farming operation in the preceding tax year, was relaxed so that this test could be satisfied if the 2nd and 3rd prior tax years had at least 50% of gross income through the farming operation (O'Neill, 2006).

While there are clearly different regimes in bankruptcy law, figure 1 displays the historical trends for farmer bankruptcies as well as the farming population. Prior to 1979, all farm bankruptcies are tracked as all chapters of bankruptcy filing required the debtor list their primary occupation. Changes in reporting make it infeasible to track every debtor's occupation since 1979 and thus there is a gap in historical bankruptcy rates until 1986 when Chapter 12 serves as a proxy for farm bankruptcies. Because farmers have multiple options to file for bankruptcy, the Chapter 12 bankruptcy rate is a lower bound estimate of financial stress. Research from Dixon et al. (2004) indicates the 1987 bankruptcy filings are a result of pent-up demand that likely resulted from farmers anticipating government policy action from the 1980s farm crisis.

Previous Economic Research

Research on farm bankruptcies is sparse within agricultural economics. Legal scholars have indicated that the immediate effects of Chapter 12, and its subsequent broadening of scope

with BAPCPA, transfers wealth from creditors to debtors. The initial effect is that more debtors now have the ability to write down a larger portion of their debt to repay over a longer period of time and at a lower interest rate (Bromley, 1987; Dull, 1986; White, 1987). The short-term benefit to the debtors may not translate to a positive long-term outlook as creditors may leave the market or adapt their loan policies to reduce the risk associated with the creditor (Barry and Lee, 1983; Rucker and Alston, 1987; Jensen, 1989). While legal analyses point out a tilted relationship towards debtors in the short run, a long run analysis is needed to determine the welfare implications of BAPCPA on the farm economy.

One of the first studies to directly evaluate farm bankruptcies is Shepard and Collins (1982), which uses national US farm bankruptcy data from 1910 until 1978 (omitting 1940 -- 46 due to World War 2). Their results indicate that non-agricultural bankruptcy rates, real net farm income, farm debt-to-asset ratio, and average farm acreage affect farm bankruptcy rates while they fail to find evidence that government support payments affect farm bankruptcy rates. Their results cannot be extrapolated to a regional conclusion due to limitations of time-series data, which leaves the possibility that variations in government payments across the US may have an aggregate null effect but is a significant predictor in farm bankruptcies.

The most similar analysis on Chapter 12 filing rates to this paper is from Dixon et al. (2004) which uses a state-panel model from 1987 to 2000 with USDA-ARMS data to determine factors affecting Chapter 12 filing rates. They find unemployment rate to be a positive predictor of farm bankruptcies, that several measures of the ability to pay current liabilities (debt-to-asset, debt-servicing ratio, and net farm income), farm characteristics (proportion of revenues from crops, off-farm work, and real value of farmland and buildings), and that government payments are significant predictors in filing rates for a given state over this time period. This analysis was largely confirmed through Stam et al. (2003) and Stam and Dixon (2004) at differing levels of analysis although throughout this time period, Chapter 12 was a temporary policy which is an important change which calls for an extension of their panel model to after the 2005 BAPCPA.

Data Description

We use data on aggregate bankruptcy filings which are publicly available from the US Courts websitethe Judicial Business publication F-2 Table of bankruptcy filings for every district starting in 1996 at the annual level for each government fiscal year.[2] In addition, their Bankruptcy Filings publication provides quarterly level filings of all bankruptcy Chapters for each district starting with the quarter ending on 31 March 2001. Figure 2 plots the quarterly number of business bankruptcy filings from 2001 to 2016 where the vertical striped line indicates the quarter when BAPCPA began applying to bankruptcy filings, which is the quarter ending on December 30th of 2005.

Figure 2 displays the effects of the passage of BAPCPA across all types of bankruptcies: personal (non-business), business, and farm bankruptcies (Chapter 12). It is clear that BAPCPA reduced the number of bankruptcy filings for businesses and non-businesses across the United States. It is not as clear that farms had a similarly pronounced decline in filing rates after the passage of BAPCPA because the pre-BAPCPA regime does not exhibit a clear trend in farm bankruptcies.

Although there is substantial temporal variation of farm bankruptcy rates, a regional inspection of farm bankruptcy rates highlights another important aspect of the farm economy (Figure 3). Business and personal bankruptcy filings are public records and every bankruptcy is filed to a district court based on either the business location or primary filer's residence. There are ninety-four district courts across the United States, of which none of these district courts cross state boundaries. Each state has at least one district and at most four districts. There is variation of law, policies, and judge tendencies across circuits, states, and districts although none of the lower courts can overstep their jurisdiction affords them from the higher courts (Chang and Schoar, 2006).

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[2] The US government's fiscal year begins the fourth quarter of the calendar year that starts on October 1. By example, the Judicial Business F-2 data begins with the twelve-month period prior to 30 September 1997 and represents the 1997 fiscal year.

Factors Affecting Bankruptcy

While a bankruptcy filing is an individual occurrence which represents a series of events that led to a poor financial position for a farm, our data on bankruptcies is aggregated and not at the farm level. Instead, we utilize regional variables which act as proxies for the financial conditions that the average farm faces. Our two regional aggregations are state and district level. We group these variables into agricultural factors and macroeconomic factors in order to distinguish the degree to which policy makers could affect farm bankruptcy rates. Our dependent variable is the Chapter 12 filings for a region divided by the number of farms within the region for that year multiplied by 10,000 for ease of interpretation. We use the USDA Agricultural Resource Management Survey (ARMS) to estimate the number of farms in a region. Table 1 contains summary statistics for all variables in the analysis and all financial values are converted to real 2015 dollars using the GDP deflator to account for inflationary issues.

Agricultural Factors

ARMS is a comprehensive survey on financial characteristics on farms across the US that is conducted by the Economic Research Service (ERS) and National Agricultural Statistics Service (NASS) beginning in 1996. ARMS is a non-random annual survey sent to approximately 30,000 farms in the US, although this varies across years. The survey utilizes a multi-phase, multi-frame, stratified, probability-weighted sampling design. The USDA selects farms into ARMS with the goal of constructing a nationally representative population of farms. Part of the survey design of ARMS is that certain variables are calibrated to match official state level estimates (e.g. acreage, number of farms, total harvest, etc.).

We utilize ARMS to calculate regional values for average acreage per farm, average farm assets, average net farm income, average government payments received, average debt-to-asset ratio, average working capital to expense ratio, average debt servicing ratio, and average share of household off-farm income to total income. Each of these statistics are evaluated at the region's weighted median value where the weights are provided by NASS and account for the farm's probability of selection into the survey and are calibrated to match other official USDA estimates. We choose median values to minimize the impact of outlier farms since we are

interested in the financial standing of what an average farm faces.[3] We supplement our ARMS data with the June Area survey, conducted by USDA-NASS, to obtain estimates of the value of an acre of agricultural land since this is not found in ARMS.

The ARMS weights are not designed to represent a smaller geographical scale than the state level. If within-state sampling for ARMS approximates a random sample conditioned on the use of survey weights, then creating district-level estimates of agricultural conditions is a justified method with the added note that there is an inherent loss of precision for these measurements.[4] However, if there is within-state correlation in ARMS observations that is not accounted for with the survey weights, then it is not clear what district-level estimates of the calculated statistics represent. If this is the case, then it is appropriate to use state level estimates of the statistics from ARMS in an analysis. We do not have enough information on the sampling procedures of ARMS from 1996 to 2015 to determine if there is within-state bias with the ARMS observations. We therefore utilize state level ARMS estimates as a robustness check on the assumption that within-state sampling for ARMS approximates a random sample.

In addition to utilizing state level values, we also leverage the sampling design of ARMS for more precise district level values. ARMS consistently over-samples 15 core states.[5] Because ARMS over-samples these states, it is more likely that the sampling scheme within districts of

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[3] As a referee suggested, the tails of the distribution for farmers may be of interest for an analysis on financial stress since that may better represent a farmer at the margin of filing for bankruptcy. We leave this for further research.

[4] This loss of precision can also be thought of as measurement error for some of the independent variables. This would lead to attenuation bias where the estimated coefficients in a regression would be biased towards 0. The implication here is that one would find fewer significant coefficient estimates than a sample with no-measurement error.

[5] Core states in ARMS are chosen due to their high values of agricultural production, they are: Arkansas, California, Florida, Georgia, Illinois, Iowa, Indiana, Kansas, Minnesota, Missouri, Nebraska, North Carolina, Texas, Washington, and Wisconsin.

these states more closely resembles a random sampling and should reflect more precise estimates of our agricultural variables of interest. This subset of the United States reflects the majority of agricultural production, which can alleviate issues involved with the modifiable areal unit problem that may arise due to the arbitrary distinction of the political boundaries for states.

Macroeconomic Factors

The Federal Deposit Insurance Corporation (FDIC) provides Reports of Condition and Income (Call Reports) and Uniform Bank Performance Reports (UBPRs) for FDIC-insured institutions. These data provide total loan amounts for an institution and further break this down by agricultural production loans and include the value of delinquent loans. We calculate annual state level values of agricultural and non-agricultural loan delinquency rates by aggregating bank level data for each state and for each year. The resulting value indicates a yearly measure of both agricultural and non-agricultural delinquency rates of all FDIC financial institutions within a state.[6] We utilize both the current and lagged values of these variables as Briggeman, Gunderson, and Gloy (2009) indicates that financial stress has a build-up effect and may be leading indicators of bankruptcies.

Annual data on one-year and ten-year treasury constant maturity rates are acquired from the Federal Reserve Economic Data (FRED) that is maintained by the Federal Reserve Bank of St. Louis. The one-year rates proxy the cost of financing short-term projects for a farm while the ten-year rates approximate the cost for long-term projects (Schnitkey, 2016).

The Bureau of Labor Statistics provides annual level values of employment and unemployment for each county through their Local Area Unemployment Statistics program. We aggregate these county level values to the regional level and calculate each region's

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[6] Financial institutions in FDIC call reports only report at the headquarter level for an institution. This may be problematic for large national banks which make loans across many states. As sensitivity analysis, we remove the top 100 banks as measured through total value of assets to compute state level agricultural delinquency rates. Results are unaffected as the two measures are highly correlated (0.999).

unemployment rate to create a macroeconomic variable that also has regional variation. We consider this a macroeconomic variable because it is mainly affected by factors outside of the agricultural sector.

And finally, we utilize the bankruptcy filings data and the Census Bureau's County Business Patterns (CBP) data to calculate the bankruptcy filing rate for non-agricultural businesses at the district level. CBP provides data on the number of establishments at the county level and further breaks this down by industry classification. We use the total business filings of Chapter 7, 11, and 13 for each region and divide this by the non-agricultural establishments in the region as another way to proxy for financial health of the region unrelated to agriculture.

Panel Models

Previous econometric models for analyzing Chapter 12 (Shepard and Collins 1982; Dixon et al 2004; Stam and Dixon 2004) generally use the filing rates for a particular region to correct for differences in farming population across time and space. We follow this convention and adopt a linear panel model as our baseline for understanding farm bankruptcies:

$$y_{it} = \alpha + \alpha_i + \beta_1 BAPCPA_t + \beta_2 X_t + \beta_3 X_{it} + \beta_4 AG_{it-1} + \varepsilon_{it}$$

Where i denotes the region (district or state) and t denotes the time period. The dependent variable, y_{it}, is the number of bankruptcies divided by the number of farms (as measured through ARMS) which is meant to proxy financial stress for farms. There is substantial regional and temporal variation in the variable, which helps motivate the choice of explanatory variables we use to better examine the factors affecting financial stress. Further, because of the sampling design of ARMS we subset our data for each of these regressions to only the core states (with the highest values of agricultural production) to reduce potential sampling design errors.

The α parameter is an overall constant for the model; α_i is a regional fixed effect used to control for unobservable fixed effects which are time invariant; $BAPCPA_t$ is a dummy variable taking the value of 1 for the post-BAPCPA period aiming to test if BAPCPA has a significant effect on farm bankruptcy rates as well as its transitory and permanent effects; X_t is a set of macroeconomic controls which affect farm bankruptcy rates; X_{it} are non-agricultural control

variables related to the macro-economy which vary across time and regions; and AG_{it-1} are agricultural related variables which proxy a region's farm financial climate. See the preceding section on data for details on the covariates in each set.

The agricultural variables are lagged one year, meaning that the bankruptcy filings across October 1996 to September 1997 are explained by ARMS observation for 1996, which explain farm financial characteristics from January 1996 to December 1996. Lagging the agricultural variables by one year is done for three reasons: income for a particular year is anticipated toward the end of the year when a farmer may decide to file for bankruptcy, , lumpiness in farm incomes imply that the previous year's income is a better proxy of the capital stock of a farm, and it produces a better fit. And finally, because Davies (1996) indicates the dynamic relationship of agricultural land values over time we include current year and previous year values for agricultural land to further examine these effects.

Of additional focus is BAPCPA and its potential impact on the agricultural sector's financial performance as well as its transitory and permanent effects. In the above specification, the coefficient β_1 will show any mean difference in the filing rates for farms after the passage of BAPCPA in 2005, controlling for agricultural and macroeconomic factors. This is one way to evaluate how BAPCPA affected farms and can be interpreted as the overall long-run effect of BAPCPA's effect on bankruptcies since pre-2005 Chapter 12 was only a temporary policy. However, there may be a myriad of effects that BAPCPA had on farms affecting the bankruptcy filing rate both positively and negatively, which may result in an aggregate null effect. To check for this possibility, we interact the $BAPCPA_t$ variable with each of the other control variables to further evaluate how BAPCPA may have had other effects on farms as follows:

$$y_{it} = \tilde{\alpha} + \tilde{\alpha}_i + \widetilde{\beta_1} BAPCPA_t + \widetilde{\beta_2} X_t + \widetilde{\beta_3} X_{it} + \widetilde{\beta_4} AG_{it-1} + \gamma_2 BAPCPA_t \times X_t + \gamma_3 BAPCPA_t \times X_{it} + \gamma_4 BAPCPA_t \times AG_{it-1} + \tilde{\varepsilon}_{it}$$

The interaction coefficients, we denote as γ, reflect the change in a marginal effect due to Chapter 12 becoming a permanent bankruptcy option due to BAPCPA. If the transitory and permanent effects of a particular variable are identical -- and assuming pre-BAPCPA represents only the transitory effects and post-BAPCPA the permanent effects-- this would lead to a null finding in the interaction coefficient. Or in other words, there would be no change in the marginal effect of X on Y across regimes and so there would be no change due to BAPCPA

occurring (ie $\beta_2 = \widetilde{\beta_2}$). This change from temporary to permanent coincides with increases of debt limits and relaxing of income requirements for Chapter 12 filings, which confounds the interpretation of the BAPCPA coefficient. While we largely interpret the effects of BAPCPA to the change to a permanent option, it may be that the filing requirement changes contribute to this effect.

Results

Table 2 provides regression results for the first panel model with districts in the first column, districts from only the core states in the second column, state level variables in the third column and state level variables for only the core states in the fourth column. Across all models, restricting the analysis to only the core states from ARMS improves the fit of the models per the adjusted r-squared. The sharp increase from a negative adjusted r-squared from the model using all districts to adjusted r-squared above 0.12 using only the districts within the core states suggests that the ARMS sampling design has a poor fit for proper inference at regional levels below the state. However, this assertion is tempered by the increase in model fit from the state level regressions which restricts the sample to only the core states.

The only significant predictor of farm bankruptcies across all four specifications is the lagged value of agricultural land which has a negative relationship with bankruptcy rates. The current value of agricultural land is negatively associated with bankruptcy rates across all regressions and statistically significant for all but the state level regression. This relationship of near term negative association but lagged positive association is a similar result to Davies (1996) which posits that the relationship between agricultural land value and financial stress may evolve dynamically due to differing managerial strategies under times of rising or falling land values. Since our data are not at the farm level, we are unable to comment on managerial strategies that farmers use but can acknowledge that these results appear to highlight a potentially dynamic relationship between agricultural land values and farm bankruptcies.

If one ignores the district level model using data from all states on the basis that ARMS may not accurately define the farm conditions at the district level, then the one-year constant maturity interest rate and regional unemployment rate are positive and significantly related to

farm bankruptcies. The one-year interest rate is positively associated with bankruptcy rates, which is an intuitive result that increasing the cost of near-term borrowing will have adverse effects on farms' ability to repay current debts. However, the ten-year constant maturity interest rate is negatively associated with bankruptcy rates and statistically significant with the core states subset, which indicates that farms become less likely to file for bankruptcy as long-term debt costs rise.[7] The one-year interest rate approached a zero bound during 2009 to 2014 while the ten-year interest rates continued a gradual decline, which may further explain these results.

We view the positive association between regional unemployment rates and bankruptcy rates as reflecting the local labor market conditions which proxy for regional economic performance and find this result intuitive and clear. As local economies fare worse, the likelihood of a farm experiencing these effects increases which would then result in higher levels of economic stress. A one percentage point increase in the unemployment rate leads to 0.366 more farm bankruptcies per 10,000 farms at the district level and 0.46 at the state level for the core states subset, which is almost a 13% increase in bankruptcies. In our sample, the unemployment rate ranges from 2.06% to 14.9% with a standard deviation of 1.9%.

The delinquency rates, which are for consumer loans and agricultural loans for the current and lagged period, have mixed results across the specifications. The agricultural delinquency rates do not appear to have a significant relationship with the agricultural bankruptcy rate with the exception of the current value at the state level showing a positive relationship. The consumer delinquency rate has consistent signs across both the current (negative) and lagged (positive) values, although the statistical significance is mixed.

Among the null findings consistent across the district and state level regressions of Table 2 are for the non-agricultural bankruptcies, government payments, and working capital to expense ratio. Our finding that the non-agricultural bankruptcy rates do not affect farm

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[7] Models with only the one-year or ten-year interest rates did not impact coefficient estimates for other variables, however the included interest rate coefficient is a positive and statistically significant value for either one-year or ten-year. This result is likely due to omitted variable bias and highlights their dynamic relationship.

bankruptcy rates is in conflict with the results of Shepard and Collins (1982). However, their analysis is based on time-series data at the national level while we are able to exploit cross-sectional variation in our panel setting. This result appears to indicate independence of the financial stress in the agricultural sector to that in the rest of the economy, controlling for interest rates and unemployment rates, which is of policy importance for those concerned with farm bankruptcies.

While only two variables have consistent insignificant effects across all specifications, the majority of the agricultural variables are null findings within these regressions with the exception of agricultural land variables. We emphasize that our agricultural measures are at the regional level and not at the farm level, therefore these results may be due to data limitations. While it may be the case that government payments, for example, are a strong predictor that a particular farm will file for bankruptcy, it is not the case that these regional indicators have predictive power for bankruptcy rates. While this result may seem unexpected, we find this to be helpful for policymakers in terms of targeting particular areas of the farm economy to alleviate financial stress. Targeting regional agricultural factors may not result in improvements in the financial stress levels of farms insofar as financial stress is measured through bankruptcies. Our findings show that fewer agricultural variables have significant impacts on bankruptcy rates than agricultural factors such as debt-to-asset ratio, net farm income per farm, and proportion of government payments to total net farm income found to have significant impacts in Dixon et al. (2004).

An additional emphasis with Table 2 is that Chapter 12 has been both a temporary and a permanent measure across the years of interest. This is problematic for disentangling transitory and permanent effects from having a chapter of bankruptcy available to farmers. To the extent that the passage of BAPCPA signals the change from transitory effects to permanent, we turn to interacting all covariates with the post-BAPCPA dummy to evaluate which variables may have disproportionate transitory and permanent effects. The results are only presented for the core states subset due to the better fit of models.

BAPCPA Results

Table 3 presents the results of the models which also interact the passage of BAPCPA with the main variables of interest. The first and third columns represent the non-interacted effects of each variable, which would be the transitory effects of Chapter 12. The second and fourth columns are the interaction terms of the main variables with the post-BAPCA dummy, which represent the permanent effects of farmer bankruptcy post-BAPCPA. A Wald test that the interaction terms are not jointly different from zero is strongly rejected across both the district and state level regressions, which would indicate that there are both transitory and permanent effects due to Chapter 12 legislation that can be identified.

In the previous results for the models without interaction terms, the variables which have consistently significant impacts on bankruptcy rates are the one-year interest rate, unemployment rate, and agricultural land values. Evaluating these variables from the pre- and post-BAPCPA context illustrates that the one-year interest rate and unemployment rate have had inverse impacts as both are positively related to bankruptcy rates prior to BAPCPA yet negatively related post-BAPCPA. Their aggregate effects are both positive in model 1, which captures a mixture of the transitory and permanent effects. The post-BAPCPA effects (which can be calculated as $\widetilde{\beta} + \gamma$) across the interest rates and unemployment rates do not significantly differ from 0 for either the districts or state regressions (we use an F-Test for the $\widetilde{\beta} + \gamma$=0 restriction for each of the independent variables and all F statistics are less than 1.6). Of interest, the post-2005 period experienced elevated unemployment rates and the Federal Funds Rate pushed interest rates towards the zero bound while much of the farming economy fared well with high net farm incomes. However, the mechanism for interest and unemployment rates no longer having a statistically significant effect on farm bankruptcies post-BAPCPA cannot be identified within our model and is beyond the scope of this paper.

Across both specifications in Table 3, the agricultural land value coefficients have the same sign for both district and state level regressions based on the BAPCPA interaction. The pre-BAPCPA regime coefficients are not significantly different from zero -- with the exception of current value based on the district level -- while the post-BAPCPA ($\widetilde{\beta} + \gamma$) effects are all statistically significant (all F statistics are greater than 5.2). Further, a potentially dynamic

relationship between the current land values (negative association) and the lagged land values (positive association) is exhibited on bankruptcy rates as seen in Table 2 across pre- and post-BAPCPA periods. The coefficients are of similar magnitudes yet in opposite directions, which would suggest that stagnant land values from year-to-year would have a null effect on the bankruptcy rate. A further implication that a rise in lagged land values along with a fall in current land values would put upward pressure on bankruptcy rates. This dynamic relationship merits more research into modelling how land values changes over time affect the farm bankruptcy rate.

Conclusion

This article examines the factors which affect the financial stress of a farm as well as addressing a new question: how does BAPCPA affect farm's financial stress? Using Chapter 12 bankruptcy filings from 1997 to 2016, we find that it is largely macroeconomic factors (interest rates and unemployment rate) which affect the financial position of farms although land values appear to also affect farm bankruptcy rates among the agricultural factors. From a policy perspective, our findings show that policy makers which aim to improve agricultural indicators (debt-to-asset ratio, working capital to expense ratio, government payments, etc.) as a way to alleviate financial stress should not expect to see a corresponding drop in farm bankruptcies. However, our results are only at the state and district level and do not extend to the farm level, whereby there may be specific farms which may have financial stress lessened due to a change in one of the agricultural indicators that we could not find evidence for an association with bankruptcy filing rates.

Our results also indicate that agricultural land values are highly related to bankruptcy filing rates and that this relationship is dynamic. Our models only use a current and lagged value, but it may be the case that there is a more complex relationship with the two than we posit. Further research is merited in evaluating how the land values, which make up over 80% of a farm's equity, can affect a farm's likelihood of filing for bankruptcy. It appears the relationship is dynamic in that a rise and fall of land values in consecutive periods indicates increased bankruptcies due to the positive and negative coefficients, respectively.

Our model fits appear to indicate that regional ARMS analysis may not be appropriate below the state level unless the core states are utilized. The sampling design of ARMS is complex and does not necessarily conform to the political boundaries of counties. Therefore, there should be caution for analysts when attempting to utilize ARMS for sub-state regional issues.

There does appear to be a regime shift in the relationship between farm bankruptcies post-BAPCPA with respect to the interest and unemployment rates that suggests these rates are no longer predictive indicators of farm bankruptcies post-BAPCPA. The result for agricultural land value remains post-BAPCPA, although its magnitudes are lessened. However, many of the predictors have in both periods indicating that farmers are likely taking advantage of Chapter 12 regardless of its status as temporary or permanent. Making farmers aware of Chapter 12 helps them to increase their options in reducing financial stress for their farms.

As the farm sector has recently experienced downturn with declining farm incomes and land values, it is important to note a concern that financial distress and bankruptcy rates will be on the rise. A prolonged period of low commodity prices and falling land values may increase the distress of very indebted farmers who may have taken on more debt to expand their operations. Bankruptcies seem to be a lagging indicator of financial stress and indeed there has been a small uptick in bankruptcy rates in the last quarter of 2016. However, the farm sector seems to still have strong equity positions which mitigates the effects of the current downturn so farm bankruptcy rates are still near historic lows.

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Tables

Table 1 Descriptive Statistics for 1997-2015

	State		District		
	Mean	Standard Deviation	Mean	Standard Deviation	Source
Farm Bankruptcy Rate (per 10,000 Farms)	2.904	3.868	3.609	15.283	Table F-2
Non-Ag Bankruptcy Rate (per 10,000 establishments)	54.55	61.65	53.233	51.321	Table F-2 and CBP
Consumer Delinquency Rate	2.50%	1.79%	---	---	FDIC Call Reports
Agricultural Delinquency Rate	2.49%	2.59%	---	---	FDIC Call Reports
Unemployment Rate	5.60%	1.95%	5.82%	1.99%	Bureau of Labor Statistics
Value of Agricultural Land (per acre)	$3,638	$3,302	---	---	USDA June Area Survey
Acreage of Operation (per farm)	124	138	112	117	ARMS
Total Assets (per farm)	$517,012	$247,971	$546,003	$956,450	ARMS
Net Farm Income (per farm)	$5,320	$7,132	$8,923	$105,316	ARMS
Share of Government Payments to Gross Cash Farm Income (per farm)	1.23%	3.51%	1.30%	4.07%	ARMS
Debt-to-Asset Ratio (in percent)	1.257	3.117	1.325	3.42	ARMS
Working Capital to Expense (in percent)	38.46	45.86	43.52	79.37	ARMS
Debt Service Ratio (in percent)	0.559	4.716	1.118	16.364	ARMS
Ratio of Household Off-Farm Income to Total Income (in percent)	0.986	0.139	1.02	1.8	ARMS
Share of Farmers with Bachelor's Degree	25.20%	11.00%	25.00%	13.40%	ARMS
1-year Interest Rate	2.46%	2.20%	---	---	FRED
10-year Interest Rate	3.97%	1.47%	---	---	FRED

Note: Farm values are the mean of the region of interest where each region's value is based on a median estimate of the variable from ARMS. Further, interest rates do not vary by region and represent the mean and standard deviation from 1997 to 2015.

Table 2 Panel Data Models for Farm Bankruptcy Rates

Farm Bankruptcy Rates per 10,000 Farms	District Level[a]		State Level[a]	
	All States	Core States	All States	Core States
Post-BAPCPA Dummy	-1.059	-0.834*	-0.388	-0.408
	(1.198)	(0.440)	(0.437)	(0.312)
1-year Interest Rate	0.274	0.780***	0.483***	0.541***
	(0.259)	(0.236)	(0.117)	(0.104)
10-year Interest Rate	-0.612	-0.849***	-0.313	-0.512**
	(0.514)	(0.322)	(0.239)	(0.205)
Non-Ag Bankruptcy Rate	0.001	0.004	0.0002	-0.006
(per 10,000 establishments)	(0.004)	(0.006)	(0.002)	(0.007)
Consumer Delinquency Rate	-0.923***	-0.179	-0.499***	-0.282
	(0.307)	(0.169)	(0.141)	(0.198)
Lagged Consumer Delinquency Rate	0.896**	0.277	0.294***	0.165
	(0.443)	(0.233)	(0.095)	(0.208)
Agricultural Delinquency Rate	0.389	-0.094	0.142**	0.367***
	(0.341)	(0.375)	(0.067)	(0.117)
Lagged Agricultural Delinquency Rate	-0.576	0.113	-0.107	-0.189
	(0.424)	(0.377)	(0.081)	(0.254)
Unemployment Rate	0.303	0.366**	0.580***	0.460**
	(0.193)	(0.155)	(0.140)	(0.204)
Value of Agricultural Land (per acre)	-2.331***	-2.157***	-1.721	-1.400**
($1,000s)	(0.848)	(0.588)	(1.058)	(0.633)
Lagged Agricultural Land Value	2.151***	2.076***	1.868*	1.744***
($1,000s)	(0.831)	(0.473)	(0.999)	(0.469)
Acreage of Operation	0.009	0.007**	0.005	0.010***
	(0.006)	(0.003)	(0.001)	(0.002)
Total Assets	0.468***	0.314	-0.165	-0.493***
($100,000s)	(0.081)	(0.311)	(0.139)	(0.109)
Net Farm Income	-2.494***	-3.933	-2.584	-1.270
($100,000s)	(0.563)	(3.234)	(2.836)	(5.349)
Share of Government Payments to Gross Cash Farm Income from	0.017	-0.033	-0.077	-0.055
	(0.048)	(0.065)	(0.051)	(0.057)
Debt-to-Asset Ratio	-0.006	0.358	0.176**	-0.003
	(0.233)	(0.271)	(0.084)	(0.062)
Working Capital	-0.015	0.004	0.003	0.004
	(0.010)	(0.005)	(0.005)	(0.003)
Debt Service Ratio	-0.024	-0.002	-0.003	-0.073**
	(0.030)	(0.007)	(0.038)	(0.029)

Ratio of Household Off-Farm Income	-0.291***	3.064	-1.314	3.820*
to Total Income	(0.106)	(2.547)	(1.744)	(2.205)
Share of Farmers with Bachelor's Degree	-0.070	0.081**	0.008	-0.033
	(0.059)	(0.034)	(0.015)	(0.025)
Number of Observations	1740	700	960	300
Adjusted R-Squared	-0.015528	0.12822	0.11169	0.28585

Notes: All standard errors are clustered at the state level. * indicates significance at the 0.1 level, ** indicates significance at the 0.05 level, and *** indicates significance at the 0.01 level.

[a] District-level models aggregate data at the district level, while state level models aggregate data at the state level.

[b] Either all states were used in the estimation or only the 15 core states with highest value of agricultural production.

Table 3 Panel Data Models for Farm Bankruptcy Rates with Interaction Terms

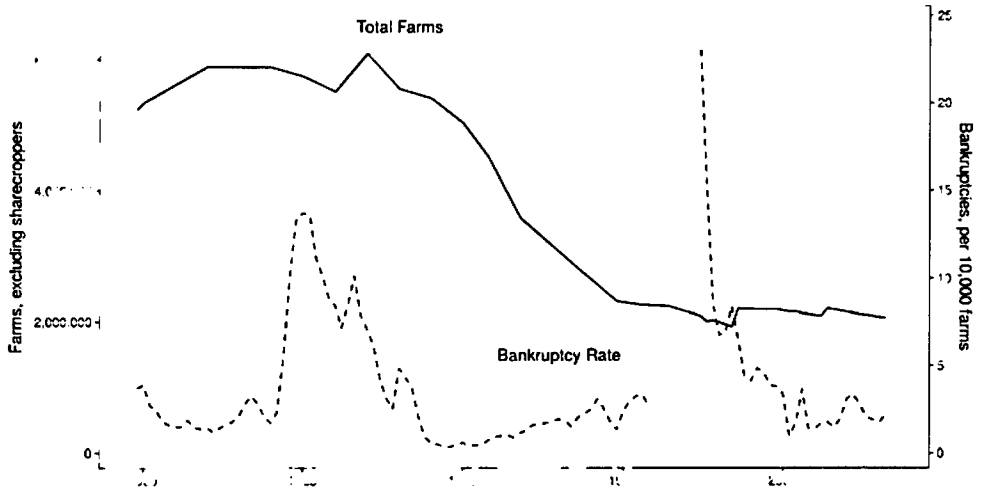
	District Level, Core States		State Level, Core States	
	Main Variables	Interaction Terms with Post-BAPCA Dummy	Main Variables	Interaction Terms with Post-BAPCA Dummy
Post-BAPCPA Dummy	9.142	---	2.570	---
	(9.993)	---	(5.262)	---
1-year Interest Rate	0.455*	-0.477	0.609***	-0.418
	(0.237)	(0.461)	(0.222)	(0.355)
10-year Interest Rate	-0.206	-0.122	-0.661***	0.376
	(0.653)	(0.861)	(0.248)	(0.511)
Non-Ag Bankruptcy Rate	-0.006	0.043**	-0.008	0.007
(per 10,000 establishments)	(0.009)	(0.020)	(0.008)	(0.013)
Consumer Delinquency Rate	0.149	-0.495	-0.657	0.479
	(0.703)	(0.783)	(0.549)	(0.510)
Lagged Consumer Delinquency Rate	-0.753	0.957	-0.453	0.661*
	(0.619)	(0.669)	(0.433)	(0.351)
Agricultural Delinquency Rate	-1.301	1.516	0.082	0.381
	(1.297)	(1.357)	(0.333)	(0.352)
Lagged Agricultural Delinquency Rate	0.452	-0.531	0.027	-0.297
	(0.663)	(0.809)	(0.323)	(0.344)
Unemployment Rate	0.667*	-0.759**	1.062***	-0.967**
	(0.369)	(0.375)	(0.403)	(0.457)
Value of Agricultural Land (per acre)	-2.119***	0.386	-1.468	-0.121
($1,000s)	(0.760)	(1.110)	(0.738)	(1.004)
Lagged Agricultural Land Value	1.307	0.074	1.443	0.145
($1,000s)	(0.905)	(1.206)	(0.970)	(1.323)
Acreage of Operation	0.005	-0.010**	0.011***	-0.010
	(0.004)	(0.005)	(0.003)	(0.007)
Total Assets	0.307	-0.034	-0.642***	0.430***
($100,000s)	(0.360)	(0.294)	(0.111)	(0.161)
Net Farm Income	-4.065	1.268	1.332	-4.055
($100,000s)	(4.458)	(5.549)	(6.531)	(7.840)
Share of Government Payments to Gross Cash Farm Income	-0.014	0.114	-0.034	0.115
	(0.086)	(0.126)	(0.074)	(0.109)
Debt-to-Asset Ratio	0.362	-0.290**	0.033	-0.573***
	(0.271)	(0.147)	(0.058)	(0.186)
Working Capital	-0.001	0.005	-0.004	0.006

	(0.009)	(0.008)	(0.006)	(0.008)
Debt Service Ratio	-0.005	0.022	-0.060***	0.204
	(0.009)	(0.078)	(0.022)	(0.131)
Ratio of Household Off-Farm Income	3.302	-5.192	5.597*	-1.173
to Total Income	(2.760)	(5.979)	(3.324)	(5.453)
Share of Farmers with Bachelor's Degree	0.124**	-0.110*	-0.021	-0.002
	(0.051)	(0.061)	(0.026)	(0.027)
Number of Observations	700	---	300	---
Adjusted R-Squared	0.15638	---	0.32811	---

Notes: All standard errors are clustered at the state level. * indicates significance at the 0.1 level, ** indicates significance at the 0.05 level, and *** indicates significance at the 0.01 level.

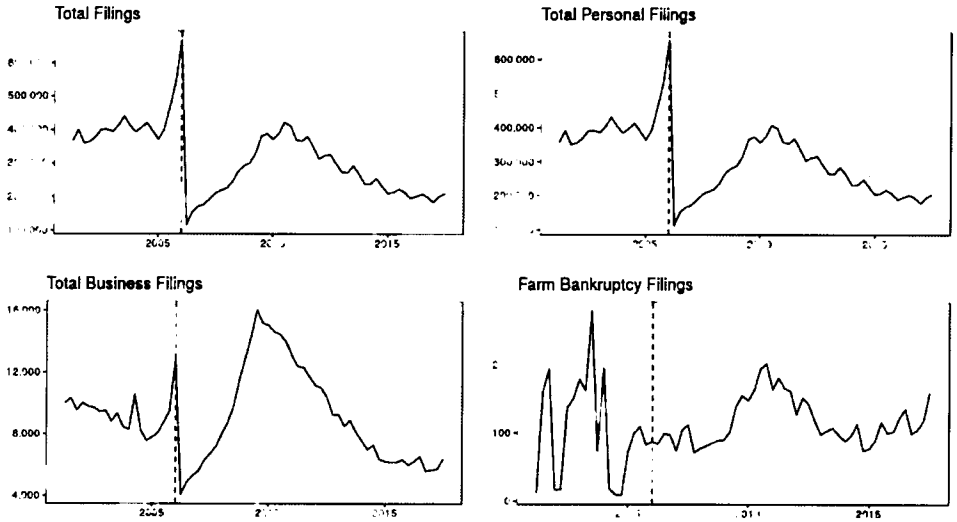
Figures

Figure 1 Historical Farm Bankruptcies



Source: Data prior to 2003 from Stam and Dixon (2002); from 2003 onward from Judicial Publications Table F-2 and USDA-NASS.

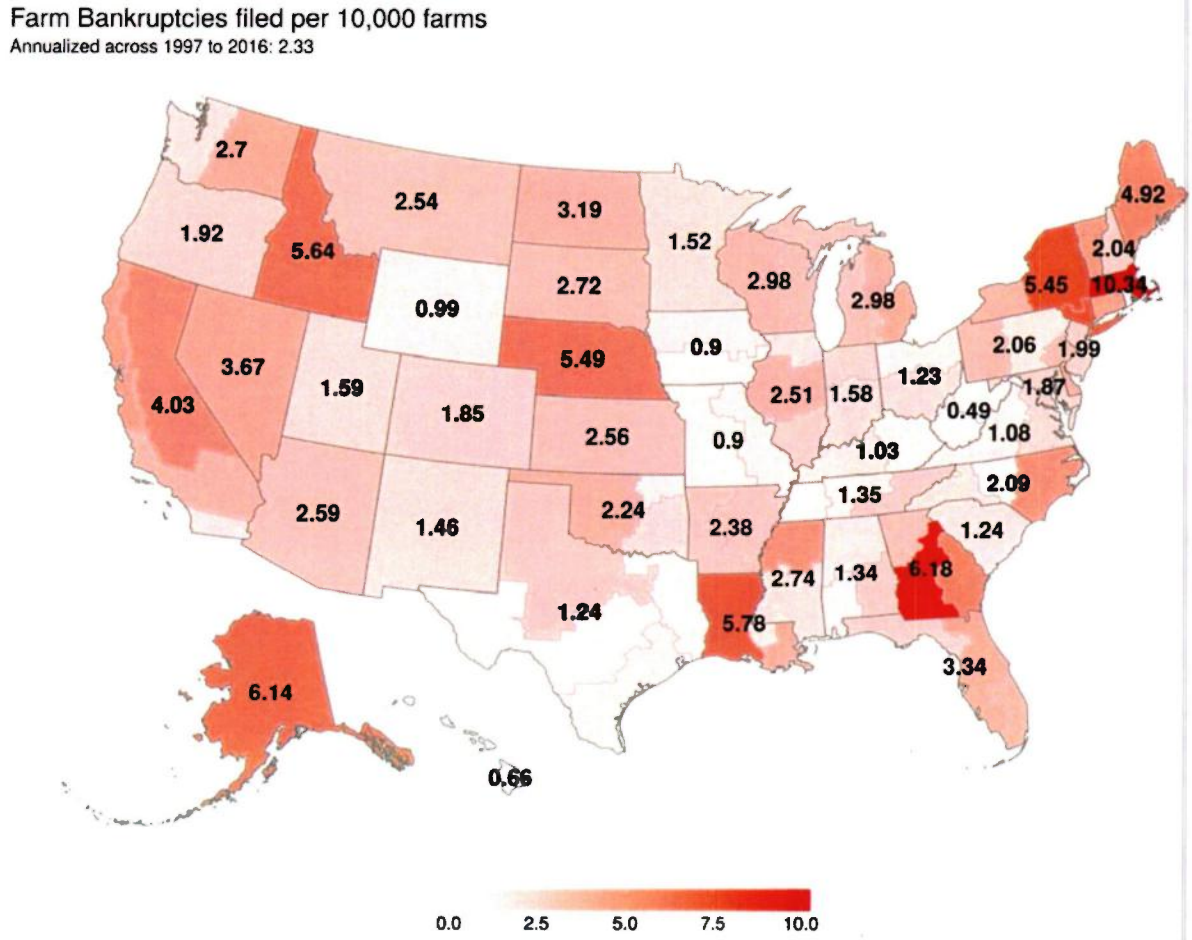
Figure 2 Bankruptcy Filings: Total, Total Personal, Total Business, and Farm Bankruptcies



Note: Red vertically dashed line indicates the enactment of BAPCPA, which was the quarter ending on December 30th 2005.

Source: Judicial Business publications Table F-2

Figure 3 Farm Bankruptcy Rates by State and District



Note: Bankruptcy rates are shown as a number for each state while shading indicates bankruptcy rate at the district level.