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Foreign Ownership of Agricultural Land: A Legislative Roadmap

Reviewing State Law Provisions Restricting Foreign Landholdings
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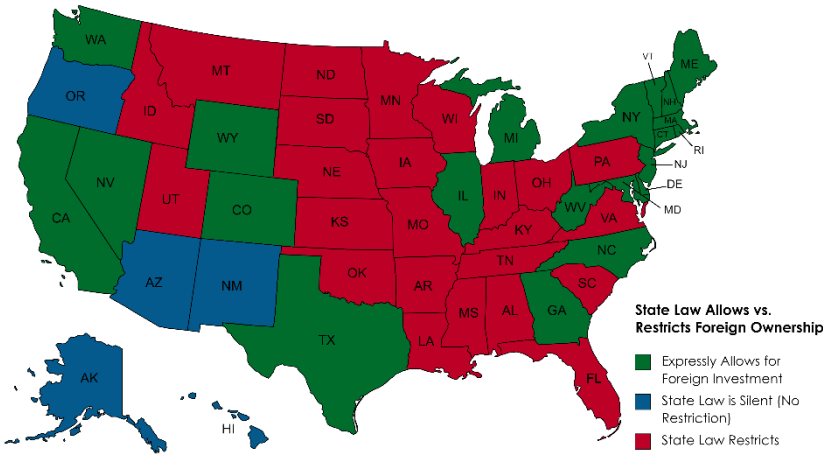
I. Introduction

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.

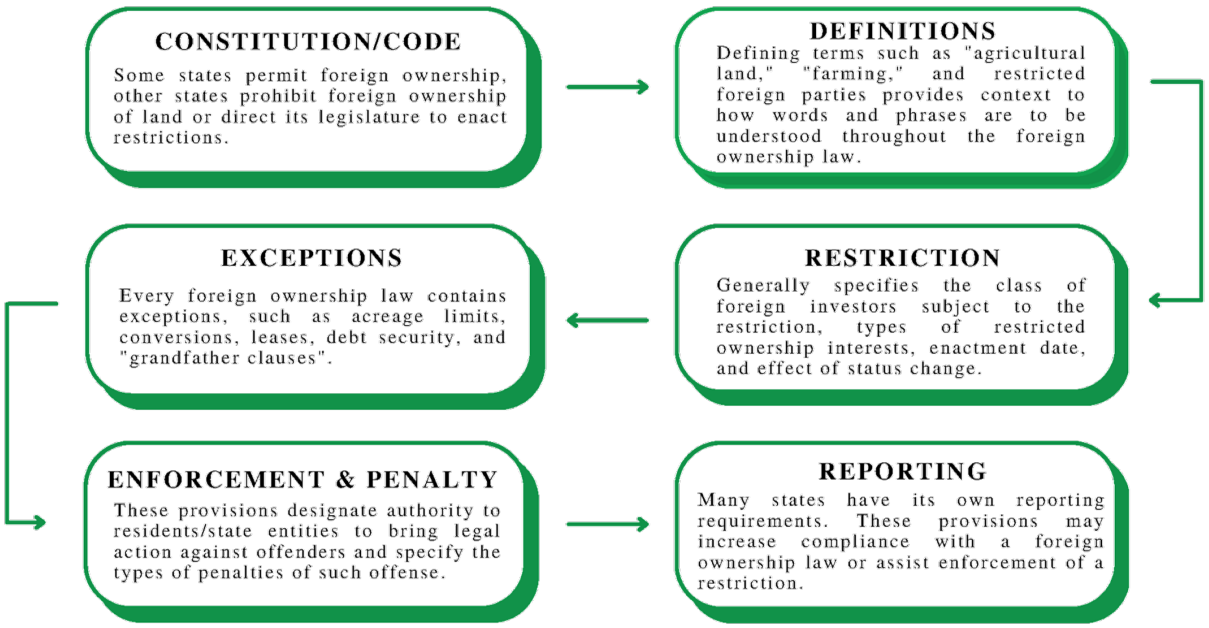
IV. Conclusion

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

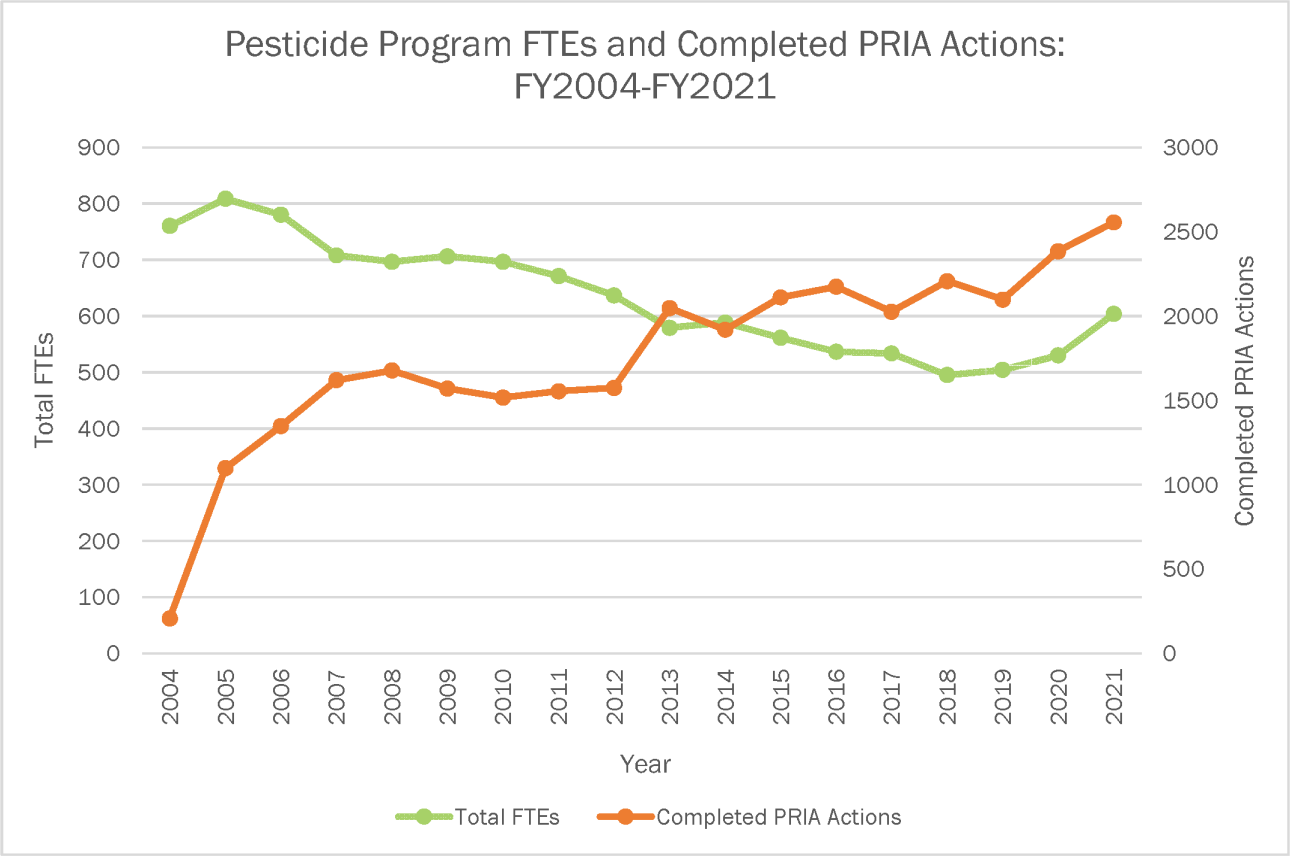


Figure 1. The graph above shows the Pesticide Program's total FTEs and the number of completed PRIA actions from 2004 to 2021. Increasing FTEs since 2018 reflect changes in PRIA IV that has enabled EPA to more fully use FIFRA fees to support OPP activities.

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.

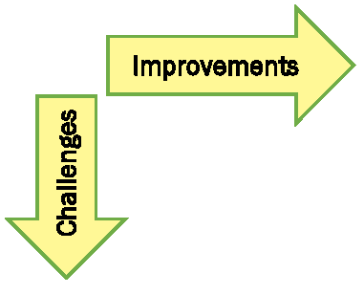
Environmental Fate and Effects Division (EFED). EFED is responsible for conducting ecological, drinking water, and endangered species assessments to evaluate potential risks posed by conventional pesticides for registration and registration review and effects to listed species. EFED also houses *Bulletins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

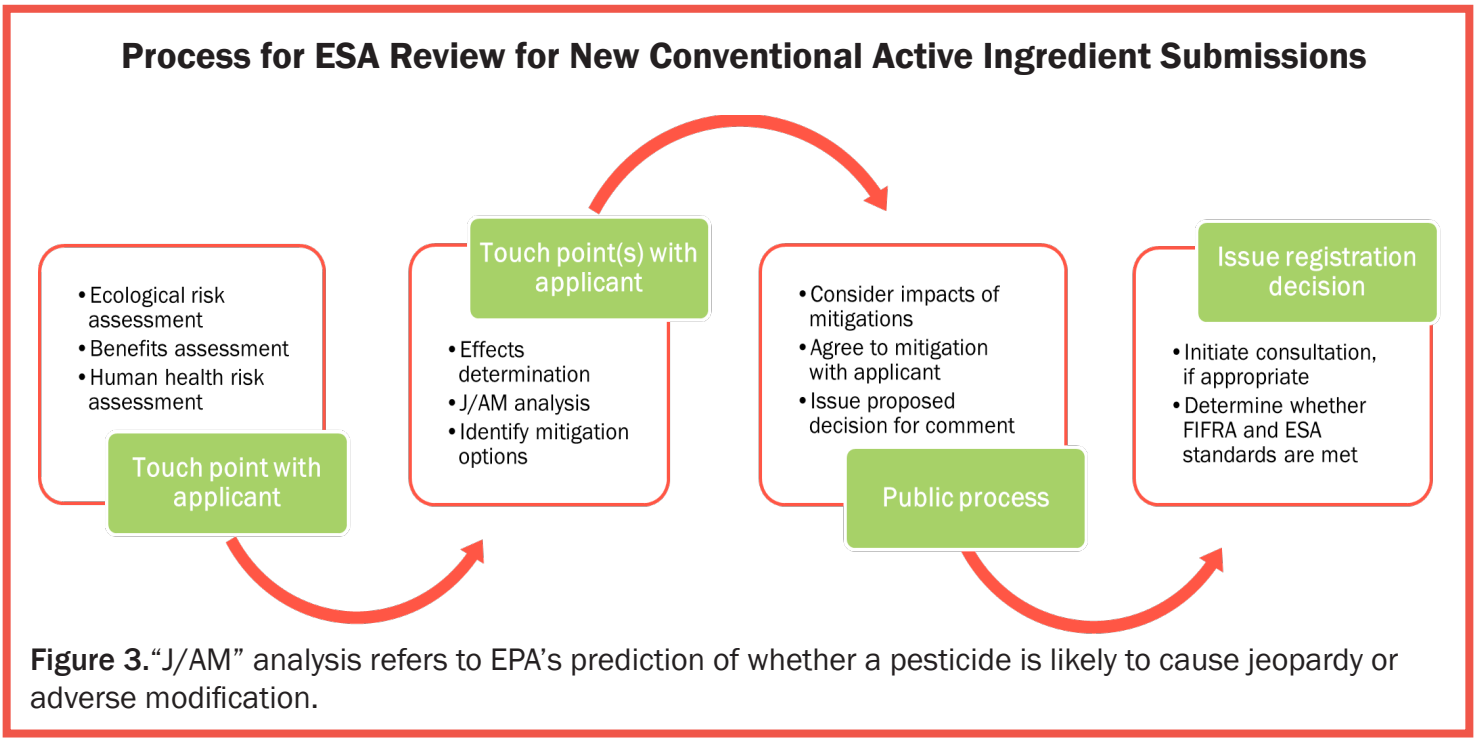


Figure 3."J/AM" analysis refers to EPA's prediction of whether a pesticide is likely to cause jeopardy or adverse modification.

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

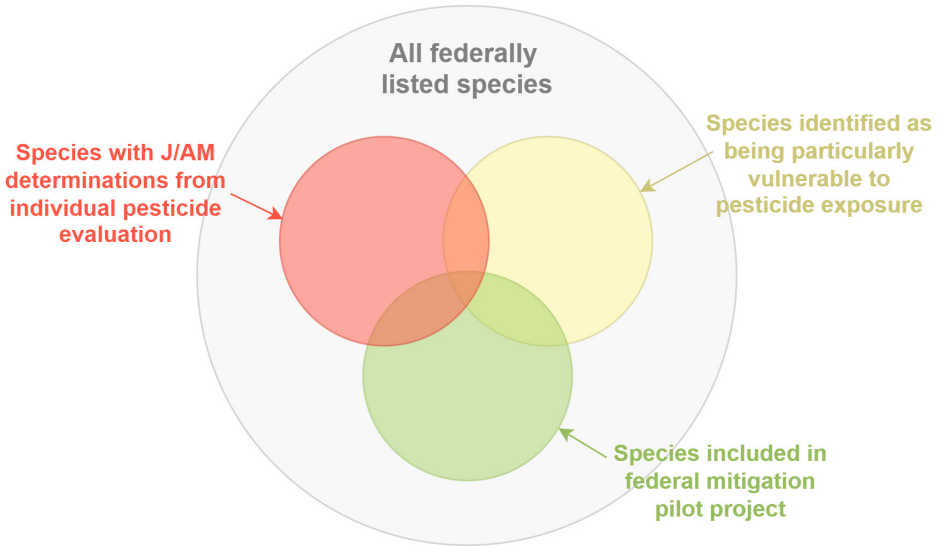


Figure 4. Currently, EPA is compiling a list of vulnerable species based on characteristics of the species or their habitat that predisposes them to pesticide effects. Some of those species are also likely to be at risk of a future jeopardy finding for certain pesticides. But not all species facing a 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]

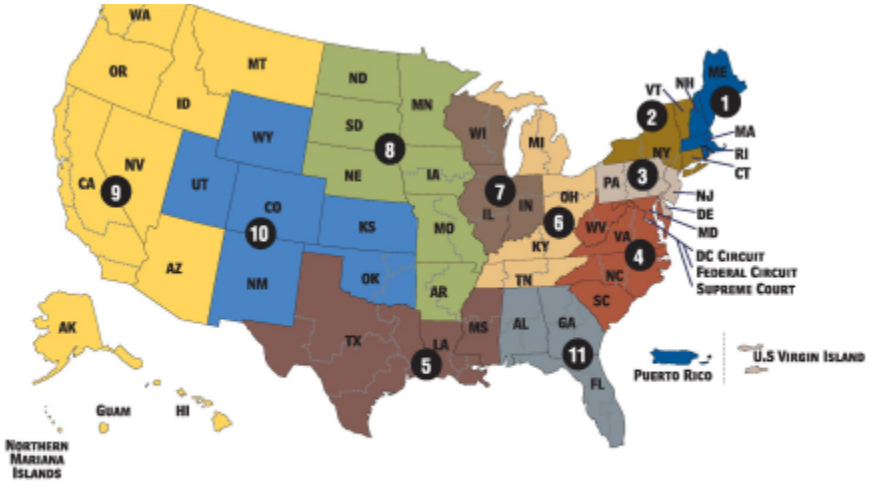
The Process of Relitigating Prior *Chevron* Cases

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).

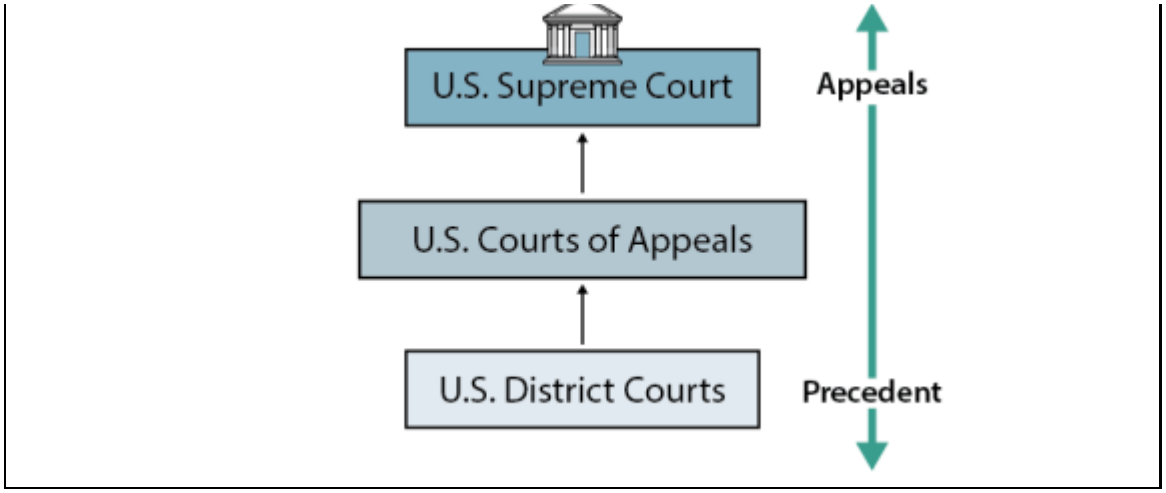
Notes: District court boundaries are delineated by gray lines within state boundaries. The U.S. Court of Appeals for the D.C. Circuit's geographical jurisdiction covers only the District of Columbia, but because many D.C. Circuit cases involve the federal government, decisions of the D.C. Circuit often 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.

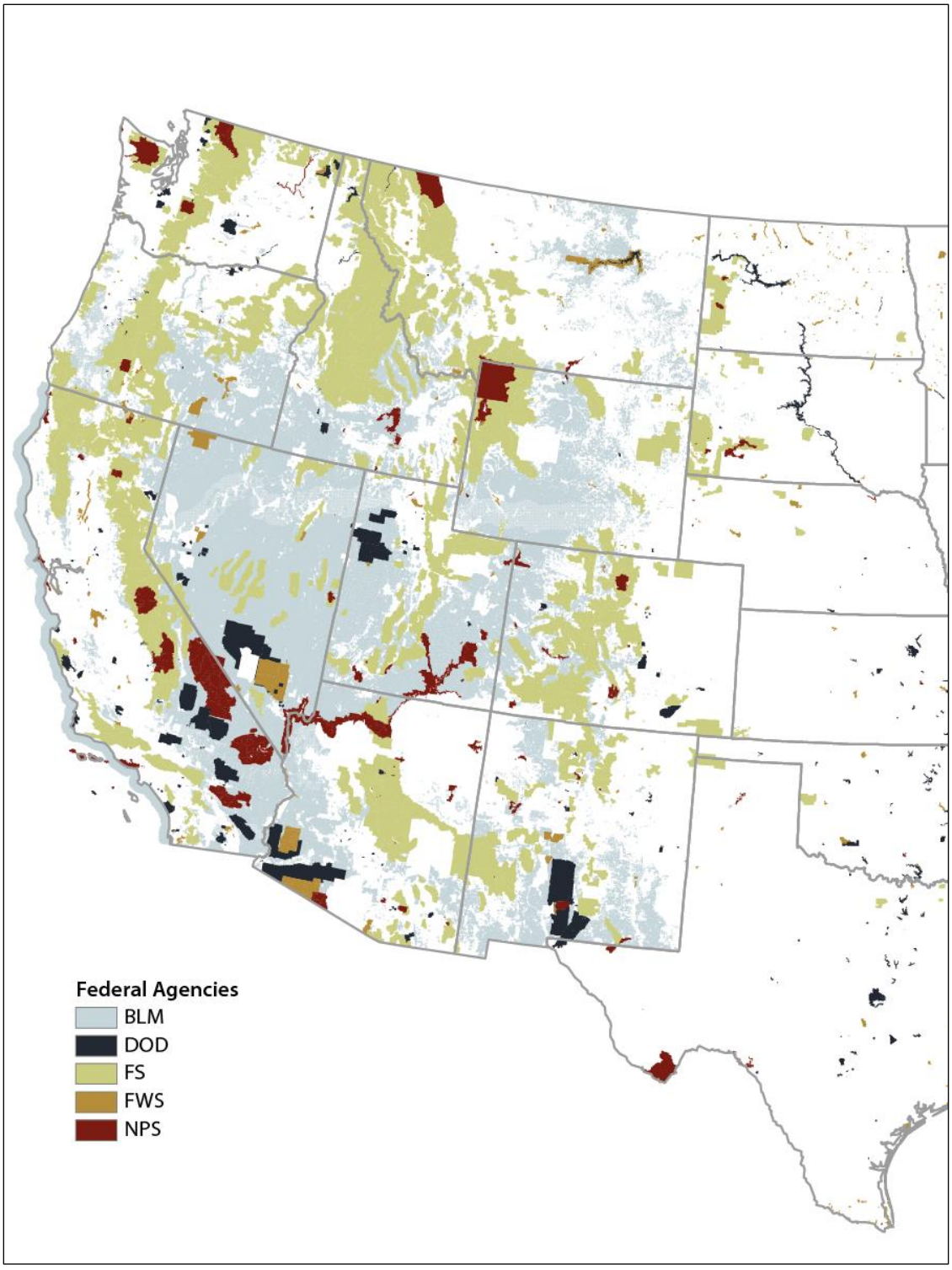
For NPS: U.S. Dept. of the Interior, National Park Service, Land Resources Division, *Acreage by State*, as of 9/30/2018, at https://www.nps.gov/subjects/lwcf/upload/NPS-Acreage-9-30-2018.pdf. Data reflect federally owned lands managed by the NPS.

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.

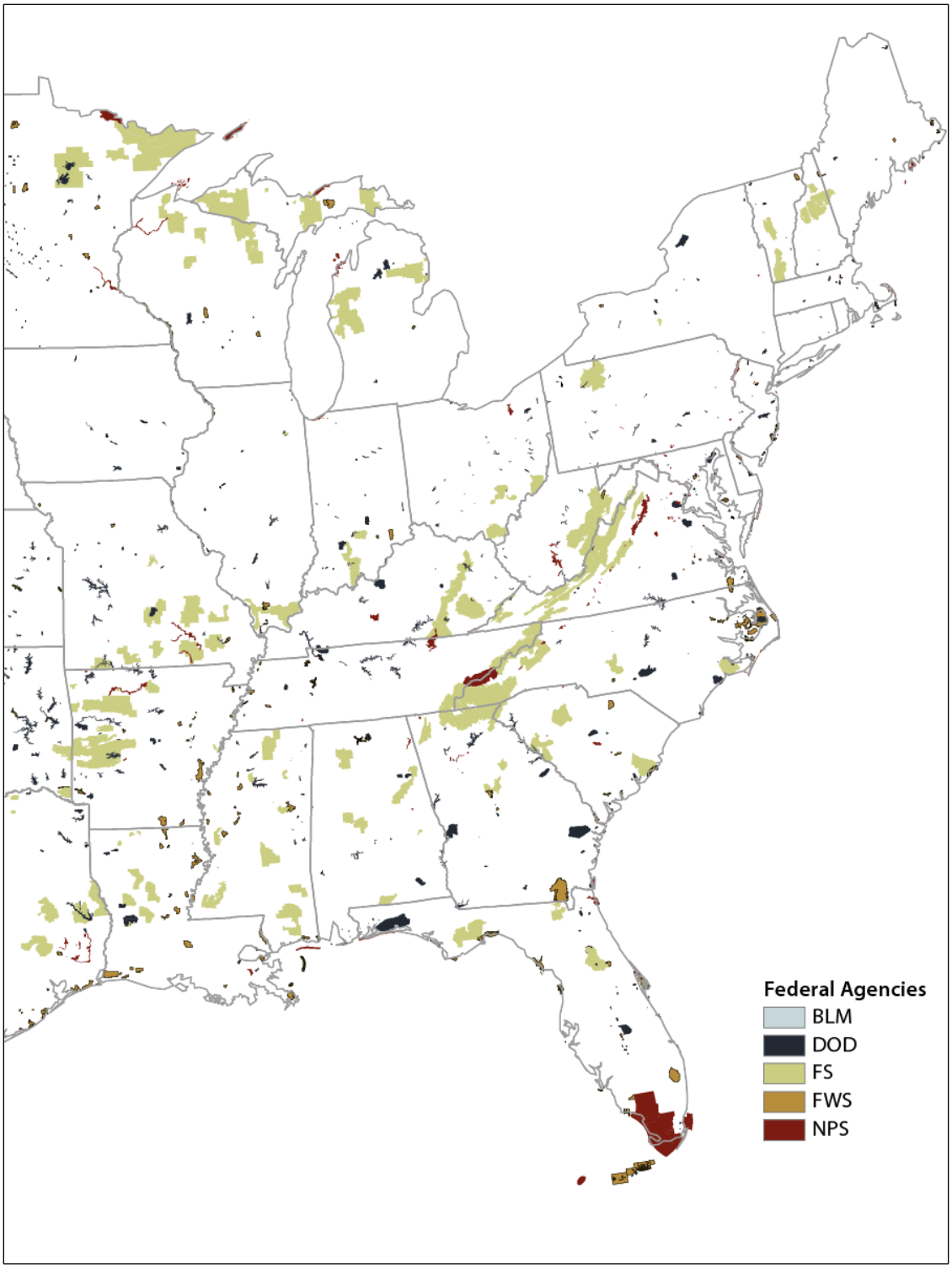
Figure 1. Western Federal Lands Managed by Five Agencies



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.

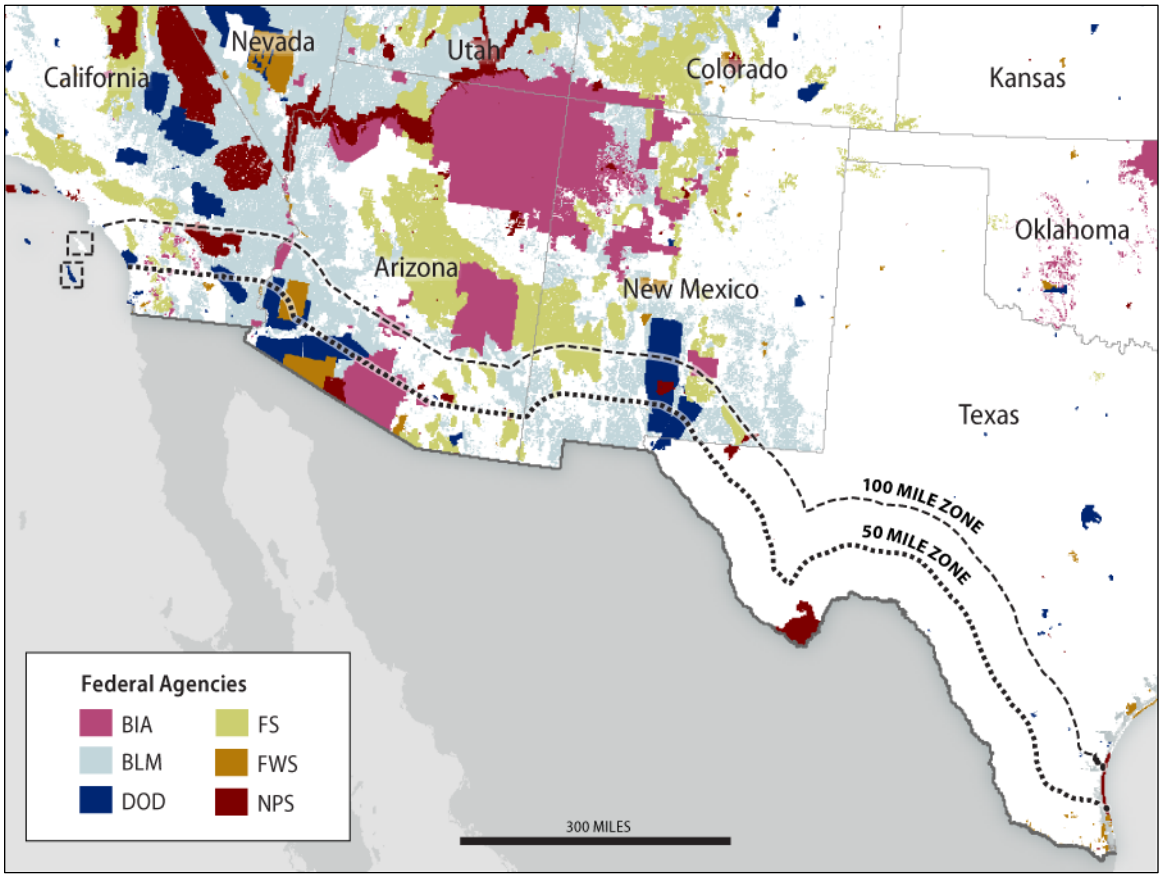
[60] For example, in 2006, DOI, DHS, and USDA entered into a memorandum of understanding entitled *Cooperative National Security and Counterterrorism Efforts on Federals Lands along the United States' Borders.* These departments have entered into additional memoranda of understanding addressing issues 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

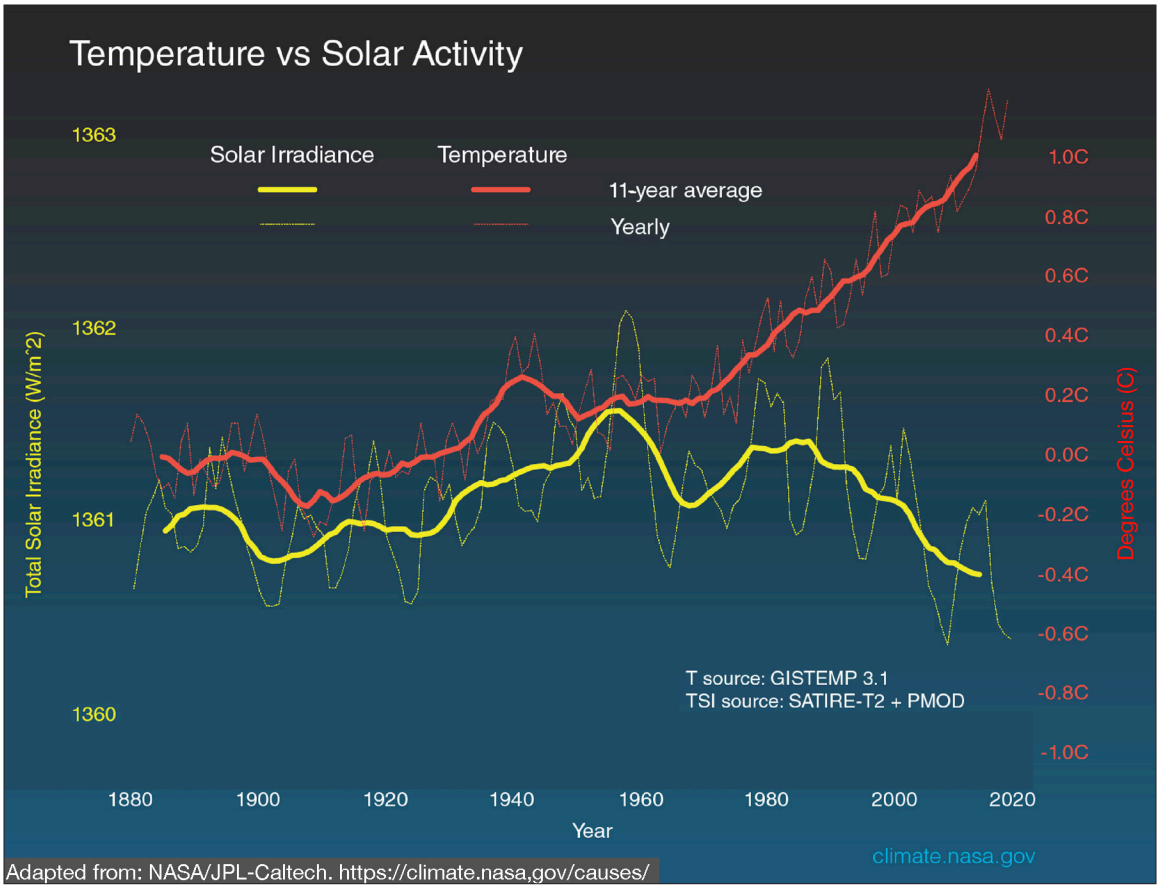
Warming Temperatures

Precipitation Change

Climate Change, Declining Agriculture, and the Law of the River

The Effects of Climate Change on the Colorado River

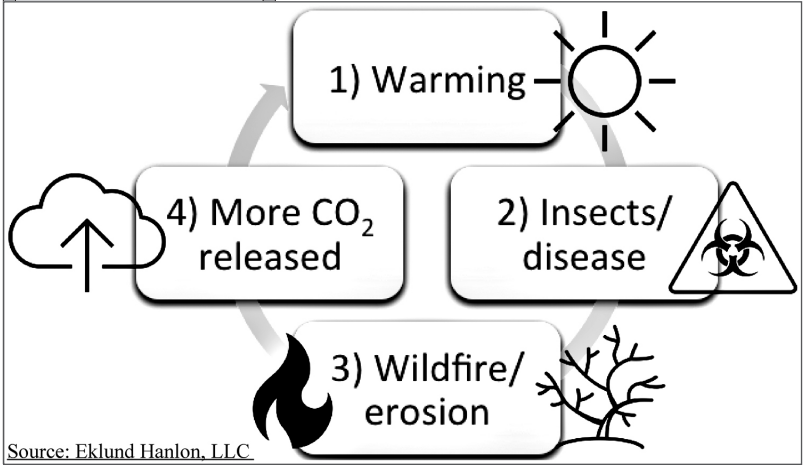
Anthropomorphic climate change is consequential for Colorado River management and presents an existential threat to communities, economies, and environments in the basin. More carbon in our atmosphere produces warmer temperatures. (NASA, 2011). Since the Gundersons homesteaded, average global temperatures 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

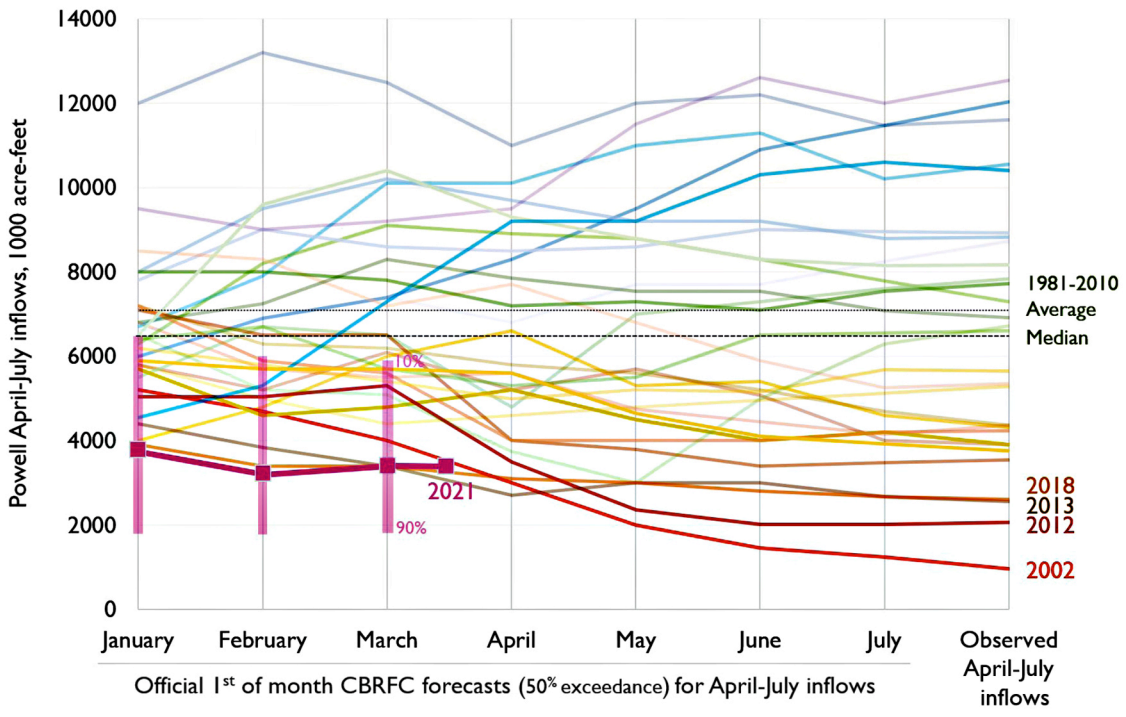
The most current scientific analysis and review of Colorado River data supports this unfortunate dynamic: "Our results underscore that greenhouse gas emissions reduction and moderating or decreasing atmospheric greenhouse gas concentrations may be critical to maintaining sufficient streamflow volumes 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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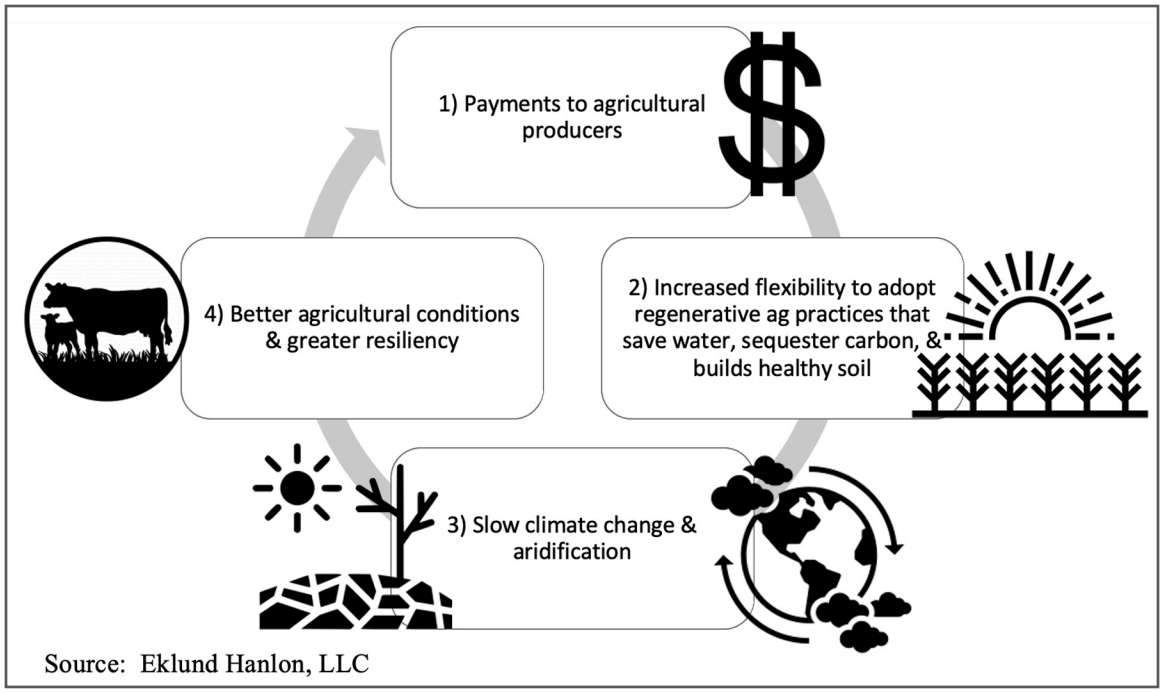
Demand Management

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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